Constitutional Law: Case Notes

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CONSTITUTIONAL LAW—EQUAL PROTECTION—AN EVOLVING INTERMEDIATE STANDARD OF EQUAL PROTECTION ANALYSIS—
Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

I. INTRODUCTION

During the period 1973-1975, a flurry of judicial activity involving constitutional challenges to guest statute legislation occurred.\(^1\) The usual basis for the recent challenges has been that guest statute legislation violates the equal protection guarantees of both the federal and state constitutions. Ohio's guest legislation has not been immune from attack. In July, 1975, the Supreme Court of Ohio, in Primes v. Tyler,\(^2\) declared the Ohio guest statute\(^3\) unconstitutional. Primes involved a relatively simple factual situation, typical of most guest statute litigation.\(^4\) The plaintiff alleged that the defendant was guilty of ordinary negligence in the operation of a motor vehicle. The evidence presented at trial established that the plaintiff was not a "paying passenger" but rather a "guest" and the trial court, following the

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\(^2\) 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

\(^3\) Ohio Rev. Code Ann. § 4515.02 (Page 1973):

The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

\(^4\) The plaintiff and defendant were part of a group of weekend golfers who utilized an informal car pooling arrangement. No arrangements in regard to transportation had ever been established on a regular basis. No payment was ever made and the golfer who drove was always responsible for transportation expenses. On the day of the mishap, the parties were en route to a golf course when the defendant failed to complete a turn at an intersection and struck a telephone pole, thereby causing injury to the plaintiff.
dictates of the guest statute, entered judgment for the defendant. The Summit County Court of Appeals determined that the plaintiff was indeed a guest transported without payment; nevertheless, it reversed the judgment of the trial court on the ground that the Ohio guest statute was unconstitutional. Upon certification, the Supreme Court of Ohio affirmed the judgment of the court of appeals. The supreme court held the guest statute violated the equal protection guarantees of the Ohio and United States constitutions, and of the “due course of law” provision of the Ohio constitution.

In *Primes*, the Supreme Court of Ohio discussed the traditional justifications for the distinctions drawn by the guest statute in terms of whether the justifications were “suitably furthered” by the classification system established by the statute. The court concluded that they were not. In reaching this conclusion, the Ohio court in effect discussed the desirability of the statute, an issue arguably outside the purview of equal protection analysis of social and economic legislation. Noticeably absent from the court’s reasoning is any explicit discussion of whether there is a rational relationship between the objectives of the statute and the statute’s classification dichotomy, a discussion generally found in equal protection challenges to legislation in this area.

If it was the intention of the Ohio court to promulgate a new level of equal protection review in *Primes*, its distinctions are particularly obscure. Even if a new level was not promulgated in *Primes*, the Ohio court has added a layer of opacity to an already nebulous area of the law. Whatever the equitable justifications for abrogating the guest statute, the Ohio supreme court in *Primes* failed to give the lower courts of Ohio the guidance necessary to afford future litigants equal protection of the laws. If stability of the law in this area is to be preserved, it is incumbent upon the Supreme Court of Ohio to provide more readily ascertainable guidelines for equal protection analysis.

II. THE STANDARD OF EQUAL PROTECTION ANALYSIS

A. Traditional Similarity of Approaches Used by the Ohio and the United States Supreme Courts

The equal protection provisions of the Ohio and United States

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6 43 Ohio St. 2d at 204-05. For the text of pertinent constitutional provisions, see 43 Ohio St. 2d at 197 n.1.
constitutions are substantially the same. Therefore, litigants have tended to claim protection under both provisions when raising an equal protection challenge. Because of this fact, Ohio courts historically have utilized the United States Supreme Court's method of analysis when testing the constitutionality of legislation challenged as violative of the state’s equal protection guarantee.

In *Primes*, the Ohio supreme court initially stated the constitutional test to be used in equal protection challenges as follows:

Under “traditional” equal protection analysis, it was required that a statutory classification be “shown to be necessary to promote a *compelling* governmental interest”... when it violated a “fundamental” interest... or was based upon a trait which rendered it “suspect”... Otherwise, the classification would be upheld if there existed any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective... 

The Ohio court did not purport to find a “suspect” classification created by the guest act, nor did it state that a “fundamental” interest or right was violated by the statute's operation. Therefore, had the guest statute been evaluated under the traditional equal protection analysis, its constitutionality would have been upheld under the rationality standard if “there existed any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective.”

