(Re)assessing the Grand Bargain: Compensation for Work Injuries in the U.S., 1900-2016

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I. Introduction

Too many workers are injured, killed or made ill by their work.[2] In the U.S., the legal system addresses occupational safety in two ways: through a preventive regulatory structure,[3] sometimes described as ossified and weak;[4] and through a no-fault strict liability compensation system that provides limited benefits to workers and protects employers from further liability. This article investigates the second component of this legal system, sometimes called the Grand Bargain in recognition of its unique roots in the early 20th century.

The compensation system, known initially as workmen's compensation and now as workers' compensation, intersects with many of the central social and economic policy issues of our times. How should we guarantee adequate health insurance coverage for all people in the U.S.? What are the key employment rights of people with disabilities? Should tort law address injuries that result from violations of known safety norms or regulations? What level of economic safety net are we, as a society, willing to provide – and how are we going to pay for it? How do we limit risk and improve safety across all the activities of our lives – including inside workplaces?

Arguably, however, workers' compensation touches each of these issues only at the margins. As a result, it remains at the periphery of many of the debates. The aggregated costs of the different state and federal programs that we refer to, collectively, as "workers' compensation" are relatively small in comparison to the costs of our largest social insurance programs. For example, the annual cost of medical care within workers' compensation constitutes only about one percent

[2] See David Michaels, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (June 2015), https://www.dol.gov/osha/report/20150304-inequality.pdf (noting that the Bureau of Labor Statistics (BLS) reports that approximately 4,500 workers are killed on the job each year and that employers record nearly three million serious occupational injuries and illnesses annually on legally mandated logs; that half of these injuries involve at least one day away from work, a job transfer or a work restriction; that many injuries and fatalities are not reported; and that studies have estimated that approximately 50,000 annual U.S. deaths are attributable to past workplace exposure to hazardous agents, such as asbestos, silica, and benzene, a number that exceeds death in traffic crashes.) [hereinafter DOL Inequality Report].

[3] The two primary federal statutes are the Occupational Safety and Health Act, 29 USC §651 et seq., and the Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

[4] *See e.g.* THOMAS MCGARITY ET AL., CTR. FOR PROGRESSIVE REFORM, WORKERS AT RISK: REGULATORY DYSFUNCTION AT OSHA 1 (2010), http://www.progressivereform.org/articles/osha_1003.pdf ("OSHA is a picture of regulatory dysfunction."); Lynn Rhinehart, *Workers at Risk: The Unfulfilled Promise of the Occupational Safety and Health Act*, 111 W. VA. L. REV. 117 (2008) (providing an overview of OSHA and its limitations); THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (1993). *See also* AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 51–52 (25th ed. 2016), http://www.aflcio.org/content/download/174867/4158803/1647_DOTJ2016.pdf.

of the total health expenditures in the U.S.;[5] the $31 billion cost of indemnity benefits that were paid to injured workers[6] in 2014 pales in comparison to the $141 billion distributed by the Social Security Administration in its disability insurance program, and it is dwarfed by the $706 billion paid in the federal old age program.[7]

Workers' compensation is in many ways more comparable to Unemployment Insurance (UI). Both programs provide largely temporary benefits to workers;[8] both programs have significant state components; each program pays approximately the same annual amount to workers in benefits.[9] Total workers' compensation benefits, including medical care, are, however, about double the benefits paid to UI recipients.[10] More importantly, UI is governed by clear federal

[5] Medical care costs in workers' compensation were $31.4 billion in 2014, while general health care was $3.0 trillion that year. MARJORIE L. BALDWIN AND CHRISTOPHER F. MCLAREN, WORKERS' COMPENSATION: BENEFITS, COVERAGE AND COSTS (2014 DATA) 2 (National Academy of Social Insurance, October 2016) https://www.nasi.org/sites/default/files/research/NASI_Workers_Comp_Report_2016.pdf [hereinafter Baldwin & McLaren]; Health Expenditures Statistics for 2014, Centers for Disease Control and Prevention, http://www.cdc.gov/nchs/fastats/health-expenditures.htm (last visited Nov. 16, 2016) (the $3.0 trillion may include workers' compensation health care costs, but this does not significantly affect the comparison).

[6] In workers' compensation, "indemnity benefits" refers to cash benefits that are paid to workers for temporary total, temporary partial, permanent partial and permanent total disability, as well as for some impairments and in the event of a death. In most systems, workers who are represented by lawyers pay for the legal assistance out of these benefits. Thus, all of the money that is referred to as indemnity or cash benefits does not, in fact, go into workers' own pockets. In many states, workers cannot successfully navigate the state's workers' compensation system without an attorney, particularly if they have claims that are complicated by arguments of causation of the health impairment or other complex legal questions.

[7] Baldwin & McLaren, *supra* note 5, at 2 (workers' compensation benefits totaling 30.9 billion in 2014); Social Security Administration, Annual Statistical Supplement, Table 4.A4 – Total annual benefits paid, by type of benefit and trust fund, and as a percentage of personal income, 1937-2015, available at https://www.ssa.gov/policy/docs/statcomps/supplement/2016/4a.pdf (last accessed Nov. 16, 2016) (showing data on total spending the Social Security programs from 1937 to 2015).

[8] Workers' compensation in theory will pay benefits for permanent disabilities, and these benefits can be paid weekly for a long period, at least in some state jurisdictions. But 75 percent of claims involve medical care only, and, of the claims involving indemnity benefits, 61 percent involve only temporary total disability benefits. Baldwin & McLaren, supra n. 1, at 7. Thus 90 percent of all claims involve either no time off work or temporary benefits that are generally time-limited. Of the remaining claims that may involve permanent disability benefits, the vast majority are settled for lump sum amounts, and the length of time during which a worker collects benefits will therefore be limited.

[9] Workers' compensation benefits totaled $30.9 billion in 2014. Baldwin & McLaren, *supra* note 5, at 2. Benefits paid in all UI programs in 2015 were $32.0 billion. Unemployment Insurance Data, Employment & Training Admin., U.S. Dep't of Labor, available at https://oui.doleta.gov/unemploy/DataDashboard.asp (last visited Nov. 7, 2016).

[10] Baldwin & McLaren, *supra* note 5, at 1 (total benefit costs, including both medical and benefits paid to workers were $62.3 billion in 2014).

mandates and requirements.[11] In contrast, workers' compensation is almost entirely state-based, varies significantly from one jurisdiction to another, is not governed by any stabilizing federal requirements, and is subject to continuous legislative and regulatory amendments in every state.[12] The system is, as a result, frustratingly opaque for outsiders and difficult to summarize or to study. It is often said of workers' compensation, "If you know one state's workers' compensation system… you know one state's workers' compensation system."[13]

The program[14] is complex enough – and the costs are relatively small enough, particularly when disaggregated among the states – to escape the notice of many social theorists, economists and legal scholars. Legitimately, perhaps, few see it as pivotal to social policy in the U.S. On the other hand, the cost of workers' compensation far exceeds the direct federal investment in safety.[15] If one looks at work-caused disability rather than workers' compensation costs, one discovers that many recipients of Social Security Disability Insurance suffer from work-related disabilities,[16] that many work-related injuries and diseases are never covered within the workers'

[11] OFFICE OF UNEMPLOYMENT INSURANCE, U.S. DEP'T OF LABOR, UNEMPLOYMENT COMPENSATION: FEDERAL-STATE PARTNERSHIP (April 2016) https://oui.doleta.gov/unemploy/pdf/partnership.pdf

[12] There are several federal workers' compensation programs that cover limited groups of workers or are focused on specific diseases. These are outside the scope of much of the discussion in this article. *See e.g.* Federal Employees' Compensation Act, 52 U.S.C. § 30101 e (providing workers' compensation benefits for federal employees); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (long shore and harbor workers); the Black Lung Benefits Act, 30 U.S.C.A. § 901 (compensation for miners totally disabled by coalworkers' pneumoconiosis); and the Energy Employee's Occupational Illness Compensation Act, 42 U.S.Ca. § 7384 (EEOICA) (compensation for diseases contracted by civilian workers in the nuclear industry).

[13] This is said and written so often it could be regarded as a meme. I have heard it at numerous meetings, including from audience members at the symposium that was the basis for this collection of articles.

[14] I have chosen in this article to use the singular noun "program" when describing the aggregation workers' compensation programs, except when I am emphasizing the variability among states. It is important to remember that this is in fact a set of state programs that share some characteristics but differ from each other in important ways.

[15] These costs may be relatively small for a national social insurance program, but they far exceed the budgets of the federal agencies that are charged with enforcing health and safety laws. The combined budgets of the Occupational Safety and Health Administration and the Mine Safety and Health Administration in 2014 was $900 million. *See* FY 2017 Department of Labor Budget in Brief at 42, 44, https://www.dol.gov/sites/default/files/documents/general/budget/FY2017BIB_0.pdf. See also . Emily A. Spieler, *Perpetuating Risk: Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUSTON L. REV 119, 121-121 (1994) (setting out in greater detail the comparative costs of workers' compensation and federal safety programs across all agencies as of 1993 and noting "workers' compensation, designed to compensate victims of work-related injuries, illnesses, and fatalities, represents our primary allocation of publicly mandated funds to safety and health in the workplace.").

[16] *See e.g.* Robert Reville & R Schoeni, *The fraction of disability caused at work*, 65(4) SOC SEC. BULL. 31–37 (2003/2004) (using the 1992 Health and Retirement Study, a nationally representative study of the U.S. population aged 51 to 61, authors found that among those whose health limits the amount or kind of work they can do, 36 percent became disabled because of an accident, injury, or illness at work; among people of this age group who are receiving Social Security Disability Insurance, 37 percent are disabled

compensation systems[17]and that workers' compensation only covers a fraction of the costs associated with occupational injury and mortality.[18] That is, workers' compensation may be our largest governmentally-mandated program that addresses occupational morbidity and mortality – but it does not come close to covering the full costs. With that further information, the limitations of the workers' compensation system become more salient to general discussions of inequality and disability. Moreover, since the United States lacks a comprehensive social safety net for people who are adversely affected in the labor market by injury, impairment and disease, this program is obviously critical to individual workers who are hurt or impaired by their work.

Recently, workers' compensation emerged as a focus in discussions about workplace safety and treatment of workers: from scathing investigations by journalists of the current status and declining adequacy of the program;[19] to a call by ten U.S. Senators and Representatives for the U.S. Department of Labor to demonstrate renewed interest in the program;[20] to Department of Labor reports that focused on inequality caused by work injury and the inadequacies of the workers' compensation system;[21] to ad hoc gatherings of experts in self-styled "summits" to discuss the future of the program;[22] to a national forum convened by the Department of Labor

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because of an accident, injury, or illness at work.). For studies that investigate the relationship between Social Security Disability and workers' compensation benefits and possible cost shifting, *see infra* n. 386.

[17] *See infra* Part IV(B).

[18] *See* NATIONAL SAFETY COUNCIL, INJURY FACTS: 2015 EDITION, at 9 (2015), available at http://www.nsc.org/Membership%20Site%20Document%20Library/2015%20Injury%20Facts/NSC_InjuryFacts2015Ed.pdf (estimating the full cost of occupational injuries to be $206 billion in 2013). *See also* J. PAUL LEIGH, STEVEN MARKOWITZ, MARIANNE FAHS, AND PHILIP LANDRIGAN, COSTS OF OCCUPATIONAL INJURIES AND ILLNESSES (2000).

[19] *See e.g.* Michael Grabell & Howard Berkes, *Insult to Injury: America's vanishing worker protections*, ProPublica & NPR, https://www.propublica.org/series/workers-compensation (March 4, 2015- Oct. 5, 2016) (series of articles exploring the declining adequacy and political attacks on workers' compensation); Jamie Smith Hopkins, *Disease victims often shut out of workers' comp system*, Center for Public Integrity (Jan. 27, 2016), https://www.publicintegrity.org/2015/11/04/18816/disease-victims-often-shut-out-workers-comp-system (focusing on occupational disease compensation); Chris Hamby, *Breathless and Burdened: Dying from black lung, buried by law and medicine*, Center for Public Integrity (Oct. 29, 2013 to Nov. 2, 2016), https://www.publicintegrity.org/environment/breathless-and-burdened (focusing on the federal black lung program).

[20] Letter to The Honorable Thomas E. Perez from Senators Patty Murray and Bernard Sanders and Representatives Robert C. "Bobby" Scott and others, Oct. 20, 2015, available at https://www.propublica.org/documents/item/2465674-letter-from-federal-lawmakers-to-labor-on.html

[21] *See Does the Workers' Compensation System Fulfill Its Obligations To Injured Workers?*, U.S. DEP'T OF LAB., https://www.dol.gov/asp/WorkersCompensationSystem/WorkersCompensationSystemReport.pdf (last visited Oct. 25, 2016) [hereinafter DOL Workers' Compensation Report]; see also DOL Inequality Report, *supra* note 2.

[22] DOL Workers' Compensation Report, *supra* note 21, at 40 n. 103; *see also* Robert Wilson, Notes From Florida Workers' Compensation Summit (National Conversation) Released, WorkersCompensation.com (Sep. 27, 2016, 8:52 AM), http://www.workerscompensation.com/compnewsnetwork/from-bobs-cluttered-desk/24640-notes-from-florida-workers%E2%80%99-compensation-summit-national-

and the National Academy of Social Insurance to examine the status of the program;[23] to the inclusion of occupational safety and compensation issues in current worker organizing efforts.[24] Academic attention to this particular program has, on the other hand, been relatively limited. The symposium that was the genesis for this collection of papers, titled "The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century," attempted to correct this vacuum by bringing together scholars from different disciplines, practitioners, jurists and other stakeholders to puzzle over this highly contentious, relatively small, but nevertheless important component of our legal and social fabric.[25]

There is little consensus regarding any of the questions that swirl around this program, including what purpose the system fundamentally serves. Are workers' compensation benefits a form of social insurance? Is this, in fact, primarily a no-fault tort liability system that provides limited damages? Is it a system for managing workplace-caused disability, in order to enable workers to return to work? Is it a line of insurance and a business for managing insurance claims and associated risks? Are these primarily safety-incentive programs? Perhaps it is all of these. But the initial characterization leads to conclusions about how it should be organized – and the conclusions differ dramatically as a result of the starting point.[26]

This article is intended to provide background for future discussions about work injury and compensation insurance by putting both the initial bargain and the subsequent century of evolution of the U.S. workers' compensation system into historical, political, legal and economic context. I grapple here with some of the definitional and historical questions. What was the "Grand Bargain"? What are the key changes over the past 100 years that affect how we should think about compensation for work injuries? What are the current political challenges to creating a just and equitable social insurance system for people injured at – or made ill by – their work? What conditions external to the program have influenced (and influence) changes in workers' compensation? Should we expect consensus (as demonstrated by the National Commission in 1972), or truce (as demonstrated by the initial legislation), or continuing political conflict (as

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conversation-released.html. The author represented the National Academy of Social Insurance at the first meeting of this group in Dallas-Fort Worth on May 11-12, 2016.

[23] *See* https://www.dol.gov/asp/WorkersCompensationSystem.

[24] *See e.g.* DEBORAH BERKOWITZ & REBECCA SMITH, ON-DEMAND WORKERS SHOULD BE COVERED BY WORKERS' COMPENSATION, Policy Brief, June 21, 2016, http://nelp.org/publication/on-demand-workers-should-be-covered-by-workers-compensation; Sandy Smith, *Workers Fed Up With McDonald's: File OSHA Complaints*, EHS TODAY (Mar. 16, 2015), http://ehstoday.com/safety/workers-fed-mcdonald-s-file-osha-complaints. *See also infra* n.422 and accompanying text.

[25] See http://poundinstitute.org/content/2016-academic-symposium.

[26] *See* Part IV(C), *infra*, for further discussion of the differing viewpoints. These disagreements go back to the very beginnings of these programs, when the compensatory nature of the system – replacing tort damages – collided with the focus on the future economic well-being of injured workers. *See, e.g.*, STEPHEN FESSENDEN, PRESENT STATUS OF EMPLOYERS' LIABILITY IN THE UNITED STATES, Department of Labor Bulletin No. 29, 1157-210, Government Printing Office (1900) (providing a detailed summary of the status of employer tort liability to workers in 1900) available at: https://fraser.stlouisfed.org/docs/publications/bls/bls_v05_0031_1900.pdf [hereinafter Fessenden].

exists today) over the availability of socially-mandated benefits for injured workers? The article provides extensive references in the notes, to assist those interested in pursuing further exploration of these issues.

The focus of this article is on U.S. programs and policies. Other countries provide different systems of compensation, and we could undoubtedly learn quite a lot from them.[27] On the other hand, we need to understand the political and economic history of this program in the U.S., and this article attempts to describe that background.

The article proceeds as follows. Parts II and III provide context for the discussion in Part IV regarding the current status of workers' compensation. Part II gives historical context. It summarizes the history of workers' compensation, starting with its initiation at the beginning of the 20th century and proceeding through recent political and legal battles in 2016. The full arc of this history has not been summarized elsewhere.[28] When looked at over time, the history demonstrates the highly volatile nature of these state programs and their vulnerability to changing political tides.

Part III explores the external context for the evolution of workers' compensation. Much of the discussion of workers' compensation is within the boundaries of the program as designed by each state: these discussions are detailed, often impenetrable for outsiders, and focus on the internal workings of particular programs. National reports focus on aggregate costs and trends within the systems,[29] but not on the surrounding environment. Part III of this article is intended to call attention to issues that lie outside this narrow perspective, including evolutionary trends in work, health care, social insurance and employment regulation that affect states' workers' compensation programs from the outside.

Using this contextual framing as background, Part IV returns to the question of the current state of workers' compensation, starting with a description and assessment of the internal workings of the program. The description of the current system is then be examined through a different lens, focusing on the large numbers of workers with work-related injuries and illnesses who do not receive benefits, and therefore never appear in a description of the program. The description of the program is also not complete without an acknowledgement of the wildly different vantage points from which workers' compensation is viewed and the problem of dueling narratives that influence the development and changes in the programs in each state. Part IV concludes with a brief reassessment of whether the current no-fault limited liability system is a "grand bargain."

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[27] Allison Morantz addresses the international context in her article in this symposium issue. Alison Morantz, *Back to the Future or Back to the Drawing Boards?* 69(3) RUTGERS L. REV. __ (forthcoming 2017). For an overview of international comparisons, see Katherine Lippel & Freek Lotters, *Public Insurance Systems: A Comparison of Cause-Based and Disability-Based Income Support Systems, in* HANDBOOK OF WORK DISABILITY: PREVENTION AND MANAGEMENT 183 (P. Loisel & J.R. Anema eds., 2013).

[28] The 2016 U.S. Department of Labor on workers' compensation briefly describes this history. *See* DOL Workers' Compensation Report, *supra* note 21, at 6-19.

[29] *See, e.g.*, Baldwin & McLaren, *supra* note 5.

Finally, Part V asks, in essence: What is to be done? This discussion is included here to remind us that the political pendulum will inevitably continue to swing, and it is important not to lose sight of long as well as short term goals. This Part proposes admittedly theoretical, and possibly controversial, suggestions, given the current political climate. There are certainly no easy answers, given the widely differing goals and the uneasy political alliances that underlie the program.

I conclude with a brief suggestion: the social safety net of the U.S. is tattered. Workers' compensation is one piece of that tattered net. It continues to be important to mend its tears, even in the absence of larger changes that might produce a more durable social fabric.

II. Context (1): The History

It is impossible to understand the current status of workers' compensation in the U.S. without understanding its roots in the early 20th century when constitutional interpretation prohibited the development of a consistent federal approach to the growing problem of injuries and fatalities caused by work. Its subsequent development as a state-based multi-jurisdictional system is a consequence of these roots.

A. Phase One: Introducing the "Grand Bargain"

Rapid industrialization brought with it an extraordinary rate of workplace-caused fatalities and serious injuries in the U.S.[30] – worse than in industrializing European countries.[31] One response was the development of workers' compensation programs that spread rapidly from one state to another. Historians, economists and legal scholars have turned their attention to this initial history, drawn to the fascinating political response to what appeared to be a crisis in both law and public health.[32]

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[30] The National Safety Council estimated that, in 1912, 18,000-21,000 workers died from work-related injuries; in 1913, the Bureau of Labor Statistics documented approximately 23,000 industrial deaths among a workforce of 38 million, equivalent to a rate of 61 deaths per 100,000 workers. *Achievements in Public Health, 1900-1999: Improvements in Workplace Safety - United States,1900-1999*, MORBIDITY AND MORTALITY WEEKLY REPORT 48(22) (Centers for Disease Control and Prevention) (June 11, 1999) at 461-469; *see also* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 3 (2004) (noting that in 1900 the annual U.S. death rate was 1 in 1000, as great as that of the most dangerous occupation in 2004) [hereinafter Witt].

[31] Witt, *supra* note 30, at 26-31.

[32] *See, e.g.*, Witt, *supra* note 30; PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (2000) [hereinafter Fishback 2000]; Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation Laws in the United States, 1900-1930*, 41 J.L. & ECON. 305 (Oct. 1998); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM.L.REV. 50 (1967) [hereinafter Friedman &

The context is important. The post-Civil War era involved both an embrace of the contractual view of the wage labor relationship[33] and growth of a fierce ideology of free labor.[34] Beginning around 1890, a growing Progressive political movement, motivated by a desire to eliminate corruption in politics, was also fighting for a wide range of economic and social rights.[35] Private insurance schemes designed to provide some assistance to injured workers were characterized by rising costs but mediocre success.[36] Theories of tort law were evolving,[37] including first the adoption of effective defenses for employers to tort litigation brought by injured workers –

Ladinsky]; John E Burton, Jr, & Daniel J.B. Mitchell, *Employee Benefits and Social Insurance: The Welfare Side of Employee Relations*, *in* INDUSTRIAL RELATIONS TO HUMAN RESOURCES AND BEYOND (Bruce E. Kaufman, Richard A. Beaumont, Roy B. Helfgott eds., 2003.) The history was also compiled for the National Commission on State Workmen's Compensation Laws. *See* Daniel J. Doherty, *Historical Development of Workmen's Compensation*, *ch. 2* in C. ARTHUR WILLIAMS, JR. & PETER S. BARTH, COMPENDIUM ON WORKMEN'S COMPENSATION at 9-21 (1973). This article makes no attempt to provide the depth of history that is provided in these other sources regarding this period.

[33] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 208-210 (1979) (noting that the family law view of employment relations was supplanted "by a purely monetary relationship that grew out of the factory system…").

[34] Witt, *supra* note 30, at 22-23, 33-36. The rapidity of the adoption of the employment-at-will doctrine to govern the employment relationship was a reflection of this ideology.

[35] *See e.g.* RICHARD HOFSTADTER, THE AGE OF REFORM (1960) and LEWIS L. GOULD, AMERICA IN THE PROGRESSIVE ERA, 1890-1914 (2001) among many others.

[36] Fishback 2000, *supra* note 32, at 98. *See also* Witt, *supra* note 30, at 124 (noting that the voluntary insurance schemes also put employers at a competitive disadvantage).

[37] Tort theory was relatively new. *See* Friedman & Ladinsky, *supra* note 32, at 51–52 ("At the dawn of the industrial revolution,…law was not highly developed… The explosive growth of tort law was directly related to the rapidity of industrial development."). Prior to 1852, employers appear to have had no liability at all to their employees. Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982) ("To say that there was no law on the subject before these epic cases were handed down would be an error. The utter dearth of cases upon the subject indicates, clearer than any judicial opinion could proclaim, an ironclad rule of breathtaking simplicity: no employee could ever recover from any employer for any workplace accident—period.").

known as the unholy trinity[38] -- followed by the erosion of these defenses.[39] There was an explosion of tort claims relating to work injuries,[40] with widely variable outcomes of this

[38] The three 19th century common law defenses to employer liability for negligently-caused injuries, known as the "unholy trinity," were the assumption of risk doctrine, the fellow servant rule, and the doctrine of contributory negligence. Together, these three meant that workers rarely won tort cases against their employers, at least initially. The doctrine of contributory negligence had its origin in 1809 in Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809). Under this doctrine, any contributory negligence (even one percent) would bar recovery. The fellow servant doctrine was first suggested in Priestly v. Fowler, 3 M&W 1, 150 Eng. Rep. 1030, further defined in 1841 in the American case Murray v. South Carolina R. Co., 26 S.C.L. 385, 36 Am.Dec. 268 (1841), and became entrenched in American common law with the decision of the Massachusetts court in Farwell v. Boston and Worcester R. Corp., 45 Mass. 49 (1842). Every court in the country rapidly reached the same conclusion with regard to the fellow servant rule that was initially propounded in 1842 in Massachusetts. Friedman & Ladinsky, *supra* note 32, at 58. As these doctrines became applied to industrial fatalities and injuries, commentators noted their effectiveness in protecting employers. According to one, "[t]he fellow-servant rule was an instrument capable of relieving employers from almost all the legal consequences of industrial injuries. Moreover, the doctrine left an injured worker without any effective recourse but an empty action against his co-worker." *Id.* at 53. The doctrine of assumption of risk, closely associated with the fellow servant rule, according to Horwitz, *supra* note 33, at 208, "expressed the triumph of the contractarian ideology more completely than any other nineteenth century legal creation" by assuming that workers and employers ("supposedly equal parties") reached an optimal agreement regarding wages and risks. *See also* Fessenden, *supra* note 26 (providing a detailed summary of the status of employer tort liability to workers in 1900).

[39] By 1911, 25 states had enacted legislation modifying the common law defenses, and the federal government abolished the fellow servant rule for railroad workers in interstate commerce in 1906. Witt, *supra* note 30, at 67. Many of these employer liability statutes were, however, limited in scope and did not provide an adequate solution for the problems arising from industrial accidents. *See also* Doherty, *supra* note 32, at 13 (noting, for example, that the initial Georgia statute abolished the fellow servant rule for railroad companies only, and that none of the new laws "attempted to abrogate all three of the employer defenses for every employer-employee relationship. By 1907, 26 States had enacted employer liability acts, with most of these abolishing the fellow servant rule while a few limited the assumption of risk and contributory negligence doctrines as well.") *and* Fessenden, *supra* note 26, 1160-1203. Employer liability laws chipped away at the assumption of risk doctrine, but even today it continues in different form: Texas quite recently endorsed the idea of that there is no employer tort liability, when addressing premises liability in relation to an employee, if a danger is "open and obvious" – distinguishing this from assumption of risk as a doctrinal matter, but not necessarily distinguishing it in a way that would be clear to a worker. *See* Austin v. Kroger Texas, L.P., 465 S.W.3d 193 (Tex. 2015).

[40] Friedman & Ladinsky, *supra* note 32, at 59 ("industrial accident litigation dominated the docket of the Wisconsin Supreme Court at the beginning of the age of workmen's compensation; far more cases arose under that heading than under any other single field of law" citing to primary research conducted by the authors); *see also* Fishback 2000, *supra* note 32, at Table 4.1 and 98 (one sign of the increase can be seen in the number of state supreme court cases related to non-railroad workplace accident litigation: increased from 154 to 490 between 1900 and 1911) *and* Witt, *supra* note 30, at 59 (noting the explosion of personal injury tort litigation in general and the "boom in the number of lawyers," many of whom were immigrants). More generally, *see* Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29 (1972) (examining every published accident opinion of American appellate courts in the first quarters of

litigation, often yielding less than a year's income for a family after the death of a worker.[41] All of these helped to set the stage for political action – and ultimately for political compromise. While sometimes seen as a victory for labor, the original workers' compensation statutes are now generally viewed as representing a compromise of all parties – employers, trade and business associations, insurance companies, unions, progressive political activists – although there are certainly different emphases and theories about what actually happened in each state.[42]

As the industrial carnage grew,[43] so did the level of desperation in the calls for reform. Sinclair Lewis in fiction (The Jungle in 1906[44]), Crystal Eastman in a powerful research report (Work Accidents and the Law in 1910[45]), President Theodore Roosevelt in speeches,[46] and many others

1875, 1885, 1895 and 1905 and exploring the general explosion of tort litigation during this period as well as the growth in plaintiffs' success, but not focused on workplace-related litigation).

[41] Friedman & Ladinsky, *supra* note 32, at 66 ("When an employee did recover, the amount was usually small. The New York Commission found that of forty-eight fatal cases studied in Manhattan, eighteen families received no compensation; only four received over $2,000; most received less than $500. The deceased workers had averaged $15.22 a week in wages; only eight families recovered as much as three times their average yearly earnings. The same inadequacies turned up in Wisconsin in 1907. Of fifty-one fatal injuries studied, thirty-four received settlements under $500; only eight received over $1,000.") Witt suggests that the real problem was "not commodification of ostensibly free laborers' bodies. The real problem was insufficient valuation." Witt, *supra* note 30, at 40. *See also* Doherty, *supra* note 32, at 11 (noting that "It has been estimated that not more than 15 percent of injured employees ever recovered damages under the common law, even though 70 percent of the injuries were estimated to have been related to working conditions or employer's negligence," *citing* Frank W. Lewis, *Employer's Liability*, ATLANTIC MONTHLY, vol. CIII, January 1909, at 60).

[42] *See* Witt, *supra* note 30, at 128-129; Friedman & Ladinsky, *supra* note 32, at 53-54 (the history of industrial accident law is much too complicated to be viewed as merely a struggle of capital against labor, with law as a handmaid of the rich, or as a struggle of good against evil.)

[43] *See* Friedman & Ladinsky, *supra* note 32, at 60 (noting that "[b]y the last quarter of the nineteenth century, the number of industrial accidents had grown enormously. After 1900, it is estimated, 35,000 deaths and 2,000,000 injuries occurred every year in the United States. One quarter of the injuries produced disabilities lasting more than one week," and further noting that while the railway injury rate doubled in between 1889 and 1906, by the late 19th century, mining, manufacturing, and processing industries contributed their share to industrial injury and death and in 1907-1908, manufacturing injuries and deaths were more than double those of the railroads, *citing* E. DOWNEY, HISTORY OF WORK ACCIDENT INDEMNITY IN IOWA 13 (1912) at 1-2).

[44] SINCLAIR LEWIS, THE JUNGLE (1906).

[45] CRYSTAL EASTMAN, WORK INJURY AND THE LAW (1910).

[46] Theodore Roosevelt, President of the United States, Sixth Annual Message (December 3, 1906)(transcript available online at http://www.presidency.ucsb.edu/ws/?pid=29547) ("In spite of all precautions exercised by employers there are unavoidable accidents and even deaths involved in nearly every line of business connected with the mechanic arts. This inevitable sacrifice of life may be reduced to a minimum, but it can not [sic] be completely eliminated. It is a great social injustice to compel the employee, or rather the family of the killed or disabled victim, to bear the entire burden of such an inevitable sacrifice. In other words, society shirks its duty by laying the whole cost on the victim, whereas the injury comes from what may be called the legitimate risks of the trade.").

alerted the public of the need for change. As Professor Witt has observed, the work-accident crisis called into question the narrative of progress; the problem was an "insuperable dilemma: tort damages were only available for injuries caused by fault, but the injured worker was 'the nonnegligent victim of nonfaulty harm.'"[47]

The assumption that this crisis of injury, disability and death was, in essence, an inevitable result of industrialization undergirded the growing public concern,[48] although there was also recognition that the incentives for employers were inadequate to promote safety. Tort law simply could not serve as a reasonable mechanism for victims' compensation nor did it create effective incentives for safety. Unions grew in strength and influence, and their support of workers' compensation laws increased as union members became disillusioned with changes in the liability laws.[49] Large firms found that it was competitively problematic to institute insurance programs on their own.[50] Once cultural consensus emerged,[51] laws were adopted quickly: "commentators described the progress of workmen's compensation with phrases like 'prairie fire' and 'whirlwind.'"[52]

In the end, arguably all parties won – at least on average – in the ultimate bargain.[53] But the bargain itself – now sometimes called "The Grand Bargain" – may be viewed as minimalist from the standpoint of benefit adequacy, at least as we understand the meaning of adequacy today.[54] Individually, employers gained predictability, a fully insurable risk (now reduced to actuarial

[47] Witt, *supra* note 30, at 38, 44, 46.
[48] Witt, *supra* note 30, at 63, 143 ("the inexorable accumulation of faultless dependents"); *see also* Roosevelt, *supra* note 46; Fishback 2000, *supra* note 32, at 3 ("the continued mechanization of workplaces raised questions about the assignment of fault for workplace accidents. Many accidents seem to come from the inherent dangers of work and fault could not easily be assigned."); Spieler, Perpetuating Risk, *supra* note 15, at 164-165 (providing sources for the prevailing idea regarding inevitability, including state commissions' reports, preambles to state laws, contemporaneous commentators, and courts, and noting that one court stated, the "price of our manufacturing greatness will still have to be paid in human blood and tears." Borgnis v. Falk Co., 133 N.W. 209, 215 (Wis. 1911) (the first case to hold a state workers' compensation statute constitutional)).
[49] Fishback 2000, *supra* note 32, at 101 (noting that membership in unions increased from 868,000 in 1900 to 2.14 million in 1910, growing three times faster than the labor force; union support for Employer Liability Acts was strong in the late 19th century, but waned as it became clear that this approach was inadequate; the unions also had provided mutual insurance programs for their members, but this too waned.) *See also* Witt, *supra* note 30, at 77-78, 88 (also noting the tension between ideals of free labor and issues of growing assertions of managerial prerogatives).
[50] Witt, *supra* note 30, at 124-25.
[51] Looked at another way, the "slow development of workmen's compensation is the classic example of what Ogburn called "cultural lag."" Friedman & Ladinsky, *supra* note 32, at 72 (arguing that the need for reform was evident for 50 years before this "whirlwind" occurred.) .
[52] Witt, *supra* note 30, at 127.
[53] Fishback 2000, *supra* note 32, at 25. According to Professor Fishback, at least in the aggregate, both employers and employees came out ahead economically.
[54] See infra notes x-x and accompanying text.

assessment of aggregated risks[55]), a level playing field, and immunity from any tort liability. Although their insurance costs rose, the costs could be passed on to consumers (the popular view at that time)[56] or to workers (at least those without unions) in the form of lower wages (the dominant economists' view).[57] Insurance companies acquired a large new market. Injured workers and their families theoretically gained guaranteed though limited benefits for obvious traumatic injuries (or deaths) that would otherwise lead to destitution. Benefits were to be measured based on limited replacement of losses associated with reduced earnings or earning capacity only – eliminating the possibility of larger damages based on pain and suffering or other non-economic losses.[58] Perhaps the biggest losers were the workers who would have successfully obtained relatively large jury awards in tort litigation. Everyone – insurance companies, employers, workers, unions – had a stake in the adoption of the legislation.

