AMERICAN BAR ASSOCIATION

321 No. Clark Street
Chicago, IL 60654-7598

WORKERS' COMPENSATION SECTIONS
2013 MIDWINTER SEMINAR AND CONFERENCE
CORAL GABLES, FL (March 16, 2013)
PANEL: FEDERALIZATION/FEDERAL STANDARDS
AND WORKERS' COMPENSATION

THE FEDERALIZATION/FEDERAL STANDARDS ISSUE: A SHORT HISTORY BEFORE AND AFTER *NFIB v. SEBELIUS* (U.S. 2012)

by David B. Torrey, WC Judge*

TABLE OF CONTENTS

* Workers' Compensation Judge, PA Department of Labor & Industry, Pittsburgh, PA; Adjunct Professor of Law, University of Pittsburgh School of Law; President, The National Association of Workers' Compensation Judiciary. Thanks to Mr. Jeffrey Seidle (Pitt Class of 2013), for his research assistance on this seminar paper. Opinions are strictly those of the author and not those of the PA Department of Labor & Industry. Contact: DTorrey@pa.gov.

I. Introduction

Critics of state-run workers' compensation programs have long asserted that parity among jurisdictions should exist with regard to coverage and benefit levels. It makes no sense, they argue, that certain occupations are covered in one state and not in another, and that the same type of injury in one state is compensated generously while in another only very modestly – or not at all.

The reform that would bring such parity could perhaps be accomplished a number of ways, but two leading solutions have been posited over the decades. The *first* is outright and explicit preemption by the federal government, which would provide for coverage and benefits, and administration as well. In other words, a program like the Longshore Act would be expanded to cover the states.

The *second* is for Congress to promulgate and then enforce federal *standards*, with certain incentives offered to states to encourage them to comply and penalties (other than preemption) for states that do not.

With regard to the first method, Congress could surely preempt state workers' compensation laws by invocation of its Article I, Section 8 powers to legislate in the area of interstate commerce and/or to tax and spend for the general welfare.[1]

As to the second method, Congress can impose federal standards through mandates on the states, enforced through promises of assistance and funds and the threat of penalties or even partial preemption, in the event of non-compliance. The scope of such federal power has, however, perhaps been called into question by principles of the "New Federalism" and its most recent application in the 2012 Supreme Court decision addressing the Affordable Care Act.[2]

In any event, the renowned National Commission on State Workmen's Compensation Laws (National Commission), in its 1972 Report, rejected federalization of the program.[3] Instead, it set forth recommendations, nineteen of which it termed "essential," which were voluntary in nature. The Commission added, however, that if states did not act to comply by mid-1975, Congress should take action to ensure such compliance.[4]

Legislation inspired by the latter recommendation – proposing standards, not federalization *per se*, and featuring inducements and the promise of penalties – was advanced both in 1975 (Williams-Javits) and in 1979 (Federal Standards Act), but neither law was enacted.

---

[1] *See infra* Section XI(B).

[2] *See infra* Section XI(A).

[3] NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKERS' COMPENSATION LAWS, p. 26 (1972) ("We reject the suggestion that Federal administration be substituted for State programs at this time.").

[4] *See infra* Section VI.

Currently, state-run workers' compensation is still the status quo. The parity critics, meanwhile, have hardly been silenced. Indeed, one scholar, writing in 2007, excoriated workers' compensation as unreformable and incorrigible. In his view, workers' compensation dwells in "preempted policy space" that will indefinitely relegate the program to the mediocrity, parochialism, and politics of state control.[5]

In response to this type of continuing criticism, in 2009, U.S. Representative Baca (D-CA), along with six colleagues, introduced a bill, H.R. 623, that would convene a new National Commission. The proposal, notably, complained of "increased … inadequacy and inequitable levels" of benefits. It proposed that the new commission would study and evaluate the critical areas of state workers' compensation laws and report to the President and Congress its findings and "recommendations for enhancement and improvements … of State workers' compensation systems …."[6]

Representative Baca did not win re-election, and the bill died at the end of the 112th Congress. And, with the convening of the 113th Congress in 2013, the bill has not, as of February 2013, been reintroduced by one of its co-sponsors or some other House member.

Still, this proposal has once again raised the issue of federal standards. At the same time, the passage of the Affordable Care Act (ACA), a comprehensive *national* reform that expands the number of individuals covered by health insurance, presents the question of effects of the same on *state-administered* workers' compensation.

The 2012 decision of the U.S. Supreme Court in *NFIB v. Sebelius*,[7] which addressed the constitutionality of the ACA, meanwhile, added an additional question. This is so not with regard to its upholding of the controversial "federal mandate," which obliges individuals to secure insurance or face a penalty. Instead, the question for workers' compensation is the court's prohibition of Congress coercing states into Medicaid expansion – upon the peril of losing all federal Medicaid funding. It was through federal inducements, of course, that some reformers have hung their hopes of encouraging compliance with federal standards in workers' compensation.

In this paper, I set forth a brief history of the federalization/federal standards issue. It first reviews the arguments in favor of federalization. This article then provides an account of why the program was never federalized, despite decades of advocacy; discusses the National Commission view; and the unsuccessful 1975 and 1979 bills. This article then analyses the potential for federal reform in the wake of *NFIB v. Sebelius*. A coda to this discussion is a note on the critique that systems that allow, or plan to allow, employers to "opt-out" of workers'

---

[5] *See* CHRISTOPHER HOWARD, THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY (Princeton University Press 2007).

[6] The full text can be viewed at http://www.govtrack.us/congress/bills/112/hr623. The bill was discussed at length at a meeting of the Workers' Injury Law & Advocacy Group ((WILG) in Chicago (July 26, 2012). For a summary of that event, see this writer's review at *PBA Workers' Compensation Law Section Newsletter*, Vol. VII, No. 112, p.41 *et seq*. (Sept. 2012) [available from author: dtorrey@pa.gov].

[7] *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (U.S. 2012).

compensation, and provide ERISA-based plans instead, essentially allow federal oversight through the backdoor.

II. The Brief in Favor of Federalization: Desire for Parity and Against the "Race to the Bottom"

As noted at the outset, critics of workers' compensation have long voiced dissatisfaction with the lack of uniformity among states in terms of which workers are covered, the parameters of coverage, and the nature of the casualties and disablements compensable. One observer, commenting in this spirit, has remarked that workers' compensation systems "tend to be iconoclastic, with relatively little comparability across jurisdictions…. This is because such systems are the result of a complex interplay of statutory language, legal interpretation, and administrative practice, all of which are specific to each jurisdiction. It is little wonder that the situation can be characterized as 'a tower of Babel.'"[8]

A. The Parity Issue

Perhaps no specific issue vexes such critics more than the lack of uniformity in benefit levels that exist among the states. Such critics observe correctly that this result has unfolded because of our federal system and the states' historic control over workers' compensation programs.

