

“Death by a Thousand Paper Cuts”¹ – How the Kansas Supreme Court Should Stop the State Legislature’s Systematic Decimation of Workers Compensation Benefits

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I. INTRODUCTION

America’s founders sought a moderate government that could prevent individual tyrants or extreme political factions from seizing power.² They feared political factions would wield the power of the government to benefit themselves, while harming the community as a whole and infringing on weaker individuals’ rights.³ As protection against both singular tyrants and tyrannical political factions, the founders explicitly protected important individual rights in the Constitution and devised our

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1. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1009 (Kan. Ct. App. 2018) (“The gradual erosion of the fair exchange between rights under the Act and common-law rights to tort recovery have, for the injured worker, amounted to death by a thousand paper cuts.”), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140, at *1 (Kan. Feb. 28, 2019). The Kansas Supreme Court held oral arguments for *Johnson* on September 17, 2020. Kansas Supreme Court, *117,725 - JOHNSON v. U.S. FOODS - Sept. 17th - 11 AM*, YOUTUBE (Sept. 17, 2020), https://www.youtube.com/watch?v=o49t-XaxGiw&ab_channel=KansasSupremeCourt [https://perma.cc/6MTP-YFKS] Oral arguments were broadcast live and recorded on the Kansas Supreme Court’s YouTube channel due to COVID-19 procedure. *Id.*

2. THE FEDERALIST NO. 10 (James Madison) (“Among the numerous advantages promised by a wellconstructed [sic] Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”); Alexander Hamilton, Constitutional Convention: Remarks on the Term of Office for Members of the Second Branch of the Legislature (June 26, 1787) (“Real liberty is neither found in despotism or the extremes of democracy, but in moderate governments.”).

3. *See id.* (discussing methods to limit extreme factions, which Madison defined as “a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed [sic] to the rights of other citizens, or to the permanent and aggregate interests of the community”); THE FEDERALIST NO. 51 (James Madison) (“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger”).

well-known system of checks and balances.⁴ The judiciary serves as a firewall should an overzealous legislature infringe on its citizens' constitutional rights.⁵ Kansans used this same framework when crafting their state constitution.⁶

Since Kansas entered the Union in 1861, its judiciary has given the Kansas Legislature—consistently dominated by one political party⁷—great deference by applying some form of rational basis review⁸ when plaintiffs challenge a statute's constitutionality.⁹ Many Kansans' opinions on the wisdom of this judicial deference likely turn on their political affiliation. Regardless of personal political ideology, most agree that at times in Kansas's history, objectively extreme political factions controlled its legislature.¹⁰ Kansas strayed far from the “moderate government” the founders sought.¹¹ Judicial deference, combined with extreme political factions, allowed infringement of individual rights, often in the name of

4. See THE FEDERALIST NO. 51, *supra* note 3 (James Madison) (“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”).

5. See *id.*

6. See generally KAN. CONST. of 1859.

7. A *Brief History of the Kansas Republican Party*, KAN. GOP 2 (Apr. 2019), <https://www.kansas.gov/wp-content/uploads/2019/04/ksgop-history.pdf> [https://perma.cc/6UVQ-RKNT] (providing summaries and statistics on Kansas elections from 1860 through 2014 and stating that “the Kansas Republican Party has dominated Kansas politics since Kansas gained statehood in 1861.”).

8. The Kansas Courts often use the term “presumption of constitutionality.” This term is essentially synonymous to a “rational basis standard of review.” This Comment will use “rational basis” throughout for the sake of consistency. See Richard E. Levy, *Constitutional Rights in Kansas after Hodes & Nauser*, 68 U. KAN. L. REV. 743, 765 (2020) (“[T]he presumption [of constitutionality] is a function of the level of scrutiny that applies, rather than a freestanding principle of judicial restraint that applies to all forms of legislative action. In particular, the presumption is a manifestation of deferential review under the rational basis test and does not apply under strict scrutiny, in which the burden is on the state to show that a law furthers a compelling interest and is necessary and/or narrowly tailored to that end.”).

9. *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 527–29 (Kan. 2019) (Stegall, J., concurring) (discussing the history of judicial deference to the legislature and stating: “In Kansas, there is evidence that we at least acknowledged some form of [high judicial deference] from our earliest days as a state.”).

10. See, e.g., Seth C. McKee, Ian Ostrander, & M. V. Hood III, *Out of Step and Out of Touch: The Matter with Kansas in the 2014 Midterm Election*, 15 THE FORUM, 291, 291, 294 (2017) (“In recent years the politics of Kansas, with its strong historic ties to the Republican Party, have taken a hard right turn.”); *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1001–02 (Kan. Ct. App. 2018) (quoting past testimony from workers compensation practitioner Jeff Cooper, who stated: “we had some moderate Republicans in the Senate that generally were not real eager to disadvantage injured workers in the state of Kansas . . . [I]n 2010 . . . the Kansas Chamber of Commerce made an organized effort to get all those moderates replaced on the Senate and with the exception of maybe one moderate senator out of Topeka, they were successful”), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140 at *1 (Kan. Feb. 28, 2019).

11. See Hamilton, *supra* note 2.

business growth.

This radically pro-business approach is particularly evident in the Kansas Workers Compensation Act.¹² In recent decades, maximum financial benefits for injured Kansas workers have not kept up with inflation and weekly maximum benefits are the third lowest in the country.¹³ As financial benefits dwindled, the Kansas Legislature passed numerous amendments that de facto denied benefits for many injured workers.¹⁴ While often painted as a political issue, this is not left versus right. It is extreme versus moderate. Corporate lobbyists versus voters. Insurance companies versus injured workers. In this battle, Kansas workers are losing.

When properly administered, workers compensation—often described as “The Grand Bargain”¹⁵—provides benefits and mitigates risk for both employers and injured workers. Unfortunately for injured workers, the current Kansas Workers Compensation Act serves as a broad shield against employer liability rather than a mutually beneficial compromise.¹⁶ Over the last thirty years, the Kansas Legislature repeatedly tilted the scales against injured workers.¹⁷ Kansas courts deferred to the Legislature’s judgment and permitted these cuts to workers’ benefits.

Through its decisions in *Hodes & Nauser v. Schmidt*¹⁸ and *Hilburn v. Enerpipe Ltd.*,¹⁹ the Kansas Supreme Court drew a line in the sand regarding its deference in applying rational basis review to constitutional statutory challenges. In these two opinions, released just months apart in 2019, the Kansas Supreme Court employed an increased level of scrutiny when reviewing legislative actions that implicated fundamental constitutional rights.

12. See Tim Alvarez, *The 2011 Kansas Workers Compensation Act: Too Sharp a Right Turn?*, 81 J. KAN. B. ASS’N 24, 25 (2012) (noting the new amendments to the Kansas Workers Compensation laws are “largely pro-employer”).

13. Kansas weekly maximum benefits rank 48th in the country, with some states’ maximums more than doubling Kansas’s. See SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS) DI 52150.045, CHART OF STATES’ MAXIMUM WORKERS’ COMPENSATION (WC) BENEFITS (2020), <https://secure.ssa.gov/poms.nsf/lnx/0452150045> [<https://perma.cc/2WTS-DR37>]. For example, Kansas’s maximum weekly payment is \$687.00 whereas Iowa’s maximum weekly payment is over \$1,800.

14. See *infra* Section II.A.2.

15. SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R44580, WORKERS’ COMPENSATION: OVERVIEW AND ISSUES 2 (2020).

16. Alvarez, *supra* note 12, at 25.

17. See *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1004–07 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140 at *1 (Kan. Feb. 28, 2019).

18. 440 P.3d 461, 502 (Kan. 2019) (holding women have the right to an abortion under Section 1 of the Kansas Bill of Rights).

19. 442 P.3d 509, 524 (Kan. 2019) (holding statutory caps on noneconomic damages in personal injury cases per se unconstitutional under Section 5 of the Kansas Bill of Rights).

This increased scrutiny may impact a wide range of legislation. This Comment does not delve into all those issues, many of which are highly socially and politically divisive.²⁰ Instead, it focuses on how the Kansas Supreme Court's recent decisions may impact something that hurts numerous injured workers, regardless of political affiliation: the Kansas Workers Compensation Act.²¹

This Comment proceeds as follows. Section II reviews the history of Kansas workers compensation, including the Kansas Court of Appeals significant 2018 decision in *Johnson v. U.S. Food Services*.²² Section II then summarizes the relevant portions of the Kansas Supreme Court's subsequent 2019 *Hodes* and *Hilburn* opinions. Section III shows how *Hodes* and *Hilburn* may affect the Kansas Supreme Court's analysis in "right to a remedy" constitutional challenges to the Kansas Workers Compensation Act, proposes a new test for reviewing these challenges, and presents an alternative method for plaintiffs to challenge workers compensation statutes by asserting their inviolate right to a jury trial. Finally, Section IV provides a brief summary and conclusion.

