(Re)Assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017

Emily A. Spieler*

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* Edwin W. Hadley Professor of Law and Dean Emerita, Northeastern University School of Law. I would like to thank John F. Burton, Jr., Leslie I. Boden, Glenn Shor, Gregory R. Wagner, Charlotte S. Alexander, and Price V. Fishback for their careful review of drafts of this article; Ana Alvarado, William (Billy) Rainsford, and Lauren Goldstein for research assistance on various aspects of the article; Elliott Hibbler for terrific professional library support; Northeastern University School of Law for providing research support; the Pound Civil Justice Institute for providing funding for the symposium that was the genesis for the article; and the Pound Civil Justice Institute, Rutgers Center for Risk and Responsibility and Northeastern University School of Law for co-sponsoring the symposium. For a description of my personal involvement with workers’ compensation and related issues, see infra, note 591.
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I. INTRODUCTION

Too many workers are injured, killed, or made ill by their work. In the United States, the legal system addresses occupational safety in two ways: through a preventive regulatory regime, sometimes described as ossified and weak, and through a no-fault strict liability compensation system. 

1. See DAVID MICHAELS, U.S. DEPT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., ADDING INEQUALITY TO INJURY: THE COSTS OF FAILING TO PROTECT WORKERS ON THE JOB 3–4 (June 2015) [hereinafter DOL INEQUALITY REPORT], https://www.dol.gov/osha/report/20150304-inequality.pdf (“The Bureau of Labor Statistics (BLS) reports that approximately 4,500 workers are killed on the job each year and estimates that employers record nearly three million serious occupational injuries and illnesses annually on legally mandated logs . . . . About half of these injuries require at least a day away from work, a job transfer or a work restriction for recovery . . . . [M]any . . . work-related injuries are not recorded by employers . . . . [S]tudies 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. In comparison, about 33,000 people died in traffic crashes.”); BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES (CFOI) - CURRENT AND REVISED DATA, https://www.bls.gov/iif/oshsfoil.htm (providing primary data on occupational fatalities); BUREAU OF LABOR STATISTICS, INJURIES, ILLNESSES, AND FATALITIES, https://www.bls.gov/iif/oshsual.htm (providing primary data on occupational injuries).
The compensation system, known initially as "workmen’s compensation" and now as "workers’ compensation," intersects with

4. The derivation of the phrase the “grand bargain” as applied to workers’ compensation is somewhat murky. It did not appear in the workers’ compensation literature until after 2000. A comprehensive search in available databases finds the very first reference to it as a descriptor of workers’ compensation in a news article in the San Jose Mercury News in 2003. Eric Nalder, California Growers, Farm-worker Clinics, Battle Workers’ Comp Charges, SAN JOSE MERCURY NEWS (Nov. 25, 2003) (“Michael Rucka, a Salinas lawyer, says worker’s compensation system was intended to be a ‘grand bargain’ between labor and management. But it has grown adversarial.”). The phrase first appears in case law in 2009 in the dissenting opinion of Justice Brian Morris in Satterlee v. Lumberman’s Mutual Casualty Co.: “The workers’ compensation system in Montana constitutes a grand bargain in which injured workers forego the possibility of larger awards potentially available through the tort system (the quid) in exchange for a no fault system that provides more certainty of an award (the quo).” 222 P.3d 566, 579 (Mont. 2009) (citing Sitzman v. Shumaker, 718 P.2d 657, 659 (Mont. 1986)). The phrase seems to have then caught on. See, e.g., Hendrix v. Alcoa, Inc., 506 S.W.3d 230, 238 (Ark. 2016); Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 676–77 (Iowa 2015); Cross v. Slayer Trucking Cos., 206 So. 3d 1124, 1130–31 (La. App. 2016); Whedbee v. N.D. Workforce Safety & Ins. Fund, 845 N.W.2d 632, 637 (N.D. 2014); Vasquez v. Dillard’s, Inc., 381 P.3d 768, 786, (Okla. 2016); Torres v. Seaboard Foods, LLC, 373 P.3d 1057, 1064–65 (Okla. 2016); Kenkel v. Parker, 362 P.3d 1145, 1151 (Okla. 2015); Collins v. COP Wyo., LLC, 366 P.3d 521, 527 (Wyo. 2016). The judicial use of the phrase seems most associated with opinions that raise concern about attacks on what is viewed as the historical bargain. See, e.g., Cross, 206 So. 3d at 1130–31 (Cooks, J., concurring in the result) (“I am troubled significantly by the increasingly onerous burden placed on injured workers . . . . This is an unfortunate circumstance that signals ‘the grand bargain’ once existing between the employer and employee for their mutual benefit, is one that should have displayed a red tag at the time it was struck boldly exclaiming: EMPLOYEES BEWARE!”). The phrase has become sufficiently common so that it is now used as if it is the accepted terminology characterizing the workers’ compensation quid pro quo. See, e.g., Comments of Chairman Woolsey, Developments in State Workers’ Compensation Systems, Hearing before the H. Subcomm. on Workforce Protections, Nov. 17, 2010, at 1–2 (“As most of you are aware, workers’ compensation statutes were passed beginning in the early 20th century to establish a no fault system for providing efficient redress for injured workers. Workers’ compensation was called the grand bargain.”). In earlier cases, the bargain was referred to as the “great compromise.” See, e.g., Stertz v. Indus. Ins. Comm’n of Wash., 158 P. 256, 258 (Wash. 1916) (“Our act came of a great compromise between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers’ booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was the cost of production, that the industry should bear the charge.”).
many of the central social and economic policy issues of our time. How should we guarantee adequate health insurance coverage for all people in the United States? 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. It is relatively small in comparison to the largest of our nation’s investments in social benefits: the aggregated costs of the different state and federal programs that we refer to, collectively, as “workers’ compensation” are dwarfed by the costs of Social Security, our largest federal social insurance program;⁵ the health care costs of workers’ compensation are insignificant within our nation’s total health care expenditures.⁶ Although workers’ compensation is more comparable to unemployment insurance in terms of cash payments to workers,⁷ the unemployment system is governed by clear federal mandates and financed through a public financing mechanism.⁸ In contrast, workers’ compensation has no federal oversight, is largely privately financed, and varies substantially from one state to another.⁹ As a result, the

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6. See Baldwin & McLaren, supra note 5, at 1 (indicating that medical care costs in workers’ compensation were $31.4 billion in 2014); Nat’l Ctr. for Health Stats., Health Expenditures, Ctrs. for Disease Control & Prevention, http://www.cdc.gov/nchs/fastats/health-expenditures.htm (last visited Apr. 4, 2017) (showing that general health care costs in the United States were $3 trillion in 2014). Thus, the annual cost of medical care within workers’ compensation constitutes only about one percent of the total health expenditures in the country.

7. See Baldwin & McLaren, supra note 5, at 1–2 tbl.1; Unemployment Insurance Data, U.S. DEPT of LAB., https://oui.doleta.gov/unemploy/DataDashboard.asp (last visited Apr. 4, 2017) (showing total unemployment benefits in 2015 were $32.0 billion). Total workers’ compensation benefits costs were, however, double the cost of unemployment insurance when medical costs are included. Baldwin & McLaren, supra note 5, at 1.


9. See generally Baldwin & McLaren, supra, note 5.
program is both opaque and complex, and, when disaggregated among the states, its costs are relatively small. Perhaps as a consequence of these characteristics, it has largely escaped the notice of most social theorists, economists, and legal scholars. Arguably, few see it as pivotal to social policy in the United States.

On the other hand, the cost of workers' compensation far exceeds the direct federal investment in occupational safety. Moreover, if one looks at work-caused disability rather than workers' compensation costs, one discovers that many recipients of Social Security Disability Insurance (SSDI) suffer from work-related disabilities, that many work-related injuries and diseases are never compensated within the workers' compensation systems, and that workers' compensation only covers a fraction of the costs associated with occupational injury and mortality. That is, workers' compensation may be our largest

10. I have chosen to use the singular noun "program" when describing the aggregate 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.


12. See, e.g., Robert T. Reville & Robert F. Schoeni, The Fraction of Disability Caused at Work, 65 Soc. Security Bull. 31, 31–37 (2004) (using the 1992 Health and Retirement Study, a nationally representative study of the U.S. population aged fifty-one to sixty-one, authors found that among those whose health limits the amount or kind of work they can do, thirty-six 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, thirty-seven percent are disabled 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 notes 444–445.

13. See infra Section IV.B.

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. Given that 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.

In the last few years, 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;\(^\text{15}\) to a call by ten U.S. Senators and Representatives for the U.S. Department of Labor to demonstrate renewed interest in the program;\(^\text{16}\) to Department of Labor reports that focused on inequality caused by work injury and the inadequacies of the workers’ compensation system;\(^\text{17}\) to ad hoc gatherings of experts in self-styled “summits” to discuss the future of the program;\(^\text{18}\) to a national forum convened by the Department of Labor and the National Academy

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18. Id. at 40 n.103; see also Robert Wilson, Notes from Florida Workers’ Compensation Summit (National Conversation) Released, WORKERSCOMPENSATION.COM (Sept. 27, 2016), http://www.workerscompensation.com/comплюнюетивкайрот/ноож-бобс-слят-деқ икест/24640-notes-from-florida-workers-compensation-summit-national-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.
of Social Insurance to examine the status of the program;\textsuperscript{19} to the inclusion of occupational safety and compensation issues in current worker organizing efforts.\textsuperscript{20}

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 \textit{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 and relatively small—but nevertheless important—component of our legal and social fabric.\textsuperscript{21}

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 it, 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.\textsuperscript{22}

This Article is intended to provide background for future discussions about work injury and compensation insurance by putting

\textsuperscript{19} The author was an expert panelist at this forum on Oct. 5, 2016. The webcast, mentioned at https://www.dol.gov/asp/WorkersCompensationSystem, is no longer available.


\textsuperscript{22} See \textit{infra} Section IV.C, 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 wellbeing of injured workers. See, e.g., Stephen Fessenden, \textit{Present Status of Employers' Liability in the United States}, 31 BULL. OF THE DEPT OF LAB. 1157, 1157–1210 (1900), https://fraser.stlouisfed.org/docs/publications/bls/bla_v05_0031_1900.pdf (providing a detailed summary of the status of employer tort liability to workers in 1900).
both the initial bargain and the subsequent century of evolution of the American 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—or made ill—by their work? What conditions external to the program have influenced (and continue to influence) changes in workers' compensation? Should we expect consensus (as demonstrated by the National Commission in 1972), truce (as demonstrated by the initial legislation), or continuing political conflict (as 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 American programs and policies. Other countries provide different systems of compensation, and we could undoubtedly learn quite a lot from them. On the other hand, we need to understand the political and economic history of this program in the United States. This Article attempts to describe that background.

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 twentieth century and proceeding through recent political and legal battles in 2017. The full arc of this history has not been summarized elsewhere. 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


24. The 2016 U.S. Department of Labor on workers' compensation briefly describes this history. See DOL WORKERS' COMP. REPORT, supra note 17, at 6–19.
the internal workings of particular programs. National reports look at aggregate costs and trends within the system but not 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 an assessment of the internal workings of the program. The description of the current system is then 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. Portrayal 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."

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 political climate in 2017. 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 American social safety net 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 United States without understanding its roots in the early twentieth 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.

25. See, e.g., BALDWIN & MCLAREN, supra note 5, at 1–3.
A. Phase One: Introducing the "Grand Bargain"

Rapid industrialization brought with it an extraordinary rate of workplace-caused fatalities and serious injuries in the United States\textsuperscript{26}—worse than in industrializing European countries.\textsuperscript{27} One key response was the rapid development of workers' compensation programs.\textsuperscript{28} 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.\textsuperscript{29}

The context is important. The post-Civil War era involved both an embrace of the contractual view of the wage labor relationship\textsuperscript{30} and growth of a fierce ideology of free labor.\textsuperscript{31} 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


\textsuperscript{27} Witt, supra note 26, at 26–31.


\textsuperscript{29} See generally Price V. Fishback & Shawn Everett Kantor, A Prelude to the Welfare State: The Origins of Workers' Compensation (2000) [hereinafter Fishback & Kantor, Prelude to the Welfare State]; Witt, supra note 26; Fishback & Kantor, supra note 28; Lawrence M. Friedman & Jack Ladinsky, Social Change and the Law of Industrial Accidents, 67 Colum. L. Rev. 50 (1967). See also John F. 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 172, 173–74 (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, in C. Arthur Williams, Jr. & Peter S. Barth, Compendium on Workmen's Compensation 11, 11–21 (Marcus Rosenblum ed., 1973). This Article makes no attempt to provide the depth of history that is provided in these other sources regarding this period.

30. Morton J. Horwitz, The Transformation of American Law, 1780-1860, at 208–10 (1977) (noting that the family law view of employment relations was supplanted "by a purely monetary relationship that grew out of the factory system").

31. Witt, supra note 26, 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.
economic and social rights. Private insurance schemes designed to provide some assistance to injured workers were characterized by rising costs but mediocre success. Theories of tort law were evolving, including, first, the adoption of effective defenses for employers to tort litigation brought by injured workers—known as the unholy trinity—followed by the erosion of these defenses. There was an explosion of

33. FISHBACK & KANTOR, PRELUDE TO THE WELFARE STATE, supra note 29, at 98; see also WITT, supra note 26, at 124 (noting that the voluntary insurance schemes also put employers at a competitive disadvantage).
34. Tort theory was relatively new. See Friedman & Ladinsky, supra note 29, at 51-52 ("At the dawn of the industrial revolution . . . tort 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 for injuries to their employees. Richard A. Epstein, The Historical Origins and Economic Structure of Workers' Compensation Law, 16 GA. L. REV. 775, 777 (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.").
35. The three nineteenth century common-law defenses to employer liability for negligently-caused injuries—the "unholy trinity"—were the assumption of risk doctrine, the fellow servant rule, and the doctrine of contributory negligence. See Fessenden, supra note 22, at 1157-1210 (describing common law principles of tort liability). 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 Priestley v. Fowler, 3 M&W 1, 160 Eng. Rep. 1030 (1837), was further defined in 1841 in the American case of Murray v. South Carolina Rail Road, 26 S.C.L. (1 McMull.) 385, 398-401 (1841), and became entrenched in American common law with the decision of the Massachusetts court in Farwell v. Boston and Worcester Rail Road, 45 Mass. (4 Met.) 49, 53-55 (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 29, at 58-59. As these doctrines became applied to industrial fatalities and injuries, commentators noted their effectiveness in protecting employers: according to one, "The 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. Professor Horwitz notes that the doctrine of assumption of risk was closely associated with the fellow servant rule and "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. HORWITZ, supra note 30, at 209-10; see also Fessenden, supra note 22, at 1157-1210 (providing a detailed summary of the status of employer tort liability to workers in 1900).
36. By 1911, twenty-five 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 26, at 67. Many of these
tort claims relating to work injuries,\textsuperscript{37} with widely variable outcomes, often yielding less than a year's income for a family after the death of a worker.\textsuperscript{38} All of this 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

employer liability statutes were, however, limited in scope and did not provide an adequate solution for the problems arising from industrial accidents. See Doherty, \textit{supra} note 29, at 13 (noting as an 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, [twenty-six] 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."); Fessenden, \textit{supra} note 22, 1160–1203. Employer liability laws chipped away at the assumption of risk doctrine, but even today it continues in a different form. For example, in 2015, the Texas court ruled that employers that did not carry workers' compensation insurance are nevertheless not liable in tort to an injured 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 Tex., L.P. (\textit{Austin I}), 465 S.W.3d 193, 213 (Tex. 2015). For further discussion of this case, see infra note 123.

37. Friedman & Ladinsky, \textit{supra} note 29, at 59 ("[I]ndustrial 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."); see also \textit{Fishback & Kantor, Prelude to the Welfare State}, \textit{supra} note 29, at 95 tbl.4.1, 98 (one sign of the increase can be seen in the number of state supreme court cases related to non-railroad workplace accident litigation, which increased from 154 to 490 between 1900 and 1911); \textit{Witt, supra} note 26, 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). See \textit{generally} Richard A. Posner, \textit{A Theory of Negligence}, 1 J. LEGAL STUD. 29 (1972) (examining every published accident opinion of American appellate courts in the first quarters of 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).

38. Friedman & Ladinsky, \textit{supra} note 29, 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, and 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." \textit{Witt, supra} note 26, at 40; see also Doherty, \textit{supra} note 29, at 11 ("It has been estimated that not more than [fifteen] percent of injured employees ever recovered damages under the common law, even though [seventy] percent of the injuries were estimated to have been related to working conditions or employer's negligence.").
political activists—although there are certainly different emphases and theories about what actually happened in each state.  

As the industrial carnage grew, 40 so did the level of desperation in the calls for reform. Upton Sinclair in fiction (The Jungle in 1906), 41 Crystal Eastman in a powerful research report (Work-Accidents and the Law in 1910), 42 and President Theodore Roosevelt in speeches; 43 among many others, sounded the alarm. As Professor John Fabian 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.” 44

The assumption that this crisis of injury, disability, and death was, in essence, an inevitable result of industrialization undergirded the growing public concern. 45 Tort law, requiring proof of negligence, simply

39. See Witt, supra note 26, at 128–29; Friedman & Ladinsky, supra note 29, 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.”).

40. See Friedman & Ladinsky, supra note 29, at 60 (“[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.”). Friedman and Ladinsky further note 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 from 1907 to 1908, “manufacturing injuries and deaths were more than double those of the railroads.” Id. at 60 n.34.

41. See generally UPTON SINCLAIR, THE JUNGLE (1906).

42. See generally CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW (1910).

43. President Roosevelt stated in his Sixth Annual Message to Congress:

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 cannot [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.


44. Witt, supra note 26, at 44, 46.

45. Id. at 63, 143 (noting “the inexorable accumulation of faultless dependents”); see also FISHEBACK & KANTOR, PRELUDE TO THE WELFARE STATE, supra note 29, at 3 (“The continued mechanization of workplaces raised questions about the assignment of fault for workplace accidents. Many accidents seemed to come from the inherent dangers of work and fault could not easily be assigned.”); Spieler, Perpetuating Risk, supra note 11, at 164–65 (providing sources for the prevailing idea regarding inevitability, including state commissions' reports, preambles to state laws, contemporaneous commentators, and
could not serve as a reasonable mechanism for victims' compensation. 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. Large firms found that it was competitively problematic to institute insurance programs on their own. Once cultural consensus emerged, laws were adopted quickly: "commentators described the progress of workmen's compensation with phrases like 'prairie fire' and 'whirlwind.'"

In the end, arguably all parties won—on average—in the ultimate bargain. 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. Employers gained predictability, a fully insurable risk (now reduced to actuarial assessment of aggregated risks), 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) or to workers (particularly those without unions) in the form of courts, and noting that one court stated that the "price of our manufacturing greatness will still have to be paid in human blood and tears." (citing Borgnis v. Falk Co., 133 N.W. 209, 215 (Wis. 1911)); Roosevelt, supra note 43.

46. See WITT, supra note 26, at 64 (noting that tort law "almost certainly served as a poor compensation mechanism for accident victims," and therefore did not provide financial incentives for safety).

47. FISHBACK & KANTOR, PRELUDE TO THE WELFARE STATE, supra note 29, 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 26, at 77–78, 88 (noting the tension between ideals of free labor and issues of growing assertions of managerial prerogatives).


49. 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 29, at 72–73 (arguing that the need for reform was evident for fifty years before this "whirlwind" occurred).

50. WITT, supra note 26, at 127.

51. See FISHBACK & KANTOR, PRELUDE TO THE WELFARE STATE, supra note 29, at 25 (concluding that, at least in the aggregate, both employers and employees came out ahead economically).

52. For a discussion of evolving ideas regarding benefit adequacy in the twentieth century, see Section II.B. infra.


54. For a discussion of this view, see Spieler, Perpetuating Risk, supra note 11, at 171 ("[T]hus emerged the frequently quoted slogan, 'the cost of the product should bear the blood of the workman.'" (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 573 (5th ed. 1984))).
lower wages (the dominant economists' view).\textsuperscript{55} 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 partial 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.\textsuperscript{56} Perhaps the biggest losers were the small number of workers who would have successfully obtained relatively large jury awards in tort litigation. Everyone—insurance companies, employers, workers, and 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.*\textsuperscript{57} The Ives decision was controversial at the

\textsuperscript{55} Fishback & Kantor, Prelude to the Welfare State, supra note 29, at 69 (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 contemporaneous judicial decisions. See, e.g., N.Y. Cent. R.R. v. White, 243 U.S. 188, 201–02 (1917) ("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 and Kantor make assumptions regarding high levels of knowledge that influenced decision-making by politicians—an assumption that is viewed with skepticism by many today. Fishback & Kantor, Prelude to the Welfare State, supra note 29, at passim ("Our assumption is that political actors could reasonably anticipate the economic consequences of the policies they promoted."); see also Witt, supra note 26, at 125 ("By replacing tort actions with compensation claims, the statutes themselves would ensure that employers would no longer need courts to enforce employment contract provisions waiving employees' right to sue."). Nevertheless, it is reasonable to accept Fishback's conclusion that "workers, employers, and insurance companies all received and could anticipate benefits from workers' compensation." Fishback & Kantor, Prelude to the Welfare State, supra note 29, at 20. For a more recent discussion of the principle that workers ultimately pay for the benefits in reduced wages, see generally Jonathan Gruber & Alan B. Krueger, The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance, 5 Tax Pol'y & Econ. 111 (1991).


