THE OPT-OUT OF WORKERS’ COMPENSATION
LEGISLATION: A CRITICAL BRIEFING AND THE
VASQUEZ V. DILLARD’S CASE (2016)

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Workers’ compensation, the one hundred year old social insurance and legal system,1 is noteworthy for its state-based character.2 This phenomenon has its genesis in the constitutional thinking of the pre-New Deal days, when it was thought impossible for the federal government to legislate such a program.3 Over the decades, this constitutional thinking has changed. Now, plainly, Congress could, if it wished, enact a federal workers’ compensation law and preempt state programs.4 Still, states and other entrenched interests have always fiercely opposed interposition of the federal government in workers’ compensation.5

Nevertheless, the National Commission on State Workmen’s Compensation Laws, created by the Occupational Safety and Health Act, succeeded in promulgating a series of nineteen essential recommendations for state laws in 1972.6 Despite the passage of time, most of these admirable recommendations, which focused on expansiveness of coverage and efficient benefit delivery systems, are still viable. They stand for the proposition that an effective, modern state system should provide no-fault in-

1. Under workers’ compensation laws, injured workers give up their right to sue their employers in the event of injury and in return are provided wage-loss and medical insurance benefits on a no-fault basis. See, e.g., Folta v. Ferro Eng’g, 43 N.E.3d 108 (Ill. 2015) (referring to workers’ compensation as “a system of no-fault liability”).
5. Howard, supra note 2, at 175, 177.
surance for wage loss and medical benefits to as many workers as possible and cover comprehensively the injuries and diseases they sustain. 7

A key recommendation treated an old issue—whether compliance with a state’s workers’ compensation law should be mandatory or elective. To avoid constitutional challenges, most state legislatures created their statutes to be a matter of election. Technically, employers were free to opt out of the system, although to do so would expose them to tort liability and deprive them of traditional affirmative defenses. 8 The National Commission, in any event, recommended that this relic of past constitutional thinking should be abolished and that workers’ compensation should be mandatory. 9 A related key recommendation, consistent with the Commission’s desire for the most inclusive coverage possible, was that no exceptions to the mandate should be allowed. 10 That workers’ compensation should be mandatory and pervasive has now (with the notable exception of Texas, an issue discussed below) been an article of faith for decades.

This equanimity was shaken in 2013 when the Oklahoma legislature, as part of a dramatic, business-friendly amendment to its workers’ compensation law, allowed employers to opt out of the law if they established a plan (presumably ERISA-governed) of their own design and governance. 11 While benefits were supposed to be of the same “form” as workers’ compensation, such things as the scope of injuries (casualties) and the concept of work-relatedness (the circumstances of the injury) were the employer’s to choose. At the same time, an employer opting out and establishing its own private plan would retain the exclusive remedy and be free of potential tort liability. 12 The development was dramatic because never had a state legislature created a law that allowed employers to escape the historic social re-
responsibility of covering work-related injuries by allowing them to establish their own policies, largely on their own terms.  

The success of the law led proponents of opt-out laws, animated by a lobby group, the Association for Responsible Alternatives to Workers’ Compensation (ARAWC), to develop support for proposed opt-out laws in other southern states, including Tennessee, South Carolina, and Georgia.

The enactment of Oklahoma’s opt-out law, although dramatic for both Oklahoma and on a national level, was not unforeseen since a prior opt-out bill had failed in the legislature in 2012. Because both injured worker interests and the workers’ compensation insurance industry had foreshadowed the law, the reaction in court was fierce. Injured workers filed multiple lawsuits asserting that the law violated provisions of the state constitution, including the right of access to courts and the ban on “special laws,” which treated one group of individuals (here injured workers) differently than others. This robust reaction, largely prosecuted by a single dedicated lawyer, was and is without parallel in the annals of workers’ compensation.

These actions had consequences. On September 13, 2016, during preparation of this article, the Oklahoma Supreme Court, in the momentous decision Vasquez v. Dillard’s, Inc., struck down the Oklahoma enactment. The court held that the law was, indeed, violative of the prohibition against special laws. As far as the court was concerned, the law “is an unconstitutional special law within the meaning of [the constitution] creating an impermissible select group of employees seeking compensation for

13. Opt-out is thus different from so-called workers’ compensation “carve-outs.” The term “carve-out” is shorthand for the process by which management and union agree in a collective bargaining agreement (CBA) to maintain their own medical delivery and dispute resolution process for work injuries. A “carve-out” is not an “opt-out” because the benefits paid are those required by the workers’ compensation law, and review of contested cases still exists in the judicial branch. Such programs have flourished in a number of states, particularly in the construction project context. See generally David B. Torrey & James Yskamp, Workers’ Compensation “Carve-Outs”: Law, Background, Criticism, and a Twelve-State Reference Table, www.NAWCJ.org (last visited Oct. 17, 2016).


17. 381 P.3d 768 (Okla. 2016).
work-related injuries for disparate treatment.” Employers that had opted-out under the law were now deemed covered by the conventional workers’ compensation law.

With Vasquez, the progress of opt-out laws has been slowed, but proponents of the laws have promised further promotion of such schemes. Meanwhile, a principal observer believes that the Oklahoma enactment is “a harbinger of things [that is, radical efforts to escape workers’ compensation] to come.” It is submitted, as a consequence, that continued examination, analysis, and critique of the phenomenon are merited.

This article provides a brief background of opt-out laws, noting, among other things, that the advent of private plans in neighboring Texas (an elective state) was a major contributing factor to their rise. It then characterizes the critical features of the now invalid Oklahoma statute and other versions of opt-out as proposed in other states. This article thereupon reviews the arguments for and against the opt-out development. It then identifies an issue raised by both scholars and the courts which have considered opt-out—to wit, the conundrum over whether such plans arise under an ERISA-governed law and, if so, whether the plans can be regulated by the states. This article thereafter turns to the issue of the constitutionality of opt-out laws, concluding with an account of the Vasquez case, where opt-out failed under the Oklahoma Constitution. This article concludes with a critique of opt-out, characterizing this dramatic retraction of social insurance benefits as highly unsatisfactory.

II. BACKGROUND

The opt-out legislation enacted—and now invalidated—in Oklahoma had its conceptual genesis in Texas where most employers carry workers’ compensation. However, uniquely among the states, carrying workers’ compensation insurance has never been mandatory. Some businesses have always declined to “opt-in,” but the disadvantage is potential exposure to tort lawsuits by their employees. In the last few years, however, many enterprises have taken a creative approach: they decline to opt-in; establish their own

18. Id. at *1.
19. Ass’n for Responsible Alternatives to Workers’ Compensation, Press Release, ARAWC Statement in Reaction to OK Supreme Court Decision on Dillard’s v. Vasquez (undated) (in light of invalidation of Oklahoma Opt Out Act, “[w]e will redouble our efforts to raise awareness in other states of the advantages of innovation and competition for both employees and employers and of their role in helping states recruit and retain businesses which provide jobs”), http://arawc.org/option/oklahoma/ (last visited Oct. 13, 2016).
private, ERISA-governed occupational injury plans; and condition workers’ employment on agreement to arbitrate disputes.22

Large employers have found that taking this approach saves money over paying workers’ compensation insurance premiums or being self-insured under the Texas workers’ compensation laws.23 Further, handling employees’ work injuries “becomes much more like all the other benefit programs that the employer has,”24 freeing them from bureaucratic oversight and the potential for worker appeals to the Texas workers’ compensation program hearing officers.

