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Constitutional Law - Do Classifications Resultant from Automobile Guest Statutes Violate Constitutional Guarantees of Equal Protection - Brown v. Merlo

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CONSTITUTIONAL LAW—Do Classifications Resultant from Automobile Guest Statutes Violate Constitutional Guarantees of Equal Protection? Brown v. Merlo, 8 Cal. 3d 855, 106 Cal Rptr. 388, 506 P.2d 212 (1973).

On October 15, 1967, Ralph Brown was riding in a vehicle which was being operated by Guiseppe Merlo. The vehicle crossed the center line of the highway and collided with an embankment. As a result of the collision Brown sustained serious physical injuries. Brown subsequently brought an action against Merlo alleging both negligence and wilful misconduct. In bringing his action in negligence, Brown challenged the constitutionality of the California guest statute which precludes recovery by an injured guest in an automobile unless he proves either wilful misconduct or intoxication on the part of the driver.[1] The trial court granted Merlo's motion for summary judgment on the negligence cause and a jury verdict was rendered in favor of Merlo on the wilful misconduct cause. Brown's appeal to the California Supreme Court was taken only from the summary judgment with respect to his action in negligence and was grounded on the constitutional argument advanced in the trial court. The California Supreme Court reversed the summary judgment, holding that the guest statute resulted in a classification of individuals bearing no rational relationship to the purpose of the statute and, as such, constituted a violation of the equal protection clauses of both the state and federal Constitutions.[2]

Historical Background of Automobile Guest Statutes

At common law, it was generally accepted that the driver of a motor vehicle owed a duty of reasonable care to an invited guest.[3] In 1917, however, the Massachusetts Supreme Court departed from this position and held that a guest in an auto-

1. No person . . . who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle . . . on account of personal injury to or death of the . . . guest during the ride unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.
CAL. VEHICLE CODE § 17158 (West 1970).
2. Brown v. Merlo, 8 Cal. 3d. 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973).
3. Annot., 20 A.L.R. 1014 (1922).

mobile could only sustain an action upon a showing of gross negligence on the part of the driver.[4] This decision provided the impetus for the subsequent enactment of automobile guest statutes in a number of states.[5] During the period from 1927 to 1939, twenty eight states[6] passed legislation limiting the causes of action which a person injured while a guest in a vehicle could maintain against the driver of that vehicle.[7] Although the statutes vary from state to state, their general effect is to deny an injured passenger any cause of action against the driver unless the injury resulted from certain specified types of misconduct[8] on the part of the driver. Consequently an action based on simple negligence which is brought by an injured passenger against the operator of the vehicle is barred in all states with automobile guest statutes.[9]

The two most frequently articulated bases for the legislation are that, first of all, guest statutes serve to promote hospitality on the part of drivers and secondly, such statutes serve to reduce the possibility of collusive lawsuits.[10] It has also been suggested that lobbying by insurance companies[11] and a lack of sympathy toward hitch-hikers[12] have been influential factors in the minds of legislators adopting guest statutes. As noted in *Brown,* the policy justfications behind the guest statutes have often been criticized.[13] This disen-

4. Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917) (basis for decision was analogy to the duty owed by a gratuitous bailee).
5. White, *The Liability of an Automobile Driver to a Non-Paying Passenger,* 20 VA. L. REV. 326, 330 (1934).
6. Comment, *Judicial Nullification of Guest Statutes,* 41 S. CAL. L. REV. 884 (1968) contains a listing of the guest statutes of the various states as well as the requisite criteria for a passenger to recover.
7. *See* Tipton, *Florida's Automobile Guest Statute,* 11 U. FLA. L. REV. 287, 288 (1958) which points out that no guest statutes have been passed since 1939.
8. Comment, *Judicial Nullification of Guest Statutes, supra* note 6.
9. *E.g.*

> No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton mis-conduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton mis-conduct contributed to the injury, death or loss for which the action is brought.

