Comment, The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy

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COMMENTS

The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy

I. INTRODUCTION

The state constitutions of thirty-nine states, including Kansas, contain “remedy by due course of law” provisions. Historically, these provisions were intended as constitutional safeguards of an individual’s right to a legal remedy. More than state equivalents of the federal Due Process Clause, these remedy provisions have resulted in a myriad of interpretations by state courts. Plaintiffs generally use state remedy provisions to challenge statutes restricting or eliminating previously established causes of action. In the last few decades, for example, injured parties have used state remedy provisions to challenge tort reform legislation, such as workers’ compensation acts and statutory caps on medical malpractice damages. With continued tort reform, this diverse area of state constitutional law promises to generate further debate and attention.

Remedy provision law in Kansas is itself a topic of considerable debate. Though historically section 18, the state remedy provision, served to guarantee an injured party’s right to a remedy, more modern cases illustrate the provision’s waning authority and suggest its imminent conflation with federal due process doctrine unless the Kansas Supreme Court decides to rethink its approach. While the court claims the remedy provision requires the legislature supply an adequate substitute

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* Shannon M. Roesler. I wish to thank Associate Dean Steve McAllister for suggesting this topic and for his helpful suggestions and comments on earlier drafts.
2. See id. at 1201-02. For example, Kansas’s remedy provision reads: “All persons for injuries suffered in person, reputation or property shall have remedy by due course of law and justice administered without delay.” KAN. CONST., Bill of Rights § 18. Some states refer to their remedy provisions as an “open courts clause” rather than a remedy clause. See Oregonian Publ’g Co. v. O’Leary, 736 P.2d 173 (Or. 1987). Kansas, however, has not recognized a separate and independent right to an open court. See Bonin v. Vannaman, 261 Kan. 199, 221, 929 P.2d 754, 770 (1996) (noting absence of separate open courts guarantee). This Comment focuses on interpretations of the provision as a remedy provision, not an open courts clause.
3. See infra Part II.B.
4. See Schuman, supra note 1, at 1199.
5. See id. at 1203 n.40 (listing law review scholarship on state remedy provisions).
6. See infra Parts III-IV.
remedy when it limits an existing remedy, its analyses and results frequently contradict its stated approach. That is, a tension exists between the rules the court claims to be applying and the actual application of these rules.

This Comment begins with a discussion of the history of the remedy provision in state constitutions, followed by an analysis of the various interpretations of the provision by different states' courts. After briefly discussing federal due process, the second part of the Comment traces the history of the remedy provision in Kansas and analyzes the Kansas Supreme Court's interpretation and application of the provision. The final section proposes three alternative approaches to the Kansas remedy provision. The first alternative is simply a revision of the two-step test the Kansas Supreme Court currently uses. The second alternative suggests the court return to its historical approach. Finally, a third alternative suggests the court consider a flexible sliding scale approach in which the level of judicial scrutiny is determined by the nature of the substitute remedy provided by the legislature. This last approach may help reconcile the tension between the court's stated rule in remedy provision cases and its actual application of that rule.

II. BACKGROUND

A. The History of the Remedy Clause: The Magna Carta and Sir Edward Coke

Most states with remedy provisions adopted the provision from earlier state constitutions. In constructing the first state constitutions, the colonial and early American writers looked to English law and history, adopting Sir Edward Coke's interpretation of language in the Magna Carta. Like Coke, they sought to protect the judiciary from corruption and to ensure its independence.

The history of the remedy provision in state constitutions begins with King John in the thirteenth century. King John's courts administered

\[\text{\footnotesize 7. See infra Parts III.B-C.}\]
\[\text{\footnotesize 9. See id. at 1296-1311.}\]
\[\text{\footnotesize 10. See id. at 1296-97.}\]
justice for a fee; those seeking access to the courts had to purchase writs,
and the more costly writs guaranteed speedier and more successful
claims. In response to the Crown’s corrupting influence, Chapter 40 of
the Magna Carta was written to restore the integrity of the courts by
specifically prohibiting the selling of writs: “[t]o no one will we sell, to
no one will we refuse or delay, right or justice.”

Because the Magna Carta’s purpose was to protect the courts from the
Crown’s corruption, it provided compelling authority for Sir Edward
Coke as he battled King James and argued for the supremacy of the
common law in the seventeenth century. As an absolutist monarch,
King James exercised power over the courts, arguing judges were merely
servants of the Crown. Coke, not only argued that the judiciary was
independent from the Crown, but also that the King was subject to the
common law. In his crusade to justify the judiciary’s independence,
Coke wrote the Second Institute; the remedy provision first appears in
this context as part of Coke’s interpretation of the language in Chapter 40
of the Magna Carta.

Coke expounded on the language in the Magna Carta to fashion a
remedy guarantee: “[E]very subject of this Realm, for injury done to him
. . . may take his remedy by the course of the Law, and have justice and
right for injury done him, freely without sale, fully without any denial,
and speedily without delay.” Although commentators have criticized

12. See id. at 395-97.
13. See id. at 395; see also A.E. DICK HOWARD, MAGNA CARTA TEXT AND COMMENTARY 15-16 (1964).
14. See Hoffman, supra note 8, at 1291. In 1225, Chapter 40 and Chapter 39 were merged into
one chapter, Chapter 29, in Henry III’s version of the Magna Carta, the version Coke used. See
Wang, supra note 11, at 206 n.10. Chapter 39 prohibited imprisonment without “lawful judgment
of his peers or by the law of the land.” See id. As others have noted, the combination of the remedy
provision (Chapter 40) with the “law of the land” provision (Chapter 39) may be the reason why
remedy provisions sometimes inspire due process language. See id. Despite the language, remedy
provisions are not intended to be state due process clauses. See generally Hans A. Linde, Without
15. See Hoffman, supra note 8, at 1291.
16. See id. at 1292.
17. See id. at 1293-94.
18. See David Schuman, Oregon’s Remedy Guarantee: Article I, Section 10 of the Oregon
ENGLISH CONSTITUTION, 1300-1629, at 365 (1948), and translating bracketed portions from Latin
to English). The three guarantees in the remedy provision (the right to a remedy without sale, without
denial, and without delay) result from Coke’s interpretation of “justice” in the Magna Carta. See id.
at 39. After the passage proclaiming a right to a remedy, Coke explained: “Hereby it appeareth, that
Justice must have three qualities: it must be [free, for nothing is more iniquitous than justice for sale;
complete, for justice should not do things by halves; swift, for justice delayed is justice denied]; and
then it is both Justice and Right.” Id. at 38 n.19 (quoting Coke).
Coke for misreading the Magna Carta, his intent in fashioning the provision, not his accuracy in translation, sheds light on the remedy provision and its historical development. Like the authors of the Magna Carta, he struggled to protect the English court from outside corruption and influence, thereby safeguarding its independence; he did not, however, seek to guarantee the creation of remedies for every injury. The remedy provision was not created, therefore, to address the relationship between the judiciary and the legislature, although this is its context today.

The doctrine of the separation of powers certainly did not exist during Coke’s time; indeed, the doctrine was not fully realized until after the United States won its independence. When the remedy provision appeared in its first state constitution, the Delaware Declaration of Rights, Coke’s interpretation of Chapter 40 of the Magna Carta was the only textual authority for an independent judiciary. Although the English judiciary’s independence was finally recognized in 1701, the colonial courts remained subject to the corrupt devices of the Crown. Thus, shortly before the American Revolution, grievances similar to those of Coke motivated colonists to seek language that would guarantee the integrity of the courts. Not surprisingly, five early bills of rights contain remedy provisions derived from Coke’s Second Institute. Moreover, though the federal Bill of Rights does not contain a remedy provision, at least two states, Virginia and North Carolina, argued for the inclusion of remedy language.