II. BACKGROUND

Analyzing the Kansas Workers Compensation Act's future requires a look back at its history and the Kansas Supreme Court's traditional standard for reviewing the Act's constitutionality. This section provides an overview of the Act's history and brief summaries of the Kansas Supreme Court's recent *Hodes* and *Hilburn* decisions.

A. *Kansas Workers Compensation Background*

This subsection outlines the Kansas Workers Compensation Act's²³ development from its enactment in the early 20th century through its drastic 1993 overhaul—the last version the Kansas Supreme Court held facially constitutional.²⁴ Next, it details amendments by the Legislature that slashed injured workers' benefits over the last decade. It then explores the Kansas Court of Appeals holding in *Johnson v. U.S. Food Services*²⁵ which struck down a recent amendment to the Act as facially unconstitutional.

20. For a thorough examination of *Hodes & Nauser v. Schmidt* and its potential implications, see Levy *supra* note 8.

21. KAN. STAT. ANN. §§ 44-501–44-5,127 (2018).

22. 427 P.3d 996.

23. KAN. STAT. ANN. §§ 44-501–44-5,127 (2018).

24. *Johnson*, 427 P.3d at 1009.

25. *Id.* at 1013.

This subsection ends with a summary of the current state of workers compensation benefits in Kansas.

1. History of the Kansas Workers Compensation Act

Kansas established one of the first comprehensive workers compensation schemes in the country in 1911.²⁶ Just three years later, in *Shade v. Ash Grove Lime & Portland Cement Co.*, the Kansas Workers Compensation Act survived its first constitutional challenge in the Kansas Supreme Court.²⁷ The *Shade* court rejected the argument that workers compensation violated an injured worker’s Section 5 right to a jury trial²⁸ and Section 18 right to remedy²⁹ under the Kansas Bill of Rights.³⁰ The *Shade* opinion comingled Section 5 and Section 18 rights without thoroughly analyzing either.³¹ Instead, the Kansas Supreme Court upheld the workers compensation statute—which included an opt-out provision for both employers and employees—primarily based on its elective, contractual nature.³²

In 1967, the Kansas Legislature eliminated an injured worker’s right to recover from a coworker, even for intentional torts such as battery, if the injured worker qualified for workers compensation benefits.³³ The Legislature subsequently mandated Kansas Workers Compensation Act coverage for most employers and employees.³⁴ This was not unique to Kansas. Nearly every state eventually adopted workers compensation mandates.³⁵ Mandatory coverage negated the “elective nature” rationale used by the Kansas Supreme Court in *Shade* and several subsequent cases.³⁶ In response, the Kansas Supreme Court developed a new method

26. *Id.* at 1003.

27. 144 P. 249, 249–50 (Kan. 1914).

28. KAN. CONST. BILL OF RTS., § 5 (“The right of trial by jury shall be inviolate.”).

29. *Id.* § 18 (“All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.”).

30. *Shade*, 144 P. at 249–50.

31. *See id.* at 249; *Miller v. Johnson*, 289 P.3d 1098, 1143 (Kan. 2012) (Beier, J., concurring in part and dissenting in part), abrogated by *Hilburn v. Enerpipe Ltd.*, 442 P.3d at 521 (Kan. 2019).

32. *Hilburn*, 442 P.3d at 535 (Luckert, J., dissenting) (discussing *Shade*).

33. *Rajala v. Doresky*, 661 P.2d 1251, 1252, 1254 (Kan. 1983) (upholding KAN. STAT. ANN. §§ 44-501, 44-504(a) (1967)).

34. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1004 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140 at *1 (Kan. Feb. 28, 2019). Some agricultural workers, firefighters, real estate professionals, and people employed by family members are exempt from the Act. KAN. STAT. ANN. § 44-505(a) (2018).

35. *Szymendera*, *supra* note 15, at 1.

36. *Shade*, 144 P. at 250; *Hilburn*, 442 P.3d at 518 (citing *Baker v. St. Louis Smelting & Refining Co.*, 65 P.2d 284, 288 (Kan. 1937)); *Potocan v. Hamilton Coal & Mercantile Co.*, 243 P. 537,

for assessing the constitutionality of Kansas workers compensation, commonly known as the quid pro quo test.

In *Rajala v. Doresky*, the plaintiff argued that the 1967 amendment barring tort actions against coworkers violated his Section 18 right to a remedy.³⁷ Rajala's coworker intentionally struck and injured him during his shift at a restaurant.³⁸ Because Rajala could recover workers compensation benefits, the 1967 amendment barred a personal injury claim against his coworker.³⁹ The Kansas Supreme Court rejected Rajala's Section 18 right to a remedy argument.⁴⁰ Although the Kansas Workers Compensation Act eliminated common law tort remedies, the *Rajala* court held that the Act provided injured workers a sufficient substitute statutory remedy.⁴¹ In other words, the Legislature can strip away a common law remedy, like a worker's right to sue their employer in tort. But to do so without running afoul of Section 18, the Legislature must provide citizens a quid pro quo in the form of a sufficient alternative remedy for their injuries, like adequate workers compensation benefits. The Kansas Supreme Court would later adopt this quid pro quo analysis as one half of a two-part test applied in constitutional challenges to the Act.

The Act went mostly untouched for several decades until the Legislature overhauled it in 1993.⁴² This overhaul included numerous amendments that reduced the likelihood of an injured worker obtaining benefits and lowered the monetary value of the benefits they did receive.⁴³ Before these amendments, employers offset workers compensation benefits dollar for dollar for any Social Security retirement benefits an injured worker received.⁴⁴ Under the 1993 Amendments, employers could also offset against workers compensation benefits "the employer's contribution (and apparently the earnings thereon) to any private

538–39 (Kan. 1926) (noting prior decisions "balked and hesitated at those statutes which were compulsory"); *Smith v. Cudahy Packing Co.*, 225 P. 110, 111 (Kan. 1924) ("Having decided that the statutes are, in fact, optional, and afford a voluntary election to accept or reject them, the entire problem is solved.").

37. 661 P.2d at 1252–53.

38. *Id.* at 1252.

39. *Id.* at 1254.

40. *Id.* at 1253.

41. *Id.* at 1253–54.

42. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1004 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140 at *1 (Kan. Feb. 28, 2019).

43. *Id.* at 1004–05.

44. Nicole M. Zomberg, Comment, *Workers Compensation Law: Constitutionality of the 1993 Kansas Workers Compensation Act*, 37 WASHBURN L.J. 829, 835, 845–46 (1998); *Johnson*, 427 P.3d at 1005.

retirement plan.”⁴⁵ The Legislature also eliminated an injured worker’s right to vocational rehabilitation treatment, which helps workers return to gainful employment after an injury.⁴⁶

For the first time in the history of the Act, “the legislature disallowed recovery for the aggravation of a preexisting injury even though the aggravation of the injury was due to a work-related activity.”⁴⁷ Prior to 1993, injured workers were taken in their condition at the time of the accident, and the Act did not impose a standard of health.⁴⁸ It was “well settled that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.”⁴⁹ The Legislature extinguished benefits for numerous workers with preexisting conditions by amending the Act to state that “[a]n injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.”⁵⁰ The 1993 amendments included multiple other changes that limited payments to injured workers.⁵¹

These amendments survived a Section 18 “right to a remedy” challenge in *Injured Workers of Kansas v. Franklin*.⁵² The Kansas Supreme Court developed a two-part test that would later become known as the *Injured Workers* test: “(1) Is the legislative change reasonably necessary in the public interest to promote the general welfare of the state? (2) Has the Legislature provided an adequate substitute remedy to replace the remedy that was restricted?”⁵³

The *Injured Workers* court answered “yes” to part one under a rational basis standard of review, where “[t]he state legislature is presumed to have acted within its constitutional power” and a statute “will not be set aside if any state of facts reasonably may be conceived to justify it.”⁵⁴ Part two of the *Injured Workers* test employed the quid pro quo analysis from *Rajala*, which asks whether an alternative remedy, provided by the Legislature in exchange for stripping citizens’ rights to a common law remedy, is

45. *Johnson*, 427 P.3d at 1005.

