CAN STATE CONSTITUTIONS BLOCK THE WORKERS'-COMPENSATION RACE TO THE BOTTOM?*

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The enactment of workmen's compensation legislation occasioned one of the nation's great battles over judicial review of reform legislation. As we have seen, the enactment of nineteenth-century tort reform legislation led to relatively few cases striking down legislation. But the enactment beginning in 1910 of workmen's compensation legislation (as today's gender-neutral workers' compensation statutes were then known) led several of the nation's courts to strike down the new compensation programs. The result was a political crisis for some of the nation's leading state courts, the New York Court of Appeals chief among them.[1]

Presently, I think most people in most states would recognize a *moral* duty for a state to provide *some* means by which a victim of workplace injury could be compensated. However, now, as in the past, competitive economic pressures may tempt employers to avoid the responsibility of compensating workers for injuries

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I want to express a debt of gratitude to Professor Michael C. Duff of the University of Wyoming Law School. His work was instrumental in bringing me "up to speed" on the developing "crisis" in worker's compensation, together with the background of these issues. *See Michael C. Duff, Worse Than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BEN. & SOC. WEL. L. REV. 123 (2016). I also want to acknowledge invaluable research assistance from Jesse Harris, now a 3L at the Law School, and David Batista, one of our Research Librarians.

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[1] John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1159 (2005). *See also* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKING MEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 126-151 (2004).

> sustained in productive activity. Even a handful of employers without scruples might easily initiate a race to the bottom. . . "to force the moral sentiment pervading any trade down to the level of that which characterizes the worst man who can maintain himself in it."[2]

I. *Introduction*

All American law students are made aware of the "Grand Bargain" that led to the advent of workers' compensation systems for workplace injuries by the time they finish their class in Torts. This major legal reform eliminated employers' common-law defenses of contributory negligence, assumption of the risk, and the fellow servant rule in return for injured workers giving up their plaintiffs', common-law tort remedies (albeit uncertain) and accepting certain, but reduced compensation. The details of this bargain were much more complex than this simple description, and varied state to state, but are beyond the scope of this article.[3] Professor Michael Duff has described the intermediate, unsuccessful steps leading up to the Grand Bargain. These included statutory modifications to the common law defenses, employee-purchased insurance, employee cooperative insurance, among other experiments.[4]

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[2] Michael C. Duff, *A Hundred Years of Excellence: But is the Past Prologue? Reflections on the Pennsylvania Workers' Compensation Act*, PA. BAR ASSOC. Q. 20, 30 (January 2016) (emphasis in original).

[3]

> Work accident cases would no longer get bogged down in litigating thorny questions of fault or arcane questions about the superior servants or different departments. Instead, injured employees would be compensated for virtually all injuries arising out of and in the course of their work. Damages would not be at the discretion of a jury or designed to make the injured employee whole, as in the law of torts, but would instead be scheduled at one-half or two-thirds the injured employees' lost wages, plus medical costs. The result would be a kind of rough-justice in any one case, splitting the difference as between employers and employees. In particular cases, employers might be required to compensate injuries for which few reasonable observers would have held them responsible. And in other cases, injured employees would not be made whole as they would have been under the law of torts. But in the aggregate, these cases would wash one another out for a kind of systemic (if not individualized) justice.

Witt, *supra* note 1, at 1186-1187.

A number of the state processes leading to the adoption of workers' compensation are analyzed in PRICE V. FISHBACK AND SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (2000).

[4] Duff, supra note 2 at 26-30.

In the end, Professors Price Fishback and Shawn Kantor concluded, as a number of others have, that employees, employers and insurance carriers all saw the adoption of workers' compensation as to their mutual benefit:

> In this article we show that the adoption of workers' compensation was not the result of employers' or workers' "capturing" the legislation to secure benefits at the expense of the other. Nor can the adoption of workers' compensation simply be attributed to the success of Progressive Era social reformers' demanding protective legislation. The legislation was enacted so rapidly across the United States in the 1910s because most members of the key economic interest groups with a stake in the legislation anticipated benefits from moving from employers' liability to workers' compensation.[5]

With the rise of industrialization it became clear that workplace accidents were a consequence and that the cost of compensating them should become part of the cost of doing business, much of which should be passed on to the consuming public. Notably, in the early years of workers' compensation workers, at least nonunionized workers, "bought" some of their coverage through reduced wage rates.[6]

There is, however, a move afoot in the country to further erode the workplace-injury compensation programs that formed one-half of the Grand Bargain: the Race to the Bottom. The ongoing litigation over the erosion of workers' compensation benefits in the states presents a moving target with new legislative and judicial developments coming at a rapid pace. Increasingly, lawyers, employers and insurance carriers are arguing that injured workers are sometimes entitled to *no or inadequate* compensation. For example, in a recent Oklahoma Supreme Court case the court summarized the arguments:

[5] Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States,* 1900—1930, 41 J.L. & ECON. 305 (1998).
[6] Id., at 306-307.

> Employer also argues on appeal petitioner has no right to file either a workers' compensation claim or seek a common-law remedy in a District Court. Employer asserts petitioner has no legal right or remedy to receive any type of compensation or medical care from her employer in any form. Employer argues petitioner has no right to an opportunity to prove her claim of injury before any court or any administrative agency. Employee argues her employer is making an unconstitutional application of workers' compensation statutes.
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> Employee argues that when the workers' compensation statutes were originally created in several States a *grand bargain* was created. . . . Employee cites to forty-two (42) provisions of the current workers' compensation scheme and argues that (1) workers' compensation remedies are inadequate, (2) the grand bargain is violated, and (3) the order denying her workers' compensation benefits should be reversed.[7]

Many workers' compensation lawyers, on both sides, have not seen themselves as "constitutional lawyers." Maybe they did not like Constitutional Law in law school. However, they are now being called on to raise, or defend against, constitutional arguments concerning statutory workers' compensation provisions. This can be a new area of law for them, requiring, among other things, understanding their own state constitutions (which are "low-visibility")[8] and the differences between state and federal constitutional law, requirements of preserving constitutional arguments, notifying

[7] Torres v. Seaboard Foods, LLC, 373 P.3d 1057, 1062, 1064-1065 (Okla. 2016) (emphasis in original). There has also been an issue concerning state workers' compensation statutes' total exclusion of classes of employees, such as farmworkers, from coverage. The New Mexico Supreme Court recently declared this exclusion unconstitutional on state equal protection grounds. Rodriguez v. Brand West Dairy, __ P.3d __ (N. MEX. 2016). For a listing of cases on this issue, *see id.,* at __ n.2 (Nakamura, J., dissenting).

[8] ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 1 (2009).

state attorneys general of constitutional claims, etc. The last several decades, however, have seen a dramatic increase in interest in state constitutions. It is clearer than ever that state constitutions may be interpreted to provide *more* protection than the national minimum standards guaranteed in the federal Constitution.[9]

II. The Race to the Bottom

The workers' compensation Race to the Bottom has been a marathon rather than a sprint. Beginning several decades ago a number of states began to amend their state statutes to reduce or limit worker's benefits in a variety of ways. The details of these steps are beyond the scope of this article, and have been described in detail by others.[10] Essentially these restrictions have included a succession of limitations on the scope of, and eligibility for workers' compensation benefits in a wide variety of circumstances. The most dramatic element is the "opt-out" possibility long in effect in Texas, and recently adopted in Oklahoma and under consideration in other states.[11] The opt-out option permits employers simply to decline to participate in the statutory workers' compensation program, and rather to develop their own employer-developed private insurance programs. These often include a few elements that are more advantageous to workers, but also many more elements that work against the receipt of benefits by injured workers, or the families of workers killed on the job. In a recent, exhaustive analysis of the Texas opt-out program, Stanford law professor Alison D. Morantz (a participant at this symposium) concluded that major employers in that state had seen reductions in their workers' compensation expenses of over forty percent.[12] Professor Morantz summarizes the Texas program as relying on private plans, providing wage-replacement benefits from the first day of lost

[9] *Id*., at ch. 5.
[10] Duff, supra note * at 132-136; Emily A. Spieler and Edwin W. Hadley, *Work Injury and Compensation in Context, 1900 to 2016*, __ RUTGERS U. L. REV. __, __ (2017).
[11] Duff, *supra* note * at 136-147.
[12] Alison D. Morantz, *Rejecting the Grand Bargain: What Happens When Large Companies Opt Out of Workers' Compensation?*. . .