By incorporating Coke’s interpretation of the Magna Carta, early state constitutions grounded judicial independence in well-established constitutional principles. As such, the remedy clause served to guarantee access to courts free from corruption by political forces, but it did not, necessarily, guarantee a right to a remedy. This distinction has led one

19. See Hoffman, supra note 8, at 1287.
20. See id. at 1288, 1316-17.
21. Hoffman has noted that the doctrine of the separation of powers did not truly surface until Madison and Hamilton’s articulation of it in The Federalist Papers. See id. at 1311. Justice Marshall provided further definition in 1803 with the United States Supreme Court’s decision in Marbury v. Madison, 5 U.S. 137 (1803). See also Hoffman, supra note 8, at 1311.
23. See Hoffman, supra note 8, at 1298.
24. See id. at 1300.
25. See id. at 1300-02.
26. See Wang, supra note 11, at 206-07 & n.13 (listing the early bills of rights of Delaware, Maryland, Massachusetts, New Hampshire, and North Carolina).
27. See id. at 207; see also 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 841, 967-68 (Bernard Schwartz ed., 1971) (reprinting state conventions of Virginia and North Carolina).
commentator to conclude that state courts should not use their constitutions’ remedy provisions to strike down properly enacted legislation that limits causes of action.\textsuperscript{28}

Although overuse of the provision may be a concern, disavowing its authority may be a mistake. While courts have at times failed to investigate the origins of the remedy provision, their use of the provision to curtail legislative power remains true to the historical spirit of the provision as a means of preserving the common law. Thus, by failing to engage in historical inquiry, the courts have not necessarily abandoned the provision’s purpose. Today, political forces certainly influence legislation that consequently limits common law causes of action, and at times these forces may threaten the integrity of the judiciary.

B. State Interpretations

The modern context of the remedy provision bears little resemblance to the provision’s origins. Litigation involving the remedy provision often surfaces in response to fairly recent areas of law, such as workers’ compensation, medical malpractice, and statutes of repose.\textsuperscript{29} Though the cases contain similar subject matter from state to state, interpretation of the remedy provision continues to be an area of rich diversity in state constitutional law.

Commentators have categorized the different state interpretations according to various schemes.\textsuperscript{30} Often classification schemes draw upon federal equal protection, distinguishing different courts’ approaches by varying degrees of judicial scrutiny and by using federal language, such as “fundamental rights.”\textsuperscript{31} In response to this use of federal equal protection language, one commentator has suggested an alternative system of classification that categorizes state interpretations using their own terminology rather than pigeonholing state approaches with federal labels and terms.\textsuperscript{32} He has divided the varied approaches into two large groups: one group consists of judicially created brightline, or per se, rules while the other group contains ad hoc balancing tests that focus on the particular costs and benefits of a challenged statute.\textsuperscript{33} Though this commentator avoids federal terminology, the balancing tests applied by courts tend to follow traditional equal protection levels of scrutiny and, therefore, will be classified as such in the following discussion. States,

\textsuperscript{28} See Hoffman, \textit{supra} note 8, at 1318.
\textsuperscript{29} See Schuman, \textit{supra} note 1, at 1199.
\textsuperscript{30} See, \textit{e.g.}, id. at 1203-05; Wang, \textit{supra} note 11, at 208-11.
\textsuperscript{31} See, \textit{e.g.}, Wang, \textit{supra} note 11, at 208-11.
\textsuperscript{32} See Schuman, \textit{supra} note 1, at 1204-17.
\textsuperscript{33} See id.
including Kansas, often incorporate a combination of brightline rules and balancing tests, but multi-tiered tests are easier to understand and to place within the greater context after an examination of the various rules that shape them.\textsuperscript{34}

1. Brightline Rules Applied by Courts in Remedy Cases

a. The Vested Rights Rule

All state courts interpreting remedy provisions agree on a seemingly straightforward rule: if a remedy exists when a plaintiff’s common law cause of action accrues, no subsequent law may abrogate that remedy.\textsuperscript{35} Courts agree that vested rights, or rights that exist prior to any legislative limitation, may not be abolished or limited.\textsuperscript{36} Certainly, once a plaintiff has received a judgment, a statute may not operate retroactively to deprive the plaintiff of this vested property right.\textsuperscript{37} No court, therefore, has interpreted the remedy provision so narrowly as to grant the legislature total deference.

Courts disagree, however, on when a cause of action accrues. Some courts determine when the tortious act or other elements of the cause of action have occurred;\textsuperscript{38} alternatively, other courts determine when the plaintiff would have been able to maintain a cause of action, for example, upon discovery of the plaintiff’s injury.\textsuperscript{39} Like the latter group of courts, Kansas recognizes an accrued right at the moment when a plaintiff has the right to pursue an action for a remedy.\textsuperscript{40} Despite differences in determining when a right accrues, courts agree that an accrued cause of action may not be affected by subsequent legislation.

\textsuperscript{34} See id. at 1204 (noting the usefulness of studying these cases in “their own terms”).

\textsuperscript{35} See, e.g., Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978) (quoting Barnes v. Kyle, 306 S.W.2d 1, 4 (Tenn. 1957)); see also Schuman, supra note 1, 1206-08.

\textsuperscript{36} See Schuman, supra note 1, 1206.


\textsuperscript{40} See Fleischer, 257 Kan. at 367, 892 P.2d at 502 (holding accrued causes of action are vested property rights, and, therefore, statute that gave directors of savings and loan associations limited personal liability could not be given retroactive effect by another statute).
b. The Pre-constitutional Remedies Rule: Protecting Remedies Existing at the Time the State Constitution Was Enacted

In deciding whether a cause of action may be limited or abolished, some courts have considered the remedy provision’s historical context. If a particular cause of action existed at the time the remedy provision was adopted, then the legislature may not alter that cause of action. All other subsequent remedies, created at common law or through legislation, are subject to change by duly enacted legislation.

Though the rule appears fairly simple, its application can be complicated because causes of action evolve and change over time. When a pre-constitutional cause of action is broadened by the legislature, for example, the right of the legislature to later limit that right is questionable even though the limitation may return the right to its pre-constitutional scope. In addition, many modern rights, such as the right to privacy and rights guaranteed by workers’ compensation, would be subject to unlimited change because they did not exist at the time the remedy provision was adopted into the state constitution.

c. Legislatively Defined Injuries and Court-defined Remedies

Some courts have interpreted their remedy provisions to impose no restrictions on the legislature’s power to limit or abrogate causes of action. The remedy provision does not, therefore, protect existing causes of action; it only guarantees that the court will provide a remedy for injuries identified and defined by the legislature (in addition to injuries defined by common law). Under this approach, legislatures create law and courts enforce it. This position of considerable deference is, of course, qualified by the vested rights rule discussed above.

41. See Schuman, supra note 1, at 1208-10.
42. See, e.g., Williams v. Wilson, 972 S.W.2d 260, 264-65 (Ky. 1998) (holding statute establishing subjective awareness for punitive damages unconstitutional because grossly negligent conduct standard was well-established common law right predating the Constitution). Kansas has applied this rule in one modern case. See Leiker v. Gafford, 245 Kan. 325, 361-62, 778 P.2d 823, 848 (1989) (holding statute limiting wrongful death claims constitutional because no wrongful death cause of action existed at common law).
43. See Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 816 (Ky. 1991) (holding products liability action was the result of historical evolution of common law causes of action and, therefore, could not be eliminated by the legislature).
44. See, e.g., Tomezak v. Bailey, 578 N.W.2d 166, 174 (Wis. 1998); see also Schuman, supra note 1, at 1205-06 (citing Montana, Tennessee, and North Carolina cases).
45. See Quesnel v. Town of Middlebury, 706 A.2d 436, 439 (Vt. 1997) (holding remedy provision does not create substantive rights but instead guarantees access to the courts for extant causes of action).
46. See supra Part II.B.1.a.
d. The Quid Pro Quo Rule