WYO. STAT. § 31-233 (1957).
10. W. PROSSER, TORTS § 34, at 187 (4th ed. 1971).
11. White, *supra* note 5, at 333.
12. Tipton, *supra* note 7.
13. Brown v. Merlo, *supra* note 2, at 232, n.22.

chantment has extended to the courts, according to some commentators, with the result that some jurisdictions have narrowly construed the statutory terms limiting a guest's causes of action.[14]

PRIOR CONSTITUTIONAL CHALLENGES TO GUEST STATUTES

Since their inception, automobile guest statutes have frequently been assailed with constitutional arguments.[15] The contentions have been made that automobile guest statutes violate state and federal constitutional guarantees of due process[16] and equal protection[17] as well as various state provisions relating to vested rights of individuals,[18] trial by jury,[19] and assurances of remedies for injuries.[20] The position usually followed by the courts is that guest statutes are constitutional so long as they do not completely deprive an injured passenger of remedies.[21]

Much of the literature and many of the decisions dealing with the subject begin with the premise that the constitutionality of guest statutes has been conclusively determined.[22] This notion is usually based on the 1929 decision of the United States Supreme Court in *Silver v. Silver*[23] upholding the Connecticut guest statute. The Connecticut act barred recovery by a gratuitous guest in a motor vehicle unless the accident was intentionally caused by the driver or was the result of his heedlessness or his reckless disregard for the rights of others.[24] The Court found that the distinctions created by the statute between gratuitous and paying passengers as well as between passengers in automobiles and those in other types of vehicles were pursuant to the state's interest in regulating use of the automobile. Moreover, the statutory

14. Comment, *Judicial Nullification of Guest Statutes, supra* note 6.
15. Annot., 111 A.L.R. 1011 (1937).
16. Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931).
17. Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (1967).
18. Cusick v. Feldpausch, 259 Mich. 349, 243 N.W. 226 (1932).
19. Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936).
20. Clarke v. Storchak, 384 Ill. 564, 52 N.E.2d 229 (1944).
21. Note, *Torts: Automobiles: Duty of Driver to Guest: Statutes Releasing Owner or Driver from Liability for Negligence Toward Guest,* 18 CALIF. L. REV. 184 (1930).
22. Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute),* 9 SANTA CLARA LAW. 1, 3 (1969).
23. Silver v. Silver, 280 U.S. 117 (1929).
24. Public Acts of Connecticut of 1927, ch. 308 (repealed 1937).

classifications were not considered arbitrary or without basis by the court in view of the large amount of litigation arising out of negligent operation of motor vehicles.[25]

BASIS FOR THE DECISION IN *Brown*

Brown argued that the California guest statute conflicted with the equal protection guarantees of both the California[26] and federal[27] Constitutions. The court agreed, holding that the statute violated both Constitutions but based its analysis primarily on the federal Constitution. It was noted at the outset of the opinion that two differing approaches have historically been taken by the courts when examining legislative action in the light of the equal protection clause.[28] The more restrained approach is often referred to as "minimum scrutiny" or application of the "mere rationality standard." This method of analysis entails ascertaining the purpose of the legislation and then determining if there is a rational relationship between the statute and the classification scheme which it creates.[29] The second approach taken by the courts with respect to equal protection is the application of what is termed "strict scrutiny" or the "compelling state interest test."[30] This approach is utilized in cases involving statutes which affect either "suspect classifications" or "fundamental interests."[31]

In *Brown,* the court rejected the plaintiff's argument that automobile guests constitute a "suspect classification" and that his right to a cause of action in negligence was a "fundamental interest." The court noted that "suspect classifications" usually involve such matters as racial or sexual distinctions while "fundamental interests" are those with significance comparable to the right to vote. Accordingly,

25. Silver v. Silver, *supra* note 23, at 123.
26. CAL. CONST. art. 1, §§ 11, 21. CAL. CONST. art. 1 § 11 provides: "All laws of a general nature shall have a uniform operation." This provision is identical to WYO. CONST. art. 1 § 34.
27. U.S. CONST. amend. XIV, § 1.
28. Brown v. Merlo, *supra* note 2, at 218.
29. *See* Comment, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1077 (1971).
30. *See* Note, *Residency Restrictions Upon Teachers,* 8 LAND & WATER L. REV. 329, 333 (1973).
31. *Supra* note 29, at 1087.