work, resulting in higher levels of employer satisfaction, including mandatory arbitration of claims, and concluded that most workers knew their employer was a nonsubscriber before being injured.[13] She continued:

> Many other features of private plans are remarkably homogeneous. All limit employees' choice of medical care provider. None compensates permanent partial disabilities or chiropractic care. Most also categorically exclude some non-traumatic injuries (such as non-inguinal hernias, cumulative trauma if the employee has worked less than 180 days, carpal tunnel syndrome, chronic fatigue syndrome and fibromyalgia) and many occupational diseases (such as any caused by mold, fungi, pollen, or asbestos) from the scope of coverage.[14]

She further described a number of "more discretionary grounds for denying claims or terminating benefits in particular cases."[15] National conservative organizations are pushing for the adoption of such laws in all fifty states.[16]

III. Constitutionalization of Workers' Compensation

A foundational event, leading to judicial involvement in constitutional questions concerning workers' compensation occurred in 1911 in the New York case of *Ives v. South Buffalo Railway Co.*.[17] This famous (infamous?) decision struck down New York's 1910 workers' compensation statute, which had been the first in the country. Notably, the New York statute had been drafted with an eye toward

[13] Id., at ___.
[14] Id., at ___.
[15] Id., at ___.
In 1995 the Texas Supreme Court struck down much of a 1989 revised workers' compensation act on the access to court/right to remedy provision of the Texas Constitution, and other grounds. Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504 (Tex. 1995).
[16] Duff, supra note * at 134-135.
[17] 94 N.E. 431, 448 (N.Y. 1911).

possible constitutional problems, but to no avail.[18] This decision caused a "political firestorm," rendered the author of the decision, Judge William E. Werner extremely unpopular, and led in short order to a state constitutional amendment overturning the decision by specifically authorizing the enactment of workers' compensation legislation.[19] Although, by contrast to the federal constitution, generally state legislatures do not need *grants* of authority in state constitutions in order to enact laws pursuant to their reserved, plenary police-power,[20] state constitutional amendments granting legislative authority are often utilized to overcome judicial decisions to the contrary.[21] Dr. John Dinan refers to these amendments as "court constraining" amendments.[22] New York's 1913 amendment thus began the "constitutionalization" of worker's compensation in some states. Similar state constitutional amendments were adopted in other states.

Ultimately, in 1917 the United States Supreme Court upheld New York's reenacted workers' compensation statute against federal constitutional challenge as an acceptable substitute for tort remedies if that substitute did not contravene the Fourteenth Amendment.[23] The Court stated, in a rationale worth quoting at length:

> it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The

[18] Witt, supra note 1, at 1185-1186.
[19] Id, at 1187-1188. *See* N.Y. CONST. OF 1894 art. I § 19 (1913). WITT, *supra* note 1, at 180. *See* PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 66-67 (1991).
[20] This is one of the major distinctions between the federal constitution and the constitutions of the states. WILLIAMS, *supra* note 8 at 27, 249-253.
[21] WILLIAMS, *supra* note 8, at 29, 128. Political scientist Douglas Read refers to this phenomenon of override of state constitutional rulings as "popular constitutionalism." Douglas R. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings,* 30 RUTGERS L.J. 871 (1999).
[22] John Dinan, *Foreword: Court – Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 995 (2007) (discussing *Ives* and N.Y. CONST. of 1894, art. I § 19 (1913)).
[23] N.Y. Cent. R. Co. v. White, 243 U.S. 188 (1917); WITT, *supra* note 1, at 179-80.

statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. 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. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject matter are not placed by the Fourteenth Amendment beyond the reach of the lawmaking power of the state, and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.[24]

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[24] Id., at 201-202

> 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.
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> This, of course, is not to say that any scale of compensation, however significant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. *Any question of that kind may be met when it arises*.[25]

The Court reaffirmed that view in 1919:

> The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of *respondent superior*, the imposition of liability without fault, and the exemption from liability in spite of fault – all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers.[26]

[25] *Id*., at 205-206 (emphasis added)
[26] Middleton v. Texas Power & Light Co., 249 U.S. 152, 163 (1919) *citing* N.Y. Central R. Co. v. White, 243 U.S. 188, 198-206 (1917) and Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917).

Looking back on those cases now, the question arises as to whether they actually established a *federal* constitutional requirement of a fair *quid pro quo* in the tradeoff between tort remedies and workers' compensation remedies.[27] Did the United States Supreme Court constitutionalize the Grand Bargain?

In addition at the federal level there have been suggestions that opt-out programs might implicate ERISA preemption doctrine. United States Labor Secretary Thomas Perez said: "What opt-out programs really are all about is enabling employers to reduce benefits." He continued that such programs "create really a pathway to poverty for people who get injured on the job."[28] He noted that the Labor Department was commissioning a study about cutbacks in workers' compensation, including opt-outs "to document the precise nature of this problem across the country."

On October 5, 2016 the Department released its report.[29] It concluded that the states' pattern of reducing eligibility and benefits has been intended, or at least had the effect, to shift the cost of workplace injuries onto government benefits and injured workers and their families.[30] The report recommends serious consideration of a *federal* oversight role over state programs, with minimum requirements, similar to that in place for unemployment compensation.[31]

After the New York experience, in other states constitutional amendments were adopted to eliminate doubt about workers' compensation statutes even before litigation challenging them. According to Dr. Dinan:

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[27] Duff, *supra* note * at 133, 187.
[28] Labor Secretary Calls Workers' Comp Opt-Out Plans A "Pathway to Poverty," http://www.npr.org/sections/thetwo-way/2016/03/25/471849458/labor-secretary-calls-workers-comp-opt-out-plans-a-pathway-to-poverty. *See also* Michael C. Duff, *Workers' Compensation Opt-Out Laws: No Escape from ERISA Preemption?* https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2016/05/23/workers-compensation-opt-out-laws-no-escape-from-erisa-preemtion.aspx.
[29] *Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers?* (https://www.documentcloud.org/documents/3121896-Labor-Department-Workers-Comp-Report-2016.html) The research reflected in this report is very complete and useful.
[30] *Id*., at 3, 6.
[31] *Id*., at 24-25.

> Meanwhile, other states adopted *court-preempting* constitutional amendments. These states acted in part out of uncertainty created by the New York court's invalidation of that state's compulsory program. Occasionally, though, these amendments were enacted because of the narrow margin of rulings handed down by other courts that sustained such acts, as in Ohio, where the state supreme court in 1912 upheld an optional program, but only by a four-two margin. Additional constitutional amendments of this sort, guaranteeing the constitutionality of worker's compensation programs, were adopted in Arizona, California, Ohio, Vermont, Wyoming, Pennsylvania, and Texas.[32]

Still other states have not "constitutionalized" their worker's compensation schemes, but a wide variety of other state constitutional limitations in the area of litigation concerning accidents and death can come into play. "Right to remedy" provisions, specific bans on damage caps, jury-trial guarantees, and many others are relevant to defending against the Race to the Bottom. We have learned much from the "tort reform" battles.[33] Tort reform proposals include caps on damages, limitations on punitive damages, statutes of repose, mandatory alternative dispute resolution, as well as a number of other approaches. Interestingly, there are virtually no federal constitutional claims that arise for plaintiffs who feel aggrieved by such state legislative restrictions. It is the state constitutions, rather, that provide a wide variety of avenues of constitutional challenge.[34] General state constitutional provisions on open

[32] Dinan, *supra* note 22, at 995-996, *citing* State *exrel* Yaple v. Creamer, 97 N.E. 602 (Ohio 1912).
[33] The following text accompanying footnotes 33-40 is from Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897, 897-99 (2001). *See also* Duff, supra note *, at 129; Jean C. Love, *Actions for Non-Physical Harm: The Relationship Between the Tort System and No Fault Compensation* (with an Emphasis on Workers' Compensation), 73 CAL. L. REV. 857 (1985).
[34] James F. Blumstein, *A Perspective on Federalism and Medical Malpractice*, 14 YALE L. & POL'Y REV. 411, 419-21 (1996); Josephine H. Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 648-56 (1985).

