

ARBITRARY LINE DRAWING

Abandoning Rational Basis Review in *Oberson v. Dept. of Agri.*

A Case Note

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I. INTRODUCTION

Your legislative representative's vote might not count if it is used to create an arbitrary and oppressive classification. Courts render a statute void by holding that the law violates the Equal Protection Clause. Traditionally, courts have exercised judicial restraint to avoid abusing this great power. However, the Montana Supreme court exercised its legislative veto power in *Oberson v. U.S. Dept. of Agric., Forest Service*.¹ In its analysis, the court did not apply the rational basis test. In doing so, it usurped the legislature's power to promote several legitimate state interests.

This essay discusses the Montana Supreme Court's departure from the traditional rational basis standard of equal protection review of statutes limiting area operator liability for inherently dangerous sports. Section II introduces the stimulus for, and then the Montana Supreme Court's rejection of statutes that reestablish assumption of risk for the inherently dangerous sport of skiing. Section III presents the factual and procedural background in *Oberson*. Section IV compares the traditional equal protection standard of review and Montana's departure from it. The essay concludes by stating that the Supreme court creates arbitrary legal classifications by refusing to apply appropriate equal protection review.

II. SETTING THE STAGE

In 1979, a verdict against a Vermont ski area operator triggered ski lobbyist to petition legislatures to enact statutes restricting liability for injuries sustained while participating in the inherently dangerous sport of skiing.² The case involved a beginner skier, skiing on a wide, well groomed and maintained trail. The skier hit an obscure piece of underbrush and fell. The fall rendered the skier quadriplegic. At trial, several witnesses testified that the ski area operator thoroughly blazed, groomed and manicured the trail so that a party skiing on the skiable portions was safe.³ Still, the court found the area operator negligent and ruled for the plaintiff.⁴ The verdict in this case prompted ski industry lobbyists to petition state legislatures to limit liability exposure. The persuasive pull of a billion dollar ski

¹ *Oberson v. U.S. Dept. of Agric., Forest Service*, 171 P.3d 715 (Mont. 2007).

² *Sunday v. Stratton Corp.*, 390 A.2d 398 (Vt. 1978).

³ *Id.* at 401.

⁴ *Id.* at 403.

industry convinced all but three states with significant ski industries to pass statutes reestablishing assumption of risk for skiing.⁵ Montana passed the Skier Responsibility Act.⁶

In *Brewer v. Ski-Lift, Inc.*, the Montana Supreme Court held that Montana's Skier Responsibility Act violated the equal protection clause.⁷ The court read the statute to require skiers to "assume all risks for injuries regardless of the presence of negligence or intentional conduct on the part of the ski area operator."⁸ According to the court, protecting the economic vitality of the ski industry is a legitimate state interest. However, the court held that the statute was too broad and therefore did not rationally relate to the statute's purpose. Therefore, the court saw no reason to give ski area operators protection that venue providers of other inherently dangerous sports did not enjoy.

III. THE OBERSON DECISION

A. Factual and Procedural Background

On the night of February 16, 1996, Brian Musselman, Tim Johnson, Patrick Kalahar, and Jamie Leinberger rode snowmobiles on the Big Sky trail outside of West Yellowstone.⁹ The men had been drinking.¹⁰ Johnson, and Kalahar were impaired by alcohol, and Leinberger was heavily impaired.¹¹ The trail was located on land owned and maintained by the Forest Service.¹²

Musselman arrived first at an unmarked hill and the site of the accident.¹³ He successfully navigated the hill and stopped to wait for his companions. Johnson, the snowmobiler immediately behind Musselman, crashed his sled when he descended the hill. Musselman dismounted his sled and crossed the trail. Suddenly, Kalahar and Leinberger sped

⁵ James H. Chalot, *Liability of Ski Area Operator for Skiing Accident*, 45 Am. Jur. P.O.F. 3d 115, § 14 (1998).

⁶ Mont. Code Ann. §§ 23-2-731 to 23-2-737 (1988).

⁷ *Brewer*, 762 P.2d 226 (1988).

⁸ *Id.* at 230.