The parity advocates assert that, in the modern day, no excuse exists for such broad-ranging lack of uniformity. One effect of this phenomenon is that many states are content to keep coverage limited and benefits inadequate. In this complaint, they echo a critique raised by the scholar Arthur Larson, and others, others a half-century ago. Larson in 1956 complained, memorably: "A number of states, whose compensation structures date from the days of kerosene lamps and outdoor plumbing, are beginning to discover that there are such things as electric lighting and indoor bathrooms, and that these things are regarded as commonplace in many other states."[10]

A prominent, recent critic of this school is Christopher Howard, a government professor at the College of William and Mary. In Howard's view, as set forth in his 2007 book,[11] workers' compensation as a state-run program for work injuries is an anachronism. In his view, it unacceptable that, in the modern day, workers who suffer the same injuries in different states are entitled to often vastly disparate benefits. Further, he decries the multi-state structure of compensation for producing the notorious "race to the bottom," where states vie with one another to cut workers' benefits, reduce costs, and thereby try to attract new business and industry. He further alleges that, as a result, benefits in most states have been shown to be

[8] H. Allan Hunt, "Performance Measurement in Workers' Compensation," in WORKPLACE INJURIES AND DISEASE: PREVENTION AND COMPENSATION, p.143 (Upjohn Institute 2005).

[10] Arthur Larson, "*Model-T" Compensation Acts in the Atomic Age*, 18 N.A.C.C.A. L.J. 39 (1956).

[11] CHRISTOPHER HOWARD, THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY (Princeton Univ. Press 2007).

inadequate, and that the multiplicity of arrangements among states creates wasteful transfer costs.

With this utter lack of uniformity, "learning from other states," often said to be a virtue of the federal system, "is all but impossible." Howard identifies and faults the persistence of state-run workers' compensation as a roadblock to progress toward a social welfare system providing adequate and equivalent benefits to all American workers. Howard admonishes, "[T]he next time someone says how adept states are at tackling social problems, ask that person about workers' compensation. States have had decades and decades to address the problem of injured workers, and their answers are about as wide-ranging and irrational now as they were seventy-five years ago…. The program has been and remains deeply flawed because vested interests have discouraged fundamental reform."[12] Howard insists, "Operating a single national program makes good sense. If workers' compensation were a developmental program, like education or sanitation, one could imagine why the states might be considered the proper level of government to take control. But workers' compensation is clearly a redistributive program, transferring income to injured workers and their families…."[13]

B. The Race to the Bottom

As foreshadowed above, critics fault state-administered systems because states, possessed of complete control of their programs, habitually seek to reduce benefits in an effort to reduce costs and thereby attract new industries to their respective states. Howard characterizes this as complete dysfunction for which the state-administered system is responsible; workers' compensation, he asserts, "belongs at the national level so that states do not compete to have the least generous program, thereby reducing coverage and benefits for a vulnerable group of citizens ...."[14]

This phenomenon has been termed the "race to the bottom." The National Commission, notably, commented on the problem. Having tried to determine why many state laws were so backwards, the Report concludes: "Even when [state legislators and officials] … have been genuinely interested in reform, [they] have too often been dissuaded by the irrational fear that the resulting increase in costs would induce employers to transfer business to States with less

[12] *Id.* at 177.

[13] Christopher Howard, *Workers Compensation, Federalism, and the Heavy Hand of History*, STUDIES IN AMERICAN POLITICAL DEVELOPMENT (2003), p.2, retrieved from http://www.ksg.harvard.edu/inequality/Seminar/Papers/Howard.PDF. This latter assertion is not completely correct. The process is not "redistributive" in the same sense as welfare and the like. "The conventional wisdom among economists is that workers pay for most of the benefits through reductions in wages." Comments of John F. Burton, Jr., to the Author (February 4, 2012) (citing J. PAUL LEIGH ET AL., COSTS OF OCCUPATIONAL INJURIES AND DISEASES, pp.175-79 (University of Michigan Press 2000) (citing Burton & Chelius)). To the same effect are Fishback and Kantor: "Although reformers considered workers' compensation to be a redistribution of income from employers to workers, employers were able to pass at least some of the costs of the higher benefits back to workers in the form of wage reductions." PRICE V. FISHBACK & SHAWN E. KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION, p.82 (University of Chicago Press 2000).

[14] Howard, *supra* note 13, at 2.

generous benefits and lower costs."[15] The Commission also asked rhetorically, "Can a State have a modern workmen's compensation program without driving employers away?"[16]

Mashaw and Gretz, in their book, *True Security*, assert that the National Commission's "credible threat of federal intervention" resulted in improvements to state systems, but also added to overall costs. They characterize the reaction that has unfolded the last few decades (*i.e.*, steady retraction), as follows:

> [W]hat do these expansions and contractions tell us about the economics or politics of workers' compensation as a social program? Put in historical perspective, the message is relatively clear. Left to their own devices, states are forced into a race – really a slow crawl – to the bottom in terms of the adequacy of workers' compensation coverage and benefits.
>
> In short, where states must respond to the "non-competitiveness" claims of employers facing rising employee benefit costs and of insurers unable to get premium relief from state regulators, they are unlikely to produce or maintain an adequate workers' compensation package.[17]

C. The Coordination of Remedies Issue

Another advocacy for federalization comes from a *different* quarter. In this regard, some have argued that state workers' compensation programs should be abolished – or at least superseded – and replaced with a federal program such as the Longshore Act, given the difficulties in construing state laws along with Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).[18]

Writing in 1999, Professor Joan Gabel asserted that employers had encountered problems "integrating the sometimes conflicting, often overlapping provisions" of compensation laws and these two later-enacted federal laws. (At least one defense law firm, in seeming corroboration, has called this situation "The Three Headed Monster."[19]) For example, at least at the time, employers complained that they faced many administrative burdens in coordinating FMLA leave with time off experienced by workers because of industrial injuries. The ADA concept of

---

[15] NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKERS' COMPENSATION LAWS, p. 25 (1972).

[16] *Id.* at 124.

[17] MICHAEL J. GRETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE, p.86 (Yale 1999).

[18] *See* Joan Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST LAW REVIEW 1083 (1999).

[19] Thompson-Hine (Columbus, OH), *The Three Headed Monster: ADA, FMLA, and Workers' Compensation - Helping Employers Ensure Compliance* (2005), *available at* http://www.thompsonhine.com/publications/publication149.html.

reasonable accommodation, meanwhile, is not always "compatible with the workers' compensation concept." Gabel asserts that because of these conflicts, "Congress should consider a federal workers' compensation system that ensures an efficient integration of the ADA, the FMLA, and workers' compensation laws."

Another view, however, is that it is "doubtful that a federal workers' compensation system would alleviate any of the problems related to the implementation of these three pieces of legislation… [T]hey will still have to be implemented simultaneously with workers' compensation whether [the latter] is a state or federal program."[21]

One form of federal legislation, however, could actually *merge* workers' compensation with laws protecting workers from discrimination (*i.e.*, like the ADA) and guaranteeing time off in case of disability or family need (*i.e.*, like the FMLA). This type of fundamental structural reform could presumably end such things as the current phenomenon where an employee can be entitled to workers' compensation from his employer, yet still sue the same under the ADA for an act of alleged discrimination connected to the injury.

III. Earliest Federalization Considerations

Workers' compensation has been termed "the most extensive tort reform legislation that has ever been enacted."[22] This characterization seems precisely right. The rapid enactment of compensation laws unfolded in the wake of a universal conviction that the tort cause of action for personal injury suffered by an employee did not provide him or her with an adequate remedy. The negligence cause of action, and its elusive damages, was to be replaced with no-fault as the operative principle and insurance benefits as compensation.