46. *Id.*

47. *Injured Workers of Kan. v. Franklin*, 942 P.2d 591, 620 (Kan. 1997).

48. *Strasser v. Jones*, 350 P.2d 779, 782 (Kan. 1960).

49. *Id.* (citing numerous prior Kansas Supreme Court decisions).

50. KAN. STAT. ANN. § 44-508(f)(2) (2018).

51. *See Johnson*, 427 P.3d at 1004–05.

52. 942 P.2d at 622–23.

53. *Johnson*, 427 P.3d at 1005 (citing *Injured Workers*, 942 P.2d at 603), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140, at *1 (Kan. Feb. 28, 2019).

54. *Injured Workers*, 942 P.2d at 599 (quoting *Leiker v. Gafford*, 778 P.2d 823, 849 (Kan. 1989)).

sufficient.⁵⁵

While a few of the 1993 amendments benefited workers, the Kansas Supreme Court recognized that “the expansion [of worker benefits] pales in comparison to what was taken away.”⁵⁶ However, the court analyzed the entire Act as one quid pro quo, instead of isolating the 1993 amendments.⁵⁷ Once a statutory scheme is considered an adequate substitute remedy—as the Kansas Workers Compensation Act was in *Rajala*—the Legislature may subsequently reduce the substitute remedy without providing an “independent and separate quid pro quo.”⁵⁸ These subsequent reductions do have an outer limit. “The legislature, once having established a substitute remedy, cannot constitutionally proceed to [weaken] the remedy, by amendments, to a point where it is no longer a viable and sufficient substitute remedy.”⁵⁹

Despite recognizing that the 1993 amendments heavily favored employers, the *Injured Workers* court held that the Act in its totality was still an adequate quid pro quo.⁶⁰ The majority explained its quid pro quo analysis by simply pointing out “[t]he amended Act still provides compensation for injured workers without proof of negligence or fault, a benefit not allowed under typical tort law.”⁶¹

In a concise dissent, Justice Allegrucci argued that Kansas workers compensation was no longer an adequate quid pro quo for workers and stated that he could not “determine at what point, if any, the majority would conclude the legislature went too far in altering a substitute remedy.”⁶² Despite numerous subsequent amendments that undermine the majority’s justification, the Kansas Supreme Court has not ruled on the constitutionality of the Kansas Workers Compensation Act since its 1997 *Injured Workers* opinion.⁶³

55. *Id.* at 619–23.

56. *Johnson*, 427 P.3d at 1005 (citing *Injured Workers*, 942 P.2d at 623).

57. *Injured Workers*, 942 P.2d at 621.

58. *Id.* (quoting *Bair v. Peck*, 811 P.2d 1176, 1189–90 (Kan. 1991)).

59. *Injured Workers*, 942 P.2d at 622 (quoting *Bair*, 811 P.2d at 1191). Kansas judicial opinions, including *Injured Workers* and *Bair*, have commonly utilized the term “emasculate” to describe something being weakened. Given the clearly misogynistic implication of using “emasculate” in this context, this Comment uses “weaken” in its place.

60. *See id.* at 623.

61. *Id.*

62. *Id.* at 623–24 (Allegrucci, J., dissenting).

63. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1009 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140 at *1 (Kan. Feb. 28, 2019).

2. Subsequent Amendments to the Kansas Workers Compensation Act

In 2011, the Kansas Legislature either amended or repealed twenty-eight sections of the Act.⁶⁴ Once again, the 2011 amendments strongly favored employers by further restricting injured workers’ chances of obtaining benefits and reducing the benefits that they could receive.⁶⁵ Kansas courts historically said the Act’s primary purpose was to protect injured workers, and its provisions must be construed liberally in favor of providing benefits whenever reasonably possible.⁶⁶ In 2011, the Legislature did not even attempt to hide that it was flipping the Act’s purpose to favor employers and their insurance companies. The Legislature shifted the focus of the Act’s first section “from compensation for injured workers to disallowances and reductions [for employers] predicated on fault-based concepts familiar to tort law.”⁶⁷ The first section’s title now explicitly includes “disallowances; substance abuse testing; exceptions, pre-existing conditions; . . . benefits reduced for certain retirement benefits.”⁶⁸ Perhaps most damning for workers, the Legislature adopted the prevailing factor standard, which imposed a fault-based burden of proof on injured workers and doubled down on stripping benefits from people with preexisting conditions.⁶⁹

Under the prevailing factor standard, an injured worker must prove a workplace accident or repetitive trauma was the “primary factor, in relation to any other factor”⁷⁰ that caused their “medical condition and resulting disability or impairment.”⁷¹ An administrative law judge considers “all relevant evidence submitted by the parties,” then applies the prevailing factor standard, which closely resembles the causation analysis in a common law tort action.⁷² Injured workers bear the burden of proving the absence of a preexisting condition and the primary cause of their

64. Alvarez, *supra* note 12, at 25.

65. *Id.*

66. See Mendel v. Fort Scott Hydraulic Cement Co., 78 P.2d 868, 876 (Kan. 1938) (noting the purpose of workers compensation “is to make certain the workmen will be protected”); Houston v. Kansas Highway Patrol, 708 P.2d 533, 536 (Kan. 1985) (noting if the statute is ambiguous, claims should be resolved in favor of the worker), *overruled on unrelated grounds* by Murphy v. IBP Inc., 727 P.2d 468 (Kan. 1986); Bahr v. Iowa Beef Processors, Inc., 663 P.2d 1144, 1149 (Kan. Ct. App. 1983) (“As a general rule, the provisions of the Workmen’s Compensation Act are to be liberally construed in favor of the worker, and compensation awarded where it is reasonably possible to do so.”) (citing Ours v. Lackey, 515 P.2d 1071, 1077 (Kan. 1973)).

67. Johnson, 427 P.3d at 1005.

68. KAN. STAT. ANN. § 44-501 (2011).

69. See Alvarez, *supra* note 12, at 26.

70. KAN. STAT. ANN. § 44-508(g) (2011).

71. *Id.* § 44-508(f)(2)(A)(iii) (2011).

72. Alvarez, *supra* note 12, at 26; KAN. STAT. ANN. § 44-508(g) (2011).

injury.⁷³ The prevailing factor standard eliminates compensation for “many injuries that were previously compensable as workers compensation injuries.”⁷⁴

Before the 2011 amendments, injured workers’ rights to compensation for medical treatment reasonably necessary as a result of their injury were not limited in amount or restricted in time.⁷⁵ Now, administrative law judges cannot award compensation for future medical treatment unless an injured worker proves, at the time of the submission of the case, their need for the future treatment is more probable than not, which typically requires medical expert testimony.⁷⁶ Because medical experts frequently struggle with predicting treatment needs in the distant future, this amendment made it more difficult for injured workers to obtain compensation for healthcare costs stemming from a workplace injury.⁷⁷ Additionally, an employer can now get an injured worker’s claim dismissed with prejudice for lack of prosecution if the claim does not reach trial or settlement within three years, instead of the five years previously afforded to workers.⁷⁸

Traditionally, Kansas recognized benefits for work disability if those benefits exceed the standard functional impairment calculation. Post-injury wage loss, a key factor in calculating work disability benefits, was defined as the difference between a worker’s wage at the time of injury and their *actual* post-injury wages.⁷⁹ After the 2011 amendments, instead of using actual post-injury wages, an administrative law judge determines a worker’s *potential* post-injury wages based on factors including the worker’s “age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market.”⁸⁰ Additionally, a permanently injured worker now must prove more than a 7.5 percent functional impairment to their whole person or they cannot obtain work disability benefits under K.S.A. § 44-510e.⁸¹

The 2011 Amendments included modest increases to the maximum

73. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1005–06 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140, at *1 (Kan. Feb. 28, 2019).

74. *Alvarez*, *supra* note 12, at 26.

75. *Johnson*, 427 P.3d at 1006.

76. *Id.*; *Alvarez*, *supra* note 12, at 28.

77. *Johnson*, 427 P.3d at 1006.

78. KAN. DEP’T OF LAB. DIVISION OF WORKERS COMPENSATION PRAC. & PROC. GUIDE, at 38 (2018) (noting for accidents occurring prior to May 2011, workers have five years from the date of filing before their claim can be dismissed for lack of prosecution) (quoting KAN. STAT. ANN. § 44-523(f) (Supp. 2006)).