Courts following the quid pro quo rule require the legislature supply an adequate substitute remedy when it eliminates or restricts a cause of action. 47 Determining what constitutes an adequate substitute remedy, however, often results in ambiguous analyses and inconsistent applications of the rule from case to case. 48 The courts, including the Kansas Supreme Court, that have endorsed this rule frequently struggle with whether an alternative remedy must directly benefit the plaintiff or whether it may simply benefit a class to which the plaintiff belongs. 49 At times, a remedy that benefits the general welfare of the public will suffice, a conclusion that buries the quid pro quo requirement in ad hoc balancing of costs and benefits and renders it meaningless. 50

As legislative amendments erode original quid pro quos, courts applying the quid pro quo rule face challenging, new questions. 51 In cases where alternative remedies are subsequently limited by the legislature, as in cases challenging amendments to workers' compensation statutes, the court must determine whether the original substitute remedy provides an adequate substitute remedy for later limitations. 52 In these cases, the court must decide whether the amended statutory scheme would have been an adequate substitute at the time the original right was eliminated. 53


Although state remedy provisions are not replications of the Fourteenth Amendment, courts often use federal due process and equal protection terminology in constructing rules and tests that apply the remedy

48. See discussion infra Parts III.B-C.
49. See infra Parts III.A, III.C.
50. See infra Parts III.B-C.
51. In Neher v. Chartier, the Oregon Supreme Court held a provision in the Oregon Tort Claims Act unconstitutional because it precluded survivors' recovery under a wrongful death statute. See 879 P.2d 156, 161 (Or. 1994). The court concluded that, though the legislature may alter legislatively created causes of action, the legislature may not eliminate the remedy and continue to endorse the existence of the cause of action. See id. Furthermore, the substitute remedy need not be an exact replacement as long as the injured party is not "entirely without a remedy." Id. at 160.
52. See Schuman, supra note 1, at 1211-12 (discussing New Hampshire case requiring a new quid pro quo for further elimination of worker's right to sue co-workers under amendment to workers' compensation scheme).
provision to cases challenging legislative abrogation of remedies.\textsuperscript{54} Indeed, although some courts and commentators have resisted direct analogies to federal constitutional law,\textsuperscript{55} most remedy provision rules contain language and analyses borrowed, in whole or in part, from the federal equal protection doctrine.\textsuperscript{56}

Multi-tiered approaches, applying both state brightline rules and federal due process balancing, provide useful, flexible tests that courts may apply to the unique facts of each case. While the brightline rules guarantee straightforward analyses and clear answers, they often draw arbitrary lines (such as those between rights created before and after the creation of the state constitution). Balancing tests, however, allow courts to carefully examine the costs and benefits of the particular statute. Because of their flexibility, balancing tests are often used in combination with brightline rules, such as the quid pro quo rule.\textsuperscript{57} Courts frequently apply a brightline rule first, followed by some form of ad hoc balancing, a safety net in case the first step fails to provide a satisfactory conclusion.\textsuperscript{58}

a. Strict Scrutiny Tests

A court concluding the legislature had restricted a fundamental right may choose to exercise strict judicial scrutiny, a level of judicial review requiring an overwhelming public need or compelling government interest in order to justify the legislative limitation.\textsuperscript{59} Hence, in order to uphold the legislation, the court must find that no alternative method for achieving the compelling government interest exists. Moreover, when reviewing legislative limitations under strict scrutiny, state courts often require the legislature provide an adequate substitute remedy, an example of the quid pro quo rule.\textsuperscript{60} State courts also may follow other brightline rules, such as the vested rights rule discussed above.\textsuperscript{61} In short, courts

\begin{footnotes}
\footnotetext[54]{See Linde, supra note 14, at 128; see also Jerome L. Withered, Indiana's Constitutional Right to a Remedy by Due Course of Law, 37 RES GESTAE 456, 457 (1994) (noting that the remedy provision is broader than the federal Due Process Clause because it applies to any injury, not just one caused by state action).}
\footnotetext[55]{See, e.g., Schuman, supra note 1, at 1204-05. The Kansas Supreme Court resisted explicitly terming its remedy provision analysis a due process analysis until recently. See Bonin v. Vannaman, 261 Kan. 199, 217, 929 P.2d 754, 768 (1996) (referring to section 18 as a due process clause).}
\footnotetext[56]{See cases cited infra notes 59-83.}
\footnotetext[57]{See discussion infra Part II.B.2.a-b.}
\footnotetext[58]{See discussion infra Parts II.B.2.a-b.}
\footnotetext[59]{See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).}
\footnotetext[60]{See, e.g., Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).}
\footnotetext[61]{See, e.g., Resolution Trust Corp. v. Fleischer, 257 Kan. 360, 366-67, 892 P.2d 497, 502 (1995). The vested rights rule exists independently; if an individual's cause of action has accrued, the court need not apply any other test. See supra Part II.B.1.a.}
\end{footnotes
applying strict scrutiny tests often combine cost-benefit analyses with brightline rules.

The court’s analysis in *Kluger v. White*, a 1973 Florida case, illustrates this complex multi-tiered approach. In *Kluger*, the plaintiff challenged a Florida statute under the state remedy provision because it eliminated the plaintiff’s right to sue for minor property damage to her automobile. The court adopted a three-step test, incorporating federal strict scrutiny review and state brightline rules. First, if the legislatively created cause of action postdates the state’s constitution, the legislature may freely alter it. Second, if the right limited or abolished by the legislature predates the state’s constitution or was created by the common law, the legislature must provide an alternative remedy, an approach that combines the pre-constitutional remedy rule with the quid pro quo rule. Third, if the challenged statute fails to meet this requirement, the court engages in a strict scrutiny analysis, requiring the legislature demonstrate that “an overpowering public necessity” exists for eliminating the right and the public need cannot be met by any other means. Using this approach, the Florida Supreme Court found the automobile statute unconstitutional.

b. Intermediate Scrutiny Tests

Not surprisingly, tests that incorporate intermediate scrutiny balancing also frequently incorporate brightline rules, particularly in the first or initial tier of the test. Again, the quid pro quo often serves as the first step in the analysis. As such, if the legislature has provided an adequate substitute remedy for the remedy eliminated, the court need not inquire further. If no quid pro quo is provided, the party challenging the statute

62. 281 So. 2d 1 (Fla. 1973).
63. See id. at 2-4.
64. See id. at 4.
65. See id.
66. See id.
67. Id.; see also Schuman, supra note 1, at 1216 (identifying *Kluger* as the “locus classicus” for this method); Wang, supra note 11, at 208-10 (discussing *Kluger* as example of strict scrutiny approach).
68. See *Kluger*, 281 So. 2d at 5.
69. See, e.g., Olson v. Ford Motor Co., 558 N.W.2d 491, 497 (Minn. 1997). After requiring the cause of action to have vested at common law, the court required the legislature have a “reasonable basis” or “legitimate legislative purpose” for eliminating the cause of action. *Id.* (emphasis added).
71. See, e.g., O’Dell v. Town of Gauley Bridge, 425 S.E.2d 551, 560 (W. Va. 1992) (requiring first a “reasonably effective alternative remedy” and second, if no alternative is provided, applying
must prove that the legislative limitation is not an arbitrary or unreasonable means of eliminating a "clear social or economic evil." In short, the purpose and means of the statute must be reasonable when balanced against the burdens on those with an interest in the previously recognized cause of action.

Again, an example will illustrate this approach. In Sax v. Votteler, the Texas Supreme Court reviewed a medical malpractice statute of limitations restricting rights of children to sue for past injuries. After noting that the right of a child to recover for someone else's negligence was well-established, the court balanced the purpose and means of the statute against this right. Though the statute's purpose, controlling insurance rates, was permissible, the means, eliminating a child's right to sue, was too burdensome. Consequently, the court struck down the statute because it violated the state's remedy provision.