This innovation captured the attention of business interests in Oklahoma, which were looking to reform the state’s law. Workers’ compensation costs were significantly above average in the state,25 and the Oklahoma Workers’ Compensation Court was perceived as facilitating an inefficient dispute resolution process.26 An opt-out law was proposed in 2012, but defeated. However, in 2013, as part of a larger business-friendly retractive reform of the workers’ compensation act, the legislature autho-

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rized employers to opt out of the law. The law was entitled the Oklahoma Employee Injury Benefit Act (OEIBA, or Opt Out Act).27

The Oklahoma Opt Out Act, although inspired by the Texas example, is quite different than the law of its neighbor.28 In Oklahoma, an employer may remove itself from the workers’ compensation system entirely if it substitutes an ERISA-governed employee benefit plan for work accidents.29 If certified by the state, such an entity becomes a “qualified employer.”30 When the employer does so, it retains its historic immunity from tort suit—that same immunity that formed the basis of the original workers’ compensation compromise or “bargain.”31

The overriding goals of the Oklahoma Opt Out Act were employer cost-cutting, particularly of medical benefits, which form a large proportion of work injury costs,32 and freedom from the agency oversight and litigation that characterizes workers’ compensation systems.33 It is notable that a qualified employer’s employees did not have the option to choose whether they were covered by an opt-out plan or retained the protections of the state workers’ compensation law. The “opt-out” choice was under the strict control of the employer. Such unilateral imposition is a feature of all opt-out proposals.

Under the now-invalidated law, a qualified employer was obligated to advise its workers of their status34 and to provide workers with contact information pertinent to any claim.35 Benefit types had to be “of the same forms” (e.g., total disability, partial disability, etc.) as those found in the state’s

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27. 85A OKLA. STAT. §§ 200–213. The law, which is called the Oklahoma Employee Injury Benefit Act, took effect February 1, 2014. The full text of the original (pre-November 2015 amendment) can be found at www.davetorrey.info (last visited Oct. 17, 2016).
28. Texas Workers’ Compensation Commissioner Ryan Brannan insisted that Texas opt-in is completely different from Oklahoma opt-out. Indeed, he quipped that Texas officials were irritated to be “dragged into the national conversation by the Oklahoma reform.” Remarks of Comm’r Ryan Brannan, NAWCJ 8th Annual Judiciary College (Aug. 23, 2016).
29. 85A OKLA. STAT. § 202.
31. 85A OKLA. STAT. § 209 (“Qualified Employer’s Liability”).
32. See Grover, supra note 24, at 2 (noting that, when Oklahoma was considering opt-out, cost advantages of Texas were extolled, and quoting one analyst as follows: “It cuts their risk and cost of compensation considerably [assuming] a Texas-like system that gives employers maximum flexibility in designing benefits, administration of benefits, and adjudication of disputes”; and further stating, “For employers that have that flexibility, the benefits can be impressive. ‘We saved roughly 50% a year in Texas,’ said . . . [an executive] of Hobby Lobby, which adopted an opt-out plan in 2004. ‘We have more fees associated [with it] but are saving about $1 million a year.’”).
34. 85A OKLA. STAT. § 202(H).
35. 85A OKLA. STAT. § 203(E).
workers’ compensation law. However, it was unilaterally up to the employer to establish the trigger of a compensable injury in its plan. This flexibility, in the end, spelled the doom of the Opt Out Act because it was found to treat workers of opt-out employers differently than those of employers bound by the workers’ compensation laws. It provided as follows:

The benefit plan shall provide for payment of the same forms of benefits included in the Administrative Workers’ Compensation Act [AWCA] for temporary total disability, temporary partial disability, permanent partial disability, vocational rehabilitation, permanent total disability, disfigurement, amputation or permanent total loss of use of a scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, with the same statute of limitations, and with dollar, percentage, and duration limits that are at least equal to or greater than the dollar, percentage, and duration limits contained in [the AWCA]. . . .

But no other provision of the [AWCA] defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma [OEIBA], unless expressly incorporated.

Disputes, meanwhile, were to be handled like those of any other employee benefit plan, with an employer agent assessing claims and an in-house appeals panel considering any challenge. Oddly, the first version of the bill prescribed that further appeals were to be prosecuted to the Oklahoma Workers’ Compensation Commission en banc, although an amendment effective November 5, 2015, directed that appeals were to an ALJ of the Commission.

In actual practice, many of the plans that were created in Oklahoma did feature exclusions and restrictive procedural provisions that are not features of the state workers’ compensation law. A neutral consultant, Gregory Krohm, reviewed multiple Oklahoma plans in 2016. He found many exceptions—many being truly remarkable—to compensability. For example, an injury suffered due to a patient’s use of a prescription drug “in contravention of physician’s orders” was non-compensable, as were bacterial infections, “except by cut”; asbestosis (and presumably mesothelioma); fibromyalgia (the last three excluded under the Dillard’s Plan); injury or death flying in a rocket-propelled aircraft; and pollen and mold exposure-induced maladies suffered by workers at a nursery.

36. 85A OKLA. STAT. § 203(B).
37. 85A OKLA. STAT. § 203(B).
38. 85A OKLA. STAT. § 203(B) (emphasis added).
39. 85A OKLA. STAT. § 203(B)(5). Review was de novo on the record established before the internal appeals committee. The standard was the familiar ERISA arbitrary and capricious standard. See infra Part V(A).
40. Krohm, supra note 33, at 23–24.
During the challenges to opt-out in Oklahoma, other proposed legislation was introduced, to date unsuccessfully, in Tennessee and South Carolina. Krohm also studied these laws, undertook a comparative analysis, and found significant variations in content. In all versions, employers, operating under the authority of state law, would escape the mandate of workers’ compensation if they established their own state-approved private plans. Under the South Carolina proposal, the employer would retain tort immunity, while in the most recent Tennessee proposal, tort liability would be restored, but with damage caps as a feature.

In comparing the Oklahoma law with the proposed bills for South Carolina and Tennessee, the lump sum settlement procedure is identical in all three versions. In at least one plan, a worker’s refusal to accept the lump-sum settlement constitutes a forfeiture of any further benefits. This feature likely reflects the high value placed by insurers on closure of claims.

An examination of many plans shows that some may end or modify benefits when the employment relationship ends, but the rules on this point vary “tremendously from plan to plan.” For those plans that allow recovery for occupational disease, a similar variability exists, and hence employer “response to late manifestation of [diseases] . . . may be different from case to case.”

Krohm correctly identified a list of common workers’ compensation law features that are absent from opt-out: (1) responsibility of prime (general) contractors for the workers’ compensation obligations of their subcontractors, (2) time standards for promptness of payment of indemnity, (3) reporting lapses/changes in insurance coverage to state compliance officers, (4) the requirement to provide claim processing information to the claimant, (5) language assistance for non-English speakers, (6) prohibition of balance-billing of non-covered medical treatment charges, (7) rules on employee choice of provider and referrals, (8) barring tort actions against fellow employees, and (9) employee protection against retaliatory discharge.
III. ARGUMENTS FOR AND AGAINST OPT-OUT

Proposed opt-out legislation has a critical goal: employee work injury cost reduction, particularly of medical benefits, which form so large a share of such costs. 47 Opt-out proponents portray these work accident plans outside of workers’ compensation as innovative cost-savers. 48 Elimination of governmental control and legalities is another, related, goal critical to opt-out. Proponents assert that workers’ compensation, its cumbersome bureaucracy, and incomprehensible “volumes of statutes” 49 are left behind with opt-outs.

How are these related goals met? Three forces, proponents argue, drive the success of an “option” bill: medical management control, employee accountability, and competition. 50 A secondary goal is opt-out’s purported facilitation of (1) superior occupational medicine practices and resultant patient outcomes, (2) escape by employers of legalistic bureaucracy, and (3) enhanced ability for employers to enforce top-down safety practices.

Consultant Krohm, however, found no quantitative evidence to validate such claims. Complicating his analysis was the fact that Oklahoma employers were largely free to design their own plans, which varied widely. Some of the plans he reviewed were more restrictive than others. And, of course, claims relative to Tennessee and South Carolina as to lowered costs, efficiency, and overall success are impossible to assess because those states have not yet implemented opt-out plans.

Five purported advantages of opt-out plans and their major critiques are reviewed below.