Because this was the immediate genesis of the law, and because the federal administrative law state was still two decades away, it was natural that the new no-fault laws were first administered by the states. It was the police powers *of the states* to govern matters of health and safety that were understood to *legitimate* the laws.[23] And, of course, the then-current reading of the Commerce Clause by the U.S. Supreme Court "precluded the possibility of a

---

[21] Elizabeth W. Malloy, *The Interaction of the ADA, the FMLA, and Workers' Compensation: Why Can't We be Friends*?, 41 BRANDEIS LAW JOURNAL 821 (2003).

[22] JOSEPH W. LITTLE, THOMAS A. EATON & GARY R. SMITH, WORKERS' COMPENSATION: CASES AND MATERIALS, p.66 (West 6th ed. 2010).

[23] *See Jensen v. Southern Pacific Co*., 109 N.E. 600, 604 (N.Y. 1915) ("Surely it is competent for the state in the promotion of the general welfare to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage. Any plan devised by the wit of man may in exceptional cases work unjustly, but the act is to be judged by its general plan and scope and the general good to be promoted by it. Fortunately the courts have not attempted to define the limits of the police power. Its elasticity makes progress possible under a written constitution guaranteeing individual rights. The question is often one of degree."). The "police power" of a state, in general, embraces its ability to enact regulations designed to promote the "public convenience or general prosperity" of the state, or regulations designed to "promote the public health, the public morals or the public safety." *See Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 393 Pa. 106, 141 A.2d 606 (1958).

Federal law on workmen's compensation for most private industry …."[24]

And, indeed many of the new workers' compensation acts left it to the third-branch judicial courts both to manage the system and entertain disputes. To this day, the states of Alabama and Tennessee, though they have executive branch administrations as well, entertain the litigation of disputed cases in civil division bench trials.[25]

Of note, however, is that at least some in Congress were convinced from the very outset that it could establish a federal workers' compensation law under its power to tax and spend for the general welfare – that is, under Article I, Section 8 of the Constitution. As foreshadowed above, the constitutional-law thinking of the day was that a federal law was impossible. Still, as discussed in a new book by Stanford Law Professor Michele Dauber, Congress in 1910 established a bipartisan blue ribbon panel to:

> study the subject of employer liability and workers' compensation…. The panel was charged with investigating the policy and legal dimensions of replacing the then-current negligence-based system with compulsory workers' compensation…. Legally, the pressing question was whether any system that required employer contributions would be constitutional under the Due Process Clause of the Fifth Amendment…. This difficulty seemed a serious obstacle to a national system….[26]

According to Dauber, at least some on the panel were convinced of the constitutionality of such a national program. They were animated in part by the idea that the power to tax and spend for the general welfare in times of disaster (a power with precedents in several congressional acts, back to the early nineteenth century), might support a federal law. However, the commission ultimately recommended a bill to Congress, "justified under the commerce power rather than the General Welfare Clause." This proposed national workers' compensation program, however, "failed to pass the House, and President Taft decided to test the waters by starting a compensation scheme in the Panama Canal zone instead …."[27]

---

[24] NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKERS' COMPENSATION LAWS, p.34 (1972).

[25] David B. Torrey, *Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, 32 JOURNAL OF THE NATIONAL ASSOCIATION OF ADMINISTRATIVE LAW JUDGES 21, 35-36 (2012).

[26] MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE, p. 63 (Univ. Chicago Press 2012).

[27] *Id.* The Commission report can be accessed as a Google book: http://books.google.com/books?id=dDofAQAAMAAJ&printsec=frontcover&dq=Message+of+the+President+of+the+U.+S.+transmitting+the+report+of+the+Employers'+liability+and+workman's+compensation+commission&hl=en&sa=X&ei=TufzUNe9JeqQ0QGo5oGIBg&ved=0CDMQ6AEwAA#v=onepage&q=Message%20of%20the%20President%20of%20the%20U.%20S.%20transmitting%20the%20report%20of%20the%20Employers'%20liability%20and%20workman's%20compensation%20commission&f=false.

IV. The Perennial Model for Federalization: The Longshore Act

Of course, a federally-administered workers' compensation act has long existed in the form of the Longshore & Harborworkers' Compensation Act (LWHCA).[28] That law, enacted in 1927, was intended to address the thorny jurisdictional issue that existed for an unusual class of workers – the stevedores and related workers who labored part of their day on dry land (state jurisdiction) and part of their day on the navigable waters of the United States (federal/maritime jurisdiction.) The law was passed to ensure that such workers would always have a workers' compensation remedy.

This law has always stood as a model for federal administration of industrial injury risks. (A bill to this effect was advanced in Congress as Senate Bill 2008 of 1979.) Some have argued, in this regard, that state workers' compensation programs should be abolished – or at least superseded – and replaced with a federal program such as the Longshore Act. Gabel, writing in 1999, declared, "The Longshore Act illustrates Congress' willingness to efficiently utilize resources by increasing benefit levels in no-fault compensation systems," and asserted that a federal program for all injuries could be enacted. (To achieve absolute efficiency she would pair this Longshore-like federalization of the compensation remedy with an *absolute ban* on all third-party actions.[29])

V. Consideration of Federalization/Federal Standards, New Deal to 1972

Workers' compensation was never federalized despite the example of the LHWCA, and despite major social welfare reforms in the 1930's, 1960's – and even after the National Commission's Report in 1972.

Precisely why federalization did not unfold is fascinating. Of course, most know the history of how the federal government, via the National Commission, encouraged states in the early 1970's to update workers' compensation law or face mandatory federal standards. An account of that effort is discussed below.

That has never happened, even though many states took only lukewarm measures at reform. Others, like Pennsylvania, updated their laws (even beating the National Commission to the punch in some areas), but have recently shown recidivism, and have once again added restrictions.

Howard (quoted above) explains that time and again, ever since New Deal social programs were launched, national policymakers considered a federal workers' compensation scheme.[30] Such an effort would consist of either complete federal preemption or imposition of a

[28] 33 U.S.C. §§ 901-950.

[29] Joan Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 Wake Forest Law Review 1083 (1999).

[30] Christopher Howard, *Workers Compensation, Federalism, and the Heavy Hand of History*, STUDIES IN AMERICAN POLITICAL DEVELOPMENT (2003), retrieved from http://www.ksg.harvard.edu/inequality/Seminar/Papers/Howard.PDF.

set of national standards with which states must comply. On every occasion, however, the combined effect of multiple entrenched state interests dissuaded such policymakers from action. The authors of the National Commission report were also aware of, and commented upon, this reliable opposition to reform.[31] Howard, for his part, declares:

> Conceivably, policy makers in the U.S. may have seen some technical advantage in state-level control, such as the need for flexibility and innovation. Faced with sizable variation in local conditions, or great uncertainty about the best remedies, it may have been thought best to let states serve as policy laboratories... . Such arguments have been used in the past to justify placement of redistributive programs like job training at the state and local levels.
>
> [T]hough invoked at times, this line of reasoning did not have a major influence on the development of workers' compensation. National officials were more likely to view state-level variation as a weakness of workers' compensation programs than as a strength.
>
> The more plausible explanation is explicitly political and hinges on the considerable power of federalism to influence policy debates in the United States. By the time policy makers gave serious thought to involvement by the national government, workers' compensation laws were so firmly entrenched in the states that major change was politically costly. States' workers' compensation laws created a textbook example of a "preempted policy space" ... .[32]

Howard asserts, specifically, that federalization was considered at the time of the New Deal reforms that produced Social Security (1930's); at the time of amendments of the Social Security laws to include disability (1950's); and at the time OSHA was created (1970). On each occasion, fears were so powerful among reformers that deeply entrenched state interests – such as insurance companies, state boards, doctors, employers, unions, and trial lawyers – would oppose a federal takeover, that they never seriously pushed the idea.