courts and right to remedy,[35] civil jury trial, due process and equal protection, and separation of powers have provided extraordinarily fertile arguments for successful constitutional challenges to tort reform measures. Also, general legislative process restrictions contained in state constitutions, such as the single-subject limit, have supported the invalidation of omnibus tort reform measures.[36] In addition, some states' constitutions contain specific provisions aimed directly at preserving tort remedies. For example, the Kentucky Constitution contains the following two provisions:

> The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.[37]

> Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporation and person so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom it belongs; and until such provision is made the same shall form part of the personal estate of the deceased person.[38]

The Arizona Constitution provides that "[n]o law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person."[39] The Oklahoma Constitution

[35] David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197 (1992); *see* Davidson v. Rogers, 574 P.2d 624, 625 (Or. 1978) (Linde, J., concurring) ("It is a plaintiffs' clause . . . ."). There is a wide range of literature on these clauses, traceable to the 1215 Magna Charta. *See* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 445-462 (5th ed. 2015); 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENCES Ch. 6 (4th ed. 2006).
[36] *See, e.g.* State *ex rel* Ohio Acad. Of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1100 (Ohio 1999).
[37] KY. CONST. § 54.
[38] KY. CONST. §241; *see* Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973).
[39] ARIZ. CONST. art. 2, § 31; *see* Hayes v. Cont'l Ins. Co., 872 P.2d 668, 676 (Ariz. 1994); Smith v. Myers, 887 P.2d 541, 544 (Ariz 1994); Roger C. Henderson, *Tort Reform, Separation of Powers and the Arizona Constitutional Convention*

provides: "The defense of . . . assumption of risk shall, in all cases whatsoever, be questions of fact, and shall, at all times, be left to the jury."[40]

A leading case on the application of state constitutional access to court/remedy guarantees[41] in the workers' compensation context was the Oregon Supreme Court's 2001 decision in *Smothers v. Gresham Transfer, Inc.*[42] There an employee alleged that chemical mist and fumes caused him a "compensable injury," and after an ALJ denied the claim (not a "major contributing cause") he filed a common-law negligence action. The employer argued, and the trial court agreed, that even though the injury was not compensable it was still barred by the statutory exclusive remedy provision!.[43] After an exhaustive analysis of Oregon's remedy guarantee the Court declared this result unconstitutional.[44]

More recently, however *Smothers* was overruled by the Oregon Supreme Court in *Horton v. Oregon Health and Science University*.[45] In *Horton* both the majority and concurring opinions provided exhaustive analysis of the English origins of the right to remedy/access to court provisions, concluding that, despite evidence to the contrary, these clauses were only addressed to the judiciary and did not limit legislative modifications of the common law.[46] This is a minority view and it remains to be seen if it

of 1910, 35 ARIZ. L. REV. 535 (1993). The Arizona provision is discussed in Stanley Feldman, *Comment*, 31 SETON HALL L. REV. 666, 668-69 (2001).

[40] OKLA. CONST. art. XXIII, § 6; *see* Reddell v. Johnson, 942 P.2d 200 (Okla. 1997); *see also* MONT. CONST. art II, §16; Connery v. Liberty Northwest Ins. Co., 960 P.2d 288, 290 (Mont. 1998); Trankel v. State Dep't of Military Affairs, 938 P.2d 614, 621 (Mont. 1997).

[41] Thirty-nine states have such provisions, which date from Magna Charta. Schuman, supra note 35, at 1201. *See also* Martin B. Margulies, *Connecticut's Misunderstood Remedy Clause*, 14 QUINNIPIAC L. REV. 217 (1994); William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration*, 27 U. MEMPHIS L. REV. 333 (1997); Jonathan M. Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001).

[42] 23 P.3d 333 (Or. 2001).

[43] *Id*., at 336. *See* also note 7, *supra*, and accompanying text.

[44] *Id*., at 338-363.

[45] 376 P.3d 168 (Or. 2016).

[46] *Id.*

is influential in other states' jurisprudence, including cases concerning reduction in workers' compensation benefits.

The third reason for constitutionalizing workers' compensation was that the state constitutional provisions protecting the common-law remedies or jury-trial rights for injury or death from legislative limitations would have stood in the way of the Grand Bargain where workers gave up their common law rights for the promise (now becoming illusory in some states) of simplified, adequate, certain no-fault benefits. Consequently, to clear the way for workers' compensation many of these preexisting state constitutional provisions had to be modified. Take, as an example Article V, Section 32 of the Arkansas Constitution:

> The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of *employees*, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. *Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.*[47]

The italicized last sentence was the original common-law protective provision and the first two sentences reflect the 1938 constitutional exception (approved by the voters) to permit legislative adoption of workers' compensation statutes. Therefore, states like Arkansas and many others had to adopt exceptions to their state constitutional protections of common-law remedies, to facilitate the

[47]KAY COLLETT GOSS, THE ARKANSAS STATE CONSTITUTION: A REFERENCE GUIDE 55, 150 (1993). *See* Young v. G.L. Tarlton, Contractor, Inc., 162 S.W. 2d 477, 479-480 (Ark. 1942). See also PA. CONST. art. III, § 18. (workers' compensation to be *reasonable*).

Grand Bargain. The Arkansas Supreme Court made this distinction clear when it enforced the original provision by striking down a cap on punitive damages in a *non-employment* context:

> The language that now precedes the original text was added in 1938 with the adoption of amendment 26 in order to confer upon the General Assembly the power to enact legislation to prescribe the amount of compensation to be paid *employees* for injury or death.[48]

Consequently, the more recent *grant* of legislative authority over compensation of workplace injuries still continues to be *limited* by the earlier state constitutional protection of common-law tort remedies from statutory restriction. In another sense, the grant of legislative competence over workplace injuries contains its own limit to the employer-employee relationship.[49]

In other states like New York, as noted earlier, judicial decisions striking down workers' compensation as violating other, more general constitutional protections like jury trial rights, had to be "overturned" by state constitutional ("court-constraining") amendments to facilitate the Grand Bargain. Thus, in both of these instances, in addition to the usual account of the Grand Bargain where workers gave up their common-law remedies, they actually also gave up their state *constitutional protection* of

[48] Bayer Cropscience LP v. Schafer, 385 S.W.3d 822, 830 (Ark. 2011) (emphasis added). *See also Id*., at 831:

> As we have made plain, the General Assembly "may limit tort liability only where there is an employment relationship between the parties." *Stapleton*, 333 Ark. at 392, 969 S.W.2d at 653.

See also Brown v. Finney, 932 S.W. 2d 769, 774 (Ark. 1996) (Dudley, J., dissenting). Here the majority applied the statutory exclusive remedy provision to bar a tort action by a seriously injured employee in an automobile accident caused by a "nonsupervisory" coemployee as an "arm" of the employer. The dissenting justice argued that the constitutional provision only authorized the legislature to bar common-law actions against "employers."

[49] Stapleton v. M.D. Limbaugh Construction Co., 969 S.W. 2d 648, 652-53 (Ark. 1998) (statute "is unconstitutional as applied in this case because it grants tort immunity to a prime contractor even when there is no statutory *employment relationship* with the injured employee.") (emphasis added). For more detailed coverage of these issues under the Arkansas constitution as well as several other state constitutions *see* Justin M. Rains, Flavio Rios Guerrero v. OK Foods, Inc.: *Advocating for Broader Intentional Tort Exception to the Workers' Compensation Exclusive-Remedy Doctrine*, 61 ARK. L. REV. 133 (2009).

such common-law remedies. This is a more valuable "consideration" by workers than is normally recognized.

In states that have constitutionalized workers' compensation, either through court-constraining or court-preempting amendments, the most obvious effect of such amendments as pointed out by Dr. Dinan was to *empower* state legislatures to enact such statutes in spite of contrary (or close-vote) judicial decisions, or in spite of doubt about such power under provisions protecting common-law rights. A less-obvious effect, however, might be that such amendments *limit* the legislature's power so that workers' compensation statutes must comport with, or fit within, the arguably limiting terms of these amendments. The best example of this "dual function" of a state constitutional workers' compensation amendment is California's article XIV, section 4. This provision, modified only in 1976, begins with an express grant of "plenary power" to the legislature (which it might have had already) to adopt a "complete system" of workers' compensation that must include, among other things, "adequate" compensation, "full provision" for medical benefits, and access to state appellate courts.[50] Arguably, statutes purporting to deny these features would violate the provision.[51] None of the other state provisions has such a clear, apparent dual function.[52]

[50] JOSEPH R. GRODIN, DARIEN SHANSKE AND MICHAEL B. SALERNO, THE CALIFORNIA STATE CONSTITUTION—(2d Ed. 2016).
[51] The California Court of Appeals has seen the provision not only as a grant of legislative power, but also with a limiting function. Six Flags, Inc., v. Workers' Compensation Appeals Bd., 51 Cal. Rptr. 3d 377 (Cal. App. 2d Dist. 2006). But *see Stevens*, *infra* note 56.
[52] *But see* ARIZ. CONST. art. XVIII, §8:

* * * *

> The percentages and amounts of compensation provided in house bill no. 227 enacted by the seventh legislature of the state of Arizona, shall never be reduced nor any industry included within the provision of said house bill no. 227 eliminated except by initiated or referred measure as provided by this Constitution.