⁹ *Oberson*, 171 P.3d at 718.

¹⁰ Br. of Respt. at 5, *Oberson v. U.S. Dept. of Agric.*, 171 P.3d 715 (Mont. 2007).

¹¹ *Id.*

¹² *Oberson*, 171 P.3d at 718.

¹³ *Id.*

over the hill at approximately 55 miles per hour. One of the sleds hit Musselman in the head, and he sustained catastrophic brain injuries.¹⁴

Oberson, acting as Musselman's legal guardian, filed suit against the forest service alleging negligence for failure to correct or warn of a dangerous condition on the snowmobile trail.¹⁵ The forest service filed third party complaints against Johnson, Kalahar, and Leinberg, and alleged they caused Musselman's injuries.¹⁶

The forest service relied on §§23-2-651, 653-54, MCA (1995) (The Snowmobile Liability Statute),¹⁷ to argue that it is liable only for acts or omissions that constitute gross negligence.¹⁸ The district court rejected this defense¹⁹ because it held that the statute violated the equal protection clause in the Montana constitution.²⁰ The district court replaced the gross negligence standard of care with an ordinary care standard. The court apportioned 40 % responsibility for the injury to the Forest Service, 10 % to Musselmen, and the remaining 50% to Kalahar and Leinberger.²¹

B. Holding

Asserting that the legal classification had been resolved in *Brewer*,²² the Montana Supreme Court affirmed the district court's ruling that the snowmobile liability statute violated the equal protection clause in the Montana Constitution.²³ Next, the court replaced the statute's "gross negligence" standard of care with an "ordinary care" standard.²⁴ Justice Morris wrote the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Mont. Code Ann. §§ 23-2-651, 23-2-653 to 23-2-654 (1995).

¹⁸ *Id.*

¹⁹ *Oberson*, 171 P.3d at 718.

²⁰ Mont. Const. art. II, §4.

²¹ *Oberson*, 171 P.3d at 718.

²² *Id.* at 720.

²³ *Id.*

²⁴ *Id.* at 722.

majority opinion in which Justices Nelson, and Cotter concurred, with Justice Leaphart specially concurring.

Justice Rice dissented and criticized the court for failing to apply a rational basis review.²⁵ He argued that the court usurped the legislature's power by inappropriately relying on *Brewer*.²⁶ Rice asserts that the majority incorrectly relied on *Brewer*, because the snowmobile liability statute does not grant the area operator complete immunity from liability like the skier responsibility statute.²⁷

IV. ANALYSIS

The *Oberson* court based its decision on the results of the *Brewer* decision. The following sections discuss how the court departs from traditional equal protection analysis in both *Brewer* and *Oberson*.

A. The Equal Protection Clause and its Purpose

The Montana constitution provides that "[n]o person will be denied the equal protection of the law."²⁸ This means that "persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment."²⁹ Montana's equal protection clause was taken directly from the 14th amendment to the United States Constitution.³⁰

The fourteenth amendment was drafted in the context of the post-Civil War era.³¹ "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."³² Still, the broad language of the clause has

²⁵ *Oberson v. U.S. Dept. of Agriculture, Forest Service*, 171 P.3d 715, 724 (Mont. 2007) (Rice, dissenting).

²⁶ *Id.* at 723.

²⁷ *Id.*

²⁸ Mont. Const. art. II, §4.

²⁹ *Rausch v. State Compensation Ins. Fund*, 114 P.3d 192, ¶18 (Mont. 2005).

³⁰ U.S. Const. amend. XIV, § 1.

³¹ Chester James Antieau & William J. Rich, *Modern Constitutional Law* vol. 2, § 25.01, 3 (2d ed., West 1997).

