

FLORIDA WORKERS' COMPENSATION ACT: THE UNCONSTITUTIONAL EROSION OF THE QUID PRO QUO

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Workers' compensation as a mechanism for compensating work-related injuries has regulated employee–employer relationships since the dawn of the twentieth century. Like the rapidly industrialized Europe that first bore the idea of workers' compensation, the United States owed the scheme's popularity to its trade-off, or quid pro quo, spirit. In exchange for certain medical benefits and protections from the loss of income, workers relinquished their rights to sue employers in tort, while employers paid regular premium payments in lieu of risking devastating effects of tort awards.

In 1935, Florida passed workers' compensation legislation that made the quid pro quo justification its central theme. At first, the scheme worked efficiently and furnished injured workers with the benefits it had been designed to deliver. As time passed, however, the workers' compensation legislation failed to keep up with legal developments and eventually lost its backbone. This Article is designed to expose deficiencies in the Florida workers' compensation scheme—as they relate to the Florida Workers' Compensation Act's “Exclusiveness of Liability” provision—and propose solutions to address them.

Part I of this Article will describe workers' compensation's path to recognition in the United States, while Part II will review its adoption in Florida. Part III will overview the 1970 legislative changes that permanently altered the character of the Florida Workers' Compensation Act (FWCA or the Act) by barring injured workers from recovery in tort and making the Act an exclusive remedy. Part IV will explain how these

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legislative amendments fail to support the archaic rationale behind the workers' compensation scheme in light of the recent Florida tort law developments. Part V will review the constitutionality of the FWCA—with a concentration on the right of court access—under the *Kluger* paradigm.¹ And finally, Part VI of this Article will propose solutions to mend the exposed statutory deficiencies.

I. BACKGROUND

The workers' compensation system, as the scheme for compensating work-related injuries, is a seed that germinated in the accident-disposed Europe during the Industrial Revolution of the late 1800s.² The onward-moving technological progress, which both figuratively and literally speaking was costing an arm and a leg, created the urgent need to decrease the rate of commonplace debilitating injuries to factory workers.³ Germany and England were first to respond by pioneering programs that strove to address the alarming industrial accident statistics.⁴ At minimum, these primeval programs operated to fund medical care of the affected laborers and reimburse them for the loss of income during recovery.⁵

The United States was slow to sell on the idea of workers' compensation.⁶ At the turn of the twentieth century, however, the sentiment toward the statutory scheme shifted. The increased number of serious and fatal occupational accidents,⁷ rising public awareness of such industrial accidents,⁸ and employers' growing liability concerns⁹

1. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973); see *infra* Part V(A) (discussing the *Kluger* test and its application to the context of workers' compensation).

2. Timothy A. Watson & Michael J. Valen, *A Historic Review of Workers' Compensation Reform in Florida*, 21 FLA. ST. U. L. REV. 501, 502 (1993).

3. *Id.*

4. *Id.* The 1884 German workers' compensation model built injury compensation into a larger benefits package (health insurance, geriatric, and invalidity care), paid for by employers. *Id.* The less generous 1897 British model limited benefits delivery to cases of employer negligence. *Id.* Employers were thus insulated from liability arising from accidents caused by fellow employees. *Id.*

5. *Id.*

6. *Id.*; see also Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 315 (1998) (stating that the American workers' compensation movement began in 1898 with the rejection of a New York compensation bill, fashioned upon the British model, as “too radical to pass” (internal quotation marks omitted)).

7. Fishback & Kantor, *supra* note 6, at 315. The accident risk in the industrial sector had risen due to a shift in employment toward more dangerous jobs. *Id.* at 315 n.24.

8. *Id.* at 315. State labor departments, which had witnessed an increase in budget allocated to addressing labor issues, revamped their accident reporting methods. *Id.* at 316, 317 tbl.1. As a result, the reported—hence perceived—level of accident risk increased. *Id.* at 316.

9. *Id.* at 315. State employer liability laws limited the number of available defenses for non-railroad accidents (interstate railroad accidents fell under the realm of the Federal Employers'

facilitated the broader acceptance of the notion of workers' compensation. Soon, the first workmen's compensation laws, which mostly embraced the British paradigm,¹⁰ started to crop up. The State of New York led the way.¹¹

Still, not everyone accepted the statutory scheme with arms wide-open, and constitutional challenges poured in. For instance, in *Ives v. South Buffalo Ry. Co.*,¹² a seminal workers' compensation case, the issue before the court was whether Article 14-a of the Labor Law,¹³ which dealt with workers' compensation in certain dangerous employments, constituted an unconstitutional taking of property.¹⁴ In its opinion, New York's highest court contrasted the "plainly revolutionary"¹⁵ statute with the common-law expectation that "the employer [was] liable for injuries to his [employee] only when the employer [was] guilty of some act . . . of negligence which caused the occurrence out of which the injuries [arose], and then only when the [employee was] shown to be free from any negligence which contribut[ed] to the occurrence."¹⁶ Not surprisingly, the court perceived the novel idea of employer liability regardless of fault—except when employee engaged in egregious and willful misconduct—too radical.¹⁷ Consequently, it rejected the law as unconstitutional.¹⁸

Liability Act of 1906 and 1908). *Id.* at 316 & n.27. Further, courts reworked some common law employer defenses, which further diluted certainty in the negligence system. *Id.* at 316 & n.28. For instance, the adopted "vice-principal exception to the fellow servant rule" exempted supervisory and managerial employees from that category "for purposes of employer liability" and precluded employers from delegating their responsibility to provide a reasonably safe workplace to the injured worker's fellow employees. Paul Raymond Gurtler, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 13 WORKERS' COMP. L. REV. 127, 129 (1990) (internal quotation marks omitted). Finally, workplace accident litigation had more than tripled in number from 1900–1911. Fishback & Kantor, *supra* note 6, at 316–17.

10. Washington and Ohio were the only states that embraced the German model. Watson & Valen, *supra* note 2, at 502–03.

11. New York was the first state to adopt a workers' compensation law in 1910. Fishback & Kantor, *supra* note 6, at 320 tbl.2. California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington, and Wisconsin followed in 1911; Maryland, Michigan, and Rhode Island joined the next year. *Id.*

12. 94 N.E. 431 (N.Y. 1911).

13. 1910 N.Y. Laws 1945, 1945–51 (ch. 674, art. 14-a).

14. *Ives*, 94 N.E. at 433 ("The question presented upon this appeal is whether [the statute] is repugnant to any of the provisions of the federal and state Constitutions . . .").

15. *Id.* at 436.

16. *Id.*; see also Fishback & Kantor, *supra* note 6, at 308–09 (discussing the legal obligation of accident compensation, grounded in the law of negligence; the burden of proof; and defenses available to the employer).

17. See *Ives*, 94 N.E. at 436 (contrasting the legislation with the common law rule and finding it too radical).

18. *Id.* at 441, 448 ("[T]he right given to the [employee] by this statute does not preserve to the employer the due process of law guaranteed by the Constitutions, for it authorizes the taking of the employer's property without his consent and without his fault. . . . [T]he liability sought to be imposed upon the employers . . . is a taking of property without due process of law, and the statute is therefore void." (citations and quotation marks omitted)). In an ironic twist of fate, only a day

As the efficacy and need for workers' compensation laws were growing more obvious, subsequent constitutional challenges became less successful.¹⁹ The year 1917 marked a critical point for the no-fault system's future. On March 6, 1917, the United States Supreme Court decided a trio of workers' compensation cases, upholding both the voluntary and compulsory types of the compensation scheme.²⁰ These decisions effectively cemented workers' compensation's standing as "one of the great success stories in social reform legislation" of the early twentieth century.²¹

Indeed, the initial zeal of constitutional challenges chilled, while the guarded acceptance of the workers' compensation idea began to take hold. The system started to gain popularity because it endeavored to reconcile two competing interests—those of employers and employees—and achieve a middle-ground compromise.²² At the heart of workers' compensation lay the idea of trading off employers' limited scope of tort liability for a limited quantum of liability under workers' compensation, and relinquishing employees' greater chances at tort recovery for an

after the court of appeals' decision, on March 25, 1911, one of New York's deadliest fires broke out in the Triangle Shirtwaist Company building, claimed lives of nearly 150 factory workers, and inevitably sparked the national debate on the utility of workers' compensation laws. See Mary L. D'Agostino, *New York State's 2007 Workers' Compensation Reform: Success or Failure?*, 76 ALB. L. REV. 367, 373–78 (2013) (listing hazardous labor conditions that contributed to the Triangle Shirtwaist disaster: missing fire extinguishers, lack of fire drill training, overcrowding, chained-up egress doors, and piles of flammable scrap fabric).

19. See, e.g., *Mackin v. Detroit-Timkin Axle Co.*, 153 N.W. 49, 53 (Mich. 1915) ("No constitutional provision is pointed out which prohibits the Legislature . . . from adopting a rule of conclusive presumption . . . [that an employee, who has] failed to give notice . . . [of proceeding under common law, is deemed] to have elected his remedy under the Workmen's Compensation Law."); *Matheson v. Minneapolis St. Ry. Co.*, 148 N.W. 71, 76 (Minn. 1914) ("A careful examination of the entire [workmen's compensation] act satisfies us that it contains nothing prohibited by either the state or federal Constitution.").

20. *Mountain Timber Co. v. Wash.*, 243 U.S. 219, 243, 246 (1917) ("We are clearly of the opinion that a State, in the exercise of its power to pass . . . legislation . . . to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power . . . [or] loss of life . . . , and may require that these human losses shall be charged against the industry. . . . We are unable to find that the [Washington workmen's compensation] act . . . is in conflict with the Fourteenth Amendment." (emphasis added) (citations omitted)); *Hawkins v. Bleakly*, 243 U.S. 210, 219 (1917) (upholding the Iowa Workmen's Compensation Act against the Fourteenth Amendment challenges); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 208 (1917) ("We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment.").

21. Steven M. Ingram, *Taking Liberties with Lochner: The Supreme Court, Workmen's Compensation, and the Struggle to Define Liberty in the Progressive Era*, 82 OR. L. REV. 779, 785–86 (2003).