This entrenched-interests opposition was encountered by Arthur Larson – no proponent, at the time, of federalization – when he simply suggested a Model Law in the 1950's. Larson, then Undersecretary of Labor for President Eisenhower, was met with fierce opposition to the

---

[31] NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKERS' COMPENSATION LAWS, p.124 (1972) ("In many States, substantial reform is difficult because there is more than one interest group with power to veto proposed changes in the law, and it is difficult to find a package of amendments acceptable to all parties. Under these circumstances, a State may be locked into a program despite serious abuses….").

[32] Christopher Howard, *Workers Compensation, Federalism, and the Heavy Hand of History*, STUDIES IN AMERICAN POLITICAL DEVELOPMENT (2003), retrieved from <url ref.id="I">http://www.ksg.harvard.edu/inequality/Seminar/Papers/Howard.PDF</url>. The author also develops this assertion in his book, *The Welfare State Nobody Knows: Debunking Myths About U.S. Social Policy* (Princeton 2007). For a review, see *PBA Workers' Compensation Law Section Newsletter*, Vol. VII, No. 94, p. 39 (December 2007) (available from author: dtorrey@pa.gov).

proposal. Indeed, he was shouted down so loudly by the insurance industry and state boards that he had to abandon the project.

Howard briefly recounts this intriguing 1950's episode, and it is one treated in depth in David L. Stebenne's 2006 Larson biography.[33] Stebenne explains that Larson's advocacy was opposed by business interests, where "reactions ranged from unenthusiastic to outright hostile." The National Association of Manufacturers, for example, "argued that the federal government had no business telling states what to do about workers' compensation or even making suggestions on that topic. Similar responses came from interested trade associations and some businesses, most notably insurance companies, that belonged to them."

Entrenched state administrators, meanwhile, raised "the same basic objection…. Fiercely protective of the states' prerogatives in this area, [state administrators] argued in effect that a model act would have been acceptable had it come from some body created by the states instead of from the federal government…." Ultimately, business and states interests "used their influence in Congress to cut off funds for any more work on this project, in effect compelling Larson to give up."

An irony was that Larson had remarked shortly before that "I believe that workmen's compensation should remain a state matter, primarily handled through private insurance, that unemployment insurance should retain its present State-Federal pattern, and that old-age and survivors insurance must of necessity be a Federal program." In addition, he stated that "we" (presumably meaning the Eisenhower Administration) have "reject[ed]" the philosophy that the state or federal government have "an obligation to support its citizens." To the contrary, social insurance schemes, the costs of which are "borne by the contributors," constituted the preferred approach.[34]

VI. The National Commission: Recommendations, Mandates, and Potential Enforcement

The National Commission on State Workmen's Compensation Laws, created by the OSHA law in 1970, produced nineteen "essential recommendations" for an adequate state workers' compensation law. The Commission also recommended that a failure to improve systems accordingly should result in federal action.[35] The National Commission, though at least at first a potent force for good in liberalizing of laws,[36] rejected preemption and federalization.[37]

---

[33] DAVID L. STEBENNE, MODERN REPUBLICAN: ARTHUR LARSON AND THE EISENHOWER YEARS (Indiana Univ. Press 2006).

[34] Arthur Larson, *Changing Concepts in Workmen's Compensation*, 14 N.A.C.C.A. L.J. 23 (1954).

[35] NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKERS' COMPENSATION LAWS, p.127 (1972).

[36] *See* ARTHUR LARSON, WORKERS' COMPENSATION, § 2.08 (Desk. ed. 2000).

[37] *See infra* Appendix.

The Commission's Executive Director, Peter Barth, has recently written that "the threat perceived by some kind of federal takeover of the state programs did not materialize into any kind of plan. Indeed, no serious discussion developed over whether the state programs should be folded into the Social Security program or subsumed into some other federal program…."[38] Former Chair John F. Burton, Jr. (a member of this panel), meanwhile, wrote in 2003:

> The serious deficiencies of state workers' compensation programs and the failures of previous reforms efforts led the National Commission to consider new strategies for improving workers' compensation. One approach considered and rejected was federalization of the state … programs – that is, enactment of a federal workers' compensation law that displaced state laws and turned over the administration of workers' compensation to federal employees….[39]

Instead, the Commission recommended federal assistance to the states, to "enhance the virtues of a decentralized, state-administered workers' compensation program":

> The assistance was to consist of two forms: (1) appointment by the President of a new commission to provide encouragement and technical assistance to the states, and (2) a 1975 review of the states' record of compliance with 19 essential recommendations of the National Commission, which would culminate in federal mandates if necessary to guarantee state compliance with these essential recommendations.[40]

With regard to enforcement, which seems to have been as thorny an issue in 1972 as it is today, Professor Burton explains as follows:

> [A]nd how was compliance to be guaranteed? …. The "obvious" enforcement mechanism was to impose a payroll tax on employers in states that did not comply with the 19 essential recommendations, which is essentially the method used since the 1930's to induce states to pass unemployment insurance laws adhering to federal standards.[[41]]
>
> However, this payroll tax enforcement mechanism was not considered politically feasibl[e] in 1972, and so the National Commission relied on two other devices.

---

[38] Peter S. Barth, *Workers' Compensation Before and After 1983*, in WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING?, p.9 (R. Victor & L. Carruba, eds., 2010)

[39] John F. Burton, Jr., *The National Commission on State Workers' Compensation Law: Some Reflections by the Former Chairman*, 40 IAIABC JOURNAL 15, 22 (Fall 2003).

[40] *Id.*

[41] If a state unemployment law meets minimum federal requirements, "employers receive up to a 5.4 percent basic and additional tax credit against the 6.0 percent federal unemployment tax, and the state is entitled to federal grants to cover all the necessary costs of administering the program." *See* http://workforcesecurity.doleta.gov/unemploy/pdf/partnership.pdf. *See* 26 U.S.C. § 3302(a), (c) (providing for tax credit); *id*., § 3303 (conditions of additional credit allowance); *id.*, § 3304 (approval of state laws).