³² *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

allowed courts to expand the scope of equal protection analysis to prevent discrimination of other groups regularly treated as inferior.³³ Judicial protection may be required to prevent discrimination of minorities who cannot obtain protection through the political process.³⁴

Still, the equal protection clause is not a proscription against legal classifications.³⁵ Often, the legislature must draw distinctions between groups in order to achieve legitimate state interests. Instead, the equal protection clause serves as a safe guard to prevent classifications "based on impermissible criteria or [classifications] arbitrarily used to burden a group of individuals."³⁶

B. Traditional Equal Protection Review

As the scope of the equal protection clause expanded beyond issues of invidious racial discrimination, the courts recognized a need to practice judicial restraint. Many valid laws would be rendered void if judges subjected all laws to the scrutiny used in reviews of racial classifications. Strict scrutiny of all laws would interfere with the democratic process and prevent the furtherance of legitimate state interests.

The court developed three standards of review to address the expanded scope of equal protection scrutiny.³⁷ When statutory review involves a suspect class,³⁸ courts use a strict scrutiny test.³⁹ Under this review, the government must show that the classification is necessary to a compelling government interest. The intermediate test is employed in gender or illegitimacy cases. This standard of review requires a showing that the classification is substantially related

³³ Antieau, *supra* n. 16, at 4.

³⁴ *Id.*

³⁵ John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.2, 597 (5d ed., West 1995).

³⁶ *Id.*

³⁷ *McDermott v. Mont. Dept. of Corrections*, 29 P.3d 992, 998 (Mont. 2001).

³⁸ A suspect classification is "a statutory classification based on race, national origin, or alienage, and thereby subject to strict scrutiny under equal-protection analysis." *Black's Law Dictionary* 1487 (Bryan A. Garner ed., 8th ed., West 2004).

³⁹ *McDermott*, 29 P.3d at 998.

to an important government interest.⁴⁰ The rational basis test applies when neither strict scrutiny nor intermediate reviews are appropriate.⁴¹ This most lenient standard of review is the standard alleged to have been employed in the review of the statutes in *Oberson* and *Brewer*.⁴² To prevail in a rational basis challenge, the challenging party must show that the statute does not rationally relate to any conceivable state interest.⁴³

Traditionally, in equal protection analysis, courts exercise extreme judicial restraint and deference. Chief Justice Warren commented,

[T]he court has held that the 14th Amendment permits the State a wide scope of discretion in enacting laws which affect some group of citizens differently from others. The constitutional safeguard is offended only if a classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.⁴⁴

For example, a statute which banned production of non-returnable milk containers but permitted the use of other non-returnable containers did not fail an equal protection challenge.⁴⁵ The statute survived an equal protection challenge because even the small environmental impact was deemed a legitimate state interest.

Although the judicial trend is to exercise deference in equal protection analysis, a court will find a statute unconstitutional if the court finds that the statute bears no rational relationship to furthering a legitimate state interest.⁴⁶ In *Hooper*, the court reviewed a statute that gave a tax

⁴⁰ Antieau, *supra* n. 16, at 8.

⁴¹ *Powell v. St. Compn. Ins. Fund*, 15 P.3d 877, 883 (Mont. 2000).

⁴² *Oberson*, 171 P.3d at 721; *Brewer*, 762 P.2d at 229.

⁴³ *Mont. Stockgrowers Assn. v. Dept. of Revenue*, 777 P.2d 285, 289 (Mont. 1989).

⁴⁴ *McGowan v. Maryland*, 366 U.S. 420, 425 (1965).

⁴⁵ *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

⁴⁶ *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 622 (1985).

exemption to Vietnam War veterans who were New Mexico citizens before May 8, 1976.⁴⁷ The fixed date residence requirement created two groups of veterans. Since the statute benefited only one group, the statute was subject to equal protection review.⁴⁸

The court held that the statute bore no rational relationship to the objective of encouraging veterans to settle in New Mexico because the state set the residence requirement date long after May 8, 1976.⁴⁹ While encouraging settlement is a legitimate state interest, the statute could not encourage settlement because veterans moving to New Mexico after the act passed would be ineligible for the benefit.⁵⁰

The statute's second stated purpose entailed showing war veterans gratitude, and compensating them for disruptions that military service created. The court recognized no legitimate state interest in restricting the benefit to veterans who were state citizens prior to or several years after the end of the war. The older citizens suffered no greater burdens than newer citizens. The court also rejected the idea that the tax exemption rationally related to a state goal of easing a citizen's transition into civilian life. The tax benefit became available at a time when veterans would have already adjusted to civilian life. In addition, since the tax exemption was available to selected veterans for the entirety of life, the benefit did not rationally relate to the purpose of easing transition into civilian life.