22. See Ellen R. Peirce & Terry Morehead Dworkin, *Workers' Compensation and Occupational Disease: A Return to Original Intent*, 67 OR. L. REV. 649, 653 (1988) ("The legal theory most often used to describe the rationale for the workers' compensation system is the social compromise theory, providing that both employers and employees gained and lost rights when workers' compensation replaced employers' tort liability.").

efficient and assured delivery of benefits.²³ The trade-off idea appealed to employees of the early twentieth century because the tort system was at the time notoriously “inhospitable to the claims of injured, destitute workers.”²⁴

The reason for inhospitality lay with a damning “unholy trinity” of defenses available to the employer to defend in a suit against the injured worker.²⁵ The first “unholy” defense—contributory negligence—precluded recovery if the worker was partly negligent in any degree, regardless of the employer’s negligence.²⁶ The second defense—assumption of risk—presumed that if a worker could avoid a hazardous work area, regardless of whether he knew of or foresaw the hazard, he had no standing to sue in the case injury occurred.²⁷ Finally, the fellow servant rule insulated an employer from liability to an injured employee if negligence of a fellow employee caused the physical harm.²⁸ The employee’s sole cause of action hinged on the employer’s negligence.²⁹ Not surprisingly, the employee, who carried the burden of proof,³⁰ rarely came out a winner.³¹ To make things worse, the employee had to cover out-of-pocket, sizeable attorneys’ fees and legal costs, and endured court delays.³² In the face of such adversity, the chances of the employee’s recovery stretched thin;³³ in fact, the odds of a successful outcome for the

23. Theodore F. Haas, *On Reintegrating Workers’ Compensation and Employers’ Liability*, 21 GA. L. REV. 843, 857–58 (1987).

24. *Id.* at 858–59.

25. *Id.* at 859. Legal commentators coined the term “unholy trinity” to refer to the three common law defenses—contributory negligence, assumption of risk, and the fellow servant rule—cumulatively. *E.g.*, W. PAGE KEETON, PROSSER & KEETON ON TORTS § 80, 569 (5th ed. 1984) (“The possibility of the injured worker’s recovery . . . was restricted . . . by the ‘unholy trinity’ of common law defenses—contributory negligence, assumption of risk, and the fellow servant rule.”).

26. Gurtler, *supra* note 9, at 128.

27. *Id.* at 128–29.

28. *Id.* at 128.

29. *Id.*

30. The finding of negligence could be sustained only if the employer failed “to provide reasonably safe machines, equipment, or appliances in the workplace.” *Id.*

31. Haas, *supra* note 23, at 859. Studies by state employer liability commissions uncovered that a great number of injured workers never received compensation under the scheme in existence before workers’ compensation laws. Ann Clayton, *Workers’ Compensation: A Background for Social Security Professionals*, U.S. SOC. SEC. ADMIN., OFF. POL’Y (2004), <http://ssa.gov/policy/docs/ssb/v65n4/v65n4p7.html>. “In samples of fatal accidents, about half the families of victims of fatal accidents received some payments . . . [which averaged] about [one] year’s income.” *Id.* In a handful of cases, injured workers or their families received large compensation sums; yet, in far more cases, no moneys were paid at all. *Id.*

32. William Kenneth C. Dippel & Robert L. Green, *The Interaction of Workers’ Compensation and Comparative Negligence—Conflicts, Alternatives, and Compromise*, 9 WORKMEN’S COMP. L. REV. 676, 682 (1986).

33. C. ARTHUR WILLIAMS, JR. & PETER S. BARTH, COMPENDIUM ON WORKMEN’S COMPENSATION 11 (Marcus Rosenblum ed., 1973). The employee was absolutely remediless in eighty-three percent of all cases. Arthur Larson, *The Nature and Origins of Workmen’s Compensation*, 37

worker were “virtually insurmountable.”³⁴ As a result, economic considerations often drove the injured employees to settle for considerably less than the actual value of the sustained damages.³⁵

With such an imbalanced distribution of rights in the backdrop, the workers’ compensation system seemed like a good fit. By 1948, all forty-eight states and the territories of Alaska and Hawaii had adopted workers’ compensation laws.³⁶

II. FLORIDA WORKERS’ COMPENSATION ACT: THE BEGINNING

Florida passed its first workers’ compensation legislation, titled “Florida Workmen’s Compensation Act,” on May 25, 1935.³⁷ The Act became effective on July 1, 1935.³⁸ The Florida Legislature did not incorporate the “legislative intent” language into the workers’ compensation statute,³⁹ but it envisioned that “every employer and every employee, unless otherwise specifically provided, . . . be presumed to have accepted the . . . Act, respectively to pay and accept compensation for injury or death, arising out of and in the course of employment, and . . . be bound thereby, unless [prior notice to the contrary is given].”⁴⁰ Although the Legislature intended to streamline most work-related

CORNELL L.Q. 206, 225 (1952). This number was based on 1907 German figures that featured the most relevant breakdown by “fault” causes of accidents. *Id.* at 224 n.41.

34. Gurtler, *supra* note 9, at 128.

35. Dippel & Green, *supra* note 32, at 682.

36. *Gordon v. Burgess Const. Co.*, 425 P.2d 602, 603 (Alaska 1967) (stating that the Alaska Territorial Legislature enacted Alaska’s first workers’ compensation law in 1915); Fishback & Kantor, *supra* note 6, at 320 tbl.2 (listing the years in which all states, except Alaska and Hawaii, first adopted workers’ compensation laws); Amanda M. Jones, Note, *Hawai’i’s Workers’ Compensation Scheme: An Employer’s License to Kill?*, 29 U. HAW. L. REV. 211, 216 (2006) (stating that the Territory of Hawaii adopted the first workers’ compensation law in 1915) (citing *Workmen’s Compensation Act*, No. 221, § 1 (1915) (reprinted in 1915 Haw. Sess. Laws 323)).

37. 1935 Fla. Laws 1456, 1456, 1494. The Legislature would eventually re-designate the Chapter to read “Workers’ Compensation Law” in place of “Workmen’s Compensation Law.” FLA. STAT. § 440.01 (1979) (“This Chapter may be cited as the Workers’ Compensation Law.” (internal quotation marks omitted)).

38. 1935 Fla. Laws at 1494.

39. The statement of intent was incorporated into the statute at a later time. *See, e.g.*, FLA. STAT. § 440.015 (2014) (“It is the intent of the Legislature that the Workers’ Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer. . . . The workers’ compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike.”); *see also* *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla. 1989) (“Florida’s worker’s compensation program was established for a twofold reason: (1) to see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents.”).

40. 1935 Fla. Laws at 1460.

injuries down the workers' compensation pipeline, an employee could opt out by giving notice prior to the injury in accordance with the procedures specified in the pertinent Section of the 1935 Act.⁴¹ In other words, the scheme was elective in nature.⁴² Conversely, if the non-acceptance notice was not furnished, the Act intended to operate—through the “Exclusiveness of Liability” provision⁴³—as the sole remaining remedy.

Although the Legislature provided a backdoor escape from the voluntary workers' compensation coverage, the Act included deterrents from opting out. While an employer was free to exempt his business endeavor from the Act, if sued for damages over a work-related injury or death, he was barred from invoking the common law defenses of assumption of risk, contributory negligence, and the fellow servant rule.⁴⁴ Likewise, while an employee was free to reject the Act, if suing a covered employer in an action for damages that resulted from a work-related injury or death, an employee ran the risk of facing the “unholy trinity.”⁴⁵ Similarly, when *both* an employer and an employee elected to exempt themselves from the Act's coverage, the Act deprived the employer of the three defenses.⁴⁶ Further, every employer who opted out of the Act was liable for the payment to his employees of the compensation determined due under Sections 13 (“Medical Service and Supplies”), 15 (“Compensation for Disability”), and 16 (“Compensation for Death”) of the Act.⁴⁷ In most cases, such compensation was due irrespective of fault as to the cause of injury.⁴⁸ Evidently, the Legislature played its cards right

41. To properly furnish a notice of non-acceptance, the 1935 Act required an employee to deliver, or send by mail, to the employer a notice to such effect in a form prescribed by the Commission, and file a duplicate of the notice with the Commission. *Id.* Such notice had to be given thirty days prior to any injury, provided that, if the injury occurred within the thirty days after the commencement of employment, a notice given at the time of the hire would suffice. *Id.* at 1461.

42. LEO M. ALPERT, *FLORIDA WORKMEN'S COMPENSATION LAW* § 2:2 (1966).

43. According to the “Exclusiveness of Liability” provision:

The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . [or] anyone [else] otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation[,] . . . an injured employee, or his legal representative, . . . may elect . . . to maintain an action at law or in admiralty for damages on account of such injury or death.

1935 Fla. Laws at 1462–63.

44. *Id.* at 1461.

45. *Id.*

46. *Id.*

47. *Id.* at 1462.

48. *Id.* Section 10(b) exempted the employer from the no-fault compensation if the injury to the employee resulted from his own intoxication, from his willful intention to injure or kill himself or another, or from his refusal to use prescribed safety appliances or perform statutory duties. *Id.*

by conditioning the employer's and employee's choice to waive workers' compensation on the unavailability—or availability, respectively—of the common law defense trifecta. En masse, the Act's statutory provisions operated as intended, and the incentives to forego workers' compensation remained few.

In over three-quarters of a century in the Florida no-fault system's history,⁴⁹ many constitutional challenges to the Act have arisen. The three main arguments have invariably implicated the rights to equal protection,⁵⁰ due process,⁵¹ and “[a]ccess to courts.”⁵² Almost just as invariably, they have failed.⁵³ The statute, at least in part, owes its longevity to the well-accepted quid pro quo justification.⁵⁴ Just as importantly, rational basis review, the lowest level of scrutiny that the judiciary may apply and one used in workers' compensation cases,⁵⁵ continues to ensure that the governmental rationale passes constitutional tests. But even when viewed through the least scrutinizing prism of judicial review, at some point in time, the quid pro quo justification may be thrown out of balance.

49. Currently, Chapter 440 of the Florida Statutes contains the Florida workers' compensation laws. FLA. STAT. §§ 440.01–440.60 (2014).

50. FLA. CONST. art. I, § 2 (“All natural persons, female and male alike, are equal before the law . . .”).

51. *Id.* art. I, § 9 (“No person shall be deprived of . . . property without due process of law . . .”).

52. *Id.* art. I, § 21 (“The courts shall be open to every person for redress of any injury . . .”).