The rationality test of constitutionality finds perhaps its best explanation in the United States Supreme Court’s decision in *McGowan v. Maryland*:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification, [not affecting a fundamental right or creating a suspect 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. A

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8 43 Ohio St. 2d at 198-199 (United States Supreme Court citations omitted).
statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.9

Since the late 1930's and the demise of substantive due process analysis in this area, the United States Supreme Court has taken the position that legislation involving economic and social welfare would not be violative of the equal protection clause if the legislative distinctions had some reasonable basis in practical experience.10 The Court's position underwent little change until 1970. Except for the increased scrutiny given classifications based on suspect criteria or affecting fundamental rights, the Court generally adhered to the traditional rationality standard, a standard of almost complete deference to legislative judgment.11

Similarly, the Supreme Court of Ohio, when utilizing this rationality test in the past, has been quick to defer to the judgment of the legislature.12 The court has not hesitated to conceive of a purpose rationally related to the classification created by a statute's operation.13 This willingness to hypothesize a legislative purpose indicated

12 See State ex rel. Lukens v. Brown, 34 Ohio St. 2d 257, 298 N.E.2d 132 (1973); Porter v. City of Oberlin, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965); State ex rel. Clark v. Brown, 1 Ohio St. 2d 121, 205 N.E.2d 377 (1965).
13 See, e.g., Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); State v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968). In Buckley, the court was faced with an equal protection challenge to a statute that placed demanding regulations on the operation of junk yards while exempting scrap yards from such regulation. After attempting to differentiate between the functions of each type of yard, the court concluded "it may well be that the General Assembly saw fit to exempt scrap processing dealers to stimulate efforts to remove junk instead of store it. Certainly we can not say that junk yards are not a conspicuous example of modern roadside blight." 16 Ohio St. 2d at 134, 243 N.E.2d at 71 (emphasis added). In Krause the court was asked to rule that the withholding of a legal remedy from persons injured by the state, while allowing a remedy to persons injured by tortious activity of a non-governmental nature, constituted discriminatory governmental action which created an unconstitutional classification. The court, in declining to make such a ruling, stated:

Assuming, arguendo, that there is in fact a classification, it is one which the General Assembly is empowered to make. To say that the State of Ohio is not entitled to a defense, i.e., the right to plead lack of consent to such suit merely because a nongovernmental tortfeasor does not have the same right, is to preclude the combined legislative judgment that there may be substantive differences between the two types of conduct.

31 Ohio St. 2d at 146, 285 N.E.2d at 744-45 (emphasis added).
the court's policy of deferring to legislative judgment. Other manifestations of this policy of judicial deference can be found in cases where a purported governmental objective or interest was accepted at face value, with little or no inquiry into the validity of the interest or the relationship between that interest and the challenged legislation. Therefore this policy placed an almost insurmountable burden of proof on the party challenging the legislation.

B. A New Approach—An Intensified Level of Scrutiny

Since the change in the United States Supreme Court's membership in the late 1960's and early 1970's, the rationality standard used in equal protection challenges has undergone substantial change. The Court since that time has repeatedly, though not consistently, subjected challenged legislation not involving suspect classifications or fundamental rights to a more demanding standard of constitutional scrutiny. This intensified level of scrutiny reflects a growing

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14 See Kyser v. Bd. of Elections, 36 Ohio St. 2d 17, 303 N.E.2d 77 (1973); Lehman v. City of Shaker Heights, 34 Ohio St. 2d 143, 296 N.E.2d 683 (1973) aff'd 418 U.S. 298 (1974); State ex rel. Soller v. Bd. of Educ., 29 Ohio St. 2d 148, 280 N.E.2d 382 (1972); State ex rel. Wallace v. Celina, 29 Ohio St. 2d 109, 279 N.E.2d 866 (1972); Red Fox Stables, Inc. v. Porterfield, 28 Ohio St. 2d 239, 277 N.E.2d 433 (1972); Ohio Assn. of Pub. School Employees v. Bd. of Educ., 28 Ohio St. 2d 58, 275 N.E.2d 610 (1971). In one instance the court went so far as to hold that challenged legislation would be sustained if the party claiming the legislation was void could not negative "every reasonable basis which might support the presumption that the enactment of the legislation included a determination by the legislative body that there was a reasonable need therefor, i.e., that someone had previously been doing, or that someone might otherwise be likely to do, what the legislation will prohibit." Porter v. City of Oberlin, 1 Ohio St. 2d at 151, 205 N.E.2d at 369. Truly it must be presumed that this is the outermost limit of judicial deference, but it does reflect the traditional evaluation of challenged legislation by the Ohio courts under the rationality standard.