79. *Johnson*, 427 P.3d at 1006 (citing KAN. STAT. ANN. § 44-510e).

80. *Alvarez*, *supra* note 12, at 27.

81. *Id.*; *Johnson*, 427 P.3d at 1006 (citing KAN. STAT. ANN. § 44-510e (2011)).

benefit caps for injured workers, the first since 1993.⁸² But, after accounting for inflation, today, some maximums still sit more than thirty percent lower than their 1993 counterparts.⁸³

When the 2011 Amendments were enacted, the Act required use of the Fourth Edition of the American Medical Association Guides (“Fourth Edition”) when calculating an injured worker’s impairment.⁸⁴ The Fourth Edition assigns significantly higher impairment percentages to most injuries than its Sixth Edition counterpart, which equals higher monetary benefits for an injured worker.⁸⁵ As a concession to pro-labor advocates leading up to the 2011 Amendments, the Kansas Legislature agreed it would not amend the Act to require use of the Sixth Edition.⁸⁶ In 2013, just two years after this agreement, the Kansas Legislature amended the Act to require use of the Sixth Edition.⁸⁷

The significance of this change lies in the different methods the Fourth Edition and Sixth Edition use to calculate impairment. Logically connected to workers compensation, the Fourth Edition calculates injuries based on impairments that reduce an injured worker’s ability to work.⁸⁸ In contrast, the Sixth Edition impairment calculation is primarily based on life-care activities like “bathing, showering, dressing, eating, functional mobility, personal hygiene, toilet hygiene and management, sleep, and sexual activity.”⁸⁹ On average, Sixth Edition “impairment ratings are 40% to 70% lower than those provided in the Fourth Edition.”⁹⁰

3. *Johnson v. U.S. Food Service*

A few months after the Sixth Edition calculation requirement took effect, Howard Johnson suffered a workplace neck injury, and filed a claim

82. Alvarez, *supra* note 12, at 27.

83. *Id.*; KAN. STAT. ANN. § 44-510f(a)(1) (2011); *Id.* § 44-510b (2018); *CPI Inflation Calculator*, BUREAU OF LAB. STAT., <https://data.bls.gov/cgi-bin/cpicalc.pl>, (last visited Aug. 25, 2020). For example, in 1993, the maximum compensation for a permanent total disability was \$125,000. \$125,000 in 1993 provided the same buying power as \$225,000 in 2020. Yet in 2020, the maximum compensation for a permanent total disability is only \$155,000. Alvarez, *supra* note 12, at 27. This disparity will grow with each passing year the Legislature fails to increase benefits for injured workers.

84. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1007 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140, at *1 (Kan. Feb. 28, 2019).

85. *Id.* at 1007–08.

86. *Id.* at 1002.

87. *Id.*

88. *See id.* at 1011.

89. *Id.* (citing CHRISTOPHER R. BRIGHAM, AMA GUIDES – SIXTH EDITION: EVOLVING CONCEPTS, CHALLENGES AND OPPORTUNITIES, AM. MED. ASS’N, 12 (2011) <https://www.6thedition.com/training/sixtheditionsyllabus2008-01-23.pdf>)).

90. *Johnson*, 427 P.3d at 1012.

for workers compensation benefits.⁹¹ Applying the Sixth Edition, an administrative law judge awarded Johnson less than \$15,000 in total workers compensation benefits, a paltry sum compared to the nearly \$62,000 he would have received under the Fourth Edition.⁹² Johnson appealed, claiming use of the Sixth Edition made the Kansas Workers Compensation Act an unconstitutional violation of his Section 18 right to a remedy.⁹³ He argued the Act no longer provided an adequate quid pro quo for its elimination of injured workers' rights to bring a common law action against their employer.⁹⁴

The Kansas Court of Appeals followed what, at the time, was longstanding Kansas Supreme Court precedent and applied a rational basis standard of review.⁹⁵ Under this standard of review, the Court of Appeals must "interpret a statute in a way that makes it constitutional if there is *any reasonable construction* that would maintain the Legislature's apparent intent."⁹⁶

The Kansas Court of Appeals then applied the same two-part test used by the Kansas Supreme Court in *Injured Workers*: "(1) Is the change in the Act reasonably necessary in the public interest to promote the general welfare of the people of Kansas? (2) Does the Act in its current form provide an adequate [quid pro quo] . . . ?"⁹⁷ The Kansas Court of Appeals held that the amendment passed part one's very low bar without providing much analysis because Johnson's argument focused on part two.⁹⁸

In part two of the *Injured Workers* test, the Kansas Court of Appeals held that adoption of the Sixth Edition surpassed the limit that prevents the Legislature "once having established a substitute remedy" from proceeding "to [weaken] the remedy, by amendments, to a point where it is no longer a viable and sufficient substitute remedy."⁹⁹ The court noted that the erosion of workers compensation benefits after *Injured Workers* "amounted to death by a thousand paper cuts" for injured Kansas workers.¹⁰⁰ The court quoted former Kansas Secretary of State Kris Kobach, who, despite being generally considered an ultra-conservative

91. *Id.* at 1000.

92. *Id.* at 1001.

93. *Id.* at 1002.

94. *Id.*

95. *Id.*

96. *Id.* (emphasis added) (citing *Solomon v. State*, 364 P.3d 536, 544 (Kan. 2015)).

97. *Johnson*, 427 P.3d at 1008 (citing *Injured Workers of Kan. v. Franklin*, 942 P.2d 591 (Kan. 1997)).

98. *Johnson*, 427 P.3d at 1008.

99. *Id.* at 1004 (quoting *Bair v. Peck*, 811 P.2d 1176, 1191 (Kan. 1991)).

100. *Johnson*, 427 P.3d at 1009.

and pro-business politician,¹⁰¹ opposed using the Sixth Edition.¹⁰² Kobach had previously explained that the Sixth Edition provided “zero compensation” for certain injury classes and reduced others “to pathetically inadequate compensation levels, by anyone’s reckoning.”¹⁰³ Kobach further stated that, “Kansas is now the only state in the union that combines the 6th Edition with the prevailing-factor rule. That puts Kansas in a class by itself, and it results in a denial of due process to Kansas workers.”¹⁰⁴

While not at issue in *Johnson*, the Kansas Court of Appeals noted that the 2011 amendments alone may have pushed the Kansas Workers Compensation Act to the unconstitutional tipping point.¹⁰⁵ Despite granting the Legislature the massive leeway of rational basis review, the Kansas Court of Appeals held that use of the Sixth Edition made the Act an insufficient quid pro quo and facially unconstitutional.¹⁰⁶ Because the Act contains a severability clause, this holding did not invalidate Kansas workers compensation in its entirety.¹⁰⁷ Instead, the Court of Appeals decision only struck the 2013 amendment adopting the Sixth Edition and required immediate reversion to the Fourth Edition.¹⁰⁸

4. Current State of Workers Compensation in Kansas

Financial benefits available to injured workers in Kansas have not kept pace with inflation and are much lower than most other states.¹⁰⁹ Regardless of a worker’s pre-injury income, wage replacement benefits are capped at \$687 per week or \$35,724 per year.¹¹⁰ This cap ranks forty-eighth among states and is less than two-thirds of the national average, which is nearly \$54,000 per year.¹¹¹ As an example of a specific injury cap, the national average maximum compensation for an arm injury is

101. See *Kris Kobach*, BALLOTPEdia, https://ballotpedia.org/Kris_Kobach [<https://perma.cc/33CQ-RU89>] (last updated Jan. 2019).

102. *Johnson*, 427 P.3d at 1007.

103. *Id.*

104. *Id.*

105. *Id.* at 1009.

106. *Id.* at 1009–13.

107. *Id.* at 1013–14.

108. *Id.* at 1014 (striking KAN. STAT. ANN. §§ 44-510d(b)(23)–(b)(24), 44-510e(a)(2)(B)).

109. See Jeanine Skowronski, *Hurt on the Job? A State-by-State Guide to Workers’ Compensation*, POLICYGENIUS (Nov. 7, 2018), <https://www.policygenius.com/blog/state-by-state-guide-to-workers-compensation/> [<https://perma.cc/5YBZ-C9JJ>]; see also *supra* notes 82–83 and accompanying text.

