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Timothy K. Kellett

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CONSTITUTIONAL LAW—EQUAL PROTECTION— CLASSIFICATIONS INVOLVING SENTENCING AND PUNISHMENT

*State v. Baker*¹

Defendant and an accomplice robbed, shot, and killed two service station attendants. Defendant was convicted of two counts of murder in the first degree and one count of robbery in the first degree. He was sentenced to life imprisonment on each murder count and to 99 years on the robbery count. The trial court, citing section 546.480, RSMo 1969,² ordered the sentences to run consecutively. Defendant appealed, alleging that mandatory imposition of consecutive sentences under the statute deprived him of equal protection of the law under both the state³ and federal⁴ constitutions. He contended that section 546.480 was not applicable to all convicted multiple offenders, but was applied if, and only if, a defendant was convicted of at least two offenses before he was sentenced for either offense. The Missouri Supreme Court reversed and remanded for sentencing only, holding that section 546.480 was a violation of equal protection.

Courts have developed three standards of review to test legislative classifications under equal protection. The first and most stringent standard is the compelling governmental interest test.⁵ Statutory classifications which are based either on certain suspect criteria⁶ or which affect certain fundamental rights⁷ are subject to the most rigid scrutiny⁸ by the courts and carry a "very heavy burden of justification."⁹ These classifications are upheld only when the state can demonstrate that they are necessary to serve a compelling governmental interest.

The second and least stringent standard of review is the rational basis test.¹⁰ Under this standard a classification is invariably upheld if any state of facts can be conceived that would sustain it.¹¹ The legislative classi-

1. 524 S.W.2d 122 (Mo. En Banc 1975).

2. The statute provides:

When any person shall be convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction.

3. Mo. CONST. art. I, § 2.

4. U.S. CONST. amend. XIV, § 1.

5. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

6. The following have been held to be suspect classifications: race, alienage, and national ancestry. *See, e.g., San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

7. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Griffin v. Illinois*, 351 U.S. 12 (1956) (criminal appeals).

8. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

9. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

10. *Morey v. Doud*, 354 U.S. 457, 463 (1957).

11. *Id.* at 463, 464; *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

faction is not upheld only when it is totally arbitrary and has no rational connection to any legitimate state interest.

The United States Supreme Court has recently retreated from rigid adherence either to the rational basis test or the compelling governmental interest test.¹² The Court has adopted in certain areas a third and intermediate standard of review, which will be referred to as the reasonable basis test.¹³ The fact that a court can find a rational basis for the classification, based on a hypothetical fact situation, is not sufficient to sustain the classification under the reasonable basis test. For the classification to be upheld, there must in fact be a substantial relationship between the legislative classification and the object of the legislation.¹⁴

When dealing with classifications involving sentencing and punishment, courts have traditionally applied the rational basis test. The determination of a particular sentence or punishment to be imposed upon a particular class has been sustained so long as there was a rational basis for any disparity in the sentences.¹⁵

At common law, all sentences were concurrent unless the sentencing court expressly made them consecutive.¹⁶ The mandatory imposition of consecutive sentences under section 546.480 first appeared in Missouri law in 1835.¹⁷ The purpose of the statute was to achieve greater equality in sentencing by making the sentences run consecutively by force of statute rather than by the specific order of the court.¹⁸ The statute was attacked on equal protection grounds for the first time in *King v. Swenson*.¹⁹ The

12. See *James v. Strange*, 407 U.S. 128 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1972). *But see* *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974) (the Court, although citing *Reed*, obviously applied the traditional rational basis test).

13. The justices of the Supreme Court have been unable to agree on any one theory to rationalize their decisions. However, commentators have set forth two theories. One is the means-oriented theory which involves an inquiry into the means by which the legislature furthers its goals in view of other available alternatives. The other theory is the sliding scale approach. In this approach, the intensity of scrutiny depends upon the importance of the interest involved. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 520-21 (1970) (Marshall J., dissenting); Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

14. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). See also Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORDHAM L. REV. 605, 616-18 (1973); Gunther, *supra* note 13, at 21.

15. See *McLaughlin v. Florida*, 379 U.S. 184 (1964); Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 245 (1951).

16. See, e.g., *Anthony v. Kaiser*, 350 Mo. 748, 751, 169 S.W.2d 47, 49 (1943); *State v. Breuer*, 304 Mo. 381, 403, 264 S.W. 1, 7 (1924).

17. RSMo 1835, at 213. This section was taken from 2 N.Y.R.S. 1829, § 11, at 700. In recommending that section 11 be included in the 1835 statute the revisors included a note which explained their reasoning: "New in Form: Generally declared in the sentence, but as it may be omitted, it is deemed useful to provide for it by law." See *State v. Breuer*, 304 Mo. 381, 404-06, 264 S.W. 1, 7 (1924).