the court refused to subject the guest statute to strict scrutiny. Instead, the court chose to apply the rationality test and laid down the basic criterion:

> Under our state and federal equal protection provisions a statute may single out a class for distinctive treatment only if such classification bears a rational relation to the purposes of the legislation.[32]

The court then proceeded to outline what it considered to be the three levels of classification created by the California guest statute:[33]

1. Automobile guests are treated differently from paying automobile passengers.
2. Automobile guests are treated in a different manner than other social guests and "recipients of generosity."
3. Different subclasses of automobile guests receive differential treatment according to various fortuitous circumstances.

Silver[34] was distinguished from *Brown* primarily because it had considered only one distinction, that drawn between automobile guests and guests in other vehicles. The court also mentioned that *Silver* was not cast against the present day background of near universal liability insurance and recent developments in the field of California tort law.[35] The relevancy of modern day circumstances was considered significant by the court in view of the maxim of jurisprudence embodied in the California Civil Code which states, "When the reason of rule ceases, so should the rule itself."[36]

In determining the rationality of the classification scheme, the court began by focusing on the purposes attributed to the guest statute, that is, the protection of hospitality and the prevention of collusive lawsuits. Drawing upon analogies to other fields of tort law the court concluded that protection of hospitality was not a sufficient justification for the classifications created by the guest statute. The court

32. Brown v. Merlo, *supra* note 2, at 216.
33. Brown v. Merlo, *supra* note 2, at 217.
34. Silver v. Silver, *supra* note 23.
35. Brown v. Merlo, *supra* note 2, at 217, n.4.
36. CAL. CIV. CODE § 3510 (West 1970).

noted that California has recently abrogated the doctrine of charitable immunity[37] and has abolished the traditional distinctions in the standard of care which a landowner owed to different persons on his property.[38] Consequently, it was determined that there were no persuasive reasons justifying the exclusion of guests in automobiles from the protection afforded generally to recipients of hospitality.[39] The court also expressed its belief that the initiation of a lawsuit by an injured guest against his host is no longer considered an act of ingratitude due to the widespread existence of automobile liability insurance.[40]

After finding no justification for the guest statute in the hospitality rationale, the court then directed its attention to the frequently made assertion that the guest statute prevents collusive lawsuits. The court conceded that some collusive lawsuits were prevented by the statute but indicated its consternation at the fact that all actions in simple negligence brought by an injured guest passenger against his host were precluded by the guest statute regardless of whether there was justifiable fear of collusion. This was seen as constituting an impermissible classification scheme in that it "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims."[41] The situation created by the guest statute was seen as analagous to a Louisiana death statute which denied a cause of action to the parents of a deceased child if the child were illegitimate. Ruling that the statute was unconstitutional, the United States Supreme Court rejected the state's contention that the statute prevented the assertion of fraudulent claims by persons falsely claiming to be the parents of the deceased child and expressed its sentiment that the Louisiana statute "gives a windfall to tortfeasors."[42]

The court's final point of concern in *Brown* was the fact that the California guest statute results in discriminatory treatment even among different classes of gratuitous auto-

37. Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951).
38. Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).
39. CAL. CIV. CODE §§ 1714, 2096 (West 1970).
40. Brown v. Merlo, *supra* note 2, at 221.
41. Brown v. Merlo, *supra* note 2, at 227.
42. Glona v. American Guarantee Company, 391 U.S. 73 (1968).

mobile guests.[43] Under the statute, the court noted, recovery by an injured guest depended upon the fortuitous circumstances of whether the injury occurred (1) during the ride (2) in any vehicle and (3) upon the highway.[44] The court noted that recovery had been allowed under the statute where a guest was injured during a momentary interruption of the ride,[45] where injuries were sustained by a guest with one foot on the ground and one foot on the running board of a moving car[46] and where the accident happened while the vehicle was moving on the shoulder of a highway.[47] The court maintained that these statutory exceptions add "yet another element of irrationality to the provision's classification scheme" and are "totally unrelated to either the hospitality or anti-collusion theme."[48] In response to one commentator's contention that the patchwork application of the statute was the result of judicial decision,[49] the court noted the established doctrine that immunities from the general rule of liability for negligence are to be narrowly construed and further commented on the legislative inaction in the face of past narrow judicial construction.[50]