\textsuperscript{57} 94 N.E. 431, 441 (N.Y. 1911) (concluding that the statute mandating coverage authorized the "taking of the employer's property without his consent and without his fault"); see also Ky. State Journal Co. v. Workmen's Comp. Bd., 170 S.W. 437, 437–38 (Ky. 1914); Cunningham v. Nw. Improvement Co., 119 P. 554, 561–62 (Mont. 1911) (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). Arguably, Maryland's initial law was in this group. See Witt, supra note 26, at 137.
time and was quickly laid to rest by a constitutional amendment that was approved by New York voters, then by the state's judiciary, and finally by the Supreme Court. 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 in New York City, many of them young women. 

But Ives had lasting impact on the development of the state laws. Perhaps most importantly, as Professor Witt noted, "Ives decisively moved compensation programs toward the elective approach." By 1913—while litigation was wending its way to the Supreme Court—twenty-one of the twenty-five states with workers' compensation laws had enacted elective statutes that allowed employers to opt-in to the new workers' compensation system rather than mandating participation; by the time the development period was over, over half of the states had adopted elective laws. This proved to be critical in

58. 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 26, at 152. 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. at 164-66.

59. The court concluded:

With 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.


61. 141 Men and Girls Die in Waist Factory Fire, N.Y. TIMES, Mar. 26, 1911, at 1 (giving first hand report of the fire). See also DOL WORKERS' COMP. REPORT, supra note 17, at 7.

62. Witt, supra note 26, at 183.

63. Id.

64. Fishback & Kantor, Prelude to the Welfare State, supra note 29, at 103-04 tbl.4.3. In fact, as late as 1954, half of the statutes remained elective in nature. Max D. Kossoris, Workmen's Compensation in the United States: An Appraisal, in U.S. DEP'T OF
the later development of the programs, as the elective system “placed inexorable downward pressure on compensation levels” in order to induce employers’ participation,\(^65\) 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.\(^66\)

The United States Supreme Court soon had the opportunity to review and endorse the constitutionality of the revised New York statute in *New York Central Railroad Co. v. White.*\(^67\) Noting that “liability without fault is not a novelty in the law,”\(^68\) and that the no-fault limited liability scheme was “not repugnant to the provisions of the 14th Amendment,”\(^69\) the court continued:

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*


\(^{66}\) Peter S. Barth, *Workers’ Compensation Before and After 1983,* in *Workers’ Compensation: Where Have We Come From? Where Are We Going?* 3–19 (Richard A. Victor & Linda L. Carrubba eds., 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.

\(^{67}\) 243 U.S. 188, 192 (1917).

\(^{68}\) *Id.* at 204.

\(^{69}\) *Id.* at 208.
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.  

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? 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 concerns had been raised regarding the reasonableness of the compensation levels offered by New York in its state program?

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 at least some medical care for the covered injury. The goal was to move away from the individualized and uncertain system of torts to a more simplified notion

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70. Id. at 205–06 (emphasis added) (“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.’” (quoting Holden v. Hardy, 169 U.S. 366, 397 (1898))). It is interesting that the Court refers in its 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.

of justice—both substantively and procedurally—for people facing significant risk at work.72

Nevertheless, the programs varied substantially with regard to coverage, benefit levels, financing and administration. A 1917 review of state laws by the Bureau of Labor Statistics, noted that “[n]o two compensation laws are alike,”73 further suggesting that “[t]he three most important factors in a compensation act are its scope, compensation benefits, and administrative system—in other words, who should receive compensation, how much should he receive, and does he actually receive it, and if so, when.”74

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,75 many states limited coverage to hazardous employment.76 In most states, farm interests successfully blocked coverage of farmworkers,77 leaving out large numbers of workers78

72. See, e.g., Witt, supra note 26, at 144 (“All that can be hoped for is a rule that is fair in the average case.” (quoting EASTMAN, supra note 42)). The Federal Employers Liability Act, currently codified at 45 U.S.C. §§ 51–60 (2012), 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 Central Railroad Co. (Employers’ Liability Cases) because it applied to employees not in interstate commerce. 207 U.S. 463, 500 (1908). The 1908 act was limited to railroad employees injured while engaged in interstate commerce. See Friedman & Ladinsky, supra note 29, 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.”).

73. Hookstadt, supra note 56, at 16.

74. Id. at 83.

75. See supra note 64 and accompanying text.

76. Hookstadt, supra note 56, at 19–20 (fourteen states enumerated specific hazardous industries for coverage; all others were excluded). Expansion of programs to less hazardous industries was upheld in Ward & Gow v. Kinsky, 259 U.S. 503, 514–17 (1922), which reasoned that levels of danger were no longer considered relevant to the constitutionality, and in doing so, departed from Hardy and Lochner.

77. Fishback & KANTOR, PRELUDE TO THE WELFARE STATE, supra note 29, at 108; see also Hookstadt, supra note 56, at 18, 21 (stating that 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; twenty-eight of the forty state statutes specifically excluded agricultural workers).

78. Hookstadt, supra note 56, at 33 (noting that 35.5% of employees excluded from workers’ compensation coverage in 1917 were excluded through the exemption of agriculture, ranging from 11.6% in New York to 83.7% in Idaho). The farming sector employed thirty-eight percent of laborers at that time. Michael Urquhart, The Employment Shift to Services: Where Did it Come From?, MONTHLY LAB. REV., Apr. 1984, at 15, 16.
despite the fact that farming was unquestionably a dangerous occupation.  79  Domestic workers were also excluded, 80 as were small firms, ranging up to eleven employees. 81 As a result, a large percentage of employees were never covered at all. 82

Echoing the presumed inevitability of these workplace events, injuries were generally only compensated if they were the product of "accidents," defined as unexpected, sudden, traumatic incidents producing an immediate result, 83 and had to "arise out of" and "in the course of" employment. 84 These requirements led to litigation from the outset, 85 and many state courts found ways to extend benefits to workers who did not appear to meet the narrow accident standard. 86 Occupational diseases were largely unrecognized by these early laws. 87

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79. Specific data regarding agricultural deaths and injuries in the early twentieth 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, U.S. DEPT OF LAB., https://www.osha.gov/dsg/topics/agricultural_operations/#3 (last visited Sept. 1, 2017).

80. Hookstadt, supra note 56, at 18, 21 (noting that domestic service was exempted in all but one state, either directly or through the small firm exemption).

81. Id. at 18, 20.

82. Id. at 18, 20, 28. The percent of employees excluded ranged up to 69.3% in New Mexico. Id. at 28.

83. See id 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."); 3–42 LARSON'S WORKERS' COMPENSATION LAW § 42.01 (2015).

84. Hookstadt, supra note 56, at 44–46 ("In every State a compensable injury must happen in the course of the employment, and in all but four States it must arise out of or result from the employment.").

85. As Hookstadt notes:

[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. . . . [I]t 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.

Id. at 46 (quoting In re Emp'rs' Liab. Assurance Corp., 102 N.E. 697, 697 (1913)).

86. 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 arsenical poisoning . . . , nervous
The basis for benefits was “economic necessity.”88 In every state jurisdiction, benefits were limited in both amount and duration; within somewhat narrow parameters, there was variation from one state to another.89 For example, the post-injury waiting period for temporary wage replacement varied: it was commonly two weeks but could be as long as three weeks.90 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,91 this suggests that many of these workers may have ended up without benefits—and without a job.92 Weekly benefits, once received, generally ranged from half to two-thirds of the workers’ weekly wage,93 subject to a maximum set in a specific amount.94 Death benefits approximated three to four years’ earnings, assuming that the worker had dependents; for workers who died without dependents, benefits were limited to burial expenses.95 Payment for partial disability was

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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.

87. Id. at 43, 45.
88. Id. at 49.
89. See id. at 49–82 (providing a full review of the benefits in 1917).
90. Id. at 48.
91. See infra notes 341–342 regarding high labor turnover rate in this period.
92. For at-will employees, there was no protection from discharge, including discharge for having filed a workers’ compensation claim, until the latter part of the twentieth century. See infra Section III.C.
93. Hookstadt, supra note 56, at 50. The current explanation for the use of two-thirds of earnings as the appropriate measure of benefits relates to the tax consequences of earnings, as opposed to benefits. Workers’ compensation benefits are not taxed, and two-thirds of wages approximates net (post-tax) earnings. This is unlikely to have been the explanation for setting benefits at two-thirds of wages in the early 20th century: the 16th Amendment, authorizing federal income taxation, was not approved until 1913, and tax rates were well below one-third of earnings. 1 MERTENS LAW OF FED. INCOME TAX’N §§ 4:2, 4:9 (2016). See generally Stephanie Hunter McMahon, A Law With a Life of Its Own: The Development of the Federal Income Tax Statutes through World War I, 7 Pitt. Tax Rev. 1 (2009) (providing a detailed history of the adoption of the federal income tax); Tracey Roberts, Brackets: A Historical Perspective, 108 NW. U. L. Rev. 925 (2014) (describing tax brackets starting in 1913).
94. Hookstadt, supra note 56, at 54. Because the maxima were set in dollar amounts, they did not automatically escalate; it required legislative action to raise them. See id. Benefits were available for temporary disability, and for partial and total permanent disability. Id. at 56. Then, as now, the basis of compensation benefits for injuries that caused partial disability “has been most difficult.” Id.
95. 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
then, as now, the "most difficult" to determine. 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.

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. In addition, some states provided compensation for disfigurement that might not have affected an individual's immediate earning capacity but "may decrease his opportunities to obtain employment." The new programs were specifically designed to exclude payment for pain and suffering, and no benefits were paid for non-work-related effects of injuries. Medical benefits were also "restricted as to the monetary amount, the period of treatment, or both," but were in "a constant state of flux," even in the very early years.

Employers covered by the mandatory statutes, or those that chose to opt-in in elective states, obtained insurance coverage, largely through private insurance. Financing mechanisms varied, from exclusive state insurance funds to private insurance without any state-

96. Hookstadt, supra note 56, at 56.
97. Id.
98. Id.
99. Id. at 57-58; see also Supplement, Workmen's Compensation: Compensation for Disfigurement, 116 A.L.R. 712 (1938).
100. Hookstadt, supra note 56, at 45-47.
101. Bruce A. Greene, Medical Services, in BULL. NO. 1149, supra note 64, at 25. In 1917, only four states required provision of unlimited medical services; many limited medical services by both duration and amount. Hookstadt, supra note 56, at 74. Choice of physician was also limited. Id. at 77-78.
102. Hookstadt, supra note 56, at 5 ("[T]he requirements as to medical service are in a constant state of flux.").
103. FISHBACK & KANTOR, supra note 29, at 148-49 (describing how 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, some states did not require employers to obtain insurance, even if they were covered by the workers' compensation law. Hookstadt, supra note 56, at 13-14.
administered funds. Unions argued, in most cases unsuccessfully, for state funds. 104

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, the relative power of the parties had significant influence on the ultimate compromises, which varied from one state to another. 107 In particular, the growing strength of labor unions had substantial impact on the final bargains that were struck in many states. 108

104. Hookstadt, supra note 56, at 15; see also Fishback & Kantor, supra note 29, 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.

105. For a detailed description of the battle over benefit levels between 1910 and 1930, see Fishback & Kantor, Prelude to the Welfare State, supra note 29, at 172–92. Fishback and Kantor note 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. Id. at 173. Fishback and Kantor specifically describe 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 56, at 9 (noting that two factors determine the provisions of the state laws: the laws of contiguous states and the “political progressiveness of the [s]tate”).

106. For example, in Missouri, plaintiffs' 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 265 (Claudia Goldin & Gary D. Libecap eds., 1994).

107. See Fishback & Kantor, Prelude to the Welfare State, supra note 29, at 122–25 (describing the union-friendly Ohio compromise backed by strong union constituency in the Ohio Senate); id. at 136–40 (describing “sixteen-year struggle” for Missouri workers' compensation where both interest groups and the electorate were politically divided).

108. Or, as Fishback and Kantor say, “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.” Id. at 25.
Assessing the Grand Bargain

As previously noted, and based on the law at the time, everyone came out ahead—on average. 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. Perhaps one should view this bargain as a truce in an on-going war rather than as a definitive response to a socioeconomic problem. The bargain did, however, set the ground rules for the design of the compensation system for work injuries, including both benefits and financing. This framework has changed remarkably little in the ensuing 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. 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

109. Witt, supra note 26, at 144 (quoting Eastman, supra note 42) (“[A]ll that can be hoped for is a rule that is fair in the average case.”).
110. At least according to Witt, in the 1910s, industrial accidents were being reported to the New York Workmen’s Compensation Commission at the rate of 1000 per day, and about 150 of these were found to be compensable. Witt, supra note 26, at 203.
111. Witt calls it the “entering wedge in the establishment of a whole panoply of social insurance schemes.” Id. at 148.
systems. Arguably, it laid the foundation for New Deal social insurance programs, including Social Security and unemployment benefits, as well as for later developments, such as 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 nineteenth century.

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

Third, these new laws effectively led to the freezing of tort theory regarding workplace hazards. At the turn of the last century, there

112. 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.

113. For a description of the short-comings of nineteenth-century charity, see Friedman & Ladinsky, *supra* note 29, at 56–57, which notes:

[F]rom 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.

114. See Fishback & Kantor, *Prelude to the Welfare State*, *supra* note 29, at 310–13 (describing how insurance companies realized the benefits offered by generalized insurance programs due to the "adverse selection problems" associated with individualized insurance and how unions and workers could better negotiate for generalized insurance through the legislature than through individual negotiations).


was an assumption that the employer assumed a duty of reasonable care and diligence, subject to the controversial unholy trinity of common law defenses. In general, the exclusivity of workers’ compensation brought the development of tort law involving employers’ liability for workers’ injuries to a halt: the evolution of tort doctrine during the twentieth century had little impact on employers’ civil liability to employees for workplace injuries and illnesses. This is particularly notable when viewed in relation to the relatively new nature of tort theory at the end of the nineteenth 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; and elsewhere, where the shield for employers created by

119. Fessenden, supra note 22, at 1157–58 (“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.”).


121. See Klein, supra note 120, at 69. For workers in the interstate railroad industry, however, tort theory continued to develop under the Employers’ Liability Act, which requires a showing of fault and allows for tort litigation. 45 U.S.C. § 51 (2012). The question of employers’ liability through a contribution claim brought by a third-party tortfeasor when injured employees bring third party action is not within the scope of this discussion. For discussion of this issue, see Klein, supra note 120, at 66–67, and Rabin, supra note 118.

122. See supra note 38 and accompanying text.

123. See Austin I, 465 S.W.3d 193, 200 (Tex. 2015) (dealing with a certified question to the Texas court, where an employee of the employer, which had opted not to participate in the state’s elective workers’ compensation system, slipped and fell at work). The court held that “an employer does not have a duty to warn employees of dangers that are open and obvious or already known to the employee.” Id. at 211 (citing Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401, 412–13 (Tex. 2009)). The court in Austin distinguished 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 section 406.033(a)(2) of the Texas Labor Code from the duty to warn. TEX. LAB. CODE ANN. § 406.033(a)(2) (West 2017); see Austin I, 465 S.W.3d at 209–10. Austin overruled Sears, Roebuck & Co. v. Robinson, 280
workers' compensation has largely been upheld despite attempts to expand liability for injuries caused by reckless disregard for safety or where an injury is substantially certain to occur.\(^{124}\) This means that employers' cost of workplace injuries is rolled into an insurable risk with limited liability. For self-insured employers, costs are limited by the statutorily defined benefits. For employers that purchase insurance, these costs are averaged and spread within an industrial class.\(^{125}\) Experience-based rating adjustments are limited, particularly for smaller employers, and the extent to which they are effective in promoting safety is debatable.\(^{126}\)

S.W.2d 238 (Tex. 1955), which held that an employee's knowledge of a dangerous condition related only to assumption of risk. *Austin,* 465 S.W.3d at 212; see *Sears, Roebuck & Co.*, 280 S.W.2d at 240. The 2015 *Austin* case has echoes of the 1900 case of *Lamson v. American Ax & Tool Co.*, 58 N.E. 585 (Mass. 1900). There, the worker complained about danger and was told to do the work or leave. *Id.* at 585. The accident he feared occurred. *Id.* 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.” *Id.* (citing *Carrigan v. Washburn & Moen Mfg. Co.*, 48 N.E. 1079, 1079–80 (Mass. 1898)).

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 employer is aware, or reasonably should have been aware, but the employee is not.” *Austin v. Kroger Tex.*, L.P., 614 F. App’x 784, 784 (5th Cir. 2015) (quoting *Austin I*, 465 S.W.3d at 201). As the Fifth Circuit noted:

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.

*Id.* The pure negligence claim in the case had been dismissed in the initial proceedings. *Austin v. Kroger Tex.*, L.P., No. 3:11-CV-1169-B, 2012 WL 2795674, at *3 (N.D. Tex. July 10, 2012). The trial court noted that in Texas a “plaintiff must allege . . . injury[y] as a result of ongoing activity . . . rather than by a condition on the property.” *Id.* at *7. “Austin ha[d] 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.” *Id.* at *8. It can certainly be argued that this case does not reflect the evolution of tort law during the twentieth century.

124. See *infra* notes 396–400 and accompanying text (discussing the erosion of exclusivity on this basis in a few states).

125. See *WITT, supra* note 26, at 1–2.

126. See *Spieler, Perpetuating Risk, supra* note 11, at 183 n.258, 189–201 (listing studies through 1993 that investigated the effectiveness of experience rating as a safety incentive and describing rate-setting methodology and experience rating in detail). For more recent studies, see generally *HARRY W. ARTHURS, FUNDING FAIRNESS: A REPORT ON ONTARIO’S WORKPLACE SAFETY AND INSURANCE SYSTEM* (2012) (analyzing various rate-setting methodologies); H. ALLAN HUNT & MARCUS DILLENDER, UPJOHN INST. FOR EMPT RESEARCH, WORKERS’ COMPENSATION: ANALYSIS FOR ITS SECOND CENTURY 65–91 (2017), http://research.upjohn.org/cgi/viewcontent.cgi?article=1262&context=up_pressMark (providing a recent summary of the literature regarding the relationship between
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 and railroad workers in interstate commerce. State regulation of safety, although permissible under *Lochner*, was inconsistent, tended to focus on factory inspections, and was overshadowed to a great extent by the sense of the inevitability of the carnage. In fact, expansive federal regulation of safety in general industry did not come until many decades later, with the Occupational Safety and Health Act of 1970.

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 one hundred years. The issues of benefit levels and duration,

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131. *See supra* note 45 and accompanying text.

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 nineteenth century free labor ideology.\textsuperscript{133} 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.\textsuperscript{134} 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.\textsuperscript{135} 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.\textsuperscript{136}

Seventh, workers' compensation was the first arena for administrative adjudication and paved the way for the development of these systems later.\textsuperscript{137}

Finally, the acceptance of the workers' compensation scheme may have had an effect on the judicial acceptance of \textit{ex ante} contracts in employment. Prior to 1900, contracts made in advance in which an employee agreed to release an employer from liability were often viewed as contrary to public policy, unless there was a specific promise that accompanied the waiver.\textsuperscript{138} Workers' compensation added to an

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134. \textit{See EASTMAN, supra note 42, at 248–49 (pointing to the hierarchical organization of modern firms and the inadequacy of tort litigation); FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 45–46 (2012) (suggesting workplace efficiency would be improved by having employees do a single job or component of a job); Witt, \textit{supra} note 26, 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 . . . accident[s]" and further noting that "it was futile to leave safety to the workers themselves").}
135. \textit{See Spieler, Perpetuating Risk, supra note 11, at 168–70, for further discussion of this concept.}
136. \textit{See infra} Section III.B (discussing changes in safety since 1900).
137. \textit{See Witt, supra note 26, at 188–90.}
138. \textit{Id.} at 67–69. Employment contracts as early as the 1860s included waivers regarding employers' liability for personal injuries, sought to establish "restrictive thirty-day notice requirements, purported to waive state safety regulations, and attempted to condition the filing of personal injury suits on medical examinations by company physicians." \textit{Id.} at 67. Some courts found these provisions to be void against public policy. \textit{Id.} at 67–68. Witt notes that courts regularly refused to enforce employment contract provisions barring injured employees from suing their employers in tort . . . . [T]he strong trend in
environment in which \textit{ex ante} waivers have become \textit{a priori} acceptable. Current judicial approval of waivers\textsuperscript{139} and pre-dispute arbitration agreements\textsuperscript{140} are arguably a current manifestation of this trend. The effect of workers' compensation is unclear, both because the earlier rejection of \textit{ex ante} injury provisions also required some promise of compensation, and also because of overall trends in contract law. But the wholesale \textit{ex ante} elimination of tort rights, irrespective of the degree of malfeasance of the employer, certainly heralded the later approval of \textit{ex ante} promises relating to workers in the twentieth and twenty-first centuries.