53. See, e.g., *Mahoney v. Sears, Roebuck & Co.*, 440 So. 2d 1285, 1286 (Fla. 1983) (holding the statute constitutional under the access to the courts challenge even though the \$1,200 payment for a partial eyesight loss might have appeared “inadequate and unfair”); *Carter v. Sims Crane Serv., Inc.*, 198 So. 2d 25, 28 (Fla. 1967) (finding that the Act did not violate the subcontractor's due process rights when it deprived him of the common law remedy against another subcontractor under the same general contract); *Berman v. Dillard's*, 91 So. 3d 875, 876–78 (Fla. 1st Dist. Ct. App. 2012) (concluding that the Act's provision requiring that permanent total disability benefits not exceed five years if the compensable injury occurred after the employee reached seventy years of age did not violate the claimant's right to court access), *reh'g denied* (July 18, 2012), *review denied*, 108 So. 3d 654 (Fla. 2012) (table); *Rucker v. City of Ocala*, 684 So. 2d 836, 840–43 (Fla. 1st Dist. Ct. App. 1996) (holding that the Act, in preventing the claimant from introducing independent medical testimony by a chiropractor who was not an “authorized treating provider,” did not violate claimant's due process rights); *Brownell v. Hillsborough Cnty.*, 617 So. 2d 803, 805 (Fla. 1st Dist. Ct. App. 1993) (finding no equal protection violation under the FWCA that entitled a claimant who had sustained an amputation of one leg to a special impairment benefit, unrelated to his actual loss of wage-earning capacity, yet deprived a claimant who had suffered a loss of both legs of such impairment benefit); *Radney v. Edwards*, 424 So. 2d 956, 957 (Fla. 1st Dist. Ct. App. 1983) (excluding small private employers from the mandatory Act's provisions did not constitute “constitutionally infirm” discriminatory treatment); *Noel v. M. Ecker & Co.*, 422 So. 2d 1062, 1063 (Fla. 1st Dist. Ct. App. 1982) (concluding that a denial of benefits to the claimant for a partial hearing loss under the 1979 amendments to the Act did not violate equal protection on the ground that it would have been compensable under the 1977 version of the Act).

54. See *supra* notes 23–35 and accompanying text (describing *supra* the quid pro quo justification underlying the workers' compensation scheme).

55. See, e.g., *Bradley v. Hurricane Rest. & Associated Indus. of Fla. Prop. & Cas. Trust*, 670 So. 2d 162, 165 (Fla. 1st Dist. Ct. App. 1996) (“The rational basis test is the proper standard by which to review the claimant's equal protection and due process challenges.”).

III. OPTING OUT IS NOT AN OPTION

The scales of justice first started to tip toward unconstitutionality in 1970 when the Florida Legislature amended the Workers' Compensation Act⁵⁶ by adopting eleven amendments and repealing three subsections.⁵⁷ The cumulative effect of these changes was to prevent employees and employers covered by the Act from opting out of its provisions.⁵⁸ A comparison between the 1969 and 1970 statutes illustrates this point.

Before the 1970 amendments, Section 440.03, which mirrored the statutory language as originally in effect, provided:

Every employer and every employee, unless otherwise specifically provided, shall be presumed to have accepted the provisions of this chapter, respectively to pay and accept compensation for injury or death, arising out of and in the course of employment, and shall be bound thereby, *unless he shall have given prior to the injury, notice to the contrary* as provided in [Section] 440.05.⁵⁹

On the other hand, after the 1970 legislative amendments, Section 440.03 succinctly read: "Every employer and employee . . . shall be bound by the provisions of this chapter."⁶⁰ The Legislature thus dropped the option of waiving coverage under the Act through the notice provision.

Next, before 1970, both the employer and employee could exempt themselves from operation under the comprehensive statutory scheme by following the enumerated procedures.⁶¹ After the amendment, Section

56. See *infra* notes 59–69 and accompanying text (outlining the 1970 legislative amendments to the workers' compensation law).

57. Edward Schroll, *Workmen's Compensation*, 26 U. MIAMI L. REV. 387, 387 (1972).

58. *Id.* The compulsory coverage took effect on September 1, 1970. *Id.*

59. FLA. STAT. § 440.03 (1969) (emphasis added).

60. FLA. STAT. § 440.03 (Supp. 1970).

61. The procedures to follow were as follows:

(1) Every employer who elects not to accept the provisions of this chapter . . . , shall post and keep posted in a conspicuous place or places in and about his place or places of business typewritten or printed notices to such effect in accordance with a form to be prescribed by the division. He shall file a duplicate of such notice with the division.

(2) Every employee who elects not to accept the provisions of this chapter . . . , shall deliver to the employer or shall send to him by mail addressed to him at his office, notice to such effect in accordance with a form to be prescribed by the division. He shall file a duplicate of such notice with the division.

(3) Such notice shall be given thirty days prior to any injury, provided, however, that if the injury occurs less than thirty days after the date of employment, such notice given at the time of employment shall be sufficient notice.

440.05 omitted the instructions on appropriate procedures to formally opt out of the workers' compensation scheme.⁶²

Further, before 1970, Section 440.06 provided that an employer who opted out of the coverage by following Section 440.05's procedures, waived the defenses of fellow servant rule, assumption of risk, and contributory negligence in an action brought by an employee to recover damages resulting from injury or death.⁶³ Similarly, an employee, not covered by Chapter 440, who brought an action to recover damages that accumulated from a work-related injury or death against his Chapter 440-covered employer, ran the risk of facing the "unholy trinity" of defenses.⁶⁴ In case neither elected to operate under the Workers' Compensation Act, the employer could not avail itself of the "unholy" trio of the common law defenses.⁶⁵

Despite the 1970 amendments, the language of Section 440.06 remained the same. However, in comparison with the 1969 statutes, the effect of unavailability to the employer of the fellow servant, assumption of risk, and contributory negligence defenses was generated by the employer's *failure to secure compensation*—not by the *rejection of the coverage*.⁶⁶ To illustrate, the Section title, as contained in the 1969 statutes, read: "When employer rejects chapter; effect."⁶⁷ By contrast, the 1970 Section title, which read "Failure to secure compensation,"⁶⁸ represented that rejecting the Chapter was no longer a viable option. Further, because employers and employees could no longer decline the mandatory coverage, Sections 440.07 and 440.08 were repealed.⁶⁹

After the 1970 amendments, the only route to seek compensation for work-related physical, mental, and financial injuries was through Chapter 440's "Exclusiveness of liability" provision.⁷⁰ This time around, Section 440.11, which read that "[t]he liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee,"⁷¹ *really* meant what it preached. The 1971 Legislature further reinforced the message by denouncing any agreements by the employee

62. FLA. STAT. § 440.05 (Supp. 1970).

63. FLA. STAT. § 440.06 (1969).

64. *Id.* § 440.07.

65. *Id.* § 440.08.

66. FLA. STAT. § 440.06 (Supp. 1970).

67. FLA. STAT. § 440.06 (1969).

68. FLA. STAT. § 440.06 (Supp. 1970).

69. *Id.* §§ 440.07–440.08 (explaining that the Sections were repealed by Chapter 70-148, Section 4 of the 1970 Laws (1970 Fla. Laws 499, 500)).

70. *Id.* § 440.11.

71. *Id.*

to waive his rights under the FWCA as invalid.⁷² En masse, the cumulative effect of these legislative changes was to provide that employees and employers covered by the Act could no longer opt out of its provisions. As such, the Act steadily began on its path to unconstitutionality.

IV. THE “UNHOLY TRINITY’S” TRIPLE DEFEAT

For nearly eighty years, the Florida Legislature and courts have dangled the “unholy trinity” of defenses before the worker’s eyes as justification for workers’ compensation laws.⁷³ Little by little, however, the original sting from contributory negligence, assumption of risk, and the fellow servant defenses has worn off as Florida tort law has evolved. In light of certain judicial and legislative choices, the scales of justice have further tipped out of balance and gravitated toward unconstitutionality.

A. *Hoffman v. Jones* and the Birth of Comparative Negligence

*Hoffman v. Jones*⁷⁴ is a critical Florida Supreme Court decision that changed the face of Florida tort law. In *Hoffman II*, the highest court dealt with the “question of great public interest,” certified by the District Court of Appeal for the Fourth District, of “[w]hether or not the Court should replace the contributory negligence rule with the principles of comparative negligence.”⁷⁵ The case dealt with a car–truck collision that caused the death of William H. Jones, Jr.⁷⁶ The trial court consolidated two separate wrongful death suits: one was brought by Mr. Jones’s widow in her individual capacity, and the other one in her capacity as the administratrix of her deceased husband’s estate.⁷⁷ Mrs. Jones asserted negligence by alleging that defendant Hoffman had carelessly operated a truck owned by co-defendant Pav-A-Way Corporation and caused the

72. FLA. STAT. § 440.21(2) (1971) (“No agreement by an employee to waive his right to compensation under this chapter shall be valid.”); Schroll, *supra* note 57, at 387–88.

73. See, e.g., *Grice v. Suwannee Lumber Mfg. Co.*, 113 So. 2d 742, 746 (Fla. 1st Dist. Ct. App. 1959) (“[A]n employee is privileged to reject the Act in the manner provided therein. By so doing, he is left free to pursue his common law remedies and recover every element of damage suffered by him from an injury arising out of and in the course of his employment. In such a suit, however, he . . . must . . . be prepared to meet and overcome the common law defenses of contributory negligence, assumption of risk[,] and the fellow servant rule.” (footnote omitted)); see also *supra* notes 23–35 and 43–46 and accompanying text (describing the quid pro quo justification to the workers’ compensation scheme and its effect on employees’ and employers’ decision to opt out of the scheme).

74. 280 So. 2d 431 (Fla. 1973) (*Hoffman II*).

75. *Id.* at 433 (internal quotation marks omitted).

76. *Jones v. Hoffman*, 272 So. 2d 529, 529 (Fla. 4th Dist. Ct. App. 1973) (*Hoffman I*). The party names were reversed on appeal.

77. *Id.* at 529–30.

deadly accident.⁷⁸ The defendants denied the allegations and mounted the affirmative defense of contributory negligence.⁷⁹ In contrast, Mrs. Jones pleaded with the trial court to allow a jury instruction grounded in the concept of comparative negligence of the parties.⁸⁰ The court rejected Mrs. Jones's request, and the jury found for the defendants.⁸¹

On appeal, the Fourth District reversed the lower court's holding,⁸² finding that it was based on the vintage precedent of *Louisville & Nashville R.R. Co. v. Yniestra*.⁸³ The Florida Supreme Court, having first pondered its authority to reverse the time-honored common law precedent,⁸⁴ ultimately adopted the principle of comparative negligence.⁸⁵ The court commented:

The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

. . .

In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.⁸⁶

78. *Id.* at 530.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 533.