As one commentator has noted, states sometimes justify their intermediate scrutiny balancing tests by adopting equal protection analyses. In reviewing a medical malpractice statute, for example, a court would identify classifications of tortfeasors (health care providers and non-health care providers) and victims (according to the amount of damages). This approach is problematic, of course, because not all statutes challenged under the remedy provision involve distinct classifications. Workers' compensation schemes, for example, could be justified in every case because, under a given statute, all workers lose the right to sue for negligence; therefore, all those affected by the statute are treated equally.

Both strict and intermediate levels of scrutiny require a substantial amount of judicial inquiry into legislative matters. A court investigating the motives of the legislature, asking whether no other permissible means exists to achieve the objective or whether the chosen means is arbitrary or unreasonable, threatens to compromise the legislature's autonomy.

73. 648 S.W.2d 661 (Tex. 1983).
74. See id. at 663.
75. See id. at 666.
76. See id. at 667.
77. See id.
78. See id.
79. See Wang, supra note 11, at 214.
81. See id.
Though the remedy provision serves to protect the integrity of the judiciary, it should not serve this purpose by compromising the legislature's integrity. Using the remedy provision to enable the court to become a super-legislature would contradict the provision's original purpose.

c. Rational Basis Tests

Indeed, some courts do recognize the danger in higher levels of scrutiny that require the court weigh the legislature's purpose against the costs to individuals affected. In an effort to defer to the legislature, these courts often engage in a form of rational basis review at some stage in their evaluation processes. Tests of this nature, however, conflate remedy provision language with federal due process language, divesting state constitutional remedy provisions of any meaningful authority. The only potential nuance in a state's rational basis analyses is the addition of one or more of the brightline rules. Like strict and intermediate scrutiny tests, rational basis tests can include multiple tiers or steps, often using a brightline rule as the introductory step.

In more recent cases, the Kansas Supreme Court has proposed a two-tiered analysis that not only incorporates rational basis review, but also shows signs of collapsing entirely into a rational basis test, a result that would deprive the Kansas remedy provision of an identity separate from federal due process law. The court has described its rational basis analysis as similar to an equal protection analysis, noting its consideration of "almost identical factors." Indeed, the court's analysis closely resembles the federal equal protection analysis in inquiring whether the

82. See, e.g., Ruter v. Minnesota Dep't of Corrections, 569 N.W. 2d 407, 408 (Minn. 1997) (applying rational basis test).

83. See, e.g., Bonin v. Vannaman, 261 Kan. 199, 929 P.2d 754 (1996); see also Gentile v. Alternatt, 363 A.2d 1, 15 (Conn. 1975). In considering whether the legislature had provided a reasonable alternative, the Connecticut Supreme Court reviewed the legislation "on the whole as a substitute" to determine whether the overall benefits justified the elimination of a cause of action. Gentile, 363 A.2d at 15. Because the legislation benefitted society in general—a rational basis analysis—the court upheld the statute. See id. See generally discussion infra Part III.

84. See Gentile, 363 A.2d at 15.

85. See id. Though the New Hampshire Supreme Court did not explicitly use federal due process language, its quid pro quo rule and balancing test overlap in Nutbrown v. Mount Cranmore, Inc., 671 A.2d 548, 550-51 (N.H. 1996). In determining whether the legislature provided an adequate substitute, the court evaluated the "totality of benefits" provided the injured plaintiff. Id. The "totality of benefits," however, means benefits to society in general and, therefore, requires only rational basis review. See id.


legislative action has a substantial relation to a legitimate government objective.\textsuperscript{88} While this deferential approach threatens the remedy provision's autonomy, it does circumvent the danger inherent in higher levels of scrutiny: the judiciary does not risk becoming a super-legislature.

C. \textit{Federal Due Process: Rational Basis and Beyond}

When reviewing general economic legislation that does not implicate fundamental rights under the Due Process Clauses of the Fifth and Fourteenth Amendments, the United States Supreme Court will inquire only whether the legislation bears a rational relationship to a permissible government objective.\textsuperscript{89} The due process doctrine closely resembles the equal protection doctrine.\textsuperscript{90} Under equal protection analyses, classification under general economic legislation, which does not categorize individuals according to certain suspect classifications, such as race, is subjected to the same highly deferential rational basis review.\textsuperscript{91}

Although the federal Due Process Clauses do not contain remedy language like the state remedy provision, the United States Supreme Court has not precluded the possibility that they nevertheless guarantee a right to a remedy. In fact, the Court has recognized and even tentatively applied the quid pro quo requirement, suggesting the potential need for a substitute remedy when Congress eliminates a cause of action.\textsuperscript{92} In one case, however, the Court concluded that the Constitution did not prohibit the elimination of old rights by the legislature if they are eliminated to achieve a constitutional government end.\textsuperscript{93}

The Court first identified the quid pro quo, or "reasonably just substitute," in reviewing state workers' compensation laws in \textit{New York Central Railroad Co. v. White}.\textsuperscript{94} Despite the Court's reluctance to rule on whether an adequate substitute was constitutionally required, it nevertheless stated: "[I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other,

\textsuperscript{89} See \textit{In re Permian Basin Area Rate Cases}, 390 U.S. 747, 769-70 (1968) (ruling legislation constitutional under the Due Process Clause as long as it is not "arbitrary, discriminatory, or demonstratably irrelevant to the policy the legislature is free to adopt." (quoting \textit{Nebbia v. New York}, 291 U.S. 502, 539 (1934))).
\textsuperscript{91} See \textit{id. See generally John E. Nowak & Ronald D. Rotunda, Constitutional Law} § 11.4, at 392 (5th ed. 1995).
\textsuperscript{94} 243 U.S. 188 (1917).
without setting up something adequate in their stead. The Court, however, did not have to decide whether a substitute remedy is required in all cases because the workers' compensation scheme provided strict liability (the right of the worker to recover for every injury) as a substitute for abrogating the common law right to sue an employer for negligence.

In a more modern case, the United States Supreme Court again addressed the quid pro quo issue. In Duke Power v. Carolina Environmental Study Group, the Court reviewed a statute that limited the amount plaintiffs could recover in the event of a nuclear power plant accident. Congress enacted the statute to enable nuclear power companies to obtain adequate insurance coverage, guaranteeing injured individuals a speedy recovery under a system of strict liability. Although the Court emphasized that no person has a "vested interest, in any rule of the common law," it also emphasized that the strict liability scheme under the act provided an adequate substitute remedy, an argument made in response to the district court's assertion that the act lacked a quid pro quo. Indeed, the fact that a person may not have a vested interest in a particular rule does not preclude a person's right to a substitute remedy should that particular rule be abridged by the legislature.

Since Duke Power, the Court has not returned to the issue of a right to a remedy under federal due process law, leaving the issue unresolved. Justice White, however, urged the Court to consider the issue before it creates further confusion and inconsistency among the states. He noted that the Court failed to resolve "whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be."

The issue of a right to a remedy under federal due process law, Justice White observed, has divided state courts and threatens to

95. Id. at 201.
96. See id.
98. See id. at 64.
99. See id.
100. Id. at 88 n.32.
103. Id. at 894.
pose even larger problems as legislatures continue to focus on tort reform.104

III. THE KANSAS SUPREME COURT’S INTERPRETATION OF THE REMEDY PROVISION

A. The History of Section 18, Kansas’s Remedy Provision

At the 1859 Wyandotte constitutional convention, delegates adopted the following remedy provision as section 18 of the Kansas Bill of Rights: “All persons, for injuries suffered in person, reputation or property shall have remedy by due course of law, and justice administered without delay.”105 Unfortunately, the convention’s documented proceedings and debates do not illuminate the drafters’ intent in adopting a remedy provision; it appears to have been adopted without controversy or explication.106 All that is documented about the provision’s origins is its primary source, the Ohio Constitution, the source for Kansas’s entire Bill of Rights.107 Although states commonly incorporated remedy provisions from earlier state constitutions without much deliberation,108 delegates to the 1859 convention did not blindly follow the Ohio model; they debated other sections of the Ohio Bill of Rights before incorporating them into the Kansas Constitution.109 As such, they likely made a conscious decision to include remedy language.