A. Medical Management Control

An important advantage of opt-out in comparison to workers’ compensation is said to be complete employer control of medical treatment of work injury claims. The opt-out lobby states that with an opt-out medical plan, “medical treatment can rely on widely acknowledged best practices and medical evidence, rather than traditional system features that remove ac-

47. See Grover, supra note 24.
48. Id.
49. The website of the opt-out lobby group, as of October 24, 2015, stated that opt-out “eliminates the need for volumes of statutes, regulations, and litigated decisions. . . .” See John Smitherman, The End of Workers’ Compensation as We Know It?, 1 Ala. Self-Ins. Ass’n [Newsletter] 4 (Spr. 2015) (quoting then-existing ARAWC website posting), www.asial.org/_literature_187266/2015_Spring_Newsletter.
countability, involve too many ancillary players, and fail to achieve the best medical outcomes.”

Is it appropriate, however, to give the employer unlimited control over all medical treatment decisions? Can employers be trusted to do the right thing every time? Krohm states:

Even if we agree that option plan administrators are professionally skilled, we cannot escape the fact that they have an inherent conflict of interest in making judgments about the necessity of medical treatment. All else equal, the lower the treatment cost for the block of claims handled, the better the . . . TPA’s . . . track record looks for marketing to other clients. That is also true in traditional workers’ compensation, but in that system the claims decision maker can be challenged by a medical provider of the claimant’s choice and have the right to an appeal before an impartial judge. Thus, there is a difference in how the judgments of the plan might be tempered by the dispute resolution process. . . .

Proponents insist, however, that plan administrators will be leveraged to fidelity in claims handling practices and compliance with their own plans because of their duties under ERISA. After all, plan administrators must act in beneficiaries’ best interests. Krohm is skeptical of these claims, noting the limited review available in the federal courts under ERISA and the difficulty in prosecuting such cases. At least one plan featured a broad clause immunizing plan administrators from liability for alleged breaches of fiduciary duties, “except as otherwise provided under ERISA. . . .”

Meanwhile, the opt-out proponents’ claim that more room exists for “best practices” in occupational medicine under an opt-out plan is puzzling to both Krohm and this writer. “Good occupational medicine,” he insists, “can be enjoyed within the traditional workers’ compensation system by [employers] contracting with high quality physicians as, in fact, is facilitated under the Oklahoma Administrative Workers’ Compensation Act. “There is no compelling reason,” he insists, “that workers’ compensation could not employ the same techniques to equal effect.”

B. Employee Accountability

A feature of opt-out advocacy is its claim that employee accountability is enhanced under an opt-out plan. Advocates assert that “prompt injury reporting leads to . . . early medical diagnosis[,] faster, more effective medical treatment; [and] better medical outcomes.” In addition, “[p]rompt injury reporting also supports: timely investigation of the claim and availability

52. Krohm, supra note 33, at 52.
of witnesses;] timely post-accident drug/alcohol testing; and coworkers exposed to unsafe conditions for shorter periods of time.\textsuperscript{53}

A key accountability tool of the opt-out plan is this latter demand that the worker immediately report the injury, lest the claim be barred. Krohm, in his review of actual plans, confirmed that same-day and end-of-shift reporting requirements were indeed a feature of those plans.\textsuperscript{54} Krohm, however, assessed such requirements as unfair because studies have shown that “delayed medical confirmation of injury is common.”\textsuperscript{55} His criticism is borne out by a widely publicized case in which a nursing home employee, who worked for an opt-out employer, was barred from benefits in an obvious injury situation because she did not report the injury until the next morning after her emergency room visit. By then, twenty-seven hours had passed, and the employer’s plan demanded notice within twenty-four hours.\textsuperscript{56}

A further criticism of immediate reporting rules is that they bar the most difficult workplace injuries, i.e., those that do not result from acute, reportable traumas, but from non-obvious situations and insidious exposures.

C. \textit{Competition: The “Free Market” Premise}

Another cost-related foundation of opt-out is macroeconomic in character. The theory is that, freed of the obligation to comply with state workers’ compensation laws, employers can demand that carriers compete with each other to provide the least cost (and presumably least benefit) work accident plans. The key architect of opt-out asserts:

‘Texas workers’ compensation [where opting out has always been allowed] is outperforming national averages because Texas employers have a choice. The [opt-out] option creates a greater sense of urgency among regulators and workers’ compensation insurance carriers to manage claims better so they can reduce premium rates and compete with the alternative system. The option also makes implementation of workers’ compensation reforms more manageable because they happen across a smaller base of claims.\textsuperscript{57}


\textsuperscript{54} Krohm, \textit{supra} note 33, at 24.

\textsuperscript{55} Id. at 28, n.22 (“According to the NCCI, only 20\% of lost time claims are reported on the day of injury.”). See Thomas Sheppard, \textit{The Relationship Between Accident Report Lag and Claim Cost in Workers Compensation Insurance} (NCCI Research Brief Jan. 2015).


Some have found this thinking unfortunate and argue that such efforts will only aggravate the already existing “race to the bottom,” as accident plan carriers vie with one another to offer the most limited plan.58 Experience suggests that such plans will be administered in the most austere fashion possible. John Burton, the economist and lawyer who headed the National Commission, remarked in 2015:

[T]he current threat to the state workers’ compensation system is a race to the bottom among states. . . . [O]ne problem is that states that try to maintain decent programs will increasingly find their workers’ compensation costs under attack as other states pass them by on the way to the bottom. . . . In my view, the state workers’ compensation system is in its most dire situation in at least the last half-century.59

Another workers’ compensation scholar agrees:

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, the more competitive pressures exist in an industry the more tempting it is for employers to avoid the responsibility of compensating for injuries sustained in productive activity. . . .60

D. Elimination of Bureaucracy, Including Dispute Resolution

“Disentanglement from the ‘huge bureaucracy in the name of protecting workers’ rights’ is one of the selling points of opt-out.”61 So concluded Krohm in his study of the structure of opt-out proposals. Opt-out, in this regard, seeks to free employers from two different aspects of governmental involvement.

The first is the oversight that workers’ compensation agencies traditionally undertake to ensure, among other things, that employers are complying with the law. Dealing with such oversight is indeed costly

(last visited Oct. 10, 2016). Meanwhile, the ARAWC website states “[w]orkers’ compensation insurance companies all offer the same product and compete almost exclusively on price. Option Insurance companies strongly compete against workers’ compensation insurance carriers and each other to see who can offer the lowest price for the broadest possible injury benefit coverage.” See http://arawc.org/option/fast-facts/ (last visited Oct. 13, 2016).

58. With regard to this term, see Does the Workers’ Compensation System Fulfill its Obligations to Injured Workers?, supra note 11, at 13 (According to the Labor Department, “The political focus on reducing costs for employers [has grown], and, by the early 1990s, benefits came under attack. Various new legislative changes were championed as ‘reforms.’ It was a race to the bottom: as each state compared its statute with those of neighboring states, found areas of greater generosity, and moved to change those provisions of its law. The political conversation shifted, and the ability of workers and their allies to hold back this tide waned as union membership and strength declined.”

59. Burton Keynote Address, supra note 3.


61. Krohm, supra note 33, at 7.
and inhibits employer control of their operations. Opponents of opt-out, however, object to this abandonment of the “active agency” model, which also stresses the importance of states in communicating law and procedure to injured workers or even providing a neutral ombudsman. Both have gained importance in the last few decades and have, as their purpose, the avoidance of disputes. It is true that ERISA requires that employers provide the opt-out plan document to the worker, but this is a far cry from such agency efforts.

The second aspect of governmental involvement concerns disputes over claims in a judicial or quasi-judicial forum where workers may be represented by a lawyer to advocate their interests. Of course, being freed from facing an organized injured workers’ bar and the hassles of litigation is of immense value to employers tempted by opt-out. Krohm, however, accurately characterized opt-out’s abolition of disinterested claims adjudication within state agencies as shocking. He discusses one plan that vests in the administrator unfettered discretionary authority as to how to interpret the plan and to decide disputes.