110. See SOC. SEC. ADMIN., *supra* note 13.

111. See *id.* (annual national average calculated based on monthly maximums as of Aug. 25, 2020).

approximately \$170,000.¹¹² However, if a Kansas worker loses an arm due to employer negligence, the worker's maximum recovery from their employer's insurance company is \$75,000.¹¹³ Under most workers compensation schemes, "[t]o assist beneficiaries' return to work and departure from the workers' compensation rolls, vocational rehabilitation services are provided."¹¹⁴ Yet, in Kansas, employers and their insurance companies get to choose whether or not to offer an injured worker vocational rehabilitation services.¹¹⁵

The Kansas Workers Compensation Act has "shifted its focus from compensation for injured workers to disallowances and reductions predicated on fault-based concepts familiar to tort law."¹¹⁶ Injured workers bear the burden of proving their "right to an award of compensation and . . . the various conditions on which [their] right depends."¹¹⁷ Injured workers must show that "a work-related accident or repetitive trauma was the primary factor in causing their injury."¹¹⁸ Even if an injured worker meets this prevailing factor standard, employers have a number of defenses at their disposal including stricter drug testing requirements, notice requirements, and provisions that act as statutes of limitations.¹¹⁹

B. Recent Shift in Constitutional Scrutiny by the Kansas Supreme Court

This subsection reviews two opinions, released months apart in 2019, where the Kansas Supreme Court diverted from its traditional deferential approach in cases raising constitutional challenges to state statutes. The heightened standard of review established for statutes that implicate fundamental constitutional rights may significantly impact future challenges to the Kansas Workers Compensation Act.

1. *Hodes & Nauser v. Schmidt*

In 2015, the Kansas Legislature enacted a bill preventing doctors from

112. Lena Groeger, Michael Grabell & Cynthia Cotts, *Workers' Comp Benefits: How Much is a Limb Worth?*, PROPUBLICA (Mar. 5, 2015), <https://projects.propublica.org/graphics/workers-compensation-benefits-by-limb#Kansas> [<https://perma.cc/KD8F-NPJ4>].

113. *Id.*

114. Szymendera, *supra* note 15, at 17.

115. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1005 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140 (Kan. Feb. 28, 2019).

116. *Id.*

117. KAN. STAT. ANN. § 44-501b(c) (2011).

118. *Johnson*, 427 P.3d at 1005-06.

119. *Id.* at 1006, 1009-10.

employing a widely used abortion procedure, except in a few narrow circumstances.¹²⁰ Physicians Herbert C. Hodes and Traci Lynn Nauser administered this abortion procedure in Kansas and claimed the bill prevented them from providing the safest second-trimester abortion procedure available.¹²¹ Hodes and Nauser argued that banning the procedure violated their patients’ inalienable natural rights, including the right to liberty, protected under Section 1 of the Kansas Bill of Rights.¹²² Section 1 provides that “all [people] are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”¹²³

The Kansas Supreme Court agreed that Section 1 rights include “a woman’s right to make decisions about her body, including the decision whether to continue her pregnancy.”¹²⁴ The majority looked at common law history and the understanding of Lockean Natural Rights Guarantees prior to 1859 to interpret the Kansas Constitution drafters’ intent for Section 1.¹²⁵ Although the right to an abortion procedure is not absolute, the court declared it a fundamental, natural right which must be reviewed under a heightened strict scrutiny standard.¹²⁶ Strict scrutiny means “the State is prohibited from restricting that right unless it can show it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest.”¹²⁷ The Kansas Supreme Court upheld the district court’s temporary injunction enjoining enforcement of the statute because Hodes and Nauser demonstrated a substantial likelihood that the bill would be held unconstitutional under a strict scrutiny analysis.¹²⁸

Justice Stegall led off his dissenting opinion in *Hodes* by positing that the majority had issued the “most significant and far-reaching decision

120. *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019) (quoting KAN. STAT. ANN. § 64-6743(a) (2015)).

121. *Hodes*, at 466–67.

122. *Id.* at 467.

123. KAN. CONST. BILL OF RTS., § 1. Not surprisingly, given when it was drafted, Section 1 uses the word “men.” *Id.* The *Hodes* majority dedicated a portion of its opinion to clarifying that Section 1 guarantees women the same inalienable rights as men. *Hodes*, 440 P.3d at 483–84. Justice Stegall agreed in his dissent and argued that, at the time the Kansas Constitution was drafted, the use of the term “men” in this context was “understood as a generic term for all humankind.” *Id.* at 523 (Stegall, J., dissenting). Regardless of the drafters’ intent, this Comment uses the more inclusive term, “people.”

124. *Hodes*, 440 P.3d at 466.

125. *Id.* at 472–73.

126. *Id.* at 502.

127. *Id.*

128. *Id.* at 502–03.

[the Kansas Supreme Court] has ever made.”¹²⁹ Justice Stegall framed his dissent as being not just about abortion policy, but rather a general disagreement with the Kansas Supreme Court only protecting judicially and politically “preferred” rights with strict scrutiny.¹³⁰ Justice Stegall argued the court should review legislative infringements on constitutional rights under a slightly elevated “rational basis with bite” standard of review.¹³¹ Ultimately, the majority’s strict scrutiny approach prevailed and influenced the outcome in *Hilburn*.

2. *Hilburn v. Enerpipe, Ltd.*

In *Hilburn*, the Kansas Supreme Court held that the statutory caps on noneconomic damages in personal injury cases were *per se* unconstitutional.¹³² A semi-truck rear-ended the car Ms. Hilburn was in and injured her.¹³³ Hilburn alleged the truck driver’s negligence caused the accident and sued Enerpipe, Ltd., the truck’s owner.¹³⁴ Enerpipe conceded both the driver’s negligence and their vicarious liability.¹³⁵ The case went to trial to determine damages. At trial, the jury awarded Hilburn approximately \$33,500 for medical expenses and \$301,500 for noneconomic losses.¹³⁶ Upon a motion from Enerpipe, the trial court reduced the noneconomic damages award to the \$250,000 statutory cap.¹³⁷

Hilburn appealed, arguing that the statutory cap on noneconomic damages infringed on her Section 5 right to a trial by jury.¹³⁸ Hilburn also contended that the legislature had not provided an adequate substitute remedy for its infringement of her Section 18 right to a remedy, making the statute an insufficient *quid pro quo*.¹³⁹ Because her Section 5 claim was dispositive, the court did not address Hilburn’s Section 18 claim.¹⁴⁰

In *Hodes*, the Kansas Supreme Court established a higher standard of review for “cases dealing with ‘fundamental interests’ protected by the Kansas Constitution.”¹⁴¹ The *Hilburn* court said it was clear that the

129. *Id.* at 517 (Stegall, J., dissenting).

130. *Id.* at 556.

131. *Id.* at 550–51.

132. *Hilburn v. Enerpipe, Ltd.*, 442 P.3d 509, 511 (Kan. 2019).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*; KAN. STAT. ANN. § 60-19a02(d) (2014).

138. *Hilburn*, 442 P.3d at 511; KAN. CONST. BILL OF RTS., § 5.

139. *Hilburn*, 442 P.3d at 511–12; KAN. CONST. BILL OF RTS., § 18.

140. *Hilburn*, 442 P.3d at 524.

141. *Id.* at 513 (citing *Hodes & Nausser v. Schmidt*, 440 P.3d 461, 495–99 (Kan. 2019)).

Section 5 right to a jury trial is fundamental under the Kansas Bill of Rights.¹⁴² Therefore, the court followed the precedent from *Hodes* and refused to “apply [rational basis review] to challenges brought under Section 5.”¹⁴³

After determining a higher standard of review applied, the Kansas Supreme Court found that the statutory caps on noneconomic damages in personal injury cases infringed on the right to trial by jury, which is “inviolate” under the Kansas Bill of Rights.¹⁴⁴ After emphasizing the importance of the word “inviolate”, the Kansas Supreme Court refused to continue its past practice of applying a quid pro quo test to Section 5 challenges and held that the statutory noneconomic damage caps in personal injury cases were *per se* unconstitutional.¹⁴⁵ The Kansas Supreme Court’s application of the heightened standard of review in *Hilburn* to Section 5 rights and statutory caps on noneconomic damages shows that *Hodes* may impact a wide range of constitutional challenges. Section 18 “right to a remedy” challenges to the Kansas Workers Compensation Act could be next.

III. ANALYSIS

A. *Hodes*, *Hilburn*, and the Right to a Remedy

This section first explores how *Hodes* and *Hilburn* may affect Section 18 “right to a remedy” challenges to the Kansas Workers Compensation Act and suggests a new two-part test for analyzing these challenges. Then, this section proposes an alternate path for future injured Kansas workers to challenge the Act by asserting their inviolate right to a jury trial under Section 5 Workers Compensation Challenges After *Hodes* and *Hilburn*.