This provision was added to the constitution in 1925 after much controversy over the original 1912 provision on workers' compensation. The technique of "constitutionalizing" the compromise statute was upheld in Alabam's Freight Co. v. Hunt, 242 P. 658 (Ariz. 1926). *See also* McPeak v. Industrial Comm., 741 P.2d 699, 701-702 (Ariz. App. 1987). See *generally*, JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 317 (1993).

In 1972 in *Matthews v. Workman's Compensation Appeals Board* the California Supreme Court emphasized this constitutional provision's grant of "plenary power" to the legislature to deal with workers' compensation, and went on to interpret that "grant" as "trumping" other constitutional protections, and through "negative implication" limiting statutes even granting more workers benefits than seemingly required by the clause.[53]

Mathews involved a challenge to a provision in the workers' compensation act that excluded workers who got into altercations where they were the "initial physical aggressor." The claimant's widow argued that this limitation violated the constitution's requirement that the legislature had to make workers' compensation available "irrespective of fault of any party." The court, however, held that this was a "misconstruction" of the constitutional language, and reviewing its history concluded that this was a reference to eliminating the common law doctrine of negligence. This was certainly not a holding that the provisions of the constitutional clause did not impose certain requirements or limitations on the nature of workers' compensation statutes but rather that the claimant's widow relied on a mistaken reading of the limitation. The closest the court came to that idea was the following:

> Furthermore, our examination of the history behind section 21, article XX indicates that the section was added to the Constitution and then amended for the sole purpose of removing all doubts as to the constitutionality of the then existing workmen's compensation statutes.[54]

The Arizona constitutional provision has been interpreted to include the limiting function. In Grammatico v. Industrial Commission, 117 P.3d 786 (Ariz. 2005) the court interpreted Article XVIII § 8 to require "no fault" workers' compensation, and therefore struck down statutes that barred compensation for workers who tested positive for drugs or alcohol.

[53] Mathews v. Workman's Comp. Appeals Bd., 493 P. 2d 1165 (Cal. 1972).

[54] Id., at 1175 (referring to the earlier section number).

This can in no way be interpreted as holding that there are no limits contained in the constitutional provision for *future* amendments to the workers' compensation statutes that do not meet the constitutional provision's requirements.

The court seems to have ignored the fact that the California legislature had *preexisting* plenary police power that could have, barring some other state constitutional limitation, supported the enactment of a workers' compensation statute. Here, the constitutional specifications for workers' compensation should have been interpreted as mandatory requirements (or limitations as the case may be) on the content of workers' compensation statutes.

This 1972 California Supreme Court decision has been read by the California Court of Appeal to have "trumped" other state constitutional limits, including those contained in section 4 itself! That court stated:

> We reject appellants' contention that article XIV, section 4 contains "line after line," establishing enforceable rules. Article XIV, section 4 defines the workers' compensation system, and leaves it to the *Legislature to enact appropriate legislation*.[55]

This view was reiterated by the Court of Appeal in 2015:

> Steven's separation-of-powers claim fails under the State Constitution's plain terms. Under Section 4, the Legislature "is [ ] expressly vested with plenary power, unlimited by any provision of this *Constitution*, to create, and to enforce a complete system of workers' compensation, by appropriate legislation."[56]

[55] Bautista v. State, 133 Cal. Rptr. 3d 909, 919 (Cal. App. 4th 2011)(emphasis added).
[56] Stevens v. Workers' Compensation Appeals Board, 194 Cal. Rptr. 3d 469, 482 (Cal. App. 1st 2015). This view seems in conflict with *Six Flags, supra* note 51.

This more recent Court of Appeal decision is now pending before the California Supreme Court.[57] This potential limiting function of state constitutional workers' compensation provisions is further explored in the discussion of Ohio cases below.

Offensive political organization and action to push for the inclusion of similar limits ("positive rights") on erosion of the Grand Bargain could be a productive adjunct to the more familiar defensive litigation.[58]

IV. Selected States

This section illustrates the possible range of litigation arguments against erosion of workers' compensation benefits in states with state constitutional provisions specifically on workers' compensation and states without such provisions. Similar arguments could be developed in other states, depending on the content of their state constitutions and the judicial doctrines surrounding them.

A. Florida

Florida continues to present a microcosm of both the erosion of the Grand Bargain through the Race to the Bottom and the state constitutional challenges attempting to block that erosion and protect workers' part of the Bargain. Florida does not have a specific workers' compensation provision in its constitution. The original statute was adopted in 1935 without any constitutional challenge.[59] Over the

[57]

[58] Emily Zackin analyzes the various movements to protect workers' rights, including workers' compensation in LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS ch. 6 (2013). *See also* AMY BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES 88-99, 120-124 (2015).

[59] Kluger v. White, 281 So. 2d 1, 4 (Fla. 1983):

> Workmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury.

years the Florida Supreme Court upheld various limitations adopted by the legislature.[60] These challenges were brought, unsuccessfully, under the Florida Constitution's "access to court" or "right to remedy" provision.[61] This provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In 1973 the Florida Supreme Court had decided a landmark case striking down a statutory no-fault automobile insurance provision that barred property-damage claims below five hundred fifty dollars: *Kluger v. White*.[62] The Court stated:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[63]

This can be seen as a different, smaller and *constitutional* version on the concept of a "grand bargain." But when the legislature enacted a comprehensive revision of the workers' compensation laws in 1989 and 1990, the Florida Supreme Court held, despite the claim that the revisions operated to "substantially reduce preexisting benefits to employees without providing any countervailing

[60] *See, e.g. Newton v. McCotter Motors, Inc.,* 475 So.2d 230 (Fla. 1985) (provision requiring that death must result within one year of a compensable accident or following five years of continuous disability to be eligible for death benefits did not deny access to courts), *cert. denied,* 475 U.S. 1021 (1986); *Sasso v. Ram Property Management*, 452 So.2d 932 (Fla.) (provision which cut off wage-loss benefits at age sixty-five did not deny access to courts), *appeal dismissed*, 469 U.S. 1030 (1984); *Acton v. Fort Lauderdale Hospital*, 440 So.2d 1282 (Fla. 1983) (amendment to workers' compensation law which reduced benefits did not deny access to courts); *Iglesia v. Floran*, 394 So.2d 994 (Fla. 1981) (amendment to workers' compensation law which repealed right to bring a lawsuit for negligence of a coworker except in cases of gross negligence did not deny access to courts).

[61] FLA. CONST. art. I §21. *See* Judith Anne Bass, Note, *Article I, Section 21: Access to Court in Florida*, 5 FLA. ST. U. L. REV. 871 (1977).

[62] 281 So. 2d 1 (Fla. 1973).

[63] *Id*., at 4.

advantages," that the amended "workers' compensation law remains a reasonable alternative to tort litigation."[64] The court purported to apply the *Kruger* test.[65]

However, the court went on to strike the amended statutes down because of a flawed legislative procedure: the state constitution's requirement that laws contain only a "single subject."[66] The court observed:

> The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent "logrolling" where a single enactment becomes a cloak for dissimilar legislation having no necessary or appropriate connection with the subject matter. . . . The act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection. *Chenoweth v. Kemp*, 396 So.2d 1122 (Fla. 1981).
>
> We agree with the trial court that chapter 90-201 violates the single subject requirement and is unconstitutional. Chapter 90-201 essentially consists of two separate subjects, i.e., workers' compensation and international trade.[67]

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[64] Martinez v. Scanlan, 582 So.2d 1167, 1171 (Fla. 1991).