Such reservations of power “are breathtaking assertions of discretion for the claim administrator and the appeals committee, which would be unthinkable in any state workers’ compensation system.” Indeed, “the dispute resolution process may be more efficient (speed and cost to the employer), but the employer’s control over the medical evidence through selection of providers and the selection and compensation of the appeal tribunal would seem to fall short of the common standards for fairness provided in state workers’ compensation systems.”

Opt-out in this realm is arguably at its most radical. Anglo-American concepts of due process call for an injured person to be able to access some kind of hearing, a principle that has been jettisoned under opt-out. The involvement of lawyers, at least on the injured worker’s side, and judges is simply incompatible with cost cutting.

E. Innovation in Safety

Opt-out proponents assert that opt-out will encourage employers to implement more safety measures. However, neither the historical record nor common sense makes such an outcome plausible. For accident insurance to leverage employers to safety, benefit levels and associated premium

62. Id. at 44.
63. Id. at 31.
64. Id.
65. See Kyle W. Morrison, The Workers’ Comp Option: Will More States Start Adopting Workers’ Compensation Opt-Out Plans?, SAFETY & HEALTH (Sept. 27, 2015) (quoting Bill Minick, the architect of opt-out: “What we found is that employers that pursue options to workers’ compensation are more focused on providing a safe work environment. . . .”).
costs must be such as to promote employer investment in safety. This dy-
namic is known in the workers’ compensation realm as the “financial incen-
tive.” The financial incentive idea has been refined by “experience rating,”
under which an employer’s premium rate is adjusted to reflect the costs of
its employees’ claims.66 Employers generating higher-than-normal claim
levels are penalized with increased premiums, while those reporting few
claims receive some sort of premium discount.67

This is a fundamental principle that has been recognized in workers’
compensation since the earliest years of the program. The first actuary of
the Pennsylvania system remarked that “compensation laws had everywhere
given a notable impetus to the safety movements,” but he took for granted
that “the higher the benefits, the greater, of course, will be the incentive to
prevention.”68 Most observers have agreed that the higher benefits of the
system, post-National Commission, have been a material factor in engen-
dering the workplace safety culture that evolved in the 1980s and
1990s.69 This writer has never read or heard of the idea that aggressive
downward pressure on benefit levels and premiums promotes safety.

A nuanced analysis of the safety issue is found in the American Insur-
ance Association critique of the proposed Tennessee opt-out:

[O]pt-out jeopardizes sound disability management by allowing unsafe
employers to “wash” bad experience by abandoning the workers’ compensa-
tion system.

[T]he workers’ compensation system’s experience rating plan requires em-
ployers with poorer safety records to bear a higher cost and protects safer em-
ployers from subsidizing the losses of less safe ones. The higher relative cost
imposed on less safe employers also is an incentive for them to improve the
safety of their workplaces, while safe employers enjoy lower insurance costs.
Opting out allows unsafe employers to “wash away” their experience, abandon-
ing a system geared to promoting workplace safety. It may also dilute the ac-
tuarial credibility of the experience rating plan for employers who remain in
the workers’ compensation system. . . . [I]s this sound public policy?70

Krohm also was unpersuaded that employers will show more attention
to workplace safety if they shift away from workers’ compensation. “It is

68. See E.H. DOWNEY, WORKMEN’S COMPENSATION 132 (MacMillan 1924).
hard to see,” he asserts, “that any employer is in any way constrained by workers’ compensation law or insurance [from providing] customized safety programs to fit its particular workforce.” Mandatory workers’ compensation has a “leveraging effect . . . on promoting safety.” Logic dictates that programs with drastically lower costs will not enhance the goal of workplace safety.

IV. IDENTIFYING THE ERISA ISSUE

The Oklahoma legislature’s now-stricken creation of the opt-out law was accompanied by a novel feature that has puzzled scholars. Opt-out plans, as advanced by some advocates, are theorized as not workers’ compensation at all, but instead as some other sort of employee benefit plan, presumably regulated by ERISA. Notably, the Oklahoma law explicitly references ERISA when it describes how a worker prosecutes an appeal from a determination of the internal, employer-controlled appeals committee.

As reviewed above, the legislature created opt-out to allow employers to avoid compliance with the traditional workers’ compensation law; the benefits of the opt-out plan need not be the same as those mandated by the workers’ compensation law. Further, some opt-out plans actually added a non-work-injury benefit. For example, the benefit plan in the case that struck down opt-out added a non-occupational death benefit.

These types of plans do not sound at all like workers’ compensation—with the exception that establishing one retains in the employer freedom from tort liability. They do, however, sound like the type of employee benefit plans regulated by ERISA. Courts, reading ERISA literally, usually hold that state laws and regulations relating to such plans are pre-

71. Krohm, supra note 33, at 60, n.51.
72. As to the striking-down of the Oklahoma law, see Vasquez v. Dillard’s, Inc., 381 P.3d 768 (Okla. 2016).
73. See, e.g., Peter Rousmarie & Jack Roberts, What Employers Need to Know About the New Oklahoma Law (2013):

The new law replaces important claims management elements of the workers’ compensation system with significant reforms. Benefit plans will come in two alternative formats. One format is state based; the other is based on federal law—the Employee Retirement Security Act (ERISA). The ERISA alternative is not expressly stated in the law, but inferred. Because of issues that were raised in the 2012 legislation, the lack of a specific mention of ERISA was purposeful because of confusion between ERISA and the Affordable Care Act among some lawmakers. The new law was designed to allow an alternative ERISA plan, by inference, in addition to the state-based plan prescribed by the law.

74. 85A OKLA. STAT. § 211(B)(5) (“The [ALJ] and Commission shall act as the court of competent jurisdiction under 29 U.S.C.A. Section 1132(e)(1). . . .”).
75. See infra Section VI.
76. 29 U.S.C. § 1002(1) (definition of “employee welfare benefit plan” under ERISA).
empted. Yet, state mandates on what must be found in opt-out plans exist; state approval is required for an employer to opt-out; and, as noted above, appeals are prosecuted to an ALJ of the Oklahoma Workers’ Compensation Commission. An additional, supreme irony exists: Oklahoma opt-out and similar plans are created intentionally to escape the workers’ compensation law yet have their genesis in legislative authorization via the workers’ compensation law. All of this sounds like state control over ERISA plans.

The challenging issue is preemption. Section 514(a) of ERISA, part of the law’s administration and enforcement provisions, establishes what can be termed “express,” “facial,” or “complete” preemption. It provides, among other things, “the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4(a) and not exempted under Section 4(b).”78 Section 4(b), dealing with the law’s scope of coverage, states that ERISA does not apply to a plan that is “maintained solely for the purpose of complying with applicable workmen’s compensation laws. . . .”79 In other words, an exemption exists to express preemption, if opt-out plans, even if they vary from workers’ compensation, are “maintained solely for the purpose of complying with applicable workmen’s compensation laws.” Yet, as posited above, opt-out plans do not seem to meet this definition.