83. 21 Fla. 700, 701 (1886) (“[A] person may be guilty of a negligent act from which injury results to another, yet if the person injured . . . by his own act . . . contributed to said injury, he cannot recover damages resulting therefrom.” (emphasis added)).

84. *Hoffman II*, 280 So. 2d 431, 434 (Fla. 1973). The court evidently became satisfied that reversing common law is not solely in the province of the Legislature. *Id.* The *Hoffman II* court further noted, “Even if it be said that the present bar of contributory negligence is a part of our common law by virtue of prior judicial decision, it is also true . . . that this Court may change the rule where great social upheaval dictates.” *Id.* at 435.

85. *Id.* at 438 (“[W]e now hold that a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence.”).

86. *Id.* at 436, 438 (citations and quotation marks omitted).

Of course, *Hoffman II* was a wrongful death case. Yet, its implications were far-reaching for the workplace context. To understand the decision's effect, one needs to: (1) reflect on Florida's injured worker's chances at recovery during the pre-workers' compensation era; (2) examine the workers' compensation scheme's role in mitigating the harshness of the ante-1935 contributory negligence doctrine; and (3) evaluate the utility of the FWCA exclusive remedy in the post-*Hoffman II* era.

During the pre-workers' compensation era, an employee was unlikely to prevail in a tort action if he or she was not perfectly fault-free. *Fitzsimmons v. A.J. Cesery & Co.*,⁸⁷ for instance, illustrates the operation of contributory negligence. In *Fitzsimmons*, the plaintiff was directed to work on a scaffold, from which he fell to the ground and received injuries to his shoulder.⁸⁸ The plaintiff brought action against his employer alleging that it "carelessly and negligently failed to provide a safe place for plaintiff to stand while performing . . . work."⁸⁹ In its defense, the employer pled, inter alia, contributory negligence.⁹⁰ The Florida Supreme Court articulated the definition of the doctrine as follows:

If an [employee] negligently fails to exercise ordinary care for his safety, he cannot in general recover damages for an injury caused by his negligence. Under the common law, a plaintiff *cannot recover* damages for injury to himself caused by the negligence of another *if he has in any appreciable way contributed to the proximate cause of the injury*. The rule has not been changed in this state in this class of cases.⁹¹

In interpretation of Section 3150 of the General Statutes of 1906, as it applied to railroad workers, Florida's highest court, in *Florida E. Coast Ry. Co. v. Lassiter*,⁹² recited the doctrine in an analogous fashion:

[U]nder our statute, authorizing recovery by an [employee] of a railroad company of damages for injury received by the running of its

87. 55 So. 465 (Fla. 1911).

88. *Id.* at 466.

89. *Id.* (internal quotation marks omitted).

90. *Id.*

91. *Id.* at 467 (emphasis added) (citing *German-Am. Lumber Co. v. Hannah*, 53 So. 516, 517 (Fla. 1910)).

92. 50 So. 428 (Fla. 1909). The pertinent provision read:

"If any person [who is an employee of a railroad company] is injured by [the] railroad company by the running of . . . machinery of such company, . . . and the damage was caused by negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery."

Id. at 428–29 (quoting Section 3150 of the 1906 Florida laws (1906 Fla. Laws 1197, 1199)).

locomotives, cars, or other machinery through the negligence of a [co-employee] . . . , the injured [employee], in order to recover, must himself be entirely free from fault or negligence. He must do nothing to contribute to his injury. . . . *Any negligence of the plaintiff in such a case, however slight, that contributes in an appreciable degree to the cause of the injury, defeats a recovery.*⁹³

These two cases plainly demonstrate that the absolute defense of contributory negligence barred any recovery if the plaintiff contributed to his plight. Not surprisingly, plaintiffs welcomed a workers' compensation system that offered a much greater certainty of a favorable outcome.

Arguably, this favorable sentiment toward workers' compensation lasted in Florida from 1935, when the Act was first adopted, until the 1973 *Hoffman II* decision. The no-fault mechanism symbolized a transition from meager chances of recovery to growing amounts of compensation. Before the Act was enacted, Florida, following the nation's trends, offered little relief in tort.⁹⁴ In comparison, the enactment of the Act mitigated the harshness of the ante-1935 contributory negligence effects. With the statutory scheme in place, recovery became nearly certain, regardless of whether an employee contributed to his injury. In 1940, workers' compensation payments in Florida amounted to \$1,880,000;⁹⁵ by 1955, the payments had multiplied to \$18,011,000;⁹⁶ and by 1962, the number had risen to \$39,058,000.⁹⁷ Further, the Act provided the employee with many benefits in addition to compensation for lost wages, which enhanced the post-injury subsistence. Such benefits included medical benefits; hospital benefits; nursing benefits; prosthetic and other appliance benefits; and in the case of death, death benefits.⁹⁸ So in a sense, the Act did operate as a much-wished-for alternative to contributory negligence and its harsher treatment of workers.

93. *Id.* at 431 (emphasis added).

94. *See, e.g.*, *Goethe-Howell Lumber Co. v. Stokes*, 127 So. 862, 862 (Fla. 1930) ("The common-law doctrine of contributory negligence . . . is in force in this state, and where an employee is guilty of negligence which contributes proximately to his injury[,] he cannot hold the master liable for such injury . . ."); *Carter v. J. Ray Arnold Lumber Co.*, 91 So. 893, 895 (Fla. 1922) ("At common law, contributory negligence bars a recovery of damages for a negligent injury . . ."); *Coronet Phosphate Co. v. Jackson*, 61 So. 318, 319 (Fla. 1913) ("[W]e do not think that the plaintiff can in law hold the defendant company liable for his injuries . . . [b]ecause of his own contributory negligence in wantonly picking up a live wire without first ascertaining whether or not it was charged with electric current . . ."); *see also supra* notes 87-93 and accompanying text (providing examples of how contributory negligence barred plaintiffs' recovery in tort).

95. ALPERT, *supra* note 42, at § 1:3 tbl.411. From this data, however, it is impossible to ascertain how much compensation was attributable to the plaintiffs who would have otherwise been barred from recovery if the contributory negligence defense was available.

96. *Id.*

97. *Id.*

98. *See generally id.* §§ 13.1-14.9 (reviewing the enumerated benefits).

The *Hoffman II* court's adoption of the comparative negligence doctrine, however, paled the Act's colors. Since 1973, the quid pro quo justification has no longer borne the same powerful implications for the injured worker. In *Cortes v. Velda Farms*,⁹⁹ Honorable Judge Jorge E. Cueto of the Eleventh Judicial Circuit Court for Miami-Dade County recently explained:

When the Supreme Court of Florida rendered its opinion on July 10, 1973 in *Hoffman v. Jones* . . . changing Florida from a *contributory* negligence state to a *comparative* negligence state, the 1973 [L]egislature failed to increase workers' compensation benefits concurrently to account for the fact that employees who previous to 1970 had the right to sue their employers now had a much greater chance of a recovery under the *comparative* negligence standard as compared to the poor chances of recovery formerly available in tort before *Hoffman*. . . .

. . . .

By the time *Hoffman*[] was decided[,] the "[quid pro quo]" had already been destroyed. The 1973 Legislature made no changes to the Act to account for the change in the value of the ["trade":] workers' compensation exclusively in exchange for the value of the lost tort remedy.¹⁰⁰

Although Judge Cueto's conclusions bore no precedential value, his reasoning highlighted two important points about the post-*Hoffman II* Act's indefensibility. First, in light of the previously repealed "opt out" provisions, the Act does not offer benefits to injured workers that would adequately compensate them for the lost opportunity to proceed through the tort system.¹⁰¹ Second, the transition to comparative negligence

99. *Cortes v. Velda Farms*, No. 11-13661 CA 25, 2014 WL 6685226 (Fla. 11th Cir. Ct. Aug. 13, 2014), *rev'd sub nom.* *State v. Fla. Workers' Advocates*, 167 So. 3d 500 (Fla. 3d Dist. Ct. App. 2015). *Cortes* created quite a commotion among all entities that constituted moving parts of the Florida workers' compensation machine by pronouncing the FWCA, in its present form, facially unconstitutional. 2014 WL 6685226, at *10. Although issued by the lowest tier of the state's court hierarchy, the ruling undertook to overturn the comprehensive statutory scheme that had withstood constitutional challenges since the dawn of the twentieth century.

100. *Cortes*, 2014 WL 6685226, at *2, 4 (citations and quotation marks omitted).

101. *Compare, e.g.*, FLA. STAT. § 440.15(1) (1971), *with* FLA. STAT. § 440.15(1) (1973) (retaining, unchanged, the provision that "[i]n case of total disability adjudged to be permanent, sixty per cent of the average weekly wages shall be paid to the employee during the continuance of such total disability" (emphasis added)); FLA. STAT. § 440.15(2) (1971), *with* FLA. STAT. § 440.15(2) (1973) (retaining, unchanged, the provision that "[i]n case of disability total in character but temporary in quality, sixty per cent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed three hundred and fifty weeks" (emphasis added)); FLA. STAT. § 440.15(3) (1971), *with* FLA. STAT. § 440.15(3) (1973) (retaining, unchanged, the provision that "[i]n case of disability partial in

considerably weakens the quid pro quo justification of workers' compensation. If protection from the "unholy trinity" of defenses, of which contributory negligence comprised a critical component, was the key rationale for workers' compensation, *Hoffman II* effectively destroyed that rationale by disposing of the doctrine all together.¹⁰²

In summary, a comparison of employees' chances of recovery before the enactment of the FWCA, after its enactment and before the Florida Supreme Court's *Hoffman II* decision, and after *Hoffman II*, shows that the Act's constitutionality has greatly eroded since its inception.

B. Assumption of Risk Merges with Contributory Negligence and as Such, Becomes Subsumed by *Hoffman II*

The scales of justice further tipped out of balance and gravitated toward unconstitutionality when the assumption of risk constituent of the notorious "unholy trinity" essentially ceased to exist as an independent defense in negligence cases by merging with contributory negligence.¹⁰³ Florida Rules of Civil Procedure, Rule 1.110(d), General Rules of Pleading: Affirmative Defenses, still states: "In pleading to a preceding

character but permanent in quality the compensation shall, in addition to that provided by subsection (2) . . . , be *sixty per cent of the average weekly wages*" and providing examples of unmodified compensation rates: "Arm lost, *two hundred weeks*' compensation"; "[l]eg lost, *two hundred weeks*' compensation"; "[l]oss of hearing: compensation for loss of hearing of one ear, *forty weeks* [and] of both ears, *one hundred and fifty weeks*" (emphasis added); FLA. STAT. § 440.15(4) (1971), with FLA. STAT. § 440.15(4) (1973) (retaining, unchanged, the provision that "[i]n case of temporary partial disability resulting in decrease of earning capacity the compensation shall be *sixty per cent of the difference* between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or other employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding *five years*" (emphasis added)); FLA. STAT. § 440.15(6) (1971), with FLA. STAT. § 440.15(6) (1973) (retaining, unchanged, the provision that "[i]n all claims for compensation for hernia resulting from injury by an accident arising out of and in the course of . . . employment[,] . . . [c]ompensation shall be paid for a period of *six weeks* from the date of the [surgical treatment at the expense of the employer]" (emphasis added)). *But compare*, e.g., FLA. STAT. § 440.16 (1971), with FLA. STAT. § 440.16 (1973) (raising compensation benefits in the event of the employee's death).