16 Gunther, supra note 11, at 18-20.

17 The precise analytical framework of this new level of scrutiny is unclear. It has been suggested that the Court is again utilizing substantive due process in the area of social and economic legislation. Tushnet, "... And Only Wealth Will Buy You Justice"—Some Notes on the Supreme Court, 1972 Term. 1974 Wis. L. Rev. 177; Yackle, supra note 10, at 238-47. Professor Gunther has suggested that the Court's new approach focuses intensely on the means used, requiring a substantial relationship between the legislative purposes and the legislative classifications. Gunther, supra note 11, at 20. Another writer submits that a "majority of the Court apparently is willing to scrutinize not only the means but also the ends of legislation involving neither fundamental rights nor suspect classifications." Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 Geo. L.J. 1071, 1072 (1974). Professor Nowak goes on to suggest a tri-level analytical model in which the level of scrutiny changes, depending on whether the classifications are (1) racial, (2) nonracial, but involving inherent human characteristics, or (3) classifications other than (1) or (2).
dislike on the part of some of the Court's personnel for the traditional two-tiered method of equal protection analysis.\textsuperscript{18}

In recent years the Court has shown an increasing reluctance to hypothesize a legislative purpose. Rather than imagine a purpose, the Court has frequently considered only expressly stated legislative objectives.\textsuperscript{19} In fact, the Court has attempted to incorporate this concern into its stated definition of the rationality standard. In \textit{McGinnis v. Royster}, for example, the Court stated that under the rationality standard the Court will "inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose."\textsuperscript{20}

Moreover, even when a legislative purpose is expressly stated, the Court has inquired into whether that purpose is the one in fact intended by the legislative branch\textsuperscript{21} and, if it is, whether that purpose is rationally furthered by the legislative means adopted. The Court has shown an increased hesitancy to accept a governmental assertion that there is a rational relationship between the stated, legitimate government interest and the means adopted to further that interest. When the Court has deemed it appropriate, it has intensified its scrutiny of the asserted rational relationship and has often found that relationship illusory.\textsuperscript{22}

Just as frequently, however, the Court has accepted the asserted rational relationship without mentioning or intimating the existence of any new standard of constitutional analysis.\textsuperscript{23} The continued use of the two approaches indicates that the Court has not totally re-

\textsuperscript{18} Gunther, \textit{supra} note 11, at 17-18; Yackle, \textit{supra} note 10, at 191.


placed the traditional rationality standard with the intensified level of scrutiny standard. Rather, it appears the Court is employing two levels of analysis when evaluating equal protection cases not involving fundamental rights or suspect classifications. As yet, no discernible indicia exist by which to consistently predict when a particular level will be utilized.\[24\]

Although its use has been infrequent, the justices of the Supreme Court of Ohio appear to have incorporated the intensified level of scrutiny test into their analytical framework. An interesting example of this approach is found in the dissent to Lehman v. City of Shaker Hts.\[25\] Lehman involved a contract between the City of Shaker Heights and Metromedia, Inc.\[26\] whereby Metromedia was prohibited from accepting any political advertisements at any time for display in or upon the Shaker Heights Rapid Transit System. Commercial advertising, on the other hand, was allowed. Plaintiff, a political candidate, was refused paid political advertising space because of this contract. Plaintiff contended that this refusal was a denial of equal protection of the law. In a four-to-three decision, the Ohio supreme court disagreed, holding that because everybody in plaintiff's class of candidates for public office was treated equally, there was no denial of equal protection.\[27\]

In his dissent, Justice Stern concluded that "[w]here a municipality has created an arena for the display of paid advertisements by providing facilities for such paid advertisements on its rapid transit system," it is a denial of equal protection to "discriminate against paid political advertisements in favor of paid commercial advertise-

24 Gunther, supra note 11, at 36; Nowak, supra note 17, at 1122. For an excellent attempt by a court at delineating the appropriate indicia, see Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975).
26 Metromedia, Inc., is the exclusive advertising agent for Shaker Heights Rapid Transit System, a municipally owned and operated system.
27 34 Ohio St. 2d at 148, 296 N.E.2d at 686. The Supreme Court of Ohio has infrequently used this varying perception of class dimensions to sustain challenged legislation while avoiding discussion of the underlying interests and principles involved. In addition to Lehman, see State v. Withers, 44 Ohio St. 2d 53, 55 (1975); Garono v. State Board of Landscape Architect Examiners, 35 Ohio St. 2d 44, 47-48, 298 N.E.2d 565, 568 (1973). Following precisely the logic of Lehman one might ask why, in Primes, the Ohio supreme court did not uphold the validity of the guest statute. Clearly, the plaintiff was treated no differently in the litigation than other persons negligently injured while traveling as guests. Yet in Primes, the court chose to look beyond the class discriminated against by the statute instead of limiting its focus to intraclass distinctions. Such oscillation without justification is not conducive to either well-reasoned opinions or guiding precedent.
ments." In reaching this conclusion, Justice Stern thoroughly analyzed the relationship between the articulated purposes to be served by the contractual provision prohibiting political advertising and the classifications created by the provision. The purposes to be served by the classification were articulated as follows:

[T]he display of paid political advertisements on the city's transit system [would present] . . . unique disadvantages, such as: (1) They might be interpreted as an endorsement by the city of a particular person or idea; (2) there exists a reasonable chance for abuse, the possibility of discrimination or favoritism; (3) the risk of violating the passenger's rights; and (4) the controversial nature of political advertisements.

Justice Stern felt the relationship between the first purpose and the statutory classification was unreasonable because the purpose could be accomplished by less drastic means, such as a statement of nonendorsement on the face of the ad. He also intimated that the relationship was irrational because no one would reasonably interpret a political display on the transit system to be a city endorsement. Similarly, he implied that the relationship between the second and fourth purposes and the statutory classification was irrational because no evidence of rationality had been presented. The dissenting justice discarded the third purpose because he felt the unlimited protection being given the passenger's rights in regard to political advertisements was not an appropriate governmental interest. Furthermore, because the passengers' rights were still being violated by commercial ads, the protection was underinclusive. The fact that Justice Stern was joined in his dissent by two other justices indicated substantial dissatisfaction with the deferential approach taken by the majority.

In Kinney v. Kaiser Aluminum & Chemical Corp., this dissatisfaction accounted for a unanimous decision. In Kinney, the Ohio court was asked to declare unconstitutional the requirement that

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28 34 Ohio St. 2d at 156, 296 N.E.2d at 690.
29 34 Ohio St. 2d at 154, 296 N.E.2d at 689-90.
30 Id.
31 34 Ohio St. 2d at 154-55, 296 N.E.2d at 690.
32 34 Ohio St. 2d at 155-56, 296 N.E.2d at 690.
33 Id.
34 Id.
35 Id.
37 41 Ohio St. 2d 120, 322 N.E.2d 880 (1975).
certain jurisdictional prerequisites be met in order to have a claim evaluated by the Bureau of Workmen’s Compensation. Under the statute, a failure to satisfy one or more of these prerequisites established a conclusive presumption that there was no causal relationship between the death of the worker and a work injury or occupational disease. In effect, the jurisdictional requirement classified dependents of deceased workmen into two groups, “those who can meet one or more of the prerequisites and those who can not, and [the requirement] automatically preclude[d] the consideration of a claim for death benefits filed by a member of the latter group.” The court stated that, because some persons in the latter group undoubtedly could prove the required causal connection if given the opportunity, the statutory classification actually obstructed, rather than furthered, the articulated legislative objective of the workmen’s compensation system—to compensate dependents of workmen for death occurring in the course of their employment. Stated otherwise, the objective of the statutory system was not rationally furthered by the classification. The overinclusiveness created by the classification was unnecessary because less drastic means were available, such as the utilization of an evidentiary hearing for each disputed claim for death benefits. Accordingly the court held the legislation creating the jurisdictional prerequisites unconstitutional.

The importance of the dissenting opinion in Lehman and the majority opinion in Kinney is the analysis of the relationship between the governmental purpose and the legislative means adopted to further it. This approach is the primary focus of the intensified level of scrutiny analysis. As employed by the Ohio court, the intensified scrutiny standard examines any overinclusive or underinclusive reach of the legislation in question. Therefore, the test goes beyond the traditional limits of equal protection analysis. Under the rationality test employed previously by the Ohio court, “[t]he ultimate question in any classification problem [was] whether it [had] some reasonable basis, not whether some were excluded from such class who might well have been included therein.” When the intensified scrutiny

37 Id. at 123, 322 N.E.2d at 883.
38 Id. at 123-24, 322 N.E.2d at 883.
39 Id. at 124-25, 322 N.E.2d at 883-84.
40 Id. at 125, 322 N.E.2d at 884.
41 See also City of Dayton v. Cloud, 30 Ohio St. 2d 295, 300-01, 285 N.E.2d 42, 47 (1972).
42 See notes 15-22 and accompanying text.
standard is utilized, however, the determination of whether the legislation extends far enough is made by the judiciary. As applied by the Ohio court, the intensified level of scrutiny standard also appears to consider whether a less drastic means exists to achieve the legislative end. Such an inquiry appears to go beyond the traditional limits of the analysis used by the Ohio court because it suggests the legislature must make the appropriate choice from the alternative means available. Previously, the wisdom of the legislation was not subject to judicial inquiry.44

Until *Primes*, the primary focus of the intensified level of scrutiny standard appeared to be whether a rational relationship existed between the legitimate statutory purpose and the classification created by the statute.45 To test the existence of this relationship, underinclusiveness, overinclusiveness, and the existence of a less drastic means to achieve the legislative purpose were the three primary considerations. The Ohio court in *Primes* added a fourth factor.