> First, federal laws would require employers to purchase workers' compensation insurance or otherwise secure workers' compensation protection incorporating the 19 essential recommendations. Second, an individual worker could file his or her claim with the state workers' compensation agency, which would be authorized by federal law *to make awards* consistent with the federal standards even if the state had not amended its workers' compensation laws to incorporate the 19 essential recommendations…..[42]

Professor Burton also notes that the subject matter of the 19 essential recommendations go to the *substance* of workers' compensation coverages and benefits, and are the types of items amenable to enforcement in "suits against employers or by employees against their employers…."[43]

Of course, in the end, no enforcement was undertaken. This is why the status quo of state-administered workers' compensation laws endures. Critics like Howard would assert that entrenched interests have been successful, as they were from the 1930's, in defeating any type of federal involvement in the system. Larson, in any event, offered the piquant comment that "[no] federal sanctions were ever adopted, in part because no device could be invented that would be both effective and politically acceptable…."[44]

VII. 1975 (The Williams-Javits Bill)

Three years after the National Commission Report, Senators Jacob Javits and Harrison Williams introduced the "National Workers' Compensation Act of 1975."[45]

This proposed law mandated that states were to assure that their workers' compensation laws met various federal standards. Such standards included broad coverage of employees (no minimum employee exception); expanded extraterritorial provisos; no dollar or time limits on medical and vocational rehabilitation benefits; TTD benefits that were not to be less than two-thirds the injured worker's average weekly wage; and establishment of state agencies to enforce workers' compensation laws in those jurisdictions where the program was still court-administered. To induce states to comply, grants were authorized to assist presumably *compliant* states to adjust their programs to the federal standards. A state desiring such funds was to apply for the same.

---

[42] *Id. See infra* Appendix.

[43] *Id.*

[44] LARSON, § 2.08 (Desk ed. 2000) (commenting also that "the precise mechanism for this guarantee [of compliance was] left somewhat vague in the report.").

[45] S. 2018 (1975). This bill can be read on-line at the following link: <http://catalog.hathitrust.org/Record/003217980. Also included in this link are the introductory remarks of Senators Javits and Williams and a comparison of S. 2008 (1973) and 2018 (1975).

An *earlier* bill, S. 2008, from the prior session of Congress, notably, would have substituted the provisions of the Longshore Act for those of the state programs if a state did not adopt federal standards. The Williams-Javits formulation did not provide for any type of immediate substitution for a deficient state plan. Instead, the law "provided that upon the effective date, its provisions are to be enforced by a state workers' compensation agency as if such provisions were part of the workers' compensation law of that state."

Other enforcement mechanisms were contemplated as well. If a state were not to comply, an injured worker could appeal any non-compliant (*i.e.*, deficient) state order to the U.S. District Court (cases where benefits were alleged to be in excess of $10,000.00). In addition, the law provided that after consultation with a state that still non-complied, the U.S. Department of Labor could institute federal standards in a forum of its own design. Finally, the Secretary of Labor was empowered to sue. The Secretary, specifically, was empowered to "sue in federal court to enforce the benefits provided under the act. The secretary's suits are not limited by any jurisdictional minimum amount. He may also intervene in any suit filed by a private party." A contemporary observer summarized the law as follows:

> Some observers believe passage of Senate Bill 2018 is a prelude to complete federalization of workmen's compensation. Indeed, if the bill becomes law, the Secretary of Labor will act as a federal overseer holding broad authority to intervene throughout the administrative and judicial progress of particular claims in each state and to force compliance, in each state with the "entitlements" described in section 5. Under Senate Bill 2018, the Secretary of Labor is a supereminent administrator; a national superintendent of workmen's compensation. … Senate Bill 2018, however, does not establish federal workmen's compensation as such. A federal administration is not substituted for those of the states. Neither does the bill establish a federal workmen's compensation fund. Instead, Senate Bill 2018 would establish federal standards below which no state program may go….[46]

Burton, in his article on the Commission, explains that this proposed bill was never enacted. In his view, it was premature vis-à-vis the deadline provided by the Commission Report. (A harsh critique of the bill, meanwhile, was advanced by Commission economist James Chelius, who asserted that its provisions as to coverage and benefits went too far beyond the recommendations to be either constructive or workable.[47])

In any event, "probably the worst consequence of the efforts to pass Williams-Javits is that it contributed to the demise of the coalition of employers, insurers, and state agencies that had supported federal standards in 1972."[48]

---

[46]James C. Wright, *Potential Federalization of State Workmen's Compensation Laws-The Kansas Response*, 15 WASHBURN L.J. 244, 272 (1976).

[47] JAMES R. CHELIUS, WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION, pp.52-57 (American Enterprise Institute 1977).

[48] John F. Burton, Jr., *The National Commission on State Workers' Compensation Law: Some Reflections by the Former Chairman*, 40 IAIABC JOURNAL 15, 25 (Fall 2003).

VIII. The National Workers' Compensation Standards Act of 1979

In 1979, Representative Beard of Rhode Island introduced H.R. 5482, which was another effort at imposing federal standards.[49] The proposed law was much the same at Williams-Javits, and it offered many of the financial inducements of federal monetary assistance that were found in that bill. The proposed law, however, took a different approach with regard to enforcement. In this regard, a claimant prosecuting a claim in a non-compliant state could appeal to the federal Benefits Review Board (BRB) to secure an award of "supplemental compensation" to in essence bring him or her up to the level of the federal standard.

Further, in case where the non-compliant state agency refused jurisdiction in a case, a federal ALJ under the Longshore Act was to entertain the case subject to BRB review. Of course, like Williams-Javits, this proposed law was not enacted. Howard asserts that "opponents successfully pointed to recent progress in the states and asked for more time…. The glass may be half full, supporters of state control argued, but it was filling up."[50]

IX. A Carter Administration Consideration

Professor Burton reports that during the Carter administration another effort was mounted at federal standards. He recounts how Assistant Secretary of Labor Donald Elisburg "led an effort to draft federal legislation that would have relied on the enforcement mechanism used in the unemployment insurance program, which was a great improvement over the enforcement schemes proposed by the National Commission." The White House was unable politically to back this proposal, as it held the promise of increased employer costs during an inflationary period, "so the federal standards bill was never introduced."[51]

X. Workers' Compensation: Proposed Healthcare Reform Under the Clinton Administration

Under some versions of the Clinton-era reforms, the medical care aspect of workers' compensation would have been merged into the obligatory general health care plans that were key to the reform. As summarized by a contemporary observer, these healthcare reform proposals, none of which were enacted, represented "three basic options for addressing workers' compensation: full integration, partial integration, and exclusion."[52]

Many in the workers' compensation community opposed such integration. Counsel for an insurance lobby, for example, wrote that superseding state workers' compensation laws would

---

[49] H.R. 5482 (1979). This bill can be read on-line at the following link: http://catalog.hathitrust.org/Record/002755061. The Senate version is at http://catalog.hathitrust.org/Record/002948193.

[50] Howard, *supra* note 11, at 174.

[51] John F. Burton, Jr., *The National Commission on State Workers' Compensation Law: Some Reflections by the Former Chairman*, 40 IAIABC JOURNAL 15, 26 (Fall 2003).

[52] Debra T. Ballen, *The Sleeper Issue in Health Care Reform: The Threat to Workers' Compensation*, 79 CORNELL LAW REVIEW 1291, 1297 (1994).

be harmful for both employees and employers, the former by introducing deductibles into medical and the latter by disallowing managed care with a focus on return-to-work.[53]

XI. Constitutional Authority for Action, the "New Federalism, and *NFIB v Sebelius*

As noted at the outset, the proposed "Baca Bill" to reconvene a National Commission raised the issue of federalization and federal standards issues once again.