Because the legislative history of Kansas’s remedy provision provides little guidance, early case law provides the only window to the provision’s history and original interpretation. Earlier cases arose in contexts different from more modern cases, but the early Kansas Supreme Court’s analysis of challenges under section 18 would certainly be a plausible analysis today. The court’s interpretation, however, has shifted considerably over the years.

The court first ruled on a remedy provision challenge in Hanson v. Krehbiel,110 a 1904 case. The plaintiff in Hanson challenged a statute limiting recovery in cases of libel to “actual” damages, thereby excluding any noneconomic damages for pain and suffering.111 A newspaper responsible for a libelous publication could, under the statute, avoid

104. See id. at 893-95.
105. KAN. CONST., Bill of Rights § 18.
106. See KANSAS CONSTITUTIONAL CONVENTION 290 (1920).
108. See Hoffman, supra note 8, at 1285.
109. See HELLER, supra note 107, at 8-9.
110. 68 Kan. 670, 75 P. 1041 (1904).
111. See id. at 672, 75 P. at 1042.
paying damages beyond actual damages by printing a retraction of the libelous subject matter upon notice by the plaintiff of potential civil action.\textsuperscript{112} In this case, the plaintiff claimed the statute denied a right to a remedy for some injuries, specifically injury to one’s reputation.\textsuperscript{113} In response to the challenge, defendants argued that the retraction restored an injured person’s good name and, thus, provided a substitute remedy for “a remedy by due course of law” under section 18.\textsuperscript{114}

In applying the remedy provision, the \textit{Hanson} court focused specifically on the meaning of “remedy by due course of law.”\textsuperscript{115} At the least, the court concluded the language requires “due and orderly procedure of courts in the ascertainment of damages for injury,” a process that would guarantee a “proper and adequate remedy.”\textsuperscript{116} Most notably, the court explicitly stated that an adequate remedy may require more than a substitute provided by the legislature because, if any legislative substitute would suffice, the legislature would have unlimited authority.\textsuperscript{117} The remedy provision, therefore, began in Kansas as a judicial check on legislative power.

After \textit{Hanson}, the court encountered few opportunities to apply the section 18 remedy provision until the right to a remedy resurfaced in more modern cases arising in response to tort reform legislation.\textsuperscript{118} Prior to the 1970s, plaintiffs challenged statutes conferring immunity on nonprofit, or charitable, hospitals in two cases.\textsuperscript{119} In both cases, the court remained true to its original interpretation in \textit{Hanson}, holding due course of law to guarantee a plaintiff’s recourse to the judiciary for remedies for \textit{all} injuries.\textsuperscript{120} The court emphasized its responsibility, in both cases, as the protector of an injured party’s right to a remedy under the state constitution.\textsuperscript{121} As such, statutes shielding hospitals from liability were held unconstitutional because they denied plaintiffs a judicial remedy.\textsuperscript{122}

\begin{itemize}
\item \textbf{112.} \textit{See id.} at 671, 75 P. at 1041-42.
\item \textbf{113.} \textit{See id.} at 673-74, 75 P. at 1042.
\item \textbf{114.} \textit{Id.} at 674, 75 P. at 1042.
\item \textbf{115.} \textit{See id.} at 674-75, 75 P. at 1042-43.
\item \textbf{116.} \textit{Id.} at 674, 75 P. at 1042.
\item \textbf{117.} \textit{See id.} at 674-75, 75 P. at 1042-43.
\item \textbf{118.} \textit{See cases cited infra} notes 123-79.
\item \textbf{120.} \textit{See Neeley,} 192 Kan. at 722-23, 267 P.2d at 160; \textit{Noel,} 175 Kan. at 763-64, 267 P.2d at 943.
\item \textbf{121.} \textit{See Neeley,} 192 Kan. at 722-23, 267 P.2d at 160; \textit{Noel,} 175 Kan. at 763, 267 P.2d at 943.
\item \textbf{122.} \textit{See Neeley,} 192 Kan. at 723, 267 P.2d at 160; \textit{Noel,} 175 Kan. at 763, 267 P.2d at 943.
\end{itemize}
B. The Shift from Plaintiffs' Individual Rights to the General Welfare of Society

In 1974, the Kansas Supreme Court began a rather abrupt shift away from precedent and its role as protector of plaintiffs' rights. Significantly, the court's discussion of section 18 in the 1974 case *Manzanares v. Bell* does not include any reference to *Hanson* or earlier analyses of the remedy provision. Instead, the court focused on federal due process precedent, as well as cases from other states, stressing the well-established federal view that the common law may be modified by the legislature as long as a rational relationship exists between the legislation and a legitimate government end. In short, the *Manzanares* court adopted the rational basis framework used to review legislation under the federal due process doctrine.

Though the *Manzanares* court acknowledged section 18 as a broad means of protecting individuals' rights, it undercut its acknowledgment by applying a highly deferential standard of review. Under this standard, legislative abrogation of a right does not violate section 18 if "the change is reasonably necessary in the public interest to promote the general welfare of the people of the state." The court upheld a no-fault automobile insurance act because it promoted the general welfare by guaranteeing accident victims recovery of certain economic losses, an adequate substitute according to the court, for the abrogation of the right to sue for noneconomic damages. In essence, the court exercised the police power of the state, the power to regulate for purposes of public health and safety. Because the state's exercise of its police power qualifies as a legitimate government end, the legislation easily passed the court's rational means test. As illustrated by this case, section 18, therefore, has no substantive authority because the court can almost

123. See *Neely*, 192 Kan. at 722-23, 267 P.2d at 160; *Noel*, 175 Kan. at 763, 267 P.2d at 943; see also Jeffrey P. DeGraffenreid, Note, Testing the Constitutionality of Tort Reform with a Quid Pro Quo Analysis: Is Kansas' Judicial Approach an Adequate Substitute for a More Traditional Constitutional Requirement?, 31 WASHBURN L.J. 314, 330-32 (1992) (discussing cases in which the Kansas Supreme Court did not require the legislature provide an adequate substitute remedy).


125. See *id.* at 589, 522 P.2d at 1291.

126. See *id.* at 599-600, 522 P.2d at 1301 (citing, for example, *New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1917)).

127. See *id.* at 599, 522 P.2d at 1300.

128. See *id.* at 599-602, 522 P.2d at 1300-03.

129. *id.* at 599, 522 P.2d at 1300.

130. See *id.* at 599, 522 P.2d at 1301.

131. See *id.* at 608, 522 P.2d at 1307.
always find a statute’s purpose to be the promotion of the general welfare.\textsuperscript{132}

Despite the court’s deferential ruling in \textit{Manzanares}, it returned to earlier precedent and the quid pro quo requirement in \textit{Kansas Malpractice Victims Coalition v. Bell}.\textsuperscript{133} In this case, the court distilled its earlier precedents, including \textit{Hanson} and \textit{Manzanares}, into essentially one rule—the quid pro quo requirement.\textsuperscript{134} Under the quid pro quo rule, the legislature may eliminate or modify common law causes of action as long as it provides an adequate substitute remedy for the remedy lost or modified.\textsuperscript{135} The statute challenged in this case set caps on the amount injured plaintiffs could recover in medical malpractice actions.\textsuperscript{136} The defendant argued the statute provided a quid pro quo by making doctors’ insurance coverage more affordable, thereby guaranteeing plaintiffs some recovery.\textsuperscript{137} The court, however, found this argument unconvincing. The law already required that health care providers carry malpractice insurance; the substitute remedy, therefore, provided no new remedy for the remedy abridged by the legislature.\textsuperscript{138} As such, the court held that the malpractice statute violated section 18.\textsuperscript{139}

\textbf{C. Modern Treatment of Section 18’s Remedy Provision}

1. Responding to \textit{Kansas Malpractice Victims Coalition v. Bell}

Shortly after \textit{Kansas Malpractice Victims}, the court reviewed another statute attacked as unconstitutional under section 18 in \textit{Samsel v. Wheeler}

\textsuperscript{132} \textit{But see} Ernest v. Faler, 237 Kan. 125, 134-38, 697 P.2d 870, 876-79 (1985) (reviewing pesticide statute requiring mandatory period for filing in order to maintain action for recovery and holding statute unconstitutional because it was an unreasonable means to achieve a government objective).