In *Hodes*, the Kansas Supreme Court profoundly shifted constitutional jurisprudence in Kansas by increasing the level of scrutiny it applies when the Legislature infringes on Kansans’ fundamental constitutional rights.¹⁴⁶ While two justices disagreed with the five-justice *Hodes* majority on the correct level of scrutiny, the court unanimously agreed the case called for something higher than rational basis review.¹⁴⁷ After this unanimous support for an elevated level of scrutiny, it is unlikely the court will shift

142. *Id.* at 513.

143. *Id.*

144. *Id.* at 524.

145. *Id.* at 515–19 (noting “none of the Kansas cases . . . using the quid pro quo test on section 5 challenges withstands scrutiny.”).

146. Levy, *supra* note 8, at 762–63.

147. *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 497–98 (Kan. 2019).

back to its traditional, highly deferential approach anytime soon. This elevated level of review already played a critical role in the Kansas Supreme Court's *Hilburn* decision and may similarly impact the Kansas Workers Compensation Act.¹⁴⁸

Injured workers challenging the Kansas Workers Compensation Act based on an infringement of their Section 18 right to a remedy have a fairly straightforward path to getting the Kansas Supreme Court to utilize a heightened standard of review. The Act inherently infringes on Section 18 rights because it strips workers of their right to pursue common law remedies against employers and coworkers.¹⁴⁹ The Kansas Supreme Court has explicitly stated that Section 18 is a “fundamental constitutional right.”¹⁵⁰ Therefore, following *Hodes* and *Hilburn*, the court should apply a heightened level of scrutiny when reviewing Section 18 challenges to the Act than it has in the past. As detailed below, the Kansas Supreme Court has the perfect vehicle in front of it for replacing the *Injured Workers* test with a new workers compensation constitutional framework.¹⁵¹

The *Hodes* majority applied strict scrutiny when analyzing a statute that infringed on a woman's right to access abortion procedures, a right the court identified as fundamental.¹⁵² If the Kansas Supreme Court applied strict scrutiny to workers compensation, numerous provisions of the Act would likely be held unconstitutional. Strict scrutiny applies such a high standard to legislation that it has been called a “virtual death-blow.”¹⁵³ Under strict scrutiny, a statute must “serve some compelling state interest and be narrowly tailored to further that interest.”¹⁵⁴

The Kansas Workers Compensation Act, at least in its original form, likely serves a compelling state interest.¹⁵⁵ Workers compensation protects businesses from the risk of financial ruin due to high damage

148. *Hilburn*, 442 P.3d at 526–27 (Stegall, J., concurring) (Noting that, over his dissent in *Hodes*, the court established a higher standard of review in “cases involving ‘fundamental interests’ under the Kansas Constitution” which is still controlling precedent. Justice Stegall's adherence to the *Hodes* precedent and subsequent concurrence was outcome determinative in *Hilburn*.)

149. See Szymendera, *supra* note 15, at Summary.

150. *Ernest v. Faler*, 697 P.2d 870, 874 (Kan. 1985).

151. See *Injured Workers of Kan. v. Franklin*, 942 P.2d 591, 603–04 (Kan. 1997).

152. *Hodes*, 440 P.3d at 466, 493–504.

153. Michael C. Duff, *Worse than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 123, 182 (2016) (“the virtual rubber-stamp of truly minimal review . . . the virtual death-blow of truly strict scrutiny”) (quoting *Richardson v. Carnegie Libr. Rest., Inc.*, 763 P.2d 1153, 1163 (N.M. 1998)).

154. *Hodes*, 440 P.3d at 493 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

155. See Duff, *supra* note 153, at 181 n.403 (providing statistics on the vast amount of workplace injuries taking place in the early 20th century when workers compensation schemes developed in America) (quoting JOHN F. WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 2–3 (2004)).

awards for pain and suffering or punitive damages in common law tort actions. Simultaneously, workers compensation was meant to protect individual workers and their families from bearing the financial burden of injuries suffered while working. This “Grand Bargain” can mutually benefit both sides and shift the burden of a social safety net for injured workers away from their family or government programs and onto the industry that profits off their labor.¹⁵⁶ Instead of many workers suffering financial devastation after an injury, and a few recovering large sums of money, all injured workers and their families receive the security of reasonable guaranteed benefits. Instead of businesses shuttering their doors due to one incident that results in a massive judgment, the cost of workplace injuries is borne out across entire industries in a predictable fashion through workers compensation insurance premiums.

Although the Kansas Workers Compensation Act, in its original form, may serve a compelling government interest, it is doubtful that the current version of the Act is narrowly tailored enough to survive strict scrutiny. Many of the recent amendments were targeted at reducing or denying benefits for injured workers to cut expenses for employers and their insurance carriers. These amendments are almost certainly broader than necessary to achieve the goals of providing employers with predictable costs and shielding them from sudden financial ruin. However, one should also consider that holding large portions of the Act, or the entire Act, unconstitutional under strict scrutiny would have drastic practical consequences and cause massive uncertainty for employers and injured workers.

Based on the opinions in *Hilburn*, the Kansas Supreme Court seems intent on avoiding this outcome. Justice Luckert dissented in *Hilburn* in part because “a new analytical model [] would collaterally create uncertainty about the constitutionality of the Workers Compensation Act.”¹⁵⁷ The *Hilburn* opinion commented on Justice Luckert’s concerns, assuring that striking down the noneconomic damage caps “on Section 5 grounds would not cause the collapse of the workers compensation system, much less make it inevitable or imminent.”¹⁵⁸ Fortunately, there is a reasonable rationale for strict scrutiny being too high of a standard when assessing Section 18 challenges to the Act.

In *Hodes*, the majority focused on the type of rights being asserted

156. Szymendera, *supra* note 15, at 3.

157. *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 534 (Kan. 2019) (Luckert, J., dissenting).

158. *Id.* at 520 (Beier, J., concurring in part and dissenting in part) (quoting *Miller v. Johnson*, 289 P.3d 1098, 1145 (Kan. 2012)).

when considering the applicability of strict scrutiny.¹⁵⁹ Inalienable natural rights, which include life, liberty, and the pursuit of happiness, are rights that are inherently bestowed upon all individuals and are “not dependent upon the will of the government.”¹⁶⁰ The *Hodes* majority found that the right to personal autonomy is an inalienable natural right that includes a woman’s right to make decisions about her own body, healthcare, and family planning.¹⁶¹ This led directly to the court’s application of strict scrutiny to the statute at issue.¹⁶²

In contrast, the right infringed upon by the Kansas Workers Compensation Act is the common law right to recover in tort action. This right is a “fundamental constitutional right” that “is recognized in the Kansas Bill of Rights [Section] 18” and deserves a heightened level of scrutiny after *Hodes*.¹⁶³ But the common law right to recover in tort action does not rise to the level of an inalienable natural right, such as bodily autonomy, that would require strict scrutiny. The Kansas Supreme Court previously made this distinction in *Farley v. Engelken* when it considered the proper level of scrutiny to apply in a constitutional challenge to a statute restricting injured patients’ recovery in medical malpractice tort actions.¹⁶⁴ The court in *Hodes* also noted, “[u]nder the facts [in *Farley*], which did not involve a natural right, the court decided to apply the intermediate scrutiny standard,” a semi-heightened analysis lying between rational basis and strict scrutiny.¹⁶⁵ The Kansas Supreme Court should apply this same intermediate scrutiny standard to the Act, which eliminates injured workers’ rights to sue their employer in tort.

The Kansas Supreme Court should also distinguish its analysis of the Act from *Hilburn*, where the court held that the statutory cap on noneconomic damages in personal injury cases were a *per se* unconstitutional violation of the right to a jury trial under Section 5, which states that “[t]he right of trial by jury shall be *inviolable*.”¹⁶⁶ Again, the

159. *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 472–73 (Kan. 2019).

160. *Id.* at 481 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *123, *129–38).

161. *Hodes*, 440 P.3d at 497–98 (“At issue here is the inalienable natural right of personal autonomy, which is the heart of human dignity. It encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination. It allows each of us to make decisions about medical treatment and family formation, including whether to bear or beget a child.”).

162. *Id.*

163. *Farley v. Engelken*, 740 P.2d 1058, 1064 (Kan. 1987) (quoting *Ernest v. Faler*, 697 P.2d 870, 874 (Kan. 1985)).