The legal status of these new systems was initially challenged and held unconstitutional in at least three states, most notably in New York in *Ives v. S. Buffalo Ry. Co.*[59] The *Ives* decision was

[55] Witt, *supra* note 30, at 127-8.
[56] For a discussion of this view, see Spieler, *Perpetuating Risk*, *supra* note 15, at 121 (noting that "thus emerged the frequently quoted slogan, 'the cost of the product should bear the blood of the workman.'")
[57] Fishback 2000, *supra* note 32, at 55, 69 (also noting that wages did not show the same reductions in workplaces with strong unions). The view that wages would adjust so that employers would not need to internalize costs was also reflected in the language of the contemporaneous judicial decisions. See, *e.g.*, New York Cent. R. Co. v. White, 243 U.S. 188, 202 ("And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale."). Fishback 2000, *supra* note 32, at 20 (and elsewhere) makes assumptions regarding high levels of knowledge that influenced decision-making by workers – a view that is viewed with skepticism by many today. Witt, *supra* note 30, at 125, points out, for example, that the incentives did not always align – in some states, workers retained the right to choose between tort and workers' compensation, suggesting this would have been an inherently bad deal for employers, irrespective of the ability to pass along the costs of workers' compensation premiums to workers. Nevertheless, it is reasonable to accept Fishback's conclusion: "workers, employers, and insurance companies all received and could anticipate benefits from workers' compensation." Fishback 2000, *supra* note 32, at 20. For a more recent discussion of the principle that workers ultimately pay for the benefits in reduced wages, see e.g. Jonathan Gruber & Alan B. Krueger, *The incidence of mandated employer-provided insurance: Lessons from workers' compensation insurance*, in TAX POLICY AND THE ECONOMY, VOLUME 5 (Jeffrey R. Brown, ed.) 111-144 (1991).
[58] CARL HOOKSTADT, COMPARISON OF WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES UP TO DECEMBER 31, 1917, Bulletin of the United States Bureau of Labor Statistics, Bull. No. 240 (1918), at 6, 14, 16, 35 *available at* https://fraser.stlouisfed.org/scribd/?title_id=3871&filepath=/docs/publications/bls/bls_0240_1918.pdf (describing benefits as of 1917).
[59] Ives v. S. Buffalo Ry. Co., 201 N.Y. 271, 272 (1911) (concluding that the statute mandating coverage authorized the "taking of the employer's property without his consent and without his fault."). *See also* Cunningham v. Northwestern Improvement Co., 44 Mont. 180 (1911) (Montana case noting that miners' compensation act singled out a particular hazardous industry and allowed miners to retain their common law rights and therefore violated equal protection); Kentucky State Journal Co. v. Workmen's Comp. Bd.,

both controversial at the time[60] and was quickly laid to rest both by a constitutional amendment that was approved by New York voters, then by the state's judiciary,[61] and finally by the Supreme Court.[62] Perhaps it was important in this history that the day after the *Ives* decision was issued, the Triangle Shirtwaist Factory fire killed 146 garment workers, many of them young women, in New York City.[63]

But *Ives* had lasting impact on the development of the state laws. Perhaps most importantly, Professor Witt noted, "*Ives* decisively moved compensation programs toward the elective approach."[64] By 1913 – while litigation was wending its way to the Supreme Court – 21 of the 25 states with worker's compensation laws had enacted elective statutes that allowed employers to opt-in to the new workers' compensation system;[65] by the time the development period was over, over half of the states had enacted elective laws.[66] This proved to be critical in the later

161 Ky. 562 (1914) (Kentucky court holding that compulsory statute limiting damages violated right to remedy under Kentucky Constitution). Arguably, Maryland's initial law was in this group. *See* Witt, *supra* note 30, at 137.

[60] According to Professor Witt, "*Ives* quickly became a centerpiece – alongside the U.S. Supreme Court's infamous decision in *Lochner v. New York*, striking down a maximum hours law – in the greatest court controversy since *Dred Scott*." Witt, *supra* note 30, at 152, 176. Witt goes on to provide a fascinating picture of the underlying facts in the *Ives* case, which involved a relatively minor injury, raising the question as to whether there may have been collusion between the railroad and Ives (or at least his lawyer) in bringing a case that would provide a terrific forum for the railroad's objections to the statute. See *Id*. 164-166.

[61] Jensen v. S. Pac. Co., 215 N.Y. 514 (1915), rev'd on other grounds 244 U.S. 205 (1917) (concluding "Withe (sic) the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both. Surely it is competent for the state in the promotion of the general welfare to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage. Any plan devised by the wit of man may, in exceptional cases, work unjustly, but the act is to be judged by its general plan and scope and the general good to be promoted by it. … It is plainly justified by the amendment to our own state Constitution, and the decisions of the United States Supreme Court … make it reasonably certain that it will be found by that court not to be violative of the Constitution of the United States.")

[62] New York Cent. R. Co. v. White, 243 U.S. 188 (1917) (holding the New York state workers' compensation statute to be constitutional)

[63] DOL Workers' Compensation Report, *supra* note 21, at 7.

[64] Witt, *supra* note 30, at 183.

[65] *Id*.

[66] Fishback 2000, *supra* note 32, at 103-104 and Table 4.3. In fact, as late as 1954, half of the statutes remained elective in nature. MAX D. KOSSORIS, WORKMEN'S COMPENSATION LAWS IN THE UNITED STATES: AN APPRAISAL, IN WORKMEN'S COMPENSATION IN THE UNITED STATES, U.S. Dep't of Labor, Bureau of Labor Statistics Bull. No. 1149 (1954) at 2. *See also* Hookstadt, *supra* note 58 (in 1917, 28 of the 40 laws were elective; in the 28 elective states, acceptance of the law was induced by modification of the common law defenses; also providing a comprehensive review of the statutes as of 1917).

development of the programs, as the elective system "placed inexorable downward pressure on compensation levels" in order to induce employers' participation,[67] thus fostering benefit inadequacy going forward. Many initial programs also permitted workers to make an *ex ante* election between tort and workers' compensation remedies; this was later characterized as allowing participating employers to require waivers from employees.[68]

The U.S. Supreme Court soon had the opportunity to review and endorse the constitutionality of the revised New York statute in *New York Cent. R. Co. v. White*.[69] Noting that "liability without fault is not a novelty in the law,"[70] and that the no-fault limited liability scheme was "not repugnant to the provisions of the Fourteenth Amendment,"[71] the court went on:

> Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.
>
> This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. *In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises*.[72]

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[67] Witt, *supra* note 30, at 183 (noting also that E.H. Downey wrote that the elective statutes "'operated as a deterrent to an adequate scale of benefits.' Downey concluded that 'the discredited opinion of a single reactionary court' had 'influenced the whole subsequent course of legislation," quoting E.H. DOWNEY, WORKMEN'S COMPENSATION 148 (1924)). *See also* Samuel K. Allen, *Struggle for Regulatory Power between States and the US Federal Government: The Case of Workers' Compensation Insurance 1930-2000*, 2 J. Econ. & Pol. Econ. 351, 362 ("Prior to 1972, states with a worker' compensation opt-out clause tended to pay lower benefits.").

[68] Peter S. Barth, *Workers' Compensation Before and After 1983*, in WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? 3-19, 8 (Richard A. Victor & Linda L. Carrubba ed. 2010) (at the time of the National Commission in 1972, "an employer in 39 states could reach an agreement with a worker that waived the employee's rights to workers' compensation benefits in the event of a work injury or disease."). This type of waiver is still allowed in some states.

[69] 243 U.S. 188.

[70] 243 U.S. 188, 204.

[71] 243 U.S. 188, 208.

[72] 243 U.S. 188, 205-207 (emphasis added) (further noting in dicta: "The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. 'The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.' Holden v. Hardy, 169 U. S. 366, 397, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383.") It is interesting that the Court refers in its

The *New York Central Railroad v. White* decision did not obliterate the depressive effects of *Ives* on benefits. And it certainly left important questions unanswered: what if the compensation *is* unreasonable in amount?[73] Can what is considered "reasonable" be a reflection of the norms and law of the time? After all, both tort theory and conceptions of adequacy have evolved over the past 100 years. Would the system as it looked in 1917 look "reasonable" to us today? Would it have looked reasonable to the court in 1917, if criticism had been made regarding the unreasonable nature of the amount of compensation?

What did the system look like?

The key bargain in the end was this: limited but reasonably predictable benefits for workers and their families under a strict liability system (that is, negligence was made irrelevant) in exchange for immunity from tort for employers. Each state's program provided for partial replacement of lost earnings and for at least some medical care. The goal was to move away from the individualized and uncertain system of torts to a more simplified notion of justice – both substantively and procedurally – for people facing significant risk at work.[74]

Nevertheless, the programs varied substantially with regard to coverage, benefit levels, financing and administration. A 1917 review of state laws by the U.S. Department of Labor, Bureau of Labor Statistics, noted that "no two compensation laws are alike,"[75] further suggesting that "the three most important factors in a compensation act are its scope, compensation benefits, and

opinion to *Holden v. Hardy* – a case that preceded *Lochner* and upheld safety regulation in the mines – in determining the issue of freedom of contract, and not to *Lochner*.

[73] *See* Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?* 69(3) RUTGERS L. REV. __ (forthcoming 2017) (addressing questions of state constitutionality). *See also* Michael C. Duff, *Worse Than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BEN. & SOC. WEL. L. REV. (forthcoming 2016). *See also* Smothers v. Gresham Transfer, Inc., 332 Or. 83 (2001) (providing an in depth history of remedial rights under the Oregon state constitution). As a constitutional matter, Smothers was overruled by Horton v. Oregon Health & Sci. Univ., 359 Or.168 (2016) (rejecting the constitutional theory articulated in Smothers in a medical malpractice case).

[74] *See, e.g.*, Witt, *supra* note 30, at 144 (quoting Eastman, *supra* note 45, that "[a]ll that can be hoped for is a rule that is fair in the average case."). The Federal Employers Liability Act, currently codified at 45 U.S.C. §§ 51-60 (1994), was an exception to this approach, and survives, somewhat anachronistically, to this day. Originally passed in 1906, it was found unconstitutional in 1908 in Howard v. Illinois Cent. R.R. Co. (Employers' Liability Cases), 207 U.S. 463 (1908) because it applied to employees not in interstate commerce. The 1908 act was limited to railroad employees injured while engaged in interstate commerce. *See* Friedman & Ladinsky, *supra* note 32, at 64–65 ("The Federal Employers' Liability Act of 1908 went much further; it abolished the fellow-servant rule for railroads and greatly reduced the strength of contributory negligence and assumption of risk as defenses. Once the employers had been stripped of these potent weapons, the relative probability of recovery by injured railroad employees was high enough so that workmen's compensation never seemed as essential for the railroads as for industry generally.").

[75] Hookstadt, *supra* note 58, at16.

administrative system – in other words, who should receive compensation, how much he should receive, and does he actually receive it, and if so, when."[76]

Many employers and workers were simply outside the reach of these new laws. In 1917, in addition to the elective nature of the majority of the statutes,[77] many states limited coverage to hazardous employment.[78] In most states, farm interests successfully blocked coverage of farmworkers,[79] leaving out large numbers of workers[80] despite the fact that farming was unquestionably a dangerous occupation.[81] Domestic workers were also excluded,[82] as were small firms, ranging up to eleven employees.[83] As a result, a large percentage of employees were never covered at all.[84]

Injuries were generally only compensated if they were the product of "accidents," generally defined as *unexpected* sudden traumatic incidents producing an immediate result,[85] and had to 'arise out of' and 'in the course of' employment. [86] These requirements led to litigation from the

[76] *Id.* at 83.
[77] *See supra* note 66 (providing specifics regarding elective statutes).
[78] Hookstadt, *supra* note 58, at 18-19 (14 states enumerated specific hazardous industries for coverage; all others were excluded). Expansion of programs to less hazardous industries was upheld in Ward & Gow v. Krinsky, 259 U.S. 503 (1922) (levels of danger were no longer considered relevant to the constitutionality, departing from *Hardy* and *Lochner*).
[79] Fishback 2000, *supra* note 32, at 108. *See also* Hookstadt, *supra* note 58 , at 18, 21 (all but two states exempt agriculture, either directly or by allowing employers to retain the three common law defenses if they did not elect coverage; 28 of the 40 state statutes specifically excluded agricultural workers).
[80] Fessenden, *supra* note 26, at 33 (35.5 per cent of employees excluded from workers' compensation coverage in 1917 were excluded through the exemption of agriculture, ranging from 11.6 per cent in New York to 83.7 per cent in Idaho). The farming sector employed 38 percent of laborers at that time. Michael Urquhart, *The employment shift to services, where did it come from?* April 1984 MONTHLY LABOR REVIEW 15 (1984).
[81] Specific data regarding agricultural deaths and injuries in the early 20th century seem to be unavailable, but agriculture remains one of the most dangerous sectors today, with a fatality rate seven times higher than the average in private industry. Occupational Safety and Health Administration, Safety & Health Topics, Agricultural Operations, available at https://www.osha.gov/dsg/topics/agriculturaloperations/#3.
[82] Hookstadt, *supra* note 58, at 18, 21 (domestic service is exempted in all but one state, either directly or through the small firm exemption).
[83] *Id.* at 18, 20.
[84] *Id.* The per cent of employees excluded ranged up to 69 percent in New Mexico. *Id.* at 27-28.
[85] *See* Hookstadt, *supra* note 58, at 44-45 (also noting that ten states did not use the term "accident" and further noting that a few states restricted the definition of compensable events even further: "In Louisiana and Nebraska, for example, an accident means an unexpected or unforeseen event, happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury; while in Oregon a compensable injury must be caused by violent or external means." Id. at 44); *see also* 3-42 LARSON'S WORKERS' COMPENSATION LAW § 42.01 (2015).
[86] *Id*. at 44-45 ("In every State a compensable injury must happen in the course of the employment, and in all but four States1 it must arise out of or result from the employment.")

outset,[87] and many state courts found ways to extend benefits to workers who did not appear to meet the narrow accident standard.[88] Occupational diseases were largely unrecognized by these early laws.[89]

The basis for benefits was "economic necessity."[90] In every state jurisdiction, benefits were limited in both amount and duration; within somewhat narrow parameters, there was significant variation from one state to another.[91] For example, the post-injury waiting period for temporary wage replacement varied, was commonly two weeks, but could be as long as three weeks.[92] This meant that workers who were off work due to an injury for this length of time went without any wage replacement benefits at all. Given the extremely high rate of turnover in industrial jobs, this suggests that many of these workers may have ended up without benefits – and without a job.[93] Weekly benefits, once received, generally ranged from half to two-thirds of the workers' weekly wage,[94] subject to a maximum set in a specific amount.[95] Death benefits approximated three to four years' earnings, assuming that the worker had dependents; for workers who died without

[87] *Id.* at 46 (quoting McNichol v. Employers' Liability Assurance Association, 215 Mass. 497, as follows: "an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury…. it excludes an injury which can not fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood; it must be incident to the character of the business and not independent of the relation of master and servant.")

[88] *Id.* at 44 (noting that courts had granted compensation under this language to such varied conditions as sunstroke, frostbite, neuritis from vibration of punch press, cerebral hemorrhage caused by gas poisoning, acute arenic poisoning, nervous shock, angina pectoris, pneumonia, typhoid, anthrax, arteriosclerosis, insanity, infection due to compulsory vaccination, tuberculosis, lead poisoning, facial paralysis, blindness due to inhalation of noxious gases, and aggravation of preexisting disease). These results varied considerably by state jurisdiction, however.

[89] *Id*. at 43, 45.

[90] *Id.* at 49.

[91] *Id.* at 49-72 (providing a full review of the benefits in 1917).

[92] *Id.* at 48.

[93] *See infra* text accompanying notes 309-310 regarding high labor turnover rate in this period.

[94] *Id.* at 50. The current explanation for the use of two-thirds of earnings as the appropriate measure of benefits is often explained based upon the fact that workers' compensation benefits are not subject to taxation. It is less clear that this was the explanation during this early period. The 16th Amendment, authorizing federal income taxation, was approved in 1913, and a federal income tax was enacted in 1916. The setting of the benefit level at one-third (or more) below earnings during this period is more likely to have been motivated by a desire to discourage workers from filing benefits. In modern parlance, that is, it was designed to reduce moral hazard.

[95] *Id.* at 54. Because the maxima were set in dollar amounts, they did not automatically escalate; it required legislative action to raise them. Benefits were available for temporary disability, and for partial and total permanent disability. Then, as now, the basis of compensation benefits for injuries that caused partial disability "has been most difficult." *Id.* at 56.

dependents, benefits were limited to burial expenses.[96] Payment for partial disability was then (as now) "the most difficult" to determine.[97] Noting this problem, a contemporaneous writer observed:

> Compensation for temporary total disability alone is inadequate, especially in view of the fact that while the employee may be able to return to work of some sort within a few weeks he is handicapped for life by reason of some maiming or other injury which interferes with his ability as a workman.[98]

This problem was addressed in two ways: either by payments based on a percentage of the worker's actual wage loss, subject to a maximum, or by adoption of specific schedules for injuries.[99] In addition, some states specifically provided that compensation be paid for disfigurement that might not have affected an individual's immediate earning capacity but "may decrease his opportunities to obtain employment."[100] The new programs were specifically designed to exclude payment for pain and suffering, and no benefits were to be paid for non-work-related effects of injuries. Medical benefits were also restricted as to the monetary amount, the period of treatment, or both,[101] but were in a constant state of flux, even in the very early years.[102]

Financing varied from monopolistic state funds to fully private insurance without any state-administered funds; unions argued, in most cases unsuccessfully, for state funds.[103] Employers

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[96] *Id.* at 54-55. (For example, employers in New Jersey were expected to pay the surviving dependents 45% of the workers' wage, to maximum of $10 per week, for up to 300 weeks, plus $100 for funeral expenses; a few states provided for statutorily-set lump sum payments for death or specified injuries; Oklahoma made no provision for fatal accidents at all.) *See also* Fishback 2000, *supra* note 32, at 56 (noting that only funeral expenses were paid when workers died without dependents.).

[97] Hookstadt, *supra* note 58, at 56.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 58. *See also* E. W. H., Workmen's compensation: compensation for disfigurement, 116 A.L.R. 712 (Originally published in 1938)

[101] Bruce A. Greene, *Medical Services*, in WORKMEN'S COMPENSATION IN THE UNITED STATES, UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN NO. 1149 25-28 (1954), *available at* https://fraser.stlouisfed.org/docs/publications/bls/bls_1149_1954.pdf. In 1917, only four states required provision of unlimited medical services; many limited medical services by both duration and amount. Hookstadt, *supra* note 58, at 72-74. Choice of physician was also limited. *Id.* at 77.

[102] Hookstadt, *supra* note 58, at 5 ("…the requirements as to medical services are in a constant state of flux.").

[103] *Id.*, at 12-16. *See also* Fishback 2000, *supra* note 32, at 148-67 (describing the battles over the financing mechanisms in detail and noting that unions preferred state funds, insurance carriers preferred private insurance, and employers vacillated between the two poles; monopoly insurance was implemented if strong labor unions were able to defeat insurance and agricultural interests, or if a political reform movement "incorporated unions' demands for state insurance into a broader program of socioeconomic changes."). *Id.* at 149.

were to buy the insurance – largely through private insurance[104] – thus spreading the cost of the risk.

Not surprisingly, choices made in each legislature were influenced by the strength of the various interest groups.[105] The parties involved in the legislative battles looked very much like those involved today: insurance companies, employers, trade associations and organizations of employers, workers and unions, lawyers, particularly plaintiffs' tort lawyers, and administrators of the state systems.[106] The positions taken in the fights also resonate with today's battles, and, like today, their relative power had significant influence on the ultimate compromises, which varied from one state to another. In particular, the growing strength of labor unions had substantial impact on the final bargains that were struck in many states.[107]

Assessing the Grand Bargain

As previously noted, and based on the law at the time, everyone came out ahead – on average.[108] The advocates for injured workers appeared to agree that something was better than nothing. Using that low bar as a measure, one might argue that the deal was "grand" – it created a functioning *ex ante* regulated system for providing compensation for workers that protected their employers from increased or unpredictable liability. But both the reach of the system and the benefits were quite limited. In fact, from the beginning, many claims were rejected.[109] Perhaps one should view this bargain as a truce in an on-going war, rather than as a definitive response to

[104] Fishback 2000, *supra* note 32, at 90, 148-67 (the unions fought for exclusive state funds, the insurance carriers advocated for private insurance, and in the majority of states the unions lost this battle). According to more detailed information provided by Hookstadt, *supra* note 58, at 13-14, some states did not require employers to obtain insurance, even if they were covered by the workers' compensation law.

[105] The battle over benefit levels between 1910 and 1930 is described in detail in Fishback 2000, *supra* note 32, at 172-92 (noting that benefit levels were influenced by three groups: employers, workers and reformers; workers did better in states where unions were strong; employers in more dangerous industries managed to hold benefit levels down, including where high-wage workers demanded substantial increases.). Fishback specifically describes the political battles for the initial laws in Ohio, Illinois, Massachusetts, New York, Minnesota, and Missouri. *Id*. at 122-40. *See also* Hookstadt, *supra* note 58, at 9 (noting that two factors determine the provisions of the state laws: the laws of contiguous states and the political progressiveness of the state).

[106] For example, in Missouri, plaintiff's lawyers attempted to slow the adoption of workers' compensation. Shawn Everett Kantor & Price V. Fishback, *Coalition formation and the adoption of workers' compensation: The case of Missouri, 1911 to 1926*, in THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 259-97 (Claudia Goldin & Gary D. Libecap eds. 1994).

[107] Or, as Fishback says, "Employers' successes in securing their optimal benefits were tempered in states where organized labor was strong, where political reform movements led to political shifts in the state legislature, and where bureaucratic agencies administered the workers' compensation system." Fishback 2000, *supra* note 32, at 25.

[108] Witt, *supra* note 30, at 144 (quoting Eastman, "[a]ll that can be hoped for is a rule that is fair in the average case).

[109] At least according to Witt, *supra* note 30, at 203, in the 1910s, industrial accidents were being reported to the NY commission at the rate of 1000 per day, and about 150 of these were found to be compensable.

a socioeconomic problem. The bargain did, however, set the ground rules for the design of the compensation system for work injuries that has changed remarkably little in the last hundred years.

Long term consequences of the initial U.S. bargain

In addition to creating a durable model for the U.S. approach to compensation for work injuries, the initial bargain established patterns and had consequences that continue to reverberate beyond workers' compensation itself.

First, workers' compensation was the initial vehicle for endorsement of social benefits as an appropriate governmental intervention, both constitutionally and politically. Social welfare theory was moved along by the economic and social crisis associated with workplace injuries resulting from industrialization; the notion of government intervention was initially resisted on constitutional as well as political grounds. The acceptance of workers' compensation laid the basis for future social insurance programs.[110] This was different from charity – and it was different from private insurance models. Workers' compensation combined elements of private insurance with legislatively mandated benefits – a hybrid form of social welfare, mandated and regulated by government but largely financed through private systems.[111] Arguably, it laid the foundation for New Deal social insurance programs, including Social Security and unemployment benefits, as well as for later developments, including the Affordable Care Act. And although the U.S. model of social welfare is certainly less generous than that of other highly developed countries, the development of these programs was a major shift from the meager charity of the 19th century.[112]

Second, and a corollary to the endorsement of social benefits, the adoption of workers' compensation represented an acceptance of both actuarial approaches to the design of programs and a generalized, rather than individual, approach to justice. Causation – or at least 'fault,' in the classic tort sense – became irrelevant. The assumption was that efficient delivery of benefits to a larger group of victims was superior to a highly individualized system that was inevitably more cumbersome, inefficient, and costly – and would fail to deliver anything to many. Importantly, however, the construction of the initial bargain, under the shadow of the initial New

[110] Witt, *supra* note 30, at 148, calls it the "entering wedge in the establishment of a whole panoply of social insurance schemes."

[111] It is impossible to avoid noting that this decision to rely on private insurance is also the basis for the U.S. health insurance system.

[112] For a description of the short-comings of 19th century charity, *see* Friedman & Ladinsky, *supra* note 32, at 56-57 ("From today's viewpoint, the word 'inadequate' is too weak a judgment on what passed for public relief in the early nineteenth century. Social insurance was unknown. Local poor relief was cruel, sporadic, and pinchpenny. Institutions for the helpless were indescribably filthy and heartless. Villages sometimes shunted paupers from place to place, to avoid the burden of paying for them. Moreover, the whole system was shot through with what strikes us today as an inordinate fear of the spread of idleness and a perverse notion that pauperism generally arose out of the moral failings of the poor. The most that can be said is that the system usually made a minimum commitment to keeping the poor alive.").

York decision in *Ives*, may have led to the depression of benefit levels that also had continuing consequences throughout the 20th century.

The third consequence was the freezing of the development of tort theory regarding workplace hazards.[113] At the turn of the last century, there was an assumption that the employer assumed a duty of reasonable care and diligence, subject to the controversial unholy trinity of common law defenses.[114] The exclusivity of workers' compensation brought the development of torts by employers involving workers' injuries to a halt. The evolution of tort doctrine during the 20th century never touched employers' liability to employees for workplace injuries and illnesses.[115] This is particularly notable when viewed in relation to the relatively new nature of tort theory at the end of the19th century and the vigor with which the early tort litigation regarding workplaces was pursued, despite the fact that settlements and judgments were uneven and often small. The freezing of tort theory can be seen in relatively recent cases, in which state courts have rejected injury claims: in Texas, for example, where workers' compensation is not mandatory and where the employer's duty of care may not encompass open and obvious dangers;[116] and elsewhere,

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[113] *See* Robert Rabin's paper in this symposium issue for further discussion of the application of current tort theory to workplace injuries. Robert L. Rabin, *Accommodating Tort Law: Alternative Remedies for Workplace Injuries*, 69(3) RUTGERS L. REV. __ (forthcoming 2017)

[114] Fessenden, *supra* note 26, at 1157-158 ("An employer assumes the duty toward his employee of exercising reasonable care and diligence to provide the employee with a reasonably safe place at which to work; with reasonably safe machinery, tools, and implements to work with; with reasonably safe materials to work upon, and with suitable and competent fellow-servants to work with him; and, in case of a dangerous or complicated business, to make such reasonable rules for its conduct as may be proper to protect the servants employed therein. If he fails to use ordinary care in the discharge of these duties, his ignorance of the dangerous nature of the working place, of defects in the tools or appliances furnished, or of the incompetency of the fellow-servants, will not excuse him from liability for an injury caused thereby.").

[115] The question of employers' liability through a contribution claim brought by a third party tort feasor when injured employees bring third party action is not within the scope of this discussion. For discussion of this issue, see Rabin, Alternative Remedies for Workplace Injuries, *supra* note 113. *See also* Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY J. EMP. & LAB. L. 65 (2005).

[116] *See* Austin v. Kroger Texas, L.P., 465 S.W.3d 193 (Tex. 2015) (on certified question to the Texas court, where employee slipped and fell at work, holding that an employer does not have a duty to warn employees of dangers that are open and obvious or already known to the employee, and distinguishing assumption of risk, a defense that may not be used by employers that choose not to opt in to the state's workers' compensation system pursuant to TEX. LAB. CODE ANN. § 406.033 (West 2011).) *Austin* overruled *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336 (1955) which had held employee's knowledge of a dangerous condition related only to assumption of risk. The 2015 *Austin* case has echoes of the 1900 case of *Lamson v. American Axe & Tool Co.*, 177 Mass. 144 (1900) (worker complained about danger, was told to do the work or leave, the accident he feared occurred: "The plaintiff, on his own evidence, appreciated the danger more than anyone else. He perfectly understood what was likely to happen…He stayed and took the risk."). In later litigation of the *Austin* case, the federal district court dismissed the claim; on appeal, the Fifth Circuit held that under Texas law, "an employer's premises-liability duty to its employee includes only the duty to protect or warn the employee against concealed hazards of which the

where the shield for employers created by workers' compensation has largely been upheld despite attempts at expanding liability for injuries caused by reckless disregard for safety or where an injury is substantially certain to occur.[117] This means that employers' cost of workplace injuries is rolled into an insurable risk with limited liability, unless an employer self-insures. For insured employers, costs are averaged and spread within an industrial class. Experience-based rating adjustments are limited, particularly for smaller employers, and the extent to which they are effective in promoting safety is debatable.[118]

Fourth, state legislatures were indisputably established as the arena for addressing costs and compensation associated with workplace risk and harm, subject only to interpretive intervention by the state courts. Federal compensation programs were initially limited to coverage for federal employees[119] and railroad workers in interstate commerce.[120] Regulation of safety was largely

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employer is aware, or reasonably should have been aware, but the employee is not." *Austin*, 465 S.W.3d at 201. Because there is no contention that Austin was unaware of the hazards of the spill leading to his fall and injury, and because he cannot claim the benefit of either of the two narrow exceptions provided for by Texas law, the district court correctly granted summary judgment on this claim." Austin v. Kroger Texas L.P., 614 F. App'x 784 (5th Cir. 2015). The pure negligence claim in the case had been dismissed in the initial proceedings. The trial court noted that in Texas a plaintiff must allege injury as a result of ongoing activity rather than by a condition on the property. Austin ahd alleged that he slipped on a puddle created by the defendant, and his injuries were therefore "properly conceived as resulting from a condition on the premises rather than an ongoing activity." Austin v. Kroger Texas L.P., No. 3:11-CV-1169-B, 2012 WL 2795674, at *3 (N.D. Tex. July 10, 2012), aff'd in part, rev'd in part, 731 F.3d 418 (5th Cir. 2013), opinion withdrawn and superseded on denial of reh'g, 746 F.3d 191 (5th Cir. 2014), certified question answered, 465 S.W.3d 193 (Tex. 2015), and aff'd in part, 614 F. App'x 784 (5th Cir. 2015). It can certainly be argued that this case does not reflect the evolution of tort law during the 20th century.

[117] *See infra* notes 348 - 353 and accompanying text (discussing the erosion of exclusivity on this basis in a few states).

[118] *See* Spieler, *Perpetuating Risk*, *supra* note 15, at 183, note 258 (listing studies through 1993 that investigated the effectiveness of experience rating as a safety incentive) *and id.* at 189-201 (describing rate-setting methodology and experience rating in detail). For more recent studies, *see e.g.* Mark Harcourt, Helen Lam, and Sondra Harcourt, *The impact of workers' compensation experience-rating on discriminatory hiring practices*, 4 (3) J. ECON. ISSUES 681 (2007); Ellen MacEachen et al, *Workers' compensation experience-rating rules and the danger to workers' safety in the temporary work agency sector*, 10 (1) POLICY AND PRACTICE IN HEALTH AND SAFETY, 77-95 (2012); Liz Mansfield et al, *A critical review of literature on experience rating in workers' compensation systems*, 10(1) POLICY AND PRACTICE IN HEALTH AND SAFETY 3-25. (2012). See also HARRY W. ARTHURS, FUNDING FAIRNESS: A REPORT ON ONTARIO'S WORKPLACE SAFETY AND INSURANCE SYSTEM: WSIB FUNDING REVIEW (2012) available at http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdex/~edisp/wsib011358.pdf (analyzing various rate-setting methodologies).

[119] Federal Employees' Compensation Act of 1916 (FECA), now codified at 5 U.S.C.A. § 8103.

[120] Federal Employers' Liability Act, 45 U.S.C. § 51 (covering railroad workers, requiring a showing of fault and allowing tort litigation). The 1906 Federal Employers' Liability Act was struck down as unconstitutional in Howard v. Illinois Cent. R. Co. (The Employers' Liability Cases), 207 U.S. 463, 495 (1908). The statute was then amended to expressly limit its scope to workers in interstate commerce, and

nonexistent at the time, having been stopped in its tracks by *Lochner*,[121] and expansive federal regulation of general industry did not come until many decades later with the Occupational Safety and Health Act of 1970.[122]

Fifth, these debates established a political pattern that remains in place today. The political fight continues in the states, although the balance of power among the players has shifted several times over the last 100 years. The issues of benefit levels and duration, covered injuries and illnesses, and covered employers and workers were and remain at the core of the political disagreements.

Sixth, the tension among the conflicting views regarding inevitability of risk, the assumption of risk by workers, and the possibility of preventing injury through safety interventions became clear during this period. The notion that workers understood and assumed risk, and that they were in control of their own safety, was deeply tied to 19th century to views of free labor.[123] But the idea that prevention was possible and that managers had responsibility for safety also emerged, as hierarchical control of work grew and Taylorism became popularized.[124] On the one hand, there was an inherent assumption within workers' compensation that, due to the inevitability of risk, there was no fault to be found.[125] On the other hand, there was a nascent safety movement that suggested that injuries could be prevented. The arc of safety improvements began at the same time as the initiation of the workers' compensation statutes.[126]

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this 1908 legislation was upheld in Mondou v. N.Y., N.H. & H.R. Co. (Second Employers' Liability Cases), 223 U.S. 1 (1912).

[121] Lochner v. New York, 198 US 45 (1905).

[122] 29 U.S.C. § 651 et seq. (2012). State regulation of some areas of safety had, of course, been previously upheld. Holden v. Hardy, 169 U.S. 366 (1898) (upholding Utah safety regulation of the mining industry); Muller v. Oregon, 208 U.S. 412 (1908) (upholding Oregon limitation on working hours for women and children). Some targeted federal compensation laws were passed after this initial period, including Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (first enacted in 1927); the Black Lung Benefits Act, 30 U.S.C.A. § 901 (compensation for coal miners with coalworkers' pneumoconiosis, first enacted 1969); and the Energy Employee's Occupational Illness Compensation Act, 42 U.S.Ca. § 7384 (EEOICA) (providing compensation for diseases contracted by civilian workers in the nuclear industry, first enacted in 1999).

[123] *See, e.g.,* Farwell v. Boston & Worcester Rail Road Corp., 45 Mass. 49 (1842).

[124] *See* FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (suggesting workplace efficiency would be improved by having employees do a single job or component of a job). *See also* Eastman, *supra* note 45 (pointing to the hierarchical organization of modern firms and the inadequacy of tort litigation); Witt, *supra* note 30, at 117-23 (discussing the rise of the engineering view that accident cases were at least bilaterally caused and noting that the engineers pointed to employers as being in the best position to prevent accidents; it was "futile to leave safety to the workers themselves." *Id.* at 121).

[125] For further discussion of this concept, *see* Spieler, *Perpetuating Risk*, *supra* note 15, at 168-70.

[126] *See infra* Part III(B) (discussing changes in safety since 1900).

Seventh, workers' compensation was the first arena for administrative adjudication and paved the way for the development of these systems later.[127]

Finally, the acceptance of the workers' compensation scheme may have had an effect on the judicial acceptance of *ex ante* contracts in employment. Prior to 1900, contracts made in advance in which an employee agreed to release an employer from liability were viewed as contrary to public policy, unless there was a specific promise that accompanied the waiver.[128] Workers' compensation added to an environment in which *ex ante* waivers were *a priori* acceptable. Current judicial approval of waivers[129] and pre-dispute arbitration agreements[130] are arguably a current manifestation of this trend. The effect of workers' compensation is unclear, both because the earlier rejection of *ex ante* injury provisions also required some promise of compensation, and also because of overall trends in contract law. But the wholesale *ex ante* elimination of tort rights, irrespective of the degree of malfeasance of the employer, certainly heralded the later approval of *ex ante* promises relating to workers in the 20th and 21st century.

B. Phase Two: The New Deal, the National Commission, and an upward spiral of benefits and costs

[127] *See* Witt, *supra* note 30, at 188-90.

[128] *Id*. at 68-69 (employment contracts as early as the 1860s included waivers regarding employers' liability for personal injuries, sought to establishing restrictive 30-day notice requirements, included waivers of state safety regulations, and attempted to condition the filing of personal injury suits on medical examinations by company physicians, citing various caselaw; but courts found these provisions to be void against public policy). Witt notes, "courts regularly refused to enforce employment contract provisions barring injured employees from suing their employers in tort…the strong trend in virtually all American jurisdictions soon moved decisively in favor of unenforceability, and a number of legislatures confirmed the trend by enacting legislation expressly barring the enforcement of such employment contract waivers." *Id*. at 123. Witt further noted that courts did accept pre-workers' compensation accident-benefit schemes that conditioned receipt of benefits *after* an accident on a waiver of the right to sue, although some statutes at the state level as well as federally barred these waivers as well. *Id.* See also Fishback 2000, *supra* note 32, at 91 (quoting STEPHEN FESSENDEN, PRESENT STATUS OF EMPLOYERS' LIABILITY IN THE UNITED STATES, Department of Labor Bulletin No. 29, 1157-210, Government Printing Office (1900)). For examples of cases that followed the public policy argument, see e.g. Roesner v. Hermann, 8 F. 782 (D. Ind. 1881) (A contract between employer and employé, whereby the employé, in consideration of the employment, agrees to release and discharge his employer from all damages on account of accident or death to the employé, caused by the negligence of his employer or co-employés, is void as against public policy); Cleveland, C., C. & St. L. Ry. Co. v. Hudson, 12 Ohio C.D. 661 (Cir. Ct. of Ohio 1898) ("When a railroad undertakes to make a contract that shall exonerate it from its negligence, whether that negligence consists in making a rule that is unsuitable to properly protect employees or strangers or persons who are riding upon the trains, it is against public policy to exonerate the company."). The case law during the period 1860-1910 was, not surprisingly, somewhat mixed on these issues, and not all judges in all jurisdictions followed the public policy argument.

[129] *See, e.g.*, Molina v. State Gardens, 88 Mass. App. Ct. 173 (2014).