Another preemption analysis exists. Section 502(a) of ERISA, also part of the law’s administration and enforcement provisions, establishes what is termed “conflict preemption.” The law states, among other things, in Section 502(a)(1)(B), that a civil action may be brought by a plan participant (here an injured worker) “to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.”80 This section also states that “[s]tate courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction under [Section 502(a)(1)(B)].”81 Thus, if ERISA governs an opt-out plan, prosecuting an appeal from the in-house plan is guided by this law. Yet, the Oklahoma opt-out plan, in Section 211, guides the injured worker differently with regard to how to go forward procedurally.82 The legislature, seeking to parallel ERISA’s enforcement procedures, made the Commission a court of competent jurisdiction,83 but Supreme Court doctrine ex-

78. 29 U.S.C. § 1144(a).
82. 85A OKLA. STAT. § 211(B).
83. 85A OKLA. STAT. § 211(B)(5).
plains that a state law cause of action that “duplicates, supplements, or supplants” the ERISA civil enforcement remedy is in conflict with ERISA and thus preempted. 84

Professor Michael C. Duff, writing in the ABA periodical The Brief, believes that a court in the future may hold that ERISA does indeed facially preempt laws such the now-invalidated Oklahoma Opt Out Act. 85 Duff elsewhere reminds the reader that ERISA states that laws “relating to” ERISA-regulated plans are preempted—and it does not take much for a state law to have such a relation. 86 By providing that opt-out plans are ERISA governed, yet demanding compliance with state law, employers seeking to opt out are impermissibly trying to “have it both ways.” Duff declares, “Either state opt-out laws are workers’ compensation laws, in which case they are excluded from ERISA coverage; or, if they say anything at all about how the alternative plans are to operate, they are directly referencing federal ERISA-regulated employee benefit plans, in which case the opt-out laws themselves are preempted.” 87

Duff also persuasively casts doubt on the idea that the creators of ERISA thought that its preemptive effect should be so cynically manipulated, consistent with the design of the opt-out architects. The original intent of ERISA was to encourage consistency of regulations and encourage integrity of benefit administration. 88 In any event, ERISA actually has no substantive requirements as to the benefit level of any employer pension or other employee benefit plan. From a policy point of view, one must question whether this is the type of law that should govern all-important worker disability programs that have been an essential component of social insurance for a century.

The designers of the law, Duff answers, would be dissatisfied with the idea that it was being cynically employed by state legislatures to allow employers to avoid workers’ compensation responsibilities—a law that preexisted most employee benefit plans, and one that has always been subject to state mandates as to coverages and procedures. 89 Duff adds that the designers would be particularly appalled where the modern intent of opt-out is


87. Duff, supra note 85, at 29.


89. Duff, supra note 85, at 27.
to shift the cost of work injuries away from employers and onto other individuals and entities—notably, and ironically, onto the federal government.  

Case law does exist for guidance in this area. Duff identifies the leading case as *Shaw v. Delta Airlines, Inc.* in which the court indicated that only separately maintained workers’ compensation plans are exempt from ERISA preemption. This language suggests that opt-out plans, such as the one in the Oklahoma *Vasquez* case, which strategically added non-work death benefits, are not exempted and instead are governed by ERISA. Still, the court declared, “This is not to say . . . that [employers] are completely free to circumvent the [New York Workers’ Compensation Act] by adopting plans that combine disability benefits inferior to those required by the law with other types of benefits. Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible.” How this arrangement might be managed has not been definitively established in the *Shaw* progeny.  

The *Shaw* case, notably, led the Oklahoma Commission, in its consideration of *Vasquez*, to believe that the legislature could provide it with power to regulate ERISA plans. On further appeal, the Oklahoma Supreme Court struck down opt-out; a concurring opinion discussed the ERISA preemption issue at length, concluding that preemption did not apply. This was so because opt-out plans were in essence workers’ compensation and hence exempt from preemption. However, the majority opinion, which invalidated opt-out, did not turn on the preemption issue. The court, in this regard, ruled that the issue had been waived. Thus, the question of ERISA preemption surrounding proposed opt-out laws remains unanswered, and this puzzle endures.  

### V. CONSTITUTIONALITY OF OPT-OUT LAWS

With their dramatic proposal to overthrow the status quo, opt-out laws have generated questions concerning constitutionality. Indeed, an expert on state constitutions has encouraged opponents of opt-out to include state constitutional theories in their challenges. And, of course, such

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90. *Id.* at 28.
92. *Id.* at 108.
94. *Id.* at 783–84 (Gurich, J., concurring).
questioning led the Oklahoma Supreme Court to strike down the entire law as violative of equal treatment under the state constitutional provisions prohibiting “special laws.”96 Of course, in reviewing critical constitutional theories, it is important to remember that state constitutions vary, as well as the case law interpreting constitutional provisions and principles of equal protection and due process.97


The most common constitutional challenge is that opt-out is violative of the “open courts” provisions that are common in state constitutions.98 Oklahoma has such a constitutional provision and, as discussed below, the Workers’ Compensation Commission relied on it to declare the state’s opt-out law invalid in 2016. On appeal, notably, the state supreme court utilized the ban on “special laws.”99

Opt-out proposals, of course, relieve employers of workers’ compensation responsibilities and restrict an employee to a private plan for work accident recovery, yet at once afford the employer immunity from tort under the exclusive remedy. Open court provisions, however, guarantee access to courts. The Pennsylvania Constitution features an open courts section, said to have its genesis in the Magna Carta,100 which provides, “All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. . . .”101 Oklahoma and several other states also have such constitutional guarantees.102 An opt-out feature that abolishes workers’ compensation, yet forecloses a tort suit, arguably runs afoul of such provisions.

This is so because of the time-honored idea of the workers’ compensation bargain. Injured workers surrendered their common law right to sue for personal injury in exchange for restricted no-fault insurance benefits. It seems questionable whether the legislature can allow employers to opt-
out and set up their own private plan yet still retain immunity from tort liability. 103

While authority in this area is limited, open courts provisions have been given teeth in a correlative context. In Oregon, the workers’ compensation statute was amended to abolish recovery for injuries where work causation was not the predominate causal factor. 104 Employers argued that when such workers’ compensation claims were dismissed by ALJ’s as non-cognizable, they still possessed the protection of the exclusive remedy. The Oregon Supreme Court, however, rejected this position, interpreting the state’s open courts provision so that an employee was to have a right and remedy in one forum or another:

[T]he remedy clause mandates that a remedy be available to all persons—including workers—for injuries to “absolute” common-law rights for which a cause of action existed when the drafters wrote the Oregon Constitution in 1857. Having alleged an injury of the kind that the remedy clause protects, and having demonstrated that there was no remedial process available under present workers’ compensation laws, plaintiff should have been allowed to proceed with his negligence action. 105

Some state constitutions may actually require a quid pro quo. For example, a Kansas court in 1980 disapproved of a medical malpractice reform law on the grounds that, when abolishing a right of action, the legislature had not provided an adequate substitute remedy. In that case, Kansas Malpractice Victims Coalition v. Bell, 106 malpractice plaintiffs sought a declaratory judgment action to prevent enforcement of a reform that limited recovery in medical malpractice actions to $250,000 for noneconomic loss and $1 million “in the aggregate” and obliged them to accept their award via annuity. The trial court granted summary judgment to the plaintiffs and the state supreme court affirmed. By limiting damages, mandating annuities, and providing no quid pro quo or adequate substitute remedy, the provisions infringed on the right to jury trial and a remedy by due course of law.

This case was later overruled in part. 107 Still, the court in that case declared:

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103. See Duff, supra note 97, at 32 (“Challenges to opt-out . . . would likely have the greatest success in those jurisdictions in which courts have been sympathetic to [the lack of quid pro quo] arguments within the tort reform context.”).
105. Id. at 362. See also Torrey & Greenberg, supra note 67, § 10:17 (analyzing Smothers and, noting similar Pennsylvania constitutional provision, arguing that Pennsylvania courts should, if the occasion arise, follow the Oregon court’s approach).
We recognize that there is a limit which the legislature may not exceed in altering the statutory remedy previously provided when a common-law remedy was statutorily abolished. The legislature, once having established a substitute remedy, cannot constitutionally proceed to emasculate the remedy, by amendments, to a point where it is no longer a viable and sufficient substitute remedy.108

Not all courts, however, are sympathetic to the requirement of a quid pro quo; an example is a California case dealing with a $250,000 cap on non-economic damages.109 There, the court held that the constitutional guarantees of due process and equal protection rights were not violated because the plaintiff had no vested property right in a particular measure of damages, and the statutes were rationally related to their legislative purposes.

Duff, analyzing these cases, also identifies an important Texas case, *Texas Workers’ Compensation Commission v. Garcia*.110 There, the court appeared sympathetic to the idea that a substitute remedy may be required when rights are eliminated, but found that the legislature had not crossed the line in its business-friendly workers’ compensation amendments. The court also posited that, even under *modern* negligence doctrine, injured workers could easily lose in the large majority of negligence cases. Viewed in this light, a retractive reform, which simply limited no-fault benefits, as opposed to abolishing them, did not seem unreasonable.