\textbf{B. Phase Two: The New Deal, the National Commission, and an Upward Spiral of Benefits and Costs}

Every state legislature had enacted a workers' compensation law by 1948.\textsuperscript{141} States regularly tweaked their statutes, changing benefit levels to increase maximum weekly benefits, expanding the lists of covered industries, or increasing available medical benefits; they did not, however, make fundamental structural changes to the pre-existing

bargain. Variability among the state statutes persisted. 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, but the general parameters of available benefits remained unchanged. Overall, costs to employers were reasonably stable. 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 legal actions.

143. See generally Heckman, supra note 141 (discussing changes in workers' compensation in the period from 1930 to 1936); Samuel B. Horovitz, Injury and Death Under Workmen's Compensation Laws: Horovitz on Workmen's Compensation (1944) (enumerating the status of the laws as of the date of publication); Reede, supra note 142 (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"); Somers & Somers, supra note 141, at 26–37 (enumerating the status of the laws as of the date of publication in 1954); C. Arthur Williams, Jr. & Peter S. Barth, Compendium on Workmen's Compensation 29–40 (Marcus Rosenbloom ed., 1973) (enumerating the status of the laws as of the date of publication in 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).
144. Fishback & Kantor, Prelude to the Welfare State, supra note 29, at 183.
145. Id. at 184 ("[I]n 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%, the benefit levels rose by 0.97%;" also noting that "[s]hifts in the party composition of state legislatures had economically and statistically significant positive effects on benefit levels.").
146. Spieler, Perpetuating Risk, supra note 11, at 131 & n.30 ("[C]osts rose from 0.94 to 1.14 per $100 of payroll [from 1953 to 1972], a twenty-one percent 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.").
147. An Investigation Relating to Health Conditions of Workers Employed in the Construction and Maintenance of Public Utilities: Hearing on H.J. Res. 449 Before the S. Comm. Of the Comm. On Lab., 74th Cong. 2 (1936) (documenting the Congressional aftermath of the disaster); Frances Perkins, Recollections of Promise and Performance, 1934–64, in A Report on the Bureau of Labor Standards 30th Anniversary 5, 13–14 (1964) [hereinafter 30th ANNIVERSARY] (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"); see also Jones v. Rinehart & Dennis Co., 168 S.E. 482, 487 (W. Va. 1933) (addressing the silicosis deaths related to this disaster and finding that under workers' compensation law that employers were not "exempt from liability for non-compensable disease (caused by negligence of the employer) or death resulting from such disease"). See generally Martin Cherniack, The Hawk's Nest Incident: America's Worst Industrial Disaster (1989)
It was not until the middle of the century that the question of benefit adequacy became the primary focus for commentators.\textsuperscript{148} 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.\textsuperscript{149} Workers' compensation was no longer a \textit{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\textsuperscript{150} and employment laws\textsuperscript{151} that changed the external context. 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.\textsuperscript{152}

\textsuperscript{(providing an epidemiologist's analysis of the hundreds of deaths attributable to acute silicosis from the building of the tunnel); HUBERT SKIDMORE, HAWKS NEST (1941) (providing a fictional account of this disaster).}

\textsuperscript{148} For example, HECKMAN, \textit{supra} note 141, discusses gaps in coverage, but does not focus on adequacy of benefits in his monograph. In contrast, REDEE, \textit{supra} note 142, focuses on issues of adequacy. There were, of course, some analysts in the early period who mentioned issues of adequacy. \textit{See} Hookstadt, \textit{supra} note 56, at 56. But the strength of these concerns regarding adequacy quite clearly grew in this later period.


\textsuperscript{152} \textit{See} Berkowitz & Berkowitz, \textit{supra} note 149, at 260 ("By the time of the New Deal, workers' compensation, which was first looked upon as a possible model for new social insurance programs, came to be regarded with suspicion and disdain.").
Arthur Reede reflected the mainstream changing views in his book, *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. After pointing out the flaws in the various workers’ compensation programs, he concluded, “[i]t 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. Compensation benefits are clearly inadequate.” His focus was on how the flaws in workers’ compensation laws “reduce the proportion of wage loss compensated.”

Benefit adequacy in these state programs grew into an issue of national concern, although federal intervention continued to be viewed as inappropriate. 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”. His objective was “improvement of the laws” and not uniformity. 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. 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.

154. Id. at 225.
155. Id.
156. Perkins, supra note 147, at 13.
158. Id. at 842.
159. Id. at 843.
160. Telephone Interview with John F. Burton, Jr., Professor (Emeritus), Rutgers Univ. and former Chair, Nat’l Comm’n on State Workmen’s Comp. Laws (Sept. 2, 2016); E-mail from John F. Burton, Jr., Professor (Emeritus), Rutgers Univ. and former Chair, Nat’l Comm’n on State Workmen’s Comp. Laws, to author (Oct. 11, 2016) (on file with author) (“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 [twenty-one] members representing business[es], 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 [sixty-eight] 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
Concerns about the inadequacy of these state programs continued to be raised within the Department of Labor through the next decade, but it took a political movement focused on occupational safety and health to galvanize sufficient attention to generate Congressional action. 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

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 [sixteen] 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 [nineteen] essential recommendations of the National Commission, and also prepared Model Act IV, which included all [sixty-eight] sections of the proposed legislation in Model Act I and Model Act II modified as necessary to accommodate all [eighty-four] of the recommendations of the National Commission.); see also Joseph W. Little et al., Cases and Materials on Workers' Compensation 617 app. B at 617–65 (5th ed. 2004).

161. DOL Workers' Comp. Report, supra note 17, 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 30th Anniversary, supra note 147, at 44–45. Peterson rhetorically asked, "Are our State workmen's compensation laws proving adequate to the demands on them?" Id. at 44. She responded that [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! . . . [W]ill 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 States in a region raise and extend benefits together? Tomorrow is later than you think for our earliest form of social insurance."

Id. at 44–45.

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) [I]n 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.163

The National Commission on State Workmen's Compensation Laws was
charged to undertake this review.164

According to a summary by Peter Barth, who served as executive
director of the National Commission, 165 "few people were aware of the
overall inadequacy of the schemes."166 More specifically, the
Commission found that, at the time of its convening: only thirty-one
states had laws that made coverage for at least some workers
mandatory, and in fifteen states, coverage of employees was below
seventy percent of the workforce167; in thirty-nine states, employers
could reach an ex ante agreement with workers that waived the
employee's rights to workers' compensation benefits;168 only twenty-
nine states met the standard of replacing two-thirds of the average
weekly wage for temporary total disability benefits, and only twenty-
five met this standard for permanent disability benefits;169 only one
state met the criterion that the maximum weekly benefit should be at
least 100% of the state's average weekly wage.170 In 2010, looking back,

84 Stat. 1590, 1616 (repealed 1972). Section 27 of the Occupational Safety and Health Act
created the National Commission on State Workmen's Compensation Laws. Id. § 27(b).
However, the Commission would "cease to exist" after ninety days once its report was
submitted. Id. § 27(c). The final deadline for its report on a "study and evaluation of State
workmen's compensation laws" was July 31, 1972. Id. § 27(d)(1)–(2).

164. Id. § 27.

165. See NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF
THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972)
[hereinafter NAT'L COMM'N REPORT].

166. Barth, supra note 66, at 7. See generally id. at 3–19.

167. Id. at 7.

168. Id. at 8.

169. Id.

170. Id. at 8–9; see also NAT'L COMM'N REPORT, supra note 165; Spieler, Perpetuating
Risk, supra note 11, at 131–32 & nn.32–34.
Barth concluded: "[t]aking 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."\textsuperscript{171}

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,"\textsuperscript{172} and unanimously endorsing eighty-four recommendations, including nineteen recommendations that the Commission members regarded as "essential."\textsuperscript{173} This feat was remarkable, given that the Commission was composed of eighteen 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.\textsuperscript{174}

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 death."\textsuperscript{175} 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.\textsuperscript{176}

\begin{footnotesize}
\textsuperscript{171} Barth, supra note 66, at 9.

\textsuperscript{172} John F. Burton, Jr., Letter of Transmittal, in NAT'L COMM'N REPORT, supra note 165, at 3 [hereinafter Burton, Letter of Transmittal].


\textsuperscript{175} Burton, Letter of Transmittal, supra note 172, at 3.

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attributed the unanimity to “the obviously inadequate quality of the state systems.”\textsuperscript{177} 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.\textsuperscript{178}

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.”\textsuperscript{179} 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.”\textsuperscript{180} 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.\textsuperscript{181} The recommendations included:

\begin{itemize}
  \item 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.\textsuperscript{182} The Commission also urged use of a definition of “employee” that would extend coverage as broadly as possible.\textsuperscript{183}
\end{itemize}

\textsuperscript{177} Burton, \textit{21st Century National Commission}, supra note 176, 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.

\textsuperscript{178} id. at 15, 35–40.

\textsuperscript{180} See \textit{supra} notes 88–102 and accompanying text.

\textsuperscript{183} \textit{Id.} at 48 (Recommendation 2.8).
• Coverage of injuries and diseases: Recommendations included "full coverage for work-related diseases" (an essential recommendation); elimination of the 'accident' test for compensability that had led to the exclusion of claims seen as the result of normal operation of businesses; coverage for injuries and diseases arising out of and in the course of employment, including full benefits for impairments or deaths "resulting from both work-related and non-work-related causes if the work-related factor was a significant cause of the impairment or death."

• Benefit levels: The Commission recommended that maximum weekly benefits be set at 100% of the state's average weekly wage initially (and then rise to 200%) and that the maximum be linked to the state's average weekly wage to avoid the need for legislative action to address general wage increases in the labor market. Subject to this maximum, the recommendation

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184. Id. at 48-51 (Recommendations 2.11-2.17).
185. Id. at 50 (Recommendation 2.13); id. at 127 (indicating the essential nature of this recommendation).
186. Id. at 49-50 (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.").
187. Id. at 50-51 (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 impossible . . . . 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.
188. Id. at 51 (Recommendation 2.17).
189. Id. 54-75 (Recommendations 3.1-3.26).
190. Id. at 62 (Recommendations 3.8 and 3.9) (temporary disability); id. at 64-65 (Recommendations 3.15-3.16) (permanent total disability).
191. Id. at 62 (Recommendation 3.10).
was that benefits should be set at least at two-thirds of the worker's gross weekly wage. The recommendations also included a waiting period of no longer than three days before eligibility for temporary benefits, 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. Most of these were included in the essential recommendations.

- Medical and rehabilitation benefits. The essential recommendations included that full medical and rehabilitation benefits without limits on amount or duration be covered. Additional recommendations involved worker choice of physician; state (not employer or insurance carrier) management of medical issues; and establishment of second injury funds to provide "broad coverage of pre-existing impairments."

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192. 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 transitional benefit level for temporary disability. Id. at 57. The Commission recommendation was initially that benefits be eighty percent of the week's spendable (net) weekly earnings. Id. at 56 (Recommendation 3.1).

193. Id. at 59 (Recommendation 3.5).

194. Id. at 65 (Recommendation 3.17) (permanent total disability); id. at 72 (Recommendation 3.25) (death benefits).

195. Id. at 65 (Recommendation 3.17).

196. Id. at 126–27. Essential recommendations for temporary total benefits included: weekly benefits of no less than 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) and "no limit on duration or total dollar amount" (Recommendation 3.17). Id. at 127. For death benefits, essential recommendations included: surviving dependents should receive the same benefit levels as for temporary disability (Recommendations 3.21 and 3.23) with no limit on duration or total dollar amount (Recommendation 3.25). For permanent total disability benefits, the benefit should be the same as for temporary disability (Recommendations 3.12 and 3.15) "with no duration or . . . dollar limits on benefits" (Recommendation 3.17), and "[t]he Commission's recommendation for the definition of permanent total disability should be used. (Recommendation 3.11)."

197. Id. at 77–85 (Recommendations 4.1–4.12).

198. Id. at 80 (Recommendation 4.2); id. at 126–27 (indicating essential nature of this recommendation).

199. Id. at 79 (Recommendation 4.1).

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

201. Id. at 84 (Recommendation 4.10).
• Safety: 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; that insurance carriers be required to provide loss prevention services; and that experience rating be used to encourage safety.

• 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." The report also made recommendations regarding the administration of these systems by the states.

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. 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. This challenge persists today.

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202. Id. at 87–98 (Recommendations 5.1–5.4).
203. See id. at 93 (Recommendation 5.1).
204. Id. (Recommendation 5.2).
205. Id. at 98 (Recommendations 5.3–5.4).
206. Id. at 48 (Recommendation 2.11); id. at 127 (indicating that this was an essential recommendation).
207. See id. at 99–114.
208. See id. at 66–67; Burton, Reflections, supra note 174, at 17–20.
209. See NAT'L COMM'N REPORT, supra note 165, at 67–70 (discussing different theories for allocating permanent partial disability benefits).
210. 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. See John F. Burton, Jr., Permanent Partial Disability Benefits, in WORKPLACE INJURIES AND DISEASES: PREVENTION AND COMPENSATION 81–87 (Karen
The Commission disbanded ninety 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.\textsuperscript{211} The report specifically noted, "[w]e reject the suggestion that Federal administration be substituted for State programs at this time."\textsuperscript{212} Federal intervention never happened.\textsuperscript{213} Whether due to shared concerns about 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,\textsuperscript{214} states' compliance with the essential recommendations increased, moving from an average of 6.8 in 1972 to 12.1 in 1980.\textsuperscript{215}

\begin{footnotesize}
\begin{enumerate}
\item Roberts et al. eds., 2005). For further descriptions of these different approaches, see id. at 69–116; see also Peter S. Barth, Compensating Workers for Permanent Partial Disabilities, 65 SOC. SEC. BULL. 16–23 (2003). 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 the amount paid pursuant to schedules for amputations. See Michael Grabell & Howard Berkes, The Demolition of Workers' Comp, PROPUBLICA (Mar. 4, 2015) [hereinafter Grabell & Berkes, Demolition], https://www.propublica.orglarticle/the-demolition-of-workers-compensation.
\item DOL WORKERS' COMP. REPORT, supra note 17, at 29.
\item NAT'L COMM'N REPORT, supra note 165, at 126 (emphasis added).
\item See Barth, supra note 66, at 10.
\item At 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 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.
\item Id. 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. National Workers' Compensation Standards Act of 1978, S. 3060, 95th Cong. (1978); Barth, supra note 66, at 12.
\item DAVID B. TORREY, SECTION 305.2 OF THE PENNSYLVANIA WORKERS' COMPENSATION ACT AND EXTRATERRITORIAL JURISDICTION: BACKGROUND, STATUTE, AND INTERPRETATION 2, http://www.davetorrey.info/files/PA_and_Comparative_Extraterritoriality_2.pdf ("In 1974, finally, the reform movement of that era caused a complete upheaval of the long-existing status quo.").
\item DOL WORKERS' COMP. REPORT, supra note 17, at 29.
\end{enumerate}
\end{footnotesize}
The adequacy of some benefits that are unambiguously defined by statute unquestionably improved in the wake of the National Commission's report. States moved from elective to mandatory laws; today, Texas is the only remaining state that allows employers to choose whether to opt into the workers' compensation system.\(^{216}\) The majority of states raised the maximum for total disability benefits to one hundred percent of the state average weekly wage.\(^{217}\) Weekly statutory benefit rates increased substantially between 1970 and 1985 and continued to increase, though more modestly, between 1985 and 1990.\(^{218}\) Costs for employers increased as well.\(^{219}\) 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 thirteen set the maximum weekly benefit at one hundred percent of the state average weekly wage or higher.\(^{220}\)

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 \textit{quid pro quo} for employers' tort immunity, the Commission suggested that adequacy of benefits—including fair

\(^{216}\) 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, 770 (Okla. 2016), and similar legislation has not been passed elsewhere.

\(^{217}\) Burton, 33 Years Later, supra note 176, at 25 (citing NAT'L COMM'N REPORT, supra note 165, at 61); see also U.S. DEPT OF LABOR, 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).

\(^{218}\) Burton, 21st Century National Commission, supra note 176, at 32 fig.2 (analyzing NCCI data).


\(^{220}\) Ramona P. Tanabe, Workers' Compensation Laws As Of January 1, 2016, at 27–31 tbl.4 (Workers' Comp. Research Inst. 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)).
administration and access to medical care for injured workers—should be paramount.\textsuperscript{221} The measure of adequacy used by the Commission was later adopted by the National Academy of Social Insurance,\textsuperscript{222} and used in sophisticated earnings losses and replacement studies that became possible with the development of new research tools in the 1980s.\textsuperscript{223} 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,\textsuperscript{224} 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—those benefits that are paid directly to injured

\textsuperscript{221} See Nat'l Comm'n Report, supra note 165, at 15.


\textsuperscript{223} For additional examples of these studies see Monroe Berkowitz & John F. Burton, Jr., Upjohn Inst. for Emp't Research, 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); Hunt & Dillinder, supra note 126, at 5–30 (summarized studies as of 2017 and describing the use of a somewhat different methodology used to calculate losses in the most recent study of Michigan workers that resulted in lower levels of calculated losses); 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 et al. eds., 2005) (noting that studies indicate that replacement rates for the ten year period after injury were forty-six percent in New Mexico, forty-one percent in Washington, thirty-seven percent in California, thirty-six percent in Oregon and thirty percent in Wisconsin for the period studies; the authors conclude the “replacement rates do not approach the benchmark for adequacy”); Leslie I. Boden & Monica Galizzi, Economic Consequences of Workplace Injuries and Illnesses: Lost Earnings and Benefit Adequacy, 36 Am. J. Ind. Med. 487 (1999); Seth A. Seabury et al., Using Linked Federal and State Data to Study the Adequacy of Workers' Compensation Benefits, 57 Am. J. Ind. Med. 1165 (2014); H. Allan Hunt & Marcus Dillender, Benefit Adequacy in State and Provincial Workers' Compensation Programs, 21 Upjohn Inst. for Emp'lt Research 1 (2014), http://research.upjohn.org/empl_research/vol21/iss4/1. For a summary of these studies as of 2003, see Barth, Compensating Workers, supra note 210.

workers. 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.

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 United States 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, 1990–2017

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 nineteenth 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. The political strength of

225. NAT'L COMM'N REPORT, supra note 165, at 16 fig. A.
226. See Barth, supra note 66, at 11 ("One of the factors that contributed to the challenge of responding to recommendations of the National Commission was the changes that the states were making in their laws in the years immediately following the report.").
228. For an analysis of the changes in the 1990s, see Martha McCluskey, The Illusion of Efficiency in Workers' Compensation "Reform", 50 RUTGERS L. REV. 657, 705 (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 for example, John F. Burton, Jr. & Emily A. Spieler, Workers' Compensation and Older Workers, in ENSURING HEALTH AND INCOME SECURITY FOR AN AGING WORKFORCE 41, 57–72 (Peter P. Budetti et al. eds., 2001) [hereinafter Burton & Spieler, Workers' Compensation and Older Workers]; John F. Burton, Jr. & Emily A. Spieler, Workers' Compensation and Older Workers, 41(2) IAIABC J. 26, 28 (2004); Emily A. Spieler & John F. Burton, Jr., The Lack of Correspondence Between
workers and their allies waned: private sector unions were declining steadily in membership amid decreasing numbers of jobs in traditionally organized sectors.229 Meanwhile, costs of workers' compensation were rising, fed by increasing benefits for workers, growing medical costs, and changes in the insurance market.230

State compliance with the Commission's essential recommendations slowed.231 By 2015, "only seven states . . . follow[ed] at least [fifteen] of the recommendations," and "[f]our states compl[ied] with less than half of them."232 Costs rose and interest rates declined;233 carriers applied for rate increases;234 and insurance regulators attempted to hold back these increases in response to political pressure, largely from employers.235

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230. BALDWIN & McLAREN, supra note 5, at 3 fig.1. See also Barry Lipton & Karen Ayres, Workers' Compensation Cost Drivers Through the Years, in WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? 21, 23–24 (Richard A. Victor & Linda L. Currubba eds., 2009) (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 11, at 152–54 (describing the changes in the insurance market generally, including the alarming growth of the residual market). See also supra note 219 and accompanying text.

231. DOL WORKERS' COMP. REPORT, supra note 17, at 29 (showing that average compliance in the states with the nineteen 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 12.86%).

232. See Grabell & Berkes, Demolition, supra note 210 (noting the decline in compliance with the recommendations).


234. See id. at 23–24.

235. See id. at 27; 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? 39, 41 (Richard A. Victor & Linda L. Currubba eds., 2010) (noting that "[w]hen states began to implement the[] recommendations [of the National Commission], costs increased" but "workers' compensation premium rates were tightly regulated by state insurance departments . . . [I]t is much easier politically to agree to raise benefits than to raise costs."); McCluskey, supra note 228, at 691–98; Emily A. Spieler, Assessing Fairness in Workers' Compensation Reform: A Commentary on the 1995
Employers' desire for reduced costs and carriers' desire for rate adequacy—neither a new phenomenon—became dominant political issues in states. Carriers pressed for the "tighten[ing] up [of] compensability criteria." The stigmatization of workers who filed claims—similar to that directed at poverty-stricken non-working social welfare recipients—grew.  