102. As expected, *Cortes* swiftly embarked on a journey to the Florida Third District Court of Appeal. Alas, the Third District did not entertain the question of the workers' compensation law's constitutionality. *Fla. Workers' Advocates*, 167 So. 3d at 504. Rather, the court disposed of the case on the issues of mootness and lack of standing. *Id.* The court reasoned that the three intervenors—Elsa Padgett, an individual workers' compensation claimant in an unrelated matter; Florida Workers' Advocates and the Workers' Injury Law and Advocacy Group, two attorney-comprised organizations dedicated to protection of Floridians' rights—could not pursue the constitutional claims or obtain the relief granted in *Cortes*. *Id.* at 504–05. Consequently, the Third District reversed and remanded, commenting: "[W]e conclude that the trial court lacked a justiciable case or controversy within which to determine, and the intervenor/appellees lacked standing to assert, that the challenged provisions of the Florida Workers' Compensation Law are unconstitutional." *Id.* at 506.

103. See *infra* notes 105–12 and accompanying text (explaining how the defense of assumption of risk merged with contributory negligence and became subsumed by *Hoffman II*).

pleading a party shall set forth affirmatively . . . [, inter alia,] assumption of risk.”¹⁰⁴ In reality, however, Florida law reserves the assumption of risk defense to the context of express contracts only. In *Blackburn v. Dorta*,¹⁰⁵ the Florida Supreme Court explained: “Included within the definition of express assumption of risk are *express contracts* not to sue for injury or loss which may thereafter be occasioned by the covenantee’s negligence as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport.”¹⁰⁶ Outside express contractual agreements, assumption of risk merged with contributory negligence.¹⁰⁷

After a split in the courts below, the Supreme Court of Florida in *Blackburn* considered the viability of the assumption of risk defense “as an absolute bar to recovery subsequent to [the court’s] adoption of the rule of comparative negligence in *Hoffman v. Jones*.”¹⁰⁸ The court reasoned that “[i]f assumption of risk [was] equivalent to contributory negligence, then *Hoffman* mandate[d] that it [could] no longer operate as a complete bar to recovery”; on the other hand, “if it [had] a distinct purpose apart from contributory negligence, its continued existence remain[ed] unaffected by *Hoffman*.”¹⁰⁹ Having noted “a puissant drift toward abrogating the defense,” the court examined the argument that assumption of risk served no independent purpose, which was not already subsumed by the doctrine of contributory negligence, and found that the former term was used nearly interchangeably with the latter.¹¹⁰ In arriving at that decision, the court discussed the background of the defense:

The concept of primary assumption of risk is the basis for the historical doctrine which arose in the master[–]servant relationship during the late nineteenth century. The master was held not to be negligent if he provided a reasonably safe place to work; the servant was said to have assumed the inherent risks that remained. In this context assumption of risk was not an affirmative defense at all. . . . As is often the case in the common law, however, the doctrine mutated into an affirmative defense, with the burden of pleading and proof upon the master. Consequently, even if the servant could show that the master owed and had breached a duty to provide a reasonably

104. FLA. R. CIV. P. 1.100(d).

105. 348 So. 2d 287 (Fla. 1977).

106. *Id.* at 290 (emphasis added).

107. *Id.* at 292–93.

108. *Id.* at 288.

109. *Id.* at 289.

110. *Id.*

safe place to work, the master could escape liability if he could establish that the servant had voluntarily exposed himself to a risk negligently created by the master. Thus, two distinct concepts came to bear the same label with inevitable confusion which has persisted to the present.¹¹¹

Having examined the types of the assumption of risk defenses and the eternal confusion plaguing them, the court then concluded:

We find no discernible basis analytically or historically to maintain a distinction between the affirmative defense of contributory negligence and assumption of risk. The latter appears to be a viable, rational doctrine only in the sense described . . . as implied-qualified assumption of risk which connotes unreasonable conduct on the part of the plaintiff.

. . . .

Therefore, we hold that the affirmative defense of implied assumption of risk is merged into the defense of contributory negligence and the principles of comparative negligence enunciated in *Hoffman v. Jones* . . . shall apply in all cases where such defense is asserted.¹¹²

Blackburn's implication for workers' compensation mirrored those of *Hoffman II*: if the employer could no longer assert assumption of risk as an independent defense in court, the protection that the workers' compensation system had purported to give to the injured worker proved even more meaningless.

C. The Fellow Servant Rule Serves Little Purpose

Finally, the fellow servant rule, the last ingredient of the "unholy" trio, also has limited application in contemporary cases. At common law, the fellow servant rule was grounded in public policy. As one Florida court explained, the doctrine "rest[ed] upon the theory that servants engaged in a common or general employment should be watchful of each other to the end that carefulness in the performance of their duties may be promoted. The safety and welfare of the public [was] in a large measure secured by this rule."¹¹³ At the heart of the defense lay the idea that

111. *Id.* at 290 (internal citation omitted).

112. *Id.* at 292-93 (internal citations omitted).

113. *Gulf, F. & A. Ry. Co. v. King*, 74 So. 475, 478 (Fla. 1917) (Ellis, J., dissenting).

when an employer ha[d] fully performed his duty to an [employee], the [employee] assume[d] the obvious risks of danger in employment voluntarily engaged in when he [was] capable of understanding and appreciating such risks and dangers, and the employer [was] not liable in damages for injuries to the [employee] caused by the negligence of a fellow servant when the master [did] not by his negligence or other conduct proximately contribute to the injury.¹¹⁴

Chapter 769 of the Florida Statutes restricted the common law fellow servant doctrine.¹¹⁵ Essentially, the Legislature reserved the doctrine to the context of hazardous occupations.¹¹⁶ Section 769.01 narrows the pool of employers to whom the fellow servant rule applies to “persons engaged in the following hazardous occupations in this state; namely, railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting and dynamiting, operating automobiles for public use, boating, when boat is propelled by steam, gas or electricity.”¹¹⁷ Such employers face liability for injuries or death from negligence of fellow servants unless they can “make it appear that they, their agents and servants have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against such persons.”¹¹⁸ Today, Florida Rule of Civil Procedure 1.100(d) still reads that “[i]n pleading to a preceding pleading a party shall set forth affirmatively . . . [, inter alia,] injury by fellow servant.”¹¹⁹ Yet, with Chapter 769 in the backdrop, the defense has limited applicability to the modern day tort law.

114. *Prairie Pebble Phosphate Co. v. Taylor*, 60 So. 114, 114–15 (Fla. 1912).

115. *A. Coast Line R.R. Co. v. Shouse*, 91 So. 90, 91 (Fla. 1922) (“Chapter 6521, Laws of 1913 . . . narrowed the fellow-servant doctrine, and reduced its scope from the common employment in which the injured employee may be engaged to the act causing the injury.”).

116. *See* FLA. STAT. §§ 769.01–769.06 (2014) (listing the specific types of hazardous occupations where employers would be affected by the fellow servant rule); *see also, e.g.*, *Jones v. Brink*, 39 So. 2d 791, 792 (Fla. 1949) (“[B]oth [the servant who was negligent and the servant who was injured] were riding horses owned by the defendants; so they were fellow servants, and under the doctrine adopted in this state, the master would not be responsible for injuries to one resulting from the negligence of the other, inasmuch as the defendants were not engaged in any occupation outlined in Section 769.01, Florida Statutes 1941 . . .”).

117. FLA. STAT. § 769.01.

118. *Id.* § 769.02. After the employee demonstrates a negligent injury, the burden shifts to the defendant–employer to show that it has exercised all ordinary and reasonable care and diligence in the premises. *Peninsular Tel. Co. v. Dority*, 174 So. 446, 448 (Fla. 1937). Conversely, when the covered employer has exercised ordinary and reasonable care and diligence, the burden shifts to the claimant to prove the alleged negligence. *See Fla. E. Coast Ry. Co. v. Daughetee*, 124 So. 757, 758 (Fla. 1929) (“The plaintiff failed to . . . show any negligence on the part of the railroad company which would make the railroad company liable for the injuries sustained under the provisions of our statutes.”).

119. FLA. R. CIV. P. 1.100(d).

Thus, as Florida law evolved throughout the twentieth century, the “unholy trinity” of the common law defenses available to the employer suffered a triple defeat. In light of the judicial and legislative changes described above, contributory negligence, assumption of risk, and the fellow servant rule can no longer justify the workers’ compensation scheme.

V. “THE COURTS SHALL BE OPEN TO EVERY PERSON”
EXCEPT AN INJURED WORKER

Article twenty-one of the Florida Constitution could not use a stronger English modal verb than “shall”¹²⁰ to pledge availability of court access to every Floridian.¹²¹ Alas, the verb’s modality has not quite functioned as a model representation of the constitutional provision’s meaning over the years. Especially in the context of workers’ compensation, the fundamental right of court access¹²² has been neatly replaced by an administrative process. The administrative practice of handling workers’ claims has successfully persisted throughout the years, guarded by the safety net of *Kluger v. White*.¹²³

A. The Florida Workers’ Compensation Act Under the *Kluger*
Paradigm

*Kluger v. White*¹²⁴ is the Florida Supreme Court case that is widely applied to confront constitutional access-to-courts challenges to the workers’ compensation scheme.¹²⁵ *Kluger* was an appeal from an

120. Black’s Law Dictionary defines “shall” as “[h]as a duty to; more broadly, is required to. . . . This is the mandatory sense that drafters typically intend and that courts typically uphold.” BLACK’S LAW DICTIONARY (10th ed. 2014).

121. FLA. CONST. art. I, § 21 (“The courts *shall* be open to every person for redress of any injury” (emphasis added)).

122. *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992) (stating that “[t]he right to go to court to resolve our disputes” is a fundamental right), *receded from on other grounds*, *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996).