[130] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

Every state legislature had enacted a workers' compensation law by 1948.[131] Regular statutory amendments by state legislatures involved tweaking of benefit levels to increase maximum weekly benefits, expansion of covered industries and increases in available medical benefits, but not fundamental structural changes in the pre-existing bargain. Variability among the state statutes persisted.[132] Benefit levels fluctuated based on the strength of the various interested groups within states and the party composition of state legislatures. In states dominated by industries that had strong union presence, benefits tended to rise,[133] but the general parameters of available benefits remained unchanged. Overall, costs to employers were reasonably stable.[134] In the background, tort litigation continued over excluded diseases: the disaster of acute silicosis in the excavation of the Hawks Next Tunnel in West Virginia fueled both political debate and litigation.[135]

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[131] *See* HERMAN M. SOMERS & ANNE R. SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY (1954). For a discussion of the changes made in the period up to 1936, see HARRY WEBER HECKMAN, THE CHANGES IN THE WORKMEN'S COMPENSATION LAWS IN THE UNITED STATES, 1930-1936, AND THE EFFECTS UPON WORKERS (1937).

[132] *See* Heckman, *supra* note 131 (discussing changes in workers' compensation in the period 1930-1936); Somers, *supra* note 131 (enumerating the status of the laws as of the date of publication in 1954); ARTHUR H. REEDE, ADEQUACY OF WORKMEN'S COMPENSATION 221(1947) (providing a comprehensive review of the status of the state laws based largely on research conducted in the 1930s and noting, in his summary, that all states had "fixed arbitrary limits to compensation"); SAMUEL B. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS (HOROVITZ ON WORKMEN'S COMPENSATION) (1944) (also enumerating the status of the laws as of the date of publication). *See also* C. ARTHUR WILLIAMS, JR. & PETER S. BARTH, COMPENDIUM ON WORKMEN'S COMPENSATION (Marcus Rosenbloom ed., 1973); PETER S. BARTH, SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (Monroe Berkowitz et al. eds., vol. I-III 1973) (updating these historical accounts as of the time of the National Commission on State Workmen's Compensation Laws).

[133] Fishback 2000, *supra* note 32, at 1984 ("in states dominated by industries where organized labor had a greater national presence, organized labor was successful in overcoming the pressure from employers for lower benefit levels. When our union measure rose by 1.0 percent, the benefit levels rose by 0.97 percent; also noting that shifts in the party composition of state legislatures had economically and statistically significant positive effects on benefit levels.").

[134] Spieler, *Perpetuating Risk*, *supra* note 15, at 131 n.30 (noting that costs rose from 0.94 to 1.14 per $100 of payroll from 1953 to 1972, a 21% increase in a twenty year period; in contrast, from 1973 to 1980, costs rose from 1.17 to 1.94 per $100 of payroll, a 66% increase in seven years.).

[135] Frances Perkins, *Recollections of Promise and Performance*, *1934-64*, in A REPORT ON THE BUREAU OF LABOR STANDARDS 30TH ANNIVERSARY, U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS BULLETIN 272, at 5, 13-14 (1964) (recounting how the news of the Gauley Bridge disaster reached the federal department of labor and noting "it was…a great and a massive operation of silicosis which attacked these men directly as they bore in."); HUBERT SKIDMORE, HAWKS NEST (1941) (providing a fictional account of this disaster); MARTIN CHERNIACK, THE HAWK'S NEST INCIDENT: AMERICA'S WORST INDUSTRIAL DISASTER (1989) (an epidemiologist's analysis of the hundreds of deaths attributable to acute silicosis from the building of the tunnel); HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON LABOR, INVESTIGATION RELATING TO HEALTH CONDITIONS OF WORKERS EMPLOYED IN THE CONSTRUCTION AND MAINTENANCE OF PUBLIC UTILITIES (1936), *available at*

It was not until the middle of the century that the question of benefit adequacy became the primary focus for commentators.[136] It seems likely that the politics underlying the New Deal – and the development of other social benefit programs – had a significant impact on the evolving thinking about workers' compensation. Workers' compensation was no longer a *sui generis* program that simply balanced the needs of various constituencies, replacing civil litigation in order to achieve what was considered a reasonable result for parties. Other changes, external to workers' compensation, created a web of multiple benefit systems[137] and employment laws[138] that changed the external context.[139] Between 1910 and 1970, views about the role of government, the acceptability of broad social programs, and the fundamental preventability of occupational morbidity and mortality had all changed dramatically. Surrounded by this energy of social innovation, workers' compensation benefits came to be viewed as woefully inadequate.

Arthur Reede reflected the mainstream changing views – his book was titled Adequacy of Workmen's Compensation – and, for the first time, he attempted to quantify the proportion of wage loss that was compensated under each state law.[140] After pointing out the flaws in the various workers' compensation programs, he concluded, "It is difficult to believe that advocates of workmen's compensation intended workers to absorb more than half of the wage loss due to industrial injuries. Yet that is what they do at present, *in every state in the United States*.

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http://www.english.illinois.edu/maps/poets/m_r/rukeyser/investigation.htm (Congressional aftermath of the disaster). *See also* Jones v. Rinehart & Dennis Co., 113 W. Va. 414 (1933) (West Virginia Supreme Court decision finding that when a worker dies as result of a noncompensable disease contracted in the course of employment and through employer's negligence, the employer is not exempt from liability in damages for wrongful death, notwithstanding the existing state workers' compensation law.).

[136] For example, Heckman, *supra* note 131, discusses gaps in coverage, but does not focus on adequacy of benefits in his monograph. In contrast, Reede, *supra* note 132, focuses on issues of adequacy. There were, of course, some analysts in the early period who mentioned issues of adequacy. *See* Hookstadt, *supra* note 58, at 56. But the strength of these concerns regarding adequacy quite clearly grew in this later period.

[137] These included the Social Security Act of 1935, including Title I – Grants to States for Old Age Assistance, 42 U.S.C. §§ 301-306 (1935); Title II – Federal Old Age Benefits, 42 U.S.C. §§ 401-410a (1935); Title III – Grants to States for Unemployment Compensation Administration, 42 U.S.C. §§ 501-503 (1935); Title IV – Grants to States for Aid to Dependent Children, 42 U.S.C. §§ 601-606 (1935); Title IX - Tax on Employers of Eight of More, 42 U.S.C. §§ 1101-1110 (1935).

[138] Starting with the New Deal, and prior to 1970, these statutes included: the National Labor Relations Act (Wagner Act) of 1935, 29 U.S.C. §§ 151-166 (1935); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1938); Area Redevelopment Act of 1961, Pub. L. No. 87-27, 75 Stat. 47 (1961); the Manpower Development and Training Act of 1962, Pub. L. No. 87-415, 76 Stat. 23 (1962); the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964); the Work Incentive Program of 1967, Pub. L. No. 90-248, 81 Stat. 871 (1967); the Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969).

[139] See *infra* Part III for further discussion of these contextual changes.

[140] Reede, *supra* note 132, at 179-210.

Compensation benefits are clearly inadequate."[141] His focus was on how the flaws in workers' compensation laws "reduce the proportion of wage loss compensated." [142]

Benefit adequacy in these state programs grew into an issue of national concern, although federal intervention continued to be viewed as inappropriate.[143] In the 1950s, Arthur Larson, then Under Secretary of Labor in the Eisenhower Administration, advocated for a Model Act that would "call to the attention of *each* state the best statutory provisions that have been worked out by *any* state";[144] his objective was "improvement of the laws" and not uniformity.[145] He nevertheless suggested that all laws should be compulsory, with coverage of all kinds of injuries, complete benefits without arbitrary cessation points and comprehensive coverage of medical and rehabilitative care.[146] Several versions of a Model Act were drafted under the auspices of the Council of State Governments, but none was ever enacted in any state.[147] Concerns about the

[141] Reede, *supra* note 132, at 225 (emphasis in original).
[142] *Id.*
[143] Perkins, *supra* note 135, at 5, 13 (1964).
[144] *See* Arthur Larson, *The Model Workmen's Compensation Act*, 23 TENN. L. REV. 838, 838 (1953-1955) (emphasis in original).
[145] *Id.* at 842.
[146] *Id.* at 843.
[147] Telephone interview with John F. Burton, Jr., Professor (Emeritus) Rutgers Univ. and former Chair, National Commission on State Workmen's Compensation Laws (Sept. 2, 2016); email from same, Oct. 11, 2016 ("There were two important efforts in the 1960s and 1970s to develop a comprehensive blueprint for state workers' compensation program that relied on individuals with expertise who represented organizations with diverse views about the program. The Council of State Governments appointed an Advisory Committee on Workmen's Compensation, chaired by Professor Arthur Larson, which included 21 members representing business, unions, the insurance industry, state and, federal agencies, the medical progression, and academics. The first complete version of the Workmen's Compensation and Rehabilitation Law (Model Act I) was published in 1968 and included suggested state legislation with 68 sections and a section-by-section commentary by Professor Larson. The second effort to provide comprehensive guidance for state workers' compensation law involved the National Commission on State Workmen's Compensation Laws … The National Commission did not include suggested statutory language but did refer to the Model Act provisions at several points. Subsequent to the submission of the National Commission report in 1972, the Council of State Governments published three additional versions of the Model Act. Model Act II largely duplicated Model Act I, but added an Introduction referring to the work of the National Commission. The Council of State Governments also appointed a new Advisory Committee on Workmen's Compensation, chaired by Indiana State Senator Wilfrid Ulrich, which included 16 members representing a variety of viewpoints. The new committee prepared Model Act III, which included the Model Act sections that needed to be revised to incorporate the 19 essential recommendations of the National Commission, and also prepared Model Act IV, which included all 68 sections of the proposed legislation in Model Act I and Model Act II modified as necessary to accommodate all 84 of the recommendations of the National Commission."). One version of the Model Act can be found here: The Model Act (rev.) has been reprinted in entirety in JOSEPH W. LITTLE, THOMAS A. EATON & GARY R. SMITH, CASES AND MATERIALS ON WORKERS' COMPENSATION app. B, at 617-65 (5th ed., 2004). [NOTE TO RUTGERS STUDENTS – I CAN'T FIND IT ANYWHERE ELSE –see if you can find a better source for the Model Act]

inadequacy of these state programs continued to be raised within the Department of Labor through the next decade,[148] but it took a political movement focused on occupational safety and health to galvanize sufficient attention to generate Congressional action.[149]

In 1970, Congress called for federal review of the status of the state workers' compensation laws:

> (A) the vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation; and
>
> (B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living. [150]

The National Commission on State Workmen's Compensation Laws was charged to undertake this review.[151]

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[148] DOL Workers' Compensation Report, *supra* note 21, at app. A, at 27-28 (providing a history of the involvement of the U.S. Department of Labor in workers' compensation). *See also* Esther Peterson, *Outlook for Labor Standards in a Changing World*, *in* A REPORT ON THE BUREAU OF LABOR STANDARDS 30TH ANNIVERSARY, U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN 272, at 38, 44 (1964) (asking rhetorically "are our State workmen's compensation laws proving adequate to the demands on them?" and responding, "The Bureau of Labor Standards has always been committed to helping States improve their laws. Its latest bulletin, however, lists 19 major gaps in State laws – 19!...will the States improve their laws to meet tomorrow's needs or will they court the risk of irresistible pressures for a Federal workmen's compensation law, or Federal standards, or a takeover by some other system? Has anybody thought of using interstate compacts to develop a regional compensation system which would minimize unfair competition from nearby States and let the State in a region raise and extend benefits together? Tomorrow is later than you think for our earliest form of social insurance.").

[149] *See* Spieler, *Perpetuating Risk*, *supra* note 15, at 131-32. In response to these political developments, Congress enacted the federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969) (superseded by the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 et seq) (including the first national compensation program for an occupational disease in the Black Lung Benefits Act) and the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.

[150] Occupational Safety and Health Act §27(a)(1), Pub. L. No. 91-596, 84 Stat. 1591 (since repealed).

[151] Occupational Safety and Health Act §27, Pub. L. No. 91-596, 84 Stat. 1591.

According to a summary by Peter Barth, who served as Executive Director of the National Commission, "few people were aware of the overall inadequacy of the schemes."[152] More specifically, the Commission found that at the time of its convening only 31 states had laws that made coverage for at least some workers mandatory; due to elective coverage and to exclusions relating to establishment size or the nature of business, in 15 states coverage of employees was below 70 percent; in 39 states, employers could reach an ex ante agreement with workers that waived the employee's rights to workers' compensation benefits; only 29 states met the standard of replacing two-thirds of the average weekly wage for temporary total disability benefits, and only 25 met this standard for permanent disability benefits; only one state met the criterion that the maximum weekly benefit should be at least 100 percent of the state's average weekly wage.[153] In 2010, looking back, Barth concluded, "Taking account of the fact that workers had lost the right to sue their employers for death or disability due to employer negligence, it appeared that workers had struck a bad bargain when evaluated against the indemnity benefits that were provided under the state laws."[154]

Ultimately, the National Commission issued a consensus report, finding that "the protection furnished by workmen's compensation to American workers presently is, in general, inadequate and inequitable,"[155] and unanimously endorsing 84 recommendations, including 19 recommendations that the Commission members regarded as "essential."[156] This feat was remarkable, given that the Commission was composed of 18 members, almost all Republicans, three of whom were *ex officio* members of the administration and the remainder appointed by President Nixon, representing diverse interests including employers, insurers, academics, lawyers, unions, and members of the medical profession.[157]

The Commission's transmittal letter of the final report to the President and Congress made an important initial statement: "Although the backgrounds of the members of the Commission varied considerably, we began with a common and profound conviction that American workers should receive adequate and fair protection if they suffer a work-related injury, disease, or

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[152] Barth, *Workers' Compensation Before and After 1983*, *supra* note 68, at 8; *see also id*. 3-19.
[153] *Id.* at 7-9. *See also* THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972) [hereinafter National Commission Report]; Spieler, *Perpetuating Risk*, *supra* note 15, notes 32-34 and accompanying text.
[154] Barth, *Workers' Compensation Before and After 1983*, *supra* note 68, at 9.
[155] Transmittal letter from John F. Burton, Jr. to the President and The Congress (July 31, 1972), *in* National Commission Report, *supra* note 153.
[156] National Commission Report, *supra* note 153, at 15-24 (introduction summarizing the recommendations). These recommendations are all summarized in the Introduction and Summary of Major Conclusions and Recommendations of the National Commission Report, *id.* at 13-30 and then set out in greater detail in the later chapters of the Report. They are also summarized in *Notes and Brief Reports, Report of the National Commission on State Workmen's Compensation Laws* 35(1) SOCIAL SECURITY BULLETIN, 31-32, 54 (Oct. 1972). [NOTE – no author is listed for this in the bulletin.]
[157] John F. Burton, Jr., *The National Commission on State Workmen's Compensation Laws: Some Reflections by the Former Chairman*, 40(2) IAIABC JOURNAL 15-32 (2003) [hereinafter Burton *Reflections*].

death."[158] In his later musings about the Commission's work, John F. Burton, Jr., who served as Chairman of the Commission, noted that the fact that open meetings were held to hear from the public, including injured workers, had significant influence on their ability to reach consensus.[159] Barth attributed the unanimity to "the obviously inadequate quality of the state systems."[160] In any event, there was clearly talented and strategic leadership involved, given the multiplicity of views held by the participants at the beginning of the process.[161]

The Commission was charged to report back to Congress no later than July 31, 1972, after undertaking "a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation."[162] Agreement was reached first on five basic objectives for workers' compensation programs: broad coverage of employees and work-related injuries and diseases; substantial protection against interruption of income; provision of sufficient medical care and rehabilitation services; encouragement of safety; and an effective system for delivery of the benefits and services.[163] These objectives served as the basis for the development of the specific recommendations; all of the recommendations accepted the basic design of benefits that was established in the early legislation.[164] The recommendations included:

- Coverage of employers and workers: Essential recommendations included compulsory rather than elective coverage, with no exemptions for small firms or government employment; mandatory coverage for all employees, including domestic and casual workers (to the extent covered by the Social Security system) and, ultimately, farmworkers. [165] The Commission

[158] Transmittal letter from John F. Burton, Jr., *supra* note 155.
[159] S*ee* Burton, *Reflections*, *supra* note 157, at 4. For Burton's additional views on the work of the National Commission, see John F. Burton, Jr., *The National Commission 33 Years Later: What Have We Learned?*, 42(2) IAIABC JOURNAL 21-38 (2005); John F. Burton, Jr., *The National Commission 33 Years Later: What Have We Learned? Part Two*, 43(1) IAIABC JOURNAL 17-34 (Spring 2006). *See also* John F. Burton, Jr., *Should There Be a 21st Century National Commission on State Workers' Compensation Laws?*, 51(1) IAIABC Journal 11, 14-16 (2015) (giving a fascinating insider view of how consensus was reached by the Commission through isolation away from telephones and interference of outsiders).
[160] Barth, *Workers' Compensation Before and After 1983*, *supra* note 68, at 9. *See also* Burton, *Should There Be a 21st Century National Commission …?*, *supra* note159, at 4 (noting "The hearings and evidence presented to the National Commission revealed a system in much worse shape than these experts had expected, and they were willing to open their minds to fundamental changes in order to preserve the state-run system.").
[161] Burton, *Should There Be a 21st Century National Commission …?*, *supra* note159, at 1-3 (noting the multiplicity of views among Commission members). The statement regarding the tremendous quality of the leadership is my own personal opinion.
[162] Occupational Safety and Health Act of 1970 §27 (d)(1), Pub. L. No. 91-596, 84 Stat. 1591.
[163] National Commission Report, *supra* note 153, at 15, 35-40.
[164] *See supra* notes 90 to 102 and accompanying text.
[165] *Id.* at 15-17, 43-48, Recommendations 2.1-2.10; 127 (indicating the essential components of recommendations).

also urged use of a definition of employee that would extend coverage as broadly as possible.[166]

- Coverage of injuries and diseases:[167] Recommendations included full coverage for work-related diseases (an essential recommendation);[168] elimination of the 'accident' test for compensability that had led to the exclusion of claims seen as the result of normal operation of businesses;[169] coverage for injuries and diseases arising out of and in the course of employment,[170] including full benefits for impairments or deaths "resulting from both work-related and non-work-related causes if the work-related factors was a significant cause of the impairment or death."[171]

- Benefit levels:[172] The Commission recommended that maximum weekly benefits be set at 100 per cent of the state's average weekly wage initially (and then rise to 200 per cent)[173] and that the maximum be linked to the state's average weekly wage[174] to avoid the need for legislative action to address general wage increases in the labor market. Subject to this maximum, the recommendation was that benefits should be set at least at two-thirds of the worker's gross weekly wage.[175] The recommendations also included a waiting period of no

[166] *Id.* at 48, Recommendation 2.8.
[167] *Id.* at 49-51, Recommendations 2.11-2.17.
[168] *Id.* at 50, Recommendation 2.13; 127 (indicating the essential nature of this recommendation).
[169] *Id.* at 49, Recommendation 2.12 ("Compensation, for example, has been denied when nothing unexpected or unusual occurred. If a man strained his back while doing regular work in the usual fashion, it was to be expected.").
[170] *Id.* at 50, Recommendation 2.14. The Commission Report further noted, "A serious problem for workmen's compensation occurs when the impairment or death is associated with several contributing factors, and the factors are both work-related and non-work-related, or when there is doubt about the etiology. A classic example is heart damage, which may result from an interaction of congenital, degenerative, and work-related factors. Diabetes is another example, because the etiology of diabetes includes hereditary and degenerative processes, but the symptoms may be aggravated by an incident or condition at work. Respiratory diseases may or may not be work-related. The determination of the etiology or 'cause' of a disease in a medical sense is often difficult or even possible. …The question is how to construct a practical application of the phrase 'arising out of and in the course of employment' in a test for compensability of injuries or disease…. As the basic purpose of workmen's compensation is to protect the employee, we believe in the traditional practice of resolving doubts in favor of the employee. At the same time, we do not believe that workmen's compensation should be converted into a general insurance scheme: its function is not to protect against all sources of impairment or death for workers." *Id.* at 50-51.
[171] *Id.* at 51, Recommendation 2.17.
[172] *Id.* 54-75, Recommendations 3.1-3.26.
[173] *Id.* at 62, Recommendation 3.8 and 3.9 (temporary disability); *Id.* at 64, Recommendation 3.15 (permanent total disability).
[174] *Id.* at 61, Recommendation 3.10.
[175] *Id.* at 57 Recommendation 3.2 (temporary disability); *Id.* at 64, Recommendation 3.12 (permanent total disability); *Id.* at 71, Recommendation 3.21 (death benefits). This was actually recommended as the

longer than three days before eligibility for temporary benefits,[176] and that no arbitrary limits be put on the duration of benefits for permanent total disability or death, including that total disability benefits be paid for the duration of the worker's disability or for life.[177] Most of these were included in the essential recommendations.[178]

- Medical and rehabilitation benefits:[179] The essential recommendations included that full medical and rehabilitation benefits without limits on amount or duration be covered.[180] Additional recommendations involved worker choice of physician;[181] state (not employer or insurance carrier) management of medical issues;[182] and establishment of second injury funds to "provide broad coverage of preexisting conditions."[183]

- Safety:[184] Although none of the essential recommendations related to safety, the Commission did recommend that workers' compensation reporting systems coordinate with reporting under the Occupational Safety and Health Act;[185] that insurance carriers be required to provide loss prevention services;[186] and that experience rating be used to encourage safety.[187]

- Inter-jurisdictional conflicts: An essential recommendation was to broaden employee choice for filing interstate claims so that employees could file claims where the injury occurred, where the employment was localized, or where the employee was hired.[188]

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transitional benefit level for temporary disability. The Commission recommendation was initially that benefits be 80 percent of the worker's spendable (net) weekly earnings. *Id.* at 56, Recommendation 3.1.

[176] *Id.* at 59, Recommendation 3.5.

[177] *Id.* at 65, Recommendation 3.17.

[178] *Id.* at 127. Essential recommendations for temporary total benefits included: weekly benefits of 66.67% of average weekly wage (Recommendation 3.7), subject to a maximum of "at least 100 percent of the State's average weekly wage by July 1, 1975" (Recommendation 3.8); no limit on duration or total dollar amount (Recommendation 3.17). For death benefits, essential recommendations included: surviving dependents should receive the same benefit levels as for temporary disability (Recommendation 3.21 and 3.23) with no limit on duration or total dollar amount (Recommendation 3.25). For Permanent total benefits, the benefit should be the same as for temporary disability (Recommendation 3.12, 3.15) with no duration or dollar limits on benefits (3.17), and the Commission's recommendation regarding the definition of permanent disability should be used.

[179] *Id.* at 77-98, Recommendations 4.1-4.12.

[180] *Id.* at 80, Recommendations 4.2-4.4; 127 (indicating essential nature of this recommendation).

[181] *Id.* at 79, Recommendation 4.1.

[182] *Id.* at 80, Recommendation 4.3 (allowing the state agency to have discretion to determine the appropriate medical and rehabilitation services in each case).

[183] *Id.* at 84, Recommendation 4.10.

[184] *Id.* at 87-98, Recommendations 5.1-5.4.

[185] *Id.* at 93, Recommendation 5.1.

[186] *Id.*, Recommendation 5.2.

[187] *Id.* at 98, Recommendations 5.3-5.4.

[188] *Id.* at 48, Recommendation 2.11; 127 (indicating that this was an essential recommendation).

The report also made recommendations regarding the administration of these systems by the states. [189]

No consensus was reached regarding the appropriate approach to compensation for permanent partial disability, and a call was made for continuing state and federal examination of the possible approaches to these disabilities. [190] The theories – and the existing state laws – all made some provision for compensation for workers who continued to work but had permanent disabilities that led to reduced earnings or, in some states, permanent health impairments irrespective of their effect on the ability to work. But the approaches varied (and continue to vary) significantly.[191] This challenge persists today.

The Commission disbanded 90 days after issuing its Report, as required under the sunset provision in the enabling statute, after calling for federal intervention if substantial compliance with the essential recommendations was not achieved by 1975. The report specifically noted, "We reject the suggestion that Federal administration be substituted for State programs *at this time."*[192] Federal intervention never happened.[193] Whether due to shared concerns about

[189] *Id.* at 99-114.
[190] *Id.* at 66-70. *See also* Burton *Reflections, supra* note 157, at 19.
[191] Generally, these benefits are all described as "permanent partial disability" (PPD) benefits. There are three patterns for determining cash awards for permanent but not total disability: (1) the permanent impairment approach that relies on either a statutory schedule with a list of body parts or, for those injuries not listed, on a rating system that evaluates the seriousness of a worker's permanent health impairment and uses a state-based conversion factor to determine the amount of PPD benefits; (2) the loss of earning capacity approach that attempts for forecast future earnings using factors that may include the worker's age, occupation and level of impairment; and (3) the actual wage loss approach, which supplements a worker's real earnings, up to a specified maximum, for a set period of time. For further descriptions of these different approaches, see John F. Burton, Jr., *Permanent partial disability benefits*, in WORKPLACE INJURIES AND DISEASES: PREVENTION AND COMPENSATION (Karen Roberts et al editors) 2005, p. 69–116. *See also* Peter S. Barth, *Compensating Workers for Permanent Partial Disabilities*, 65(4) SOC.SEC.BULL. 16-30 (2003/2004). In all of these approaches, the actual amount of benefits is capped in some way, and full life-time earnings losses are not replaced. There is large state to state variation, including in the amount paid pursuant to schedules for amputations. *See* Michael Grabell & Howard Berkes, The Demolition of Workers' Comp, (March 4, 2015), https://www.propublica.org/article/the-demolition-of-workers-compensation [hereinafter Grabell & Berkes, Demolition].
[192] National Commission Report, *supra* note 153, at 126 (emphasis added).
[193] *See* Barth *Workers' Compensation Before and After 1983, supra 68*, at 10 (providing an interesting history of the subsequent federal thinking on this: "[A]t a meeting in 1973 held at the White House attended by four persons, including myself, a decision was made to delay as long as possible any decision or action on the Report. Instead, the policy was set to appear to take some steps that would placate those calling for some White House decision or action, while taking no action that would appear to threaten the state programs. In short, the aim was to buy some time and hope that the heat would be turned down and the issue of the federal government's involvement might disappear. In order to maintain the *status quo ante*, the response would be to take two modest steps beginning in 1974. First, the Department of Labor would appoint a handful of individuals to act as technical advisors to the states to assist them on steps

adequacy, or fear of potential federal intervention, or a change in the balance in power in state legislatures, or simply a recognition that reform was in the air,[194] states' compliance with the essential recommendations increased, moving from an average of 6.8 in 1972 to 12.1 in 1980.[195]

The adequacy of some benefits that are unambiguously defined by statutes unquestionably improved in the wake of the National Commission's report. States moved from elective to mandatory laws, so that only Texas remains today as a state that allows employers to choose whether to opt into the workers' compensation system.[196] The majority of states raised the maximum for total disability benefits to 100 percent of the state average weekly wage.[197] Weekly statutory benefit rates increased substantially between 1970 and 1985 and continued to increase, though more modestly, between 1985 and 1990.[198] Costs for employers increased as well.[199] If one looks today at the array of state laws, many still meet at least some of these minimum standards. For example, all but two states calculate the weekly benefit at two-thirds or higher of the pre-injury weekly wage; all but 13 set the maximum weekly benefit at 100 percent of the state average weekly wage or higher.[200]

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they might take in improving their laws. Second, an Interdepartmental Task Force on Workers' compensation was to be organized drawing from high level operatives in the federal agencies most closely connected to the issue…") There was a bill introduced in the Senate, known as the "Javitz Bill", introduced by Senator Jacob Javitz and others, in 1978, but it did not progress. *See* Sen. Bill 3060, Congressional record, p. 13406, May 11, 1978.

[194] David B. Torrey, *Section 305.2 of the Pennsylvania WC Act and Extraterritorial Jurisdiction: Background, Statute, and Interpretation*, DAVETORREY.INFO, http://www.davetorrey.info/files/PA_and_Comparative_Extraterritoriality__2.pdf (last visited Nov. 6, 2016) ("In 1974, finally, the reform movement of that era caused a complete upheaval of the long-existing status quo.").

[195] DOL Workers' Compensation Report, supra note 21, Appendix B.

[196] Baldwin & McLaren, *supra* note 5, at 6. Note that recent attempts to recreate elective systems have not yet succeeded: the opt-out system in Oklahoma was held unconstitutional, Vasquez v. Dillard's, Inc., 381 P.3d 768 (Okla. 2016), and similar legislation has not been passed elsewhere.

[197] John F. Burton, Jr., *The National Commission 33 Years Later: What Have We Learned? supra* note 159 (*citing* National Commission Report, *supra* note 153, at 61) *and* G.A. WHITTINGTON, STATE WORKERS' COMPENSATION LAWS IN EFFECT ON JANUARY 1, 2004 COMPARED WITH THE 19 ESSENTIAL RECOMMENDATIONS OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (2004).

[198] John F. Burton, Jr., *Should There be a 21st Century National Commission on State Workers' Compensation Laws?*, *supra* note 159, at 32 and Figure 2 (based on analysis of NCCI data).

[199] Spieler, *Perpetuating Risk*, *supra* note 15, at 131 n. 30 (from 1973 to 1980, costs rose from 1.17 to 1.94 per $100 of payroll, a 66% increase in seven years); Baldwin & McLaren, *supra* note 5, at 3-4, Figures 1 and 2 (showing steady increase in costs from 1980 to early 1990s).

[200] RAMONA P. TANABE, WORKERS' COMPENSATION LAWS AS OF JANUARY 1, 2016, Table 4 (Workers' Compensation Research Institute 2016) (annual report providing detailed information regarding state laws, building on work done by the U.S. Department of Labor, which suspended production of the report after January 1, 2006, and now prepared by the Workers' Compensation Research Institute in partnership with the International Association of Industrial Accident Boards and Commissions (IAIABC)).

Long term consequences of the National Commission era

Perhaps most significantly, the Commission's Report reflected and created a broad public consensus regarding issues of adequacy in workers' compensation programs. Rather than a system that was designed to balance employers' desires against workers' needs, with limited benefits being the *quid pro quo* for employers' tort immunity, the Commission suggested that adequacy of benefits – including fair administration and access to medical care for injured workers – should be paramount. The measure of adequacy used by the Commission was later adopted by the National Academy of Social Insurance,[201] and used in sophisticated earnings losses and replacement studies that became possible with the development of new research tools in the 1980s.[202] Some problems were, however, kicked aside – and these remained unsolved. Although the Commission advocated for compensation for occupational diseases, and subsequent reports explored the barriers,[203] no solution has yet been found for the long term consequences of prevalent occupational diseases. The problem of the appropriate approach to compensation for permanent partial disability was also inadequately addressed.

The Commission focused primarily on the amount and duration of indemnity benefits. Its conclusions and recommendations significantly changed states' laws in the ensuing period. Later developing issues, including an explosion of medical costs that would drive increases in overall costs in the following decades, could not have been foreseen.

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[201] *See* ALAN H. HUNT, ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS (2004) (report prepared by a committee of the National Association of Social Insurance on the issue of benefit adequacy in workers' compensation).

[202] For examples of these studies *see, e.g.*, Hunt, *supra* note 201; Leslie I. Boden, et al, *The Adequacy of Workers' Compensation Cash Benefits* in WORKPLACE INJURIES AND DISEASES: PREVENTION AND COMPENSATION: ESSAYS IN HONOR OF TERRY THOMASON 37-68 (Karen Roberts, John F. Burton, Jr. and Matthew M. Bodah, eds., 2005) (the studies indicate that replacement rates for the 10 years after injury were 46 percent in New Mexico, 41 percent in Washington, 37 percent in California, 36 percent in Oregon and 30 percent in Wisconsin. The authors conclude the "replacement rates do not approach the benchmark for adequacy."); Leslie I. Boden & Monica Galizzi, *Economic Consequences of Workplace Injuries: Lost Earnings And Benefit Adequacy*, 36 AM. J. IND. MED. 487 (1999); Seth A. Seabury, E. Scherer, Paul O'Leary, A. Ozonoff, Leslie I. Boden, *Using linked federal and state data to study the adequacy of workers' compensation benefits*, 57 AM. J. IND. MED. 1165 (2014); H. Allan Hunt and Marcus Dillender. *Benefit Adequacy in State and Provincial Workers' Compensation Programs*, 21 EMPLOYMENT RESEARCH 1 (2014), available at http://research.upjohn.org/empl_research/vol21/iss4/1; MONROE BERKOWITZ & JOHN F. BURTON, JR., PERMANENT DISABILITY BENEFITS IN WORKERS' COMPENSATION (1987) (the first study to examine large samples of workers who received benefits in California, Florida, and Wisconsin and compared their earnings losses due to their workplace injuries with the cash benefits they received from their workers' compensation programs). For a summary of these studies as of 2003, see Barth, Compensating Workers, supra note 191.

[203] *See* RAY MARSHALL & ARNOLD H. PAKCER, AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASES (1980) (report submitted to Congress in June 1980 by Secretary of Labor Marshall and Assistant Secretary for Policy Evaluation and Research Packer). *See also* PETER S. BARTH & H. ALLAN HUNT, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES (1980).

It is no surprise that there was an upswing in ideas of benefit adequacy, followed by an uptick in statutory benefits, during this period. Between 1910 and 1970, views about the role of government, the acceptability of broad social programs, and the fundamental preventability of occupational morbidity and mortality had all changed dramatically. Labor union strength in the U.S. peaked soon after World War II in the 1950s, but unions were politically strong into the 1980s, particularly in states with large manufacturing and mining sectors. Progressive politics resulted in important advances in civil rights, and Americans were coming to accept the existence of a wide range of social welfare and social insurance programs. Finally, fear of federal intervention was palpable in the period after the issuance of the National Commission Report. No plausible threat of intervention has been made since.

C. Phase Three: Reversing course, 1990-2016

The political environment changed rapidly starting in 1980, and the trend toward expansion of benefits faded away. The resurgent ideology of free markets and free labor – echoing the language of politicians and judges of the 19th century – came to permeate state legislatures and supplanted the communitarian ideals of the New Deal. The likelihood of federal regulation of state-based compensation programs evaporated. Attacks on workers' compensation heated up through the 1990s – and have continued unabated.[204] The political strength of workers and their allies waned: private sector unions were declining steadily in membership, amid declining numbers of jobs in traditionally organized sectors.[205] Meanwhile, costs of workers' compensation were rising, fed by increasing benefits for workers, growing medical costs, and changes in the insurance market.[206]

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[204] For an analysis of the changes in the 1990s, see Martha McClusky, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 705-06 (1998) ("Between 1989 and 1997, most states enacted substantial revisions in their workers' compensation statutes designed to reduce benefit costs."). For summaries of the legislative amendments during this period, *see, e.g.*, John F. Burton, Jr. & Emily A. Spieler, *Workers' Compensation and Older Workers*, in ENSURING HEALTH AND INCOME SECURITY FOR AN AGING WORKFORCE, 41-83 (Peter P. Budetti, Richard V. Burkhauser, Janice M. Gregory & H. Allan Hunt, eds. 2001); John F. Burton, Jr. & Emily A. Spieler, *Workers' Compensation and Older Workers*, 41(2) IAIABC JOURNAL (Fall 2004); Emily A. Spieler & John F. Burton, Jr., *The lack of correspondence between work-related disability and receipt of workers' compensation benefits*, 55 (6) AM. J. IND. MED. 487-505 (2012); Leslie I. Boden & Emily A. Spieler, *Workers' Compensation*, in THE OXFORD HANDBOOK OF U.S. SOCIAL POLICY, 451-468 (Daniel Béland, Christopher Howard & Kimberly J. Morgan, ed. 2014); Leslie I. Boden & Emily A. Spieler, *The Relationship Between Workplace Injuries and Workers' Compensation Claims: The Importance of System Design*, in WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? 215-234 (Richard A. Victor & Linda L.Carrubba, eds. 2010).