APPLICATION OF THE CONSTITUTIONAL STANDARD

In rendering its decision, the court felt that its result reflected a recent United States Supreme Court trend to make increasing use of the rationality test to strike down legislation as violative of the Equal Protection Clause.[51] In the past nearly every instance of judicial intervention on equal protection grounds was effected by the "strict scrutiny" approach which, in turn, was predicated on the existence of either a suspect class or a fundamental interest.[52] For example, it was through the mechanism of "strict scrutiny"

43. Brown v. Merlo, *supra* note 2, at 228.
44. CAL. VEHICLE CODE § 17158 (West 1970). The Wyoming guest statute, WYO. STAT. § 31-233 (1957) does not contain comparable terminology. Consequently, the Wyoming act does not result in the fortuitous classification of non-paying automobile guests which the court found in *Brown*.
45. Boyd v. Cress, 46 Cal. 2d 164, 293 P.2d 37 (1956).
46. Prager v. Israel, 15 Cal. 2d 89, 98 P.2d 729 (1940).
47. Olson v. Clifton, 273 Cal. App. 2d 359, 78 Cal. Rptr. 296 (1969).
48. Brown v. Merlo, *supra* note 2, at 229.
49. Comment, *Judicial Nullification of Guest Statutes*, *supra* note 6.
50. Brown v. Merlo, *supra* note 2, at 230, n.20.
51. Brown v. Merlo, *supra* note 2, at 219, n.7.
52. Guenther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972).

that the California Supreme Court was able to strike down the financing methods for California public schools in *Serrano v. Priest.*[53] In *Serrano,* it was held that the right to a public education was a fundamental interest and that discrimination based on wealth constituted a suspect classification. The United States Supreme Court, however, subsequently expressed its disagreement with the labels applied by the California court and upheld a similar financing system of a Texas school district.[54] Resort to the rationality test, on the other hand, does not subject the court to the possibilities of direct contradiction which result from the summary designation of an interest as "fundamental" and a classification as "suspect."

In stating the criteria which a statute must meet in order to satisfy equal protection provisions, the court said that the classifications must bear a "rational relation to the purposes of the legislation."[55] In examining the guest statute, however, the court appeared to focus more on rationality of the purposes of the legislation than on the relationship between the statutory classifications and legislative objectives. This is evidenced by the court's statement that "the hospitality justification . . . does not constitute a rational ground for withdrawing a guest's right to recover . . ."[56] It has been suggested that in application of the rationality test, an examination of legislative objectives is only appropriate to ascertain the most probable purpose of the legislation or perhaps to determine if such a purpose is "permissible."[57] It is submitted that a discussion of the relative merits of a purpose would be more appropriate when a legislative objective is balanced against a statutory classification touching upon a "suspect classification" or a "fundamental interest."[58] In dealing with the deficiency of the legislative purpose rather than the inadequacy of the relationship of the classification

53. Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

54. San Antonio Independent School Dist. v. Rodriguez, ... U.S. ....., 93 S. Ct. 1278 (1973).

55. Brown v. Merlo, *supra* note 2, at 216.

56. Brown v. Merlo, *supra* note 2, at 224.

57. Comment, *Developments in the Law—Equal Protection, supra* note 29.

58. *Id.* at 1103, 1122.

to that purpose, the court would appear to be exposing itself to criticism that it is, in fact, becoming a "super legislature."[59]