III. PRIMES V. TYLER

The Ohio guest statute attacked in *Primes* is a fertile field for an equal protection challenge. The Ohio statute makes a discriminatory classification between “guests” and “paying passengers” by allowing host-drivers to accord those fitting the guest category a lesser degree of care. Surely an injured guest would consider this classification irrational.

A. History and Nature of the Guest Statute

The Ohio guest statute was enacted in 1933 amidst the flurry of “hitchhiker-itis” that swept through the legislatures of twenty-nine states between 1927 and 1939.46 Before 1933, the Ohio courts were committed to the common law doctrine that the owner or operator of an automobile owed an invited guest the duty to exercise reasonable care in the operation of his automobile and not to unreasonably


45 This standard seems to place at least the burden of initial production of evidence for the issue of rational relationship on the party seeking to find shelter under the legislative enactment. Under this intensified standard, a party such as the defendant in *Primes* could find himself in the unenviable position of defending legislative action against constitutional attack, at least to the extent of presenting a prima facie showing of rational relationship.

expose the guest to danger and injury. The effect of the guest statute was to absolve the Ohio courts from this common law commitment. Stated otherwise, the Ohio guest statute completely abrogate[d] the liability of an owner, operator or person responsible for the operation of a motor vehicle to a guest while being transported without payment therefor, for damages for injuries or death, excepting where such injuries or death are caused by the wilful or wanton misconduct of such operator, owner or person responsible for the operation of such motor vehicle.

The constitutionality of the statute was judicially tested and approved by an Ohio appellate court within two years of its enactment, and efforts to repeal or amend its harshness have proved unavailing. The accepted purposes of the statute are the preservation of the hospitality of the host-driver and the prevention of collusion between injured guests and drivers who might attempt to defraud insurance companies.

This “rose” of legislative ingenuity soon proved, however, to be a “thorn” in the side of the appellate courts of Ohio. The act clearly mandated that there be no liability imposed upon a host-driver guilty of negligence, and the courts were “obliged to give force to such statute according to its express terms and plain intent.” Attempts to satisfy this obligation and simultaneously effectuate equitable results precipitated extensive statutory interpretations that occupied much of the courts’ time and energy. The results of these attempts

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47 Sparrow v. Levine, 19 Ohio App. 94, 102-03 (1923).
48 Cunningham v. Bell, 149 Ohio St. 103, 77 N.E.2d 918 (1948), approving and following paragraph one of the syllabus in Vecchio v. Vecchio, 131 Ohio St. 59, 1 N.E.2d 624 (1936).
51 Stiltner v. Balner, 10 Ohio St. 2d 216, 222, 227 N.E.2d 192, 196 (1967).
52 Thomas v. Herron, 20 Ohio St. 2d 62, 66, 253 N.E.2d 772, 775 (1969). It has also been suggested that the statute was passed “in response to a general feeling of animosity towards ‘hitchhikers’ and other guests bringing personal injury actions against the ‘good samaritan’ motorists.” Comment, The Ohio Guest Statute, 22 Ohio St. L.J. 629 (1961).
53 Miller v. Fairley, 141 Ohio St. 327, 334, 48 N.E.2d 217, 221 (1943).
54 For an estimation of the burden imposed on a state judicial system by guest act litiga-
were anything but satisfactory. An examination of over forty years of judicial interpretation reveals "a hodge-podge of anomalies, contradictions and misnomers."\(^5\) These interpretive difficulties caused by the patent ambiguities of the statute may very well have been an underlying and unacknowledged factor that motivated the Ohio supreme court in *Primes* to declare the guest statute unconstitutional.