Fear of business flight became an increasingly central political focus, although this concern was certainly not new. The National Commission had concluded that the "spector of the vanishing employer" was pure myth—and, in fact, there never was any persuasive evidence that workers' compensation plays a significant role in business location decisions. 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. Changes were made to basic components of the system in many states, reducing workers' access to benefits and medical care. State after

West Virginia Workers' Compensation Legislation, 98 W. VA. L. REV. 23, 78–111 (1995) (describing the particular history of rate-making in West Virginia, where insurance rates were reduced 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) [hereinafter Spieler, Assessing Fairness].

236. Rate adequacy concerns could be addressed, in part, by deregulation of the workers' compensation insurance market, and this was done in many states. See Lipton & Ayres, supra note 230, at 27 (noting that "approved rate levels were below . . . actuarial indications," resulting in a growth in the residual insurance market, thereby destabilizing workers' compensation insurance markets).

237. Id. at 29.

238. See Boden & Spieler, Oxford Workers' Compensation, supra note 228, at 461.

239. NAT'L COMM'N REPORT, supra note 165, at 125.

240. Evidence to the contrary is, however, 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. STAT. 14, 20 (1985) (concluding that business income and property taxes generally have a small effect on business location decisions, contradicting "the conventional wisdom," but finding that, with regard to unemployment and workers' compensation, "these variables' coefficients have the wrong sign or are insignificant"); Rodney A. Erickson, Business Climate Studies: A Critical Evaluation, 1 ECON. DEV. Q. 62, 69 (1987) (reviewing business climate studies generally, describing the methodological problems these studies involve, and concluding "[t]here is no direct one-to-one relationship between business climate—even assuming that it was accurately measured—and industrial growth that emerges from any of these investigations.").

241. DOL WORKERS' COMP. REPORT, supra note 17, at 13.

242. See Grabell & Berkes, Demolition, supra note 210 (providing a state by state analysis of legislative changes that impact benefits between the more recent period of 2002 to 2014).
state has enacted “reforms” that have reduced the availability of cash benefits and access to claimant-chosen medical care.\(^\text{243}\)

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 increased or maintained benefits in the period 2002 to 2014.\(^\text{244}\) In 2015, this story was reported in comprehensive detail in *The Demolition of Workers’ Comp*, by reporters Michael Grabell of ProPublica and Howard Berkes of NPR.\(^\text{245}\)

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.\(^\text{246}\) The changes vary from one state to another.\(^\text{247}\) 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 claimant would win.\(^\text{248}\) States have reversed this language,\(^\text{249}\) or instead adopted rules requiring that claimants win their cases by preponderance of the evidence,\(^\text{250}\) or, in some limited situations, by clear and convincing evidence.\(^\text{251}\)

\(^{243}\) *Id.*

\(^{244}\) *Id.*

\(^{245}\) *Id.*

\(^{246}\) *See DOL WORKERS’ COMP. REPORT, supra* note 17, 13–19 (describing these statutory changes). These changes are also described in several other sources, see *See supra* note 228.

\(^{247}\) No state has adopted all of these changes. References provide examples rather than exhaustive lists of states that have made or rejected these changes.

\(^{248}\) *HOROVITZ, supra* note 143, at x (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 NAT’L COMM’N REPORT, supra* note 165, at 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, 563 S.E.2d 685, 687 (Va. 2002) (citing Byrd v. Stonega Coke & Coal Co., 28 S.E.2d 725, 729 (Va. 1943)) (“[T]he Act is remedial legislation and should be liberally construed in favor of the injured employee.”).

\(^{249}\) *See, e.g.*, TENN. CODE ANN. § 50-6-116 (2017) (stating that workers’ compensation law “shall not be remedially or liberally construed”).

\(^{250}\) *See, e.g.*, W. VA. CODE ANN. § 23-4-1g(a)–(b) (LexisNexis 2017) (“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
• States have abandoned the long accepted rule regarding aggravation of pre-existing injuries. In the past, employers “took workers as they found them.” 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 the “predominant cause”—or equivalent language—of the disability. 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 compensation, but also barred from bringing negligence actions. This essentially nullifies, for 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.

251. For example, in occupational disease claims involving “gradual deterioration or cumulative physical stress disorders,” claimants in Alabama must prove their cases by clear and convincing evidence. Ala. Code § 25-5-81(c) (2017); Williams v. Union Yarn Mills, Inc., 709 So. 2d 71, 72 (Ala. Civ. App. 1998).


253. See, e.g., Mo. Ann. Stat. § 287.020(3)(1) (West 2017) (“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(7)(a)(B) (West 2017) (“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. STAT. ANN. § 440.09(1) (West 2017) (“[T]he accidental compensable injury must be the major contributing cause of any resulting injuries.”).

254. 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., 915 P.2d. 175, 177 (Mont. 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 Missouri, Kansas, Oklahoma, Tennessee, Oregon, Oklahoma and Florida; it is currently under consideration in Illinois. E-mail from John F. Burton Jr., Professor (Emeritus), Rutgers Univ. Sch. of Mgmt. &
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.\textsuperscript{255}

- States are taking a similar approach to injuries that may be partially attributable to aging, with equivalent results.\textsuperscript{256}

- Other states have moved to apportionment between the work and non-work-related impairment. For example, in California, a

\textsuperscript{255} See 9-100 LARSON'S WORKERS' COMPENSATION LAW § 100.04 (2015) ("[E]mployer 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").

\textsuperscript{256} See, e.g., WYO. STAT. ANN. § 27-14-102(a)(xi)(G) (2017) (providing that a compensable injury does not include "[a]ny 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").
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.\textsuperscript{257} Similarly, in Kansas, awards are reduced “by the amount of functional impairment determined to be preexisting,”\textsuperscript{258} and the Wisconsin Worker’s Compensation Act, which 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.\textsuperscript{259}

- Some states simply fail to compensate specific (common) conditions, including musculoskeletal injuries resulting from cumulative trauma and mental health claims resulting from stress.\textsuperscript{260}

- Second injury funds, initially developed to assist in the employment of disabled veterans after World War II, have been closed.\textsuperscript{261} The underlying justification for these funds was that

\begin{itemize}
  \item \textsuperscript{257} See CAL. LAB. CODE § 4663(c) (West 2017) (requiring that the 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"); Id. § 4664 (requiring that "[t]he 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"); City of Jackson v. Workers’ Comp. Appeals Bd., 216 Cal. Rptr. 3d 911, 914 (Cal. Ct. App. 3, 3d Dist. 2017) (providing an extreme example of the application of the apportionment statute where a physician attributed forty-nine percent of a worker’s musculoskeletal impairment to inherited factors, despite the fact "that there is no way to test for genetic factors").
  \item \textsuperscript{258} KAN. STAT. ANN. § 44-501(e) (West 2017).
  \item \textsuperscript{259} WIS. STAT. ANN. § 102.175(1) (West 2017).
  \item \textsuperscript{260} See TANABE, supra note 220, at 52–55 tbl.9 (showing coverage for “mental stress, cumulative trauma, hearing loss, and disfigurement” and demonstrating that seventeen 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 § 56.04 (2015) (noting that mental-mental claims are commonly excluded from compensation). For example, after the Supreme Court of Virginia excluded “job-related impairments resulting from cumulative trauma caused by repetitive motion . . . as a matter of law” from compensability, Stenrich Grp. v. Jemmott, 467 S.E.2d 795, 802 (Va. 1996), the legislature amended the state statute to require proof by “clear and convincing” evidence rather than “preponderance of the evidence.” TANABE, supra note 220, at 55 tbl.9 n.22.
  \item \textsuperscript{261} See Barth, supra note 66, at 14 (noting "[t]he closing out of second injury funds"); TANABE, supra note 220, at 95–98 tbl.16 (showing existence of second injury funds as of January 1, 2016); Ray Farmer, Workers’ Comp Second Injury Fund: Going, Going, Gone, INS. J. (Feb. 9, 2004), http://insurancejournal.com/magazines/partingshots/2004/02/
the cost of the pre-existing impairment should not be added to the responsibility of the newly hiring employer.\textsuperscript{262} When combined with the adoption of "major contributing cause" standards, workers with preexisting conditions are now 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 testing;\textsuperscript{263} others encourage workplace policies that may result in selective enforcement of safety policies if a worker is injured.\textsuperscript{264} 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.\textsuperscript{265} They also strengthen and expand policies that focus on worker-fault, damaging the basic no-fault principles built into the workers' compensation scheme.\textsuperscript{266}

- Permanent partial disability benefits are increasingly linked to impairment evaluations performed with use of one of the recent editions of the American Medical Association (AMA) Guides to

\footnotesize{09/36602.htm.}

\textsuperscript{262} Nat'l Comm'n Report, supra note 165, at 83–84.

\textsuperscript{263} Compare Fla. Stat. Ann. § 440.102 (West 2017) (Statute (1) enacting drug-free workplace program requirements creating incentives for employers to adopt drug testing programs by offering discounts on insurance premiums; (2) including 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 (3) allowing employers to deny medical and indemnity benefits if an injured worker tests positive for a drug), with Grammatico v. Industr. Comm'n, 117 P.3d 786, 787, 794 (Ariz. 2005) (finding that the Arizona drug-free policy introduced fault into the compensation and holding section § 23-1021 of the Arizona Revised Statutes unconstitutional to the extent it imposed a restriction on access to benefits guaranteed under article 18, section 8 of the Arizona Constitution).

\textsuperscript{264} See, e.g., Tenn. Code Ann. § 50-6-110(a)(1) (2017) (excluding compensation if a 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.

\textsuperscript{265} See Alison D. Morantz & Alexandre Mas, Does Post-Accident Drug Testing Reduce Injuries? Evidence from a Large Retail Chain, 10 Am. L. & Econ. Rev. 246, 246 (2008) (finding that claims are reduced when post-accident drug testing is implemented as well as "some 'circumstantial evidence' that a portion of the observed decline could be caused by employees' reduced willingness to report workplace accidents").

\textsuperscript{266} See 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").
the Evaluation of Permanent Impairment. The use of the Guides as a tool to evaluate permanent partial disabilities is controversial, has been shown to lead to reductions in cash benefits for workers, and has been challenged on constitutional grounds.

- 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

267. See generally ROBERT D. RONDINELLI ET AL., AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (Am. Med. Ass'n 6th ed. 2012). See also TANABE, supra note 220, at 37-44 tbl.6 (showing that a total of thirty jurisdictions mandate use of the AMA Guides). Of the jurisdictions that mandate use of the AMA Guides, twenty-one specify use of the fifth or sixth edition, or the most recent edition. Id.


269. See generally ROBERT MOSS ET AL., IMPACT ON IMPAIRMENT RATINGS FROM SWITCHING TO THE AMERICAN MEDICAL ASSOCIATION’S SIXTH EDITION OF THE GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (2012), https://www.ncci.com/Articles/Documents/II_Impact_of_AMA_Guides.pdf (examining 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, and finding in a report of the National Council on Compensation Insurance (NCCI) "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. See generally 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 123–40 (Terry Thomason & Richard P. Chaykowski eds. 1995).

270. See, e.g., Protz v. Workers’ Comp. Appeal Bd., 161 A.3d 827 (Pa. 2017) (holding that the provision in the workers' compensation statute that required physicians to apply the methodology set forth in the most recent edition of the AMA’s Guides to the Evaluation of Permanent Impairment constituted an unconstitutional delegation of authority by the state legislature under the Pennsylvania Constitution, Art. II, § 1). See also Maxwell v. Sprint PCS, 369 P.3d 1079, 1085 (Okla. 2016) (claimant’s “knee injury was exempt from evaluation under the AMA Guides”).
to return to work.\textsuperscript{271} According to a 2016 report from the U.S. Department of Labor, "[e]mployers in some states are [actually] forbidden to provide longer benefits, under threat of audit and fine, even if they are willing."\textsuperscript{272}

- Requirements to qualify for permanent disability benefits have become increasingly stringent, and these benefits are often cut off at retirement age\textsuperscript{273}—despite the fact that the workers' 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.\textsuperscript{274}

- Strict limits have been put on attorneys' fees for claimants, despite the increasing complexity of the litigation.\textsuperscript{275} Not surprisingly, these provisions are being challenged aggressively.\textsuperscript{276}

\textsuperscript{271} See TANABE, supra note 220, at 27–31 tbl.4 (showing that at least eight states limit temporary total disability benefits to a specified number of weeks). But see, e.g., Westphal v. City of St. Petersburg, 194 So. 3d 311, 313 (Fla. 2016) (holding a statutory limitation of workers' "disability benefits after 104 weeks to a worker who [was] totally disabled and incapable of working but who ha[d] not yet reached maximum medical improvement" to be unconstitutional).

\textsuperscript{272} DOL WORKERS' COMP. REPORT, supra note 17, at 15.

\textsuperscript{273} See TANABE, supra note 220, at 32–36 tbl.5 (showing age cutoffs at seventy-five in Florida; at sixty-seven in Minnesota with a rebuttable presumption of retirement; at retirement in Montana and North Dakota; limited to fifteen years or until claimant reaches retirement, whichever is longer, in Oklahoma; until seventy in West Virginia; and until Social Security retirement eligibility or for 260 weeks if the date of injury is after age sixty in Tennessee); id. (listing the following jurisdiction with specific length limitations: D.C. (500 weeks with ability to petition for an additional 167 weeks); Indiana (500 weeks); Kansas (maximum of $155,000); Mississippi (450 weeks or until total compensation equals $210,883.50); 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, in an application for Social Security Disability Insurance benefits.

\textsuperscript{274} BALDWIN & MCLAREN, supra note 5, at 9.

\textsuperscript{275} See TANABE, supra note 220, at 79–85 tbl.14 (showing the fee formulas for all jurisdictions and indicating that, in most states, the fee is paid from the injured workers' award, and that in sixteen states the fee is limited to twenty-five percent or less of the award to the claimant).

\textsuperscript{276} These provisions have been held unconstitutional in at least three states. See generally 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); Clower v. CVS Caremark Corp., 01-CV-2013-904687, 2017 WL 1948883 (Ala. Cir. Ct. May 8, 2017). In Alabama, the trial judge has stayed his order pending further action. Clower, 2017 WL 1948883, at *1, *15; see Amy O'Conner, Alabama Workers' Compensation Act to Remain in Place, For Now, INS. J. (May 18, 2017),
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. See NCCI Proposes Nearly 20% Florida Workers Comp Rate Increase, INS. J. (July 5, 2016), http://www.insurancejournal.com/news/southeast/2016/07/05/418940.htm. In Florida, the National Council on Compensation Insurance (NCCI), a national rating bureau, proposed a large rate increase for employers’ insurance as a result of the Castellanos decision. See NCCI Proposes Nearly 20% Florida Workers Comp Rate Increase, INS. J. (July 5, 2016), http://www.insurancejournal.com/news/southeast/2016/07/05/418940.htm. On November 23, 2016, a trial court ruled the NCCI proposal inadequately transparent under the Florida "sunshine law." Michael Moline, Judge Voids 14.5 Percent Workers’ Comp Rate Increase, FLA POL. (Nov. 23, 2016, 6:29 PM), http://floridapolitics.com/archives/227843-workers-comp. See also HOROVITZ, supra note 143, at xi (suggesting that these kinds of fee limits are anathema to adequacy). Horovitz noted 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 [ten] to [twenty] 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.

Id. 277. See TANABE, supra note 220, at 21–26 tbl.3 (showing medical benefits and method of physician selection). For example, in Illinois, the employee may choose the provider, but “[u]tilization review may limit [medical] treatment.” Id. at 21 tbl.3. Meanwhile in North Carolina and Oklahoma, the employer chooses the provider and may exercise utilization review. Id. at 23 tbl.3. See also David Neumark et al., The Impact of Provider Choice on Workers’ Compensation Costs and Outcomes, 61 INDUS. & LAB. REL. REV. 121, 131–33, 132 tbl.5 (2007) (noting that workers’ satisfaction rates were higher 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).

278. See TANABE, supra note 220, at 21–26 tbl.3 (comparing each state’s requirement for choice of treating physician).

279. See infra Section III.E., for a discussion of the changing landscape of medical care in workers’ compensation.

280. See BALDWIN & MCLAREN, supra note 5, at 5 fig.3 (showing the continuing escalation of medical costs in workers’ compensation).
injured workers complain consistently about the problems with the delivery of care.281

- Growing requirements for "objective" medical evidence,282 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 but may not be visible on x-rays or scans. 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.283

- States enacted enhanced fraud provisions, particularly focused on potential worker fraud, in the 1990s.284 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.285

- 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 1990.286 These lump sum settlements cut off future

281. See Boden & Spieler, Oxford Workers' Compensation, supra note 228, at 461 ("Many injured workers report feeling stigmatized, humiliated, and doubted by their employers" and "mistrusted by medical providers.").

282. See, e.g., FLA. STAT. ANN. § 440.09(1) (West 2017) ("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. § 39-71-116(22) (West 2017) ("Objective medical findings' means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.").

283. See Boden & Spieler, Oxford Workers' Compensation, supra note 228, at 459; Burton & Spieler, Workers' Compensation and Older Workers, supra note 228, at 1–6 (providing a general discussion of the relationship between issues of aging and workers' compensation).

284. Boden & Spieler, Oxford Workers' Compensation, supra note 228, at 454.


286. See DOL WORKERS' COMP. REPORT, supra note 17, at 18 n.72 (noting that "[i]n the 1990s, Pennsylvania, New York and West Virginia all amended their statutes to allow
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. In many states, future medical costs are also included in the settlement, raising additional concerns regarding workers’ future well-being as well as further complicating the process because of the federal concern that medical costs will be transferred to Medicare.  

- 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.

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settlements. As of 2005, the remaining states that limited or prohibited settlements were Delaware, Kentucky, Minnesota, Nevada, New Mexico, Texas and Washington”) (citing David B. Torrey, Commentary on and Analysis of Compromise and Release Agreements under State Workers’ Compensation Laws, 42 IAIABC J. 91, 91–118 (2005); David B. Torrey, Commentary on and Analysis of Compromise and Release Agreements under State Workers’ Compensation Laws (Part Two), 43 IAIABC J. 73, 73–114 (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. Id.  

287. 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 were received without settlements. See DOL WORKERS’ COMP. REPORT, supra note 17, at 18. See generally MONICA GALIZZI ET AL., THE WORKERS’ STORY: RESULTS OF A SURVEY OF WORKERS INJURED IN WISCONSIN xvii (Workers Compensation Res. Inst. 1998) (finding that workers whose claims were settled had the worst outcomes and were more likely to work in low wage, nonunion, temporary, physically demanding and service sector jobs); JAMES N. MORGAN ET AL., 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 J. LAB. ECON. S1 (1993) [hereinafter Thomason & Burton, Economic Effects of Workers’ Compensation].  


289. See TANABE, supra note 220, at 12–15 tbl.1 (showing insurance sources for all U.S. jurisdictions).
This is just a partial list. As of this writing, legislation that would reduce the availability of benefits is pending or proposed in state legislatures around the country.290

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.291 While complex changes in work and safety may also contribute to this decline, there is little doubt that these statutory changes are also a cause.292 Meanwhile, the workers’ compensation line


291. See BALDWIN & MCLAREN, supra note 5, at 3 fig.1, 4 fig.2. Total workers’ compensation benefits per $100 of payroll declined from $1.65 in 1991 to $0.91 in 2014. Wage replacement benefits for workers fell substantially over the same time period from $0.99 per $100 in 1991 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 be 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.

292. 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 & John F. Burton, Jr., The Effects of Changes in the Oregon Workers’ Compensation Program on Employees’ Benefits and Employers’ Costs, 1 WORKERS’ COMP. POL’Y REV 7, 7–23 (2001) (noting that changes in the Oregon statute reduced the number of claims by 12–28% and benefits by 20–25% between 1987 and 1996) [hereinafter Thomason & Burton, Effects of Changes in Oregon]; Leslie I. Boden & John W. Ruser, Workers’ Compensation “Reforms,” Choice of Medical Care Provider, and Reported Workplace Injuries, 85 REV. ECON. & STAT. 923, 923–29 (2003) (explaining that compensability restrictions accounted for 7–9.4% of the decline in DART injuries reported to BLS in 1991–1997); Xuguang (Steve) Guo & John F. Burton, Jr., Workers’ Compensation: Recent Developments in Moral Hazard and Benefit Payments, 63 IND. & LAB. REL. REV. 340, 340–54 (2010) (noting that changes in eligibility rules explain more of the decline in cash benefits during the 1990s than the decline in the BLS injury rate) [hereinafter Guo & Burton, Developments in Moral Hazard].
of insurance is becoming more profitable, and rates are declining in many states. 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.