[65] *Id*.:

> Likewise, we reject Scanlan's claim in the instant case. Although chapter 90-201 undoubtedly reduces benefits to eligible workers, the workers' compensation law remains a reasonable alternative to tort litigation. It continues to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation. Furthermore, while there are situations where an employee would be eligible for benefits under the pre-1990 workers' compensation law and now, as a result of chapter 90-201, is no longer eligible, that employee is not without a remedy. There still may remain the viable alternative of tort litigation in these instances. As to this attack, the statute passes constitutional muster.

[66] FLA. CONST. art. III, §6. *See generally* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803 (2006); Martha J. Dragich, *State Constitutional Restrictions on Legislature: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. LEGIS. 103 (2001).

Because the workers' compensation amendments were included in a bill that also dealt with international trade the court struck down the entire act.[68]

This type of legislative-procedure constitutional challenge can be effective, but as a procedural rather than substantive challenge, the legislature can remedy the violation by reenacting the statute following the proper procedure.[69] This is exactly what happened in Florida, thus "curing" the procedural constitutional violation.[70]

There is another important point about this type of "single-subject" challenge. An asserted violation is apparent from the face of the enacted law; it carries "its death warrant in its hand."[71] This is also true for claims that the title of the act does not property disclose its contents; this argument can be made simply by reference to the face of the enacted law.[72] By contrast, other legislative-procedure challenges under state constitutions, such as those alleging that the law was improperty "altered" during its passage through the legislature so as to "change its original purpose," require extrinsic evidence beyond the face of the law.[73] In some states such extrinsic evidence is barred by the "enrolled bill rule."[74]

In controversial areas of state legislation, such as workers' compensation "reform," legislators will be tempted to shortcut or bypass some of the state constitutional requirements for the enactment

[67] Martinez, 582 So.2d at 1172.
[68] *Id*.:

> In the instant case, however, the subjects of workers' compensation and international trade are simply too dissimilar and lack the necessary logical and rational relationship to the legislature's stated purpose of comprehensive economic development to pass constitutional muster.

[69] WILLIAMS, *supra* note 8, at 275.
[70] Martinez, 582 So. 2d at 1172-73.
[71] WILLIAMS *supra* note 8, at 261 n. 76, 267.
[72] *Id*., at 262.
[73] *Id*., at 263.
[74] *Id*., at 263-264, 266, 268-269.

of state laws. Those resisting such "reforms" would do well to pay attention to the possibilities of such procedural challenges.[75]

Litigation in Florida has attempted, with mixed results, to challenge some of the more recent cutbacks in workers' compensation coverage. For example, *Stahl v. Hialeah Hospital* challenged the legislature's imposition of a ten-dollar copay for medical visits after a claimant attains maximum medical improvement, and the elimination of permanent partial disability (PPD). The District Court of Appeal rejected the challenge:

> We disagree, because both amendments withstand rational basis review, in that the copay provision furthers the legitimate stated purpose of insuring reasonable medical costs after the injured worker has reached a maximum state of medical improvement, and PPD benefits were supplanted by impairment income benefits.[76]

After initially accepting jurisdiction[77] the Florida Supreme Court "discharged" jurisdiction, after it "considered the briefs in *Stahl*, heard oral arguments. . . now decided not to consider the case."[78]

Another important case that did not result in Florida Supreme Court review was *Padgett v. State of Florida*.[79] The trial judge observed:

> As of October 1, 2003, the legislature eliminated *all* compensation for loss of wage earning capacity that is not total in character. The last vestige of compensation for partial loss of wage earning capacity was repealed. No reasonable alternative was put in its place. Injured workers now receive permanent impairment benefits pursuant to the Florida impairment guidelines and nothing else unless the employee is permanently and

[75] *See*, e.g. State ex rel. Ohio Acad. Of Trial Lawyers v. Sheward, 715 N.E. 2d 1062, 1100 (Ohio 1999); note 133 infra.
[76] Stahl v. Hialeah Hospital, 160 So. 3d 519, 520 (Fla. App. 1 Dist. 2015).
[77] Stahl v. Hialeah Hospital, 182 So. 3d 635 (Fla. 2015); Amy O'Connor, *Florida high court set to hear constitutional challenge to Workers' Comp system,* INSURANCE J. _____ (January 31, 2016).
[78] David Langham, *Stahl is over in Florida* ___ INSURANCE J. ___ (May 2, 2016).
[79] Case No. 11-13661 CA 25, (11th Judicial Cir. ____).

> totally disabled (PTD). The benefits for PTD and at age 75 or after 5 years of payment, whichever is greater.[80]

The judge cited the landmark *Kluger* decision, together with a 1949 Florida Supreme Court decision stating that the purpose of workers' compensation included "the consequences of a broken body, a *diminished income*, an outlay for medical and other care."[81] The judge further emphasized the "right to be rewarded for industry" which is protected by Article I, Section 2 of the Florida Constitution. A 1989 Florida supreme court case had relied on this constitutional right and applied strict scrutiny to invalidate a limitation on workers' compensation.[82]

The judge continued:

> The purpose of workers' compensation is not for it to be used as a weapon in an economic civil war. Its purpose is to provide adequate compensation for on the job injuries in place of the tort remedy so at to relieve society from the costs of industrial injuries.[83]

Judge Cueto therefore declared the statutory workers' compensation amendments unconstitutional, but the Third District Court of Appeal reversed on standing and mootness grounds,[84] and the Florida Supreme Court denied review.[85] It is, of course, very difficult to determine how these views would have played in the Florida appellate courts.

[80] *Id*., at 9 (emphasis in original).
[81] Id., at 9, citing Mobile Elevator v. White, 39 So. 2d 799, 800 (Fla. 1949) (emphasis in original).
[82] De Ayala v. Florida Farm Borough Casualty Co., 543 So. 2d 204 (Fla. 1989).
[83] *Padgett*, *supra* note 79, at ___.
[84] State v. Florida Workers' Advocates, 167 So. 3d 500 (3d DCA 2015).
[85]

A long-awaited[86] decision of the Florida Supreme Court struck down a legislative limitation on workers' attorney fees (not employers') that eliminated the reasonableness standard and substituted a rigid formula.[87] Because counsel spent over one hundred hours resisting numerous (at least twelve) defenses but the recovery was under one thousand dollars, the fee that was awarded amounted to $1.53 per hour![88] In a 5-2 decision the Court declared the statute mandating this result, as a conclusive, irrebuttable presumption, unconstitution on its face under both the state and federal due process clauses, without reaching the other state constitutional claims.[89]

The Court noted that while the legislature purported to adhere to the purpose of workers' compensation as providing "the quick and efficient delivery of disability and medical benefits to an injured worker" . . . "in reality, the workers' compensation system has become increasingly complex *to the detriment of the claimant*, who depends on the assistance of a competent attorney to navigate the thicket."[90] The Court noted that the claimant's right to a reasonable attorney's fee was a "critical feature" of workers' compensation, and that this is a deterrent to unreasonable resistance to claims by carriers.[91] It held that a reasonable attorney's fee is "central" to the constitutionality of the workers' compensation law.[92] Based on the language of the majority's opinion, it appears that the Florida court

[86] Robert J. Grace, Jr., *Florida Workers' Compensation: The Great Wait*, https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-develpments/archive/2015/06/25/florida-workers-compensation-the-great-wait.aspx.
[87] Castellanos v. Next Door Company, 192 So. 3d 431 (Fla. 2016).
[88] *Id*., at 433.
[89] *Id*., at 432 n.1; 448 It is puzzling that the Court relied on both constitutional provisions, without any separate analysis of the different provisions. The federal ground opens up the possibility, however unlikely, of review and possible reversal by the United States Supreme Court. *Michigan v. Long*, 463 U.S. 1032 (1983); WILLIAMS, *supra* note 8, at 122-23, 231.
[90] *Id*., at 434 (emphasis added). *See also id.*, at 434 n.3 (describing increasing complexity of workers' compensation).
[91] *Id*.
[92] *Id*., at 448.

The Supreme Court of Utah struck down a restrictive fee schedule adopted by the Labor Commission, pursuant to statutory delegation, *on separation of powers* grounds. Injured Workers Assoc. of Utah v. Utah, 374 P.3d 14 (Utah 2016). Utah's constitution, like many others, gives the Supreme court exclusive power over regulating the practice of law. *See generally* WILLIAMS, *supra* note 8, at 292-293.

has established access to a reasonable attorney's fee for successful claims as to a constitutionally required element of the Grand Bargain.