**B. The Equal Protection Approach in Primes**

In *Primes*, the Ohio supreme court reiterated the twofold objective of the guest statute: "[T]o preserve the hospitality of the host driver and to prevent the possibility of fraudulent, collusive lawsuits against insurance companies."\(^5\) Unlike other jurisdictions deciding the same issue,\(^5\) the court did not conceptualize any other possible or probable legislative objectives, but proceeded to make its constitutional determination considering only these two articulated objectives. The court's refusal to conceptualize in favor of the constitutionality of the legislation seemed to indicate that its final constitutional determinations would be made under the intensified level of scrutiny standard. Had this been the case, a *Lehman-Kinney*-type analysis intensively focusing on whether there was a rational relationship between the purposes of the legislation and the guest-passenger classification would have followed. Instead, the court's analysis in *Primes* was couched in terms of "whether there [was] an appropriate govern-

\(^5\) Note, *Treadmill to Confusion—Ohio's Guest Statute*, 8 CASE W. RES. L. REV. 170 (1957). Similar sentiments were recently expressed by an Ohio attorney. "[O]ne need only count the pages of case annotations [following § 4515.02] in the OHIO REVISED CODE to realize the veritable legal tower of Babel erected over a seemingly innocuous 'hitchhiker' statute. This Matterhorn of legal rhetoric has not resulted in an anthill's worth of jurisprudential advancement." Brief for Martha Berisford as Amicus Curiae at 3, Berisford v. Sells, 43 Ohio St. 2d 205, 331 N.E.2d 408 (1975).

The Ohio courts have at various times attempted to determine who is a guest within the meaning of the statute, what constitutes payment for transportation, whether a guest relationship can be terminated once begun, whether violation of a statute constitutes wilful or wanton misconduct and what exactly constitutes wilful or wanton misconduct. For a detailed discussion of the attempts by Ohio courts to resolve these and other questions, see Comment, *The Ohio State Guest Statute*, supra note 52; Note, *Treadmill to Confusion—Ohio's Guest Statute*, supra note 55. The resulting determinations have been at best ambiguous and have caused the highest court in the state to decline further invitations to elucidate. Klein v. Reynolds, 32 Ohio St. 2d 163, 291 N.E.2d 446 (1972).

\(^5\) 43 Ohio St. 2d at 197, 331 N.E.2d at 725 (footnotes omitted).

mentally furthered by the differential treatment" brought about by the guest statute’s operation. Immediately the question becomes in what context this “suitably furthered” language was used. Was it to articulate in different words the traditional rationality standard, to restate the intensified level of scrutiny standard, or to add another factor to the intensified scrutiny test?

Instead of giving deference to the legislative determinations, the court intensified its analysis by considering the overinclusive and underinclusive aspects of the statute, and whether less drastic means existed by which the desired goals could be achieved. The court abandoned the traditional approach and began analysis of the prevention of collusive lawsuits objective with an examination of the major factors used in the intensified level of scrutiny analysis. The Ohio court concluded that this objective was underinclusive because the possibility for fraudulent claims regarding payment and wanton misconduct exists even in the presence of the guest statute. The court also included an overinclusive and less drastic means argument among its reasons for striking down the guest statute. The court concluded that all remedy should not be withdrawn in order to avoid a rare recovery based upon false testimony. And, in the court’s view, the judicial process is the appropriate place in which to detect this fraud, a means less drastic than the conclusive presumption of the guest statute.

The reasoning of the court goes beyond the traditional rationality standard for several reasons. First, the propensity for collusion attributable to the persons involved is a matter for which no readily available data exists and any conclusions reached concerning the

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58 43 Ohio St. 2d at 199, 331 N.E.2d at 726.
59 The “suitably furthered” language quoted by the court in Primes is taken from Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). The opinion in Mosley was written by Justice Marshall, who has led the Court in search of new analytical tools for equal protection reviews. Gunther, supra note 11, at 17. Although Mosley involved first amendment interests that caused the challenged legislation to be subjected to close scrutiny, Justice Marshall took the opportunity to formulate the “suitably furthered” language as “an overarching question appropriate to all equal protection cases.” Id. However, this “overarching” standard has not replaced the multilayered method of equal protection evaluation generally employed by the United States Supreme Court. This conclusion is adequately supported by reference to equal protection cases decided subsequent to Mosley by the Supreme Court. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Recently, even Justice Marshall has indirectly acknowledged the continued existence of the multilayered method of analysis. See Hill v. Stone, 421 U.S. 289 (1975); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (Marshall, J., dissenting).
60 43 Ohio St. 2d at 200-01, 331 N.E.2d at 727.
61 Id.
62 Id.
honesty of the groups involved are mere speculations. It involves "an appraisal of human motivations and reactions which judges are no better qualified to make than legislators." The situation is one in which, under the traditional rationality standard, judicial deference would be accorded the legislature's determinations. Second, under the traditional standard of analysis, "it is reasonably conceived ground by the legislature to determine that the temptation or actual incidence of fraud is very great; or that collusion is especially difficult to detect; or that the judicial system should not be responsible for having to detect fraud." As indicated in Kinney, however, judicial evaluation of the overinclusiveness of the statute and of whether the means chosen were the least drastic available are proper considerations under the intensified level of scrutiny standard.