[205] Union density fell from 20.1 percent in 1983 to 11.1 percent in 2015, but the rate in the private sector is much lower – less than 7 per cent in 2015. Bureau of Labor Statistics, Economic News Release, Union Members Summary - 2015 (January 28, 2016), available at http://www.bls.gov/news.release/union2.nr0.htm

[206] Baldwin & McLaren, *supra* note 5, Figure 1 at 3. *See also Barry Lipton & Karen Ayres, Workers' Compensation Cost Drives Through the Years*, in WORKERS' COMPENSATION: WHERE HAVE WE COME

Compliance with the Commission's essential recommendations slowed, and then states began to retreat from attempts to comply with the National Commission's recommendations.[207] By 2015, only seven states followed at least 15 of the recommendations, and four states were complying with less than half.[208]Costs rose and interest rates declined;[209] carriers applied for rate increases;[210] insurance regulators attempted to hold back these increases in response to political pressure, largely from employers.[211] Employers' desire for reduced costs and carriers' desire for rate adequacy – neither a new phenomenon – became dominant political issues in states.[212] Carriers pressed for the tightening up of compensability criteria.[213] The stigmatization of claimants – similar to that of welfare recipients but now turned on people who were workers – grew.[214]

Fears of business flight became an increasingly central political focus, although these concerns were certainly not new. The National Commission had concluded that the "specter of the

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FROM? WHERE ARE WE GOING? (Richard A. Victor & Linda L. Currubba, eds.) (2010) 21, 24 (noting that costs to carriers increased as benefits and claim frequency rose in the wake of the report of the National Commission, affecting the insurance market for workers' compensation); Spieler, *Perpetuating Risk*, *supra* note 15, at 152-54 (describing the changes in the insurance market generally, including the alarming growth of the residual market).

[207] DOL Workers' Compensation Report, *supra* note 21, Appendix B (studies by the Department of Labor showed average compliance in the states with the 19 essential recommendations of the Commission was only 6.79 in 1972 and grew to 12.10 in 1980; then compliance slowed, so that in 2004 the compliance rate was only 12.85.)

[208] See Grabell & Berkes, Demolition, *supra* note 191 (noting the decline in compliance with the recommendations).

[209] See Lipton & Ayres, *supra* note 206, at 24.

[210] *Id.*

[211] *Id.* at 27. *See also, Robert J. Malooly, Workers' Compensation Insurance Markets and the Role of State Funds*, in WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? (Richard A. Victor & Linda L. Currubba, eds.) (2010) 39,41 (noting that when states began to implement the recommendations of the National Commission, costs increased but workers' compensation premium rates were tightly regulated by state insurance departments: "it is much easier politically to agree to raise benefits than to raise costs."); McCluskey, supra note 204, at 691-97; Emily A. Spieler, *Assessing Fairness in Workers' Compensation Reform: A Commentary on the 1995 West Virginia Workers' Compensation Legislation*, 98 W. VA. L. REV. 23 (1995) (describing the particular history of rate-making in West Virginia, where insurance rates were reduced by one-third for political reasons without an actuarial basis, sending the monopolistic state fund into a downward spiral that ended with the elimination of the state fund and reductions in benefits between 1995 and 2005.)

[212] Rate adequacy concerns could be addressed, in part, by deregulation of the workers' compensation insurance market, and this was done in many states. Lipton & Ayres, *supra* note 206, at 27 (noting that approved rate levels were below actuarial indications, resulting in a growth in the residual insurance market, and destabilizing the workers' compensation insurance market).

[213] *Id.*, at 29.

[214] See Boden & Spieler, Workers' Compensation in U.S. SOCIAL POLICY, *supra* note 204, at 461.

disappearing of employer"[215] was pure myth - and, in fact, there has never any persuasive evidence that workers' compensation plays a significant role in business location decisions.[216] This nevertheless became the leading justification for legislative decisions that cut benefits in order to cut costs. State legislators looked to the statutes of neighboring states to find whether their own system was "too generous" – and then amended their laws to match the less liberal provisions of their neighbors.[217] Changes were made to basic components of the system in many states, reducing workers' access to benefits and medical care.[218] State after state enacted "reforms" that reduced the availability of cash benefits and access to claimant-chosen medical care.[219]

A remarkable number of states have played this game, and the downward spiral has been inexorable. The number of states that cut availability of benefits significantly outnumbers those that have increased or maintained benefits in the period 2002 to 2014.[220] This story was reported in comprehensive detail in "The Demolition of Workers' Comp" by reporters Michael Grabell (ProPublica) and Howard Berkes (NPR) in 2015.[221]

Many of these changes are insidious – they occur without being obvious to observers because they do not involve bright line changes such as a reduction in the weekly benefit rate paid to an injured worker.[222] The changes vary from one state to another.[223] Here are some examples:

- Some states have abandoned the liberal standard that was used to approach all questions of interpretation, including in individual claims. Historically, the majority of states, as well as the National Commission, endorsed a rule of liberality: all things being equal, the

[215] National Commission Report, *supra* note 153, at 125.
[216] Evidence to the contrary, on the other hand, is available. See e.g. Timothy J. Bartik, *Business location decisions in the United States: Estimates of the effects of unionization, taxes, and other characteristics of states*, 3 J. BUS.& ECON. STATISTICS 14-22 (1985); Timothy J. Bartik, *Small business start-ups in the United States: Estimates of the effects of characteristics of states*, 1989 SOUTHERN ECON. J. 1004-1018 (1989); RA Erickson, *Business climate studies: A critical evaluation*, 1 ECON. DEV. QUARTERLY 62-71 (1987).
[217] DOL Workers' Compensation Report, *supra* note 21, at 13.
[218] See Grabell & Berkes, Demolition, *supra* note 191 (providing a state by state analysis of legislative changes that impact benefits during the more recent period of 2002-2014)
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *See* DOL Workers' Compensation Report, *supra* note 21, 13-19 (describing these statutory changes). These changes are also described in several other sources, *see supra* note 204.
[223] No state has adopted all of these changes. References provide an example rather than an exhaustive list of states that have made or rejected these changes.

claimant would win. [224] States have reversed this language,[225] or instead adopted rules requiring that claimants win their cases by preponderance of the evidence[226] – or, in some limited situations, by clear and convincing evidence.[227]

- States have abandoned the long accepted rule regarding aggravation of pre-existing injuries. In the past, employers 'took workers as they found them.'[228] This rule is being supplanted in one state after another with rules that require a worker to demonstrate that the workplace event was the "major contributing cause" - or equivalent language - to the disability. [229] Workers who cannot meet this standard are excluded from obtaining benefits – despite the fact that it was the workplace injury that precipitated the inability to continue to work. These workers are sometimes also dually excluded: unable to obtain

[224] Horovitz, *supra* note 132 (noting that "the great *majority* of state courts have taken the cue from the legislative mandate – the command of broad and liberal construction") (emphasis in original). *See also*, National Commission Report, *supra* note 153, at 50-51 ("…. As the basic purpose of workmen's compensation is to protect the employee, we believe in the traditional practice of resolving doubts in favor of the employee.) Some states have retained this standard. See e.g. E.I. Du Pont De Nemours v. Eggleston, 264 Va. 13, 17 (2002) (the "Act is remedial legislation and should be liberally construed in favor of the injured employee" citing Byrd v. Stonega Coke & Coal Co., 182 Va. 212, 221, 28 S.E.2d 725, 729 (1944)).

[225] *See e.g.* Tenn. Code Ann. § 50–6–116 (workers' compensation law shall not be remedially or liberally construed).

[226] *See e.g.* W.Va. Code . § 23-4-1g ("For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution…. A claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.").

[227] For example, in Alabama in occupational disease claims involving gradual deterioration or cumulative physical stress disorders, claimants must prove their cases by clear and convincing evidence. Ala. Code §25-5-81(c); Williams v. Union Yarn Mills, Inc., 709 So.2d 71 (Ala. Civ. App. 1998).

[228] *See* 1-9 Larson's Workers' Compensation Law § 9.02 (2015) (explaining general historical rule).

[229] *See e.g.* Mo. Ann. Stat. § 287.020 ("In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor; is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."); Or. Rev. Stat. Ann. § 656.005 ("If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition."); Fla. St. § 440.09 ("…the accidental compensable injury must be the major contributing cause of any resulting injuries.").

compensation, but also barred from bringing negligence actions.[230] This essentially nullifies, for these workers, the generally accepted historical rule that if an injury is not covered by workers' compensation, the worker retains the right to bring a tort action.[231]

- States are taking a similar approach to injuries that may be partially attributable to aging, with equivalent results.[232]

[230] Generally, injuries that are clearly excluded from workers' compensation are not covered by the limitation on negligence actions. For example, states that have excluded "mental-mental" claims have allowed litigation outside of workers' compensation for these claims. See e.g. Stratemeyer v. Lincoln Cty., 276 Mont. 67, 71 (1996). The question posed by the issue of dual denial in cases involving aggravation – where there is no explicit exclusion of the injury by type – has drawn more controversy. According to John F. Burton, Jr., states that have implemented this heightened standard (including "major contributing cause" or "primary cause") include Illinois, Missouri, Kansas, Oklahoma, Tennessee, Oregon, Oklahoma and Florida; it is currently under consideration in Illinois. Email from John F. Burton, Nov. 15, 2016, 11:16 a.m. Note that this is a partial list.

Challenges have been brought to these limitations when they leave workers with no remedy, but their success has been mixed. The history in Oregon is emblematic of this. *See* Smothers v. Gresham Transfer, Inc., 332 Or. 83 (2001). *Smothers* was a response to a 1995 legislative change that extended exclusive remedy to situations in which the worker's underlying health condition was aggravated by workplace exposures; under the amended statute, the condition was deemed not compensable, but nevertheless covered by the expansive tort immunity for employers. The Oregon Appeals Court again held that an employee was constitutionally entitled, under the remedy clause, to proceed with negligence claims in 2013. Alcutt v. Adams Family Food Servs., Inc., 258 Or. App. 767 (2013). The constitutional premise underlying *Alcutt* and *Smothers* was overruled in May 2016 in *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168 (2016), a medical malpractice case. But the Oregon legislature had already acted to ensure that workers denied workers' compensation could pursue negligence claims. *See* OR. REV. STAT. ANN. § 656.019(1)(a) (West 2001) ("An injured worker may pursue a civil negligence action for a work-related injury that has been determined to be not compensable because the worker has failed to establish that a work-related incident was the major contributing cause of the worker's injury only after an order determining that the claim is not compensable has become final.").

Litigation in other states has been variable. *E.g. compare* Gillispie v. Estes Exp. Lines, Inc., 361 P.3d 543 (Okla. Civ. App. 2015) (claimant appealed administrative order that he had no compensable injury because he had a previous injury to the same part of the body; held that an aggravation of a pre-existing condition is a new injury and therefore compensable) *and* Bias v. Eastern Associated Coal Corp., 220 W. Va. 190; 640 S.E.2d 540 (2006) (holding that an employer cannot be sued, despite the fact that there was no remedy under the state's workers' compensation law for mental-mental claims).

[231] *See* 9-100 Larson's Workers' Compensation Law § 100.04 (2015) ("employer should be spared damage liability only when compensation liability has actually been provided in its place) *See also* J.T.W., *Workmen's compensation act as exclusive of remedy by action against employer for injury or disease not compensable under act*, 121 A.L.R. 1143 (Originally published in 1939) (noting "workers' compensation acts did not constitute an exclusive remedy so as to bar an action at common law, or under a statute, to recover for an injury or disease which was not compensable under the act.")

[232] *See e.g.* Wyo. Stat. § 27-14-102(a)(xi)(an injury does not include any "injury resulting primarily from the natural aging process or from the normal activities of day-to-day living, as established by medical evidence supported by objective findings").

- Other states have moved to apportionment between the work and non-work-related impairment. For example, in California, a physician must indicate what percentage of the impairment is attributable to the work event; the rest of the impairment is excluded from consideration for benefits.[233] Similarly, in Kansas, awards are reduced "by the amount of functional impairment determined to be preexisting,"[234] and the Wisconsin Worker's Compensation Act that took effect on March 2, 2016, requires physicians to apportion permanent disability ratings between the percentage caused by a work injury and the percentage attributable to other factors.[235]

- Some states simply fail to compensate specific (common) conditions, including musculoskeletal injuries resulting from cumulative trauma and mental health claims resulting from stress.[236]

- Second injury funds, initially developed to assist in the employment of disabled veterans after World War II, have been closed.[237] The underlying justification for these funds was that the cost of the pre-existing impairment should not be added to the responsibility of the newly hiring employer.[238] When combined with the adoption of 'major contributing cause' standards, workers with preexisting conditions are more likely to be shut out of the workers' compensation system entirely.

- Various rules that are designed to put the onus of the injury onto the worker have been devised and codified: some states require or strongly encourage post-injury drug

[233] *See* Cal. Lab. Code § 4663-§ 4664 (evaluating physician "shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries" and "employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.")
[234] *See* Kan.Stat.Ann. § 22-501(3).
[235] *See* Wis. Stat. Ann. § 102.175.
[236] *See* Tanabe, *supra* note 200, at 52-55, Table 9 (showing coverage for mental stress, cumulative trauma, hearing loss and disfigurement and demonstrating that 14 states do not compensate claims in which the harm is caused by stress or other non-physical injuries resulting in mental health claims, generally referred to as mental-mental claims); 4-56 Larson's Workers' Compensation Law § 56.04D (2015) (noting that mental-mental claims are commonly excluded from compensation.) After the Virginia court excluded job-related impairments resulting from cumulative trauma caused by repetitive motion as a matter of law from compensability, Stenrich Grp. v. Jemmott, 251 Va. 186 (1996), the legislature amended the state statute to require proof by clear and convincing evidence rather than preponderance of the evidence. Tanabe, *supra* note 200, Table 9, note 22.
[237] See Barth, *Workers' Compensation Before and After 1983*, *supra* note 68, at 14 (noting the closing out of second injury funds). See also Tanabe, *supra* note 200, Table 16 (showing existence of second injury funds as of January 1, 2016).
[238] National Commission Report, *supra* note 153, at 83-84.

testing;[239] others encourage workplace policies that may result in selective enforcement of safety policies if a worker is injured.[240] Some of these provisions are not new. These kinds of policies are likely to have the effect of discouraging workers from reporting injuries or filing claims.[241] They also strengthen and expand policies that focus on worker-fault, damaging the basic no-fault principles built into the workers' compensation scheme.[242]

- Permanent partial disability benefits are increasingly linked to impairment evaluations performed with use of one of the recent editions of the AMA Guides to the Evaluation of Impairment. [243] The use of the Guides as a tool to evaluate permanent partial disabilities

[239] *See e.g.* Fla. Stat. Ann. § 440.102 (Drug-free workplace program requirements creating incentives for employers to adopt drug testing programs by offering discounts on insurance premiums; including within the definition of "reasonable suspicion" that will justify performing a drug test that an employee has "been involved in an accident while at work"; and allowing employers to deny medical and indemnity benefits if an injured worker tests positive for a drug. *Compare* Grammatico v. Industrial Comm'n, 211 Ariz. 67 (2005) (finding that the Arizona drug-free policy introduced fault into the compensation and holding the Ariz. Rev. Stat. § 23-1021 unconstitutional to the extent it imposed a restriction on access to benefits guaranteed under the Arizona state constitution, Art. 18, § 8).

[240] *See e.g.* Tenn.Code Anno. § 50-6-110(a)(1) (exclusion if worker deliberately violates a safety rule). The problem is not that employers want to enforce safety rules; rather, the problem arises when a safety rule is not regularly enforced, but is used in a manner that targets workers who are injured and apply for compensation.

[241] *See* Alison D. Morantz & Alexandre Mas, *Does Post-Accident Drug Testing Reduce Injuries? Evidence from a Large Retail Chain* , 10 (2) AM.LAW & ECON. REV. 246-302 (2008), available at http://ssrn.com/abstract=1318092 or http://dx.doi.org/ahn012 (finding that claims are reduced when post-accident drug testing is implemented and "we find some 'circumstantial evidence' that a portion of the observed decline could be caused by employees' reduced willingness to report workplace accidents.")

[242] S*ee* 3-32 Larson's Workers' Compensation Law § 32.01 (2015) (explaining the basic rule that "employee fault of any character is irrelevant" but noting that some statutes have allowed a defense based on "wilful failure to use safety devices or violation of law").

[243] Robert D. Rondinelli et al, AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, SIXTH EDITION (2012) (latest edition of the Guides). *See also* Tanabe, *supra* note 200, at 37-44, Table 6 (showing that a total of 30 jurisdictions mandate use of the AMA Guides; of these, 21 jurisdictions specify use of the 5th or 6th edition or the most recent edition).

is controversial [244] and has been shown to lead to reductions in cash benefits for workers.[245]

- The duration of temporary total disability has been limited to a specific number of weeks, without regard to whether the injured worker has reached maximum medical improvement or is able to return to work.[246] According to a 2016 report from the U.S. Department of Labor, employers in some states are actually forbidden to provide longer benefits even if they are willing, under threat of audit and fine.[247]

- Requirements to qualify for disability benefits have become increasingly stringent, and these benefits are often cut off at retirement age[248]– despite the fact that the worker's

[244] See John F. Burton, Jr., *The AMA Guides and Permanent Partial Disability Benefits*, 45(2) IAIABC J.13 (2008) (critiquing the rating system developed in the Guides); Emily A. Spieler, Peter Barth, John F. Burton, Jr., Jay Himmelstein, & Linda Rudolph, *Recommendations to Guide the Revision of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 283 JAMA 519-523 (2000) (criticizing the 4th edition of the Guides); Emily A. Spieler, Written Statement of Emily A. Spieler Before the Subcommittee on Workforce Protections Committee on Education and Labor, U.S. House of Representatives (Nov. 17, 2010), http://edworkforce.house.gov/uploadedfiles/11.17.10_spieler.pdf (critiquing the 6th edition of the Guides). See also Ellen Smith Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 103 HARV. L. REV. 964 (1990) (critically evaluating the Guides and suggesting that the Guides exhibited inherent gender bias).

[245] ROBERT MOSS, DAVID MCFARLAND, CJ MOHIN & BEN HAYNES, IMPACT ON IMPAIRMENT RATINGS FROM SWITCHING TO THE AMERICAN MEDICAL ASSOCIATION'S SIXTH EDITION OF THE GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, 3 (July 2012), available at https://www.ncci.com/Articles/Documents/II_Impact_of_AMA_Guides.pdf (In a study of claims in Kentucky, Georgia, Montana, Tennessee, and New Mexico, all states that transitioned from the Fifth to the Sixth editions of the Guides without any other legislative or procedural changes, the National Council on Compensation Insurance (NCCI) found in a report, "For the states studied, a decrease in the average impairment rating is observed in the years immediately after the implementation of the sixth edition.") An earlier study looked at the relationship between impairment ratings and economic loss under a prior edition of the AMA Guides. Sandra Sinclair & John F. Burton, Jr, *Development of a Schedule for Compensation of Noneconomic Loss: Quality-of-Life Values vs. Clinical Impairment Ratings*, in RESEARCH IN CANADIAN WORKERS' COMPENSATION 123-140 (Terry Thomason & Richard P. Chaykowski, eds. 1995).

[246] *See* Tanabe, *supra* note 200, Table 4 (showing that at least eight states limit temporary total disability benefits to a specified number of weeks). *But see* Westphal v. City of St. Petersburg, No. SC13-1930, 2016 WL 3191086 (Fla. June 9, 2016) (statutory limitation of 104 weeks on receipt of temporary total disability benefits held unconstitutional, in a case where the worker was totally disabled and incapable of working but had not been deemed to have reached the maximum medical improvement needed to be eligible for permanent total disability benefits).

[247] DOL Workers' Compensation Report, *supra* note 21, at 15.

[248] *See* Tanabe, *supra* note 200, at 27-31, Table 5 [showing age cutoffs at 75 in Florida, 67 in Minnesota with a rebuttable presumption of retirement, at retirement in Montana and North Dakota, limited to 15 years or until claimant reaches retirement whichever is longer in Oklahoma, until 70 in West Virginia,

retirement savings or pension would have been reduced as a result of his or her time away from work. Notably, permanent total disability benefits are rare in workers' compensation.[249]

- Strict limits have been put on attorneys' fees for claimants, despite the increasing complexity of the litigation.[250] Not surprisingly, these provisions are being challenged aggressively. [251]

- Multiple efforts have been made to contain medical costs that restrict claimant choice of physician, set specific rules regarding treatment modalities, and create roadblocks through utilization review for prompt delivery of medical care.[252] Workers' primary care doctors are mistrusted and often excluded as a result of increasing levels of requirements of expertise in evaluation of injuries. In truth, some of these changes were designed to

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until Social Security retirement eligibility or for 260 weeks if the date of injury is after age 60 in Tennessee; and also showing the following jurisdiction with length limitations: D.C. (500 weeks with ability to petition for an additional 67 weeks); Indiana (500 weeks); Kansas (maximum of $155,000); Mississippi (450 weeks or until total compensation equals $210,883); North Carolina (500 weeks, but can be extended); South Carolina (500 weeks); Wyoming (80 months, but can be extended).] As noted elsewhere in this article, the duration limitations on permanent total disability are likely to result, for some people, to an application for Social Security Disability Insurance benefits.

[249] Baldwin & McLaren, *supra* note 7, at 9.

[250] *See* Tanabe, *supra* note 200, at 79-85, Table 14 (showing the fee formulae for all jurisdictions; 16 states limit the fee to 25% or less of the award to the claimant).

[251] These provisions have been held unconstitutional in at least two states. Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016); Injured Workers Ass'n of Utah v. State, 374 P.3d 14 (Utah 2016). The National Council on Compensation Insurance (NCCI), a national rating bureau, is proposed a large rate increase for employers' insurance as a result of the decision in Florida. See http://www.insurancejournal.com/news/southeast/2016/07/05/418940.htm. On November 23, 2016, a trial court has just ruled this proposal inadequately transparent under the Florida 'sunshine law.' Michael Moline, Judge voids 14.5 percent workers' comp rate increase, available at http://floridapolitics.com/archives/227843-workers-comp?utm_content=buffer50399&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer. *See also* Horovitz, *supra* note 132, at xi (suggesting that these kinds of fee limits were anathema to adequacy; noting that "lawyers in general cannot afford to practice on the worker's side. The fees are limited by the various administrative officials to small sums, usually ranging from 10 to 20 percent, and unless a lawyer has a sufficient number of cases, the work is not remunerative, and the law questions raised are multiple. No attempt is made by the commissions to control fees paid by carriers to its attorneys, and their number is legion; carriers' work is widely sought by both doctors and members of the bar.")

[252] *See* Tanabe, *supra* note 200, Table 3 (showing medical benefits and method of physician selection). *See also* RICHARD A. VICTOR, PETER S. BARTH & DAVID NEUMARK, THE IMPACT OF PROVIDER CHOICE ON WORKERS' COMPENSATION COSTS AND OUTCOMES, Workers' Compensation Research Institute (2005) (workers' satisfaction rates were higher with similar perceived recovery of physical health when workers selected physicians; costs were generally higher and return-to-work outcomes poorer when the worker selected the provider, where return-to-work outcomes were measured by one month duration).

reduce costs and improve the quality of care; costs have continued to escalate[253] and injured workers and their lawyers complain consistently about the problems with the delivery of care.

- Growing requirements for "objective" medical evidence,[254] undoubtedly fueled in part by the development of new diagnostic techniques, have resulted in rejection of claims for common and debilitating injuries, including back injuries. Insurance carriers, physicians and administrators distrust claims involving soft tissue injuries that involve pain and restricted movement but may not be visible through visible measurable findings. These injuries are also particularly prone to exclusion under the major contributing cause standard given the common nature of spinal and other abnormalities, particularly in aging workers.

- States enacted enhanced fraud provisions, particularly focused on potential worker fraud in the 1990s.[255] And this focus on worker fraud spawned a new industry of video surveillance, watching workers at home to ascertain whether they are engaging in activities that might be inconsistent with their claimed level of disability.

- Although disfavored by the National Commission, settlement of claims has now become ubiquitous. All but seven states allow agreements that fully settle claims, irrespective of the severity of the disability; several states have authorized settlements since 1990.[256] These lump sum settlements cut off future benefits, may not provide sufficient funds to replace lost earnings, and generally eliminate any right of the injured worker to return to work with the pre-injury employer.[257]

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[253] See Baldwin & McLaren, *supra* note 5, at 5 and Figure 3 (showing the continuing escalation of medical costs in workers' compensation).

[254] *See e.g*. Fla. Stat. Ann. § 440.09 ("The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings."); Mont. Code Ann. § 37-71-116 ("Objective medical findings" means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.")

[255] *See* Boden & Spieler, Workers' Compensation in U.S. SOCIAL POLICY, *supra* note 204, at 462-62.

[256] *See* DOL Report on Workers' Compensation, *supra* note 21, at 18 (noting "In the 1990s, Pennsylvania, New York and West Virginia all amended their statutes to allow settlements. As of 2005, the remaining states that limited or prohibited settlements were Delaware, Kentucky, Minnesota, Nevada, New Mexico, Texas and Washington). *See also* David Torrey, *Commentary on and Analysis of Compromise and Release Agreements under State Workers' Compensation Laws*, 42(2) IAIABC J. 91-118 (Fall 2005); David Torrey, *Commentary on and Analysis of Compromise and Release Agreements under State Workers' Compensation Laws (Part Two)*, 43(1) IAIABC J. 73-114 (Spring 2006). Currently, settlements in all states are subject to review by the Centers for Medicare and Medicaid Services that require set-asides in order to address possible cost-shifting to Medicare.

[257] As noted by the DOL Report on Workers' Compensation, *supra* note 21, at 18, studies have shown that workers may feel pressured to enter into settlement agreements; that this is particularly true for workers of lower socio-economic status; and that settlements tended to yield lower benefits in claims than

- The number of states with exclusive state funds has declined. The only remaining monopolistic funds are maintained in Ohio, North Dakota, Washington and Wyoming. While the exclusion of private carriers is undoubtedly controversial, the conversion to private insurance was generally opposed by trade unions and is illustrative of the declining political power of the unions in states such as West Virginia, which moved to a private insurance system in 2005.

This is just a partial list. As of this writing, legislation that would reduce the availability of benefits are pending or proposed in state legislatures around the country.[258]

Many of these changes are directly contrary to the essential recommendations that were made in 1972 by the National Commission. Not surprisingly, total benefits paid to workers have been declining steadily.[259] While complex changes in work and safety may also contribute to this decline, there is little doubt that these statutory changes are one cause.[260] Meanwhile, the

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were received without settlements. *See* JAMES N. MORGAN, MARVIN SNIDER, MARION G. SOBOL, LUMP SUM REDEMPTION SETTLEMENTS AND REHABILITATION: A STUDY OF WORKMEN'S COMPENSATION (2013); Terry Thomason, John F. Burton Jr., *Economic effects of workers' compensation in the United States: Private insurance and the administration of compensation claims*, 11(1)(Part 2) J. LABOR ECON. __ (1993); MONICA GALIZZI, LESLIE I. BODEN, T.C. LIU, THE WORKERS' STORY: RESULTS OF A SURVEY OF WORKERS INJURED IN WISCONSIN, WCRI WC-90-5, xvii (1998) (finding that workers whose claims were settled had the worst outcomes, were more likely to work in low wage, nonunion, temporary, physically demanding and service sector jobs); EARL F. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT (1961).

[258] *See e.g.* Matt Dietrich, *Illinois, Indiana work comp law: Same words, different results,* Politifact Illinois (Dec. 19, 2016), http://www.politifact.com/illinois/statements/2016/dec/19/david-menchetti/illinois-indiana-work-comp-law-same-words-differen (Governor Bruce Rauner of Illinois has proposed a compensability standard under which benefits would not be granted unless the workplace is more than 50 percent responsible for the injury compared to all other causes, after suggesting that he was following Indiana's lead on this issue).

[259] *See* Baldwin & McLaren, *supra* note 5, Figure 1 at 3 and Figure 2 at 4. Total workers' compensation benefits per $100 of payroll declined from $1.65 in 1990 to $0.91 in 2014. Wage replacement benefits for workers fell substantially over the same time period from $0.99 per $100 in 1990 to $0.50 per $100 of payroll in 2007, and have remained essentially steady since 2003, declining to $0.45 in 2014. Id. Note that benefits per $100 of payroll may not be a good measure of benefit adequacy, as this number will affected by numerous variables; benefit levels set by statute are only one of these variables. Others, for example, will include changes in injury rates due to increased safety, changes in injury rates due to different industrial mix, changes in wage rates, or changes in rates of claims filed by injured workers.

[260] A number of researchers have found that these legislated changes have had an impact on the availability of benefits, irrespective of changes in the economy and labor market. *See e.g.* Terry Thomason and John F. Burton, Jr., *The effects of changes in the Oregon workers' compensation program on employees' benefits and employers' costs*, 1(4) WORKERS' COMPENSATION POLICY REV (2001) 7–23 (changes in the Oregon statute reduced the number of claims by 12-28% and benefits by 20-25% between 1987 and 1996); Leslie I. Boden and John W. Ruser, *Workers' Compensation 'Reforms,' Choice of Medical Care Provider, and Reported Workplace Injuries*, 85(4) REV. ECON. & STATS. (2003) 923–929

workers' compensation line of insurance is becoming more profitable.[261] In Texas, following 2005 legislative changes, insurers hit their highest profit margins in eight years, and employers are flocking back into the only remaining elective workers' compensation system.[262]

The statutory changes also have troubling secondary effects. For example, the evidentiary requirements, when combined with exclusions or apportionment for preexisting conditions and increasing diagnostic and evaluative criteria together lead inevitably to more and more complex litigation. Proof of expertise is required, and Daubert standards,[263] originally designed to decide what evidence should be heard by a jury, are now used in workers' compensation administrative processes.[264]

But the most disturbing legislative development – from the vantage point of benefit adequacy and fairness – was the 2013 Oklahoma statute that both substantially cut benefits within the state-administered system and created a new system that allowed employers to "opt-out" while retaining immunity from tort.[265] Employers who chose the opt-out option were allowed to design their own benefits and their own review process, leaving very narrow review for the state agency

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(compensability restrictions accounted for 7-9% of the decline in DART injuries reported to BLS in 1991-97); Xuguang (Steve) Guo and John F. Burton, Jr., *Workers' Compensation: Recent developments in moral hazard and benefits payments*, 63 (2) IND. LAB. REL. REV. 340–354 (2010) (changes in eligibility rules explain more of the decline in cash benefits during the 1990s than the decline in the BLS injury rate).

[261] *See* NCCI STATE OF THE LINE GUIDE, https://www.ncci.com/Articles/Documents/II_AIS-2016-SOL-Guide.pdf (showing that in 2015 the workers compensation combined ratio for private carriers declined 6 percent from 2014 to to 94%—an indicator of improved profitability of the insurance line; also showing that lost-time claims declined, indemnity costs increased by one percent, and medical costs decreased by one percent).

[262] *See* Texas Department of Insurance, Div. of Workers' Compensation, Biennial Report to the 85th Legislature (Dec. 2016), http://www.tdi.texas.gov/reports/dwc/documents/2016dwcbienlrpt.pdf (noting that the legislative changes in 2005 led to reduced costs per claim, lower insurance premiums and higher employer participation for employers opting in to the state workers' compensation system, and attributing much of this to the substantial reduction in reported injuries in the same time period and the aggressive management of medical care and costs as a result of the 2005 amendments).

[263] *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

[264] Some states now apply the rules for qualification of experts who testify before juries in civil cases that were established in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) to workers' compensation claims. *See e.g.* Case of Canavan, 432 Mass. 304, 316 (2000); Perry v. City of St. Petersburg, 171 So. 3d 224 (Fla. Dist. Ct. App. 2015). Concerned about this level of complexity in workers' compensation proceedings, the New Mexico court refused to follow the reasoning of the Massachusetts court in Banks v. IMC Kalium Carlsbad Potash Co., 133 N.M. 199 (Ct. App. 2002), aff'd, 134 N.M. 421 (2003).

[265] The new Oklahoma statute replaced the preexisting Workers' Compensation Code with three interrelated sections, the Administrative Workers' Compensation Act, Okla. Stat. Ann. tit. 85A §1 et seq., the Oklahoma Employee Injury Benefit Act, Okla. Stat. Ann. tit. 85A § 200 et seq. and the Workers' Compensation Arbitration Act, Okla. Stat. Ann. tit. 85A, § 300 et seq., allowing employers to establish arbitration processes for resolution of claims.

responsible for workers' compensation.[266] Investigative reporters found that "the plans almost universally have lower benefits, more restrictions and virtually no independent oversight."[267] The early elective systems – like the Texas opt-in system today – required employers to choose between tort liability and workers' compensation coverage.[268] Oklahoma offered an opt-out with tort immunity. Noting the discrepancy in rights, the Oklahoma Supreme Court found the statute to be unconstitutional.[269]

The opt-out plans could have been generous and provided better benefits and more protection to workers. But that was not what happened. The plans that were adopted – largely developed by and hyped as great successes by their vendor, PartnerSource, and its President, Bill Minick[270] – were not covered by state law provisions that forbid retaliation for filing claims.[271] Provisions in

[266] For a thorough discussion of these plans, see Michael Grabell & Howard Berkes, Inside Corporate America's Campaign to Ditch Workers' Comp (October 14, 2015), https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp

[267] Id.

[268] Although for several years in Texas, companies that did not opt in to the workers' compensation system required their new employees to sign pre-injury agreements waiving their right to sue their employer if they were injured and agreeing to accept insurance offered by the employer outside of workers' compensation; this was no doubt a model for the Oklahoma statute. See Lawrence v. CDB Servs., Inc., 44 S.W.3d 544 (Tex. 2001) (allowing voluntary pre-injury employee elections to participate in nonsubscribing employees' benefit plans in lieu of exercising common-law remedies does not violate public policy). Ten weeks after the decision in Lawrence, the Legislature amended the state Labor Code to prohibit pre-injury waivers, Tex. Lab.Code Ann. § 406.033(e); the new statute was cited as authority abrogating Lawrence in Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 192 (Tex. 2004). According to one investigative report, however, many large meat and poultry companies, such as Tyson Foods, Cargill and Pilgrim's Pride, continued to use post-injury waivers. See Grabell & Berkes,Inside Corporate America, *supra* note 266.

[269] Vasquez v. Dillard's, Inc., 381 P.3d 768 (Okla. 2016). In a 7-2 decision, Justice Watt wrote for the majority: "The core provision of the Opt Out Act, 85A O.S. Supp. 2015 §203 creates impermissible, unequal, disparate treatment of a select group of injured workers. Therefore, we hold that the Oklahoma Employee Benefit Injury Act, 85A O.S. 2014 §§201-213, is an unconstitutional special law under the Oklahoma Constitution, art.2, §59." The decision was scathing with regard to the nature of the plans: "the clear, concise, unmistakeable, and mandatory language of the Opt Out Act provides that, absent the Act's express incorporation of some standards, such employers are not bound by an provision of the Workers' Compensation Act for the purpose of: defining covered injuries; medical management; dispute resolution or other process; funding; notices; or penalties…This Court has previously made it clear we will not accept the invitation of employers to find a discriminatory state statute constitutional by relying on the interests of employers in reducing compensation costs." The challenges to the Oklahoma 2014 law are largely due to the extraordinary energy of one lawyer, Bob Burke, who had previously served as Commerce Secretary for the State of Oklahoma and as Chairman of the Fallin Commission on Workers' Compensation Reform in the 1990s. See http://bobburkelaw.net/about_us/as_an_attorney .

[270] See Bill Minick, Cost Shifting: Candy Stores and Scapegoats, June 15, 2016, in Risk & Insurance, http://www.riskandinsurance.com/cost-shifting-candy-stores-scapegoats/

[271] The Oklahoma general workers' compensation act prohibits retaliation against workers for filing workers' compensation claims, 85A O.S. Supp. 2015 §7, and, under the general workers' compensation

these plans included the following[272]: requirements for 24 hour or end of shift reporting of injuries for an injury to be considered compensable; cut off of benefits if the employee is no longer employed (and a specific right to discharge if the employer believes the worker has violated a safety rule, reviewable only through employer-controlled arbitration processes); medical review performed only by reviewers selected by the plan; [273] cut off of medical treatment after a set period of time; specific limitations on treatments or costs of treatments; requirements that workers allow employer representatives to accompany them when they visit the plan-selected physicians; exclusion of conditions that might be common in the particular workplace;[274] arbitration as the preferred mechanism for dispute resolution, with employer control of the arbitration process.[275]

Proponents called the plans "ERISA plans," suggesting that state law would be preempted under the Employee Retirement Income Security Act's broad preemption of state regulation of employee benefit plans; they would thereby escape the state's regulatory reach. [276] But a federal

law, benefits would survive after the employment relationship ends. In contrast, this provision was not included in the Opt Out Act, Oklahoma Employee Injury Benefit Act, Okla. Stat. Ann. tit. 85A § 200 et seq., which in fact permits qualifying employers to adopt plans that terminate an employee's benefits when the individual's employment ends. This was true in Dillard's plan that was the specific focus of the recent case, *see supra* note 269. But see Nesvold v. Tulsa Promenade LLC, Case No. CJ-2016-2223, District Court for Tulsa County, State of Oklahoma, Oct. 16, 2016 (creating a common law cause of action when a plaintiff alleges retaliation for filing for workers' compensation benefits).