Another important decision responded to an apparent "gap" between Florida's 104-week cap on temporary total disability benefits and the point at which a claimant reaches "maximum medical improvement" but is totally disabled.[93] The employer and insurance carrier argued that the claimant was not entitled to any benefits during this interim period. The claimant responded that the statute should not be interpreted to require that result, and that if it was the statute was unconstitutional as a denial of his state constitutional right to a remedy/access to court.[94] Florida's First District Court of Appeal, *en banc,* overturned its prior precedent, avoided the constitutional question and held that the statute was not intended to create such a gap.[95] This decision, which was reversed by the Florida Supreme Court which instead reached the constitutional question, still underlines the importance of aggressive and creative *statutory interpretation* arguments to complement state constitutional challenges.[96] Under similar circumstances the Pennsylvania Supreme Court relied on its "policy to resolve claims on non-constitutional grounds when it is possible to do so . . ."[97] Of course, whether a statutory interpretation argument is convincing is in the eye of the judicial beholder.[98]

The Utah court had earlier struck down an offset for one-half a claimant's Social Security retirement benefits as age discrimination in violation of the Utah Constitutions "uniform operation of laws" clause, Merrill v. Utah Labor Comm., 223 P.3d 1089 (Utah 2009), and applied the decision retroactively. Merrill v. Utah Labor Commission, 223 P.3d 1099 (Utah 2009). *See also* Caldwell v. MACO Workers' Comp. Trust, 256 P.3d 923 (Mont. 2011) (similar result under state equal protection analysis). The Kansas Supreme Court took the opposite view, reversing earlier cases, under federal and state equal protection doctrine. Hoesli v. Triplett, Inc., 361 P.3d 504 (Kan. 2015).

[93] Westphal v. City of St. Petersburg, 122 So.3d 440 (Fla. App. 2013).

[94] *Id*., at 443-444.

[95] *Id*., at 442 (. . . "the notion that there can be a period of time during which a disabled worker is not entitled to be compensated for his or her workplace injury is contrary to the basic purpose of the Workers' Compensation Law.")

[96] WILLIAMS, supra note, at 140-141.

[97] Tooey v. AK Steel Corp., 81 A.3d 851, 857 (Pa. 2013):

> For the reasons that follow, we conclude that claims for occupational disease which manifests outside of the 300-week period prescribed by the Act do not fall within the purview of the Act,

The Florida Supreme Court took the *Westphal* case and reversed the District Court of Appeal on the statutory interpretation question, finding that the statute was plain and could not be saved under the doctrine of constitutional avoidance.[99] The court, however, then took up the constitutional question and declared the clear statutory "gap" in benefits as violating Florida's access to court provision as interpreted in *Kluger*.[100] A challenge to the entire Florida workers' compensation statute was raised by amicus curiae Florida Workers' Advocates but not considered by the court.[101] The court stated forcefully:

> The "reasonable alternative" test is then the lynch pin and measuring stick, and this Court has undoubtedly upheld as constitutional many limitations on workers' compensation benefits as benefits have progressively been reduced over the years and the statutory scheme *changed to the detriment of the injured worker*.
>
> But, there must eventually come a "tipping point," where the diminution of benefits becomes so significant as to constitute a *denial* of benefits—thus creating a constitutional violation.[102]

The court went on to characterize the diminution in benefits as "dramatic."[103] By way of remedy, the court ordered a reversion to the prior stator 260-week cap.[104] Justice Lewis concurred, but argued for a much more far-reaching declaration of unconstitutionality. He concluded:

> and, therefore, that the exclusivity provision of Section 303(a) does not apply to preclude an employee from filing a common law claim against an employer.

Id., at 855. *See* Johelys M. Cecala, *Reconciling Latent Occupational Diseases Under the Worker's Compensation Act, A Survey of* Tooey v. AK Steel, 24 WIDENER L.J. 595 (2015).

[98] *See*, e.g. Westphal, 122 So. 3d at 451 (Thomas and Wetherell, J.J. dissenting). For a case where there was no saving statutory interpretation argument, *See* Stapleton v. M.D. Limbaugh Const. Co., 969 S.W. 2d 648 (Ark. 1998).

[99] Westphal v. City of St. Petersburg, 194 So. 3d 311, 313-314 (Fla. 2016).

[100] Id., at 315, 321-322.

[101] Id., at 315 n. 2.

[102] Id., at 323 (first italics added, second italics in original).

[103] Id., at 324.

[104] Id., at 327.

> Where totally disabled workers can be routinely denied benefits for an indefinite period of time, and have no alternative remedy to seek compensation for their injuries, something is drastically, fundamentally, and constitutionally wrong with the statutory scheme.[105]

In April, 2016 Florida's First District Court of Appeal, relying heavily on its earlier decision in *Jacobson v. Se. Pers. Leasing, Inc.,*[106] struck down the statutory ban, including *criminal* penalties, for a claimant or any other person or entity to give an attorney's fee or gratuity to a claimant's lawyer.[107] The court applied strict scrutiny in holding that the ban violated *federal*[108] First Amendment free speech, association, and right to petition for redress, as well as the right to freedom of contract. The court noted:

> Furthermore, again as in *Jacobson*, an attorney's fee paid by Claimant and her union would have no impact on workers' compensation premiums, because Claimant and her union are the ones paying the fee, not the E/C. If Claimant prevailed, the E/C still could not be required to pay more in fees that the Legislature allows under section 440.34, Florida Statutes, regardless of Claimant obtaining legal counsel not authorized under chapter *440*, as Claimant would pay the excess fee.[109]

From this progression of litigation in Florida, as a response to apparent domination of the legislature by employer and insurance carrier interests, we see that the courts were willing to tolerate quite substantial erosion of employee benefits but at some juncture to see this as exceeding the "tipping point" of the Grand Bargain. Such litigation, together with more effective legislative advocacy on behalf

[105] Id., at 328.
[106] 113 So.3d 1042 (Fla. App. 2013).
[107] Miles v. City of Edgewater Police Department, 190 So. 3d 171 (Fla. App. 2016).
[108] *See* note 89, *supra*.
[109] *Miles*, supra note 107, at 181

of workers, is going to be necessary to stem the Race to the Bottom. Notably, the Florida Constitution Revision Commission will convene in 2017.[110] Perhaps a reasonable workers' compensation provision, protecting the Grand Bargain, can be considered and proposed without legislative involvement to Florida's voters.[111]

B. Ohio

The potential role of specific state constitutional provisions on workers' compensation can be illustrated by a line of Ohio cases concerning "intentional torts" as outside the exclusive remedy provision of workers' compensation. Even though the original workers' compensation statute was upheld, Ohio has two clauses on workplace injuries: Article II, Sections 34[112] and 35.[113] There has been a

[110] floridabar.org/crc; revisefl.com/

[111] Robert F. Williams, *Foreword: Is Constitutional Revision Worth Its Popular Sovereignty Price?* 52 FLA. L. REV. 249 (2000).

[112]

> Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, *and providing for the comfort, health, safety and general welfare of all employees*; and no other provision of the constitution shall impair or limit this power. (emphasis added)

[113]

> For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. *Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.* Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the general assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it

decades-long disagreement between the Ohio Legislature and a divided Supreme Court of Ohio over the Legislature's ability to define "intentional torts" given the two specific state constitutional provisions.

In 1982 the Ohio Court held that Article II, § 35 did not bar employees from bringing common-law damage actions for "intentional" injuries suffered at the workplace.[114] The Court characterized the constitutional provision as "a basis for legislative enactments in the area of workers' compensation,"[115] and concluded that the Workers' Compensation Act "has always been for negligent acts and not for intentionally tortious conduct."[116] Public policy would not support insurance for such behavior.[117]

Two years later the Court extended its holding to situations where the employee both received workers' compensation *and* sued for a common-law intentional tort.[118] The Legislature responded by enacting several restrictive statutory definitions of "intentional" injury and in 1999 the Court struck down the statutes as violative of *both* Article II, § 34 ("clearly not a law that furthers the . . . comfort,

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> may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution. (emphasis added)

See generally STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE ___ (2004).

[114] Blankenship v. Cincinnati Milacron Chemicals, Inc., 433 N.E. 2d 572 (Ohio 1982). The employees alleged they were injured by chemical fumes that the employer knew were dangerous and through intentional, willful and wanton motives did nothing about.