Considering these three factors, the court in Primes could have reached the conclusion that the relationship between the statute's classifications and the objective of preventing collusive lawsuits was irrational in the intensified level of scrutiny sense. Instead, the court concluded that "the prevention of spurious claims is not 'suitably furthered' by the guest statute nor by the differential treatment afforded therein to guests and passengers." By using this "suitable
furtherance" language, and by failing to hold the relationship irrational, and therefore unconstitutional, after considering the factors of the intensified scrutiny standard, the court implied that it was looking at more than those factors. The additional factor appears to be suitability, i.e. desirability, as interpreted by the Ohio supreme court.

Absent from the opinion in Primes was any express consideration of whether there is a rational relationship between the classification and the objective. Arguably this absence was an implicit indication that the court believes such a relationship exists. Had the court concluded that the classifications of the guest statute were not rational, it could have used the analysis of the intensified scrutiny standard to strike it down—all of the factors were present. Instead, the court implicitly concluded that, even after examining these factors, the relationship was rational. That is, the three factors were not a sufficient basis to strike down the statute. Therefore, the court's use of the overinclusiveness and underinclusiveness arguments in support of the conclusion that the prevention of collusive lawsuits was not suitably furthered by the classificatory system of the guest statute, indicated that the court was operating beyond the described intensi-

were legitimated under state law. Illegitimates not fitting one of the categories of this class were denied benefits, without an opportunity to establish entitlement thereto because of dependency on the disabled parent. A careful reading of the Jimenez opinion shows that the potential for spurious claims which concerned the Supreme Court was mainly in regard to the fabrication of proof of dependency by the two subclasses of illegitimates. 417 U.S., at 635-37; 417 U.S., at 639. (Rehnquist, J., dissenting). And indeed the potential for spurious claims was exactly the same for each subclass.

This exactness is noticeably absent in the Primes situation. In Primes the Ohio court tried to equate the fraudulent claims that might arise when a guest presents a claim that he paid for the ride or that the driver was guilty of willful or wanton misconduct, and proves such a claim by perjury and the collusive assistance of the driver, with the fraudulent claims that might arise if the driver and guest were to collude in regard to the issue of ordinary negligence. 43 Ohio St. 2d, at 200-01, 331 N.E.2d, at 727.

Fraudulent suits effected by claims of payment or wanton and wilful misconduct would involve blatant untruthfulness on the part of the driver and the guest. These matters are hardly ones of degree. On the other hand, ordinary negligence in the course of a split-second accident is very much a matter of degree. The line between ordinary care and ordinary negligence is often difficult to draw and drivers may very well be "inclined to allow their testimony about responsibility for an accident to be colored by sympathy for guests who have accepted their hospitality," Tisko v. Harrison, 500 S.W.2d at 569, without ever doubting the truthfulness of their testimony. These two situations are not equivalent, and do not exhibit the same degree of exactitude.

Additionally, the analogy is forced because illegitimacy has recently been treated as a quasi-suspect classification. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 692 n.12, 232 N.W.2d 636, 652 n.12 (1975) (Coleman, J., dissenting); Tisko v. Harrison, 500 S.W.2d at 571. The guest classification has not been similarly treated.
fled level of scrutiny standard.

Additional evidence that the court used a factor of desirability in its analysis is found in the court's evaluation of the preservation of hospitality objective of the guest statute. In regard to this objective, the court stated "[j]ust as the guest statute does not suitably further the governmental interest in preventing collusive lawsuits, the differential treatment afforded therein to guests and passengers cannot be justified by an alleged interest in fostering the amorphic concept of hospitality." The court concluded that "the statutory objective of preventing ingratitude is no longer viable in the context of differential treatment afforded by the guest statute." The court's chief justification for this conclusion was that liability insurance is available to most drivers. The court's consideration of the liability insurance factor, however, rendered its conclusion concerning the "viability" of the governmental interest unnecessary. By emphasizing the widespread availability of liability insurance the court was, in effect, asserting that the hospitality interest of the host-driver was no longer endangered. Thus, the court could have easily determined that any legislation designed to protect that which was judicially noticed as being free from danger was irrational. Stated otherwise, the court could have recognized the superfluity of the guest statute as a ground for finding its classification to be irrational. Had the court examined intensively the nexus between the classification and the objective of preserving the hospitality of the host-driver, the intensified level of scrutiny standard would not have been met.