\textsuperscript{134} \textit{See Kansas Malpractice Victims}, 243 Kan. at 350, 757 P.2d at 263. Justice McFarland, however, entered a rather strong dissent, admonishing the court for inquiring too deeply into legislative motives and stressing the presumption of constitutionality. \textit{See id.} at 359, 757 P.2d at 268 (McFarland, J., dissenting).

\textsuperscript{135} \textit{See id.} at 350, 757 P.2d at 263.

\textsuperscript{136} \textit{See id.} at 334, 757 P.2d at 253.

\textsuperscript{137} \textit{See id.} at 351, 757 P.2d at 263.

\textsuperscript{138} \textit{See id.} at 351-52, 757 P.2d at 263-64. A few years earlier, the court held the state workers’ compensation act did provide a quid pro quo in the form of strict liability; workers no longer had to prove fault and were guaranteed recovery. \textit{See Rajala v. Doresky}, 233 Kan. 440, 441-42, 661 P.2d 1251, 1253 (1983). \textit{Rajala} is not necessarily inconsistent with \textit{Kansas Malpractice Victims}. Though it denies access to the courts, the quid pro quo in workers’ compensation cases seems easier to justify in that it truly provides a substitute remedy to injured parties. Statutory caps on medical malpractice damages provide society in general with the supposed benefit of quality health care, a kind of preemptive quid pro quo that does not directly provide injured parties with any new remedy.

\textsuperscript{139} \textit{See Kansas Malpractice Victims}, 243 Kan. at 351-52, 757 P.2d 263-64.
Transport Services. Again, the court had to determine whether statutory caps on damages infringed on a plaintiff’s right to a remedy. Though the statute limited an injured plaintiff’s recovery to $250,000 in noneconomic damages, the court held the statute provided a quid pro quo because, if the jury awarded damages in excess of the cap, the judge could not lower the award below $250,000. In finding an adequate substitute remedy, the court claimed to follow the quid pro quo rule as outlined in Kansas Malpractice Victims. Although the quid pro quo in Samsel may be a new remedy as required in Kansas Malpractice Victims, a quid pro quo limiting the discretion of judges only benefits injured plaintiffs in certain cases. Consequently, the substitute remedy does not completely replace the abrogated remedy. The court’s decision, therefore, endowed the quid pro quo with little real authority, leaving room for the court to broadly define what constitutes an adequate substitute remedy.

The court did indeed stretch the definition of adequate substitute remedy, broadly interpreting it to support later amendments to statutes that originally eliminated common law rights. In Bair v. Peck, the court held that a quid pro quo does not have to be concurrent with the elimination of a common law right. As such, the court did not require a new quid pro quo for an amendment to the Kansas Health Care Provider Insurance Availability Act, a statute eliminating the vicarious liability of a health care provider for the acts of an employee health care provider. The court concluded that the appropriate question is “whether the substitute remedy would have been sufficient if the modification had been a part of the original Act.” Noting the inability of the legislature to draft legislation that foresees all future needs, the court found the original quid pro quo, specifically mandatory malpractice insurance, to be an adequate substitute remedy for the amended act.

The majority in Bair conceded that the legislature may not use the same quid pro quo to justify repeatedly amending a statutory replacement...
of a common law right.\textsuperscript{149} Aside from concluding that the amendment was permissible in this case, however, the court did not define the extent to which the legislature may modify the act before providing a new quid pro quo.\textsuperscript{150} This ambiguity caused three justices to dissent, arguing that the original quid pro quo could not support subsequent limitations of the statutory right.\textsuperscript{151} The dissenting justices expressed concern that the majority's rule weakened the state constitution's authority and left section 18 vulnerable to liberal applications of the quid pro quo requirement.\textsuperscript{152}

2. The Two-Tier Test

In \textit{Bonin v. Vannaman},\textsuperscript{153} the court constructed a two-step test to be used in remedy provision cases.\textsuperscript{154} A reflection of the court's past analyses, the test is a combination of the rational basis \textit{Manzanares} rule and the quid pro quo rule.\textsuperscript{155} First, legislation limiting a remedy must be "reasonably necessary in the public interest to promote the general welfare of the people of the state."\textsuperscript{156} Second, the legislature must provide an adequate substitute remedy for the remedy limited or abolished.\textsuperscript{157} Although the court clearly stated the rule, its analysis reflected the departure from a strict quid pro quo requirement, thereby creating a confusing inconsistency between the stated rule and the court's application of it.\textsuperscript{158}

The plaintiff in \textit{Bonin} challenged an eight-year statute of repose under section 18, arguing it denied her right to a remedy for an injury resulting from medical malpractice.\textsuperscript{159} Because the alleged act of negligence occurred when the plaintiff was three years old, the statute of repose barred her right to sue when she reached the age of majority.\textsuperscript{160} Despite the statute's preclusion of a remedy, the court applied its two-step test and upheld the statute as constitutional under section 18.\textsuperscript{161}

\textsuperscript{149} See id.
\textsuperscript{150} See id.
\textsuperscript{151} See id. at 845-46, 811 P.2d at 1191-92 (Herd, Lockett, & Allegrucci, JJ., dissenting).
\textsuperscript{152} See id. at 845, 811 P.2d at 1192.
\textsuperscript{154} See id. at 217, 929 P.2d at 768.
\textsuperscript{155} See id.
\textsuperscript{156} Id. (quoting \textit{Manzanares v. Bell}, 214 Kan. 589, 599, 522 P.2d 1291, 1300-01 (1974)).
\textsuperscript{158} See id. at 219, 929 P.2d at 769.
\textsuperscript{159} See id. at 201-02, 929 P.2d at 759.
\textsuperscript{160} See id. at 203, 929 P.2d at 760.
\textsuperscript{161} See id. at 219, 929 P.2d at 769. But see Makos v. Wisconsin Masons Health Care Fund, 564 N.W.2d 662, 666 (Wis. 1997) (holding statute of repose unconstitutional under state remedy provision because it deprived plaintiff access to courts for injury "recognized by the laws of the
Upon close examination, however, the court’s two-step test does not seem to include two distinct steps. In applying step one, the rational basis inquiry, the court concluded that the statute was rationally related to the legitimate government objective of “affordable, available malpractice insurance for doctors and available health care for Kansas citizens.” Similarly, the court found step two was satisfied because “the continued availability of health care in Kansas” served as a quid pro quo. Thus, although the two steps ask seemingly different questions, they arrive at the same answer; they are essentially justified by the same rationale. As such, the quid pro quo fades into the state’s general police power—the legitimate government end becomes the quid pro quo.

Hence, as the dissenting justices in *Bair* had predicted, the court continued to liberally interpret section 18’s remedy guarantee, relaxing the quid pro quo requirement arguably to the point of oblivion. Not surprisingly, the court in *Bonin* referred to its remedy provision analysis as a due process analysis, a significant change in language marking the court’s shift in philosophy. The remedy provision, therefore, did not serve its historical purposes: to safeguard an individual’s right to a remedy and to preserve the integrity of the judiciary. Instead, it functioned, like federal due process doctrine, as a highly deferential means of judicial review.

The plaintiffs in *Lemuz v. Fieser*, challenging the same health care statute as that challenged in *Bair*, argued for a stricter standard of review than the rational basis standard used in federal due process cases. Section 18, according to the plaintiffs, is not a mere replica of federal due process language; rather, it is an autonomous clause of the state constitution intended to protect fundamental rights. In response to the plaintiffs’ argument, however, the court stated that section 18 challenges are already subjected to a stricter standard in the form of the quid pro quo requirement.