[272] Not all of these provisions are in every one of the plans. Note that the Oklahoma opt-out plans, and the non-participating employer plans in Texas, are very similar. The Texas plans are described in Alison D. Morantz, *Rejecting the Grand Bargain: What Happens When Large Companies Opt Out of Workers' compensation?* (March 18, 2016). Stanford Law and Economics Olin Working Paper No. 488. Available at SSRN: http://ssrn.com/abstract=2750134

[273] Moreover, according to Grabell & Berkes, Inside Corporate America, *supra* note 266, "[i]n many cases, ProPublica and NPR found, the medical director charged with picking doctors and ultimately reviewing whether injuries are work-related is Minick's wife, Dr. Melissa Tonn, an occupational medicine specialist who often serves as an expert for employers and insurance companies."

[274] Such as exclusion of bacterial infections in a large chain of assisted living facilities. Id.

[275] For a very careful review of the opt-out system, prepared for the IAIABC, see GREGORY KROHM, UNDERSTANDING THE OPT-OUT ALTERNATIVE, prepared for the IAIABC Board of Directors, April 18, 2016, available at ///C:/Users/e.spieler/Downloads/Understanding-the-Opt-Out-Alternative_06-03-2016_Final.pdf (also comparing the proposed opt out legislation in Tennessee and South Carolina to the enacted legislation in Oklahoma).

[276] ERISA, 29 U.S.C.A. § 1144, provides that ERISA supersedes all state laws insofar as they relate to any employee benefit plans but exempts any employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. § 1003(b)(3). The question here is whether the opt-out plans are plans that fit within this savings clause. For a more detailed discussion of this issue, see Duff, *supra* note 73. Note that *all* state regulation would be preempted, raising the perplexing question of why proponents thought that the enabling statute that defined these opt-out plans would survive an ERISA preemption challenge.

court concluded that ERISA preemption does not apply, remanding cases to the state courts, [277] and, as noted above, the Oklahoma Supreme Court found the law to be unconstitutional on September 13, 2016.[278] Other provisions of the 2013 law have also been successfully challenged.[279]

Not surprisingly, the plans that are designed outside the traditional workers' compensation system save employers a lot of money.[280] Their success is touted: not only are they cheaper, according to Minick, but they exhibit shorter "average duration of disability, and both the initial and sustained return to work rates are much higher."[281] But the only data available to assess his claims comes from PartnerSource.[282] Moreover, critics suggest that these findings, if true, may result from the cutting off of benefits, resulting in highly problematic outcomes for workers and, potentially, transfer of costs to other programs.[283] No study by researchers unconnected with PartnerSource regarding the outcomes for workers has been done.

Opt-out approaches similar to the Oklahoma law are being promoted by the Association for Responsible Alternatives to Workers' Compensation (ARAWC),[284] a membership organization in which the senior executives come from Walmart, Nordstrom, Lowe's and other large

[277] See e.g. Vasquez v. Dillard's Inc., No. CIV-15-0861-F, 2015 WL 9906300, at *2 (W.D. Okla. Sept. 30, 2015) ("The court concludes that the OIEBA is part of Oklahoma's statutory scheme governing occupational injuries and workplace liability; in other words, the OIEBA is part of Oklahoma's statutory scheme governing workmen's compensation. The court further concludes that this action arises under the workmen's compensation laws of Oklahoma. Accordingly, 28 U.S.C. § 1445(c) makes this action nonremovable. The fact that the plan under which plaintiff claims may be (and is presumed to be, for present purposes) an ERISA plan, does not change these conclusions. Judge Joe Heaton reached the same conclusions in Davina Cavazos v. Harrah Nursing Center, CIV–15–0366–HE. That action, like this one, was a removed action in which the employer contended it had elected to be exempt from the Oklahoma Administrative Workers' Compensation Act …").

[278] Vasquez v. Dillard's, Inc., 381 P.3d 768 (Okla. 2016) (holding that the Oklahoma Employee Injury Benefit Act, 85A O.S. Supp. 2014 201–213, is an unconstitutional law because it created an impermissible select group of employees seeking compensation for work-related injuries for disparate treatment, in violation of art. 5, 59 of the Oklahoma Constitution).

[279] *See e.g.* Torres v. Seaboard Foods, LLC, 373 P.3d 1057 (Okla. 2016), as corrected (Mar. 4, 2016) (180 day predicate for cumulative trauma claims held to violate due process requirements); Maxwell v. Sprint PCS, 369 P.3d 1079 (Okla. 2016) (scheduled members are exempt from the AMA Guides, and permanent partial disability deferral provision of Workers' Compensation Act was an unconstitutional violation of due process under Oklahoma Constitution); Carlock v. Workers' Comp. Comm'n, 324 P.3d 408 (Okla. 2014) (adjudication of claims for injuries occurring prior to February 1, 2014, are governed by the law in effect at the time of the injury).

[280] *See* Morantz, Rejecting the Grand Bargain, supra note 272. *See also* Krohm, *supra* note 275.

[281] *See* Bill Minick, Cost Shifting: Candy Stores and Scapegoats, Risk & Insurance, June 15, 2016, http://www.riskandinsurance.com/cost-shifting-candy-stores-scapegoats.

[282] Grabell & Berkes, Inside Corporate America, *supra* note 266.

[283] *Id.*

[284] See http://araworkers' compensation.org/

employers.[285] The 'opt-out solution' has been proposed in other states, but has not yet advanced to full consideration anywhere.[286] Opposition to this approach has been voiced broadly, creating remarkable unanimity among insurers, rating bureaus, some employers, claimants' attorneys, unions and advocates for injured workers.[287]

The clamor to turn the clock back to an elective system is not limited to the Oklahoma opt-out scheme, however. Developments in Florida in 2016 are instructive. Cutbacks in the availability of benefits led to litigation challenging the basic reasonableness of the system.[288] Legislation substantially cut the availability of claimants' attorney fees,[289] thereby reducing the likelihood that claimants would have effective representation on claims. The Florida Supreme Court found this restriction to be unconstitutional.[290] Almost immediately, the National Council on Compensation Insurance announced the need for substantial insurance rate increases, and these were approved by the Florida Office of Insurance Regulation;[291] litigation was brought challenging the rate increases;[292]and a bill was written that would make workers' compensation

[285] Grabell & Berkes, Inside Corporate America, *supra* note 266.
[286] As of the time of this writing, opt-out had been introduced in Tennessee and South Carolina but had not advanced out of committee. Information provided to author by Malcolm Crosland, Jr., Chair, Opt-Out Taskforce, Workplace Injury Litigation Group, May 4, 2016. See Gloria Gonzalez, *Proponents say workers comp opt-out could make a comeback*, BUSINESS INSURANCE, Dec. 13, 2016, http://www.businessinsurance.com/article/20161213/NEWS08/912310956/Proponents-say-workers-comp-opt-out-could-make-a-comeback/
[287] For example, at the annual meeting of the Workers' Compensation Research Institute, held March 20-11, 2016, in Boston, Massachusetts, speakers from the Property Casualty Insurers Association of America, the American Insurance Association, and the Workplace Injury Litigation Group all raised serious concerns about this approach to workplace injury compensation. (author was present at this meeting)
[288] *See e.g.* Stahl v. Hialeah Hosp., 160 So. 3d 519 (Fla. Dist. Ct. App.), reh'g denied (Apr. 14, 2015), review granted, 182 So. 3d 635 (Fla. 2015), and review dismissed, 191 So. 3d 883 (Fla. 2016), and cert. denied, No. 16-98, 2016 WL 3937154 (U.S. Oct. 31, 2016) 016)
[289] *See* Fla. Stat. Ann. § 440.34.
[290] *See* Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016)
[291] *See* "It's Official: Florida Workers' Comp Rates Going Up Nearly 15%," Insurance Journal, Oct.11, 2016, http://www.insurancejournal.com/news/southeast/2016/10/11/428955.htm. Note that attorneys' fees are generally taken from awards to claimants; this is not a fee-shifting statute. Any increase in rates would assume that larger awards would be won by claimants if there was better compensation for their attorneys.
[292] See "Judge Halts Florida's 14.5% Workers' Compensation Hike Set for Dec. 1," Insurance Journal, Nov. 27, 2016 ("A Florida circuit judge has blocked a 14.5 percent workers' compensation rate increase due to go into effect Dec. 1 after finding that the insurers' rating organization and state officials did not comply with the state's Sunshine Laws and open meeting requirements in setting the new rate."). This ruling is under appeal as of this writing. See "Florida Appeals Judge's Order Halting 14.5% Workers' Comp Rate Increase" Insurance Journal Nov. 29, 2016. [NOTE to Rutgers students - this will need to be updated before publication]

coverage elective for employers. [293]As of the time of this writing, the bill has not yet been introduced and the litigation is pending.

Meanwhile, other litigation that challenges the constitutionality of restrictive workers' compensation provisions appears to be increasing. For the first time, the exclusion of farmworkers from workers' compensation coverage was successfully challenged in New Mexico.[294] Statutory fee limits for claimants' attorneys have been rejected on constitutional grounds in Utah,[295]as well as Florida. Limits on duration of temporary benefits were thrown out in Florida as well.[296] A 180 working days requirement before qualifying for benefits for carpal tunnel syndrome did not pass due process muster in Oklahoma.[297] A case is pending attacking the California statute on gender-bias grounds.[298]

The year of 2016 has now been described by one workers' compensation expert as the year of 'equal justice under the law.'[299] It is possible that the pendulum has indeed now swung too far away from a commitment to adequacy of benefits, at least from the point of view of some courts. With the increasingly low likelihood of federal intervention, it is likely that state court challenges will continue.

III. Context (2): External Forces

[293] See https://ww3.workcompcentral.com/fileupload/uploads/2016-12-08-023010FL%20new%20bill%20to%20allow%20opt%20out.pdf. As of 12/21/2016, this bill has not been introduced.

[294] Rodriguez v. Brand W. Dairy, 378 P.3d 13, 22 (N.M. 2016) (applying a rational basis equal protection test, the New Mexico Supreme Court concluded " that there is no unique characteristic that distinguishes injured farm and ranch laborers from other employees of agricultural employers, and such a distinction is not essential to accomplishing the Act's purposes."). *Compare* Haney v. N. Dakota Workers Comp. Bureau, 518 N.W.2d 195 (N.D. 1994) (rejecting an equal protection challenge to the exclusion of farmworkers in North Dakota).

[295] Injured Workers Ass'n of Utah v. State, 374 P.3d 14 (Utah 2016).

[296] Westphal v. City of St. Petersburg, No. SC13-1930, 2016 WL 3191086 (Fla. June 9, 2016)

[297] Torres v. Seaboard Foods, LLC, 373 P.3d 1057 (Okla. 2016), as corrected (Mar. 4, 2016) (180–day requirement imposes predicate for filing a cumulative trauma claim, and violated due process as applied to claimant.)

[298] Clarisse Jones, Lawsuit alleges unequal disability payments for women, USA Today, July 6, 2016, http://www.usatoday.com/story/money/2016/07/06/lawsuit-filed-guarantee-california-women-same-disability-payments-men/86754760 (lawsuit alleging systemic gender bias in workers' compensation system in California). Legislation addressing gender bias has also been introduced in the California legislature.

[299] Thomas A. Robinson, *The Year of Equal Justice and Due Process,* The WorkComp Writer, Nov. 4, 2016, available at http://www.workcompwriter.com/the-year-of-equal-justice-and-due-process (reviewing the state constitutional law decisions of 2016 and noting that equal justice under the law "more or less encapsulates the common thread that seems to wind its way through all the important 2016 court decisions" and asking, rhetorically, "Can state legislatures—often at the bidding of well-heeled employers—carve out special laws that eat away at the original workers' compensation bargain and yet continue to provide immunity from suit for employers?")

The foregoing description focuses on the history of workers' compensation as a program. Workers' compensation experts and researchers tend to concentrate on the program's intricacies and its history, often failing to address the external forces that affect it.[300] Here, in this Part, I turn away from this inside-baseball focus. Workers' compensation does not exist in a vacuum, and it both affects and is affected by external economic, social, technological and political forces. These forces have had – and continue to have – tremendous impact on injured workers' well-being as well as on the system of compensation itself.

The central lesson is this: If we analyze worker's compensation from the inside out, we neglect consideration of the forces that shape it, and we engage in inadequate discussions regarding both problems and potential solutions affecting the adequacy and equity of this social insurance program. The behavior of each of the internal players – individual workers, insurance carriers, employers, administrators, courts, medical care providers, and lawyers – is a response to these external systems. The following discussion highlights briefly a few of the critical external factors that must be analyzed in considering both the history and the future of compensation for work injuries. [301]

A. Changes in work

The nature of work has been changing continuously, and these changes have been accelerating since the enactment of the initial workers' compensation laws. Today, this has fueled a renewed debate about the appropriate future scope of this program.[302]

Looking at the full arc of the history of work over the past century, the most obvious change has been the shifting sectoral distribution of jobs:[303]

[300] The early histories written by Witt, *supra* note 30, and Fishback 2000, *supra* note 32, are notable exceptions to this.

[301] This admittedly is not an exhaustive set of factors. For example, there are significant issues that affect the insurance market that are relevant to the functioning of private workers' compensation insurance carriers, including the effects of equity markets on reserving for long tailed claims. I have not attempted to address this set of issues here.

[302] *See e.g.* Frank Neuhauser, *The Myth of Workplace Injuries: Or Why We Should Eliminate Workers' Compensation for 90% of Workers and Employers*, 1 IAIABC PERSPECTIVES 16 (April 2016) available at http://user-olv4vzh.cld.bz/IAIABC-Perspectives-April-2016/16-17 (arguing that workers' compensation should be overhauled and limited to the most hazardous industries). *Compare* Berkowitz, *supra* note 24 (arguing for expansion of workers' compensation to workers in the on-demand economy, no matter what the businesses they work for choose to call them).

[303] *See* Urquhart, *supra* note 80 (data for 1850, 1900, 1952 and 1982); Bureau of Labor Statistics, Employment Projections, Table 2.1 Employment by Major Industry Sector (showing shifts from 2004 to 2014 and projections for 2024), http://www.bls.gov/emp/ep_table_201.htm (data for 2004, 2014, 2024).

	Agricultural workers	Goods producing (including construction)	Service workers
1850	64.5%	17.7	17.8
1900	38.0	30.5	31.4
1952	11.3	35.5	53.3
1982	3.6	27.2	69.2
2004	1.5	15.1	76.8
2014	1.4	12.7	80.1
2024 (projected)	1.3	12.0	80.1

These changes are stark. In 1900, when workers' compensation laws were initially contemplated, the agrarian economy had been shrinking but was still large; the sectors were close to evenly divided in the numbers of workers that they employed. Today, the service sector dominates. Looking at the workers (as opposed to the sectors), the largest growth was in the broad category of professional, managerial, clerical, sales, and service workers, which grew from one-quarter to three-quarters of total employment between 1910 and 2000.[304] The growth of workers in the health care industry has been particularly notable.[305]

These are not the only changes. The workforce grew six-fold during the 20th century.[306] Demographics of the workforce changed: women entered the labor market, children were increasingly barred from work, non-white participation grew, and the workforce was aging.[307] In real terms, average wages also increased in the first half of the 20th century, but stagnated beginning in the 1970's.[308] Technology has had dramatic impact on jobs – from the development

[304] *Ian D. Wyatt & Daniel E. Hecker, Occupational changes during the 20th century*, March 2006 MONTHLY LABOR REVIEW 35.
[305] *Id*. at 40, 42 (healthcare workers grew 5 times as a proportion of total employment between 1910 and 2000, from 1.2 percent to 7.0 percent; employment grew from 453,000 to 9,056,000).
[306] Donald M. Fisk, *American Labor in the 20th Century* (2003), http://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf (noting that the workforce registered 24 million in 1900 with those aged 10 and above reporting a gainful occupation; in 1999 it was 139 million, counting those 16 and older).
[307] *Id. See also* Mitra Tossi, *A century of change: the U.S. labor force, 1950-2050*, May 2002 MONTHLY LABOR REV. 15, 16 (describing demographic shifts in the workforce and noting that the 55-and-older age group made up 13 percent of the labor force in 2000 and is expected to increase to 20 percent by 2020); Bureau of Labor Statistics, News Release: Nonfatal Occupational Injuries and Illneses Requiring Days Away from Work, 2015 (Nov. 10, 2016), available at http://www.bls.gov/news.release/archives/osh2_11102016.pdf (showing that in 2015, workers in the age group 45-54 had the highest number of days- away-from work due to occupational injuries).
[308] JOSH BIVENS, ELISE GOULD, LAWRENCE MISHEL & HEIDI SHIERHOLZ, RAISING AMERICA'S PAY: WHY IT'S OUR CENTRAL ECONOMIC POLICY CHALLENGE, ECONOMIC POLICY INSTITUTE BRIEFING PAPER #378 (June 4, 2014) available at http://www.epi.org/files/pdf/65287.pdf (showing wage stagnation since 1979, particularly for low and middle wage workers, despite rising productivity).

of new fields of work to changes in traditional manufacturing and distribution networks to current development of the gig economy. Long tenure in jobs was not a characteristic of work during the early part of the 20th century, and labor turnover was extremely high.[309] Unionization and improved working conditions led to more stability in workforce; workers tended to stay longer in jobs as the century progressed.[310] This high turnover undoubtedly contributed to the early sense that workers' compensation was designed to provide limited wage replacement and medical care to workers; it was not intended to be part of a system that involved continued employment. This view changed dramatically in the latter part of the last century. As longer tenure became characteristic of many workplaces, the focus in workers' compensation on disability management and return-to-work for injured employees grew.[311] It will be interesting to see whether this continues to be true, particularly if the current trends toward part-time work,[312] contracting out, and technological displacement continue.

The sheer growth in the workforce encouraged the development of an increasingly large and complex workers' compensation industry of insurance carriers, claims managers, lawyers and administrators – all of whom developed an investment in each state's own intricate and convoluted system. The aging of the workforce raises particular concerns about the cost of workers with pre-existing conditions who are injured at work, leading to efforts to reduce liability for preexisting conditions through exclusions or apportionment. New types of work, and shifts to injuries in industries previously regarded as 'safe,' have upended stereotypes and required changes in workers' compensation claims processing.

The classic workers' compensation claimant has shifted, from the worker with a hard hat who works in a mine or on a railroad or assembly line. Today, it is as likely that the injured worker will be a home health worker or nurse's aide in a nursing home, or an immigrant worker in a meat or seafood processing facility, or a roofer from a construction job. The hazardous industries

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[309] *See* SUMNER H. SLICHTER, TURNOVER OF FACTORY LABOR, 3 (1919) (relying on labor market data from before World War I and noting, for example, that one study in Pittsburgh found that it was necessary to hire 21,000 people annually to maintain a workforce of 10,000, and that at least one coal operator thought that 2,000 hirings (sic) a year to maintain a permanent workforce of 1,000 "was not too high for the coal mining industry.").

[310] *See* Laura Owen, *History of Labor Turnover in the U.S.*, https://eh.net/encyclopedia/history-of-labor-turnover-in-the-u-s/ (describing labor turnover 1910-1970 and noting "data show high rates of labor turnover (annual rates exceeding 100%) in the early decades of the twentieth century, substantial declines in the 1920s, significant fluctuations during the economic crisis of the 1930s and the boom of the World War II years, and a return to the low rates of the 1920s in the post-war era; also noting that job instability increased among some groups of workers, particularly those with longer tenure, in the 1990s.). *See also* DANIEL NELSON, FARM AND FACTORY: WORKERS IN THE MIDWEST 1880-1990, 99 (1995) (noting that 'exits' – the rate at which workers left their jobs – was much lower in unionized mines).

[311] *See infra* text accompanying notes 379 - 382.

[312] LONNIE GOLDEN, STILL FALLING SHORT ON HOURS AND PAY: PART-TIME WORK BECOMING NEW NORMAL, EPI REPORT, Dec. 5, 2016, http://www.epi.org/files/pdf/114028.pdf (finding ongoing structural shift toward more use of part-time employment by many employers is leading to an elevated rate of involuntary part-time work.)

of the past employ fewer people; the industries of today may pose different hazards that are more challenging to administrative structures originally designed to deal with traumatic injuries caused by sudden unexpected accidents at single workplaces.

The fissured workplace involves increasingly complex firm to firm relationships, including layers of contracting and subcontracting, franchising and use of staffing agencies.[313] A growing number of people are classified (or misclassified) as independent contractors, including workers who work in the 'gig' economy, such as Uber drivers or TaskRabbits. [314] According to one report from the Economic Policy Institute, "Misclassification is most common in industries where it is most profitable (such as construction, *where workers' compensation insurance premiums are high*), and in industries with scattered worksites where work is performed in isolation;"[315] high premiums correlate with higher hazard industries. Independent contractors are presumptively outside the reach of employment laws and benefits that are linked to an employment relationship, including workers' compensation. Workers' compensation only reaches wage and salaried employees; other workers, irrespective of the level of risk in their jobs, are outside this safety net. This means they retain rights to sue in tort, but lack social insurance for the non-negligent injuries that may occur.

For those who work in triangulated working relationships – through staffing or 'temp' agencies – the relationships can be more complex. Direct employers are required to provide all statutory benefits; the host employer – the site where the worker performs the work – may be responsible for these benefits as a 'statutory' employer.[316] Tort immunity is often extended through this

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[313] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

[314] Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (2016) available at: http://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_v3.pdf?m=1459369766 (noting that "[t]he percentage of workers engaged in alternative work arrangements – defined as temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers – rose from 10.1 percent in February 2005 to 15.8 percent in late 2015. The percentage of workers hired out through contract companies showed the sharpest rise increasing from 0.6 percent in 2005 to 3.1 percent in 2015. Workers who provide services through online intermediaries, such as Uber or Task Rabbit, accounted for 0.5 percent of all workers in 2015."). No data are available on the extent of misclassification, although some commentators believe it to be rampant. *See e.g.* Sarah Leberstein, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (updated August 2012) available at http://www.nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf.

[315] Françoise Carré, (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION, ECONOMIC POLICY INSTITUTE REPORT, June 8, 2015, http://www.epi.org/publication/independent-contractor-misclassification/ (noting that a Massachusetts study showed that over the period 2001–2003, up to $7 million of workers' compensation premiums were not paid for misclassified construction workers and up to $91 million for misclassified workers across all industries) (emphasis added).

[316] *See* 5-68 LARSON'S WORKERS' COMPENSATION LAW § 68.06 (2015) (discussing "dual employment" in general). Rules on this vary from one jurisdiction to another; often, state workers' compensation statutes set out the specific terms of statutory employers. See e.g. Campbell v. Flowers Bakery of

chain of contracting, either through statutory provisions[317] or through contracting, irrespective of which employer actually provides the compensation – or which is responsible for correcting any dangerous work conditions.[318] Joint employers may be jointly responsible for the provision of compensation to an injured worker.[319]

These more complex relationships are often confusing to workers, particularly immigrant workers.[320] In part as a result of this complexity, states have passed legislation like the Massachusetts Temp Worker Right To Know Law.[321] The combination of immigrant status, tremendously confusing contractual relationships among firms, language barriers, fear of retaliation and stigma mean that many of these workers may never file for injury compensation.[322] Workers who are not unionized, and immigrant workers, are far less likely to file workers' compensation claims when they are injured.[323] It is particularly troubling that these

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Crossville, 2014 WL 233815 (M.D.Tenn. 2014) (bakery is covered by workers' compensation exclusivity and shielded from tort liability when worker employed by staffing agency was injured at the bakery because bakery is statutory employer). This requirement is unlikely to be extended to workers who are classified as casual laborers, however. *See e.g.* Stringer v. Robinson, 155 Idaho 554 (2013) (premises owner not responsible for workers' compensation for a carpenter employed by a contractor who was injured on site because the worker fell within the statutory exemption for casual employment).

[317] This immunity may also be extended to insurers and claims administrators; bad faith actions against the insurers are thereby prohibited. See e.g. Or. Rev. Stat. Ann. § 656.018 ("The exemption from liability given an employer…is also extended to the employer's insurer, the self-insured employer's claims administrator…")

[318] Tort immunity of the host employer is established either through statutory employer provisions or through contractual relationships or insurance riders. *See e.g. See e.g.* Molina v. State Gardens, 88 Mass. App. Ct. 173 (2014) (tort immunity for host employer through employee's ex ante waiver and workers' compensation insurance); Daniels v. Riley's Health and Fitness Ctrs., 310 Ark. 756, 840 S.W.2d 177 (1992) (extended tort immunity to athletic club when temp worker was injured on site). *See generally* 5-68 LARSON'S WORKERS' COMPENSATION LAW § 68.06D (2015) (providing additional case law).

[319] *See* 5-68 LARSON'S WORKERS' COMPENSATION LAW § 68.02 (2015).

[320] *See* Charlotte S. Alexander, Transmitting the Costs of Unsafe Work (paper submitted for publication, draft on file with author, forthcoming 2017).

[321] *See* Mass. Gen. Laws ch. 149,§ 159C (requiring staffing agencies to provide to temporary workers the name, address and telephone number of the workers compensation carrier, in addition to other information related to job duties and benefits). For a public description of the law, see http://www.mass.gov/lwd/labor-standards/employment-agency/employment-placement-and-staffing-agencies-program/twrtk-poster-website-accessible.pdf

[322] See Charlotte S. Alexander, Transmitting the Costs of Unsafe Work, *supra* note 320. For further discussion of this issue, s*ee infra* Part IV(B).

[323] *See e.g.* Barry T. Hirsch, David A. MacPherson, and J. Michael Dumond, *Workers' Compensation Recipiency in Union and Nonunion Workplaces*, 50(2) IND. & LABOR REL. REV. 213 (1997); Charlotte S. Alexander, Transmitting the Costs of Unsafe Work, *supra* note 320; Tim Morse et al, *The Relationship of unions to prevalence and claim filing for work-related upper-extremity musculoskeletal disorders*, 44 AM. J. IND. MED. 83-93 (2003); Tim Morse et al., *Trends in work-related musculoskeletal disorder reports by years, type, and industrial sector*, 48 AM. J. IND. MED. 40-49 (2005); Glenn Pransky et al., *Under-*

workers often work in dangerous industries – from meat and poultry processing to agriculture (where they may be statutorily excluded from compensation) to residential construction to health care institutions.[324]

B. Changes in safety and conceptions of safety

In 1910, at the genesis of workers' compensation, workplace injuries were alarmingly common, frequently serious, and widely viewed as inevitable.[325] Two trends in safety over the last 100 years have had significant impact on the functioning of workers' compensation programs.

First, there is little doubt that, on average, workplaces are safer today than they were in the early 20th century. Annual workplace fatalities fell from an estimated peak of over 20,000 in 1912 to 5314 in 1995,[326] while the total workforce grew from 24 million in 1900 to 139 million adults by 1999.[327] The number and rate of reported fatalities continued to decline in this century,[328] but the decline has not been steady: in 2014 fatal work injuries in goods-producing industries rose by 9 percent[329] and deaths in trench collapses doubled from 2015 to 2016.[330] Although injury data are not available at the beginning of the century,[331] the downward trend in reported injuries is also clear.[332] Despite significant problems with underreporting of occupational injuries and diseases, discussed *infra* in Part IV(B), it is clear that safety at work has, overall, generally improved.

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reporting of work-related disorders in the workplace: A Case study and review of the literature, 42 ERGONOMICS 171-182 (1999).

[324] *See infra* Part III(B).

[325] *See supra* Part II (A).

[326] *See* Improvements in Workplace Safety, *supra* note 30, at 461, 464.

[327] See *supra* note 306 (data on workforce).

[328] Bureau of Labor Statistics, 2004 Census of Fatal Occupational Injuries (revised data), TABLE A-1. Fatal occupational injuries by industry and event or exposure, All United States, 2004, http://www.bls.gov/iif/oshwc/cfoi/cftb0196.pdf (showing reported occupational fatalities fell from a total of 5,764 deaths in 2004 to 4,821 in 2014). For estimates of the total number of work injuries occurring annually, see J.P. Leigh, *Economic burden of occupational injury and illness in the United States*, 89 MILBANK QUARTERLY 729-772 (2011) (estimating more than 8.5 million non-fatal work injuries occurred in 2007). See also GS Smith et al, *Injuries at work in the US adult population: Contributions to the total injury burden*, 95 AM. J. PUBLIC HEALTH 1213-1219 (2005).

[329] Bureau of Labor Statistics News Release - Census of Fatal Occupational Injuries Summary, 2014 (September 17, 2015) http://www.bls.gov/news.release/cfoi.nr0.htm (rates ran higher in mining, agriculture, manufacturing and construction in that year).

[330] Occupational Safety & Health, *News Release: Ohio worker's death highlights grim 2016 national stat: trench collapse fatalities have more than doubled*, Nov. 17, 2016 available at https://content.govdelivery.com/accounts/USDOL/bulletins/1733480

[331] Fisk, *supra* note 306, at 2.

[332] Bureau of Labor Statistics, *News Release: Employer-Reported Workplace Injuries and Illnesses—2014*, http://www.bls.gov/news.release/archives/osh_10292015.htm (October 29, 2015)USDL-15-2086 (showing that injuries declined from a total of 6.8 million injuries reported in private industry workplaces during 1994, a rate of 8.4 cases for every 100 full-time workers, to 3.0 million nonfatal workplace

This should mean that workers' compensation claims – and costs – in the aggregate should be going down. And, in fact, total benefits paid to injured workers have indeed been declining.[333] This trend data alone cannot tell us the cause of changes in trend, however. While the decline in benefits that are paid may reflect declining injury rates, it also reflects changes in rates of filing for benefits or reductions in the availability of benefits under tightening rules.[334]

But injury rates vary widely by industry.[335] There have been significant shifts in the industries that are the most dangerous for workers. Today, for example, the health care industry, now employing nine percent of the U.S. workforce, has close to the highest overall rate of reported injuries.[336] Nursing has become one of the most dangerous occupations.[337] Meat processing leads the list for reported serious injuries, followed closely by nursing and residential care facilities.[338] It is also particularly problematic that industries with large numbers of immigrant and low wage workers are plagued by high injury rates; it is these workers who are least likely to file workers' compensation claims.[339]

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injuries and illnesses reported by private industry employers in 2014, a rate of 3.2 cases per 100 full-time workers).

[333] This can be measured in total benefit costs or as a payroll based total in terms of benefits paid per $100 of payroll. The former will show less decline as the wage and salaried population of workers grows. Nevertheless, total benefits paid on this measure declined from 2012 to 2014 by 1.2 percent. Baldwin & McClaren, *supra* note 5, at 2, Table 1, at 19, Table 5, and generally18-24. Benefits paid per $100 of payroll have also declined, from a peak of $1.65 per $100 of payroll in 1992 to $0.91 today. *Id.* at 3, Figure 1. The share of total benefits paid in medical care – and therefore paid not to injured workers but to medical providers – rose to 50 percent of the total in 2010 and has continued to represent half of total benefits in the following years. *Id.* at 5, Figure 3. These numbers vary by state jurisdiction. Id. at 27-35 and Tables 9, 10, 11. *See also* KATHY ANTONELLO, 2015 STATE OF THE LINE: ANALYSIS OF WORKERS [SIC] COMPENSATION RESULTS 6-7 (2015), available at https://www.ncci.com/Articles/Documents/II_AIS-2015-SOTL-Article.pdf

[334] *See supra* note 260 for studies on this issue.

[335] Bureau of Labor Statistics, *Highest incidence rates of total nonfatal occupational injury and illness cases*, 2014 Table SNR01, available at http://www.bls.gov/iif/oshwc/osh/os/ostb4347.pdf [hereinafter BLS Highest Incidence Rates]

[336] *Id.*

[337] *See* Daniel Zwerdling, Hospitals Fail To Protect Nursing Staff From Becoming Patients (Feb. 4, 2015) (showing high rates of back injuries, relying on BLS data), http://www.npr.org/2015/02/04/382639199/hospitals-fail-to-protect-nursing-staff-from-becoming-patients

[338] *See* BLS Highest Incidence Rates, *supra* note 335 (showing an incidence rate of 8.3 per 100 for meat processing and 7.9 for by nursing and residential care facilities).

[339] *See* Alexander, Transmitting the Costs of Unsafe Work, supra note 320. *See also* Xiuwen Sue Dong, Julie A. Largay, & Xuanwen Wang, *New Trends in Fatalities among Construction Workers*, 2(3) CPWR DATA BRIEF 1 (2014) available at http://www.cpwr.com/sites/default/files/publications/Data%20Brief-%20New%20Trends%20in%20Fatalities%20among%20Construction%20Workers.pdf (from 2011 to 2012, the number of Hispanic construction workers who died on the job increased 12.7%; overall fatalities in residential construction, where many immigrants work, increased 37.2% from in comparison a 3.0% increase in nonresidential construction); Paul J. Leigh, *Numbers and costs of occupational injury*

Second, there has been a radical shift regarding expectations of safety at work. In the early 1900s, although assumptions of inevitability of injuries may not have been universal,[340] these assumptions were common and underlay the theory that compensation should only be paid for 'accidents' at work.[341] The National Commission, recognizing that these provisions excluded large numbers of work injuries when nothing "unexpected or unusual occurred," recommended the elimination of this requirement.[342] Today, workplace injuries are viewed as largely preventable by public health advocates, government regulators and many employers. The passage of the Coal Mine Safety and Health Act of 1969[343] and the Occupational Safety and Health (OSH) Act of 1970[344] signaled a different legal conceptualization of workplace risk, viewing all injuries and diseases as subject to intervention and therefore largely avoidable. In a sense, the safety advocates and engineers of the 1910s won this policy argument. The purpose of the OSH Act was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources,"[345] and, at least for disease-causing agents, to ensure "that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."[346] Echoing this sentiment, the National Commission listed safety as a critical objective in thinking about workers' compensation.[347]

This reconceptualization may have been partly responsible, in the 1980s and 1990s, for the legal struggle over the definition of intentional harm under the workers' compensation statutes. In general, liability outside of the compensation system had been – and continues to be – very limited.[348] That was precisely the point of the initial bargain. One common exception to the exclusivity rule allowed tort actions by workers when an employer has the deliberate intent to

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and illness in low-wage occupations, Center for Poverty Research, and Center for Health Care Policy and Research, University of California Davis (December 2012), available at http://defendingscience.org/sites/default/files/Leigh_Low-wage_Workforce.pdf; DOL Inequality Report, *supra* note 2, at 4 (noting the greater impact on lower-wage workers of the costs of occupational injuries).

[340] *See* Witt, *supra* note 30, at 111-125.

[341] *See supra* notes 85 - 88 and accompanying text (regarding the role of the accident terminology in workers' compensation).

[342] National Commission Report, *supra* note 153, at 49, Recommendation 2.12 ("Compensation, for example, has been denied when nothing unexpected or unusual occurred. If a man strained his back while doing regular work in the usual fashion, it was to be expected.").

[343] Coal Mine Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969) (superseded by the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 et seq)

[344] 29 U.S.C. § 651 et seq. (2012).

[345] OSH Act, 29 USC § 651 (b).

[346] OSH Act, 29 USC § 655(b)(5).

[347] National Commission Report, *supra* note 153, at 35 (listing safety as one of the basic objectives of a modern workers' compensation program).