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 increasingly complex litigation. Proof of expertise is required, and Daubert standards, originally designed to decide what evidence a jury should hear, are now used in some workers’ compensation administrative processes.

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. Employers who chose the opt-out option could then design their own benefit plans and claims review

293. See NCCI, State of the Line Guide: Maximizing Your State of the Line Experience 1, (2016), https://www.ncci.com/Articles/Documents/IIAIS-2016-SOL-Guide.pdf (showing that in 2015 the workers compensation combined loss ratio for private carriers declined six percent from 2014 to to ninety-four percent—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).

294. Tex. Dep’t of Ins., Div. of Workers’ Comp., Biennial Report to the 85th Legislature, at 1–2, 4 tbl. 1 (2016), http://www.tdi.texas.gov/reports/dwc/documents/2016 dwcbienlrpt.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).


processes, leaving very narrow review for the state agency responsible for workers' compensation.\(^\text{298}\)

In view of the latitude given to employers in designing these opt-out plans, the plans could, at least theoretically, have been generous and provided better benefits and more protection to workers than the state-administered program. In fact, investigative reporters found that "the plans almost universally had lower benefits, more restrictions and virtually no independent oversight."\(^\text{299}\) These plans—largely developed by and hyped as great successes by their vendor, PartnerSource, and its President, Bill Minick\(^\text{300}\)—had provisions such as the following:\(^\text{301}\): requirements for twenty-four-hour or end-of-shift reporting of injuries for an injury to be considered compensable; cut off of benefits if an employee was no longer employed (and a specific right to discharge, reviewable only through employer-controlled arbitration processes, if an employer believed a worker has violated a safety rule); medical review performed only by reviewers selected by the plan;\(^\text{302}\) 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 visited the plan-selected physicians; exclusion of conditions that might be common in the particular workplace;\(^\text{303}\) and arbitration as the preferred mechanism for dispute resolution, with employer control of the arbitration process.\(^\text{304}\)

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298. For a thorough discussion of these plans, see Michael Grabell & Howard Berkes, Inside Corporate America's Campaign to Ditch Workers' Comp, PROPUBLICA (Oct. 14, 2015), [hereinafter Grabell & Berkes, Inside Corporate America].

299. Id.


302. Moreover, according to Grabell & Berkes, Inside Corporate America, supra note 298, "[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."

303. Such as exclusion of bacterial infections in a large chain of assisted living facilities. Id.

304. For a very careful review of the opt-out system, see generally GREGORY KROHM, IAIABC, UNDERSTANDING THE OPT-OUT ALTERNATIVE TO WORKERS' COMPENSATION (2016) (reviewing the opt-out system as well as comparing the proposed opt out legislation in Tennessee and South Carolina to the enacted legislation in Oklahoma). This report is
Notably, the early elective systems—like the Texas opt-in system today—required employers to choose between tort liability and workers’ compensation coverage.\(^{305}\) Oklahoma offered an opt-out with tort immunity.\(^{306}\) Moreover, these plans were also not covered by state law provisions that forbid retaliation for filing claims.\(^{307}\)

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.\(^{308}\) But a

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\(^{305}\) It is nevertheless likely that the Texas system served as a model for the Oklahoma statute. In theory, Texas employers always had to choose between workers’ compensation coverage (providing tort immunity) and private plans that did not provide tort immunity. In fact, however, Texas companies that did not opt in to the workers’ compensation system also had a practice of requiring 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. See Lawrence v. CDB Servs., Inc., 44 S.W.3d 544, 554 (Tex. 2001) (holding that “allow[ing] voluntary pre-injury employee elections to participate in non[-]-subscribing employers’ 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) (West 2017). 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.” Grabell & Berkes, Inside Corporate America, supra note 298.


\(^{308}\) ERISA, 29 U.S.C. § 1144 (2012), 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) (2012). 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 71, at 142–44. 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.
federal court concluded that ERISA preemption does not apply, remanding cases to the state courts.309 Noting the discrepancy in rights, the Oklahoma Supreme Court found the opt-out provisions of the statute to be unconstitutional.310 Other provisions of the 2013 law that limited benefits in the state-administered system have also been successfully challenged.311

309. 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 Cauazos 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 . . . .") (citations omitted).

310. Vasquez v. Dillard’s, Inc., 381 P.3d 768 (Okla. 2016) (holding that the Oklahoma Employee Injury Benefit Act, OKLA. STAT. tit. 85A §§ 201–213 (2014), 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 Article 5, section 59 of the Oklahoma Constitution). In a 7–2 decision, Justice Watt wrote for the majority, stating "[t]he core provision of the Opt Out Act creates impermissible, unequal, disparate treatment of a select group of injured workers. Therefore, we hold that the Oklahoma Employee Benefit Injury Act, is an unconstitutional special law under the Oklahoma Constitution." Id. at 770 (citations omitted) (citing OKLA. CONST. art. 11, § 59; OKLA. STAT. tit. 85A § 203 (2015); OKLA. STAT. tit. 85A §§ 201–213 (2014)). The decision was scathing with regard to the nature of the plans:

[The clear, concise, unmistakable, and mandatory language of the Opt Out Act provides that, absent the Act’s express incorporation of some standard, such employers are not bound by any 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.


311. See, e.g., Torres v. Seaboard Foods, LLC, 373 P.3d 1057, 1081 (Okla. 2016), as corrected (Mar. 4, 2016) (holding that 180 day predicate for cumulative trauma claims violates due process requirements); Maxwell v. Sprint PCS, 369 P.3d 1079, 1094 (Okla. 2016) (holding that “scheduled members are exempt from the AMA Guides,” and
Not surprisingly, the plans that are designed outside the traditional workers' compensation system save employers a lot of money. 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.” But the only data available to assess these claims come from PartnerSource. 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. Independent researchers who have no connection to PartnerSource have not yet studied the opt-out program or looked at the outcomes for workers in these plans.

Opt-out approaches similar to the Oklahoma law are being promoted by the Association for Responsible Alternatives to Workers' Compensation (“ARAWC”), a membership organization in which the senior executives come from Walmart, Nordstrom, Lowe’s and other large employers. The “opt-out solution” has been proposed in other states, but has not yet advanced to full consideration anywhere. 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. In 2017, perhaps in response to the failure of the legislation

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, 408 (Okla. 2014) (holding that adjudication of claims for injuries occurring prior to February 1, 2014, are governed by the law in effect at the time of the injury).

312. See Morantz, Rejecting the Grand Bargain, supra note 301, at 5; KROHM, supra note 304.

313. See Minick, supra note 300.

314. Grabell & Berkes, Inside Corporate America, supra note 298.

315. Id.

316. Id.


318. Grabell & Berkes, Inside Corporate America, supra note 298.


320. For example, at the annual meeting of the Workers' Compensation Research Institute, 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. Remarks at the Workers Compensation Research Institute, Annual Conference in Boston, Mass. (Mar. 20, 2016) (author was present at this meeting).
and the vociferous opposition, ARAWC hired Littler Mendelson to promote opt-out nationally.\footnote{321}{Ben Penn, \textit{Littler Mendelson Tapped for Workers Comp Lobbying}, BLOOMBERG LAW: BIG LAW BUS. (Apr. 24, 2017), https://bol.bna.com/littler-mendelson-tapped-for-workers-comp-lobbying ("A business coalition has hired Littler Mendelson to lobby on workers' compensation programs, in what appears to be the controversial state-level advocacy group's first foray into national politics.")}

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.\footnote{322}{See Stahl v. Hialeah Hosp., 160 So. 3d 519, 519–20 (Fla. Dist. Ct. App. 2015), reh'g denied (Apr. 14, 2015), review granted, 182 So. 3d 635 (Fla. 2015), review dismissed, 191 So. 3d 883 (Fla. 2016), cert. denied, 137 S. Ct. 373 (U.S. 2016).} Legislation substantially cut the availability of claimants' attorney fees,\footnote{323}{See Castellanos v. Next Door Co., 192 So. 3d 431, 449 (Fla. 2016).} thereby reducing the likelihood that claimants would have effective representation on claims. The Florida Supreme Court found this restriction to be unconstitutional.\footnote{324}{See Fla. STAT. § 440.34 (2017).} 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;\footnote{325}{It's Official: Florida Workers' Comp Rates Going Up Nearly 15%, INS. J. (Oct. 11, 2016), http://www.insurancejournal.com/news/southeast/2016/10/11/428955.htm. Florida is among the minority of states that may require employers or insurance carriers to pay claimants' attorneys fees. See TANABE, supra note 220, at 79 tbl.14.} litigation was brought challenging the rate increases;\footnote{326}{See Judge Halts Florida's 14.5% Workers' Compensation Hike Set for Dec. 1, INS. J. (Nov. 27, 2016), http://www.insurancejournal.com/news/southeast/2016/11/27/433200.htm ("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."); Florida Appeals Judge's Order Halting 14.5% Workers' Comp Rate Increase, INS. J. (Nov. 29, 2016), http://www.insurancejournal.com/news/southeast/2016/11/29/433411.htm.} and a bill was written that would make workers' compensation coverage elective for employers.\footnote{327}{See Untitled Florida House Bill, https://ww3.workcompcentral.com/fileupload/uploads/2016-12-08-023010FL%20new%20bill%20to%20allow%20opt%20out.pdf; Louise Esola, Florida Bill Would Allow Workers Comp Opt Out, BUS. INS. (Dec. 12, 2016, 10:56 AM), http://www.businessinsurance.com/article/20161212/NEWS08/912310926/Florida-bill-would-allow-workers-comp-opt-out-employers.} As of the time of this writing, the litigation is pending and the bill has not yet been introduced.

Meanwhile, other litigation that challenges the constitutionality of restrictive workers' compensation provisions appears to be
increasing.\footnote{328} For the first time, the exclusion of farm workers from workers’ compensation coverage was successfully challenged in New Mexico.\footnote{329} Statutory fee limits for claimants’ attorneys have been rejected on constitutional grounds in Utah\footnote{330} and in Florida.\footnote{331} Limits on duration of temporary benefits were thrown out in Florida as well.\footnote{332} In Oklahoma, a 180 working days requirement to qualify for carpal tunnel syndrome benefits did not pass due process muster.\footnote{333} The Pennsylvania court concluded that the legislature’s designation of the most recent edition of the \textit{AMA Guides to the Evaluation of Permanent Impairment} for use in claims constituted an unconstitutional delegation of legislative authority.\footnote{334} In Alabama, where there is no severability provision in the workers’ compensation statute, a trial judge threw out the entire statute after finding the attorney fees restriction and cap on permanent partial disability to be unconstitutional;\footnote{335} he has since stayed that ruling.\footnote{336} A pending case attacks the California statute on gender-bias grounds.\footnote{337}

\footnote{328} See Williams, \textit{supra} note 71 (discussing state constitutional challenges to workers’ compensation provisions).

\footnote{329} See 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”). \textit{But see} Haney v. N.D. Workers Comp. Bureau, 518 N.W.2d 195, 202 (N.D. 1994) (rejecting an equal protection challenge to the exclusion of farm workers in North Dakota).

\footnote{330} Injured Workers Ass’n of Utah v. State, 374 P.3d 14, 24 (Utah 2016).


\footnote{332} Westphal v. City of St. Petersburg, 194 So. 3d 311, 327 (Fla. 2016).

\footnote{333} Torres v. Seaboard Foods, LLC, 373 P.3d 1057, 1066, 1079 (Okla. 2016) (holding that the requirement “imposes a duration-of-employment condition as a necessary predicate for filing a cumulative trauma workers’ compensation claim,” and that it “violates the Due Process Section of the Oklahoma Constitution”).


\footnote{336} \textit{See} O’Connor, \textit{supra} note 276.

\footnote{337} Charisse Jones, \textit{Lawsuit Alleges Unequal Disability Payments for Women}, USA TODAY (July 6, 2016, 1:03 P.M.), http://www.usatoday.com/story/money/2016/07/06/lawsuit-filed-guarantee-california-women-same-disability-payments-men/86754760 (noting that the lawsuit alleges systemic gender bias in workers’ compensation system in California). Legislation addressing gender bias has also been introduced in the California legislature.
The year of 2016 has now been described by one workers’ compensation expert as the year of “equal justice under the law.”338 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 probable that state court challenges will continue.

III. CONTEXT (2): EXTERNAL FORCES

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.339 But workers’ compensation does not exist in a vacuum: 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 workers’ 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.340

338. Thomas A. Robinson, The Year of Equal Justice and Due Process, WORKCOMP WRITER (Nov. 4, 2016), 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, “[c]an 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?”).

339. The early histories written by WITT, supra note 26, and FISHBACK & KANTOR, PRELUDE TO THE WELFARE STATE, supra note 29, are notable exceptions to this.

340. 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.
A. Changes in Work

At the time workers’ compensation laws were passed, work was, without question, hard and dangerous. The changes in work over the past century have had both direct and indirect effects on the functioning of the state workers’ compensation systems. Several changes are particularly relevant here.

First, in the early 1900s, few workers stayed in a single job for an extended period of time, and labor turnover was extremely high. 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. Over time, unionization and improved working conditions led to more stability in the workforce; workers tended to stay longer in jobs as the century progressed. Expectations for longer tenure undoubtedly contributed to the focus in workers’ compensation on disability management and return-to-work for injured employees. Current trends, including shorter tenure and growth of part-time work, contracting out, and continuous technological change create new pressures.

341. See Sumner H. Slichter, The 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 a year to maintain a permanent workforce of 1,000 “was not too high for the coal mining industry”).

342. See Laura Owen, History of Labor Turnover in the U.S., EH.NET (Apr. 29, 2004), https://eh.net/encyclopedia/history-of-labor-turnover-in-the-u-s/ (describing labor turnover in 1910–1970 and noting “[t]hese 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.”); id. (noting also that job instability increased among some groups of workers, particularly those with longer tenure, in the 1990s); 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).

343. See infra notes 433–438 and accompanying text.


346. See Derek Thompson, A World Without Work, ATLANTIC (July/Aug. 2016), https://www.theatlantic.com/magazine/archive/2015/07/world-without-work/395294 (describing effects of technological change over time and addressing the effect of these changes on the availability of work); Jerome A. Mark, Technological Change and
Second, there has been a dramatic shift in the sectoral distribution of jobs. Although the agrarian economy had been shrinking, it was still the largest sector in the early twentieth century, making the exclusion of agricultural workers from the new state workers' compensation programs particularly problematic. Today, the service sector dominates; the broad category of professional, managerial, clerical, sales, and service workers grew from one-quarter to three-quarters of total employment between 1910 and 2000. The growth of workers in the health care industry has been especially notable.

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. Now, it is as likely that the injured worker will be a home health worker or nurse's aide in a nursing home, an immigrant worker in a meat or seafood processing facility, or a roofer from a construction job. The hazardous industries of the past employ fewer people; the industries of today pose different hazards—including repetitive strain hazards—that are more challenging to administrative

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Employment: Some Results from BLS Research, MONTHLY LAB. REV. 26, 27 (Apr. 1987), https://www.bls.gov/opub/mlr/1987/04/art3full.pdf (describing technological effects on work as of 1987 and noting that relatively few workers had been laid off due to these changes at that time).

347. See Urquhart, supra note 78 (providing data for 1850, 1900, 1952, and 1982, and showing the following changes in the three sectors of agricultural workers, goods producing including construction, and service workers between 1850 and 1982: agricultural workers declined from 64.5% of the workforce in 1850, to 38.0% in 1900, to 11.3% in 1952, to 3.6% in 1982; goods producing workers represented 17.7% of the 1850 workforce, 30.5% in 1900, peaked at 35.5% in 1952 and declined to 27.2% in 1982; service workers grew steadily, from 17.8% in 1850, to 31.4% in 1900, to 53.3% in 1952, and to 69.2% in 1982). See also Bureau of Labor Statistics, Industry Employment and Output Projections to 2024, MONTHLY LAB. REV. tbl.1 (Dec. 2015), https://www.bls.gov/opub/mlr/2015/article/industry-employment-and-output-projections-to-2024.htm (showing shifts from 2004 to 2014 and projections for 2024 in the workforce as follows: in 2004, agricultural workers were 1.5% of the workforce, continuing to decline to 1.4% in 2004 and to 1.3% by 2024; goods producing workers also continued their decline, from 15.1% in 2004, to 12.7% in 2004, to a projected 12.0% in 2024; service workers continued their growth, from 76.8% in 2004, to 80.1% in 2014, remaining steady at that level in the projections for 2024).

348. Urquhart, supra note 78.

349. See supra notes 77–79 and accompanying text.


352. 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 458,000 to 9,056,000.”).

structures originally designed to deal with traumatic injuries caused by single sudden unexpected accidents.

Third, the demographics of the workforce have changed. The workforce grew six-fold during the twentieth century;\(^\text{354}\) women entered the labor market;\(^\text{355}\) children were increasingly barred from work;\(^\text{356}\) participation by people of color grew;\(^\text{357}\) and the workforce aged.\(^\text{358}\) 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 feeds employers' and insurance carriers' concerns about the potential cost of benefits for workers with pre-existing conditions who are injured at work, leading to efforts to reduce liability to these workers through exclusions or apportionment.\(^\text{359}\)

Fourth, changing technology has had dramatic impact on the hazards posed by jobs—from the development of new fields of work to changes in traditional manufacturing and distribution networks to current development of the gig economy. 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.

Fifth, the fissured workplace involves increasingly complex firm-to-firm relationships, including layers of contracting and subcontracting, franchising, and use of staffing agencies.\(^\text{360}\) A growing number of people


\(^{355}\) Id.

\(^{356}\) Id.

\(^{357}\) Id.

\(^{358}\) Id. at 3; see also Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LAB. REV. 15, 16 (May 2002) (describing demographic shifts in the workforce and noting that the 55-and-older age group made up 13% of the labor force in 2000 and is expected to increase to roughly 20% by 2020); News Release, Bureau of Labor Statistics, Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, 2015 (Nov. 10, 2016), 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).

\(^{359}\) See supra notes 252–259 and accompanying text; Burton & Spieler, *Workers' Compensation and Older Workers*, supra note 228 (discussing the interrelationship between age and issues in workers' compensation).

\(^{360}\) See generally WEIL, supra note 345 (describing the fissured workplace and the effects of contracting relationships on workers and the workplace).
are classified as independent contractors, including workers who work in the gig economy, such as Uber drivers or TaskRabbits. Independent contractors are presumptively outside the reach of employment laws and benefits that are linked to an employment relationship, including workers' compensation. While they may retain rights to sue in tort, these workers therefore lack social insurance for any non-negligently-caused injuries that may occur.

Many of these workers may be misclassified, and therefore illegally excluded from employment protections. According to one report from the Economic Policy Institute, “[m]isclassification 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.” High premiums, not surprisingly, correlate with hazardous industries and, within industries, dangerous workplaces.

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

361. See Lawrence F. Katz & Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015 2 (Nat'l Bureau of Econ. Research, NBER Working Paper No. 22667, 2016), https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws__march_29_20165.pdf (“The 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% in February 2005 to 15.8% in late 2015.”). The percentage of workers who report that they worked for a company that contracted out their services in the preceding week rose from 0.6% in 2005 to 3.1% in 2015.” Id. at 8. It was also found that in 2015 about “0.5% of workers indicate[d] that they were working through an intermediary, such as Uber or Task Rabbit . . . .” Id. at 3. 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 1 (Aug. 2012), http://www.nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf.

362. FRANCOISE CARRÉ, ECONOMIC POLICY INSTITUTE, (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 4 (2015), http://www.epi.org/publication/independent-contractor-misclassification/. Workers' compensation only reaches wage and salaried employees; other workers, irrespective of the level of risk in their jobs, are outside this safety net. Id. at 1 (“All independent contractors . . . are ineligible for benefits such as the minimum wage, overtime pay, unemployment insurance, and workers' compensation.”). Id. at 2 (emphasis added); see also id. at 4 (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”).

363. Id. at 4 (“Workers' compensation insurance premiums are higher for hazardous . . . work . . . and provide a sizeable incentive to avoid covering workers.”).
responsible for these benefits as a “statutory” employer.\textsuperscript{365} Tort immunity is often extended through this chain of contracting, either through statutory provisions\textsuperscript{366} or through contracting, irrespective of which employer actually provides the compensation—or which is responsible for correcting any dangerous work conditions.\textsuperscript{367} Employers that share control of the worker or workplace may be jointly responsible for the provision of compensation to an injured worker.\textsuperscript{368}

In part as a result of this complexity, states have passed legislation like the Massachusetts Temp Worker Right to Know Law, requiring employers to give information to workers regarding workers’ compensation coverage.\textsuperscript{369} The combination of immigrant status, tremendously confusing contractual relationships among firms, language barriers, fear of retaliation and stigma mean that many of

\textsuperscript{365} 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. Compare Campbell v. Flowers Bakery of Crossville, LLC, No. 2:13-0101, 2014 WL 233815 (M.D. Tenn. Jan. 22, 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), with Afoa v. Port of Seattle, 296 P.3d 800, 804 (Wash. 2013) (holding primary contractor responsible through common law theories to injured employee of subcontractor working at site of primary contractor). This arrangement is unlikely to be extended to workers who are classified as casual laborers, however. See, e.g., Stringer v. Robinson, 314 P.3d 609 (Idaho 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).