Since the 70's heyday of federal standards talk, however, the U.S. Supreme Court has issued a series of decisions which have heralded a so-called "New Federalism." These cases have given muscle to the 10th Amendment, holding that limits exist with regard to (1) the power of Congress to regulate under the authority of its commerce clause powers; and to (2) tax and spend for the general welfare.

The most recent articulation of the New Federalism was the momentous holding in *NFIB v. Sebelius*,[54] which addressed the constitutionality of the Affordable Care Act (ACA). The court rejected the proposition that Congress could, under its power to regulate interstate commerce, impose a mandate on individuals to purchase health insurance (though allowing exercise of such power under the power to tax and spend); and found unconstitutional Congress' directive that the states were to expand Medicaid to cover more categories of leveraged individuals, lest they (the states) not only sacrifice Medicaid expansion funds but lose *all* Medicaid funds. Justice Roberts wrote that Congress cannot "put a gun to the heads" of the states and "commandeer" them in such a coercive manner.

Does the New Federalism restrict the power of Congress to impose federal standards? Some have expressed concern in this regard. The precise anxiety is that imposing federal standards has become imperiled by the way the Supreme Court is restricting congressional pressure on the states. The concern is whether, in the present day, a platform exists for federal/state mandates.[55]

A. Federal Standards

I am convinced that the ability of Congress to impose federal standards remains, notwithstanding precepts of the New Federalism and the court's willingness to strike down federal statutes that "commandeer" the states into regulation.

The *NFIB* ruling regarding Medicaid expansion was an application of the New Federalism "anti-commandeering" precedents. Those cases have been evolving since 1995 with the court's decision in *New York v. United States*.[56] There, the court held that the 10th

---

[53] *Id.*

[54] *NFIB v. Sebelius*, 132 S. Ct. 2566 (U.S. 2012).

[55] Remarks of Dean Emily Spieler, WILG Conference, June 2012 (discussed at *PBA Workers' Compensation Law Section Newsletter*, Vol. VII, No. 112, p.41 et seq. (Sept. 2012)).

Amendment, which reserves non-enumerated powers to the states, prohibited Congress from mandating that state legislative bodies adopt laws or state agencies adopt regulations. The federal law involved in that case was the "Low-Level Radioactive Waste Policy Amendments Act." The law featured federal incentives to promote compliance. The state of New York sought to avoid one of these mandates, to wit, that state officials "take title" and assume liability for nuclear waste generated within their borders if they failed to comply with the agreement. The *New York* court held this mandate to be impermissibly coercive and a threat to state sovereignty.

In another case, *Printz v. United States*,[58] the court ruled similarly. It held that Congress could not, under the 10th Amendment, order chief law enforcement officers of local jurisdictions to perform background checks on would-be purchasers of firearms (a temporary obligation imposed by the Brady Act) until the federal government could develop its own program.

One scholar explains the doctrine borne of these cases as follows. The anti-commandeering doctrine:

> prohibits the federal government from commandeering state governments: more specifically, from imposing targeted, affirmative, coercive duties upon state legislators or executive officials. This doctrine is best understood as an external constraint upon congressional power – analogous to the constraints set forth in the Bill of Rights – but one that lacks an explicit textual basis….[59]

Most assert that the anti-commandeering doctrine, and the import of the 10th Amendment, has been expanded with the *NFIB* case. One commentator posits the following:

> [I]n finding the ACA's Medicaid expansion coercive, the Court has re-conceptualized what constitutes a federal "command" to the states, and thus re-defined he scope of the anti-commandeering principle. The Court's holding means that federal laws can constitute commands even when they do not legally compel the states to act. The relevant inquiry is now practical rather than formal; has Congress left the states with a "real option" of saying no to the federal government's conditions?
>
> [T]his is an important shift. Not only does it potentially jeopardize a range of federal spending programs, but it also affects laws operating on the states as "conditional prohibitions" – federal statutes conditionally preempting state laws. Until now, such statutes have been considered fully consistent with the anti-commandeering doctrine because they do not formally require the state to act…. Congress's conditions specifying how that subject matter must be governed (to avoid federal preemption) may well amount to unconstitutional commandeering.[60]

---

[56] *New York v. United States*, 112 S. Ct. 2408 (U.S. 1992).

[58] *Printz v. United States*, 117 S. Ct. 2365 (U.S. 1997).

[59] Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 158 (March 2001).

The potential import of this expansion is obvious in the workers' compensation reform context. As discussed above, reformers have traditionally considered making the states comply with federal standards addressing coverage and benefits lest they, and/or employers, suffer some federal penalty. As also discussed above, this is how the federal government has endeavored to get the states to conform with federal standards in *unemployment compensation*.

The leading published defense of mandated federal standards, dating from 1999, is worth reevaluation in light of *NFIB v. Sebelius.* In that year Professor Joan Gabel took into account the New Federalism cases *New York v. United States* and *Printz*, and posited the following:

> A federal workers' compensation system and the administration of the system might take several different forms. Regardless of which form the system takes, as long as the federal system does not commandeer state legislative and regulatory systems and force state officials to administer provisions of the act, it should have little trouble passing muster under the holdings from *New York* to *Printz*….
>
> The concept of "cooperative federalism" further bolsters the idea that a system which affects a federal goal without stripping states of their autonomy would be constitutional. The Supreme Court defined cooperative federalism in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*[61] … as a program that allows the states, within the limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.
>
> Under cooperative federalism, Congress may utilize its spending power to condition grant money on states' adherence to federal guidelines, thus inducing states to regulate in ways that implement federal goals. States that failed to meet or exceed the federal statutes' requirements would forfeit their entitlement to federal funding. The Supreme Court deemed a similar plan constitutional in *South Dakota v. Dole*[62], where the Court held that conditions on federal funds are constitutional if they: (1) are enacted for the general welfare; (2) do not violate constitutional restrictions; (3) are unambiguous; (4) are reasonably related to the purpose of the expenditure; and (5) are not unduly coercive.[63]

Consistent with Gabel's analysis, I am persuaded that Congress still can leverage the states to adopt standards. This is so as long as no act of "commandeering" is committed, and this is likewise so despite the muscle that has been provided to the anti-commandeering doctrine in

---

[60] Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering*, SANTA CLARA LAW DIGITAL COMMONS (2012), available at http://digitalcommons.law.scu.edu/aca/334 .

[61] *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (U.S. 1981).

[62] *South Dakota v. Dole*, 107 S. Ct. 2793 (U.S. 1987).

[63] Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST LAW REVIEW 1083, 1133-34 (1999).

NFIB v. Sebelius. A congressional effort to impose workers' compensation standards, coupled with penalties for non-compliance, has little to do with the type of remarkable *spending* scheme that was proposed by the ACA – and forbidden, in part, by the *NFIB* court. States administer compensation programs, but the vast bulk of monies paid, in most states, are not federal tax revenues but insurance monies disbursed by private carriers or employers. There are simply no Medicaid–type monies to potentially withhold when regulating workers' compensation systems. And, indeed, the analysis of the state/federal relationship in *NFIB* was in reference to the *spending* clause of Article I, section 8. A federal standards bill would not be a spending bill in the sense of the ACA's Medicaid expansion.