[348] *See* 9-100 LARSON'S WORKERS' COMPENSATION LAW § 100.01, § 100.04 (2015) (explaining the general rule governing exclusivity of remedy and exceptions to the rule, noting that actual intent to injure is generally required for the exclusivity exception to apply)

cause an injury.[349] Starting in 1978 in West Virginia, state courts became more receptive to arguments that employers should face broader potential tort liability when they engaged in willful, wanton or reckless misconduct or knew that an existing hazard was substantially certain to lead to serious injury or death. [350] In the ensuing years, other state courts concluded that the exception for "intentional" acts included the broader substantial certainty exception to the exclusivity doctrine, expanding employers' potential tort liability.[351] The early distinction between "accidents" – the focus of workers' compensation – and preventable events had become blurred.[352] Court decisions became a political lightening rod in these states, demonstrating the critical importance of the promise of tort immunity to employers. In several states a legislative-judicial ping-pong match followed the initial judicial decisions; often, employers' broad immunity from tort liability was restored.[353]

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[349] *See* Beauchamp v. Dow Chem. Co., 427 Mich. 1, 16 (1986) (summarizing the interpretation of deliberate intent in various states).

[350] Mandolidis v. Elkins Indus., 161 W. Va. 695, 705 (1978) (noting that prior case law had precluded recovery by an employee unless there was a showing of specific deliberate intent on the part of the latter to produce the injury, but holding "when death or injury results from wilful, wanton or reckless misconduct such death or injury is no longer accidental in any meaningful sense of the word, and must be taken as having been inflicted with deliberate intention for the purposes of the workmen's compensation act"). For full discussion of the issue of tort liability, see Rabin, Alternative Remedies for Workplace Injuries, *supra* note 113. *supra* note 113.

[351] *See* Spieler, *Perpetuating Risk*, *supra* note 15, at 176 and note 247 (giving detailed history of these changes and political battles through 1993). In addition to West Virginia, states adopting the 'substantial certainty' test for international torts included, in chronological order: Louisiana, Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981); South Dakota, 334 N.W.2d 874, 876 (S.D. 1983); New Jersey, Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 165 (1985); Michigan, Beauchamp v. Dow Chemical Co., 427 Mich. 1 (1986); Missouri, Speck v. Union Elec. Co., 741 S.W.2d 280, 283 (Mo. Ct. App. 1987); North Carolina, Woodson v. Rowland, 329 N.C. 330, 337 (1991); Connecticut, Suarez v. Dickmont Plastics Corp., 242 Conn. 255, 280 (1997); Oklahoma, Parret v. UNICCO Serv. Co., 127 P.3d 572, 577 (Okla. 2005). *See also* Hannifan v. American National Bank of Cheyenne, 185 P.3d 679 (Wyo. 2008) (setting the standard as willful and wanton); Helf v. Chevron USA, Inc., 203 P.3d 962 (Utah 2009) (setting the standard as virtually certain, rather than substantially certain, to occur).

[352] *See* Beauchamp v. Dow Chemical Co., 427 Mich. 1, 20 (1986) (specifically addressing this conceptual change and noting that the original workers' compensation legislation was designed to address accidental not intentional injuries).

[353] This was particularly true in Ohio and Michigan. *See e.g.* Houdek v. ThyssenKrupp Materials N.A., Inc., 134 Ohio St. 3d 491, 494-97 (2012) (describing the history of legislative and judicial responses in Ohio, and upholding the final legislation that "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort). In Michigan, the legislature responded by re-limiting employers' liability to deliberate intentional acts, see Mich. Comp. Laws Ann. § 418.131(1) (1994) ("An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.") and the courts have upheld the legislation, see e.g.Cavalier Mfg Co v. Employers Ins of Wausau, 211 Mich.App 330, 337 (1995) ("The swift legislative response to Beauchamp was to require a much more rigorous standard than that of 'substantial certainty.'"). In West Virginia, the

These changes in tort law did not continue as a trend. There have, however, been some recent decisions that suggest that some state courts are again reassessing the scope of exclusivity. In Pennsylvania, for example, a statutory provision that limited occupational disease claims to diseases "occurring within three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to hazards of such disease," was challenged in a case involving mesothelioma, a disease with a long latency period that is caused almost exclusively by asbestos exposure. The court chose not to reach the constitutional issue, holding instead that the exclusive remedy provision of the workers' compensation statute simply did not apply.[354] In South Carolina, where a municipal worker was killed while working on a sewer line when an unsupported trench collapsed, the court held that the worker's wife was entitled to proceed with her § 1983 claim against the employer, noting that the employer's "conduct appears 'to rise above negligent conduct and state a substantive due process claim.'"[355]

The U.S. Department of Labor, in the 2015 report titled Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job,[356] reiterated the current focus on safety, noting that the most effective solution is "to prevent workplace injuries and illnesses from occurring in the first place. This is what is required by the law, and it would spare workers and their families from needless hardship and suffering, as well as from the loss of income and benefits associated with these conditions." [357] We have moved a long way past the acceptance of the inevitability of accidents at work.

C. Changes in work regulation

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legislature responded by limiting the scope of liability, and the statute has been amended several times. See W.Va. Code §23-4-2 (2015). For one commentary on the continuing legislative response in West Virginia, see Christopher Edwards, West Virginia Legislature Proposes Substantial Changes to Deliberate Intent Statute, Jurist, 2/5/2015, available at http://www.jurist.org/hotline/2015/02/christopher-edwards-workers-compensation.php .

[354] Tooey v. AK Steel Corp., 623 Pa. 60, 67 (2013)

[355] Estate of Marvis Lavar Myers v. City of Columbia, No. CV 3:16-00852-MGL, 2016 WL 3433721 *1 (D.S.C. June 22, 2016) (decedent, a public sector workers, was killed in a trench collapse when working for the city, and his widow brought a § 1983 claim against the city, claiming that the city maintained policies and practices that required workers to work regularly in untrenched boxes and punished employees who raised safety concerns, and that these policies violated the Fifth and Fourteenth Amendments; the Court held "that Plaintiffs have pled a plausible claim for relief under 42 U.S.C. § 1983 by alleging that City violated Decedent's rights to life, liberty, and bodily integrity under the Due Process Clause of the Fourteenth Amendment. … Plaintiffs aver that the City does this to further its policy and practice of jeopardizing employee safety in favor of expediency and cost cutting measures. Resolving all inferences in favor of Plaintiffs, such conduct appears to rise above negligent conduct and state a substantive due process claim."). Note that civil rights claims are generally not viewed as subject to the exclusivity rule of workers' compensation, and Estate of Marvis Lavar Myers v. City of Columbia may possibly viewed as analogous to this alternative line of cases.

[356] DOL Inequality Report, *supra* note 2.

[357] *Id.* at 11.

In the 20th century, there was essentially no intervention in the market-driven employment relationship. As early Supreme Court decisions exemplified, work relationships outside of interstate commerce were simply not within regulatory reach unless conditions were unusual,[358]and the employment at will doctrine dominated legal views.[359] From its outset, the at-will doctrine has defined the power relationships at work, shaped the behaviors of employers and employees, and clearly delineated the expansive right of employers to control the workplace and the workforce. Workers' compensation laws made no attempt to alter this reality.

But the developments in labor and employment law in the 20th century created a different context for the functioning of the compensation program. The changes came in two types. The first directly intervened in the employment relationship, amending the at-will doctrine to provide protection to workers for a range of activities[360] as well as prohibitions on status-based discrimination.[361] The second involved the development of new mandated and voluntary insurance systems for overlapping risks.

Discussions by workers' compensation stakeholders regarding the external effects of these laws often focus on direct intersections of benefit programs, such as issues of cost-shifting involving Medicare, Social Security Disability Insurance, general health insurance or other disability benefit programs. But this approach is myopic, as the broader set of employment laws influence behaviors within workers' compensation programs in a much larger sense at both the macro and the micro sense. At the macro level, the workers' compensation system is affected by the surrounding regulatory structure that now places legal requirements on employers with regard to treatment of their injured employees. At the individual level, the likelihood that workers will pursue claims is deeply influenced by the power relationships established by legal rights in the employment relationship.[362]

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[358] Lochner v. New York, 198 US 45 (1905); Howard v. Illinois Cent. R. Co. (The Employers' Liability Cases), 207 U.S. 463, 495 (1908); Mondou v. N.Y., N.H. & H.R. Co. (Second Employers' Liability Cases), 223 U.S. 1 (1912).

[359] The origins of the at-will doctrine are found in HORACE C. WOOD, MASTER AND SERVANT § 134, 272-273 (1877). State courts almost immediately began to echo the rule in decisions involving free wage laborers. See e.g. McCullough Iron Co. v. Carpenter, 11 A. 176, 178-179 (Md. 1887) (citing the treatise as "an American authority of high repute ...."). See also Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000) (providing a history of the at-will rule).

[360] Including collective activity for mutual aid and protection under the National Labor Relations Act, and whistleblower and anti-retaliation rights for engaging in a range of individual activity in which an employee raises concerns about a wide range of issues, from workplace safety to the safety of consumer items to discriminatory practices.

[361] These laws include Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and so on. There are also state-based equivalent laws, often referred to as Fair Employment Practice Acts.

[362] *See* Spieler, *Perpetuating Risk*, *supra* note 15, at 211-237 (discussing the effect of the employment relationship on filing behaviors in workers' compensation and noting that "workers are caught within an

Despite the fact that employment and labor legislation became common after the New Deal, it was not until the 1970s that changes really began to affect injured workers and workers' compensation.[363] In 1973, in *Frampton v. Cent. Indiana Gas Co*., the Indiana Supreme Court concluded that an injured worker had a common law cause of action against her employer for retaliatory discharge as a matter of public policy where she alleged her discharge was in retaliation for filing a workers' compensation claim.[364] Other states rapidly followed Indiana's lead. [365] To many, this felt like a tectonic shift in the common law. Until this point, a non-union worker would have had no legal expectation for continued employment after filing for compensation benefits – and in unionized workplace, discharges were upheld when a worker had become medically unfit, including as a result of an occupational injury. The development of this cause of action was a revolutionary change in the conceptual framework of workers' compensation, re-uniting the employment relationship and the award of benefits.

Despite this development, however, the employment-at-will common law doctrine has remained remarkably resilient, and the shifts in legal regulation have come from legislative, rather than common law, developments. Statutory changes provide a range of job security protection for injured workers that affect the relationship between workers and employers after an injury. The National Labor Relations Act[366] protects workers' right to engage in collective activity and allows the negotiation of collective bargaining agreements that provide job security. Not surprisingly, unionized workers are more likely to file workers' compensation claims when they are injured,[367] just as they are more likely to raise safety concerns:[368] job security and solidarity matter. The OSH Act includes an anti-retaliation provision to protect workers who raise concerns

unequal employment relationship which influences their decisions regarding when, or whether, to file workers' compensation claims."). *See also infra*, Part V, for a discussion of the barriers to filing claims that result from the nature of the employment relationship.

[363] 9-104 Larson's Workers' Compensation Law § 104.07 (2015) (noting that it was "odd" that the change "was so long in coming.")

[364] Frampton v. Cent. Indiana Gas Co., 260 Ind. 249 (1973). The first case signaling this shift in common law had been Petermann v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 396, 174 Cal. App. 2d 184 (1959) (involving allegations of pressure to present false testimony in response to a subpoena), but other states did not follow Petermann's logic until the Indiana court decided Frampton.

[365] *See* Spieler, *Perpetuating Risk*, *supra* note 15, at 223-225 (enumerating the state cases adopting the Frampton rationale and creating an exception to the at-will doctrine when workers were terminated for filing compensation claims). *See also* Theresa Ludwig Kruk, *Recovery for discharge from employment in retaliation for filing workers' compensation claim*, 32 A.L.R.4th 1221 (Originally published in 1984).

[366] 29 U.S.C. §§ 151-169.

[367] *See* Hirsch, *supra* note 323; Morsel, *The Relationship of unions to prevalence and claim filing*, *supra* note 323; Morse, *Trends in work-related musculoskeletal disorder reports*, *supra* note 323; Pransky, *supra* note 323 (all showing that union members are substantially more likely to receive workers' compensation benefits than non-union workers).

[368] See David Weil, *Enforcing OSHA: The role of labor unions*, 30 (1) INDUS. REL. 20-36 (Winter 1991).

about safety or report injuries.[369] The Family and Medical Leave Act provides a limited guarantee for some workers to return to work after an absence for a serious injury.[370] Perhaps most significantly, from the standpoint of workers' compensation, the Americans with Disabilities Act (ADA, as amended by the ADA Amendments Act of 2008),[371] establishes a federally-based right to employment (and arguably re-employment) for people with disabilities. States have similar state laws, bounded by the preemptive effects of some federal statutes. All of these laws create employment-based rights for individual injured workers, and thereby change the functioning of workers' compensation claims, embedding questions of the treatment of injured workers into the on-going relationship between workers and their employers.

In fact, however, the laws that protect individual unorganized workers from retaliation for raising safety concerns or reporting injuries are troublingly weak. In the wake of *Frampton*, virtually every state developed either a statutory or judicially-created prohibition against retaliation for filing a workers' compensation claim,[372] but these protections do not extend to workers who raise safety concerns, to disputes that may arise during the pendency of a compensation claim or to discharge for absences resulting from work injuries.[373] Moreover, few retaliatory discharge cases are likely to be filed by non-managerial employees.[374] The general anti-retaliation provision under the OSH Act for workers in these situations is also startlingly ineffective,[375] and the anti-retaliation provisions under the federal discrimination laws have been interpreted to require a high standard for proof of causation.[376] The early ineffectiveness of the original ADA led to statutory amendments, and the effectiveness of these amendments in protecting individual

[369] 29 USC § 660(c) (2012)
[370] 29 U.S.C. § 2601et seq.
[371] 42 USCA § 12211 et seq.
[372] 9-104 Larson's Workers' Compensation Law § 104.07 (2015)
[373] *See id*. (employers may defend claims based on legitimate non-discriminatory reasons for the retaliation, including absence and other policies). However, the Family and Medical Leave Act, 29 U.S.C. § 2601et seq., makes it unlawful for employers to discharge employees off work for a serious health condition, assuming the jurisdictional requirements of that Act in terms of employer size and employee longevity can be met.
[374] *See e.g*. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 467 (1992) ("Because of litigation costs, all but middle and upper income employees are largely foreclosed from any access to a remedy for wrongful dismissal.").
[375] *See* Emily A. Spieler, Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act, forthcoming, ABA J. LABOR & EMPL. (providing a review of the anti-retaliation provision of the OSH Act, an analysis of the administrative barriers to its effective enforcement, and describing attempts by OSHA to expand protection for workers through its regulatory powers) [NOTE: add full cite before publication – article will be published before this symposium issue]
[376] The reasoning in Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013), requiring that plaintiffs meet a "but for" standard under the retaliation provisions of Title VII has been applied to other anti-discrimination statutes with similar statutory language, including disability claims. *See e.g.* E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 767 (6th Cir. 2015) (applying the Nassar proof standard to a case brought under the Americans with Disabilities Act, and noting "[d]iscrimination here means retaliation—that 'but for' an employee's statutorily protected activity the employer would not have taken the adverse employment action.")

injured workers is not yet clear. Employers are requiring pre-dispute arbitration agreements that waive basic procedural – and arguably substantive -- rights.[377] Together, this means it is difficult for workers to challenge retaliatory acts successfully. It goes without saying that the more workers fear retaliation, the less likely they are to seek workers' compensation benefits, a serious factor in assessing the overall effectiveness of the program.[378]

Nevertheless, the ADA may have had a real effect on views of injured workers and workers' compensation. As costs rose in the wake of state legislative changes following the National Commission's Report, cost containment became an increasingly important component of management of claims. Agitation for expansion of disability rights grew during the 1980s, culminating in 1990 with the passage of the ADA. Although there is little evidence that injured workers were an organized part of the political campaign for the statute, the rhetoric regarding employment of people with disabilities was transformed and expectations for continued employment grew. The development of rights under the ADA was associated with the evolution of return-to-work and disability management efforts in workers' compensation. Since the 1990s, insurers and employers have championed return-to-work efforts as a win-win: best for the worker and a great cost reduction mechanism in the workers' compensation claim. Thus they came to say in the 1990s, "Workers' compensation is a disability management system – not a benefits system"[379] – a notion that is obviously contradictory to earlier characterizations of the program.

The issue of return-to-work for individual injured workers now is part of the discussion in virtually every lost-time claim.[380] These employment issues add a complex layer to the

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[377] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). *See also* E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1 (2015) (providing a comprehensive review of the status of pre-dispute arbitration agreements in employment with a focus on the pre-emptive effects of rulings by the Supreme Court).

[378] *See* Part IV(B), *infra*, for a discussion of the large numbers of injured workers who never file for workers' compensation. *See also* Charlotte S. Alexander, Transmitting the Costs of Unsafe Work, *supra* note 320 (discussing data from surveys in which workers name retaliation as a reason not to report or file after an injury); National Economic and Social Rights Initiative (NESRI), *Injured, Ill and Silenced: Systemic Retaliation and Coercion by Employers Against Injured Workers* (April 2015) available at https://www.nesri.org/sites/default/files/WC%20retaliation%20policy%20brief%204%2010%2015%20FINAL.pdf (discussing the problem of retaliation and failure to file workers' compensation claims).

[379] This became a mantra at meetings that I personally attended as a workers' compensation administrator in the 1990s. *See infra* Part IV(C) for further discussion of these views.

[380] *See e.g.* IAIABC DISABILITY MANAGEMENT AND RETURN TO WORK COMMITTEE, RETURN TO WORK: A FOUNDATIONAL APPROACH TO RETURN TO FUNCTION (April 19, 2016), https://www.iaiabc.org/images/iaiabc/Return-to-Work_Foundational-Approach-to-Return-to-Function_Final.pdf (investigating the 5-10 percent of workers' compensation claims that involve time off work, noting that successful return to work requires that all the key stakeholders commit to the restoration of health and function of the injured person) [hereinafter IAIABC Return to Work].

consideration of these claims. There is palpable tension between questions of continued employment for injured workers, a desire to simply monetize the injury (a desire often shared by claimants' attorneys) and the desire of employers and insurers to contain costs. For example, almost all lump sum settlement agreements in workers' compensation claims include a waiver by the injured worker of any future claim to a job with the pre-injury employer.[381] Advocates for injured worker advocates agree that this may be the best solution for some workers, but they view with mistrust the pressure to return to work that is accompanied by cessation of benefits but may not provide appropriate accommodation for the injured worker. There are, unfortunately, many examples of inappropriate return to work situations in which the worker's temporary total disability benefits are terminated, sometimes before the worker has completed the healing process (called reaching maximum medical improvement, or MMI); depending on the jurisdiction, temporary benefits may be difficult to restore. The Institute for Work and Health in Toronto, Ontario, Canada, has developed principles for return-to-work that are essentially rooted in the idea that there must be trust between the employee and employer[382] – but for most American workers, who are unrepresented by unions, trust is difficult to achieve. The surrounding legal system shapes and corrodes the potential for trust.

Evolving disability rights also helped to justify the elimination of second injury funds that had assisted in paying for workers' compensation claims when workers had disabilities with a combination of pre-existing and immediate causes. Advocates for their elimination argued that, in view of the protection of people with disabilities, the funds were no longer needed. The elimination of these funds, when combined with the new "major contributing cause" requirements, means that the cost of the disabilities that arise from multiple causes are now transferred out of the workers' compensation system. This may be particularly true for older workers, who are more likely to have pre-existing conditions or co-morbidities.

D. Changes in the social safety net

Social welfare and mandated insurance programs were generally anathema to the American theories of freedom of contract when workers' compensation was initially conceived. Over the

[381] I am unaware of any written source for this statement. It was agreed upon, however, at the meeting of the "summit." *See supra* note 22.

[382] *See* INSTITUTE FOR WORK AND HEALTH, SEVEN PRINCIPLES FOR RETURN TO WORK, https://www.iwh.on.ca/system/files/documents/seven_principles_rtw_2014_0.pdf . *See also* IAIABC Return to Work, *supra* note 380, at 16-17 (noting need for trust); WORKERS COMPENSATION RESEARCH INSTITUTE (WCRI), PREDICTORS OF WORKER OUTCOMES IN TENNESSEE (Jan. 2015) (also showing that trust is essential to successful return to work); RENEE-LOUISE FRANCHE, KIMBERLEY CULLEN, JUDY CLARKE ET. AL, WORKPLACE-BASED RETURN-TO-WORK INTERVENTIONS: A SYSTEMATIC REVIEW OF THE QUANTITATIVE AND QUALITATIVE LITERATURE, SUMMARY at 7 (2004) available at https://www.iwh.on.ca/system/files/sbe/summary_rtw_interventions_2004.pdf ("Conditions of goodwill and mutual confidence are influential factors contributing to the success of RTW arrangements."); INSTITUTE FOR WORK & HEALTH, ONTARIO SOCIETY OF OCCUPATIONAL THERAPISTS, COLLEGE OF OCCUPATIONAL THERAPISTS OF ONTARIO, WORKING TOGETHER: SUCCESSFUL STRATEGIES FOR RETURN TO WORK, https://www.iwh.on.ca/system/files/documents/working_together_2008.pdf

ensuing century, both governmental and employer-based insurance systems developed, and these clearly overlap with the benefits that were traditionally provided by workers' compensation. Employer-based health insurance became common during World War II when benefits did not come under wartime wage and price controls and became a key component of both collective bargaining and mechanisms for recruiting workers.[383] Social Security Disability Insurance (SSDI) was added to the Social Security system in 1956, providing universal disability insurance for totally disabled people who met the statute's requirements for labor market participation.[384] Many employers also now provide private short and long term disability policies to their employees.[385]

Injured workers must navigate among these systems. Sometimes the multiplicity of programs creates barriers: for example, if a worker has filed for compensation, the general health provider may refuse to cover medical costs, even if the workers' compensation claim is in litigation, leaving the worker with no mechanism for payment, and resulting in delays in treatment. Sometimes, the multiplicity of systems leads to transfer of costs: researchers have found that significant costs in the SSDI program are rooted in work-related injuries.[386] Sometimes the

[383] *See* Alain C. Enthoven and Victor R. Fuch, *Employment-Based Health Insurance: Past, Present, And Future*, 25(6) HEALTH AFFAIRS (November 2006) 1538-1547, 1538 (This growth was most rapid in the three decades after World War II; decline started in the late 1980s. By the mid-1950s, 45 percent of the population had hospital insurance; by 1963 more than half of the population had coverage for regular medical expenses, and almost one-fourth had major medical insurance coverage; hospital insurance soared to 77 percent by 1963. Employment-based coverage reached its peak sometime in the 1980s and has been declining since then.).

[384] *See* John R. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 (3) Social Security Bull. (2005/2006) available at https://www.ssa.gov/policy/docs/ssb/v66n3/v66n3p1.html (providing a history of the SSDI program at its 50th anniversary and also noting the existence of the need-based SSI program).

[385] *See* Kristen Monaco, Disability insurance plans: trends in employee access and employer costs, 4(4) Pay & Benefits Beyond the Numbers, February 2015, available at http://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm (providing data on access to these plans, including: "Workers in service occupations (such as waiters/waitresses, hair stylists, and dental hygienists) have the lowest access rates for both short- and long-term disability insurance. Access to short-term disability ranges from 20 percent for service workers to 54 percent for workers in management, professional, and related occupations. Access rates for long-term disability ranges from 10 percent for service workers to 59 percent for management, professional, and related occupations.")

[386] *See* Xuguang (Steve) Guo & John F. Burton, Jr., *The Growth of Applications for Social Security Disability Insurance: A Spillover Effect from Workers' Compensation*, 72(3) SOC. SEC. BULL. 69-88 (2012); Xuguang (Steve) Guo & John F. Burton, Jr., *Improving the Interaction Between the SSDI and Workers' Compensation Programs*, in SSDI SOLUTIONS: IDEAS TO STRENGTHEN THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM (April 2016); Paulo O'Leary et al., *Workplace Injuries and the Take-up of Social Security Disability Benefits*, 72(3) SOC. SEC. BULL. 1-17; Melisa McInerey and Kosali Simon, *The Effect of State Workers' Compensation Program Changes on the Use of Federal Social Security Disability Insurance* 51(1) IND. REL. 57-88 (2012). The question of the extent to which this phenomenon has grown in recent years is disputed; the fact that SSDI is paying the costs of people whose disability is rooted in work injuries is not disputed. *See also* Reville, *supra* note 16.

transfers of costs may go both ways: physicians themselves may have incentives to bill under workers' compensation plans or under general health insurance plans, depending on reimbursement rates and utilization review requirements.[387]

Some states have attempted to address some of these issues. For example, Maine makes explicit provision for payment of health care costs when a workers' compensation claim is still in litigation.[388] Michigan provides for coordination of benefits between workers' compensation and employer-provided disability insurance. [389]

As workers' compensation programs have tightened up on the availability of lifetime permanent total disability benefits, it is no surprise that people with complex health conditions turn to other programs. Some researchers believe that the incidence of this is rising, contributing to SSDI's underfunding problems.[390] The complexity of settlement of long term medical costs in workers' compensation has been caught up in attempts by the Centers for Medicaid and Medicare Services (CMS) to ensure that costs of treatment are not transferred to Medicare if an injured worker qualifies for SSDI.[391] Similarly, questions have been raised about the impact of the Affordable Care Act on cost transfers in (and out) of workers' compensation.[392] Those who believe that employers should internalize the costs of workplace injuries through workers' compensation believe that these costs should not be transferred to SSDI or any other program.[393] Those who

[387] *See e.g.* RICHARD A. VICTOR, OLESYA FOMENKO & JONATHAN GRUBER, WILL THE AFFORDABLE CARE ACT SHIFT CLAIMS TO WORKERS' COMPENSATION PAYORS? WC15-26 (Sept. 2015), http://www.wcrinet.org/studies/public/books/wcri893.pdf (suggesting that growth of capitated and other regulated payment methodologies in group health would result in the transfer of cases to workers' compensation because of the latter's fee-for-service payment model).

[388] Maine may be unique in having a statute that specifically addresses this problem. *See* Me. Rev. Stat. tit. 39A, Chap.5 § 222 (providing for payment by the general health carrier and a subrogation right for that carrier's against the workers' compensation carrier if the compensation claim is approved).

[389] *See* Arbuckle v. Gen. Motors LLC, No. 151277, 2016 WL 3866110 (Mich. July 15, 2016) (General Motors could reduce costs of paying injured workers by coordinating disability pension and workers' compensation benefits: "Applying federal substantive law to the facts of this case, we hold that defendant may coordinate plaintiff's disability pension benefits because the parties' collective-bargaining agreements and the subsequent modifications thereto did not vest plaintiff's right to uncoordinated benefits.")

[390] *See*) Guo & Burton, *The Growth of Applications for Social Security Disability Insurance* , *supra* note 386.

[391] *See* 8-94 Larson's Workers' Compensation Law § 94.02 (2015) (providing an explanation of the Medicare relationship to workers' compensation).

[392] *See e.g.* Workers' Compensation Research Institute, Will the Affordable Care Act Shift Claims to Workers' Compensation Payors? Executive Summary available at http://www.wcrinet.org/studies/protected/exec_summaries/will_aca_shift_wc-es.html (noting, for example, that a patient covered by a capitated group health plan was 11 percent more likely to have a soft tissue injury such as back pain called work-related than a similar patient covered by a fee-for-service group health plan).

[393] *See* DOL Inequality Report, *supra* note 2, at 11 (noting, "The shifting of cases and costs from workers' compensation to SSDI and Medicare also creates subsidies that may reduce employer financial incentives to prevent work-related injury and illness.")

are concerned about the differences in reimbursement rates and physician behaviors in general health care and workers' compensation are likewise concerned.

Lurking in this discussion is the question of what the purpose of workers' compensation is and should be. Concerns about the financial stability of SSDI fueled debates in 2016 in Washington D.C. regarding state workers' compensation programs.[394] A different concern is, on the other hand, that workers who are disabled as a result of their work may be excluded from all programs and unable to pursue tort remedies. These workers may be threatened with falling into poverty (or greater poverty if they are low wage workers) because the designs and interaction of these programs are ill-suited to meet the needs, on the ground, of many workers.

E. Changes in health care insurance, delivery and technology

In the early 20th century, Western allopathic medicine was in its infancy: germ theory was a product of the second half of the 19th century; antibiotics did not yet exist; the first medical x-rays were taken in 1896; modern medical schools did not begin to develop until after the Flexner report in 1910;[395] modern imaging was not anywhere on the horizon.

But medicine and the health care system changed rapidly.[396] Several developments became pivotal in the development of workers' compensation. As noted above, employment-based general health insurance was widely adopted after World War II.[397] The wide availability of third party payers for health care fueled the development of technology and specialization, creating escalating costs in the health care system overall and modifying the power relationships within the system.[398] Within the workers' compensation system, this led to changing expectations regarding diagnosis, treatment and evaluation of health conditions, and, as a result, growing costs and increasing complexity of litigation.

Medical care was not a central part of the political debates until the 1980s, when workers' compensation medical costs exploded.[399] Medical costs came to dominate the trends in total

[394] The Department of Labor and the National Academy of Social Insurance issued reports and convened a national forum about workers' compensation on October 5, 2016. *See supra* note 23.
[395] ABRAHAM FLEXNER, MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, Bull. No. Four (1910), available at http://archive.carnegiefoundation.org/pdfs/elibrary/Carnegie_Flexner_Report.pdf
[396] *See generally* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982) (providing a history of how the American health care system of doctors, hospitals, health plans, and government programs evolved).
[397] *See* Enthoven & Fuchs, *supra* note 383 (noting the rapid growth of employment-based health insurance following World War II).
[398] *See generally* Starr, *supra* note 396.
[399] Barth, *Workers' Compensation Before and After 1983*, *supra* note 68, at 13 ("until the early 1980s, health care costs in workers' compensation were only of very limited interest to those involved in public policy."); Baldwin & McLaren, *supra* note 5, at 4, Figure 2 (showing growth in medical costs).

benefit costs in the ensuing period, rising from 29% of total benefits paid in 1980 to 50% in 2010.[400] Health care providers are eating up an increasing share of the total benefits that are paid.

This rise in medical care costs also inevitably puts downward pressure on the adequacy of benefits to be paid to injured workers themselves. While benefits paid per $100 of payroll (including both medical and cash payments to workers) has been declining since 1990,[401] the amount paid in indemnity benefits directly to workers is demonstrably shrinking.[402] Peter Barth, Executive Director of the National Commission, observed, "As the cost of workers' compensation health care surpasses expenditures for indemnity benefits, it seems reasonable to suggest that the former is having an impact on the latter. That is, the growth in costs of one element in workers' compensation (medical costs) is a cause of employer attempts to limit benefit growth in another area (indemnity payments)."[403] This may manifest itself in political attempts to restrict the availability of benefits generally, or in claims management techniques that turn to disability management or other approaches to reduce benefits in individual claims.

Increasing medical costs have also led to a wide range of statutory changes and health care management interventions intended to slow these rising costs. Not surprisingly, techniques such as managed care limited networks, fee schedules, drug formularies and utilization review have been adopted by states and workers' compensation insurance carriers.[404] To a significant extent, these changes mirror developments in the general health care system – and, as in that arena, their success in restricting cost increases is mixed.[405] But there have also been more controversial changes. For example, the right of worker-patients to choose their treating physician has been significantly restricted: in at least thirteen states the employer chooses the physician, at least initially.[406] In some of these states, no provision is made for workers to switch to physicians of their own choice without approval from the employer or insurer.[407] Not surprisingly, workers and their advocates view some of these restrictions with hostility.

Medical care costs are driven higher by treatment that involves higher utilization rates and more expensive procedures and drugs. But the development of increasingly precise diagnostic techniques has also changed approaches in claims to initial diagnosis and to disability evaluation. Old form histories and physicals have been replaced with newer, presumably more objective, diagnostic tools, and the use of primary care providers has often been supplanted in favor of

[400] Baldwin & McLaren, *supra* note 5, at 5, Figure 3.
[401] *Id.* at 3, Figure 1.
[402] Id. at 4, Figure 2.
[403] Barth, *Workers' Compensation Before and After1983*, *supra* note 68, at 13.
[404] *See* Tanabe, *supra* note 200, at 21-26, Table 3.
[405] *See* STACEY M. ECCLESTON, ANATOMY OF WORKERS' COMPENSATION MEDICAL COSTS AND UTILIZATION: A REFERENCE GUIDE, WCRI WC-00-8 (2000) (analyzing medical costs and utilization of medical services in eight states – California, Connecticut, Florida, Georgia, Massachusetts, Minnesota, Pennsylvania and Texas – representing 40 percent of the benefits paid in the nation's workers' compensation system).
[406] Tanabe, *supra* note 200, at 21-26, Table 3.
[407] *Id.*

specialists. These changes have far-reaching consequences for the litigation system, as administrative systems demand both high levels of expertise from witnesses[408]and objective medical evidence that will support claims.[409]

The development of the American Medical Association's Guides to the Evaluation of Permanent Impairment tracks these changes. The first edition was authored by an ad hoc committee and published in 1971,[410] and multiple editions followed.[411] The Guides created a non-evidence-based but widely accepted rating system for partial impairments.[412] This system has remained largely unchanged over time, [413] although it appears that later editions have led to reduced levels of compensation.[414] Each new edition has reflected the changing approaches to diagnosis and medical evaluation.

In sum, changes in U.S. health care have had dramatic effect on the evolution of the workers' compensation system. One would expect that medical care would change in tandem with health care changes made more generally. But the effects of these changes run through the entire workers' compensation system – from the decisions to award benefits, to the amount that is awarded, to the adjudication of claims.

F. Changes in the political equilibrium

As a state-based program with no federal guidelines, workers' compensation is particularly vulnerable to changing balances of political power. The legislative history, described in Part II of this Article, reflects the shifting political balance in states over time – from the early adoption of these laws, through the attempt to improve benefit adequacy in the wake of the National Commission's Report, and then to the changes that have been enacted over the past 25 years.

The dominant business agenda for workers' compensation focuses on reduction in costs for employers, while retaining full immunity from tort. While perhaps best illustrated by the 2013

[408] *See supra* note 264 (use of Daubert standards in litigation in some states).
[409] *See supra* note 254and accompanying text.
[410] AMERICAN MEDICAL ASSOCIATION, COMMITTEE ON RATING OF MENTAL AND PHYSICAL IMPAIRMENT, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (1971) at i (noting that the chapters were initially published in the Journal of the American Medical Association over the years 1958 to 1971 and then reviewed, revised, and combined into a single volume).
[411] Later editions of the Guides were published in 1984 (Second Edition);1988 (Third Edition); 1990 (Third Edition, revised); 1993 (Fourth Edition); 2000 (Fifth Edition); 2007 (Sixth Edition).
[412] *See supra* note 244 (references regarding the accuracy of the ratings).
[413] *See* Burton, The AMA Guides and Permanent Partial Disability Benefits, *supra* note 244, at 17-20 (calling the establishment of the initial ratings "casual empiricism." Id. at 19)
[414] *See* Moss, *supra* note 245, generally and Appendix B, AMA Guides by State at 32.

Oklahoma legislation,[415] the assault on benefits in some states has been nothing short of breathtaking.[416] Norms have shifted.

In many states, this shift is likely to be a reflection of the dramatically declining strength of the union movement. Much as income levels have reflected union density over time,[417] the degree of union density is largely correlated with the adequacy of workers' compensation benefits and with the nature of the legislative changes that are adopted. In states where unions were strong, they were a dominant force throughout the 20th century in protecting injured workers' benefits: from the initial passage of legislation in terms of benefit levels and creation of exclusive state funds;[418] to protecting workers' wage rates when non-union wages fell as a result of workers' compensation insurance costs;[419] to ensuring that unionized workers were able to file for benefits – or raise safety concerns – without suffering retaliation.[420] The decline in labor union density and strength has meant that unions have lost much of their influence in state legislative battles. The effects of this can be seen in a wide variety of state-based labor legislation;[421] the decline in workers' compensation benefits reflects this shift in power.