164. 740 P.2d at 1063–66.

165. *Hodes*, 440 P.3d at 667 (citing *Farley*, 740 P.2d at 1068); see *Levy*, *supra* note 8, at 751 (noting intermediate scrutiny requires “that government action must serve an important governmental interest and be substantially related to that interest.”).

166. *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 511 (Kan. 2019) (emphasis added) (quoting KAN. CONST. BILL OF RTS., § 5).

court likely wants to avoid the chaos that would result from holding that Kansas Workers Compensation Act is a *per se* unconstitutional violation of the right to a remedy under Section 18. The *Hilburn* court paid significant attention to the text of Section 5, specifically the word “inviolate.”¹⁶⁷ Section 18’s text, which says “[a]ll persons . . . shall have remedy by due course of law,” is distinguishable from Section 5.¹⁶⁸ Section 18’s language does not indicate that any infringement on the right to a remedy is *per se* unconstitutional like the word “inviolate” does in Section 5.¹⁶⁹ Section 18 only guarantees the right to a reasonable remedy to redress injuries through due process, not an inviolate right to a specific remedy.¹⁷⁰ Therefore, the Kansas Supreme Court can maintain consistency with its *Hodes* and *Hilburn* fundamental rights approach, and avoid holding the Act *per se* unconstitutional by applying an intermediate level of scrutiny to the Act.

To apply an intermediate level of scrutiny to workers compensation, the Kansas Supreme Court does not need to create a new framework from whole cloth. It can look to the *Injured Workers* two-part test which asks: “(1) Is the legislative change reasonably necessary in the public interest to promote the general welfare of the state? (2) Has the Legislature provided an adequate substitute remedy to replace the remedy that was restricted?”¹⁷¹

The *Injured Workers* test has not failed Kansas workers because its structure is illogical, but rather because of the extremely low level of scrutiny it employs.¹⁷² Assessing part one of the test under rational basis is essentially a free pass to the Legislature allowing for post hoc rationalizations. In *Injured Workers*, the State cited concerns about fraud based on a *New York Times* report compiled by employers and insurance companies that was later shown to have vastly overestimated the frequency of fraudulent workers compensation claims.¹⁷³ The Kansas Supreme Court said the State’s concerns about this report sufficiently

167. *Hilburn*, 442 P.3d at 514–17. Note that this opinion contains the word “inviolate” twenty-seven times. *Id.*

168. KAN. CONST. BILL OF RTS., § 18.

169. *Id.* §§ 18, 5.

170. *Id.* § 18.

171. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1005 (Kan. Ct. App. 2018) (citing *Injured Workers of Kan. v. Franklin*, 942 P.2d 591, 603–04 (Kan. 1997)), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140 (Kan. Feb. 28, 2019).

172. *Injured Workers*, 942 P.2d at 603–04 (using rational basis analysis).

173. *Id.* at 600 (discussing the *New York Times* report estimating thirty percent of workers compensation claims are fraudulent); Lisa Cullen, *The Myth of Workers’ Compensation Fraud*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/workplace/etc/fraud.html#1> [<https://perma.cc/KSJ8-LGD9>] (citing studies from a few years after the *New York Times* report showing that in reality “only 1 to 2 percent of workers’ compensation claims are fraudulent”).

showed strict reporting requirements—which would wholly bar some injured workers from benefits—served a valid state objective.¹⁷⁴ The court went on to say that a statute “will not be set aside if *any* state of facts reasonably may be conceived to justify it.”¹⁷⁵ This is an almost impossibly high burden for plaintiffs challenging a state action to overcome.

Part two of the *Injured Workers* test, the quid pro quo analysis, has also been applied at much too low a standard of review. As is, the precedent set in *Injured Workers*¹⁷⁶ seems to be that so long as the Legislature leaves some crumbs for workers, they can give the rest of the pie to employers and satisfy quid pro quo standard.

Some plaintiffs have argued that any amendments to the workers compensation statute need to come with their own quid pro quo.¹⁷⁷ The Kansas Supreme Court rightfully rejected this argument.¹⁷⁸ Requiring a separate quid pro quo for any amendment would likely gridlock the Legislature. Legislators would hesitate to pass anything that is subject to a quid pro quo analysis, even if the statute is mutually beneficial to the parties affected and serves the greater good. There would be a debilitating fear that the Legislature could never pare back benefits for either party if a statute does not achieve its intended result. The Legislature should be permitted to try new ideas and correct its own mistakes on matters of public policy. Instead of applying a separate quid pro quo analysis to amendments to the Act, the Kansas Supreme Court should continue reviewing the Act in its entirety, but under a heightened standard of review.

A logical path forward is replacing the *Injured Workers* test with a similar two-part test that utilizes an intermediate standard of review. The Kansas Supreme Court should consider borrowing language from the United States Supreme Court, by employing the words “substantially advance[s] legitimate state interests”¹⁷⁹ and “rough proportionality.”¹⁸⁰ Although the United States Supreme Court used this language in cases involving government takings of private property under the Fifth Amendment of the United States Constitution, they are a good fit for Section 18 workers compensation analysis.¹⁸¹ An injured worker’s right

174. *Injured Workers*, 942 P.2d at 600.

175. *Id.* at 602 (citing *Leiker v. Gafford*, 778 P.2d 823, 849 (Kan. 1989)).

176. *Id.* at 604.

177. *See id.* at 621–23.

178. *Id.*

179. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987) (alteration in original) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

180. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

181. *Nollan*, 483 U.S. at 834; *Dolan*, 512 U.S. at 391.

to a tort claim against their employer can be considered a private property interest deserving of similar constitutional protections.¹⁸²

The United States Supreme Court developed a two-part test in cases where the government offered to issue land use permits it normally would have denied in exchange for an easement on citizens' private property.¹⁸³ The government taking an easement without any compensation is clearly unconstitutional under the Fifth Amendment.¹⁸⁴ However, the United States Supreme Court permits this type of permit-for-easement quid pro quo if: (1) the easement taken substantially advances the same state interest that would have caused denial of the land use permit; and (2) the easement taken and land use permit granted have roughly proportional value.¹⁸⁵ This is very similar to the *Injured Workers* test. Part one tests the purpose of a government action, and part two applies a quid pro quo test to an exchange of individual rights for a replacement remedy. The difference is that the wording employed by the United States Supreme Court creates a level of scrutiny higher than the rational basis deference under *Injured Workers*, but lower than the strict scrutiny used in *Hodes*.

The Kansas Supreme Court should replace the *Injured Workers* test with a new two-part test that reads: (1) Does the legislative change *substantially* advance a *legitimate* state interest? (2) Has the legislature provided a substitute remedy that is *roughly proportional* to the remedy that was restricted? Part one of this test would place the burden on the state to demonstrate that its action is substantially tied to a legitimate goal, instead of the virtual free pass allowed under part one of the *Injured Workers* test. Part two would still be a quid pro quo analysis applied to the Kansas Workers Compensation Act in its entirety, but it would require something closer to an even balance of benefits for employers and workers. This balance would not demand mathematical precision, but it would be a much higher standard than the “leave the workers a crumb” standard the Kansas Supreme Court applied in *Injured Workers*.¹⁸⁶

The Kansas Supreme Court granted certiorari and recently heard oral arguments in *Johnson v. U.S. Food Services*.¹⁸⁷ The Court of Appeals holding in *Johnson* was limited to the 2013 amendment adopting the Sixth

182. See Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L. Q. 373, 376–402 (2009) (arguing that “legal claims are constitutional property”).

183. *Nollan*, 483 U.S. at 827, 834; *Dolan*, 512 U.S. at 377, 391.

184. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”).

185. *Nollan*, 483 U.S. at 834; *Dolan*, 512 U.S. at 391.

186. See *Injured Workers of Kan. v. Franklin*, 942 P.2d 591, 604 (Kan. 1997).

187. 427 P.3d 996 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140 at *1 (Feb. 28, 2019); see also *supra* note 1.

Edition AMA Guides and simply severed this amendment from the rest of the Act.¹⁸⁸ This creates a great opportunity for the Kansas Supreme Court to introduce this new test in its *Johnson* holding without slashing apart the entire Act and sending shockwaves through Kansas businesses and insurance providers, something the court likely wants to avoid.