\textsuperscript{366} This immunity may also be extended to insurers and claims administrators; bad faith actions against the insurers are sometimes thereby prohibited. See, e.g., OR. REV. STAT. ANN. § 656.018(3) (2017) (“The exemption from liability given an employer . . . is also extended to the employer’s insurer, [and] the self-insured employer’s claims administrator . . . .”). But see Meeks v. Guarantee Ins. Co., 392 P.3d 278 (Okla. 2017) (allowing bad faith claim against workers’ compensation insurance carrier to proceed after carrier failed to pay benefits that had been awarded).

\textsuperscript{367} Tort immunity of the host employer is established either through statutory employer provisions or through contractual relationships or insurance riders. See, e.g., Molina v. State Garden, Inc., 37 N.E.3d 39 (Mass. App. Ct. 2015) (tort immunity for host employer through employee’s ex ante waiver and workers’ compensation insurance); Daniels v. Riley’s Health and Fitness Ctrs., 840 S.W.2d 177 (Ark. 1992) (extended tort immunity to athletic club when temp worker was injured on site). See 5-68 LARSON’S WORKERS’ COMPENSATION LAW § 68.06D (2015) (providing additional case law).

\textsuperscript{368} See 5-68 LARSON’S WORKERS’ COMPENSATION LAW § 68.02 (2015).

\textsuperscript{369} See MASS. GEN. LAWS ANN. ch. 149, § 159C(b) (West 2017) (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). See http://www.mass.gov/lwd/labor-standards/employment-agency/employment-placement-and-staffing-agencies-program/twrtk-poster-website-accessible.pdf, for a public description of the law.
these workers may never file for injury compensation.\textsuperscript{370} Workers who are not unionized and immigrant workers are far less likely to file workers’ compensation claims when they are injured.\textsuperscript{371} It is particularly troubling that these workers often work in dangerous industries, including meat and poultry processing, agriculture (where they may be statutorily excluded from compensation), residential construction, and health care.\textsuperscript{372}

In sum, changes in work have put pressures on injured workers and on the workers’ compensation system as a whole. Today, this has fueled a renewed debate about the appropriate future scope of the program.\textsuperscript{373}

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.\textsuperscript{374} Two trends in safety over the last 100 years have had significant impact on the functioning of workers’ compensation programs.


\textsuperscript{372} See infra Section IV.B (noting fact that many of these workers do not file for workers' compensation benefits).

\textsuperscript{373} 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, 20 (April 2016), http://user-olv4vzh.cld.bzlAIABC-Perspectives-April-2016/16-17 (arguing that workers' compensation should be overhauled and limited to the most hazardous industries); Berkowitz & Smith, supra note 20, at 1 (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).

\textsuperscript{374} See supra Section II.A.
First, there is little doubt that, on average, workplaces are safer today than they were in the early twentieth century. Annual workplace fatalities fell from an estimated peak of over 20,000 in 1912 to 5314 in 1995 and continued to fall in the last 20 years, while the total workforce grew from 24 million in 1900 to 139 million adults by 1999. Although injury data are not available for the beginning of the twentieth century, the downward trend in reported injuries is also clear. Despite significant problems with underreporting of occupational injuries and diseases, discussed infra Section IV.B, it is clear that safety at work has generally improved.

This means that workers' compensation claims—and costs—in the aggregate should be declining, and, in fact, total benefits paid to injured workers have indeed been going down. Of course, this decline in

375. See ACHIEVEMENTS IN PUBLIC HEALTH, supra note 26, at 461, 464.
377. See Fisk, supra note 354, at 1.
378. Id. at 2.
380. 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 of a 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%. BALDWIN & MCCLEAREN, supra note 5, at 2 tbl. 1, 19 tbl.5, 18–24. 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 fig.1. The share of total benefits paid in medical care—and therefore paid not to injured workers but to medical providers—rose to 50% of the total in 2010 and has continued to represent half of total benefits in the
benefits may result from declining injury rates, but it may also reflect changes in rates of filing for benefits or reductions in the availability of benefits under tightening rules.  

Moreover, injury rates vary widely by industry. 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, followed closely by meat processing. It is particularly problematic that workplaces and industries with large numbers of immigrant and low wage workers exhibit high injury rates.

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, these assumptions were common and underlay the theory that compensation should only be paid for “accidents” at work. The National Commission, recognizing that these provisions excluded large numbers of work injuries when nothing “unexpected or unusual occurred,” recommended the elimination of this

following years. Id. at 5 fig.3. These numbers vary by state jurisdiction. Id. at 27–35, 26 tbl. 9, 28 tbl.10, 30 tbl.11; see also KATHY ANTONELLO, 2015 STATE OF THE LINE—ANALYSIS OF WORKERS COMPENSATION RESULTS 6–7 (2015), https://www.ncci.com/Articles/Documents/IIAIS-2015-SOTL-Article.pdf.

381. See Thomason & Burton, Effects of Changes in Oregon, supra note 292; Boden & Ruser, supra note 292; Guo & Burton, Developments in Moral Hazard, supra note 292, for studies on this issue.

382. See BLS HIGHEST INCIDENCE RATES, supra note 353.

383. Id. See also Daniel Zwerdling, Hospitals Fail to Protect Nursing Staff from Becoming Patients, Nat’l Pub. Radio (Feb. 4, 2015, 4:27 PM), http://www.npr.org/2015/02/04/382691999/hospitals-fail-to-protect-nursing-staff-from-becoming-patients (showing high rates of back injuries, relying on BLS data).

384. See BLS HIGHEST INCIDENCE RATES, supra note 353 (showing an incidence rate of 10.7 per 100 for meat processing and 12.6 for nursing and residential care facilities).

385. See Alexander, supra note 370; Xiuwen Sue Dong et al., New Trends in Fatalities Among Construction Workers, 3 CPWR DATA BRIEF 1 (2014), 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%, in comparison with a 3.0% increase in nonresidential construction); J. Paul Leigh, Numbers and Costs of Occupational Injury and Illness in Low-Wage Occupations, DEFENDING SCIENCE at 17 (2012), http://defendingscience.org/sites/default/files/Leigh_Low-wage_Workforce.pdf; DOL INEQUALITY REPORT, supra note 1, at 4 (noting the greater impact on lower-wage workers of the costs of occupational injuries).

386. See Witt, supra note 26, at 111–25.

387. See supra notes 83–86 and accompanying text (regarding the role of the accident terminology in workers’ compensation).
requirement. Today, workplace injuries are viewed as largely preventable by public health advocates, government regulators and many employers. The passage of the Federal Coal Mine Safety and Health Act of 1969 and the Occupational Safety and Health Act of 1970 (OSH Act) 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” 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.” Echoing this sentiment, the National Commission listed safety as a critical objective in thinking about workers’ compensation.

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. That was precisely the point of the initial bargain. One common exception to the exclusivity rule allows tort actions by workers when an employer has the deliberate intent to cause an injury. Starting in 1978 in West Virginia, state courts became more receptive

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388. NAT’L COMM’N REPORT, supra note 165, at 49 (“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.”).
393. Id. § 6(b)(5), 84 Stat. 1594.
394. NAT’L COMM’N REPORT, supra note 165, at 35 (listing safety as one of the basic objectives of a modern workers’ compensation program).
395. 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).
to arguments that the interpretation of this exception should be broadened, and that employers should face 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.\textsuperscript{397} 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.\textsuperscript{398} The early distinction between "accidents," the focus of workers' compensation, and preventable events had become blurred.\textsuperscript{399} Court decisions became a political lightning 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.\textsuperscript{400}

\textsuperscript{397} Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 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 employer to produce the injury, but holding that "when death or injury results from willful, 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 a full discussion of the issue of tort liability and workers' compensation, see Rabin, supra note 118.

\textsuperscript{398} See Spieler, Perpetuating Risk, supra note 11, at 176 n.247 (giving a detailed history of these changes and political battles through 1993). Following the lead of West Virginia, several state supreme court decisions adopted the 'substantial certainty' test for international torts included the following, in chronological order: Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981); VerBouwens v. Hamm Woods Prods., 334 N.W.2d 874, 876 (S.D. 1983); Millison v. E.I. du Pont de Nemours & Co., 501 A.2d 505, 507 (N.J. 1985); 


\textsuperscript{400} See Beauchamp, 398 N.W.2d at 890–91 (specifically addressing this conceptual change and noting that the original workers' compensation legislation was designed to address accidental not intentional injuries).

400. This was particularly true in Ohio and Michigan. See, e.g., Houdek v. ThyssenKrupp Materials N.A., Inc., 983 N.E.2d 1253, 1258 (Ohio 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) (West 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.").
These changes in tort law did not continue as a trend. There have, however, been some recent decisions that hint that a few state courts may again be 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.401 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.402 In Washington, the state court refused to extend tort immunity to a general contractor when the employee of a subcontractor was seriously injured, holding that general contractors have a duty “to maintain a common area for any employee of subcontractors.”403 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 section 1983404 claim against the employer, noting that the employer’s “conduct appears to rise above negligent conduct and state a substantive due process claim.”405

The courts have upheld such legislation. See, e.g., Cavalier Mfg. Co. v. Emp’rs Ins. of Wausau, 535 N.W.2d 583, 587 (Mich. Ct. App. 1995) (“The swift legislative response to Beauchamp was to require a much more rigorous standard than that of 'substantial certainty.'”). In West Virginia, the legislature responded by limiting the scope of liability, and the statute has been amended several times. See W. VA. CODE ANN. § 23-4-2 (LexisNexis 2017). 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 (Feb. 5, 2015, 12:00 PM) http://www.jurist.org/hotline/2015/02/christopher-edwards-workers-compensation.php.

402. Id. at 865.
405. Estate of Marvis Lavar Myers v. City of Columbia, No. 3:16-00852-MGL, 2016 WL 3433721, at *2 (D.S.C. June 22, 2016). The decedent, a public sector worker, was killed in a trench collapse when working for the city, and his widow brought a section 1983 claim against the city, claiming that the city maintained policies and practices that required workers to work regularly in unanchored boxes and punished employees who raised safety concerns, and that these policies violated the Fifth and Fourteenth Amendments. Id. 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.” Id. (citations omitted). Note that civil rights claims are generally not viewed as
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*, 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." We have moved a long way past the acceptance of the inevitability of accidents at work.

C. Changes in Work Regulation

In the early twentieth 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. Rooted in the fierce commitment to the doctrine of free labor, the dominant at-will doctrine 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 twentieth century created a different context for the functioning of the compensation program. In addition to the evolution of minimum standards governing wages and hours and occupational safety legislation, the changes most relevant here came in three types. The first established legal protection for collective worker voice. The

subject to the exclusivity rule of workers' compensation, and Myers may possibly be viewed as analogous to this alternative line of cases.

406. DOL INEQUALITY REPORT, supra note 1.

407. Id. at 11.

408. See, e.g., Lochner v. New York, 198 U.S. 45, 59 (1905) (implying that a profession would have to be unusually unhealthy to be reached by regulation); Howard v. Illinois Cent. R.R. Co. (The Employers' Liability Cases), 207 U.S. 463, 495 (1908); Mondou v. New York, New Haven, & Hartford R.R. Co. (Second Employers' Liability Cases), 223 U.S. 1, 48–50 (1912).

409. The origins of the at-will doctrine are found in HORACE C. WOOD, MASTER AND SERVANT § 134, 272–73 (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, 178–79 (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).

second intervened directly in the employment relationship, amending the at-will doctrine to provide protection to workers for a range of activities as well as prohibitions on status-based discrimination. The third 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 cost-shifting issues 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 level. 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.

It was not until the 1970s that changes in employment law began to affect injured workers and workers’ compensation directly. In 1973,

411. In addition to collective activity for mutual aid and protection under the National Labor Relations Act, these include 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, and common law protections in many states for retaliatory discharge rooted in violations of public policy. See Summers, supra note 409, at 70–71, 78 & n.78. See generally JON O. SHIMABUKURO ET AL., CONG. RESEARCH SERV., SURVEY OF FEDERAL WHISTLEBLOWER AND ANTI-RETALIATION LAWS (2013), https://www.fas.org/sgp/cream/misc/R43045.pdf (providing a reasonably complete list of all federal whistleblower laws); OCCUPATIONAL SAFETY & HEALTH ADMIN., DIRECTORATE OF WHISTLEBLOWER PROTECTION PROGRAMS (DWPP), WHISTLEBLOWER STATUTES DESK AID 1–8 (2017), https://www.whistleblowers.gov/whistlebloweracts-desk_reference.pdf (enumerating and describing the twenty-two whistleblower laws that the Occupational Safety and Health Administration investigates).

412. These laws include Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and so on. Federal Laws Prohibiting Job Discrimination Questions and Answers, EEOC, https://www.eeoc.gov/facts/qanda.html (last updated Nov. 21, 2009). There are also state-based equivalent laws, often referred to as Fair Employment Practice Acts. Id.

413. See Spieler, Perpetuating Risk, supra note 11, at 211–37 (discussing the effect of the employment relationship on filing behaviors in workers’ compensation and noting that “workers are caught within an unequal employment relationship which influences their decisions regarding when, or whether, to file workers’ compensation claims”). See also infra Section IV.B, for a discussion of the barriers to filing claims that result from the nature of the employment relationship.

414. 9-104 LARSON’S WORKERS’ COMPENSATION LAW § 104.07 (2015) (noting that it was “odd” that the change “was so long in coming”).
in *Frampton v. Central 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. Other states rapidly followed Indiana's lead. 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 workplaces, 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, creating, for the first time, a direct linkage between the employment relationship and the award of benefits.

Nevertheless, the employment-at-will common law doctrine has remained remarkably resilient, and the primary 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 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, just as they are more likely to raise safety concerns: job security and solidarity

416. *Id.* at 428. The first case signaling this shift in common law had been *Petermann v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 396*, 344 P.2d 25, 28 (Cal. Ct. App. 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*.
417. *See* Spieler, *Perpetuating Risk*, supra note 11, at 223–25 (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); Theresa Ludwig Kruk, *Recovery for Discharge from Employment in Retaliation for Filing Workers' Compensation Claim*, 32 A.L.R.4th 1221 (1984).
418. *See*, e.g., Kruk, *supra* note 417, at § 2[a] ("The recognition of a cause of action . . . for such retaliatory conduct marks a significant erosion upon the traditional rule that an employer may terminate an employee at any time, with or without cause.").
matter. The OSH Act includes an anti-retaliation provision to protect workers who raise concerns about safety or report injuries. The Family and Medical Leave Act provides a limited guarantee for some workers to return to work after an absence for a serious injury. Perhaps most significantly, from the standpoint of workers’ compensation, the Americans with Disabilities Act (ADA) establishes federally based rights 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, but these specific protections do not extend to workers who raise safety concerns, disputes that may arise during the pendency of a compensation claim, to discharge for absences resulting from work injuries, or, generally, to applicants for positions who have previously filed compensation claims. Moreover, few retaliatory discharge cases are likely to be filed by non-managerial employees. The general anti-retaliation provision under the OSH Act for workers in these situations is also startlingly ineffective, and the anti-retaliation provisions under the federal

426. 9-104 LARSON’S WORKERS’ COMPENSATION LAW § 104.07 (2015).
427. See id. (stating 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. § 2612(a) 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.
428. 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.”).
429. See Emily A. Spieler, Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act, 32 A.B.A. J. LAB. & EMP. 1 (2016)
discrimination laws have been interpreted to require a high standard for proof of causation. The early ineffectiveness of the original ADA led to statutory amendments, and the effectiveness of these amendments in protecting individual injured workers is not yet clear. Employers are requiring pre-dispute arbitration agreements that waive basic procedural—and arguably substantive—rights. 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.

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.

(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) [hereinafter Spieler, Whistleblowers].

430. The reasoning in University of Texas Southwestern Medical Center v. Nassar, 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. 133 S. Ct. 2517, 2522–23 (2013). 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”).


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, “[w]orkers' compensation is a disability management system not a benefits system”\footnote{434}---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.\footnote{435} These employment issues add a complex layer to the 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.\footnote{436} Advocates for injured workers 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.\footnote{437} 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 (generally referred to as reaching

\footnote{434} This became a mantra at meetings that I personally attended as a workers' compensation administrator in the 1990s. See infra Section IV.C for further discussion of these views.

\footnote{435} See, e.g., IAIABC Disability Mgmt. and Return to Work Comm., Return to Work: A Foundational Approach to Return to Function 5 (Apr. 19, 2016) [hereinafter IAIABC, RETURN TO WORK], https://www.iaiabc.org/images/iaiabc/Return-to-Work_Foundational-Approach-to-Return-to-Function_Final.pdf (investigating the five to ten 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).

\footnote{436} I am unaware of any written source for this statement. It was agreed upon, however, at the meeting of the "summit." See supra note 18.

maximum medical improvement); 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—a 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. As noted previously, 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 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


439. See supra note 261.

440. See Farmer, supra note 261.
did not come under wartime wage and price controls, and became a key component of both collective bargaining and mechanisms for recruiting workers.\textsuperscript{441} 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.\textsuperscript{442} Many employers also now provide private short and long-term disability policies to their employees.\textsuperscript{443}

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.\textsuperscript{444} Sometimes

\begin{itemize}
\item \textsuperscript{441} See Alain C. Enthoven & Victor R. Fuchs, Employment-Based Health Insurance: Past, Present, And Future, 25 HEALTH AFF. 1538, 1538–40 (2006). This growth was most rapid in the three decades after World War II. \textit{Id.} at 1538. “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.” \textit{Id.} at 1539.
\item \textsuperscript{442} See John R. Kearney, Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability, 66 SOC. SEC. BULL. (2005), 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).
\item \textsuperscript{443} See Kristen Monaco, Disability Insurance Plans: Trends in Employee Access and Employer Costs, BEYOND THE NUMBERS (Feb. 2015), http://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm (providing data on access to these plans). Monaco notes that:
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[\%] for service workers to 54[\%] for workers in management, professional, and related occupations. Access rates for long-term disability range[] from 10[\%] for service workers to 59[\%] for management, professional, and related occupations.
\textit{Id.}
\item \textsuperscript{444} See John F. Burton, Jr. & Xuguang (Steve) Guo, Improving the Interaction Between the SSDI and Workers' Compensation Programs, in SSDI SOLUTIONS: IDEAS TO STRENGTHEN THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM 6–9 (2016); Xuguang (Steve) Guo & John F. Burton, Jr., The Growth in Applications for Social Security Disability Insurance: A Spillover Effect from Workers' Compensation, 72 SOC. SEC. BULL. 69, 80 (2012) [hereinafter Guo & Burton, Growth in Applications for SSDI]; Melissa McInerney & Rosali Ilayperuma Simon, The Effect of State Workers' Compensation Program Changes on the Use of Federal Social Security Disability Insurance 51 INDUS.
the transfer 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.445

A few 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.446 Michigan provides for coordination of benefits between workers' compensation and employer-provided disability insurance.447

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.448 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.449 Similarly, questions have been raised about the impact of the Affordable Care Act on cost

REL. 57, 57 (2012); Paul O'Leary et al., Workplace Injuries and the Take-up of Social Security Disability Benefits, 72 SOC. SEC. BULL. 1, 3, 13–14 (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 & Schoeni, supra note 12, at 31–37.


446. Maine may be unique in having a statute that specifically addresses this problem. See ME. REV. STAT. ANN. tit. 39-A, § 222 (2017) (providing for payment by the general health carrier and a subrogation right for that carrier against the workers' compensation carrier if the compensation claim is approved).

447. See Arbuckle v. Gen. Motors LLC, 885 N.W.2d 232, 234 (Mich. 2016) (finding that 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").

448. See Guo & Burton, Growth in Applications for SSDI, supra note 444, at 79.


transfers in (and out) of workers' compensation. 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. Those who 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. 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 design 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 twentieth century, Western allopathic medicine was in its infancy: germ theory was a product of the second half of the nineteenth 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; modern imaging was not anywhere on the horizon; and employer-based health insurance was, at a minimum, rare.

451. See, e.g., VICTOR ET AL., supra note 445, at 9 (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").

452. See DOL INEQUALITY REPORT, supra note 1, at 11 ("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.").

453. 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 19.


But medicine and the health care system changed rapidly.\textsuperscript{456} 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.\textsuperscript{457} The wide availability of third party payers for health care contributed to the development of technology and specialization, creating escalating costs in the health care system overall and modifying the power relationships within the system.\textsuperscript{458} 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 workers’ compensation political debates until the 1980s, when workers’ compensation medical costs exploded.\textsuperscript{459} Medical costs came to dominate the trends in total benefit costs in the ensuing period, rising from twenty-nine percent of total benefits paid in 1980 to fifty percent in 2010.\textsuperscript{460} The decline since 1990 in benefits (including medical care) per $100 of payroll,\textsuperscript{461} is largely due to the decline in indemnity benefits paid directly to workers.\textsuperscript{462} Health care providers are consuming an increasing share of the total benefits that are paid.