Generally, statutes survive equal protection challenges under the rational basis test. In rare circumstances when the court intercedes, the court refutes all conceivable bases for upholding the statute.

⁴⁷ *Id.* at 617.

⁴⁸ *Id.*

⁴⁹ *Id.* at 619.

⁵⁰ *Id.* at 620.

C. Montana Departs from Traditional Rational Basis Review

1. In *Brewer*, the court departs from the traditional rational basis standard of equal protection review. Traditionally, courts exercise extreme judicial restraint in rational basis review. When courts do interfere, as the *Hooper* court did, the court negates every conceivable basis for creating the legal classification. Conceivable reasons for restricting a ski area operator's liability include, protecting the economic vitality of the industry, and encouraging recreationalist to exercise greater caution. In its opinion, the court recognizes protecting the economic vitality of the ski industry as a legitimate state interest.⁵¹ However, the court does not consider whether the statute furthers this state interest. Instead, the court confines its analysis to a limited portion of the statute which discusses an objective of shifting responsibility to the skier for risks that are essentially impossible to eliminate. The court ends its rational basis analysis after concluding that that the statute is too broad to rationally relate to the narrow objective. By refusing to negate other conceivable bases for creating a legal classification, the court fails to properly apply rational basis review.

One might excuse the departure in *Brewer* because the statute excused ski area operators from gross negligence and intentional actions that injure a skier.⁵² Excusing gross negligence and intentional harmful actions might offend traditional notions of justice. Although the skier responsibility act may not be unconstitutional, according to the rational basis test, it might create an offensive privilege.

2. The court in *Oberson* does not use the rational basis test in its analysis. Instead, it considers the matter resolved because *Brewer* involved the review of a statute with a

⁵¹ *Brewer*, 762 P.2d at 230.

⁵² *Id.*

substantially similar purpose, and found it to be unconstitutional.⁵³ It saw no reason why "the unique economics of the snowmobile industry or the addition of a motor distinguishes snowmobiling from other inherently dangerous sports."⁵⁴ Accordingly, it held the snowmobile liability statute to be unconstitutional.⁵⁵

By relying on the *Brewer* decision as authoritative on the constitutionality of the snowmobile statute, the court continues its departure from traditional equal protection review. However, while the *Brewer* decision might be justified, the statute reviewed in *Oberson* is less broad and does not offend traditional notions of justice. The snowmobile liability statute does not excuse area operators from gross negligence or intentional actions that injure snowmobilers.⁵⁶

In fact, the statute holds area operators to a more stringent tort standard than the "recreational use" statute⁵⁷ which would govern in the absence of the snowmobile liability statute.⁵⁸ The recreational use statute "applies a 'willful or wanton' standard to landowners who allow individuals to use their land, free of charge, for 'recreational uses,' such as snowmobiling."⁵⁹ The snowmobile liability statute actually expands area operator's liability exposure.

D. The State has a Legitimate Interest in Limiting Area Operator Liability

1. Problems with Reasonableness

Inherently dangerous activities create interesting problems of reasonableness and liability. Decision making involves the weighing of risks and benefits. If the benefits outweigh

⁵³ *Oberson*, 171 P.3d at 720.

⁵⁴ *Id.*

⁵⁵ *Id.* at 721.

⁵⁶ Mont. Code Ann. §§ 23-2-651, 23-2-653 to 23-2-654 (1995).

⁵⁷ Mont. Code Ann. § 70-16-302(1) (1995).

⁵⁸ *Oberson*, 171 P.3d at 721.

⁵⁹ *Id.* at 721.

the risks, then a person will engage in the activity. In inherently dangerous sports, parties often consider greater risks to be a greater benefit. Snowmobilers participate in the sport because the motorized machines enable travel at high speeds over varied terrain. The thrills of snowmobiling stem from these risks. Venues on forest service land are more appealing due to the natural scenery and varied terrain. Snowmobiling on a controlled but extremely safe indoor track would not be as appealing to most snowmobilers. The risks are an essential component of the sport, and participants frequently seek greater risks.