As union strength has waned, interest in workers' compensation from non-traditional workers' advocacy groups has grown.[422] But these groups lack the political clout of unions in the almost

[415] *See supra* notes 265-285and accompanying text (describing the Oklahoma legislation).
[416] West Virginia is a good example of this. Historically, West Virginia was identified as a state with generous benefits and strong unions. Current data show West Virginia to have had the greatest decline in benefits per $100 of payroll among all states, declining from $2.26 to $1.59 between 2010 and 2014. Baldwin & McLaren, *supra* note 5, at 32-33, Table 12. Employers' costs per $100 of payroll have similarly declined during the same time period, from $2.03 to $1.61. Id. at 38-39, Table 14. But the decline did not begin in 2010: in 1999, benefits per $100 of payroll were $3.96. DANIEL MONT, JOHN F. BURTON, JR., VIRGINIA RENO & CECILI THOMPSON, WORKERS' COMPENSATION: BENEFITS, COVERAGE, AND COSTS, 1999 NEW ESTIMATES AND 1996-1998 REVISIONS (2001) at 21, Table 11. Some of the early changes in the West Virginia statute are described in Spieler, Assessing Fairness, *supra* note 211.
[417] Emin Dinlersoz & Jeremy Greenwood, *The Rise and Fall of Unions in the U.S.*, CES 12-12, June 2012, available at https://www2.census.gov/ces/wp/2012/CES-WP-12-12.pdf (noting that union membership displayed a ∩-shaped pattern over the 20th century, while the distribution of income sketched a U.)
[418] Fishback 2000, *supra* note 32, at 25, 90, 148-67.
[419] *Id.* at 55 (noting that wages did not decline in workplaces with unions in response to workers' compensation costs for employers).
[420] *See* Hirsch, *supra* note 323; Morsel, *The Relationship of unions to prevalence and claim filing*, *supra* note 323; Morse, *Trends in work-related musculoskeletal disorder reports*, *supra* note 323; Pransky, *supra* note 323 (all showing that union members are substantially more likely to receive workers' compensation benefits than non-union workers); Weil, Enforcing OSHA, *supra* note 368 (showing the enhanced ability of unionized workers to raise safety complaints).
[421] For example, state legislatures in states that previously had high union density passed "Right to Work" legislation in West Virginia (2016), Wisconsin (2014), Michigan (2012), and expanded the legislation to the private sector in Indiana (2012).
[422] *See e.g.* Berkowitz, *supra* note 24. (the National Employment Law Project advocating for workers' rights in compensation); NESRI, *What are Injured and Ill Workers' Human Rights?* available at

annual debates over workers' compensation in state legislatures. This means that the entire calculus of political compromise – the calculus that led to the initial "Grand Bargain" – has been upset: with the loss of traditional manufacturing jobs and the tremendous drop in union strength and influence, there is no effective organized voice for injured workers. The balance of power between business, focused on costs, and labor, focused on benefits, has simply shifted. Injured workers lose as a result.

IV. Workers' Compensation Today

The initial Grand Bargain was dually rooted in providing essential benefits to injured workers and the families of workers killed on the job and protecting employers from civil tort liability. Workers gave up their right to sue in exchange for a presumptively *reasonable* alternative. Returning to a description of the program itself, the underlying question continues to be: What is reasonable? Part A examines the program from the inside: what is the current status of benefits, costs and other aspects of the program – and to what extent do benefits meet a definition of adequacy? But an inquiry that focuses on the inside of the program fails to acknowledge that many workers with injuries and illnesses that are caused by work never receive benefits at all – they are entirely outside the frame. Part B explores this issue. Part C returns to one source of the political problems: workers' compensation views are deeply rooted in inconsistent narratives about the system. Finally, Part D turns to a reassessment of the underlying bargain.

A. The current status of workers' compensation

As was true from the initial enactment of workers' compensation statutes, each state establishes its own rules for insuring the workers' compensation risk, regulating the medical care in the program, and setting the specific mechanism and rate for payment to workers who are off work or who suffer long term consequences from their occupational injuries or illnesses. The state laws continue both to share certain basic characteristics and to differ from one another in critically important but often opaque ways. The changes enacted over the past 25 years continue the pattern of variability.

There are some shared characteristics, however. The consistency within the programs follows the pattern that was established in the early 20th century.[423] All programs provide medical care for

https://www.nesri.org/programs/what-are-injured-and-ill-workers-human-rights (the National Economic and Social Rights Initiative addressing workers' compensation issues); NESRI, Injured, Ill and Silenced, *supra* note 378 (addressing issues of retaliation against injured workers). The National Council for Occupational Safety and Health is also active in this area. See http://www.coshnetwork.org/. Individual workers' centers also advocate in this arena, including safety-focused organizations such as WorkSafe (http://www.worksafe.org/) in California and MassCOSH (http://masscosh.org/) in Boston, as well as more general workers' centers focused on low wage and immigrant workers' rights.

[423] For a simple and accurate overview of workers' compensation, see Baldwin & McLaren, *supra* note 5, at 7-10. See also generally Tanabe, *supra* note 200 (providing tables listing benefits and other aspects of

compensated injuries and diseases – although some now limit the duration or amount of medical care that is provided. All programs provide temporary wage replacement benefits (generally referred to as temporary total disability, or TTD, benefits); all replace lost earnings at a fixed percent of pre-injury earnings with a maximum that is generally tied to the particular state's average weekly wage. All make provision for permanent total disability benefits when a worker is too disabled to return to the labor market. All provide benefits to dependents of workers who die from occupational injuries or disease, again with varying limitations. All make some provision for permanent impairments that result from occupational injuries; this last category encompasses a broad array of approaches, all generally referred to as permanent partial disability (PPD) benefits.[424]

Benefits are financed through various insurance mechanisms.[425] In all but four states, employers purchase coverage from private insurance carriers or self-insure after providing some evidence of financial capacity.[426]Increasingly, employers purchase plans with large deductibles, so that initial claims' costs are paid directly by the employer. These employers, as well as self-insured employers, generally engage third party administrators to manage the claims. Self-insurance creates larger incentives for employers to manage the costs of claims and to assist workers in returning to work – but it also increases incentives to discourage the filing of claims in the first place.

In addition, a variety of additional state-controlled funds fill in gaps. For example, special funds often provide insurance to the residual market (i.e., employers who cannot obtain insurance on the private market, often due to a history of large numbers of claims). They may also ensure that workers who find that their employer are (illegally) uninsured can obtain benefits. In every state, employers that fail to obtain insurance lose the mantle of tort protection,[427] but not all states have established special funds to finance benefits and medical care for employees of these employers. In these situations, if employers have disappeared or gone bankrupt, workers may have no recourse at all to obtain either benefits or to sue for damages.

Each state establishes its own system for administration of claims, starting with the procedure for filing a claim through the adjudication of disputes. These procedures vary widely. Those claims that involve arguments over whether work was the cause of the injury or illness, or raise other

state systems); 6-80 Larson's Workers' Compensation Law § 80.01 et seq. (2015) (describing types of disability and benefits).

[424] *See supra* note 191 (briefly describing the different methodologies for PPD).

[425] *See* Baldwin & McLaren, *supra* note 5, at 9-10. Note that an entire separate article could be written on the insurance aspects of this program. I have not attempted to address these issues here.

[426] For insured employers, all premiums are paid by the employer, and there is no payroll deduction taken from employees' paychecks, except in the states of Washington and Oregon. *See* Baldwin & McLaren, *supra* note 5, at 7, n. 9. Note that economists argue that, in reality, workers pay indirectly for the program through reduced wages. *See supra* note 57. *See also* Leigh, Costs of Occupational Injuries and Illnesses, *supra* note 18.

[427] *See* 9-100 Larson's Workers' Compensation Law § 100.01 [4] (2015) ("The operative fact in establishing exclusiveness is that of actual coverage…")

issues involving coverage of an event or an injury, or in which the extent of permanent disability is at issue are, not surprisingly, the most contentious.[428]

Of the claims that are filed and approved, most involve only medical treatment; in these, the injured worker is not off work and presumably suffers no longer term consequences from the injury. These claims are very common (representing 75 percent of all claims) and relatively inexpensive (involving only seven percent of total benefit payments).[429] They are rarely litigated or studied. Of the claims in which some form of cash benefits is paid to workers, the majority involve only temporary earnings replacement,[430] and about 95 percent of the workers in this category are off work for six weeks or less.[431] Claims that also include permanent impairment benefits accounted for less than 38 percent of the lost-time claims, but 53 percent of the total benefits paid.[432] Less than one percent of claims involve permanent total disability or fatalities, representing 7-13 percent of total payments in the period 1994-2012.[433]

As noted previously, the aggregate cost of benefits has been following a downward trend.[434] At the same time, the cost per claim has been rising and the frequency of claims – that is, claims that have been filed, accepted and on which benefits have been paid – has been falling.[435] But this tells us nothing regarding the adequacy of benefits in individual claims. Arguably, none of the state systems have designed benefit structures that consistently meet the definition of adequacy that evolved during the 20th century: that the program should replace two-thirds of earnings lost as a result of an injury.[436] Nor do they meet the basic parameters set out in the National Commission's essential recommendations. In fact, as noted above, the rate of compliance with these recommendations is declining.[437]

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[428] *See* Burton & Spieler, The Lack of Correspondence, *supra* note 222, at 14 (discussing the problem of gray areas in claims that may lead to litigation).
[429] Baldwin & McLaren, *supra* note 5, at 7.
[430] *Id.*
[431] WORKERS' COMPENSATION RESEARCH INSTITUTE, COMPSCOPE™ BENCHMARKS, 15TH EDITION: THE DATABOOK (April 2015), Table 2.12 (data for claims with 2013 injuries).
[432] Baldwin & McLaren, *supra* note 5, at 9.
[433] *Id.*
[434] *See supra* note 259. Note that a trend fails to explain two critical issues. First, it tells us nothing about the cause of the trend. The cause of the trend may be that workplaces are safer; that more workers are failing to file claims; that benefits have become less adequate; that more filed claims are rejected; and so on. Second, a trend does not tell us whether the benefits were or are adequate at any point in time.
[435] In 2015, the average indemnity cost for a claim involving lost-time was $23,455, a 4.5%, and the average medical cost was $28,520. Over the last 20 years, indemnity benefits increased 4.5% year over year and medical benefits increased 5.9% year over year. The frequency of approved lost-time claims decreased 3.6% year over year. Note that frequency here refers to the frequency of claims on which benefits have been paid. The decline in frequency can be attributed to a variety of factors, from better safety to more suppression of claims to a stricter approval process that means that claims are not approved.
[436] *See supra* note 202 (studies on benefit adequacy in workers' compensation).
[437] *See supra* notes 207-208 and accompanying text.

The problems with the adequacy of cash benefits begins as soon as workers are off work because of an injury. For those workers who only receive temporary benefits for a short time, the waiting period required to trigger wage replacement benefits means that they are left without income for a portion of their absence; the benefits for the initial days is only restored if their absence exceeds a specified period.[438] For better paid workers who earn above the average state wage, their weekly benefits are capped by the statutory weekly maximum, resulting in substantially less replacement than two-thirds of their lost income. While the loss of the initial days of income replacement may affect the lowest wage workers the most, the capping of weekly benefits affects high wage earners in hazardous industries, including mining and construction. For those workers who work several jobs – arguably a growing phenomenon[439] - the lost earnings from other jobs may not be covered by the temporary benefits.[440] What this means for individual workers and their families is that, in many situations, they cannot meet household expenses even if they qualify for benefits.[441] The design of benefits may not prevent workers from falling deep into poverty as a result of an injury. Workers who are poor before an injury as a result of working in low wage jobs can quickly fall into destitution as a result of an occupational injury, despite the existence of this safety net.[442]

Replacement for long term lost earnings is even more problematic. The level of benefits paid to workers varies substantially from one state to another. Studies clearly demonstrate that wage losses can extend for many years through a worker's life, even for workers whose absence from work is short.[443] The picture gets gloomier: research now shows that even workers who received only medical care lose earnings during their lifetime in comparison to those who never filed for

[438] The waiting period ranges from three to seven days. Most state statutes also set out a 'clawback' period, so that after this additional period of absence, the benefits for the waiting period are restored. This period ranges up to six weeks in Nebraska. Baldwin & McLaren, supra note 5, Table C at 68-76. Oklahoma and Rhode Island have waiting periods of three days with no clawback. *Id. See also* PETER ROUSMANIERE, THE UNCOMPENSATED WORKER: THE FINANCIAL IMPACT OF WORKERS' COMP ON INJURED WORKERS AND THEIR FAMILIES, WorkCompCentral Special Report January 2016 (describing the effects of the waiting period).

[439] *See* Golden, *supra* note 312 (describing the structural labor market shift to part-time work).

[440] Baldwin & McLaren, supra note 5, at 7. Again, this varies by state.

[441] *See* Rousmaniere, *supra* note 438 (describing the impact on workers and families of the various ways in which temporary total disability benefits fail to fully compensate).

[442] *See* DOL Workers' Compensation Report, *supra* note 21, at 9 and note 25 (noting that "a full-time, year-round worker paid the federal minimum wage of $7.25 per hour would earn $15,080 a year, below the current poverty level guidelines for families, which are set at $16,020 for a family of two, $20,160 for a family of three, $24,300 for a family of four. Workers' compensation does not fully replace immediate income losses…").

[443] *See supra* note 202 (providing a list of many of these studies).

benefits,[444] and that life expectancy for workers who have been injured at work is shorter.[445] Recent changes in states' rules governing benefits are likely to exacerbate these problems.[446]

Long term earnings losses for people with relatively minor injuries is puzzling. In theory, these workers return to work without incident and continue to work. One potential insight comes from an advocacy group that reported that a major company asked, on its pre-employment application, "Have you ever filed for workers' compensation benefits?" A positive answer to this question could easily lead to a decision not to hire – and it would be difficult to prove that this was the motivation.[447] It is possible that stigma and discrimination attach to the filing of claims, and that this follows workers as they seek new employment.

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[444] *See* Seabury, Using linked federal and state data, *supra* note 202.

[445] *See* Leslie I. Boden et al, The impact of non-fatal workplace injuries and illnesses on mortality, 59(12) AM. J. IND. MED. 1061-69 (2016) (finding that lost-time occupational injuries are associated with a substantially elevated mortality hazard for men and women).
Pages 1061–1069

[446] In California, for example, the state contracted with RAND Corporation to review the impact of legislated changes in their workers' compensation system. These studies investigate a range of effects of the legislation. See e.g. Mark A. Peterson et al, Compensating Permanent Workplace Injuries: A Study of the California System, RAND Corporation, MR-920-ICJ (1998), http://www.rand.org/pubs/monograph_reports/MR920.html; Robert Reville et al, Permanent Disability at Private, Self-Insured Firms: A Study of Earnings Loss, Replacement, and Return to Work for Workers' Compensation Claimants, RAND Corporation, MR-1268-ICJ (2001), http://www.rand.org/pubs/monograph_reports/MR1268.html; Seth A. Seabury & Ethan Scherer, Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments Prepared for the California Commission on Health and Safety and Workers' Compensation RAND Corporation (2014), http://www.rand.org/pubs/research_reports/RR425.html. See also Robert T. Reville, *The Impact of a Disabling Workplace Injury on Earnings and Labor Force Participation*, in CONTRIBUTIONS TO ECONOMIC ANALYSIS (John Haltiwanger & Julia Lane eds. 1999), 147–173.

[447] The interesting question is whether this inquiry would violate disability discrimination or other laws. In general, workers' compensation statutes that forbid retaliation refer to discharge of employees and not to hiring decisions. See e.g. Wash. Rev. Code Ann. § 51.48.025 ("no employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation"). Compare La. Stat. Ann. § 23:1361 (extending protection to applicants for employment: "No person, firm or corporation shall refuse to employ any applicant for employment because of such applicant having asserted a claim for workers' compensation benefits.") *See also* Kruk, *supra* note 365. Very few cases have addressed this issue. *See e.g.* Runski v. Nu-Car Carrier Inc., 47 Pa. D. & C.3d 192, 200 (Pa. Com. Pl. 1987) (had plaintiffs demonstrated they had actually been discriminated against based on the fact that they had previously filed worker's compensation claims, the public policy against retaliatory discharge of employees might well apply with equal force to a "retaliatory" refusal to hire). *Compare* Warnek v. ABB Combustion Eng'g Servs., Inc., 137 Wash. 2d 450, 455 (1999) (answering in the negative certified question as to whether workers' compensation retaliation encompasses a failure to rehire). Disability discrimination laws, including the ADA, do cover hiring decisions as well as discharge.

In addition, the problem of assessing permanent disability has plagued the workers' compensation program since its inception. The current state programs are not designed to fully replace earnings lost as the result of an injury. Permanent total disability benefits are rarely awarded and are capped in various ways;[448] these cases are also often classified as partial disability cases and settled without any real review of the long term employment possibilities for the injured worker. Partial benefits are calculated in a range of ways, none of which are designed to replace lifetime earnings losses for injured workers.[449] The growing focus on impairment ratings, generally derived from the AMA's Guides to the Evaluation of Permanent Impairment, as a proxy for earnings replacement, further aggravates the problem.[450] The practice of lump sum settlement of claims also limits the adequacy of benefits – and there is some evidence that these settlements are most often accepted in cases involving workers of lower socio-economic status who were in more dire financial straits.[451] If the primary purpose of these benefits is to replace lifetime earnings losses, then the program is a failure.

Should benefits also include some compensation for non-economic losses? The generally asserted rule is that workers' compensation benefits include economic losses only.[452] But the early compensation systems made provision for disfigurement payments;[453] the lists of scheduled payments for specific injuries in state laws sometimes provide payments in addition to the benefits available for wage losses, or provide them irrespective of whether the worker had any long term economic losses;[454] and the National Commission thought limited payment should be available for the "lifetime effects on the personality and normal activities of the workers."[455] For example, should workers whose hearing is substantially impaired as a result of exposure to excessive noise at work be entitled to some compensation, in addition to medical care and devices, even if they continue at their jobs? Should indemnity benefits be paid to a worker who has limited mobility as a result of an injury, needs assistance at home, but who has been provided full accommodation at work without earnings losses? Currently, the move toward an impairment-based system in many states means that individuals receive only an amount for impairment, irrespective of actual losses. At least in theory, this might encompass both the

[448] *See supra* notes 248-249 and accompanying text.
[449] *See supra* note 191 (explaining the different methodologies for calculation of these benefits).
[450] John F. Burton Jr. has suggested that it would be possible to develop a better proxy for work disability, but no one has attempted to do this.
[451] *See supra* note 257.
[452] *See* 6-80 Larson's Workers' Compensation Law § 80.05 (2015) ("workers' compensation in its origins had a well-understood function: it was to provide support for industrially-disabled workers during periods of actual disability, and for their dependents in the event of occupationally-related death, together with hospital, medical and funeral expenses.")
[453] *See supra* note 100.
[454] *See* 6-80 Larson's Workers' Compensation Law § 80.05 (2015) (the payment for work disability has "given way to a process of paying cash for physical impairment as such, regardless of either actual or presumed loss of earning capacity, and often in a lump sum").
[455] National Commission Report, *supra* note 153, at 68-69.

effects of work disability, with accompanying wage losses, and non-work disability.[456] In other states, in which benefits are determined solely by wage loss, workers receive no compensation for their non-economic losses.[457]

Medical care provided through workers' compensation is highly variable. Now that medical care represents half of the total cost of benefits,[458] there is general agreement that medical care costs are taking too much of the total available resources – and thereby putting additional downward pressure on the benefits that go into workers' pockets. The response to escalating health care cost has been to expand administrative interventions that limit workers' choice without necessarily improving care or reducing costs. While workers in general report that they are satisfied with the medical care they receive,[459] there is considerable controversy regarding some of the health care management techniques that have been introduced into the program.

There is also evidence that the administration of claims, particularly complex claims, is terribly flawed. According to the 2016 U.S. Department of Labor report, Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers?, "workers generally report unhappiness and frustration with state workers' compensation systems."[460] Workers tell endless stories about their wanderings through these systems, about delayed medical care, about unpleasant and stigmatizing interactions, about confusion about what is happening, about feeling pressured into settlements. Lawyers – even the best of them – are unable to solve the problems for their clients. State administrations lack information in the languages that injured workers speak. The more complex the claim, the more difficult this becomes. But the stories abound even in simpler claims. Qualitative empirical research confirms these impressions.[461]Ever increasing complexity of procedures and litigation is resulting in yet more confusion (and dissatisfaction) for all parties.

It is entirely possible that workers with clear traumatic injuries who file claims and return to work quickly (or never lose days at work) may get through the workers' compensation maze reasonably quickly and effectively, with only minimal immediate disruption of earnings. There is

[456] *See* Tanabe, *supra* note 200, at 37-44, Table 6 (states offering only permanent partial impairment benefits include Alaska and West Virginia).
[457] *Id.* Some states provide no "scheduled" permanent partial disability benefits, but pay for wage loss with separate caps. These states include Massachusetts and Michigan.
[458] *See* Baldwin & McLaren, *supra* note 5, at 5, Figure 3.
[459] *See* Bogdan Savych & Venella Thumula, Comparing Outcomes for Injured Workers in Wisconsin, WC-16-37, at 39 Table 3.7, Satisfaction with Overall Care and Primary Providers (May 2016) (results of 15 state surveys of injured workers with approved claims and more than seven days of last time, workers reported satisfied or very satisfied with their health care 71-84 percent of the time, and very dissatisfied 10-20 percent of the time; claimants were least satisfied in Florida and most satisfied in Wisconsin).
[460] DOL Workers' Compensation Report *supra* note 21, at 22.
[461] *See id.* and note 97 (citing several empirical studies validating this point). *See also* Grabell & Berkes, Demolition, *supra* note 191.

evidence to show that a small number of claims soak up the resources of the system.[462] It is, however, also clear that injured workers with compensable claims are receiving medical care through a different and sometimes less responsive system, and that the benefits they receive do not come close to meeting our shared understanding of adequacy.

The political conundrum is that the past creates an equilibrium: all arguments start with protection or change to the status quo ante. Improvements in the benefit structure would inevitably increase costs, leading to predictable opposition from employers and insurers. The political situation in Florida in late 2016 is an example of what happens next.[463]

B. Injured workers outside the workers' compensation frame

In theory, workers' compensation provides medical care and benefits to all workers who suffer injuries and illnesses that arise out of their employment. But the adequacy of the system cannot be assessed without acknowledging that large numbers of American workers do not in fact receive these benefits, even when their injuries and illnesses are clearly caused or exacerbated by their work.[464] This is rarely considered in the discussions of the internal adequacy of the system. In fact, it is estimated that only 20 percent of the costs of occupational illnesses and injuries are now being borne by employers.[465] Instead, costs are being transferred to the workers themselves, to their families and communities, and to other benefit programs.[466]

There are three ways in which workers with work injuries or occupational illnesses end up outside the workers' compensation system: the statute explicitly excludes them or their employers from coverage; they never file claims; or they are arguably covered by the statute, file claims, but their claims are rejected as non-compensable. For all of these workers, no benefits are paid. None of these workers are counted when assessments are done of the benefits that are paid in the system – or of the costs that are paid by employers.

1) Statutory exclusions

Despite the urging by the National Commission, groups of workers and employers are still explicitly excluded by statute. Some states do not require workers' compensation insurance for

[462] IAIABC Return to Work, *supra* note 380, at 5 (estimating that 5 to10% of workers' compensation claims account for 80 to 90% of claims costs).
[463] *See supra* notes 288-293 and accompanying text.
[464] *See* Spieler & Burton, The Lack of Correspondence, *supra* note 222, at 7-9 (describing the various ways in which workers with work-caused disabilities may be excluded from workers' compensation).
[465] J. Paul Leigh and JP Marcin, *Workers' compensation benefits and shifting costs for occupational injury and illness*, 54 J. OC. & ENVIRON. MED. 445-450 (2012). *See also* DOL Workers' Compensation Report, *supra* note 21, at 5.
[466] For studies showing transfer of costs to SSDI, *see supra* note 386. *See also* DOL Workers' Compensation Report, *supra* note 21, at 6, 23.

small employers.[467] Domestic workers are excluded almost universally.[468] Coverage for farm workers is still very limited in many states.[469] Independent contractors, a growing segment of the labor force,[470] as well as casual workers, are outside the scope of social insurance programs entirely. So are many of the workers in Texas, the only remaining state in which employers can elect workers' compensation coverage.[471] The National Academy of Social Insurance estimates that 97 percent of workers in wage and salary jobs that are covered by the UI system are also covered by workers' compensation.[472] This is an underestimate of the total effect of these exclusions, as it does not consider the workers who do not fit into the classic employee-employer model.[473]

2) Failure to file

The data are startlingly clear: many workers who work in jobs covered by the workers' compensation laws simply do not file for benefits.[474] Studies have reached the alarming

[467] *See* Tanabe, *supra* note 200, at 16-20, Table 2.
[468] *See id.*
[469] *See id*. *See also* Baldwin & McLaren, *supra* note 5, 58-59, Table A.
[470] Krueger & Katz, *supra* note 314.
[471] *See* Baldwin & McLaren, *supra* note 5, 58-59, Table A (estimating non-covered workers in Texas at 2.2 million).
[472] *See* Baldwin & McLaren, *supra* note 5, at 58-59, Table A.
[473] *Id.*
[474] *See* Spieler & Burton, The Lack of Correspondence, *supra* note 222 (citing numerous studies demonstrating the failure to file as a core reason that the numbers of people with work-caused disabilities and the numbers of claims do not match up); Emily A. Spieler & Gregory R. Wagner, *Counting matters: Implications of undercounting in the BLS survey of occupational injuries and illnesses*, 57(10) AM.J. IND.MED. 1077–1084 (2014) (exploring the various reasons that workers' do not report injuries). Six studies involving amputations were funded by the Bureau of Labor Statistics to investigate underreporting in the BLS Survey of Occupational Injuries and Illnesses, and were published as a group in 2014 in the American Journal of Industrial Medicine; these studies compared workers' compensation data with Bureau of Labor Statistics and with hospital reports and found substantial underreporting in all three systems. *See* Leslie I. Boden, *Capture–recapture estimates of the undercount of workplace injuries and illnesses: Sensitivity analysis*, 57(10) AM.J. IND.MED.1090–1099 (2014); Sara E. Wuellner and David K. Bonauto, *Injury classification agreement in linked Bureau of Labor Statistics and Workers' Compensation data*, 57(10) AM.J. IND.MED. 1100–1109 (2014); Lauren Joe, Rachel Roisman, Stella Beckman, Martha Jones, John Beckman, Matt Frederick & Robert Harrison, *Using multiple data sets for public health tracking of work-related injuries and illnesses in California*, 57(10) AM.J. IND. MED . 1110–1119 (2014); Letitia K. Davis, Kathleen M. Grattan, Sangwoo Tak, Lucy F. Bullock, Al Ozonoff and Leslie I. Boden, *Use of multiple data sources for surveillance of work-related amputations in Massachusetts, comparison with official estimates and implications for national surveillance*, 57(10) AM.J. IND.MED. 1120–1132 (2014); Sara E. Wuellner and David K. Bonauto, *Exploring the relationship between employer recordkeeping and underreporting in the BLS Survey of Occupational Injuries and Illnesses*, 57(10) AM.J. IND.MED 1133–1143 (2014); Sangwoo Tak, Kathleen Grattan, Les Boden, Al Ozonoff and Letitia Davis, *Impact of differential injury reporting on the estimation of the total number of work-related amputations*, 57(10) AM.J. IND.MED. 1144–1148 (2014). These studies re-confirm other research that

conclusion that large numbers of people who sustain injuries at work as clearly compensable as amputations (amputations!) do not file claims.[475]

In her recent article, *Transmitting the Costs of Unsafe Work*, Professor Charlotte Alexander describes the results of two worker surveys: the 2008 Three Cities Survey of 4,387 low-wage workers in New York, Chicago, and Los Angeles who were drawn from a variety of industries and occupations, including cooks and dishwashers, maids and housekeepers, cashiers, garment workers, teachers' assistants, and security guards; and a 2011 survey of 286 non-supervisory poultry workers in Alabama.[476] These surveys provide illuminating information regarding low wage workers and workers' compensation filing rates. In the 2008 urban survey, 607 workers reported they had been seriously injured in the prior three years; of these, 537 informed their employer. The most frequent employer reactions to the reports "were attempts to deter or dissuade workers from filing a workers' compensation claim and/or outright acts of retaliation… Of those 537 workers who notified their employers, sixty-six (twelve percent) then went on to file a workers' compensation claim. And of the filed claims that had been resolved by the time of the survey, fifty-three (eighty percent) were granted benefits."[477] That is, of the sample of 607 injured workers, only 53 workers, or less than nine percent, actually received benefits. Analysis of the results determined that "workers who lacked legal immigration status, whose employers were not 'high road,' and who lacked legal knowledge, were all less likely to have filed a workers' compensation claim."[478] Among the poultry workers, approximately fifty-nine percent of their occupational injuries were reported. Reasons given for not reporting fell into two primary categories: "fear of retaliatory termination, suspension, or discipline" and "a belief in the ineffectiveness of the system."[479] Of those workers who did report their illnesses and injuries, only nine workers actually received workers' compensation benefits.[480]

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shows significant numbers of people simply do not file. *See e.g.* Kenneth Rosenman et al, *How much work-related injury and illness is missed by the current national surveillance system*? 48 J. OC. & ENVIRON. MED. 357-365 (2006); Leslie I. Boden & David A. Ozonoff, *Capture–recapture estimates of nonfatal workplace injuries and illnesses*, 18 ANNALS OF EPIDEMIOLOGY 500-506 (2008); Tim Morse, C. Dillon, Nicholas Warren, et al., *Capture-recapture estimation of unreported work-related musculoskeletal disorders in Connecticut*, 39 AM.J. IND. MED. 636-642 (2001); Monica Galizzi, P. Miesmaa, Laura Punnett, et al., *Injured Workers' Underreporting in the Health Care Industry: An Analysis Using Quantitative, Qualitative, and Observational Data*, 49 IND.REL.: A JOURNAL OF ECONOMY AND SOCIETY 22-43 (2010); Z.J. Fan ZJ, David K. Bonauto, M.P. Foley, et al., *Underreporting of work-related injury or illness to workers' compensation: individual and industry factors*, 48 J. OC. & ENVIRON. MED. 914-922 (2006); X.S.Dong, A. Fujimoto, Knut Ringen, et al., *Injury underreporting among small establishments in the construction industry*, 54 AM.J. IND. MED 339-349 (2011). See also DOL Inequality Report, *supra* note 2; DOL Workers' Compensation Report, *supra* note 21.

[475] See the six studies referenced *supra* note 474 that were published in 2014 in the American Journal of Industrial Medicine.

[476] Charlotte S. Alexander, Transmitting the Costs of Unsafe Work, *supra* note 320.

[477] *Id.*

[478] *Id.*

[479] *Id.*

[480] *Id.*

The reasons that people do not file for benefits are varied and complex, reflecting both the power relationships within the employment relationship, the level of knowledge of workers (and their doctors), and the nature of the system.[481] More specifically, empirical research has shown that these reasons include the following: ignorance about the system[482] or about the work-relatedness of a condition;[483] fear of retaliation;[484] concern about stigma;[485] failure of the physician to link the injury or illness to work;[486] belief that the injury is inadequately severe to merit a claim;[487] administrative and procedural hurdles that can be demeaning or, at best, time consuming;[488] or a decision to seek coverage under alternative payment systems.[489] Policies and practices of employers that discourage reporting of injuries or filing of claims, such as offering incentives to reduce reporting of injuries, are now outlawed by the Occupational Safety and Health Administration, which responded to persistent stories of "safety bingo" programs that led to

[481] *Id. See also* Spieler & Burton, The Lack of Correspondence, *supra* note 222; L.S. Azaroff, Charles Levenstein, David H. Wegman, *Occupational injury and illness surveillance: Conceptual filters explain underreporting*, 92 AM.J. PUBLIC HEALTH, 1421-1429 (2002) (describing mechanisms through which injuries and illness fail to be recorded by employers).
[482] Spieler & Burton, The Lack of Correspondence, *supra* note 222 at 10 (citing various studies)
[483] *Id.* at 11 (citing various studies)
[484] *Id.* See also Dong X, Ringen K, Men Y, et al. Medical costs and sources of payment for work-related injuries among Hispanic construction workers, 49 J. OC. & ENVIRON. MED. 1367-1375 (2007) (showing that undocumented workers are particularly unlikely to file for this reason.); WCRI, Predictors of Worker Outcomes in Tennessee, supra note 382 (45 percent of workers who responded to survey reported they were somewhat or very concerned that they would be fired or laid off if they were injured).
[485] *See* Lee Strunin & Leslie I. Boden, *The workers' compensation system: Worker friend or foe*? 45 AM. J. IND. MED. 338-345 (2004).
[486] *See* GOVERNMENT ACCOUNTING OFFICE, WORKPLACE SAFETY AND HEALTH: BETTER OSHA GUIDANCE NEEDED ON SAFETY & HEALTH PROGRAMS, GAO-12-329 (2012) (describing pressure put on physicians regarding filing for workers' compensation benefits).
[487] Spieler & Burton, The Lack of Correspondence, *supra* note 222, at 11 (citing various studies).
[488] *Id.*
[489] *Id.*

unreported injuries and claims.[490] The rate of underreporting of injuries varies, but ranges as high as 77%, according to a recent study of agricultural workers.[491]

The implications of these findings are important for workers' compensation policy: reductions in the number of claims may be a reflection of external factors – including both the nature of the employment relationship as well as the generosity and the perceived fairness of the system – rather than a reflection of changing injury rates. [492]

[490] The Occupational Safety and Health Administration has indicated that incentive programs may discourage reporting and that these types of programs are unlawful under both the whistleblower laws (see Memorandum from Richard E. Fairfax, Employer Safety Incentive and Disincentive Policies and Practices, March 12, 2012, available at https://www.osha.gov/as/opa/whistleblowermemo.html), and in regulations issued in 2016 governing record-keeping requirements for employers that prohibit various policies that might depress the willingness of employees to report hazards and injuries. *See* 29 C.F.R. §§ 1904.35–1904.36 (2015). In 2016, the new rule was further explained on the OSHA website (https://www.osha.gov/recordkeeping/modernization_guidance.html) (last visited Dec. 28, 2016) and in a memorandum issued by Deputy Assistant Secretary Dorothy Dougherty to Regional Administrators on October 19, 2016. Memorandum from Dorothy Dougherty, Deputy Assistant Secretary, Occupational Safety & Health Admin. (Oct. 19, 2016) https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html (noting that amended 29 C.F.R. 1904.35 adds "two new provisions: section 1904.35(b)(1)(i) makes explicit the longstanding requirement for employers to have a reasonable procedure for employees to report work-related injuries and illnesses, and (b)(1)(iv) incorporates explicitly into Part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c)").

[491] J. Paul Leigh, Juan Du, Stephen A. McCurdy, *An estimate of the U.S. government's undercount of nonfatal occupational injuries and illnesses in agriculture*, 24 ANNALS OF EPIDEMIOLOGY 254 (2016). Underreporting of injuries by employers, and failure to file workers' compensation claims, appear to have some correlation, although both systems of counting display significant levels of underreporting. *See* Spieler & Wagner, *supra* note 474 (discussing findings regarding underreporting and the implications for public health).

[492] *See supra* notes 326 to 330 and accompanying text for a discussion of the reported injury and fatality rates. Notably, underreporting is not new. Fishback 2000, *supra* note 32,at 39, notes with regard to the pre-workers' compensation negligence system, "If there was little chance of compensation, a worker had little incentive to report an accident under the negligence system because doing so may have jeopardized his job by signaling to the employer that he was either accident-prone or a malcontent. Similarly, employers had little incentive to report accidents for which they did not compensate workers because they might alert factor inspectors and others to dangerous working conditions." Workers with more experience at their firms were more likely to receive compensation. *Id.* at 44. Fishback does not acknowledge in his discussion of moral hazard that the same disincentives may persist in workers' compensation schemes.