18. *State v. Breuer*, 304 Mo. 381, 404-06, 264 S.W. 1, 7 (1924).

Missouri Supreme Court, applying the rational basis test, found that the legislative classification did have a rational connection to the state's interest in greater equality in sentencing and thus upheld the statute.²⁰

In *Baker* the Missouri Supreme Court declared that the purpose of the statute was to insure that multiple criminal offenders would be punished more severely than others. The court found that the statute violated equal protection because the classification was not based on multiple crimes and criminal propensities, but applied only if a defendant was convicted of at least two offenses before he was sentenced on either offense.²¹

It is not clear from the court's opinion in *Baker* which standard of review was applied in reaching the decision. Indeed, the court indiscriminately used language and cited cases which indicated all three standards. First, the court cited *Skinner v. Oklahoma*,²² a United States Supreme Court decision which first applied the "compelling governmental interest" test to classifications involving "fundamental interests."²³ However, the court also indicated that it had applied the reasonable basis test when it said: "Equal protection does require that distinctions in classifications have some relevance to the purpose for which the classification is made."²⁴ In addition, the court cited *In re Interest of J.D.G.*,²⁵ a recent Missouri Supreme Court decision applying the reasonable basis test to classifications based on sex. Finally, the court indicated that it was applying the rational basis test by referring to "the capriciousness of the classification" and "all semblance of rationality of the classification [disappearing]."²⁶

Because the opinion itself is ambiguous, it is necessary to determine which test would be consistent with the result. First, the result could not be reached under the rational basis test, because the statute clearly has a rational connection to the state's interest in equality in sentencing. For example, assume that defendant *A* and defendant *B* both commit separate murders on the same day. Before either one is apprehended, they each kill another person. *A* and *B* are both tried and convicted of the first murder charges. They each file a motion for a new trial which is subsequently denied. In the meantime both are tried and convicted on the second murder charges. Before section 546.480 was enacted, imposition of consecutive sentences in these cases would be discretionary with the trial judge. Thus, the judge could sentence *A* to serve consecutive terms on the two convictions which the same judge could sentence *B* to serve concurrent terms for his

20. *Id.* at 706.

21. 524 S.W.2d at 129.

22. 316 U.S. 535 (1942).

23. The Court stated:

We are dealing here with legislation which involved one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . [S]trict scrutiny of the classification which a State makes in a sterilization law is essential

Id. at 541.

24. 524 S.W.2d at 130.

25. 498 S.W.2d 786 (Mo. 1973).

26. 524 S.W.2d at 130.

two convictions. Even if this judge intended for *B* to serve consecutive terms, if he inadvertently omitted such a direction, *B* would serve only concurrent terms. This is precisely the kind of unequal treatment that the statute was designed to eliminate by limiting the discretion of judges. Because a state of facts that sustains the statute is conceivable and these facts could have existed when the statute was passed, the statute should have been upheld under the rational basis test.²⁷

Furthermore, in applying the rational basis test, courts have recognized that legislative reform may proceed one step at a time.²⁸ The legislature, in selecting the particular statutory classification, had the discretion to remedy one phase of the problem while neglecting others. Thus section 546.480 can be upheld, even though it does not achieve total equality, as the Missouri legislature's first step toward attaining total equality in sentencing and punishment.

Although the *Baker* court could have concluded that section 546.480 is unconstitutional by applying the "compelling governmental interest" test, it is unlikely that this was in fact the standard applied. First, the only indication that the court applied this standard of review was the citation to *Skinner*. Second, application of the "compelling interest" test to a classification involving sentencing and punishment would have gone far beyond prior case law²⁹ and would have implicitly made sentencing a "fundamental interest." Such a radical change in the standard of review would surely have been accompanied by a more explicit statement of the standard of review being applied and the reasons for so great a change.

Because the decision cannot be explained under either the compelling governmental interest test or the rational basis test, the court must have, without acknowledging it, applied the intermediate reasonable basis test. If so, the court has raised the standard of review in sentencing and punishment cases in Missouri from a rational basis to a reasonable basis. Although *Baker* involved the question of consecutive versus concurrent sentences in a narrow fact situation, its rationale should be equally applicable to other sentencing and punishment statutes. For example, statutory classifications under the new Missouri Capital Murder Act³⁰ or under a statute providing for a minimum sentence for the use of a gun in the commission of a crime³¹ should be subject to closer scrutiny. Missouri courts, under the new reasonable basis test, may now reevaluate sentencing statutes to determine whether they comply with this higher standard.

TIMOTHY K. KELLETT

27. See notes 10, 11 and accompanying text *supra*.

28. *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955).

29. See notes 15-20 and accompanying text *supra*.

30. § 559.009, RSMo 1975 Supp.

31. See, e.g., *Missouri Ann. Laws*, ch. 12, § 18B (1974).