The Kansas Supreme Court should affirm the Court of Appeals holding in *Johnson*. *Johnson* was decided prior to *Hodes* elevating the standard of review for fundamental rights. So, in *Johnson*, the Kansas Court of Appeals applied the *Injured Workers* test under the traditional rational basis standard of review.¹⁸⁹ Even under this low standard of review, the Court of Appeals held that the Kansas Workers Compensation Act was no longer an adequate quid pro quo because of how drastically the Sixth Edition AMA Guides cut benefits for workers.¹⁹⁰ Overturning *Johnson* in a post-*Hodes* world would require the Kansas Supreme Court to either reverse course on Section 18 being a fundamental constitutional right or determine that the Court of Appeals decision was so off-base that, even under a heightened standard of review, the Act is a sufficient quid pro quo.

Instead, the Kansas Supreme Court can affirm the *Johnson* decision and lay out a new workers compensation framework without making wholesale changes to the Act or causing chaos in the administrative workers compensation process. By using *Johnson* to announce a new approach to Section 18 workers compensation challenges, the Kansas Supreme Court can send a message to the Legislature that the court is willing to claw back some rights for Kansas workers. This warning shot would hopefully motivate the Kansas Legislature to proactively amend the Act and restore a roughly proportional quid pro quo. If the Legislature fails to act, future injured workers could use the new two-part test from *Johnson* to challenge other portions of the Kansas Workers Compensation Act. The Kansas appellate courts would almost certainly be receptive to some of those claims under a heightened level of review.

B. Possible Section 5 Challenges to the Kansas Workers Compensation Act

While Section 18 challenges are likely the best method for injured workers to attack the constitutionality of the Kansas Workers Compensation Act, an alternative route may be available. Future plaintiffs

188. *Johnson*, 427 P.3d at 1013–14.

189. *Id.* at 1008.

190. *Id.* at 1013–14.

might successfully argue that the Act also infringes upon their inviolate Section 5 right to a jury trial under the Kansas Bill of Rights. To have a right to a jury trial, a plaintiff must first have a cause of action. Therefore, there has been no reason to reach a Section 5 analysis in assessing the Act’s constitutionality because workers’ rights to a common law tort cause of action are eliminated.¹⁹¹ But, as previously discussed, the 2011 amendments to the Kansas Workers Compensation Act added several fault-based provisions allowing employers to deny compensation to many injured workers.¹⁹² Many of these amendments place a burden of proof on the injured worker and convert workers compensation claims into a process reminiscent of a common law civil trial—minus a jury.¹⁹³

Under the Kansas Workers Compensation Act, findings of fact are made solely by an administrative law judge.¹⁹⁴ An injured worker can appeal this decision within the administrative agency, then once administrative appeals are exhausted, they may appeal to the Kansas appellate courts.¹⁹⁵ However, there is no point where an injured worker is entitled to have their claim heard by a jury of their peers, as they bypass the Kansas district courts. The Kansas Supreme Court may have deemed this acceptable in the past because the Kansas Workers Compensation Act provided guaranteed and expedited benefits to injured workers, regardless of fault.¹⁹⁶ However, the recent amendments have made the workers compensation benefits far from a guaranteed, no-fault form of recovery.

In *Hilburn*, when trying to distinguish noneconomic damage caps on personal injury claims from the workers compensation scheme’s infringements on Section 5 and Section 18 rights, Justice Beier emphasized an allegedly low burden on injured workers compared to a plaintiff pursuing a common law tort remedy.

[T]he comprehensive workers compensation system at issue in *Rajala* is totally distinct from the noneconomic damages cap [P]ersonal injury plaintiffs in Kansas are still required to file civil lawsuits; conduct necessary discovery; obtain required expert testimony; and prove negligence, causation, and damages to a jury by a preponderance of the

191. *Id.* at 1003.

192. *Id.* at 1005–07.

193. *See, e.g.*, KAN. STAT. ANN. §§ 44-523, 44-549 (2018) (discussing administrative hearing requirements).

194. *Id.* §§ 44-523, 44-549.

195. *Id.* §§ 44-555c(a), 44-556 (2018).

196. *Johnson*, 427 P.3d at 1003 (quoting *Howard Delivery Serv. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 662–63 (2006)) (“[W]orkers compensation . . . involves a classic social trade-off or, to use a Latin term, a *quid pro quo*. . . . What is given to the injured employee is the right to receive certain limited benefits regardless of fault.”).

evidence.¹⁹⁷

While these distinctions between a civil suit and a worker's compensation claim were potentially accurate in the past, that is arguably no longer true after the 2011 amendments to the Kansas Workers Compensation Act. This language was intended to counter the dissent's argument that the *Hilburn* decision spelled the end of workers compensation in Kansas.¹⁹⁸ While Justice Beier is likely correct that the Kansas Workers Compensation Act will not be eliminated, many of its recent amendments create the same burdens for injured workers that she listed for personal injury plaintiffs.

Although injured workers do not file a civil lawsuit, they must give their employer notice of their injury and file an application for a hearing within specified timeframes that are analogous to a statute of limitations.¹⁹⁹ At the hearing, an administrative law judge considers relevant evidence presented by employees and employers, typically in the form of expert witness opinions, then awards or rejects benefits.²⁰⁰ If injured workers are not satisfied with the outcome, they must appeal within the administrative agency, and then, potentially to the Kansas appellate courts.²⁰¹ To obtain an award for future medical benefits, employees typically must hire medical experts. To meet the prevailing factor test and show a work accident or repetitive trauma was the primary cause of injury,²⁰² a showing very similar to the causation standard for common law negligence, a worker may have to hire experts and conduct factual investigations resembling discovery. Finally, an administrative law judge determines monetary benefits based on factual findings about a worker's percentage of impairment and, when work disability is available, potential future earnings, which often requires a vocational expert. Injured workers, many of whom are unemployed at the time of the administrative hearing, must protect their right to a remedy for their injury by engaging in this expensive battle of the experts with their employer's insurance company.

By implementing procedural hurdles and fault-based defenses and placing ever-higher burdens of proof on injured workers, workers compensation claims in Kansas have moved closer to common law

197. *Hilburn v. Enerpipe, Ltd.*, 442 P.3d 509, 520 (Kan. 2019).

198. *See id.* at 534–35 (Luckert, J., dissenting).

199. KAN. STAT. ANN. §§ 44-520, 44-534 (2018).

200. *Id.* §§ 44-523, 44-549 (2018).

201. *Id.* §§ 44-555c(a), 44-556 (2018).

202. *Johnson v. U.S. Food Serv.*, 427 P.3d 996, 1005–06 (Kan. Ct. App. 2018), *cert. granted*, No. 117725, 2019 Kan. LEXIS 140, at *1 (Kan. Feb. 28, 2019).

negligence claims, rather than a method for providing guaranteed and expedited benefits to injured workers. Again, the Legislature can amend common law remedies. But the Legislature has not merely amended a remedy—it has essentially recreated a common law remedy within an administrative agency where injured workers are stripped of their Section 5 inviolate right to a jury trial. If the Kansas Supreme Court accepted this argument and followed *Hilburn* by refusing to apply a quid pro quo test to Section 5 challenges, some of the recent amendments to the Kansas Workers Compensation Act imposing these hurdles and burdens on injured workers would likely be facially unconstitutional. The court could use the Act’s severability clause to strike down challenged portions of the Act that impose these procedural hurdles on injured workers and avoid holding the entire Act *per se* unconstitutional.²⁰³

IV. CONCLUSION

By applying the low rational basis standard of review, the Kansas Supreme Court has historically granted the Legislature significant leeway when reviewing statutes that infringe on constitutional rights. This has allowed the Kansas Legislature to enact amendments to the Kansas Workers Compensation Act over the past thirty years that are radically pro-business and hurt Kansas workers and their families. In *Johnson*, the Kansas Court of Appeals pushed back against the Legislature and held that its most recent amendment to the Act is facially unconstitutional. Through the Kansas Supreme Court’s subsequent opinions in *Hodes* and *Hilburn*, the court raised the standard of review applied to statutes infringing on fundamental constitutional rights. This was a significant shift by the Kansas Supreme Court that may, and as this Comment argues, should, impact the Kansas Workers Compensation Act very soon. The Kansas Supreme Court should use *Johnson* to replace the *Injured Workers* test with a similar two-part test that employs an intermediate level of scrutiny. Adopting this approach would stop the state Legislature’s systematic decimation of workers compensation benefits, even the playing field between employers and injured workers moving forward, and preserve the benefits afforded to both sides under the “Grand Bargain.”

203. KAN. STAT. ANN. § 44-574(b) (2018); see *Johnson*, 427 P.3d at 1013–14.