The rise in medical care costs inevitably puts downward pressure on the adequacy of benefits to be paid to injured workers themselves. 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).\textsuperscript{463}

\textsuperscript{456} See id. at 123–24, 154–69, 290–96 (1982) (detailing the history of how the American health care system of doctors, hospitals, health plans, and government programs evolved).

\textsuperscript{457} See Enthoven & Fuchs, supra note 441, at 1538 (noting the rapid growth of employment-based health insurance following World War II).

\textsuperscript{458} See STARR, supra note 455, at 291–95.

\textsuperscript{459} Barth, supra note 66, 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 fig.2 (showing growth in medical costs).

\textsuperscript{460} BALDWIN & McLAREN, supra note 5, at 5 fig.3.

\textsuperscript{461} Id. at 3 fig.1.

\textsuperscript{462} Id. at 4 fig.2.

\textsuperscript{463} Barth, supra note 66, at 13.
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 mandated by states or voluntarily adopted by workers' compensation insurance carriers.\textsuperscript{464} 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.\textsuperscript{465} 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 fifteen states the employer chooses the physician, at least initially.\textsuperscript{466} 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.\textsuperscript{467} 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 to initial diagnosis and to disability evaluation in many claims.\textsuperscript{468} 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 specialists.\textsuperscript{469} These changes have far-reaching consequences for the litigation system, as administrative systems demand both high levels of

\textsuperscript{464} See TANABE, \textit{supra} note 220, at 21–26 tbl.3.
\textsuperscript{466} TANABE, \textit{supra} note 220, at 21–26 tbl.3.
\textsuperscript{467} Id.
\textsuperscript{468} See Spieler & Burton, \textit{Lack of Correspondence, supra} note 228, at 15–16.
expertise from witnesses\textsuperscript{470} and objective medical evidence that will support claims.\textsuperscript{471}

The development of the AMA Guides to the Evaluation of Permanent Impairment tracks these changes. The first edition\textsuperscript{472} was authored by an ad hoc committee and published in 1971,\textsuperscript{473} and multiple editions followed.\textsuperscript{474} The Guides created a non-evidence-based but widely accepted rating system for partial impairments.\textsuperscript{475} This system has remained largely unchanged over time,\textsuperscript{476} although it appears that later editions have led to reduced levels of compensation.\textsuperscript{477} Each new edition has reflected the changing approaches to diagnosis and medical evaluation.\textsuperscript{478}

In sum, changes in U.S. health care have had a dramatic effect on the evolution of the workers' compensation system, including the fueling of concerns regarding cost-shifting between general health and workers' compensation insurance. It is not surprising that workers' compensation medical care would develop in tandem with health care 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.

\textsuperscript{470} See supra notes 295–296 and accompanying text.

\textsuperscript{471} See Fla. Stat. Ann. § 440.09(1) (West 2017) ("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. § 39-71-116(22) (West 2017) ("Objective medical findings' means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.").

\textsuperscript{472} See Am. Med. Ass'n, Committee on Rating of Mental and Physical Impairment, Guides to the Evaluation of Permanent Impairment (1st ed. 1971).

\textsuperscript{473} Id. at 1 (noting that the guides 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).


\textsuperscript{475} See supra notes 267–269 and accompanying text.

\textsuperscript{476} See Burton, AMA Guides, supra note 268, at 17–20 (calling the establishment of the initial ratings "casual empiricism" and noting that on crucial issues, "the original choices [made in 1971] have been immutable").

\textsuperscript{477} See Moss et al., supra note 269, at 25 ("The results of this study provide evidence that a decrease in the average impairment rating is realized when a state switches from the fifth edition to the sixth edition of the AMA Guides, all else being equal").

\textsuperscript{478} See id. at 4 (explaining the new approaches and framework in the sixth edition of the Guide). See also Spieler, AMA Testimony, supra note 268 (setting out and critiquing the changes in the sixth edition).
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 twenty-five 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 Oklahoma legislation,479 the assault on benefits in some states has been nothing short of breathtaking.480 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,481 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 twentieth century in protecting injured workers’ benefits: from the initial passage of legislation in terms of benefit levels and creation of exclusive state funds;482 to protecting workers’ wage rates when non-union wages fell as a result of workers’ compensation insurance costs;483 to ensuring that unionized workers

479. See supra notes 297–311 and accompanying text (describing the Oklahoma legislation).
480. 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 that West Virginia 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 tbl.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 tbl.14. But the decline did not begin in 2010: in 1999, benefits per $100 of payroll were $3.96. Daniel Mont et al., Workers’ Compensation: Benefits, Coverage, and Costs, 1999 New Estimates and 1996–1998 Revisions 20–21 tbl.11 (2001). Some of the earlier changes in the West Virginia statute are described in Spieler, Assessing Fairness, supra note 235, at 25–31.
481. See Emin Dinlersoz & Jeremy Greenwood, Center for Economic Studies The Rise and Fall of Unions in the U.S., Abstract (2012), https://www2.census.gov/ces/wp/2012/CES-WP-12-12.pdf (“Union membership displayed a \( \cap \)-shaped pattern over the twentieth century, while the distribution of income sketched a U.”).
482. Fishback & Kantor, Prelude to the Welfare State, supra note 29, at 25 (“When it came to the adoption of state insurance or choosing benefit levels, the strength of political reform movements often played a decisive role.”).
483. Id. at 55 (noting that wages did not decline in workplaces with unions in response to workers’ compensation costs for employers).
were able to file for benefits—or raise safety concerns—without suffering retaliation.\textsuperscript{484} 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;\textsuperscript{485} 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.\textsuperscript{486} But these groups lack the political clout of unions in the almost annual debates over workers’ compensation in state legislatures. This means that the entire calculus of political compromise—the calculus that led to the initial “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 workers’ compensation “bargain” was dually rooted in providing essential benefits to injured workers and the families of

\textsuperscript{484} See Hirsch et al., supra note 371, at 233; Morse et al., The Relationship of Unions to Prevalence and Claim Filing, supra note 371, at 83–84; Morse et al., Trends in Work-Related Musculoskeletal Disorder Reports, supra note 371, at 42 (showing that union members are substantially more likely to receive workers’ compensation benefits than non-union workers); Weil, Enforcing OSHA, supra note 421, at 21 (showing the enhanced ability of unionized workers to raise safety complaints).


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? Section 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. Section B explores this issue. Section C returns to one source of the political problems: workers' compensation views are deeply rooted in inconsistent narratives about the system. Finally, Section D reassesses the underlying bargain.

A. The Current Status of Workers' Compensation

As has been true since 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 twenty-five 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 twentieth century.487 All programs provide medical care for 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

487. See BALDWIN & MCLAREN, supra note 5, at 7–10, for a simple and accurate overview of workers' compensation. See also TANABE, supra note 220 (providing tables listing benefits and other aspects of state systems); 6-80 LARSON'S WORKERS' COMPENSATION LAW §§ 80.01–80.07D (2015) (describing types of disability and benefits).
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.\textsuperscript{488}

Benefits continue to be financed through various insurance mechanisms.\textsuperscript{489} In all but four states (which still maintain exclusive state funds), employers purchase coverage from private insurance carriers or competitive funds managed by their state, or they self-insure after providing some evidence of financial capacity.\textsuperscript{490} Increasingly, employers purchase plans with large deductibles, so that initial claims' costs are paid directly by the employer.\textsuperscript{491} These employers, as well as self-insured employers, generally engage third party administrators to manage the claims. Self-insurance and large deductible policies increase employers' financial incentives to reduce costs through claims management and return-to-work programs—but they also increase incentives to discourage the filing of claims in the first place.

In addition, a variety of state-controlled funds fill in gaps.\textsuperscript{492} 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 high claims costs). They may also ensure that workers who find that their employers are (illegally) uninsured can obtain benefits. In every state, employers that fail to obtain insurance lose the mantle of tort protection,\textsuperscript{493} 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, 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

\textsuperscript{488} See supra note 210 (explaining the different methodologies for calculating permanent partial disability benefits).

\textsuperscript{489} 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.

\textsuperscript{490} For insured employers, the employer pays all premiums, 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 55.

\textsuperscript{491} See BALDWIN & McLAREN, supra note 5, at 9.

\textsuperscript{492} Id. at 9–10.

\textsuperscript{493} See 9-100 LARSON'S WORKERS' COMPENSATION LAW § 100.01(4) (2015) ("The operative fact in establishing exclusiveness is that of actual coverage . . . ").
raise other 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.494

Of the claims that are filed and approved, most involve only medical treatment; in these, the injured worker is not off work and is assumed to suffer no long-term consequences from the injury. These claims are very common (representing seventy-five percent of all claims) and relatively inexpensive (involving only seven percent of total benefit payments).495 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,496 and about ninety-five percent of the workers in this category are off work for six weeks or less.497 Claims that also include permanent impairment benefits account for less than thirty-eight percent of the lost-time claims, but fifty-three percent of the total benefits paid.498 Less than one percent of claims involve permanent total disability or fatalities, representing seven to thirteen percent of total payments in the period 1994–2012.499

As noted previously, the aggregate cost of benefits has been following a downward trend.500 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.501 But this tells us nothing regarding the adequacy of benefits in individual claims. Arguably, none of the state systems has designed benefit structures that consistently meet the definition of adequacy that evolved during the twentieth century: that the program should replace two-thirds of earnings lost as a result of an injury, without time

494. See Spieler & Burton, Lack of Correspondence, supra note 228, at 500 (discussing the problem of gray areas in claims that may lead to litigation).
495. BALDWIN & McLAREN, supra note 5, at 7.
496. Id.
498. BALDWIN & McLAREN, supra note 5, at 9.
499. Id.
500. See supra note 380. 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.
501. See ANTONELLO, supra note 380, at 6–7 (showing that the average cost of the indemnity portion of workers' compensation lost-time claims was estimated to be $23,600 in 2014, representing a four percent increase from 2013; that the average medical portion of lost-time claims increased in 2014 by four percent to $29,400; and that claim frequency declined in 2014, "marking the 18th annual claim frequency decline in the last 20 years").
limitations.\textsuperscript{502} Nor do they meet the basic parameters set out in the National Commission's essential recommendations.\textsuperscript{503} In fact, as noted above, the rate of compliance with these recommendations is declining.\textsuperscript{504}

The problems with the adequacy of cash benefits begin 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 are only restored if the worker's absence exceeds a specified period.\textsuperscript{505} 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.\textsuperscript{506} 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.\textsuperscript{507} Moreover, benefits replace only cash earnings; fringe benefits, including contributions to pension funds, are not included.

For those workers who work several jobs—arguably a growing phenomenon\textsuperscript{508}—the lost earnings from other jobs may not be covered by the temporary benefits.\textsuperscript{509} What this means for individual workers

\begin{itemize}
  \item \textsuperscript{502} See supra note 222–223, for studies on benefit adequacy in workers' compensation.
  \item \textsuperscript{503} See supra notes 197–207 and accompanying text.
  \item \textsuperscript{504} See DOL WORKERS' COMP. REPORT, supra note 17, at 2 and accompanying text; Grabell & Berkes, Demolition, supra note 210 and accompanying text.
  \item \textsuperscript{505} BALDWIN & MCLAREN, supra note 5, at 68–76 tbl.C. The waiting period ranges from three to seven days. \textit{Id.} Most state statutes also set out a "retroactive" (or "clawback") period, so that after this additional period of absence, the benefits for the waiting period are restored. \textit{Id.} at 67. This period ranges up to six weeks in Nebraska. \textit{Id.} at 72. Oklahoma and Rhode Island have waiting periods of three days with no clawback. \textit{Id.} at 73–74; see also PETER ROUSMANIERE, THE UNCOMPENSATED WORKER: THE FINANCIAL IMPACT OF WORKERS' COMP ON INJURED WORKERS & THEIR FAMILIES 6 (WorkCompCentral 2016) (describing the effects of the waiting period).
  \item \textsuperscript{506} See ROUSMANIERE, supra note 505, at 8. See also Clower v. CVS Caremark Corp., 01-CV-2013-904687, 2017 WL 1948883 (Ala. Cir. Ct. May 8, 2017) (holding that the discrepancy in wage replacement for permanent partial disability benefits in Alabama is unconstitutional under Article 1, §13, of the Alabama Constitution). The Alabama decision has been stayed as of this writing. See O'Connor, supra note 276. Arithmetically, in a state in which weekly benefits are set at two-thirds of a worker's pre-injury wage, and the maximum is set at the state's average weekly wage, any worker who earns more than 150% of the state's average weekly wage will receive less than two-thirds of his or her pre-injury earnings.
  \item \textsuperscript{507} See ROUSMANIERE, supra note 505, at 8.
  \item \textsuperscript{508} See GOLDEN, supra note 344, at 1, 5 (describing the structural labor market shift to part-time work).
  \item \textsuperscript{509} BALDWIN & MCLAREN, supra note 5, at 7. Again, this varies by state. \textit{Id.}
and their families is that, in many situations, they cannot meet household expenses even if they qualify for benefits.510 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.511

Replacement for long-term lost earnings may be even more problematic. The level of benefits paid to workers varies substantially from one state to another.512 Studies clearly suggest that wage losses can extend for many years through a worker's life, even for workers whose absence from work is short.513 This 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 benefits,514 and that life expectancy for workers who have been injured at work is shorter.515 Recent changes in states' rules governing benefits are likely to exacerbate these problems.516

Long-term earnings losses for people with relatively minor injuries is puzzling. In theory, these workers return to work without incident

510. See Rousmaniere, supra note 505, at 4 (describing the impact on workers and their families due to the various ways in which temporary total disability benefits fail to fully provide compensation).

511. See DOL Workers' Comp. Report, supra note 17, at 9 n.25 ("[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.").

512. See Tanabe, supra note 220, at 27–70 tbls.4–12 (detailing states' benefits).

513. See supra note 223 for a list of many of these studies.

514. See Seabury et al., supra note 223, at 1165–66, 1169 (using linked federal and state data).


and continue to work. One potential insight comes from an advocacy group that reported a question 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. 517 It is possible that stigma and discrimination attach to the filing of claims, and that this follows workers as they seek new employment.

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; 518 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. 519 The growing focus on impairment ratings, generally derived from the AMA Guides to the Evaluation of Permanent Impairment, as a proxy for earnings replacement, further aggravates the problem. 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

517. An 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 applicants or hiring decisions. See, e.g., WASH. REV. CODE ANN. § 51.48.025(1) (West 2017) ("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 . . . "). This is not, however, the universal rule. See, e.g., LA. STAT. ANN. § 23:1361(a)(201) (extending protection to applicants for employment: "[n]o person, firm or corporation shall refuse to employ any applicant for employment because of such applicant having asserted a claim for workers' compensation benefits . . . "); Kruk, supra note 417, at *19–20. Very few cases have addressed this issue. Compare Runski v. Nu-Car Carrier Inc., 47 Pa. D. & C.3d 192, 200 (Pa. D. & C.3d 1987) ("[T]he public policy against retaliatory discharge of employees might well apply with equal force to a 'retaliatory' refusal to hire."); with Warnék v. ABB Combustion Eng’g, Servs., Inc., 137 Wash. 2d 450, 455 (Wash. 1999) (answering in the negative a 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. Americans with Disabilities Act 42 U.S.C. § 12112(a) (2009).

518. See supra note 273–274 and accompanying text.

519. See supra note 210 (explaining the different methodologies for calculating permanent partial disability benefits).
are in more dire financial straits. Attorneys' fees are also often paid as a percentage of the lump sum award, further decreasing the adequacy of the benefits that the injured worker actually receives.

Should benefits also include some compensation for non-economic losses? The generally asserted rule is that workers' compensation benefits include economic losses only. But the early compensation systems made provision for disfigurement payments; 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; and the National Commission thought limited payment should be available for the "lifetime effects on the personality and normal activities of the workers." 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. In other states, in which benefits are determined solely by wage loss, workers may receive no compensation for their non-economic losses.

520. See MORGAN ET AL., supra note 287; Thomason & Burton, Economic Effects of Workers' Compensation, supra note 287.
521. See TANABE, supra note 220, at 79–84, tbl.14 (providing state by state enumeration of attorney fee provisions in workers' compensation statutes).
522. 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.").
524. See 6-80 LARSON'S WORKERS' COMPENSATION LAW § 80.05 (2015) (discussing that 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").
525. NAT'L COMM'N REPORT, supra note 165, at 69.
526. See TANABE, supra note 220, at 37–44 tbl.6 (indicating that states that offer permanent partial benefits based on impairment only include Alaska and West Virginia).
527. Id. Some states provide no "scheduled" permanent partial disability benefits, but pay for wage loss with separate caps.
Medical care provided through workers' compensation is highly variable. Now that medical care represents half of the total cost of benefits, 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 costs 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, 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." 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, and 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. 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.

528. See Baldwin & McLaren, supra note 5, at 5 fig.3 (charting rise of medical benefits between 1994 and 2014).
529. See Bogdan Savych & Venella Thumula, Comparing Outcomes for Injured Workers in Wisconsin 39 (2016) (showing results of fifteen state surveys of injured workers with approved claims and more than seven days of lost time, workers reported satisfied or very satisfied with their health care 71% to 84% of the time, and very dissatisfied 10% to 20% of the time; claimants were least satisfied in Florida and most satisfied in Wisconsin).
530. Id.
531. DOL Workers' Comp. Report, supra note 17, at 22.
532. Id.
533. Id. at 14.
534. See id. at 14 (citing several empirical studies validating this point).
There is evidence to show that a small number of claims soak up the resources of the system.\textsuperscript{535} 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 cash benefits they actually receive often 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.\textsuperscript{536}

\section*{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.\textsuperscript{537} This is rarely considered in the discussions of the internal adequacy of the system. In fact, it has been estimated that only twenty percent of the costs of occupational illnesses and injuries are now being borne by employers.\textsuperscript{538} Instead, costs are being transferred to the workers themselves, to their families and communities, and to other benefit programs.\textsuperscript{539}

As described more fully below, 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

\begin{itemize}
\item \textsuperscript{535} IAIABC, \textit{Return to Work}, \textit{supra} note 435, at 5 (estimating that 5\% to 10\% of workers' compensation claims account for 80\% to 90\% of claims costs).
\item \textsuperscript{536} \textit{See supra} notes 322–327 and accompanying text.
\item \textsuperscript{537} \textit{See} Spieler \& Burton, \textit{Lack of Correspondence}, \textit{supra} note 228, at 495–503 (describing the various ways in which workers with work-caused disabilities may be excluded from workers' compensation).
\item \textsuperscript{538} J. Paul Leigh \& James P. Marcin, \textit{Workers' Compensation Benefits and Shifting Costs for Occupational Injury and Illness}, 54 J. OCCUPATION. \& ENVT. MED. 445, 447 (2012). \textit{See also} DOL WORKERS' COMP. REPORT, \textit{supra} note 17, at 5.
\item \textsuperscript{539} \textit{See} DOL WORKERS' COMP. REPORT, \textit{supra} note 17, at 6, 23.
\end{itemize}
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 small employers. Domestic workers are excluded almost universally from mandatory coverage. Coverage for farm workers is still very limited in many states. Independent contractors, a growing segment of the labor force, 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. The National Academy of Social Insurance estimates that ninety-seven percent of workers in wage and salary jobs that are covered by the unemployment system are also covered by workers' compensation. This is an underestimate of the total effect of these exclusions, however, as it does not consider the workers who do not fit into the classic employee-employer model.

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. Studies have reached the alarming conclusion that large

540. Id. at 10–11.
541. See TANABE, supra note 220, at 16–20 tbl.2.
542. See id.
543. See id.; BALDWIN & MCLAREN, supra note 5, at 58–59 tbl.A.
545. See BALDWIN & MCLAREN, supra note 5, at 58–59 (estimating non-covered workers in Texas at 2.2 million).
546. See id.
547. See id. at 57.
548. See Emily A. Spieler & Gregory R. Wagner, Commentary, Counting Matters: Implications of Undercounting in the BLS Survey of Occupational Injuries and Illnesses, 5 AM. J. INDUS. MED. 1077, 1077–84 (2014) (exploring the various reasons that workers do not report injuries) [hereinafter Spieler & Wagner, Counting Matters]; Spieler & Burton, Lack of Correspondence, supra note 228, at 496–98 (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). The Bureau of Labor Statistics funded six studies involving amputations to investigate underreporting in the BLS Survey of Occupational Injuries and Illnesses that 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
numbers of people who sustain injuries at work as clearly compensable as amputations (amputations!) do not file claims.549

Low-wage and vulnerable workers fare particularly badly. In her recent article, Transmitting the Costs of Unsafe Work,550 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,551 and a 2011 survey of 286 non-supervisory poultry


549. See the six studies referenced, supra note 548, that were published in 2014 in the American Journal of Industrial Medicine.