A review of the United States Supreme Court decisions cited in *Brown* as typical of the "newer equal protection"[60] is helpful in providing an insight into that Court's view of the relationship between judicial review and legislative determination of statutory objectives. Of the seven cases cited,[61] only two, *Eisenstadt* and *Weber,* contain significant discussion on the purpose of the statute in question. In *Eisenstadt,* the opinion is expressed that the statute at issue has an impermissible objective, the prohibition of contraception, which infringes on the right to privacy.[62] Likewise in *Weber,* the Court concluded that it was impermissible for a statute to have as its purpose the discrimination against illegitimates. This conclusion was reached after the Court rejected the argument that the classification scheme bore a rational relationship to other, admittedly legitimate, state interests.[63] The remaining five cases[64] all exemplify instances where the Court found a valid statutory objective but felt that the resulting classification scheme did not bear the requisite rational relationship to that objective. Therefore, the position of the United States Supreme Court would appear to be that, barring invocation of the strict scrutiny standard, a statute is valid under the Equal Protection Clause of the federal Constitution unless:

(a) the statute furthers an impermissible purpose or
(b) the classifications resulting from the statute bear no rational relationship to a legitimate statutory purpose.

The approach taken by the California Supreme Court in *Brown* does not fit comfortably within the context of the

59. The term "super legislature" was apparently first utilized by Brandeis in his dissent in *Jay Burns Baking Company v. Bryan,* 264 U.S. 504, 534 (1924).
60. Brown v. Merlo, *supra* note 2, at 219, n.7.
61. James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).
62. Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).
63. Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 175 (1972).
64. Cases cited *supra* note 61.

standards adopted by the United States Supreme Court. In discussing the hospitality justification for the guest statute, the court appears to focus more on the unconvincing nature of the statutory purpose rather than on the impermissibility of that purpose or the lack of rationality connecting the classification scheme to the suggested purpose. If the encouragement of hospitality is in fact a purpose of the California guest statute, it would seem somewhat questionable whether it is within the province of the judiciary to question the desirability of such an objective.

As noted above, the court in *Brown* also held that the guest statute constitutes an overinclusive classification scheme with respect to the statutory objective of preventing collusive lawsuits.[65] This position has merit by virtue of its support in authority.[66] As noted by the court, "[i]nstead of confining its disability to those who actually institute collusive suits, the provision reaches out beyond such persons and burdens the great number of honest automobile guests."[67] The traditional position with regard to overinclusiveness has been that to satisfy constitutional guarantees of equal protection a statute must ensure that persons similarly situated with respect to the law must receive like treatment.[68] This criteria is clearly not met by the California guest statute. Furthermore, as pointed out by the court, the guest statute may also suffer from the infirmity of being underinclusive. Under the provisions of the act the driver and passenger may collude with respect to the payment of compensation and thus escape the statutory bar to bringing an action for negligence.[69] Consequently, in examining the anti-collusion rationale, the court has determined that the overinclusion and underinclusion inherent in the guest statute are sufficient to evince the lack of rationality connecting the classification scheme to the legislative objective.

65. Brown v. Merlo, *supra* note 2, at 227.

66. Comment, *Developments in the Law—Equal Protection*, *supra* note 29.

67. Brown v. Merlo, *supra* note 2, at 228.

68. Reed v. Reed, 404 U.S. 71, 76 (1971).

69. Brown v. Merlo, *supra* note 2, at 228.

CONCLUSION

The California Supreme Court has determined its state's automobile guest statute to be unconstitutional on the grounds that it violates the equal protection clauses of both the California and United States Constitutions. The court based its decision on the finding that the classification scheme created by the statute did not bear a rational relationship to the legislative purposes of promoting hospitality on the part of drivers and eliminating collusive lawsuits.

The decision in *Brown* lacks some cogency by virtue of its overlapping of the concepts of permissibility and efficacy in the treatment of the hospitality justification for guest statutes. The primary focus was on the statutory "end" rather than "means" chosen to effectuate that "end." In expressing its lack of conviction to an expressed statutory purpose, the court may have transgressed the bounds which have constrained the United States Supreme Court during the evolution of the "newer equal protection."[70]

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70. The reader is reminded that the court struck down the act under the equal protection clauses of both the federal and state Constitutions. Therefore, comparison of the *Brown* decision with United States Supreme Court decisions may very well have no actual significance with respect to the status of the California guest statute within that state.