An associated issue is whether emotional distress claims of third parties, arising out of workplace injuries or death are "derivative" and therefore barred, or independent and not barred. *See Collins v. COP Wyoming, LLC*, 366 P.3d 521 (2016) (collecting cases) ("separate and distinct" injury "is outside the 'grand bargain'"…).

[115] *Id*., at 575.

[116] *Id*., at 577.

[117] *Id*.

[118] Jones v. VIP Development Co., 472 N.E. 2d 1046 (Ohio 1984).

health, safety and general welfare of all employees'") and § 35 ("it attempts to regulate an area that is beyond the reach of *empowerment*.").[119]

In all of these cases, despite the fact that state constitutions assign plenary authority to the legislative branch, and the 1912 decision of the Ohio Supreme Court upheld the legislature's power to enact a workers' compensation law,[120] up through 1999 the courts perceived Article II, Sections 34 and 35 as the *source or authorization* for the legislature to enact workers' compensation laws. Viewed from this perspective, the provisions of Section 34 and 35 were seen also as limitations on the legislature's power. In the 1999 decision in *Johnson v. BP Chemicals, Inc.*[121] two dissenters challenged that view, contending that the constitutional provisions were not actually limitations on the legislature's power to enact workers' compensation statutes, but rather the statutes challenged in that case were products of the legislature's preexisting plenary power.[122]

The dissenters had identified and challenged the majority's technique of "negative implication" in state constitutional interpretation. When state constitutional provisions mandate legislative action or grant authority to a state legislature which already has plenary power, courts can transform these apparent grants of authority into judicially created limitations on legislative power. As Professor Frank Grad and I have cautioned:

> It must be emphasized that very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation.
>
> . . . .

[119] Johnson v. BP Chemicals, Inc., 707 N.E. 2d 1107, 1114 (Ohio 1999) (emphasis added). *See also* Brady v. Safety-Kleen Corp., 576 N.E. 2d 722 (Ohio 1991) (both constitutional provisions).
[120] *Supra* note 32.
[121] 707 N.E. 2d 1107 (Ohio 1999).
[122] Id., 1116 and 1121-22.

> . . . In constitutional theory state government is a government of plenary powers, except as limited by the state and federal constitutions . . . . In order to give effect to such special authorizations, however, courts have often given them the full effect of negative implication, relying sometimes on the canon of construction *expression unius est exclusio alterius* (the expression of one is the exclusion of another).[123]

After another restrictive statute concerning employers' intentional torts was enacted, the majority of the Ohio Supreme Court adopted the view of the dissenters in *Jones*.[124] After a detailed review of intentional tort doctrine under Sections 34 and 35, the court characterized "Section 34, Article II as a broad *grant* of authority to the General Assembly, not as a limitation on its power to enact legislation. . . . [and Plaintiffs'] position will require Section 34 to be read as a limitation, in effect, stating: "'No law shall be passed on the subject of employee working conditions *unless it furthers* the comfort, health, safety and general welfare of all employees.' Under that approach, however, Section 34 would prohibit all legislation imposing any burden whatsoever on employees, regardless of how beneficial to the public that legislation might be."[125] The court continued:

> Just as Section 34, Article II is phrased as an affirmative grant of power to the general assembly. . .
>
> It follows that Section 35 does not forbid the legislation before us today, which affects employees' recovery for intentional torts, but not receipt of workers' compensation. Viewed from an employee's perspective, Section 35 addresses and

[123] FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS AND AMENDMENTS 82-83 (2006).
[124] Kaminski v. Metal & Wire Products Company, 927 N.E. 2d 1066 (Ohio 2010). *See also* Samaritan Health Serv. v. Industrial Comm., 823 P. 2d 1295, 1297 (Ariz. App. 1991).
[125] Id., at 1081, *citing* Am. Assn. of Univ. Professors, v. Cent. State Univ. 717 N.E. 2d 286, 292 (Ohio 1999); and Rocky River v. State Emp. Relations Bd., 539 N.E. 2d 103, 114 (Ohio 1989).

authorizes recovery under the Workers' Compensation Act. Legislation that does not affect the recovery falls outside of any Section 35 concerns.[126]

Referring to the dissenting opinions in *Johnson*, the court concluded that the Ohio Constitution's workers' comp clauses did not carry a "negative implication."[127]

In a companion case, the Ohio court upheld the new intentional tort statute against state constitutional claims under the right to remedy provision, civil jury trial guarantee, due process, equal protection, and separation of powers doctrines.[128] Notably, the court stated that both the Ohio Constitution's due process ("due course of law") and equal protection ("all political power is inherent in the people. Government is instituted for their equal protection and benefit.") were "equivalent" of the differently worded, but similar federal constitutional provisions.[129]

In dissent, Justice Pfeifer, stated:

> R.C. 2745.01 purports to grant employees the right to bring intentional-tort actions against their employers, but in reality defines the cause of action into oblivion. An employee may recover damages under the statute only if his employer deliberately intends to harm him. It is difficult to conjure a scenario where such a deliberate act would not constitute a crime. Are we to believe that criminally psychotic employers are really a problem that requires legislation in Ohio?[130]

[126] Id., at 1081-1083.
[127] Id., at 1085.
[128] Stetter v. R.J. Corman Derailment Services, L.L.C., 927 N.E. 2d 1092 (Ohio 2010).
[129] Id., at 1106, 1108. See generally WILLIAMS, *supra* note 8 at ch. 7. (criticizing state courts "lockstepping" state and federal constitutional provisions). *See also* Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415 (2004). The Ohio Supreme Court, however, recently rejected "lockstepping," at least in some contexts such as equal protection. State v. Mole ___ N.E. 3d ___ (Ohio 2016).
[130] *Id*., at ___.

Ohio, like Florida, is engaged in a study of its state constitution, with recommended changes being proposed to the legislature by the Ohio Constitutional Modernization Commission.[131] Perhaps this body could take a look at Ohio's workers' compensation provisions in the state constitution and propose a revision that would solidify the Grand Bargain.

C. *Oklahoma*

The Oklahoma Supreme Court upheld that state's workers' compensation law in 1932.[132] After many years experience with workers' compensation, Oklahoma is now in the national spotlight with Florida, Texas, and a few other states.

In 2013 the Oklahoma legislature repealed the prior workers' compensation statute, and replaced it with both an Administrative Workers' Compensation Act *and* an Employee Injury Benefit Act. These two laws were included in the same bill, and the second one constituted Oklahoma's "opt-out" law. Later that year the Oklahoma Supreme Court rejected a single-subject ("logrolling") state constitutional challenge, holding that the two laws were sufficiently connected to pass muster under Oklahoma's state constitutional single-subject clause.[133] Two justices, however, wrote separately to suggest strongly that the opt-out statute was subject to very serious constitutional infirmities on equality and "special law" grounds.[134]

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[131] Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 345-354 (2016).
[132] Indian Territory Illuminating Oil v. Davis 9 P.2d 40 (Okla. 1932).
[133] Coates v. Fallin, 316 P. 3d 924 (Okla. 2013). Oklahoma's single-subject clause is OKLA. CONST. art. V, § 57.
[134] *Id.*, at 925-931. OKLA. Const. art. V, § 46:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate; …

Next, in 2016 the Oklahoma Supreme Court considered a constitutional challenge to the Administrative Workers' Compensation Act Provision that barred compensation for "cumulative-trauma injury" for workers who had not been employed for a continuous 180-day period.[135] Because the employer argued that the worker was not entitled to either workers' compensation or a common law remedy the court declared this provision unconstitutional as a violation of Oklahoma's Due Process provision. [136] Noting that its due process provision "includes an equal protection element," the court characterized the 180-day threshold as an irributtable presumption that, although serving a legitimate state interest to avoid fraud, was too arbitrary to pass constitutional muster.[137] The court stated:

> *When considering the articulated purpose of preventing workers' compensation fraud,* a statute creating a class of employees who are injured, in fact, with a cumulative trauma injury during the first 180 days of employment with their then current employer, and then they are conclusively placed within a class of employees who file fraudulent claims, that statutory placement is overinclusive by lumping together the innocent with the guilty. On the other hand, if one of the purposes of workers' compensation is to provide statutory compensation for employees actually suffering an injury arising out of the course and scope of employment; then the statute is underinclusive because it fails to include employees actually injured during the first 180 days of employment.[138]