**B. Procedural Due Process**

Critics of opt-out legislation have correctly identified that lack of impartiality is apparent in the manner in which opt-out plans, as authorized by the statute, handle disputes.111 All plans described on the ARAWC website have the initial and first-level review, that is, fact-finding, handled by employer-appointed, internal reviewers and panels. Review, presumably on an arbitrary and capricious standard, is handled by the state agency. This standard is extremely deferential, placing immense discretion in the hands of the in-house, employer-controlled decision-makers.112

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108. Id. at 1190.
110. Tex. Workers’ Comp. Comm’n v. Garcia, 893 S.W.2d 504 (Tex. 1995); see also Duff, supra note 97, at 36–37.
111. Krohm, supra note 33, at 56.
The now-invalidated Oklahoma statute provided for initial review and a second level appeal in-house. Further appeal, under a November 2015 amendment, went to the ALJ of the state Workers’ Compensation Commission, as opposed to the Commission en banc.113 The provision setting forth this procedure states that the review is de novo, although such review is of the original record:

If any part of an adverse benefit determination is upheld by the committee, the claimant may then file a petition for review with the Commission . . . [which] shall appoint an administrative law judge to hear any appeal of an adverse benefit determination as a trial de novo. . . . The administrative law judge and Commission . . . shall act as the court of competent jurisdiction under 29 U.S.C.A. Section 1132(e)(1), and shall possess adjudicative authority to render decisions in individual proceedings by claimants to recover benefits due to the claimant under the terms of the claimant’s plan, to enforce the claimant’s rights under the terms of the plan, or to clarify the claimant’s rights to future benefits under the terms of the plan; . . . The Commission shall rely on the record established by the internal appeal process and use an objective standard of review that is not arbitrary or capricious. . . . Any award by the administrative law judge or Commission shall be limited to benefits payable under the terms of the benefit plan. . . .114

At no point does the statute, even as amended to add some enhanced review, provide that the worker is allowed to actually speak, cross-examine witnesses, or both.

This process has been met with dismay by opt-out critics. This scheme, notably, fails to meet the definition of an adequate hearing under such statutes as the federal Administrative Procedure Act115 and the Pennsylvania Administrative Agency Law,116 in which cross-examination is a guaranteed right. Plainly, if the right of recovery for a work injury is still to be taken seriously, procedural guarantees, such as found in these laws, must apply. The opt-out scheme fails under a procedural due process analysis.

This is certainly so when opt-out schemes are compared to the current system. In workers’ compensation laws, every state has a dispute resolution system where the worker has the ability to appear and speak, cross-examine witnesses are ‘arbitrary and capricious’ and can only reject benefits decisions if employers were unreasonable or did not adhere to their plans”).

113. See generally 85A OKLA. STAT. § 211.
114. 85A OKLA. STAT. § 211(B)(5). The Vasquez concurred opinion, reflecting on this provision, remarked that “[i]f the Commission and the appointed ALJ are limited to relying on the record established by the internal appeal process, then the trial de novo is not actually a trial de novo.” Vasquez v. Dillard’s, Inc., 381 P.3d 768, 785, n.55 (Okla. 2016) (Gurich, J., concurring).
115. 5 U.S.C. § 556.
116. 2 PA. CONS. STAT. § 505.
witnesses, and present evidence.\textsuperscript{117} Elimination of such access, heretofore thought to be required in the event of work injury dispute resolution, is a departure from familiar principles of due process and an individual’s access to justice.

The procedure under the now-invalidated Oklahoma Opt Out Act, because it featured disinterested de novo review, seemed to accord some fairness to the process. However, any opt-out plan that has the agency undertaking arbitrary and capricious review would be deficient under the federal Administrative Procedure Act, in which review of the facts is based on substantial evidence,\textsuperscript{118} one less deferential than the ERISA arbitrary and capricious standard. Further, courts have noted that, “With respect to disability matters, . . . both the Administrative Procedure Act governing administrative adjudication generally and regulations applicable to decisions of ALJ’s in disability matters ‘require that the administrative law judge specify the reasons or basis for the decision.”\textsuperscript{119}

C. Equal Protection

Another constitutional principle invoked by opt-out critics is equal protection guarantees that can be derived from state constitutions. The issue is whether the legislature can carve out the employees of opt-out employers, who will presumably receive only modest benefits and limited procedural protections, while the employees of non-opt-out enterprises enjoy the presumably superior benefits and protections of traditional workers’ compensation acts.

Usually, courts view workers’ compensation in this realm of constitutional analysis as economic legislation, and hence equal protection challenges to aspects of workers’ compensation laws are subject only to rational basis review. As a consequence, challenges under this rubric do not usually succeed.\textsuperscript{120}

Still, the New Hampshire Supreme Court has identified the right to recover for personal injury as one “sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.”\textsuperscript{121} Thus, in a case


\textsuperscript{118} 5 U.S.C. § 706(2)(E).

\textsuperscript{119} Myers v. Am. Dental Ass’n, 695 F.2d 716 (3d Cir. 1982) (citing Cotter v. Harris, 642 F.2d 400 (3d Cir. 1981)).

\textsuperscript{120} See Duff, supra note 97, at 41 (“In workers’ compensation contexts there have been few successful equal protection challenges by plaintiffs or defendants . . .”).

that ultimately struck down provisions of a medical malpractice reform bill, the court required that legislation be “reasonable, not arbitrary, and must [be based] upon some ground of difference having a fair and substantial relation to the object of the legislation.” Florida, too, has struck down a malpractice reform law on state equal protection grounds.

Still, Duff asserts that most states would not consider the right to recover for personal injury as one “sufficiently important” to require more than rational basis evaluation in the equal protection context. Yet, as noted throughout this article, the Oklahoma Supreme Court found room in its state constitution to invalidate opt-out on a special unequal treatment theory.

D. Substantive and “Structural” Due Process

Another analysis centers on the quid pro quo, substantive due process, and the federal constitution.

Opt-out, of course, abolishes the employee’s workers’ compensation rights, while allowing the employer to retain tort immunity. The quid pro quo is eliminated. Although the qualifying employer must introduce a private plan in order to opt out, nothing exists under ERISA to prevent such an employer to pare down the plan to essentially nothing. Can the legislature abolish the workers’ compensation right, disallow the injured worker’s tort remedy, and provide no replacement remedy without generating a violation of the Due Process Clause of the Fourteenth Amendment?

122. Carson, 424 A.2d 825, 830. The precise violation of equal protection was as follows:

[The medical malpractice reform law] improperly singles out victims of medical negligence, as distinct from victims of other kinds of negligence, for harsh treatment by restricting the means by which they may sue and the damages they may recover for their injuries. . . . The medical malpractice statute establishes several classifications. First, it confers certain benefits on tortfeasors who are health care providers that are not afforded to other tortfeasors. Conversely, it distinguishes between those tort claimants whose injuries were caused by medical malpractice and all other tort claimants. The statute also distinguishes between medical malpractice victims whose non-economic loss exceeds $250,000 and those whose non-economic loss is $250,000 or less and between malpractice victims whose future damage awards exceed $50,000 and those who are awarded $50,000 or less for future damages. The issue is whether any of these classifications violates the equal protection mandate that “those who are similarly situated be similarly treated.”

Id.

123. See Est. of McCall v. United States, 134 So. 3d 894 (Fl. 2014).
124. See Duff, supra note 97, at 41.
125. See infra Section VI.
126. See supra Part V(A).
127. During oral argument to the Commission in Vasquez, counsel for Dillard’s admitted that a company’s private accident plan could even eliminate as compensable injuries from “slip and fall accidents.” Gilliland Comments, supra note 25.
In this regard, the U.S. Supreme Court seemed to suggest, in its 1917 case, New York Central Railway v. White, that the quid pro quo is necessary. Yet, the law has since been identified as unclear as to whether the constitutional legitimacy of workers' compensation is dependent on a quid pro quo. Justice White made this point in a 1985 dissent.