123. *See infra* Part V(A) (discussing the *Kluger* test and its application to the context of workers’ compensation).

124. 281 So. 2d 1, 4 (Fla. 1973).

125. *See, e.g.*, *Eller v. Shova*, 630 So. 2d 537, 542–43 (Fla. 1993) (finding that the 1988 amendment to the Act that had raised the degree of negligence necessary to maintain a civil tort action against policymaking employees from gross negligence to culpable negligence passed the *Kluger* test); *Berman v. Dillard’s*, 91 So. 3d 875, 878 (Fla. 1st Dist. Ct. App. 2012) (holding that the provision of the Act that authorized termination of the claimant’s permanent total disability benefits passed the *Kluger* test); *Amorin v. Gordon*, 996 So. 2d 913, 918 (Fla. 4th Dist. Ct. App. 2008) (finding, under the *Kluger* framework, the Legislature’s effort to establish horizontal immunity in certain circumstances constitutional).

automobile injury case.¹²⁶ The appellant challenged the constitutionality of Section 627.738 of the Florida Statutes¹²⁷ that provided that “the traditional right of action in tort for property damage arising from an automobile accident is abolished, and one must look to property damage with one’s own insurer, unless the plaintiff . . . has chosen not to purchase property damage insurance, and . . . has suffered property damage in excess of \$550.00.”¹²⁸ The issue before the court was whether “the constitutional guarantee of a ‘redress of any injury’ . . . [barred] the statutory abolition of an existing remedy without providing an alternative protection to the injured party.”¹²⁹ The court arrived at the following conclusion:

We hold . . . that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to [Section 2.01 of the Florida Statutes], the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.¹³⁰

In effect, the *Kluger* court developed a test—to be applied in future workers’ compensation challenges—that requires the Florida Legislature, before a tort action can be abolished, to provide a reasonable alternative to protect citizens’ right to court access. The Legislature can nonetheless overcome the burden by showing that: (1) the overpowering public policy exists to abolish such right; and (2) no alternative to the abolishment will properly serve the articulated public policy.¹³¹

126. *Kluger*, 281 So. 2d at 2.

127. FLA. STAT. § 627.738 (1973), *repealed by* Laws 1976, ch. 76-266, § 13, effective Oct. 1, 1976 (1976 Fla. Laws 716, 726–27).

128. *Kluger*, 281 So. 2d at 2.

129. *Id.* at 3 (citation omitted) (quoting FLA. CONST. art. I, § 21).

130. *Id.* at 4.

131. Further, the *Kluger* decision has been interpreted to mean that

[t]he Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action. As discussed in *Kluger* and borne out in later decisions, no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action.

While the FWCA may, at some point, have met the *Kluger* scrutiny, in light of the elimination of Chapter 440's "opt-out provision"¹³² and "unholy trinity's" de facto eradication,¹³³ this can no longer hold true.

As to the threshold issue of whether the Florida Legislature abolished tort action in the employment context, the answer is obvious. The 1935 law made it clear: "From and after the taking effect of this Act, every employer and every employee, unless otherwise specifically provided, shall be presumed to have accepted the provisions of this Act"¹³⁴ Hence, since July 1, 1935, the Act, through its exclusivity provision of Section 11, functioned as the sole remedy for the injured worker,¹³⁵ in lieu of the previously available tort remedies.

If the Legislature abolished the tort remedy, *Kluger* then demands that it provide "a reasonable alternative to protect the rights of the people of the State to redress for injuries."¹³⁶ That alternative, as the *Kluger* court observed, is reasonable, thus satisfying the right-to-redress requirement, if "adequate, sufficient, and even preferable safeguards for an employee who is injured on the job"¹³⁷ are in place.¹³⁸

In 1935, an administrative process was called to embody the "reasonable alternative." To administer the FWCA, the Legislature created the Florida Industrial Commission¹³⁹—a three-member body designed to serve as an appellate tribunal over workers' compensation claims.¹⁴⁰ The Commission was charged, inter alia, with "hear[ing] and determin[ing] claims for compensation and . . . conduct[ing] such hearings and investigations and . . . mak[ing] such orders, decisions and determinations as may be required . . . in accordance with the provisions of [the] Act."¹⁴¹ Workers' compensation claims proceeded before judges of industrial claims, who in 1979 were re-designated into deputy

Amorin v. Gordon, 996 So. 2d 913, 917–18 (Fla. 4th Dist. Ct. App. 2008) (internal quotation marks omitted) (quoting Jetton v. Jacksonville Elec. Auth., 399 So. 2d 396, 398 (Fla. 1st Dist. Ct. App. 1981)).

132. See *supra* Part III (discussing the 1970 legislative amendments to the Florida Workers' Compensation Act).

133. See *supra* Part IV(A)–(C) (explaining a gradual erosion of the "unholy trinity").

134. 1935 Fla. Laws 1456, 1460.

135. Still, as discussed, the Act—as an oxymoron of sorts—was elective and provided avenues for opting out. See *supra* notes 41–43 and accompanying text (explaining the elective nature of the Act).

136. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

137. *Id.*

138. Judith Anne Bass, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U. L. REV. 871, 888–89 (1977).

139. 1935 Fla. Laws at 1488–89.

140. Jack A. Weiss, *A Primer on Workers' Compensation Appeals*, FLA. B.J., Oct. 2006, at 63, 63.

141. 1935 Fla. Laws at 1490.

commissioners,¹⁴² and a decade later, into judges of compensation claims (JCC).¹⁴³ As of 1979, all appeals were heard by the First District Court of Appeal, which had taken place of the Commission.¹⁴⁴ But semantics aside, the system remained largely administrative in character.¹⁴⁵

Today, the majority of all work-related injuries¹⁴⁶ are handled privately, through insurance companies. Only if the insurance provider denies the benefits allegedly due to the injured worker, will the claim proceed to the Office of the Judges of Compensation Claims (OJCC).¹⁴⁷ Prior to an adjudicative hearing, a mediation session is scheduled between the disagreeing parties in most cases.¹⁴⁸ That means in many cases, the claimant will settle for the compensation that may or may not reflect the true scope of his injury.¹⁴⁹ Moreover, mediation is plainly not

142. See FLA. STAT. § 440.44 (1979) (noting that Section 35, Chapter 79-40 “changed the title of judges of industrial claims to ‘deputy commissioners’”).

143. FLA. STAT. § 440.45 (1989).

144. See FLA. STAT. § 440.442 (1979) (noting that Section 1 of Chapter 79-312 “abolished the Industrial Relations Commission, effective October 1, 1979”).

145. See Fla. Dep’t of Fin. Servs., *Workers’ Compensation System Guide*, MYFLORIDACFO.COM 4–8, 32–33 (July 2014), available at <http://www.myfloridacfo.com/Division/WC/pdf/WC-System-Guide.pdf> [hereinafter *System Guide*] (providing a flowchart with a succinct explanation of the benefits delivery process).

146. Chapter 440 of the Florida Statutes provides for *narrow* exceptions where an affected employee *may* sue in tort. See FLA. STAT. § 440.11(1) (2014) (“The liability of an employer [is exclusive] . . . , except as follows: (a) If an employer fails to secure payment of compensation . . . [or] (b) When an employer commits an intentional tort that causes the injury or death of the employee. . . . [A]n intentional tort . . . [is defined as situations where the] employer deliberately intended to injure the employee; or . . . [t]he employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.”).

147. *System Guide*, *supra* note 145, at 32–33. It is critical to note in passing, however, that a JCC, by definition, is not a judicial officer, but rather an employee of a state agency. *Cf.* Bass, *supra* note 138, at 889–90 (discussing *Scholastic Sys., Inc. v. LeLoup*, 307 So. 2d 166 (Fla. 1974) and Justice Richard W. Ervin’s dissenting position that the Industrial Commission—by definition a state agency and not a court—did not afford a claimant an opportunity for an appellate-type review).

148. “Mediation is mandatory in most [cases].” Office of Judges of Comp. Claims, *2013–2014 Settlement Report & Mediation Statistics Report of the Office of the Judges of Compensation Claims 3*, FLJCC.ORG (2014), available at <http://www.fljcc.org/jcc/files/reports/2014SR-MSR.pdf> [hereinafter *Settlement Report*]; see also FLA. STAT. § 440.25(1) (“[A]fter a petition for benefits is filed . . . , the [JCC] shall notify the interested parties by order that a mediation conference concerning such petition has been scheduled unless the parties have notified the [JCC] that a private mediation has been held or is scheduled to be held.” (emphasis added)).

149. In fiscal year 2012–2013, 58,041 petitions for benefits were filed; 15,850 mediations by the OJCC held; and 10,303 cases, or sixty-five per cent, resolved with a varied degree of success (of which 4,668—settled, 891—overall “all issues resolved,” 2,228—overall “all resolved except fees,” and 2,516—overall some issues resolved). *Settlement Report*, *supra* note 148, at 6, 8. In fiscal year 2013–2014, 59,292 petitions were filed; 16,188 mediations held; and 10,774 cases, or sixty-six and a half per cent, resolved with a varied degree of success (of which 5,180—settled, 921—overall “all issues resolved,” 2,199—overall “all resolved except fees,” and 2,474—overall some issues resolved). *Id.* FLA. STAT. § 440.20(11) authorizes settlements in workers’ compensation cases.

a creature of the formal judicial process; thus, many procedures, which are standard attributes in a judicial forum, do not apply.¹⁵⁰

Before 1979, when appeals from workers' compensation cases began to travel to the First District Court of Appeal, the administrative process was easier to challenge as containing no direct judicial review. For instance, in *Scholastic Systems*,¹⁵¹ Florida Supreme Court Justice Ervin pointed out in his dissent:

Administrative or bureaucratic processes affecting the in lieu civil claims of thousands of workmen should not be short circuited by permitting only a limited certiorari review instead of a direct judicial review. A direct judicial review of compensation orders as a matter of right is necessary to safeguard the constitutional rights inherent in remedy cases. . . .

. . . .

I do not believe that an administrative review of a judge of industrial claims' order by the Industrial Relations Commission is the equivalent of an initial *judicial review* as contemplated by Article I, Section 9 (due process) and 21 (access to the courts) of the State Constitution.

The Florida Industrial Relations Commission is the administrative—not the judicial—reviewer in the statutory echelon of the administrative structure for processing workmen's compensation claims. It is not a judicial court of review. . . .

. . . .