Next, the court addressed a broadside attack on the entire workers' compensation scheme in Oklahoma ("forty-two (42) provisions of the current workers' compensation scheme") violated the

On special laws provisions in state constitutions, see WILLIAMS, *supra* note *8*, at 277-279.
[135] Torres v. Seaboard Foods, LLC, 373 P.3d 1057 (Okla. 2016).
[136] OKLA. CONST. ART. II, §7.
[137] *Torres*, 373 P.3d at 1074.
[138] Id., at 1078. (emphasis in original)

grand bargain. "Employee argues that when the workers' compensation statutes were originally created in several States a *grand bargain* was created."[139] The court, however, did not view these claims as properly raised in this litigation and saw this challenge as a "hypothetical question whose judicial resolution in this appeal would not, under the present record on appeal, alter her rights on remand."[140] Several justices, although concurring, wrote separately to describe access-to-court and equal protection infirmities in the current workers' compensation scheme.[141]

Also in 2016, in a decision with national implications, the Oklahoma Supreme Court declared the "opt-out" law unconstitutional as violating the state constitution's ban on "special laws."[142] The court noted:

> Rather than providing employees of qualified plan employers equal rights with those of employees falling within the Workers' Compensation Act, the clear, concise, unmistakeable, 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.* The statutory language itself demonstrates that injured workers under the Opt Out Act have no protection to the coverage, process, or procedure afforded their fellow employees falling under the Administrative Workers' Compensation Act. There is little question that §203 specifically allows the employers creating their own plans to include conditions for recovery making it more difficult for the injured employee falling

[139] Id., 1079.
[140] Id., ___.
[141] Id., at ___.
[142] Vasquez v. Dillard's, Inc., ___ P.3d ___ (Okla. 2016).

within to recover for a work-related injury than a counterpart covered by the Administrative Act.[143]

V. Majoritarian Judicial Review

Looking at litigation concerning workers' compensation from the federal constitutional vantage point, it may simply look like "economic regulation" which deserves the lowest level of judicial scrutiny.[144] State courts, however, never rejected the *Lochner* era and have continued a much more rigorous analysis of state economic regulation.[145] The focus of much of this judicial review is on "special interest" or "rent seeking" state statutes, that work against the rights of the *majority*. The workers' compensation statutes involved in the "Race to the Bottom" could be viewed in this light, and therefore judicial review and constitutional scrutiny could serve *majoritarian* protection. As the editors of the Harvard Law Review noted, in the context of "tort reform" ligation:

> Both courts and commentators have largely ignored the possibility that judicial review might play a radically different role—that of safeguarding the interests of majorities. State constitutional law could be dramatically divorced from its federal counterpart if state courts were to reconceive their purpose in terms of elaborating and employing a theory of majoritarian, rather than anti-majoritarian, review. In fact, there

[143] *Id*., at ___ (emphasis in original)

See also Maxwell v. Sprint PCS, 369 P.3d 1079 (Okla. 2016) (deferral of permanent partial disability payments to workers who return to work, under the Administrative Workers' Compensation Act, is a due process violation under art. 2, § 7 of the state constitution and is an unconstitutional special law under art. 5, § 59.)

[144] John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 528-29(2005) ("To impose any harder-look review would be to ignore the counsel of *Munn v. Illinois* …that individuals lack a vested interest in mere common law rules. Stricter scrutiny, these judges worry, would resurrect *Lochner* and its much-maligned constitutionalization of the common law"). *See also* Robert G. McCloskey, *Economic Due Process and the Constitution: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962).

[145] *See* James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241 (1981); Peter J. Galie, *State Courts and Economic Rights*, 496 ANNALS 76 (1988); Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 879-883 (1976).

is reason to believe that state courts already have undertaken something very much like this change of direction in one area: the review of economic regulation.[146]

A state constitutional argument challenging a special-interest statute reducing workers' compensation benefits with no corresponding benefit ("majoritarian" judicial review) could certainly appeal to a judge or judges who might not be inclined to strong enforcement of negative constitutional rights to protect unpopular minorities. This is apparent in much of the "Tort Reform" litigation.

Of course, we have seen a very significant increase in powerful economic interests' involvement in state supreme court election and appointment processes as a result of state constitutional "Tort Reform" and same-sex marriage litigation.[147] Their dominance in state legislatures has been refocused on state courts. This has resulted in a threat to state judicial independence.[148] Neil Devins has provided an exhaustive analysis of state supreme court justices' considerations in controversial state constitutional litigation.[149] Some of these may, of course, be applicable to the types of litigation described in this article.

VI. *Horizontal Federalism*

When state courts engage in judicial review, interpreting their own constitutions, they may also (unlike federal constitutional law) look to the decisions of other state courts interpreting identical or similar *state* constitutional provisions. This is referred to as "horizontal federalism." This can be contrasted with the vertical approach, where state courts look to federal and United States Supreme Court decisions interpreting identical or similar *federal* constitutional provisions.[150] Therefore, the

[146] *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1498-99 (1982). *See also* WILLIAMS AND FRIEDMAN, *supra* note 35 at 236-246.
[147] Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism,* 62 STAN. L. REV. 1629, 1660-1665 (2010).
[148] *Id*.; Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835 (2002).
[149] Devins *supra* note 147.
[150] WILLIAMS, *supra* note 8, at 352.

judicial decisions enforcing the Grand Bargain pursuant to state constitutional provisions, in states like Florida, Oklahoma, California and Ohio may be of special importance to similar litigation in other states.

VII. *International Human Rights Norms*

I have pointed out elsewhere:

> Despite the controversy over the use of international law in federal constitutional interpretation, state constitutional interpretation has, and is likely to continue to, refer to international law in certain contexts. For example, in interpreting the Oregon provision banning "unnecessary rigor" in the treatment of prisoners, Justice Hans Linde referred to international law norms. The West Virginia Supreme Court of Appeals cited the Universal Declaration of Human Rights in its state constitutional school funding decision. There is a growing literature on this important technique of interpretation.[151]

Pursuant to this little-known approach, international human rights documents, even if they are not binding treaties and therefore do not carry the force of federal law, can have persuasive weight in interpreting state constitutional provisions. There are such instruments that could be relevant to the kind of litigation described herein.[152] Further, as noted above, there is an expanding literature on this technique of interpretation.[153]

VIII. *Conclusion*

[151] WILLIAMS, *supra* note 8, at 355 (footnotes omitted).

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[153] *See generally* Margaret M. Marshall, *"Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U.L. REV. 1633 (2004); Johanna Kalb, *Litigating Dignity: A Human Rights Framework,* 74 ALB. L. REV. 1727 (2010/2011); Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORHAM L. REV. 411 (2008); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights,* 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006).

It is possible to view the specific state constitutional provisions on workers' compensation as "positive rights."[154] Helen Hershkoff has noted the tendency of state courts unjustifiably to import *federal* rational basis analysis into *state* constitutional interpretation of positive rights.[155] She argues, rather, that state courts should apply "rigorous scrutiny to determine whether the provision is likely to effectuate the constitutional goal."[156] In an exhaustively-researched article, Judith Resnik contends that right-to-remedy and access-to-court guarantees constitute a positive entitlement owed by state governments to litigants in need of this government service.[157] This approach could cause state courts, like those in California and Ohio as well as others, to be more skeptical of erosion of workers' compensation benefits based on the specifics of their own constitutions.

Of course, the specifics of a *statutory* Grand Bargain cannot bind future legislatures.[158] This underlines the importance of *constitutional* analysis of the statutes constituting the Race to the Bottom. Whether based on more general right to remedy/access to court provisions, due process and equality, and separation of powers provisions, or on the more specific court-constraining or court-preempting workers' compensation provisions, state constitutions may provide potent checks to block the Race to the Bottom.

This area of legislative erosion of workers' compensation benefits and the resulting state (and possibly federal) constitutional litigation presents a fast-developing area of the law. Given the national conservative groups that are pushing the Race to the Bottom it is very likely to continue for some time. Hopefully this preliminary and admittedly limited survey of the state constitutional landscape will contribute to this very important body of law.

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[154] See note *58*, *supra* and accompanying text.
[155] Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).
[156] *Id*., at 1184.
[157] Judith Resnik, *Constitutional Entitlements To and In Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917 (2012).
[158] WILLIAMS, *supra* note 8, at 254.