The better view, as expressed by Duff, is that the law is still unclear. The most recent case on point, Duke Power Co. v. Carolina Environmental Study Group, questioned the need for a quid pro quo, but ultimately applied the concept and found that, in the case under consideration, due process had not been offended.

Duff, considering this issue, states that if the rule in this realm is in question, it is also true that no precedent has yet disowned White. Certainly, room exists to believe that White and federal quid pro quo are still alive. He argues further that the right to recover for personal injury should be conceived of as the sort of “historically rooted right” to which the Supreme Court has afforded constitutional protection.

Duff also submits that the right to recover for personal injury may be found in the idea of structural due process. Under this theory, rights can become constitutionally protected when they are perceived as having been traditionally prized as part of our understanding of fundamental rights necessary to a system of ordered liberty.

The personal injury recovery right, he asserts, should be conceived of as such a right. The White court seemed to take this proposition for granted. Duff concludes:

No just legal system could conclude that the right to a remedy for personal injury, and particularly physical injury, is subject to significant modification or eradication on the whim of the legislature. . . . It is unacceptable and violative of structural due process that the American legal system

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129. See Fein v. Permanente Med. Grp., 474 U.S. 892, 894–95 (U.S. 1985) (White, J., dissenting) (“Whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court . . .”).
130. See Duff, supra note 97, at 47.
134. See Duff, supra note 97, at 52.
135. Id. at 9. Duff states, “In the workers’ compensation context, White once appeared to require that tort substitutions for workplace injury be ‘reasonably just’ to pass judicial muster . . .” Duff finds further support in the writing of Founding Father George Mason, who channeled into American law the Lockean idea that citizens come together, hence legitimating government, in critical aspect to protect the safety of the community. Id. at 53–55.
could leave those injured employees [that is, those harmed via employer negligence] without a reasonable remedy for injury. However, that is what both opt-out and the continuous erosion of workers’ compensation benefits threaten.\textsuperscript{136}

E. Laws Paying “Reasonable” Compensation

A challenge, perhaps unique to Pennsylvania, is whether a private Oklahoma-style plan that pays minimal benefits reflects “reasonable compensation.” In this regard, the Pennsylvania Constitution was amended in 1915 to allow the legislature to enact laws that limit “damages” to the extent a workers’ compensation law might be enacted that provided for “reasonable compensation.” This provision, Article III, Section 18,\textsuperscript{137} was tested in the late 1930s, in a case where the Pennsylvania Supreme Court declared unconstitutional, as “unreasonable,” liberal amendments to the law that dramatically raised benefit levels and seemed to foreshadow a significant corresponding increase in premiums.\textsuperscript{138} A law authorizing the draconian, Oklahoma-style opt-out plan, were it enacted in Pennsylvania, would seemingly run afoul of this principle.

VI. VASQUEZ V. DILLARD’S

The robust constitutional challenge to the Oklahoma Opt Out Act was successful. The Oklahoma Supreme Court, on September 13, 2016, declared the state’s Employee Injury Benefit Act (referred to in the opinion as the “Opt Out Act”) unconstitutional.\textsuperscript{139} The court did so on the basis of the law’s violation of the state constitution’s ban on “special laws.” The law, in this regard, illicitly created “an impermissible select group of employees seeking compensation for work-related injuries for disparate treatment.”\textsuperscript{140} The case had its genesis in an alleged aggravation injury sustained on September 11, 2014, by Jonnie Yvonne Vasquez while she was working for Dillard’s, a department store that had been approved as a “qualified

\textsuperscript{136} Id. at 55.

\textsuperscript{137} This section of the Pennsylvania Constitution states:

“The General Assembly may enact laws requiring the payment of the employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and fixing the basis of ascertaining of such compensation and the maximum and the minimum limits thereof, and providing special or general remedies for the collection thereof . . .”


\textsuperscript{139} Vasquez v. Dillard’s, Inc., 381 P.3d 768 (Okla. 2016).

\textsuperscript{140} Id. at 769.
employer” under the Opt Out Act. The Dillard’s plan excluded such injuries and the employer was immune from any negligence tort suit as well. The plan thus denied Ms. Vasquez’s claim, and the internal appeals panel affirmed.141

Following the Opt Out Act design, Vasquez appealed to the Oklahoma Workers’ Compensation Commission.142 Dillard’s, however, sought removal of the case to federal district court, asserting that the plan was governed by ERISA and hence that proceedings under state law were necessarily preempted.

In an order of September 30, 2015, however, the district court denied the removal attempt:

The court concludes that the OIEBA [i.e., the Opt Out Act] 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, [the law] . . . 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.143

The court thus remanded the case to the Workers’ Compensation Commission. In a February 26, 2016, decision, the Commission agreed with Vasquez that the Opt Out Act was unconstitutional on a number of bases.144 In the Commission’s view, the law in its entirety unconstitutionally deprived injured workers of equal protection, constituted an illicit “special law,” and deprived injured workers of access to the courts.145 The Commission referred the case to an ALJ for a trial on the merits. Dillard’s was to be deemed an insured under the conventional workers’ compensation laws.146

Of note is that the Commission, at the outset of its decision, defended its jurisdiction over the appeal. The Commission noted ERISA preemption and that such preemption normally would be applicable because the plan featured not only disability and medical benefits but non-occupational death benefits. It was hence not exempt from preemption as conventional

141. Id. at 770.
142. The law was changed in late 2015 to provide that appeal from the appeals committee is prosecuted to an ALJ of the Commission and not to the Commission en banc. 85A OKLA. STAT. § 211(B)(5). See supra Part II.
145. Id., Findings Nos. 46–50.
146. Id., Conclusion.
workers’ compensation laws would be. Still, authority existed for the proposition that states are able to exert regulation over ERISA plans in certain circumstances. Thus, the legislature’s creation of an appeal proceeding within Opt Out was legitimate and not preempted. The Commission also considered itself a “court of competent jurisdiction” to entertain challenges to the legitimacy of the law. Dillard’s appealed.

The Supreme Court affirmed, although on somewhat different grounds. The majority based its decision solely on the Oklahoma state constitution’s ban on special laws and hence did not reach the other constitutional issues addressed by the Commission. The special law ban is found in Article 5, Section 59, of the constitution: “Laws of a general nature shall have uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.” In Vasquez,

The constitutionality of the Oklahoma Employee Injury Benefit Act . . . is squarely before this Court. . . . The core provision of the Opt Out Act . . . creates impermissible, unequal, and disparate treatment of a select group of injured workers [that is, those, like Ms. Vasquez, who are employed by employers who have opted out, in contrast to employees of employers who are bound by the workers’ compensation act, with its varying benefits]. . . . Remarkably, the court noted its recent decision that the Commission had no power “to determine the facial constitutionality of the Opt Out Act as a special law” and that, as a consequence, “the Commission’s determinations of constitutionality were not authorized as a blanket strike of the Opt Out Act.” That the Commission had no such authority did not, however, preclude the Supreme Court’s consideration of the case because the legislature specifically gave power to the court to consider the constitutionality of the law.

The concurring opinion, which provides significant history and context (it may originally have been the proposed majority opinion), justified the jurisdiction of the court to review the controversy. The concurrence in-

147. Under ERISA, preemption does not apply to a plan when it is “established and is maintained solely for the purpose of complying with applicable workers’ compensation laws. . . .” 29 U.S.C. § 1000(b)(3).
150. In the ensuing appellate litigation, a remarkable number of amicus briefs were filed in support of affirming the striking down of the Opt Out Act. See http://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=114810 (last visited Oct. 16, 2016).
152. Id. at 770.
153. Id. at 771 (citing Robinson v. Fairview Fellowship Home for Senior Citizens, Inc., 371 P.3d 477 (Okla. 2016)).
154. Id.
sisted that even if the law created an ERISA plan, which it did, state oversight was still legitimate. The concurring justice did not, unlike the Commission, invoke the leading case of *Shaw v. Delta Air Lines, Inc.*, but instead declared that opt-out plans were in essence workers’ compensation and hence exempt from preemption. If no preemption applied, the court had jurisdiction to declare the law unconstitutional.