550. See Alexander, supra note 370.

workers in Alabama.\footnote{Id. at 31.} 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.\footnote{Id. at 31.} The most frequent employer reactions to the reports were attempts to deter or dissuade the worker 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.\footnote{Id. at 31.}

That is, of the sample of 607 injured workers, only 53 workers, or less than 9%, actually received benefits.\footnote{Id. at 31.} 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.”\footnote{Id. at 28–29 (footnotes omitted).} Among the poultry workers, approximately fifty-nine percent of their occupational injuries were reported.\footnote{Id. at 31.} Reasons given for not reporting fell into common categories: “fear of being fired and a fear of retaliatory suspension, or discipline” and “a belief in the ineffectiveness” of the system.\footnote{Id. at 31.} Of those workers who did report their illnesses and injuries, only nine workers actually received workers’ compensation benefits.\footnote{Id. at 31.}

We found that the workers’ compensation system is not functioning for workers in the low-wage labor market.

- Of the workers in our sample who experienced a serious injury on the job, only 8 percent filed a workers’ compensation claim.
- When workers told their employer about the injury, 50 percent experienced an illegal employer reaction—including firing the worker, calling immigration authorities, or instructing the worker not to file for workers’ compensation.
- About half of workers injured on the job had to pay their bills out-of-pocket (33 percent) or use their health insurance to cover the expenses (22 percent). Workers’ compensation insurance paid medical expenses for only 6 percent of the injured workers in our sample.

\textit{Id.}

\footnote{Id. at 31.} Alexander, supra note 370, at 8–10.
\footnote{Id. at 23, 27.} \footnote{Id. at 27.} \footnote{See id.} \footnote{Id. at 28–29 (footnotes omitted).} \footnote{Id. at 31.} \footnote{Id. at 32.} \footnote{Id. at 31.}
The reasons that people do not file for benefits are varied and complex, reflecting the power relationships within the employment relationship, the level of knowledge of workers (and their doctors), and the nature of the system. More specifically, empirical research has shown that these reasons include the following: ignorance about the system or about the work-relatedness of a condition; fear of retaliation; concern about stigma; failure of the physician to link the injury or illness to work; belief that the injury is inadequately severe to merit a claim; administrative and procedural hurdles that can be demeaning or, at best, time consuming; or a decision to seek coverage under alternative payment systems. 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 unreported injuries and claims. The rate of underreporting of injuries

560. See id. at 36; Lenore S. Azaroff et al., Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting, 92 AM. J. PUB. HEALTH 1421, 1421–29 (2002) (describing mechanisms through which injuries and illness fail to be recorded by employers); Spieler & Burton, Lack of Correspondence, supra note 228, at 496–98 (listing possible reasons why employees might not file claims).

561. Spieler & Burton, Lack of Correspondence, supra note 228, at 496 (citing various studies).

562. Id. at 497 (citing various studies).

563. Id. See also Xiuwen Sue Dong, et al., Medical Costs and Sources of Payment for Work-Related Injuries Among Hispanic Construction Workers, 49 J. OCCUPATIONAL & ENVTL. MED. 1367, 1373 (2007) (showing that undocumented workers are particularly unlikely to file for this reason); SAVYCH ET AL., supra note 438, at 12–13 (noting that forty-five 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).


566. Spieler & Burton, Lack of Correspondence, supra note 228, at 497 (citing various studies).

567. Id. ("[A claimant may] face long waits, repeat medical examinations by nontreating physicians, embarrassing questions from lawyers and insurance company representatives, and even video surveillance.").

568. Id.

569. OSHA 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, Deputy Assistant Sec'y, Occupational Safety & Health Admin., to Reg'l Adm'rs, Whistleblower Program Managers, Occupational Safety and Health Admin. (Mar. 12, 2012), https://www.osha.gov/as/opa/whistleblowermemo.html, and in regulations issued in 2016.
varies, but ranges as high as approximately seventy-seven percent, according to a recent study of agricultural workers.570

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.571

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, Improve Tracking of Workplace Injuries and Illnesses—Employee’s Right to Report Injuries and Illnesses Free from Retaliation, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/recordkeeping/modernization_guidance.html (last visited Oct. 16, 2017), and in a memorandum issued by Deputy Assistant Secretary Dorothy Dougherty to Regional Administrators on October 19, 2016, Memorandum from Dorothy Dougherty, Deputy Assistant Sec'y, Occupational Safety & Health Admin., to Reg'l Adm'rs, 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)"). The new reporting rule has been challenged by industry associations. TEXO ABC/AGC, Inc. v. Perez, No. 3:16-CV-1998-L, 2016 WL 6947911, at *1 (N.D. Tex. Nov. 28, 2016) (denying plaintiff's motion for preliminary injunction).

570. J. Paul Leigh et al., An Estimate of the U.S. Government's Undercount of Nonfatal Occupational Injuries and Illnesses in Agriculture, 24 ANNALS EPIDEMIOLOGY 254, 257 (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, Counting Matters, supra note 548 (discussing findings regarding underreporting and the implications for public health).

571. See supra notes 375–379 and accompanying text for a brief description of falling reported injury and fatality rates. Notably, underreporting is not new. FISHBACK & KANTOR, PRELUDE TO THE WELFARE STATE, supra note 29, at 39. Fishback and Kantor note 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,\textsuperscript{572} despite the fact that all states nominally provide benefits for qualifying diseases.\textsuperscript{573} There is strong evidence that diseases caused by work exposures are common.\textsuperscript{574} But statutes of limitations in some states bar claims for diseases with long latency periods,\textsuperscript{575} and other states exclude diseases that may be confused with ordinary diseases of life that exist outside of work.\textsuperscript{576} Workers may have retired, moved on, or 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.\textsuperscript{577} Responding to these troubling gaps and to moments of particular political pressure, federal laws have been passed to compensate coal miners for black lung disease,\textsuperscript{578} first responders to the 9/11 attacks,\textsuperscript{579} people exposed to radiation\textsuperscript{580} and

\textsuperscript{572} See Barth & Hunt, supra note 224, at 147 (noting that there is little evidence that occupational diseases are compensated); Jeff Biddle et al., What Percentage of Workers with Work-Related Illnesses Receive Workers' Compensation Benefits?, 40 J. OCCUPATIONAL & ENVTL. MED. 325, 325–31 (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 548, at 1078.

\textsuperscript{573} See 4-52 Larson's Workers' Compensation Law § 52.01 (2015).


\textsuperscript{575} See, e.g., ALA. CODE § 25-5-117(b) (2017) (statute of limitations for filing occupational disease claims runs from “the date of last exposure”); 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).

\textsuperscript{576} See 4-52 Larson's Workers' Compensation Law § 52.03 (2015).

\textsuperscript{577} See Spieler & Wagner, Counting Matters, supra note 548, at 1078.


civilian workers in the nuclear industry. These are laws of very limited scope, although their cost demonstrates that compensation for diseases can, indeed, be expensive.

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. Difficulties 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.

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, 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).


582. See Baldwin & McLaren, supra note 5, at 64 (stating that excluding administrative costs, benefit costs under the Black Lung Benefit Act in 2014 were $309,048,000); id. at 65 (stating that costs for EEOICPA Part B and Part E benefits in 2014 were $1,039,859,000); id. at 66 (stating that total benefits paid as of 2014 under the Radiation Exposure Compensation Act were $1,960,298,000).

583. See Spieler & Burton, Lack of Correspondence, supra note 228, at 499–501.

584. See supra note 292 (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.

585. See supra notes 253–259 accompanying text.

586. See supra note 260 and accompanying text.
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 and has been addressed by the various state adjudicatory bodies. Ultimately, the policy question is: who should pay the costs of a worker's impairment, displacement from work, or long-term loss of earnings? 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 seems logical that workers who go to work and are able to do their jobs in the morning, but who are unable to continue to work at the end of the day due to an intervening injury, should be among those eligible for compensation. The trend toward dual denial, in which workers have no legal recourse at all for injuries—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.

587. Nat'l Comm'n Report, supra note 165, at 50 (noting that while all states use the same statutory phrase, or a variant thereof, to define compensable injuries, the interpretation of this phrase is not uniform among or even within states).
588. Id. at 51. The National Commission contemplated the issue, stating that:
[t]he 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.
589. See 1-3 Larson's Workers' Compensation Law § 3.01 (2015).
590. See supra note 254 and accompanying text (discussing issue of dual denial).
C. Inconsistent Narratives

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.

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. In general, settlements of claims that result in a lump sum are therefore viewed with 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.

591. The information in Section IV.C. 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. Department of Energy; participating in the work of the National Academy of Social Insurance on workers' compensation for twenty 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. Department of Labor on whistleblower laws; and participating in legal committees for injured workers groups as well as in scholarly meetings.

592. 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 11, at 123–26; Hunt & Dillinder, supra note 126, at 65–94.

593. See supra note 223 (describing studies on benefit adequacy in workers' compensation). See also Rousmaniere, supra note 505, at 8–11 (showing the risk of family financial instability while the worker recovers); DOL Workers' Comp. Report, supra note 17, at 21–22 (describing how the five major objectives of successful workers' compensation programs are not being met in many states).

594. See, e.g., Grabell & Berkes, Demolition, supra note 210 (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 cut off the on-going insurance obligation, 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 an 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 workers' compensation 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.\textsuperscript{595} Thus, business interests will fight hard against judicial decisions that expand liability,\textsuperscript{596} will support efforts to institute systems that deny workers both benefits and tort rights,\textsuperscript{597} will rarely express concern about workers who are excluded from the compensation system,\textsuperscript{598} and largely favor settlements that will end future liability

\textsuperscript{595} 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. Rabin, \textit{supra} note 118, at 1130. The question then becomes whether the exclusivity granted by workers' compensation should be extended to these types of claims. \textit{See id.} It is beyond the scope of this Article to explore third party claims against entities that are not, at least arguably, the employer.

\textsuperscript{596} \textit{See supra} notes 398–400 and accompanying text.

\textsuperscript{597} \textit{See supra} note 254 and accompanying text (discussing issue of dual denial).

\textsuperscript{598} Although, to be fair, there was some dismay at the Workers' Compensation Summit in June 2016 expressed by employer and insurer representatives when there was discussion that twenty percent of amputees may not be filing for benefits. (Author was present at the meeting).
and create efficiencies in the litigation system. Operating from this vantage point, the development of the opt-out system in Oklahoma was hailed as a positive change by the business community.\textsuperscript{599} 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.\textsuperscript{600} 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?"\textsuperscript{601}

\textsuperscript{599} The Oklahoma Chamber of Commerce did, in fact, decry the September ruling by the Supreme Court of Oklahoma that tossed out the opt-out law. Chamber vice president of government affairs Jonathan Buxton said on September 13, 2016:

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.


\textsuperscript{600} See supra note 360–368 and accompanying text.

\textsuperscript{601} Robert Wilson, \textit{Can We Change the Culture of Comp with a Single Word?}, COMPNEWSNETWORK (Oct. 19, 2016, 07:04 AM), http://www.workerscompensation.com
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.  

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.

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. 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


602. See IAIABC, RETURN TO WORK, supra note 435, at 8–10.
603. See id. at 11–12.
604. 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.

What Are Injured and Ill Workers' Human Rights?, supra note 486.
independent contractors;\textsuperscript{605} waivers of rights that are not fully voluntary;\textsuperscript{606} workplace policies that discourage workers from filing for benefits;\textsuperscript{607} retaliation for filing claims;\textsuperscript{608} failure to acquaint temporary workers regarding their rights to compensation;\textsuperscript{609} compromise and release or settlement agreements that leave workers with inadequate benefits and no right to return to work;\textsuperscript{610} bad faith actions by workers' compensation insurers;\textsuperscript{611} medical care utilization controls that may delay essential care;\textsuperscript{612} 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.\textsuperscript{613} 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 shared with employers, and about forced return to work after an injury that terminates benefits without appropriate workplace accommodation

\textsuperscript{605} See Berkowitz & Smith, supra note 20; supra notes 360–363 and accompanying text.
\textsuperscript{607} See \textit{Injured, Ill and Silenced}, supra note 432, at 2.
\textsuperscript{608} \textit{Id}. at 1–2.
\textsuperscript{609} Spieler & Burton, \textit{Lack of Correspondence}, supra note 228, at 496–97.
\textsuperscript{610} \textit{Id}. at 498.
\textsuperscript{611} Bad faith of workers' compensation carriers can include failure to make payments that are due. States vary on whether there is any liability for carriers, or whether they are protected by the workers' compensation exclusivity shield. \textit{See supra} note 366. As noted above, the Oklahoma Supreme Court recently allowed a worker to go forward with a bad faith claim after the carrier failed to pay benefits that had been awarded. Meeks v. Guar. Ins. Co., 392 P.3d 278 (Okla. 2017).
\textsuperscript{612} Spieler & Burton, \textit{Lack of Correspondence}, supra note 228, at 497.
\textsuperscript{613} The story of the federal black lung program and the doctors within it exemplifies this last concern. \textit{See} Chris Hamby, \textit{Class Action Lawsuit Filed Against Johns Hopkins Hospital over Black Lung Program}, CTR. FOR PUB. INTEGRITY (Nov. 2, 2016, 10:37 AM), https://www.publicintegrity.org/2016/11/02/2016/class-action-lawsuit-filed-against-johns-hopkins-hospital-over-black-lung-program (describing a class action lawsuit alleging that doctors at Johns Hopkins Hospital "intentionally defrauded hundreds of sick coal miners out of compensation and health benefits while pocketing large sums from coal companies").
or commitment to long-term employment.614 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.615 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 increasingly restrictive 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.616 They argue that claims management is critical.617 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.


615. 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 569 & accompanying text; Spieler, Whistleblowers, supra note 429, at 22–25 (describing attempts by OSHA to expand protection for workers through its regulatory powers).


617. See id.
Whose behavior warrants concern? Economists focus on questions of moral hazard—the way in which the existence of insurance creates economic incentives that affect peoples behaviors.618 Workers' advocates concentrate on the behavior of employers and insurance carriers. They note 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 an 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.619 Notably, recent research suggests that moral hazard effects involving workers may, in any event, have been overstated.620 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 cause 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 an increase in illegitimate claim filing.

618. For a discussion of the various ways to conceptualize moral hazard in the context of workers' compensation, see Guo & Burton, Developments in Moral Hazard, supra note 292, at 341–42 (providing a theoretical model and noting that workers may 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 by denying or fighting claims, or by restricting duration of claims through return-to-work or other interventions), and Morantz et al., Economic Incentives in Workers' Compensation, supra note 23, at 1025–28 (providing a discussion of moral hazard in workers' compensation). For a review of the empirical literature, see John F. Burton, Jr., The Economics of Safety, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 863 (James D. Wright ed., 2d ed. 2015).

619. See Morantz et al., Economic Incentives in Workers' Compensation, supra note 23, at 1018 n.9 (providing references for studies regarding the potential moral hazard effects on workers), Guo & Burton, Developments in Moral Hazard, supra note 292, at 341–42 (providing similar references and also suggesting that workers may not be responsive to changes in benefit levels, contradicting previous research).

620. See Guo & Burton, Developments in Moral Hazard, supra note 292, at 342.
These differing motivations and opinions are deeply held by people involved in the state-based political battles over workers' compensation. The inability to find a 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, “[d]istrust—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 fight claims.”

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.” In 1917, the Supreme Court suggested that, to survive constitutional muster, the system had to replace workers' tort rights with reasonable benefits. 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,” 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 and safety principles during the twentieth century, it is reasonable to suggest that tort

621. See IAIABC, Return to Work, supra note 435, at 11–12 (describing the inconsistent views of stakeholders and arguing for a more inclusive approach to return-to-work).
622. DOL Workers' Comp. Report, supra note 17, at 22.
623. 9-100 Larson's Workers' Compensation Law § 100.01(1) (2015).
624. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 203–04 (1917) (finding the New York workers' compensation law constitutional, the Court noted that it is permissible to require an employer to contribute "a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power" for the injured employee).
626. See id.
liability for workplace harms would have been liberalized during the course of the twentieth century, but for the existence of this program. Even in 1900, employers owed their employees a duty of reasonable care and diligence.629 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. In any event, these defenses would have been unlikely to survive the evolution of the common law in the ensuing decades. One might, given all this, persuasively argue that workers with injuries resulting from recognized hazards within the control of the employer would now 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,630 or they may be transferred to other benefit programs.631


628. See supra Section III.B.
629. See supra note 119.
630. Although the Affordable Care Act ("ACA") extended health insurance to many people, those who work for employers with fewer than fifty employees are theoretically required to purchase insurance on their own. See Patient Protection and Affordable Care Act, Pub. L. No., 111-148, § 1513, 124 Stat. 121, 253–56 (2010) (codified as amended at 26 U.S.C. §§ 4971, 4980H (2012)). Apparently, it is common for injured workers to lack general health insurance. Undocumented workers have no protection under the ACA. This was specifically stated by two different workers' compensation judges at the first "summit" meeting. See supra note 18 (author was in attendance at the Dallas-Fort Worth meeting).
631. See Workers with Disability Insurance Plans, U.S. BUREAU OF LAB. STAT. (Mar. 4, 2015), https://www.bls.gov/opub/ted/2015/disability-insurance-plans-for-workers.htm (showing thirty-nine percent of workers are covered by short-term disability plans and thirty-three percent are covered by long-term disability plans in 2014). In addition,
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 mid-2017, the political attacks on workers' compensation are continuing in many states. 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. 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.

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 one hundred years ago. 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. A system that creates portable benefits for workers, as they move through the current changing labor market, would be a second approach.

The problem, of course, is that many workers do not have access to alternative health insurance or disability benefits. If we were to build from the existing system—rather than changing the basic structure of American social insurance—we might think about the following:

1. A separate medical care system for injured workers has resulted in increasing costs, barriers to care, and the development of different treatment protocols for injuries, often without

634. See Neuhauser, supra note 373, at 20.
635. Id. at 19–20.
636. These proposals generally focus on the issue independent contractors. See, e.g., Seth D. Harris & Alan B. Krueger, A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker” 20 (2015), 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 ST. J. (Nov. 10, 2015, 6:46 PM), http://www.wsj.com/articles/on-demand-workers-need-portable-benefits-tech-and-labor-leaders-say-1447199167 (describing a letter sent to lawmakers in which a “[g]roup calls for more protections for contract workers in rapidly changing economy”). The letter referred to in this article was signed by forty executives and public policy experts and 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.” Portable Benefits, Common Ground for Independent Workers, MEDIUM (Nov. 9, 2015), https://medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3fbcf548#e86f85ce003.
adequate scientific 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 United States). 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 of delays that injured workers face 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 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. 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; this should be reimbursed by the workers’ compensation insurance carrier. Currently,

637. One method would be a single-payer health care system that includes health care for injuries and illnesses related to work. A bill introduced in the California legislature on Feb. 27, 2017, would accomplish this. See S. 562, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB562 (“The board shall develop a proposal for HC coverage of health care services currently covered under the workers’ compensation system, including whether and how to continue funding for those services under that system and whether and how to incorporate an element of experience rating.”).

638. Maine currently provides for a subrogation right when a claim is contested. See supra note 446 and accompanying text.
providers receive little payment for these services in many states, contributing to their reluctance to participate in the program.

Integrating payment to health care 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 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. Issues of proof that might streamline administrative review—including effective use of presumptions in some cases—should be explored.

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 leveling 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

639. John F. Burton, Jr. has repeatedly suggested that this is possible and should be done. See Burton, AMA Guides, supra note 268, at 30; Burton, 33 Years Later, supra note 176, at 21–25.

640. 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. CONS. STAT. § 27.1(n) (2011). 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 . . . .” § 413.
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. They also arguably may violate international human rights standards.

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.

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.

5. Careful reevaluation 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.

641. See supra note 3 (listing references critical of the functioning of the Occupational Safety and Health Administration).


643. Compare Tooey v. AK Steel Corp., 81 A.2d. 851, 855 (Pa. 2013) (allowing for tort litigation where a disease was excluded from workers' compensation coverage by the statute of limitations), with Hendrix v. Alcoa, Inc., 506 S.W. 3d 230, 237 (Ark. 2016) (barring civil action by deceased worker's wife where the worker's compensation claim for mesothelioma, 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").

644. See Spieler, Whistleblowers, supra note 429, at 11, for a discussion of the relationship of federal and state law with regard to this issue.

645. See HARRIS & KRUEGER, supra note 636, at 27 (suggesting extension of workers' compensation to independent contractors).
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 throughout the last century, the claim that businesses will leave or not locate in a state due to workers' compensation costs is persistent and overtakes the dialogue, justifying cutbacks of workers' benefits allegedly to foster business development or retention. The National Commission rejected this theory, it has never been supported by evidence, 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 twentieth 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 United States, 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 farm workers in New Mexico, as well as some other state-based constitutional litigation, suggests 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 United States had an expansive social safety net that supported working age people through their lives when they encounter
economic and health adversity, the importance of workers' compensation would arguably fade. But that is not the American reality. The American 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 one hundred years ago. Despite this, the rhetorical and political parallels between 1900 and 2017 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 was designed to address.

It is important to remember that the political pendulum swings from side to side. It did so throughout the twentieth century, as the history of this program demonstrates. It undoubtedly will continue to do so in the twenty-first 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.