As in *Bair*, the court in *Lemuz* had to decide whether the health care act provided an original quid pro quo sufficient to sustain subsequent amendments further restricting the rights of injured parties. Although the court emphasized the strict standard required by the quid pro quo

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162. *Bonin*, 261 Kan. at 218, 929 P.2d at 768.
163. *Id.* at 219, 929 P.2d at 769.
164. See *id.* at 217, 929 P.2d at 768.
166. See *id.* at 947, 933 P.2d at 143.
167. See *id.*
168. See *id.* at 947-48, 933 P.2d at 143-44.
169. See *id.* at 954, 933 P.2d at 147.
rule, it did concede the deferential review embodied in step one of the Bonin test. In applying step one, the court noted that the “analysis is similar to a rational basis test,” although identical would be more accurate. Again, the court reasoned that the statute satisfied step one because it promoted the general welfare by improving the quality of health care in Kansas. Subsequently, after a lengthy analysis, the court arrived once again at the same justification for the statute’s satisfaction of the quid pro quo requirement: the act reduces insurance costs so more doctors can afford to practice, thereby improving the quality and availability of health care in Kansas.

The court applied the same approach and reached a similar conclusion in its most recent section 18 case, Injured Workers v. Franklin, upholding the state workers’ compensation act as constitutional despite amendments that further restrict claims of injured parties. Referring to section 18 as a due process clause, the court found the original quid pro quo, strict liability guaranteeing injured workers compensation, supported subsequent limitations under the act. Again, the court acknowledged that later amendments to a statutory scheme may weaken original remedies beyond an acceptable limit, but it did not clarify how far is too far, as Justice Allegrucci noted in his dissent.

Furthermore, the court also indicated, as it did in Lemu, that amendments expanding individuals’ rights may supplement the original quid pro

170. See id. at 949, 933 P.2d at 144.
171. Id. (emphasis added).
172. See id.
173. See id. at 959, 933 P.2d at 150. First, the court concluded that the act provided a supplemental quid pro quo in the form of later amendments requiring hospitals implement risk management programs. See id. at 958-59, 933 P.2d at 150. These amendments, in combination with the original quid pro quo of the act, constituted a sufficient quid pro quo for the amendment in question. See id. Subsequently, in attempting to determine the point at which the statute’s original quid pro quo was so attenuated that it no longer served as a substitute remedy, the court concluded that the act’s original quid pro quo was sufficient without the supplemental quid pro quo of the amendments. See id. at 959, 933 P.2d at 150. The court’s previous analysis, therefore, loses its relevance.

175. See Franklin, 262 Kan. at 888, 942 P.2d at 623.
176. See id. (justifying finding a quid pro quo with rationale similar to that used to justify finding rational basis for the statute). “The bill was the product of a comprehensive reform effort that attempted to balance the interests of employees, employers, labor, and business organizations.” Id. at 889, 942 P.2d at 623.
177. See id. at 889, 942 P.2d at 623-24 (Allegrucci, J., dissenting). Justice Allegrucci restated the concerns he expressed in Bair. “I am unable to determine at what point, if any, the majority would conclude the legislature went too far in altering a substitute remedy.” Id. at 889, 942 P.2d at 623.
qux, compensating for amendments that restrict rights.\textsuperscript{178} While the legislature had enacted amendments expanding workers' rights, the court conceded "the expansion pales in comparison to what was taken away."\textsuperscript{179} Rather than strengthening the court's rationale, this argument undercut the court's result by highlighting the considerable degree to which employees' rights have been restricted.

IV. ALTERNATIVE APPROACHES TO SECTION 18

As recent cases demonstrate, the quid pro quo requirement has essentially disappeared into the rational basis analysis applied in step one of the Kansas Supreme Court's remedy provision test. Section 18 is becoming the state equivalent of federal due process doctrine, despite its history to the contrary. Without a true quid pro quo requirement, legislative limitations on an individual's right to a remedy need only pass a rational basis test. At the very least, the court should clearly state what test it is applying and stop justifying the existence of a quid pro quo with forced, circular arguments.

The critical dilemma now is whether the quid pro quo rule warrants reviving, whether it contributes meaningfully to analyses of remedy provision challenges. The answer is yes: when given proper authority, the quid pro quo rule contributes significantly. At minimum, it certainly reflects a more accurate interpretation of the remedy provision's historical purpose to safeguard an individual's right to a remedy administered by the judiciary.

More importantly, however, the rule provides a solution to the search for an appropriate standard of judicial review. A court exercising rational basis review may not sufficiently protect an individual's rights because it will not inquire into legislative motives. Alternatively, a court exercising a higher level of scrutiny threatens to become a super-legislature by engaging in responsibilities constitutionally reserved to the legislature. The quid pro quo rule provides a compromise: a court need only review the legislation to insure it provides an adequate substitute remedy, thereby protecting an individual's right to a remedy without unduly infringing on the power of the legislature.\textsuperscript{180}

\textsuperscript{178} See id.

\textsuperscript{179} Id.

\textsuperscript{180} See Learner, supra note 101, at 200-01 ("Not only does [the quid pro quo] provide more meaningful protection to the individual, but it allows the legislature more freedom to shape and fine-tune its regime innovatively.").
A. The Two-Step Test Reversed

Instead of continually conflating the quid pro quo with a rational basis test, the Kansas Supreme Court should revise its remedy provision test in order to endow the quid pro quo rule with actual meaning. One potential means of achieving this objective involves simply reversing the steps so that the court applies the quid pro quo rule first and the rational basis test second. When the quid pro quo requirement is combined with balancing tests in other states, it serves as a threshold test, while the balancing test, such as a rational basis test, serves as a safety net or second means of reviewing legislation that fails to meet the quid pro quo requirement.181 If the Kansas Supreme Court continues to use the two-step test, it should at least join the majority and simply reverse the steps.

While reversing the steps might ostensibly prevent the quid pro quo rule from disappearing into rational basis, reversing the steps is not likely to strengthen the rule's ultimate authority. In fact, the quid pro quo requirement would likely disappear altogether because, when the court failed to find a quid pro quo, it could simply skip to the next step and evaluate the legislation under a rational basis test. For example, even if the court in Lemuz182 had concluded that amendments to the health care act lacked an adequate substitute remedy, it could proceed to the second tier and conclude the legislature had a rational basis for amending the act, namely the improvement of health care in Kansas. In short, although the quid pro quo and rational basis steps would be distinct, the quid pro quo rule would still lack authority.

Hence, the inclusion of rational basis review at any step threatens to subsume Kansas's remedy provision into the deferential world of federal due process.183 As the plaintiffs argued in Lemuz, the quid pro quo requirement has no authority in the context of rational basis.184 As such, in order for the quid pro quo rule to be effective, a stricter level of review must govern the second tier of the test. The Florida case, Kluger v. White,185 discussed above follows this approach, requiring the legislature demonstrate an overwhelming public necessity in the absence of a quid pro quo.186 This less deferential standard endows the quid pro quo rule with more authority, provided the court does not weaken the

181. See, e.g., Kluger v. White, 281 So. 2d 1 (Fla. 1973); see also discussion supra Part II.B.2.a.
183. The Illinois Supreme Court has expressly recognized the remedy provision's lack of authority, calling it "an expression of philosophy" and applying rational basis review. See McAlister v. Shick, 588 N.W.2d 1151, 1157 (Ill. 1992). If this is true of Kansas's remedy provision, the court should explicitly say so.
184. Lemuz, 261 Kan. at 947, 933 P.2d at 143.
185. 281 So.2d 1 (Fla. 1973).
186. See id.; see also supra text accompanying notes 59-68.
first tier by allowing a general public benefit to serve as a quid pro quo.187

B. Return to Historical Interpretation

As recently as Kansas Malpractice Victims in 1988, the Kansas Supreme Court required that an adequate substitute remedy directly benefit the class of individuals affected by providing a new remedy in place of the abrogated remedy.188 The court’s ruling reflects the approach in early cases, such as Hanson, in which the court interpreted the remedy provision as a means of protecting individuals’ rights, rather than a means of promoting the public interest.189 Historically, section 18 served as a check on the legislature, insuring the integrity of the judiciary by preserving common law rights and remedies.190 Indeed, this was the remedy provision’s purpose from its origins, when Sir Edward Coke first drafted it and when early Americans first adopted it into their state constitutions.191 Returning to the provision’s original purpose, at least to some degree, is perhaps the easiest approach to justify as it relies on long-standing, well-established precedent.