The majority made no mention of ERISA, stating that the preemption issue had been waived. This was a remarkable statement. While an inspection of the Dillard’s brief shows that the employer did not address the issue, ERISA preemption goes to a court’s jurisdiction, to wit, a non-waivable issue.

**VII. CRITIQUE OF OPT-OUT**

The only opt-out law to have been enacted has been declared unconstitutional and was stricken in its entirety. The *Vasquez* decision was perhaps predictable because the Oklahoma Supreme Court, considering other challenges to the 2013 reforms, had earlier expressed dissatisfaction with the radical nature of the changes. Nevertheless, the court’s ruling was dramatic and unequivocal.

Some have opined that this momentous case will cause progress of opt-out bills among states to sputter, but proponents have rejected this proposition. Indeed, the architect of opt-out, a Texas lawyer who also consults about and markets such plans, stated that “efforts to expand these alternatives to other states will ‘unquestionably’ continue.”

While this article has presented a defense of the status quo, this writer acknowledges that workers’ compensation systems are flawed (waste of

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156. *Vasquez*, 381 P.3d at 783–784 (Gurich, J., concurring). According to the concurring opinion, “[t]he Dillard’s plan in this case was maintained solely for the purpose of complying with Oklahoma’s workers’ compensation laws. . . .”

157. *Id.* at 777, n.12.

158. See *Torres v. Seaboard Foods*, 373 P.3d 1057 (Okla. 2016) (requirement under revised law that injured worker pursuing workers’ compensation benefits for “cumulative trauma injury” must have worked continuous 180-day period, for that employer, violated the due process provision of the state constitution; statute’s over-inclusive and under-inclusive classifications were not rationally related to the purported state interests of preventing fraud and decreasing employers’ costs); *Maxwell v. Sprint PCS*, 369 P.3d 1079 (Okla. 2016) (PPD “deferral” provision of revised law violated due process because the deferral of such benefits to a “subclass” of injured workers was an unconstitutional “special law” under state constitution).

time and money, perverse motivations on both sides, and overly litigious dispute systems are endemic), but he nevertheless joins in this defense. If these dysfunctional aspects of workers’ compensation are to be addressed, such reform should not be via the radical machination of opt-out.

This writer has previously identified multiple reasons why opt-out laws should be opposed. Elimination of impartial review, discounting of workers’ compensation as an occupational safety enhancer, and rejection of valuable governmental oversight are all unacceptable features of opt-out.160 This writer also joined in the advocacy that a “separate but unequal” regime161 should not be allowed. It is gratifying to see that the argument prevailed. But further unsatisfactory aspects of opt-out remain to be addressed.

A. Opt-Out as Unfairly Affecting the Working Class and Working Poor

Opt-out unfairly affects the working class and the working poor—the real constituency of workers’ compensation. This is particularly true of those workers who have developed issues with their benefit provision and are in need of dispute resolution.

In Pennsylvania, a state with a high average weekly wage ($978 in 2016), the vast majority of workers’ compensation claimants possess only a high school education, many have only a GED or no degree, and their average wages are frequently less than one-half of the average.162 Many such injured workers testify that they have no savings and were living paycheck-to-paycheck prior to their disabling injuries. Further, despite the expansion of general healthcare coverage under the Affordable Care Act, many workers still testify that they have no insurance to support medical treatment when the workers’ compensation claim has been denied or some element of treatment in an accepted case has been contested.

Many of these workers labor for the type of national retailers and nursing home chains that are said to desire opt-out. Given its disparate impact, opt-out is hence a form of unfair class legislation and would hurt these highly leveraged injured workers the most.

B. Opt-Out as Promoting Unsatisfactory Cost-Shifting

The advent of the Medicare Set Aside reflects the federal government’s reasonable concern that the costs of work injuries are too often shifted

160. See supra Part III.
away from workers’ compensation and onto Medicare.  

A recent study has also suggested that workers’ compensation laws that restrict the concept of injury cause a transfer of work injury disability costs onto the Social Security Disability (SSD) system.

Opt-out will exacerbate this unsatisfactory situation. Draconian Oklahoma-style opt-out plans erect technical defenses in order to deny meritorious claims and penalize workers with forfeiture for alleged non-compliance with treatment programs. These devices will likely divert medical costs to SSD, Medicare, and Medicaid, shifting the burden to the taxpayers.

C. Opt-Out Is Inconsistent with International Standards

England, France, and Germany all adopted workers’ compensation in the decades before the United States. They did so for the same reasons as did U.S. states, and many laws were in fact modeled on those of England. Japan, meanwhile, has always had a workers’ compensation system, and a robust one since World War II.

Of course, European countries have broadened their social welfare programs over the decades. Yet, workers’ compensation is still mandatory, no-fault based, thought to promote safety, and endures as a matter of social justice. Workers’ compensation is, in short, a benefit of the First World. To this writer’s knowledge, no developed country allows employers to opt out, generate their own plans, and be free of tort liability. A jurisdiction that allows opt-out exhibits its unwillingness to recognize international values.

163. See Torrey & Greenberg, supra note 67, § 16:68 (“the federal government [has] advised the state workers’ compensation communities that it would no longer tolerate cost-shifting. . . .”).


167. Professor Alison Morantz has persuasively argued that assessing the adequacy of U.S. workers’ compensation laws should include comparing the same with the similar laws of other countries. See Alison Morantz, Workers’ Compensation at a Crossroads: Back to the Future or Back to the Drawing Board?, 69 RUTGERS L. REV. ___ (forthcoming 2017) (http://poundinstitute.org/content/2016-symposium-papers) (last visited Oct. 18, 2016).
Opt-out, a now-stalled phenomenon, may be broadly conceptualized in a number of ways. First, since 1980, retraction, for the most part, has been the major feature of legislation in state workers’ compensation laws. Opt-out, a complete rejection of the social compact, can be conceived of as the most dramatic (or even nihilistic) manifestation of this historical trend. Second, and in a related sense, opt-out efforts can be conceptualized as another manifestation of tort reform, as has been current in medical malpractice and products liability. All agree, in this regard, that the main drivers of opt-out proposals are reducing costs to business and eliminating litigation.

Third, retrenchment in workers’ compensation, of which opt-out is a prime example, can be viewed as another example of a larger, pervasive, attempt by employers to escape the public system and avoid traditionally acknowledged social responsibilities. Arbitration clauses increasingly found in employment contracts are another example. Opt-out lacks the communitarian spirit that imbued the National Commission report with its admonitions that all be bound by the law. Opt-out casts this idea aside in favor of pure self-interest.

Fourth, opt-out proposals can be rightly viewed as reflecting an ultimate negation of rights. Opt-out, in fact, considers work injury recovery as not a right, but as just another employee benefit which can be pared off at will—one where costs can be reduced via the employer’s complete control over medical care, restricted compensation triggers, and freedom from challenges in disputed cases. The idea that a worker’s injury recovery possesses an element of justice, one that derives from the Constitution, the common law, and social concerns, is forgotten.

Whatever else is true, the legal community must be aware of opt-out. As its proponents have moved beyond the idea of “rights” and “due process,” they cast the activity of lawyers in the work accident realm, and the proceedings of workers’ compensation adjudication, as mere “bureaucracy.” This thinking is unfortunate. The moral test of any society is how it treats its most vulnerable members. That population includes many injured workers, and their rights will not be vindicated without lawyers and judges who take those rights seriously. The correct remedy and forum is workers’ compensation.


169. See Duff, supra note 97, at 26 (“Challenges to significant changes in workers’ compensation law are akin to even broader challenges to tort reform seeking to reduce plaintiff remedies.”).