In addition, occupational disease claims are rarely filed and often not compensated once they are filed,[493] despite the fact that all states nominally provide compensate qualifying diseases.[494] There is strong evidence that diseases caused by work exposures are common.[495] But statutes of limitations in some states bar claims for diseases with long latency periods,[496] and other states exclude diseases that may be confused with ordinary diseases of life that exist outside of work.[497] Workers may have retired, moved on and been treated by physicians who never think to ask about their occupational history; or they may think it is not worth the trouble to file; or they may be far from the jurisdiction in which they would be expected to file and pursue their claims. The disease claims that show up in workers' compensation – or in the reporting system of the Bureau of Labor Statistics – simply do not reflect the prevalence of disease.[498] Responding to these troubling gaps and moments of particular political pressure, federal laws have been passed to compensate coal miners for black lung disease,[499] first responders to the 9-11 attacks,[500] people exposed to radiation[501] and who worked as civilians in the nuclear industry.[502] These are laws of

[493] See Barth & Hunt, supra note 203 (noting that there is little evidence that occupational diseases are compensated); see also Biddle J et al, What percentage of workers with work-related illnesses receive workers' compensation benefits? 40 J. Oc. & Environ. Med. 325-331 (1998) (showing low level of compensation for diseases). Occupational diseases are also not reported in the Survey of Occupational Injuries and Illnesses (SOII) of the Bureau of Labor Statistics, thus remaining largely invisible from the discussion of the costs of occupationally-caused morbidity. See Spieler & Wagner, Counting Matters, supra note 474.

[494] See 4-52 Larson's Workers' Compensation Law § 52.01 (2015).

[495] See Paul A. Schulte, Characterizing the burden of occupational injury and disease, 47 J. Oc. & Environ. Med.607-622 (2005 (providing a theoretical construct); Kyle Steenland et al, Dying for work: The magnitude of U.S. mortality from selected causes of death associated with occupation, 43 Am. J. Ind. Med. 461-82 (2003) (numerical description of the problem).

[496] See e.g. Ala. Code § 25-5-117 (statute of limitations for filing occupational disease claims runs from the date of last exposure). See also 4-53 Larson's Workers' Compensation Law § 53.04 (2015) (discussing this issue and noting that eight states continue to have statute of limitations restrictions on occupational diseases irrespective of latency periods).

[497] See 4-52 Larson's Workers' Compensation Law § 52.03 (2015).

[498] *See* Spieler & Wagner, Counting Matters, supra note 474.

[499] Black Lung Benefits Act (BLBA), 30 U.S.C. § 901 (Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat .742, 30 U.S.C. § 801 et seq.). The BLBA has been amended several times since its initial passage in 1969, most recently by Section 1556 of the Affordable Care Act that restored several presumptions that had been removed from the law.

[500] The September 11th Victim Compensation Fund, Pub. L. No. 107–42, 115 Stat. 230 (2001) and the James Zadroga 9/11 Health and Compensation Act of 2010, Pub.L. 111-347 (both providing compensation and medical care victims of the Sept. 11, 2001 attacks on the World Trade Center in New York City).

[501] Radiation Exposure Compensation Act, 42 U.S.C. § 2210 (established an administrative program for claims relating to atmospheric nuclear testing and to uranium industry employment).

[502] The Energy Employees Occupational Illness Compensation Act, 42 U.S.C. § 7384 (EEOICA) (compensation for civilian workers in the nuclear weapons industry).

very limited scope, although their cost demonstrates that compensation for diseases can, indeed, be expensive.[503]

3) Failure to compensate claims that are filed

For those injured workers who do file claims, there is no guarantee that they will receive benefits. The conceptual framework of workers' compensation is to provide benefits to workers whose injuries or illnesses arose out of and in the course of their employment. In essence, this requires proof of causation. In many claims, particularly those involving acute traumatic events, causation is not questioned. Questions and litigation over causation may arise, however, in cases that are less clear. These include, for example, conditions arising from multiple exposures over time or aggravation of a worker's preexisting health conditions.[504]

New provisions in state laws that exclude aggravation of preexisting conditions or require higher standards of evidentiary proof are likely to decrease the approval of claims that have been filed,[505] and, as a consequence, to further discourage injured workers from filing claims. These changes, described earlier in this article, particularly focus on the exclusion of injuries where work may not be the major contributing cause of the condition (though it may be the straw that broke the camel's back, causing work-related disability) or specifically exclude or limit compensation for particular conditions (such as some musculoskeletal or stress-related disorders).

The boundaries of what is – or should be – considered compensable have never been crystal clear. The question of where to draw the line was debated by the National Commission[506] and has been addressed by the various state adjudicatory bodies.[507] Ultimately, the policy question is: who should pay the costs of a worker's impairment, displacement from work or long term loss of earnings losses? If claims are denied – or pre-existing conditions are not compensated through an apportionment process – then workers themselves, or other benefit systems, bear these costs. It

[503] *See* McLaren & Baldwin, *supra* note 5, at 64, Table B3 (excluding administrative costs, benefit costs for black lung in 2014 were $309,048,000); Id. at 65, Table B4 (costs for EEOICPA benefits in 2014 were $1,039,859,000); Id. at 66, Table B5 (total benefits paid as of 2014 under the Radiation Exposure Compensation Act were $1,960,299,000).
[504] *See* Spieler & Burton, Lack of Correspondence, *supra* note 222 at 13-15.
[505] *See supra* note 260 (listing empirical studies showing that these compensability rules have affected the availability of benefits). Notably, there appears to be no available data that provide good insight into the numbers of claims that are filed but not compensated, despite the growing concern that recent legislative changes may result in rejections of claims.
[506] National Commission Report, *supra* note 153, at 50-51 ("The question is how to construct a practical application of the phrase 'arising out of and in the course of employment' in a test for compensability of injuries or disease…. As the basic purpose of workmen's compensation is to protect the employee, we believe in the traditional practice of resolving doubts in favor of the employee. At the same time, we do not believe that workmen's compensation should be converted into a general insurance scheme: its function is not to protect against all sources of impairment or death for workers.")
[507] *See* 3 Larson's Workers' Compensation Law § 3.01 (2015).

seems logical that workers who go to work and are able to do their jobs in the morning, who are unable to continue to work at the end of the day, should be among those eligible for compensation. The trend toward dual denial, in which workers have no legal recourse at all for injuries[508] – whether or not their employers' have been negligent or reckless – is a complete abrogation of the initial 'bargain.' The alternative, of course, is that workers' compensation should be more inclusive, in which case costs of the program would inevitably rise.

C. Inconsistent narratives [509]

The politics of workers' compensation are affected by the deep divisions among stakeholders in their views of this world. The very purpose of workers' compensation is described and valued differently by different parties. Here are three different viewpoints.[510]

1) Workers' compensation as social insurance

Those who view workers' compensation as a social insurance program ask: What is the financial burden on workers and their families that results from the injury? Are the benefits adequate to replace injured workers' lost earnings? Is the medical care prompt and appropriate? Researchers who study these questions assume that the measure of benefit adequacy should be lifetime lost earnings, and they universally conclude that benefits are not adequate.[511] In general, settlements of claims that result in a lump sum are therefore viewed by suspicion. This is the view that often dominates the public critiques of the program, with a focus on the inconsistencies and the barriers to compensation.[512]

[508] *See supra* note 230 and accompanying text (discussing issue of dual denial).
[509] The information in this section is largely drawn from the author's extensive personal experience with workers' compensation programs and stakeholders. These experiences have included working with injured workers in West Virginia; acting as Commissioner (sole CEO) for the West Virginia workers' compensation system while it was an exclusive state fund; developing and defending a legislative agenda in West Virginia while in this position; participating in numerous national meetings of stakeholders; acting as Chair of the federal advisory committee on the Energy Occupational Injury and Illness Compensation Act to the U.S. Dep't of Energy; participating in the work of the National Academy of Social Insurance on workers' compensation for 20 years; acting as President Obama's transition team member assigned to review the Occupational Safety and Health Administration; acting as Chair of the federal advisory committee to the U.S. Dep't of Labor on whistleblower laws; and participating in legal committees for injured workers groups as well as in scholarly meetings.
[510] There are other viewpoints, not covered in the text, including those that emerge from the vantage point of the insurers, and those that emerge when the focus is primarily on the interrelationship between workers' compensation and safety. With regard to the latter issue, see Spieler, Perpetuating Risk, *supra* note 15.
[511] *See supra* note 202 (studies on benefit adequacy in workers' compensation). *See also* Rousmaniere, *supra* note 438 (showing the risk of family financial instability while the worker recovers); DOL Workers' Compensation Report, *supra* note 21, at 21-22.
[512] *See e.g.* Grabell & Berkes, Demolition, *supra* note 191 (focusing on the decreasing adequacy of benefits and inconsistency in state programs).

2) Workers' compensation as a no-fault strict liability system

On the other hand, the system can be viewed as a no-fault strict liability replacement for the common law tort system. In this view, the point of the system is financial compensation of the victim and, otherwise, broad immunity from civil liability in tort for employers. It follows, then, that settlements that monetize claims and terminate litigation and liability are inherently appropriate. The employment relationship is essentially irrelevant. Often claimants' attorneys, insurers and employers will agree that a final monetary settlement of a claim within the system's parameters is the best result – that the parties should end the ambiguity of an on-going claim or any expectation of on-going employment – and move on. This acceptance of finality is much more consistent with a tort-based view than a social insurance perspective.

Rigid protection against expanded civil tort liability for employers is critical to any understanding of this strict liability 'bargain.' Any incursion on this protection is viewed as entirely inconsistent with the essential nature of workers' compensation. Notably, if tort immunity is the primary goal of the statutes, then the fact that lower benefits are paid – or that workers with legitimate injuries may never file claims or receive benefits – is entirely irrelevant. The strength of the immunity does not fluctuate with the adequacy of coverage, as long as workers are precluded from filing tort actions when the employer is negligent or even reckless with regard to worker safety. [513] Thus, business interests will fight hard against judicial decisions that expand liability,[514] will support efforts to institute systems that deny workers both benefits and tort rights,[515] will rarely express concern about workers who are excluded from the compensation system,[516] and largely favor settlements that will end future liability and create efficiencies in the litigation system. Operating from this vantage point, the development of the opt-out system in Oklahoma can be hailed as a positive change by the business community.[517]

[513] Professor Rabin suggests that the allowance of alternative remedies for injured workers against non-employer entities may represent a crack in the exclusivity of workers' compensation, particularly when third party litigation involving an injured worker results in a contribution claim against the employer because of the employer's contribution to the injury. The question then becomes whether the exclusivity granted by workers' compensation should be extended to these types of claims. *See* Rabin, *supra* note 113.

[514] *See supra* notes 351- 353 and accompanying text.

[515] *See supra* note 230 and accompanying text (discussing issue of dual denial).

[516] Although, to be fair, there was some dismay at the Workers' Compensation Summit in June 2016 expressed by employer and insurer representative when there was discussion that 20% of amputees may not be filing for benefits. (Author was present at the meeting)

[517] The Oklahoma Chamber of Commerce has, in fact, decried the September ruling by the Oklahoma Supreme Court that tossed out the opt-out law. "Once again the Oklahoma Supreme Court has shown disdain for the legislative process by legislating from the bench. Today's ruling that the Oklahoma Option is (an) unconstitutional 'special law' shows a lack of understanding of the reason for that article in the constitution — and a willingness to use that provision as a 'hammer' to pound any legislative 'nail' it doesn't like," said Chamber vice president of government affairs Jonathan Buxton on September 14, 2016

Similarly, the extension of immunity through statutory or contractual protections or pre-employment waivers to subcontractors, contractors and site employers in fissured arrangements makes complete sense, irrespective of the level of danger at the workplace.[518] While sometimes viewed as an effort to ensure that benefits are available to workers who work within these complex employment relationships (that is, bolstering the availability of social insurance), immunity from tort appears to be an equally important consideration as these arrangements are made.

3) Workers' compensation as a disability management system

There is a third dominant view that has emerged in recent decades: workers' compensation as a disability management system. From this vantage point, the purpose of the system is to get an injured worker back to work. Compensation is secondary to this goal. As one workers' compensation professional describes this view:

> I have been proposing that the industry known as "Workers' Compensation" be renamed to the more aptly titled and more easily defined, "Workers' Recovery". The concept first started its gestation with the realization that those people who were newly injured and completely lost within the matrix of workers' comp were focusing on the word compensation …Over the years I have been bothered when I see a new injured worker … give a general description of their accident, and then … ask the question, "How much will I make?" The better question would be, "How do I get better?", or "How do I manage this complex and frustrating system and get back to work?" [519]

Of course, the question, "How much will I make?" is exactly the right question if the system is viewed as a simple replacement for tort. On the other hand, clear evidence shows that successful return-to-work interventions result in better social, economic and health outcomes for workers – when managed appropriately, with the interests of the injured worker in mind. [520]

4) How these views collide

There are unquestionably on-going efforts to suggest that a more consistent and evidence-based narrative would be beneficial. But, for now, the stakeholders in this program remain far apart.[521]

(as quoted in William W. Savage III, Workers' Comp: Supreme Court Voids Special Law, Nondoc (September 14, 2016) https://nondoc.com/2016/09/14/workers-comp-supreme-court-special-law/

[518] *See supra* notes 313 to 319 and accompanying text.

[519] Robert Wilson, Can We Change the Culture of Comp With a Single Word? (10/19/2016 07:04:00) available at http://www.workerscompensation.com/compnewsnetwork/from-bobs-cluttered-desk/24798-can-we-change-the-culture-of-comp-with-a-single-word.html

[520] *See* IAIABC, Return to Work, *supra* note 380, at 8-10.

[521] *Id.* at 11-12.

Workers' advocates view workers' compensation as a critically necessary social benefit program. They ask: are benefits adequate, equitable and available? From this vantage point, it is vital that universal adequate benefits be available to all workers who are injured or made ill by their work. Human rights activists have articulated a set of principles that should govern the system.[522] Many currently common practices are cause for concern: exclusions of workers from the system, from farm and domestic workers to workers who are misclassified as independent contractors;[523] waivers of rights that are not fully voluntary;[524] workplace policies that discourage workers from filing for benefits; retaliation for filing claims;[525] failure to acquaint temporary workers regarding their rights to compensation; compromise and release or settlement agreements that leave workers with inadequate benefits and no right to return to work; medical care utilization controls that may delay essential care; distrust of doctors whom workers are required to see (and who, they believe, devalue their pain and levels of disability) – the list is long, and involves an intricate pattern of employers' and insurers' practices, various bars to adequate review of claims, extensive medical treatment controls, and, sometimes, actual lies.[526] The view is that the current system is woefully inadequate, both procedurally and substantively, and it is growing worse as states race to the bottom and the increasingly fissured workplace creates more work without any employment protections. Although not outright rejecting the idea of disability management, advocates view with suspicion any attempt to limit benefits through claims management techniques. They worry about the loss of confidentiality when workers' medical information is

[522] The National Economic and Social Rights Initiative (NESRI) has developed the following human rights principles to govern workers' compensation:

- Universality: Every person must have full, prompt, and guaranteed access to health care, income support, retraining, and rehabilitation, according to their needs after a work injury or illness;
- Equity: Health care and income support for injured and ill workers must be publicly financed through equitable taxation, and must be aligned with other health care and social support systems. All people must have equitable access to workers' compensation regardless of the nature of their injury or illness, their industry of employment, or any other factor;
- Accountability: Oversight, monitoring, and evaluation mechanisms must ensure that injured and ill workers' human rights are realized;
- Transparency: Decision-making processes that affect the design, implementation, and management of systems for injured and ill workers must be open, clear, and easily accessible. All relevant data and information must be collected and provided clearly and accessibly to workers, and must accurately report work injuries and illnesses;
- Participation: Government must support a meaningful role for workers in decisions that affect how their human rights are met after experiencing a workplace injury or illness.

See NESRI, What are Injured and Ill Workers' Human Rights? *supra* note 422, available at https://www.nesri.org/programs/what-are-injured-and-ill-workers-human-rights

[523] *See e.g.* Berkowitz, *supra* note 24.

[524] *See e.g.* Molina v. State Gardens, 88 Mass. App. Ct. 173 (2014) (tort immunity for host employer through employee's ex ante waiver).

[525] *See* NESRI, *Injured, Ill and Silenced*, *supra* note 378.

[526] The story of the federal black lung program and the doctors within it exemplifies this last concern. *See* Hamby, *supra* note 19 (Pulitzer Prize winning story regarding the denial of benefits to coal miners with black lung disease).

shared with employers, and about forced return to work after an injury that terminates benefits without appropriate workplace accommodation or commitment to long term employment.[527] The focus of worker advocates is on controlling the behavior of employers and insurance carriers (and their associations) that may result in denial or delay in claims or retaliation against workers.

This viewpoint is fueled by consistent and painful narratives of workers whose claims are rejected or who are caught in endless Kafkaesque claims administration and litigation, unable to get necessary medical care and stigmatized and treated with disrespect by their employers, by the insurance carriers, by claims administrators – and sometimes by co-workers who are motivated by their employers' "safety bingo" policies.[528] The problem is exacerbated by many claimants' lawyers whose case volume is too large to give individualized attention to their clients – and the case volume grows as legislatures enact statutory fee maximums.

Of course, critics of this viewpoint are wary – or sometimes hostile. They point to 'unmanageable' escalations in costs and the comparative competitiveness of their own states in attracting businesses. They argue that claims management is critical. Thus, they champion disability management as a win-win – restoring injured workers to the workplace and reducing costs in a claim. They therefore may insist that workers' medical information needs to be shared with workers' employers and that the employer should control the return to work process, working with the employee's physician – who may have been selected by the insurance carrier or employer. They are often suspicious of workers, raising concerns about fraud in filing or duration of claims. They support these narratives with stories of workers who have 'gamed' the system. In essence, their focus is on controlling workers' behavior and on cost reduction.

Whose behavior warrants concern? Economists focus on questions of moral hazard – the way in which the existence of insurance creates economic incentives that affects peoples' behaviors.[529] Workers' advocates concentrate on the behavior of employers and insurance carriers. They note

[527] The research literature demonstrates that an initial return to work – often associated with a termination of benefits – does not necessarily correlate with long term employment. See e.g.
Richard J. Butler et al, *Managing work disability: why first return to work is not a measure of success*, 48(3) IND. & LAB. REL. REV. 452-469 (1995).

[528] This is particularly true for incentive programs that provide a group of workers with individual rewards if none of them is 'injured' – that is, reports an injury. *See supra* note 490 (OSHA's attempt to address them). *See also* Spieler, Whistleblowers and Safety at Work, *supra* note 375.

[529] For a discussion of the various ways to conceptualize moral hazard in the context of workers' compensation, see Guo & Burton, W*orkers' Compensation: Recent Developments in Moral Hazard and Benefit Payments*, *supra* note 260, at 341-42 (providing a theoretical model and noting that workers' may respond to respond to increases in expected benefits by incurring more injuries or by filing more or longer duration claims, while employers may respond by making workplaces safer, or by denying or fighting claims, or by restricting duration of claims through return-to-work or other interventions). See also Morantz, Back to the Future *supra* note 27 (providing a discussion of moral hazard in workers' compensation). For a review of the empirical literature, see John Burton, *The Economics of Safety*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORIAL SCIENCES 863 (James D. Wright ed., 2nd ed. 2015).

that employers can reduce compensation costs not just through safety but also through other more problematic behaviors. These include policies that discourage the filing of claims through various incentive programs, increased scrutiny of workers' behaviors if they report injuries, aggressive denial of claims, suppression of the filing of claims through retaliation or threats, and inappropriate return to work programs that bring workers back to work and cut off their benefits without a real promise of continued accommodation.

In contrast, the concerns raised by employers and insurers focus on the behavior of workers and the advocates, including treating physicians who – they charge – are easily manipulated by their patients with whom they want to maintain on on-going relationship. This view focuses on concerns about fraud, over-filing of claims, and excessive length of time off work, arguing that higher benefits lead, at a minimum, to increased numbers and longer duration of claims, and perhaps to increased injury rates.[530] Notably, recent research suggests that moral hazard effects involving workers may, in any event, have been overstated.[531] The multiplicity of variables – including not only worker and employer behavior, but also trends in productivity, technology, management techniques and so on – make it difficult to isolate any single causation for changes in the number of claims filed. Any increases in claims filing that coincides with increased benefits may simply mean that more legitimate claims are filed – rather than any increase in illegitimate claims-filing.

These differing motivations and opinions are deeply held by people involved in the state-based political battles over workers' compensation.[532] The inability to find compromise and a path forward is, at least in part, rooted in these viewpoints. There is no indication that these divisions are lessening, and thus every sign points to continuing state-by-state political battles. According to the 2016 Department of Labor report on workers' compensation, "Distrust – on all sides, in individual claims, with regard to systemic issues and in the political process – characterizes almost every state program and undoubtedly contributes to workers' decisions not to file claims and to employers' decisions to fights claims."[533]

D. Reassessing the Grand Bargain

The bargain is a "quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance."[534] In 1917, the Supreme Court suggested that the system had to

[530] *See* Morantz, Back to the Future, *supra* note 27 (providing references for studies regarding the potential moral hazard effects on workers) *and* Guo & Burton, *Workers' Compensation: Recent Developments in Moral Hazard and Benefit Payments*, *supra* note 529 (same, and also suggesting that workers may not be responsive to changes in benefit levels, contradicting previous research.)
[531] *See* Guo & Burton, *Workers' Compensation: Recent Developments in Moral Hazard and Benefit Payments*, *supra* note 260.
[532] *See* IAIABC Return to Work, *supra* note 380 (accurately describing the inconsistent views of stakeholders and arguing for a more inclusive approach to return-to-work)
[533] DOL Workers' Compensation Report, *supra* note 21, at 22.
[534] 9-100 Larson's Workers' Compensation Law § 100.01 (2015)

give workers reasonable benefits.[535] The National Commission suggested that the benefits should be adequate and equitable. Today, many injured workers never receive compensation – but they are nevertheless foreclosed from bringing tort actions. Those who successfully pursue compensation claims often receive too little, given the design of the benefits and the long term consequences of injuries. The system is not, and has never been, "adequate,"[536] in the sense articulated by the National Commission. The current political environment means that attacks on benefit adequacy will continue in many states. At the same time, the protection of employers from tort litigation has remained largely intact.

Given the evolution of both tort doctrine[537] and safety principles during the 20th century,[538] it is reasonable to suggest that tort liability for workplace harms would have been liberalized during the course of the 20th century, but for the existence of this program. Even in 1900, employers owed their employees a duty of reasonable care and diligence.[539] Had tort law not been frozen for the last century as a result of the workers' compensation bargain, what would this duty of reasonable care look like today? The unholy trinity of contract-based defenses was eliminated through statutory changes before the enactment of the initial workers' compensation laws, and in any event would have been unlikely to survive the evolution of the common law in the ensuing decades. Given the evolution of ideas of safety, one might persuasively argue that workers with injuries resulting from recognized hazards within the control of the employer now would meet a modern test for negligence in most common law jurisdictions.

Given this, it follows that this expanded duty of care should make the value of the workers' exchange more valuable to employers, and that the system should therefore become more, rather than less, generous to workers. This is arguably true despite the current use of pre-dispute arbitration agreements that might force negligence cases into the arbitral forum. In fact, of course, the opposite is occurring. The result is that employers are getting a better and better deal, the program is not paying adequately for the injuries and illnesses that are caused at work, and many workers are receiving inadequate benefits (or no benefits at all). The costs of occupational injury and disease are thus externalized from the workplace. To a large extent, these costs are transferred to the workers themselves, who may lack access to health insurance,[540] or they may

[535] New York Cent. R. Co. v. White, 243 U.S. 188 (1917)
[536] *See supra* notes 152-156 and accompanying text.
[537] *See e.g*. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992) (noting huge growth in tort liability that occurred after about 1960); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L.REV. 963 (1981) (same); Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031 (2003) ("It is a truism that tort law changed in character sometime in the middle of the twentieth century.").
[538] *See supra* Part III(B).
[539] *See supra* note 114.
[540] Although the Affordable Care Act extended health insurance to many people, those who work for employers with fewer than 50 employees are theoretically required to purchase insurance on their own. Apparently, it is frequent for injured workers to lack general health insurance. This was specifically stated

be transferred to other benefit programs.[541] Whatever the view in 1910, it does not look so much like a "grand" bargain today.

It remains true, however, that in the absence of a system like workers' compensation many injured workers would be unable to maintain an action for negligence; that civil actions – or even actions forced through pre-dispute arbitration agreements to be heard by arbitrators – would take longer and might fail to deliver fair and equitable relief; and that delivery of prompt medical care for injuries is critical and might not be available to workers who are medically uninsured or under-insured. Despite the decline in reported injuries at work, a workers' compensation system, of some sort, remains the political compromise that may best meet these needs.

V. The Future of Workers' Compensation

As of late 2016, the political attacks on workers' compensation are continuing in many states.[542] While some stakeholders are attempting to improve the dialogue, there is little evidence as yet that this will heal the deep distrust that exists on all sides.[543] The political campaigns to reduce costs for employers – irrespective of the effects on workers – are likely to continue. The problems that workers, particularly low wage vulnerable workers, confront – from retaliation at work to administrative processes that are opaque -- are unlikely to be solved in the near term. The growth of independent contractors and casual laborers – whether properly classified under current law or not – puts additional workers at risk of poverty when they are injured. Despite the efforts of the U.S. Department of Labor in 2016 to launch a reasoned national discussion regarding the future of workers' compensation, this is unlikely to happen in the short run. At best, there is an uneasy equilibrium. At worst, successful attacks on the program will further erode its reach. The aggregate costs will continue to go down, masking the increasing transfer of costs associated with occupational illness and injury to workers and other benefit programs.

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by two different workers' compensation judges at the first "summit" meeting. See *supra* note 22 (author was in attendance).

[541] *See* Bureau of Labor Statistics, *Workers with disability insurance plans* (Mar. 4, 2015), https://www.bls.gov/opub/ted/2015/disability-insurance-plans-for-workers.htm (showing 39 percent of workers are covered by short term disability plans and 33 percent are covered by long term disability plans). In addition, California, Hawaii, New Jersey, New York and Rhode Island have state-mandated short term disability insurance programs for workers. These programs may cover disability costs for workers who might otherwise qualify for workers' compensation benefits. In addition, workers who are permanently disabled may qualify for Social Security Disability Insurance. *See supra* note 386. Many workers, however, have no alternative disability plans and cannot qualify for SSDI, which requires proof of permanent total disability; in these cases, the workers and their families bear the costs of the injury or illness.

[542] Florida (s*ee supra* notes 288-293 and accompanying text) and Illinois (*see supra* note 258) are two current examples of attacks in late 2016.

[543] The IAIABC report on Return to Work is an example of this attempt. *See* IAIABC Return to Work, *supra* note 380.

Nevertheless, perhaps as an academic exercise – and leaving aside for the moment the considerable political barriers -- it is worth thinking about what an improved design might look like. At least one researcher and commentator, Frank Neuhauser, has suggested that workers' compensation should be overhauled and limited to the most hazardous industries – harkening back to the approach 100 years ago.[544] His argument is that, overall, people are actually safer at work than at home, and that workers in non-hazardous industries would be better served with general health insurance and other forms of disability policies and support. Indeed, a robust social safety net for people with disabilities would go a long way toward meeting the goals for workers' compensation articulated by the National Commission. The problem, of course, is that many workers do not have access to alternative health insurance or disability benefits. A system that creates portable benefits for workers, as they move through the current changing labor market, would be a second approach.[545]

If we were to build from the existing system, program changes might include the following. But even these suggestions will be controversial.

1. A separate medical care system for injured workers has resulted in increasing costs, barriers to care, and sometimes the development of different treatment protocols for injuries without adequate justification. Workers now are caught in arguments between payers, resulting in treatment delays. Injured workers encounter different limits on medical treatment, or different care, because of the etiology of their health condition. Medical care for work-related injuries and illnesses should be part of a unified health care system (should this ever be developed in the U.S.). Combining health care payment sources would remove concerns about cost shifting based on fee schedules differentials, physicians' whims, or workers' preferences; it would eliminate the problem that workers are faced with delays in obtaining medical care due to questions about the compensability of their claims; it would simply level the playing field for the delivery of care. This would require that we address one current

[544] *See* Neuhauser, *The Myth of Workplace Injuries*, *supra* note 302.

[545] These proposals generally focus on the issue independent contractors. *See e.g.* Seth D. Harris and Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"* (Dec. 2015), at 20 http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf (proposing that intermediaries be permitted to opt to provide expansive workers' compensation insurance policies to cover independent workers, in exchange for immunity from tort, without transforming these relationships into employment); Rachel Emma Silverman, *On-Demand Workers Need 'Portable Benefits,' Tech and Labor Leaders Say*, WALL STREET JOURNAL (Nov. 10, 2015) (group calls for more protections for contract workers in rapidly changing economy). The letter referred to in this article was signed by 40 executives and public policy experts, stated, "We need a portable vehicle for worker protections and benefits. Traditionally, benefits and protections such as workers compensation, unemployment insurance, paid time off, retirement savings, and training/development have been, largely or partly, components of a worker's employment relationship with an employer." The letter is available at https://medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3fbcf548f#.86j85co03.

justification for separate insurance and payment: that injured workers need different or more aggressive medical care than those injured at home. There is no medical justification for this position: everyone needs to be returned to full functioning as quickly as possible, and a focus on achieving this more quickly for injured workers is driven by other incentives, including the desire to limit the cost of disability benefits paid to the worker.

There are a variety of ways this could be accomplished through insurance mechanisms. If there is a strong feeling that workers' compensation should pay for this medical care, then reimbursement can be provided to the general health care system by the workers' compensation insurer.[546] Workers' compensation insurers would pay for the co-payments and deductibles in order to preserve the first-dollar-coverage that workers have come to expect from workers' compensation. This would still leave medical evaluations that are required to determine work-causation and degree of disability within the workers' compensation system, and these would need to be reimbursed by the workers' compensation insurance carrier. Currently, providers receive little payment for these services in many states, contributing to their reluctance to participate in the program.

Combining the payment to providers would go a long way toward reducing the friction associated with the delivery of medical care for work injuries. It would, however, require that universal health insurance become a reality for all working Americans. As of the time of this writing, there is diminishing hope of this in the near future.

2. The recommendations of the National Commission with regard to coverage, benefit adequacy and compensability of injuries need to be revisited. We are moving ever further from the adequate and equitable goals that were part of the initial bargain and were the basis for the Commission's recommendations. New approaches to research, including evidence-based research that would create a better system for estimating earnings losses for injured workers, can assist in refining these recommendations.[547] Issues of proof that might streamline administrative review – including effective use of presumptions in some cases – should be explored.[548]

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[546] Maine currently provides for a subrogation right when a claim is contested. *See supra* note 388.

[547] John F. Burton, Jr. has repeatedly suggested that this is possible and should be done. *See* Burton, AMA Guides, *supra* note 244, at 30, *and* Burton, Should There Be a 21st Century National Commission, *supra* note 159 at 20-25.

[548] For example, the Pennsylvania workers' compensation system lists occupational diseases within its definitional section and further includes the following language: "(n) All other diseases (1) to which the claimant is exposed by reason of his employment, and (2) which are causally related to the industry or occupation, and (3) the incidence of which is substantially greater in that industry or occupation than in the general population." 77 Pa. Stat. Ann. § 27.1. Proof is then based on the following rebuttable presumption: "If it be shown that the employe [sic], at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's [sic] occupational disease arose out of and in the course of his employment…" 77 Pa. Stat. Ann. § 413.

3. The scope of exclusivity needs to be reevaluated and measured against the adequacy of workers' compensation benefits for injured workers. Employers' duty to provide safe workplaces should not be obscured by the levelling attained through a social benefit system that allows for claims suppression and limited adjustment of insurance rates for claims that are paid. Despite improvements in safety records overall, the incentives to establish and maintain safe workplaces are remarkably weak. If we take seriously the need for incentives to encourage continuous safety improvement in workplaces, then expansion of tort remedies in situations in which the employers allow the persistence of known hazards needs to be reevaluated. Employers who maintain unsafe workplaces put their workers at excessive risk and may often violate federal law, but the federal inspectorate is remarkably weak.[549] They also arguably may violate international human rights standards.[550] The failure of workers' compensation to compensate most victims of occupational diseases also needs to be addressed. If workers' compensation systems are not able to compensate occupational diseases that develop over time, then these diseases should be removed from the 'bargain' and employers' should, when appropriate, be liable in tort. [551]

4. Anti-retaliation protection for workers in all states needs to be strengthened. The weakness of these laws feeds back to a reluctance to file claims and allows employers to develop claims suppression strategies. This can be done through amendments to existing federal law, but state legislatures and courts also can and should address the problem.[552]

5. Careful re-evaluation of the definition of "employee" is needed. Irrespective of firm-to-firm contracting relationships or creative individual contracting, workers who lack control over the conditions in which they work should be included in this system.[553]

6. In the end, we need national standards that set a floor and eliminate the desperate state-to-state competition that results in a race to the bottom. Despite consistent warnings through the last 100 years, the claim that business will leave or not locate in a state due to workers' compensation costs is persistent and overtakes the dialogue, justifying cutbacks for workers'

[549] *See supra* note 4 (listing references critical of the functioning of the Occupational Safety and Health Administration).
[550] See Emily A. Spieler, Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right, in Workers' Rights as Human Rights (Gross J, ed.) ILR Press, 78-118 (2003).
[551] *See* Tooey v. AK Steel Corp., 623 Pa. 60, 67 (2013) (allowing for tort litigation where a diseases was excluded from workers' compensation coverage by the statute of limitations). *Compare* Brenda Hendrix v. Alcoa, Inc., 2016 Ark. 453 (2016) (barring civil action by deceased worker's wife where the worker's compensation claim for mesotheliomia, an asbestos-related disease, was time barred because his diagnosis and filing occurred more than two years from his date of last exposure, noting "it could not have been the intent of the General Assembly to absolve an employer of liability for worker's compensation after a period of time only to subject the employer to liability in tort after that period elapses.").
[552] For a discussion of the relationship of federal and state law with regard to this issue, *see* Spieler, Whistleblowers and Safety at Work, supra note 375, at __.
[553] *See* Harris & Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work*, *supra* note 545 (suggesting extension of workers' compensation to independent contractors).

benefits allegedly to foster business development or retention. The National Commission rejected this theory, it has been debunked repeatedly, and yet it reemerges like a phoenix. There does not seem to be any way to address this persistent claim without establishing national standards for these state programs.

Current political realities make all of these suggestions entirely theoretical – at least for the time being.

Throughout the 20th century, the political debate has, not surprisingly, been controlled by the inside players. When a discussion of federal standards emerged during 2016, many of those with a strong current investment in the program rose up to voice their preferences for the status quo. The political debate needs to be broadened to include those who focus on the entire social system in the U.S., and to acknowledge that those with limited vested interests may not be the best advocates for the public good. As we discuss these issues during the current period of anticipated cutbacks in social benefits, we also might look more to models in other countries to develop our own thinking about how to build a more equitable and just future in the longer term.

In the short term, there are existing strategies to attempt to shore up the program. These inevitably must acknowledge the state-based nature of the program, and the remarkable variability from one state to another. The successful challenge to the exclusion of farmworkers in New Mexico, as well as some other state-based constitutional litigation, suggest that litigation strategies may succeed in some jurisdictions. The aggressive – and remarkably successful -- approach to litigation in Oklahoma may be a model for at least some other states. The development of workers' advocacy groups that press for greater benefits and rights for vulnerable workers have also had success in some places. These battles are spread out across the states. Perhaps the most essential need is for a renewed and organized voice on behalf of workers within these fights and across the country.

VI. Conclusion

If the U.S. had an expansive social safety net that supported working age people through their lives when they encounter economic and health adversity, perhaps the importance of workers' compensation would arguably fade. But that is not the American reality. The U.S. safety net is tattered and under continuous attack. Workers' compensation is one piece of that tattered net. It is therefore important to mend its tears, even in the absence of larger changes that might produce a more durable social fabric.

It is true that most of our jobs are safer than they were 100 years ago. Despite this, the rhetorical and political parallels between 1900 and 2016 are troubling. Contingent attachment to the labor market is growing; proposals for elective workers' compensation laws are re-emerging; the reach of existing mandatory laws is being narrowed; the employment-at-will doctrine remains at the core of our employment law regime. Workers fall from the labor market into poverty as a result of work-caused injuries and illnesses. That is precisely the problem that workers' compensation programs were designed to address.

It is important to remember that the political pendulum swings from side to side. It did so throughout the 20th century, as the history of this program demonstrates. It undoubtedly will continue to do so in the 21st century. Given this, it is appropriate both to mount the best defense now of the program as we know it – but also to prepare a full strategy that focuses on workers' well-being for the next swing of the pendulum.