In any event, federal programs have been upheld when non-complying states only suffer limited prejudice from withheld funds. This is the lesson of *South Dakota v. Dole*,[64] the precedent cited above by Gabel. There, the court upheld the constitutionality of a federal statute that withheld federal funds from states whose legal drinking age did not conform to federal policy. The statute withheld 5% of federal highway funding from states that did not maintain a minimum legal drinking age of twenty-one, and provided for the percentage *to rise* to 10% in 1988. In that case, the court ruled that the statute represented a valid use of congressional authority.

Additionally, a pivotal aspect of the *NFIB* court's application of the commandeering principle was its *contractual* analysis. States, the court indicated, had already agreed to cooperate with the Medicaid plan and had come to rely on the same. To now condition continued participation on expansion, lest *all* funds be withdrawn, was essentially a *breach* of contract.[65] This type of scenario does not apply when one considers introduction of federal standards in workers' compensation, which would obviously be *new*. Also, a federal standards law that allows a state an option to ignore the standards – with the upshot that federal coverage and benefits levels will apply by default – has not been commandeered into anything.

Finally, surely the precedent *Garcia v. San Antonio Metropolitan Transit Authority*[67] is authority for federal action in this area. There, the court held that a local public transit authority was not immune from the minimum wage and overtime requirements of the Fair Labor Standards Act, as nothing in those requirements could be discerned that destroyed state sovereignty or violated any constitutional provision.

Of course, Chief Justice Roberts' approach in *NFIB v. Sebelius* "has left constitutional scholars asking, "What just happened? And what does it mean?"[68] One answer is that the

---

[64] *See, e.g., South Dakota v. Dole*, 107 S. Ct. 2793 (U.S. 1987).

[65] *See* James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, CATO SUPREME COURT REVIEW 67 (2011-2012).

[67] *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (U.S. 1985).

[68] Mark Risk, *Okay, What Just Happened? Scholars React to Healthcare Decisio*n, LABOR AND EMPLOYMENT LAW, Vol. 40, p.1 (Summer 2012).

conditional spending approach of federal mandates has been called into question and may be subject to a new level of scrutiny. Still, it is difficult to conceive of how a court would apply the *NFIB* case to restrict a federal standards bill in the workers' compensation context.

B. Outright Preemption

This writer remains convinced, in any event, that Congress could completely preempt state workers' compensation laws by invocation of its Article I, Section 8 powers to legislate in the area of interstate commerce.

The *NFIB* decision, with its holding that the commerce power would not allow a federal mandate on individuals to purchase insurance, made a gesture towards limiting such power. Still, the case hardly overruled the renowned commerce clause decisions like *NLRB v. Jones & Laughlin Steel Corp*. (1937)[70]; and *Wickard v. Filburn* (1942),[71] which greatly increased Congress' power under the Commerce Clause. Indeed, the Fair Labor Standards Acts (FLSA)[72] and Occupational Safety and Health Act (OSHA)[73] are both broad enactments that were and are justified by this power.

The latest precedents, indeed, hold that Congress can regulate under the Commerce clause (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in the same; and (3) activities that have a substantial effect on interstate commerce.[75] Surely regulation of industrial injuries and insurance for the same fits the bill. As submitted in the preface of the 1979 Standards Act, "injuries, diseases, and deaths arising out of and in the course of employment, constitute a burden upon interstate commerce and have a substantial adverse effect upon the general welfare."[76]

---

[70] *NLRB v. Jones & Laughlin Steel Corp*., 57 S. Ct. 615 (U.S. 1937).

[71] *Wickard v. Filburn*, 63 S. Ct. 82 (U.S. 1942). There, in an effort to drive up the cost of wheat during the Great Depression, the federal government instituted caps on production of the same for farmers based on acreage. The plaintiff challenged the law because the wheat he was producing was used only for consumption on the farm. The wheat would never leave farm, much less the state. The court held that the law was valid and pertained to the plaintiff because his onsite wheat production impacted how much wheat the farmer buys – therefore it impacted interstate commerce.

[72] *See* 29 U.S.C. § 202(b) ("It is declared to be the policy of this chapter, *through the exercise by Congress of its power to regulate commerce among the several States* and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.") (emphasis added).

[73] *See* 29 CFR § 1975.2 ("The power of Congress to regulate employment conditions under the Williams-Steiger Occupational Safety and Health Act of 1970, is derived mainly from the Commerce Clause of the Constitution…. U.S. Constitution, Art. I, Sec. 8, Cl. 3….").

[75] *United States v. Lopez*, 115 S. Ct. 1624 (U.S. 1995).

[76] Section 2(a)(2) of the National Workers' Compensation Standards Act of 1979.

Stanford Professor Dauber, considering the *NFIB* court's limits on both conditional spending and commerce powers, suggests another constitutional basis supporting a federal workers' compensation law:

XI. Postscript: Federalization through the Backdoor? Opt-out State Plans Regulated by ERISA

The fact that employers in Texas can elect out of coverage[78] was much in the news during 2012. In March 2012, Wal-Mart dropped out of the system and indicated that it was switching to its own program.[79] In late April, meanwhile, the purported sure-thing of Oklahoma adopting an opt-out proviso, a move that would allegedly prompt "a wave of similar legislation in other states," failed in the State House.[80]

Wal-Mart and Target are large Texas employers who opt-out, and who provide alternative, ERISA-governed plans. According to analyst Jason Ohana, these plans can be termed alternative "occupational injury benefits." In 2008, 52% of non-subscribers, covering 82% of non-subscriber employees, provided such plans.

During the unsuccessful attempt in Oklahoma to adopt a markedly different opt-out program, some opponents sarcastically called the plan "Obamacomp," as any replacement program would be regulated by the federal, not the state, government. One news account characterized the Oklahoma plan as follows: "The measure would permit qualifying employers with at least one employee to offer an alternative plan to workers' compensation as long as medical and indemnity benefits are equal or superior to those mandated by workers' compensation statutes and the alternative plan complies with the Employee Retirement Income Security Act (ERISA)…." Those against the legislation, H.B. 2155, "attacked it as 'Obama Comp' and contend[ed] it would result in the 'federalization' of Oklahoma's workers'

> [T]he way forward [for federal legislation] is extremely clear[:] direct national … taxing and spending in the general welfare … has no such problem [as does conditional spending]. It has a long and untouchable constitutional pedigree … beginning with disaster relief and running through the [19th and 20th centuries]. There is no question that Congress can enact a single payer [health insurance program], or a national system of workers' compensation. The Supreme Court may have ironically pushed us in the direction of direct national programs with its restrictions on the Commerce and conditional spending powers ….[76]

E-mail, M. Dauber to the Author (Jan. 11, 2013).

[78] Jason Ohana, *Texas Elective Workers' Compensation: A Model of Innovation?*, 2 WILLIAM & MARY BUSINESS LAW REVIEW 323 (2011), available at http://scholarship.law.wm.edu/wmblr/vol2/iss2/5/.

[79] Becca Aaronson, *As Large Companies Opt Out, Concerns Grow for Workers' Compensation System*, New York Times (April 7, 2012), available at http://www.nytimes.com/2012/04/08/us/fears-grow-for-workers-compensation-system-as-large-texas-companies-opt-out.html.