The point I make is that litigants [cannot] constitutionally be deprived of the equivalent of a direct judicial appeal as a matter of right of workmen's compensation orders of the judges of industrial claims and of the Industrial Relations Commission on any of the bases set forth in the majority opinion.¹⁵²

Since judicial review became available,¹⁵³ theoretically, the right of court access at the heart of Florida's constitutional guarantees was satisfied. Still, the path to the appellate review is a hurdle, indeed. Judicial review

150. See FLA. STAT. § 440.25(3) ("Such mediation conference shall be conducted informally and does not require the use of formal rules of evidence or procedure.").

151. 307 So. 2d 166.

152. *Id.* at 173–74 (Ervin, J., dissenting).

153. FLA. STAT. § 440.271.

becomes a possibility only after a mediation session, a pre-trial hearing, or a trial hearing before the JCC all fail to resolve the worker's claim.¹⁵⁴

Even if the Act does not, in its present form, constitute a "reasonable alternative" to redress work-related injuries, the statute may survive under the *Kluger* standard if it can be shown that (1) overpowering public policy exists to abolish the fundamental right of court access, and (2) no alternative to the abolishment will properly serve the articulated public policy.¹⁵⁵

When the FWCA was first enacted, public policy might very well have commanded its adoption. The statutory scheme was perceived as a favorable substitute to the tort system's uncertainty and an overall good fit considering contemporaneous societal and industrial realities. For example, the Florida Supreme Court explained:

Florida's [workers'] compensation program was established for a twofold reason: (1) to see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to *replace an unwieldy tort system* that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents.¹⁵⁶

The First District Court of Appeal further described the workers' compensation system's improvement over the tort system:

Litigation expenses, including those borne by the claimant are reduced by the administrative handling of claims. Litigation delays are also reduced. The cost of inevitable injury is spread throughout the industry. The employee is further benefited by not having any recoverable damages reduced by the proportionate fault of the employee. Certainty and efficiency are given in exchange for potential recovery. This satisfies the requirements of Article I, Section 21, Florida Constitution.¹⁵⁷

More recently, the Florida Supreme Court again summarized the Act's purpose:

The workers' compensation system seeks to balance competing interests and provide tradeoffs between employees and employers.

154. *System Guide*, *supra* note 145, at 32–33.

155. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

156. *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla. 1989) (emphasis added) (citing *McLean v. Mundy*, 81 So. 2d 501, 503 (Fla. 1955)).

157. *Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1101 (Fla. 1st Dist. Ct. App. 1982).

Specifically, the workers' compensation system provides employees limited medical and wage loss benefits, without regard to fault, for losses resulting from workplace injuries in exchange for the employee relinquishing his or her right to seek certain common law remedies from the employer for those injuries under certain circumstances.¹⁵⁸

No doubt, these excerpts are all accurate portrayals of the *original* quid pro quo nature of the workers' compensation system. Still, the trade-off rationale does not justify the FWCA in its *present* state, i.e. so long as it contains Section 440.11's exclusivity provision. In light of the "unholy trinity's" de facto eradication¹⁵⁹ and the elimination of an "opt-out" provision,¹⁶⁰ the quid pro quo can no longer support the Act.¹⁶¹

Moreover, more reasonable alternatives to the FWCA, in its present state,¹⁶² are available. First, the Florida Legislature may revise the "Exclusiveness of Liability" provision embodied in Section 440.11,¹⁶³

158. *Jones v. Martin Elecs., Inc.*, 932 So. 2d 1100, 1104 (Fla. 2006).

159. *See supra* Part IV(A)–(C) (explaining a gradual erosion of the "unholy trinity").

160. *See supra* Part III (discussing the 1970 legislative amendments to the FWCA).

161. The Act is also not a reasonable substitution to tort remedies for other reasons that are outside this Article's scope. In *Cortes v. Velda Farms*, Judge Cueto pointed out some of these reasons:

The [Florida Workers' Compensation] Act became the exclusive remedy in 1970 . . . with no reasonable alternative benefit provided by the [L]egislature for the loss of the right to opt out. Benefits provided by the Act should have increased substantially to account for the change in the value of the trade, i.e.: allegedly fast, sure[,] and *adequate* payments in exchange for the tort remedy that was cumbersome, slow, costly and under which it had been legally difficult for injured workers to prevail. . . .

Injured workers lost their right to "opt out" without any concomitant benefit to take the place of that right. Injured workers also lost many more rights which were in place in 1968. One of those [rights] . . . is the loss of any remuneration or benefit for partial loss of wage earning capacity, also called permanent partial disability. . . . As of October 1, 2003, the [L]egislature eliminated *all* compensation for loss of wage earning capacity that is not total in character. The last vestige of compensation for partial loss of wage earning capacity was repealed. . . . Injured workers now receive permanent impairment benefits pursuant to the Florida impairment guidelines and nothing else unless the employee is permanently and totally disabled (PTD). The benefits for PTD end at age [seventy-five] or after [five] years of payments, whichever is greater. PTD was a lifetime benefit in 1968.

No. 11-13661 CA 25, 2014 WL 6685226, at *4–5 (Fla. 11th Cir. Ct. Aug. 13, 2014), *rev'd sub nom.* *State v. Fla. Workers' Advocates*, 167 So. 3d 500 (Fla. 3d Dist. Ct. App. 2015). As seen from the language of the trial court's opinion, Judge Cueto argued that the Act's constitutionality had eroded over the years as the benefits provided to injured workers had gradually dwindled away. *Cortes*, 2014 WL 6685226, at *5. As this Article is largely focused on the policies behind the Act, Judge Cueto's points, while timely and insightful, are outside its scope.

162. It would be indefensible to advocate for abolishment of the workers' compensation system as a whole. *See Haas, supra* note 23, at 855–56 (explaining that elimination of the no-fault system "would be both psychologically unrealistic and inconsistent with the primary accident cost reduction rationale of both workers' compensation and tort law"). Thus, I argue that Chapter 440 is compromised only so long as it contains the exclusivity of remedy provision of Section 440.11.

163. FLA. STAT. § 440.11 (2014).

and accompanying Sections, and adopt an “opt-out” mechanism, similar to the one provided to the workers prior to the 1970 statutory amendments.¹⁶⁴ In essence, this idea highlights the notion that parties can establish their rights and obligations through an agreement.¹⁶⁵ Second, the Florida Legislature may adopt the so-called “double-protection,” or hybrid, system¹⁶⁶ that—in cases of most serious injuries where workers’ compensation substantially undercompensates the victim, and the employer’s negligence has caused the injury—gives access to the tort system.¹⁶⁷

B. Solutions

“Evolution does not go backward,”¹⁶⁸ but perhaps in the case of Florida’s workers’ compensation, it should. Borrowing legislative wisdom from the past may be a necessary measure to afford an injured worker a meaningful recourse in the court of law as dictated by the Florida Constitution. The Florida Legislature should consider re-introducing the “opt-out” mechanism into Chapter 440 to mirror the exemption procedure that was in effect until 1970. Although a minority view, the Act waiver is not unheard of in the modern day.¹⁶⁹ For instance, Arizona workers’ compensation scheme¹⁷⁰ authorizes employee waivers

164. See *supra* notes 40–41 and accompanying text (describing the “opt-out” mechanism in the 1935 Act); see also *infra* Part V(B) (proposing solutions to repair the FWCA).

165. See generally David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 563–658 (2009) (reviewing the United States Supreme Court’s jurisprudence during the liberty of contract heyday).

166. The “double-protection” mechanism was suggested by Theodore F. Haas in his Article *On Reintegrating Workers’ Compensation and Employers’ Liability*. Haas, *supra* note 23, at 844–56.

167. See *infra* Part V(B) (proposing solutions to repair the FWCA).

168. J. H. RUSH, THE DAWN OF LIFE 35 (1962).

169. See, e.g., ARIZ. REV. STAT. § 23-906 (2014) (employees may opt out from coverage); OKLA. STAT. tit. 85A, § 202 (2015) (employers may opt out); TEX. LAB. CODE § 406.002 (2015) (employers may opt out); *id.* § 406.034 (employees may opt out). As this Article is being polished for publication, two more states—Tennessee and South Carolina—are considering similar opt-out legislation. See Stephanie Goldberg, *South Carolina Considers Workers Comp Opt-Out System*, BUS. INS. (May 20, 2015, 10:04 AM), <http://www.businessinsurance.com/article/20150520/NEWS08/150529987/south-carolina-considers-workers-comp-opt-out-system?tags=|62|92|329|> 304 (discussing that South Carolina is the fourth state to weigh opt-out legislation); Amy O’Connor, *Tennessee Workers Comp Opt-Out Legislation Revised, Ready for Next Session*, INS. J. (May 4, 2015), <http://www.insurancejournal.com/magazines/features/2015/05/04/365980.htm> (discussing that the proposed opt-out legislation is deferred to the 2016 legislative session).

170. ARIZ. REV. STAT. §§ 23-901–23-910. The statute covers state, county, city, town, municipal corporation, and school district employers, and every employer who regularly employs any workers, generally excluding domestic servants, independent contractors, and casual labor. *Id.* § 23-902.

of the workers' compensation scheme.¹⁷¹ The pertinent Section of the Arizona Revised Statutes reads:

B. The employee's election to reject the provisions of this chapter shall be made by a *notice in writing*, signed and dated by him and given to his employer, in duplicate in substantially the following form:

To (name of employer):

You are hereby notified that the undersigned elects *to reject the terms, conditions and provisions of the law for the payment of compensation*, as provided by the compulsory compensation law of the state of Arizona, and acts amendatory thereto.

C. The notice shall be filed with the employer *prior to injuries* sustained by the employee, and within five days the employer shall file with his insurance carrier the notice so served by the employee. All employees shall be conclusively *presumed to have elected* to take compensation in accordance with the terms, conditions and provisions of this chapter unless the notice in writing has been served by the employee upon his employer prior to injury.¹⁷²

Essentially, Section 23-906(B) of the Arizona Statutes mirrors Section 440.05(2) of the 1969 Florida Statutes¹⁷³ by requiring advance notice from an employee who purports to exempt himself or herself from the operation of the workers' compensation statute. Further, Section 23-906(C) of the Arizona Statutes echoes Section 440.05 of the 1969 Florida Statutes¹⁷⁴ by stipulating that the notice of non-acceptance of the Act must be furnished before any work-related injury occurs. As in Section 23-906(C) of the Arizona Statutes and Section 440.03 of the 1969 Florida Statutes, an employee is presumed to have accepted the workers' compensation scheme unless he or she has expressly rejected it.¹⁷⁵ The Florida Legislature should endorse a similar opt-out passage, so that the injured worker can properly be rewarded for industry, if he or she is

171. *Id.* § 23-906. Arizona statutes do not contain a similar opt-out option for employers who employ any employees. *See id.* §§ 23-901–23-910 (Arizona workers' compensation statute).