Unlike the first alternative approach, however, a more historical approach would change the result in recent Kansas cases. For example, in Lemuz,192 the reduction of health care costs would not be an adequate quid pro quo because it does not directly benefit the class of individuals affected, specifically injured plaintiffs, and does not provide a new remedy previously unavailable under the statute. In short, the quid pro quo must directly benefit those affected rather than simply benefitting the general welfare of society. In addition, old substitute remedies could not continually serve as new substitute remedies. Hence, while the approach is easy to justify, the court may find it less desirable because it promises different results.

The result may be less clear, however, in certain cases, specifically cases like Franklin193 that involve workers’ compensation statutes. Because strict liability for work-related injuries (the quid pro quo) did not exist at common law, the court would have to address how the historical approach translates into a modern context. Historically, if no one was

187. Weakening the quid pro quo rule in this regard is largely a matter of definition. See discussion infra Part IV.C.
190. See supra Part III.A.
191. See supra Part II.A.
liable for the plaintiff’s injuries, the court did not provide a remedy. If no remedy existed at the time the remedy provision was adopted into the state constitution, the court must decide whether to require a quid pro quo. Arguably a remedy provided solely by the legislature could later be restricted or eliminated by the legislature.

The case grows more complicated, however, because some individuals are denied a remedy by workers’ compensation statutes. Workers’ compensation schemes prevent injured plaintiffs from suing in tort, thereby denying another class of individuals a traditional common law cause of action. These plaintiffs can no longer seek a judicial remedy; they, therefore, deserve an adequate substitute remedy that is not subject to constant amendment by the legislature.

In order to apply a historical approach, the court must first resolve this issue and decide which causes of action require substitute remedies. One solution may be to adopt a form of the pre-constitutional remedies rule. Under this rule, if a cause of action existed at the time the state constitution was adopted, the legislature may not restrict that cause of action. The legislature, however, may alter all remedies subsequently created. For example, because the workers’ compensation statute at issue in Franklin originally abrogated a common law tort action, the legislature correctly provided a substitute remedy in the form of strict liability. The mere fact that another class of individuals, whose injuries are not a result of tortious conduct, benefits from the quid pro quo should not give the legislature freedom to weaken it. As such, under a historical approach, the result in Franklin would likely change.

C. A New Quid Pro Quo Rule: A Sliding Scale

A new approach, slightly more complex but fairly easy to apply, may provide more satisfactory results. The Kansas Supreme Court’s opinions become most convoluted when attempting to define what constitutes a quid pro quo, especially in recent cases in which later amendments to a statutory scheme leave plaintiffs with a partial quid pro quo. This confusion could be eliminated by adopting a test in which the quid pro quo dictates the level of scrutiny applied by the court.

Such a test would operate on a sliding scale. First, the court would determine if the legislature provided an adequate substitute remedy for the remedy eliminated or limited. If so, the court would apply the lowest level of scrutiny, a rational basis test to insure the legislation is reason-

194. See supra Part II.B.1.b.
196. See Franklin, 262 Kan. at 887-88, 942 P.2d at 622-23.
197. See supra Parts III.B-C.
ably related to a legitimate government end. Second, if the legislature did not provide a quid pro quo, the court would apply strict judicial scrutiny, and the legislation would survive only if the court found evidence of a compelling government interest. Lastly, if the legislature provided a partial quid pro quo, the court would apply intermediate scrutiny, inquiring whether the legislation bears a substantial relationship to an important government interest. Under an intermediate scrutiny test, the court would balance government interests against the burdens on those directly affected by the legislative limitation of the right. 198

This sliding scale would facilitate clearer, less confusing opinions. In particular, the court’s rationale, in cases like Lemuz and Franklin, would better support its result because it could uphold legislation by finding only a partial quid pro quo, provided the legislation passes intermediate scrutiny. For example, if the court had used this test in Franklin, it could have reached its result more logically. In justifying its finding of an adequate substitute remedy, the court actually engaged in intermediate scrutiny, researching the legislative history of the amendment to the workers’ compensation act. 199 Though the court clearly applied an intermediate scrutiny balancing test, it did not label its approach as such, creating inconsistency between its stated rule and its analysis. 200

Had the Franklin court applied a sliding scale test, it could have prevented any inconsistency. First, it would have found a partial quid pro quo (the original quid pro quo of strict liability limited by later amendments). The court would then have reviewed the legislation to insure it bears a substantial relationship to an important government interest, an inquiry resembling its analysis in Franklin. By allowing the quid pro quo to determine the level of scrutiny, the court would have avoided awkward arguments and eliminated the inconsistency between the rule it claims to be applying and its analysis or rationale.

Although the sliding scale creates a more flexible, and thus more workable, relationship between the quid pro quo requirement and judicial scrutiny, a clear definition of the quid pro quo must accompany it. Define the quid pro quo is certainly difficult. Not surprisingly, the

198. In Ernest v. Falter, the Kansas Supreme Court actually applied an intermediate scrutiny test to a section 18 challenge. See 237 Kan. 125, 697 P.2d 870 (1985). Noting the right to a remedy under section 18 implicated a fundamental right, the court purported to apply a strict scrutiny standard of review. See id. at 129-31, 697 P.2d at 873-74. In its analysis, however, the court actually applied intermediate scrutiny, inquiring “whether the legislative means selected has a real and relevant relation to the objective sought.” Id. at 134, 697 P.2d at 876. Most recently, the court applied an intermediate scrutiny balancing test to determine the constitutionality of a statute’s application under section 18. See Adams v. Saint Francis Reg’l Med. Ctr., 264 Kan. 144, 955 P.2d 1169 (1998).

199. See Franklin, 262 Kan. at 888, 942 P.2d at 623.

200. See id.
court has avoided an explicit definition, thereby creating substantial discrepancy in what constitutes a quid pro quo from case to case. For example, affordable health care constitutes a quid pro quo in *Bair* and *Lemuz*; the same rationale, however, supports the court’s rational means analyses. Hence, the court interprets the quid pro quo so broadly it renders it meaningless.

Whatever approach the court uses, its first task should be to define the quid pro quo. The sliding scale would help resolve this problem by allowing the court to find a partial quid pro quo in cases like *Bair* and *Lemuz*. The test’s flexibility best accommodates the elusive nature of the quid pro quo because it accounts for the ambiguous cases in which the court might be willing to find only a partial quid pro quo. Because of the test’s inherent flexibility, the court could adopt a more historical definition of quid pro quo; legislative limitations once again would require a new substitute remedy that directly benefits those affected.

V. CONCLUSION

As the varied interpretations of different states suggest, the remedy provision generates many questions. Most courts agree that its purpose, even today, is to protect an individual’s right to a remedy. Questions such as what constitutes a remedy and how it may be administered, however, have caused varied interpretations not only among the different courts from state to state, but also within individual courts from case to case. Indeed, the Kansas Supreme Court’s interpretation of section 18 has varied dramatically over the years.

Although no obvious or simple solution may exist, the Kansas Supreme Court should, nonetheless, address the issue and clarify its current two-step test. The crucial question for the Kansas court revolves around the quid pro quo requirement. The court should first determine if the remedy provision continues to require an adequate substitute remedy. If it does, the court should then clearly delineate what constitutes an adequate substitute remedy and clarify the approach, or test, it is using to evaluate the legislation. Without setting some guidelines, the future of Kansas’s remedy provision is grim.