People will be injured while participating in these sports. Some injuries will be catastrophic. Should area operators provide a venue for activities that will cause catastrophic injuries? No person wants to be catastrophically injured, but people's continued willingness to assume the risk of catastrophic injury suggests that the benefits outweigh the risks and consequences.

Area operators must strike a balance between allowing and mitigating risks. Eliminating too many risks destroys the character of the activity, while gross neglect may cause more frequent injuries and deter participation. Even if area operators exercise diligence in mitigating risk, participants seeking greater thrills will break rules and venture outside safety structures. When participants take greater risks, the potential for injury increases. The greater the potential for injury, the greater chance an injured party will be able to link the injury to negligence.

In *Oberson*, the snowmobilers created great risks. The participants traveled at night, while impaired by alcohol, at speeds in excess of the posted speed limit. This behavior created great risk to themselves and to others. The court found the Forest Service negligent for not posting a sign warning of the hill. One might question, however, if the hill would present a danger deserving of a warning sign had the snowmobilers exercised more caution. The obstacle

might have been readily apparent if recreationalists exercise prudence. An area operator's difficulty in foreseeing injuries increases as recreationalists take greater risks.

2. Legislatures are Justified in Addressing Concerns of Excessive Liability

Dangerous sports create unique liability problems which force community members and legislatures to be concerned about the economic viability of the industry. The statute reviewed in *Oberson*, protects local economies dependent on snowmobiling. Area operator liability insurance may become excessively expensive if courts hold area operators liable for injuries suffered in dangerous sports. Eliminating all risks that may be construed as negligence would require costly policing and risk analysis. A requirement to remove obstacles or post warnings for every danger would transform the natural environment and alter the character of the sport. Concerns of liability exposure may cause operators to restrict or deny access to snowmobile venues, and ultimately harm economies dependent on the snowmobile industry.

The Snowmobile Liability statute encourages snowmobilers to evaluate risks and proceed with greater caution. Careful behavior is especially important in a sport which enables high-speed travel and great risks of serious injury. Many injuries can be avoided if risk takers proceed with caution. Snowmobilers that assume conditions are perfect, or that the area operator will post warnings of every obstacle, will not drive as carefully. Driving with a false sense of security will likely result in accidents like the one in *Oberson*.

A public policy consideration for refusing to limit area operator liability is to promote the possibility that injured parties will be insured. Insurance companies are best able to compensate for costly injuries. Area operators likely carry insurance, while individual sports participants may not.

However, the creation of public policy is the responsibility of the legislature.⁶⁰ The legislature drew a rational relationship between the high risks inherent in the sport of snowmobiling and the legitimate state interests of restricting area operator's liability. Snowmobilers travel at much greater speeds and carry greater risks of expensive catastrophic injuries. Limiting area operator liability would protect the economic vitality of the industry, and encourage snowmobilers to evaluate risks and exercise greater caution.

V. CONCLUSION

The decision in *Oberson* interferes with the democratic process. The equal protection clause is designed to prevent the arbitrary classification of groups. The legislature has granted, doctors, psychologists, and judges degrees of liability immunity.⁶¹ The Montana Supreme court has not found these classifications to violate the equal protection clause. Does a court prevent arbitrary classifications if it allows some groups liability immunities, while, at other times, refuses to consider how other classifications promote legitimate state interests? Refusing to engage in the established standards of equal protection review allows courts to draw lines of legal classifications where ever it chooses. This line drawing becomes arbitrary if courts do not follow established structures but instead allow or deny legal classifications at will. Court centered classification interferes with the democratic process and ultimately defeats the equal protection purpose of preventing arbitrary legal classifications.

⁶⁰ U.S. Const. art I, §8.

⁶¹ Mont. Code Ann. § 41-1-407(3) (2007) (doctors); Mont. Code Ann. § 41-1-407(3) (2007) (psychologists) ; Mont. Code Ann. § 41-1-407(2) (2007) (judges).