172. *Id.* § 23-906(B)–(C) (emphasis added).

173. *See supra* note 61 and accompanying text (setting forth the notice requirement).

174. *See supra* note 61 and accompanying text (requiring a thirty-day advance notice).

175. ARIZ. REV. STAT. § 23-906(C) ("All employees shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this chapter unless the notice in writing has been served by the employee upon his employer prior to injury."); *Sneed v. Belt*, 635 P.2d 517, 524 (Ariz. Ct. App. 1st Div. 1981) ("Generally the employee is deemed to have 'exercised' [the] option in favor of compensation by merely failing to notify in writing prior to injury.").

willing to accept the traditional menaces of the tort system (i.e., expenses, greater uncertainty of outcome, or litigation delays).¹⁷⁶ As a flowing consequence, the fear of substantial damages awarded to the plaintiff may incentivize the employer to work more diligently to deter workplace accidents.¹⁷⁷

Alternatively, the Florida Legislature should adopt a “double-protection” system, whereby the plaintiff is granted access to the courts when there is a serious injury, workers’ compensation substantially undercompensates the victim, and the employer’s negligence has caused the injury.

The hybrid system—a combination of workers’ compensation and tort remedies—is not a novel idea.¹⁷⁸ Besides, the FWCA does not intend to make employer liability absolute. The Act already recognizes exceptions that enable an injured employee to proceed in tort: for instance, when an employer intentionally causes an injury or death to the employee; when an employer, under statutorily specified conditions, engages in conduct that is virtually certain to result in injury or death to the employee;¹⁷⁹ when corporate officers elect to opt out;¹⁸⁰ or when an employer who employs fewer than four employees elects not to proceed under the Act.¹⁸¹ So a further exception that incorporates a mechanism to convert a workers’ compensation claim into a tort claim will not be a complete novelty to the no-fault system.

Under the hybrid system, in a case of a serious work-related injury, an employee will first recover benefits due under the workers’ compensation schedules. Any difference between the total benefits paid and the scope of tangible and intangible injuries in monetary terms will constitute the amount of under-compensation.¹⁸² That amount, as

176. “All natural persons . . . have inalienable rights, . . . [such as] the right . . . to be rewarded for industry” FLA. CONST. art. I, § 2. *See also* *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla. 1989) (“Florida’s [workers’] compensation program was established . . . to see that workers in fact were rewarded for their industry”).

177. Haas, *supra* note 23, at 849–50.

178. *See id.* at 844–45 (discussing various commentators’ proposals); *cf.* Richard A. Epstein, *Coordination of Workers’ Compensation Benefits with Tort Damage Awards*, 13 F. 464, 464–66 (1978) (discussing the system that allows a third-party defendant–tortfeasor, once the worker has prevailed in court, to place on the employer a lien in the amount of paid-out workers’ compensation benefits).

179. *See supra* note 146 and accompanying text (providing examples of when the access to tort remedies is available).

180. FLA. STAT. § 440.05(1) (2014) (“Each corporate officer who elects not to accept the provisions of this chapter . . . shall mail to the department in Tallahassee notice to such effect”).

181. *Id.* § 440.055.

182. Currently, the FWCA does not provide for the payment of benefits for “mental or nervous injur[ies] due to stress, fright, or excitement only” unless they are accompanied by physical trauma requiring medical treatment. *Id.* § 440.093(1). Further, the Act does not compensate for a physical injury resulting from mental or nervous injuries that is unaccompanied by physical injury requiring

determined by relevant expert testimony, will then remain recoverable in tort.

The touchstone of the proposed mechanism is its focus on improvement of workplace safety. Of course, the idea of incentivizing an employer to reduce lurking occupational hazards is already at the heart of the workers' compensation system.¹⁸³ Still, it is unclear whether employers actually embrace it since they can "internalize, regularize, and minimize the costs of workers' accidents, making worker injury simply a finite cost of doing business."¹⁸⁴ If an employer potentially faces additional damages recoverable through tort action, it will have a more meaningful incentive to improve conditions in the workplace and decrease negligent injuries to employees.¹⁸⁵

The leitmotif of workers' compensation awards versus tort awards has punctured both the discussion about the opt-out provision and the hybrid system alternatives. No doubt, the gap between the awards that the two mechanisms produce is sizeable. The workers' compensation system generally does not purport to restore the victim to a wholesome condition. Rather, it gives him just enough money to get by on, without becoming a social burden.¹⁸⁶ The tort system, on the other hand,

medical treatment. *Id.* The Florida law's approach to the hard-to-objectivize psychological trauma has historically been guarded. *Cf., e.g., Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 850 (Fla. 2007) (stating that "[i]n Florida, the prerequisites for recovery for negligent infliction of emotional distress differ depending on whether the plaintiff has or has not suffered a physical impact from an external force," and explaining that "[i]f . . . the plaintiff has not suffered an impact, the complained-of mental distress must be 'manifested by physical injury'") (quoting *Eagle-Picher Indus. Inc. v. Cox*, 481 So. 2d 517, 526 (Fla. 3d Dist. Ct. App. 1985)). I propose that the Florida Legislature revise the statute to expand compensation for psychological trauma, arising out of and in the course of employment, as demonstrated through testimony by a qualified mental health specialist. While compensation for mental-mental claims is an uphill-battle argument, compensable mental trauma resulting in physical injuries is not an avant-garde thought. *Compare, e.g., Natalie D. Riley, Mental-Mental Claims—Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 MO. L. REV. 1023, 1023-45 (2000) (discussing limits to the compensability of mental-mental claims with an emphasis on the Missouri law), *with, e.g., Montgomery Cnty. v. Grounds*, 862 S.W.2d 35, 42 (Tex. App. 1993) ("The law in Texas is settled that in heart attack cases, compensation benefits are due when a heart attack results from mental or emotional stress traceable to a definite time, place and event."). This argument, however, is outside the scope of this Article.

183. Kenneth Matheny, *Achieving Safer Workplaces by Expanding Employers' Tort Liability Under Workers' Compensation Laws*, 19 N. KY. L. REV. 457, 473 (1992) ("One of the main purposes of workers' compensation is to promote workplace safety.")

184. *Id.* at 473 (internal quotation marks omitted) (quoting Jamin B. Raskin, *Reviving the Democratic Vision of Labor Law*, 42 HASTINGS L. J. 1067, 1071 (1991)).

185. The Bureau of Labor Statistics reports that in Florida, in 2008, there were 292,600 total recordable cases of illness and injury across all industries; in 2009—250,300; and in 2010—222,600. U.S. Dep't of Labor, Bureau of Labor Stats., *Databases, Tables & Calculators by Subject: Workplace Injuries*, BLS.GOV, <http://www.bls.gov/data/#injuries> (last visited Dec. 14, 2015). In 2011, Florida witnessed 226 workplace fatalities; in 2012—218; and in 2013—239. *Id.* (The data provided on the Bureau's website lacked information on Florida fatalities in 2008–2010 and cases of illness and injury in 2011–2013.)

186. Haas, *supra* note 23, at 847 n.18.

endeavors to make the victim “whole”¹⁸⁷ by awarding him with a combination of compensatory,¹⁸⁸ pain and suffering,¹⁸⁹ or—when circumstances so require—punitive damages.¹⁹⁰ Although the workers’ compensation’s quid pro quo spirit has repeatedly been emphasized in the legislative and judicial work product, in truth, the worker has consistently been dealt the short end of the stick. If the “Florida’s [workers’] compensation program was established . . . to see that workers *in fact* were rewarded for their industry,”¹⁹¹ a possibility to recover tort damages either in lieu of, or in addition to, the workers’ compensation benefits must be meaningful.

VI. CONCLUSION

As demonstrated, the archaic policy reasons behind the Florida workers’ compensation statute cannot any longer support the Act in its present state. With the “unholy trinity” of defenses essentially eliminated, the Act’s failure to pass the *Kluger* standard, and the availability of reasonable alternatives to the exclusive remedy provision in the backdrop, the statute has become “constitutionally infirm.”¹⁹² As long as it contains Section 440.11, which bars recovery in tort, the FWCA

187. *Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1135 (Fla. 4th Dist. Ct. App. 2007) (“In tort actions, the goal is to restore the injured party to the position it would have been in had the wrong not been committed.” (internal quotation marks omitted)) (quoting *Nordyne, Inc. v. Fla. Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1286 (Fla. 1st Dist. Ct. App. 1993)).

188. See generally, e.g., Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 39–76 (1994) (discussing the role and goals of compensation in tort law).

189. Compare, e.g., *Myers v. Rollette*, 439 P.2d 497, 502 (Ariz. 1968) (“The workman retains the right . . . to choose whether to sue for damages or to accept the provisions of the Workmen’s Compensation Act. If he does elect to sue, he is not limited to the scheduled amounts or formulas set up in the Compensation Act. He takes his chances on whether he will recover in an action for negligence, or if so, in what amount. . . . It is well established that pain and suffering are proper elements to consider in awarding damages in a negligence action for personal injuries.” (citation omitted)), with, e.g., *Port Everglades Terminal Co. v. Canty*, 120 So. 2d 596, 601 (Fla. 1960) (“[I]t is the intention of our workmen’s compensation law to compensate an injured workman only for the loss of earning *capacity* attributable to and resulting from an industrial injury, and *not* for . . . pain and suffering resulting therefrom.” (first emphasis in original; second emphasis added) (citation omitted)).

190. 17 FLA. JUR. 2D *Damages* § 140 (“Mere negligence, in the absence of circumstances of malice, wantonness, or other essential aggravating elements, will not justify a recovery of exemplary or punitive damages.” (citation omitted)).

191. *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla. 1989) (emphasis added).

192. *Cortes v. Velda Farms*, No. 11-13661 CA 25, 2014 WL 6685226, at *10 (Fla. 11th Cir. Ct. Aug. 13, 2014), *rev’d sub nom.* *State v. Fla. Workers’ Advocates*, 167 So. 3d 500 (Fla. 3d Dist. Ct. App. 2015).

promotes the system that has once again—ironically—become “inhospitable to the claims of injured, destitute workers.”¹⁹³

193. Haas, *supra* note 23, at 859.