[80] Thomas A. Robinson, *Oklahoma Opt Out Legislation Fails: A Post Mortem*, Lexis-Nexis Workers' Compensation Blog (May 2, 2012), available at http://www.lexisnexis.com/community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2012/05/02/oklahoma-opt-out-legislation-fails-a-post-mortem.aspx. At the beginning of the year, meanwhile, the Texas Supreme Court held that an employer that insures for workers' compensation, and hence has *opted in*, does so for *all* of its workers: "the employer may not split its workforce by electing coverage for some employees but not coverage for all." *Port Elevator-Brownsville, LLC v. Casados*, 2012 Tex. LEXIS 115 (Tex. 2012).

compensation system."[81]

Critics of this variety cast opting out as acquiescence in federalization of workers' compensation, "through the back door." The criticism seems highly rhetorical. ERISA, after all, does not oblige employers to provide health insurance to its employees, but only regulates the operation of such insurance plans if an employer chooses to establish the same. Likewise, the law does not oblige employers to provide employee pensions, but only regulates the same when they exist.

XII. Conclusion

A regime of federal standards would do much to enhance the purpose and performance of workers' compensation systems. It is indeed irrational for workers, resident in the various states, who suffer the same injuries, to be entitled to widely varying benefits. The "race to the bottom," meanwhile, is real and does not seem to have any positive attributes.

A federal takeover, on the other hand, would be an egregious turn in the wrong direction. Critics have persuasively argued that the unsatisfactory performance of the federal government running the Social Security Disability system bodes ill for any federal administration of workers' compensation.[82] Surely the botched roll-out and unsatisfactory administration of the Medicare Set Aside program must give everyone grave pause in seriously believing that the federal government would perform better than the states in administering workers' compensation.

Law professors Little, Eaton, and Smith, declare in their book that, although the details of workers' compensation laws "are being constantly adjusted, no proposal to repeal them or replace them with drastically different plans is likely to receive generous attention anywhere."[83] In 2011, meanwhile, when the Illinois legislature proposed retractive reform, and an opponent responded with a proposal to abolish the whole system, the measure was predictably, and properly, derided as a "crazy idea." "Crazier still," the critic noted, "is that the legislature is actually considering it."[84] (Of course, no such repeal unfolded.) These views speak loudly to the expectation of educated observers that state-based workers' compensation will endure and that federalization is unlikely.

---

[81] "OK Alternative Benefits Bill Awaits Vote, Opponents Call It 'Obama Comp'" (Apr. 26, 2012), available at http://wccop.wordpress.com/2012/04/26/state-ok-alternative-benefits-bill-awaits-vote-opponents-call-it-obama-comp/.

[82] *E.g.*, Comments of John F. Burton, Jr., Massachusetts Workers' Compensation Centennial Seminar, Boston, MA (Apr. 9, 2011).

[83] JOSEPH W. LITTLE, THOMAS A. EATON, AND GARY R. SMITH, CASES AND MATERIALS ON WORKERS' COMPENSATION, p. 72 (Thomson-West 5th ed. 2004).

[84] Roberto Ceniceros, *Abolish the Workers Compensation System*, Business Insurance (April 8, 2011), available at http://www.businessinsurance.com/article/20110408/BLOGS02/110409945 (last visited Feb. 12, 2012).

APPENDIX

ENFORCEMENT MECHANISMS
National Commission Report, pp. 127-28 (1972)

We believe that compliance of the States with these essential recommendations should be evaluated on July 1, 1975, and, if necessary, Congress with no further delay in the effective date should guarantee compliance.

We believe that the most desirable method to insure that each state program contains our essential recommendations would be to include these recommendations as mandates in Federal legislation, applicable to all employers specified by our essential recommendations.

Compliance with the mandates could be insured by two complementary methods. Any employer within the scope of the Federal legislation not already covered by a State workmen's compensation act would be required to elect coverage under the Act in an appropriate State. Also all employers affected by the Federal law would be required to insure or otherwise secure the mandated recommendations. Employer compliance with the election and security requirements of the Federal legislation would be assured by a penalty enforceable through lawsuits filed by the U.S. Attorney's office in the appropriate Federal District Court.

Most employers can be expected to comply voluntarily with the Federal mandates. For the remaining recalcitrant employers, the most common enforcement mechanism probably will involve suits by the U.S. Attorney's Office. There is a second mechanism that would rely on individual employee action. A workman would file his claim with his State workmen's compensation agency, which would be authorized by Federal law to make awards consistent with the Federal mandates. The workman and his employer would have the right to appeal issues concerning the mandates to the State courts, with an eventual right to appeal to the Federal courts on the compliance issue. Should the State workmen's compensation agency refuse to assist in the implementation of the Federal mandates, the employee would be entitled to sue his employer for payment in State or Federal courts. If he requests, he should have the assistance of the U.S. Attorney.

The enforcement methods we have recommended lack the attribute of instant intelligibility. Nonetheless, we believe they represent a workable solution to our desire to preserve workmen's compensation as essentially a State program while providing Federal assurance that injured workmen, no matter where they live, receive prompt, adequate, and equitable protection. For the vast majority or workers, the mandate approach we have recommended would affect only the substance, not the procedure, of their claims compared to the present program.

REFERENCES

Peter S. Barth, *Workers' Compensation Before and After 1983*, in *Workers' Compensation: Where Have We Come From? Where are We Going?* (R. Victor & L. Carruba, eds., 2010).

James R. Chelius, *Workplace Safety and Health: The Role of Workers' Compensation* (1977).

Michele Landis Dauber, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State* (University of Chicago Press 2012).

Price V. Fishback & Shawn E. Kantor, *A Prelude to the Welfare State: The Origins of Workers' Compensation* (University of Chicago Press 2000).

Christopher Howard, *The Welfare State Nobody Knows: Debunking Myths About U.S. Social Policy* (Princeton University Press 2007).

Arthur Larson, *Workers' Compensation* (Lexis Nexis Publishing 2000).

Nat'l Comm'n on State Workmen's Comp. Laws, *The Report of the National Commission on State Workers' Compensation Laws* (1972) (*available at* http://www.workerscompresources.com).

David L. Stebenne, *Modern Republican: Arthur Larson and the Eisenhower Years* (Indiana University Press. 2006).

***

Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 158 (March 2001).

Debra T. Ballen, *The Sleeper Issue in Health Care Reform: The Threat to Workers' Compensation*, 79 CORNELL LAW REVIEW 1291 (1994).

John F. Burton, Jr., *The National Commission on State Workers' Compensation Law: Some Reflections by the Former Chairman*, 40 IAIABC JOURNAL 15 (Fall 2003).

Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST LAW REVIEW 1083 (1999).

Christopher Howard, *Workers Compensation, Federalism, and the Heavy Hand of History*, Studies in American Political Development (2003), retrieved from http://www.ksg.harvard.edu/inequality/Seminar/Papers/Howard.PDF

Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering*, SANTA CLARA LAW DIGITAL COMMONS (2012), available at http://digitalcommons.law.scu.edu/aca/334

Elizabeth W. Malloy, *The Interaction of the ADA, the FMLA, and Workers' Compensation: Why Can't We be Friends?*, 41 BRANDEIS LAW JOURNAL 821 (Summer 2003).