Instead of merely using the intensified scrutiny standard more understandably, the court unnecessarily expressed an opinion as to the relative desirability of the preservation of hospitality interest vis-à-vis the injured guest's interest in redress, thus balancing the interest presented in the case. This balancing is not within the traditional scope of an equal protection analysis. Under both the traditional
rationality and the intensified level of scrutiny standards, the analysis proceeds by first determining whether the governmental interest is constitutionally permissible and then whether that interest is rationally furthered by the means adopted. Instead, the Primes court engaged in a balancing of interests that would seem to be more appropriate in a substantive due process framework than in an equal protection analysis. It weighs what it perceives, in the light of economic and social developments, to be the significance of the governmental interest against what the court perceives to be the discriminatory injustice fostered by the classifications created and the injured guest’s interest in redress. The court then determines the continued “viability” of the governmental interest. Thus the court in effect asks whether the legislation is a desirable method of furthering a relatively unimportant interest, as determined by the court. In Primes the court determined that it was not.

In summary, the analysis in Primes evaluates the desirability (suitability) of the relationship between the statute’s purpose and its classification, rather than determining whether such a relationship exists. Under this approach, once it is determined (explicitly or im-

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70 See, e.g., Lindsey v. Normet, 405 U.S. 56, 74 (1972): “Since the purpose of the Oregon statute is constitutionally permissible and since the classification under attack is rationally related to that purpose, the statute is not repugnant to the . . . Fourteenth Amendment.” The difference between the rationality and intensified scrutiny standards is the intensity with which the means used is analyzed.

71 43 Ohio St. 2d at 202, 331 N.E.2d at 728. It is of interest to note the reasoning by which courts employing the traditional rationality standard have rejected this “liability-insurance-as-panacea” argument. It has been suggested that the social engineering notion of shifting liability for negligently-inflicted injuries from the injured guest to the general motoring public through liability insurance is an economic and social solution that must be legislatively, not judicially introduced. Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121, 126; Cannon v. Oviatt, 520 P.2d 883, 888. It has also been stated that there are many instances where the negligent driver carries only the minimum policy limits required by statute, and personal injury cases often result in judgments which exceed the host’s liability limits. Botsch v. Reisdorff, 226 N.W.2d 121, 126 (Neb. 1974); Duerst v. Limbocker, 525 P.2d 99, 103 (Ore. 1974). Further, it has been stated that a significant number of drivers do not have any liability insurance, as evidenced by the many statutes requiring uninsured motorists coverage to be offered in automobile insurance policies. Id. One writer has suggested that feelings of ingratitude are not necessarily measured in dollars; that the burden of being forced through a lawsuit as a defendant may in itself have a “chilling” effect on hospitality. 53 Neb. L. Rev. 267, 272 (1974). Another rather obvious ramification of the widespread availability of liability insurance not discussed in Primes concerns the first objective of preventing collusive lawsuits. Since the United States Supreme Court, in Silver v. Silver, 280 U.S. 117 (1929), felt the existence of liability insurance increased the likelihood of collusive suits at that time, it has been suggested that the now nearly universal presence of liability insurance has commensurately increased the potential for collusion between owner and guests, thereby increasing the need for preventing such collusion. Tisko v. Harrison, 500 S.W.2d 565, 570 (Tex. Civ. App. 1973).
plicitly) that the purpose is rationally furthered by the classification, the statute needs to pass a higher level of review that asks whether the purpose is suitably furthered by the classificatory effects of the statute. Included in this higher level of review is an evaluation of the appropriateness of the statute's classification in terms of the continued significance of the governmental objective.

No direct language concerning the desirability of the statute appears in the opinion. However, the court's expressed concern with the perceived inequities achieved by the statute's operation at the expense of injured guests, the court's general conclusions of the unsuitability of statutory purpose and relationship supported by a subjective process of weighing the interests involved, and the absence of any discussion of the lack of a rational relationship between the purpose and the classification leads to the conclusion that the court has injected a desirability factor into its equal protection analysis. While the Supreme Court of Ohio might be commended for its candor in discussing the desirability of the interests involved and the fairness it perceives, such discussion contributes nothing to the analytical framework. This discussion only reflects the subjective attitudes of the justices. It is a weighing of intangibles, of the advantages and disadvantages of legislation, which the court is no more qualified to undertake than the legislature. Indeed, this weighing is a proper legislative function. If the subjective attitudes of the justices become the standard by which the constitutionality of challenged legislation is evaluated, then there is no limit on the power of the judiciary to override legislative determinations. As indicated, the court was sufficiently equipped with analytic tools to deal effectively with the legislation in question. There was no need for it to introduce this desirability factor.

If the Ohio court in Primes did introduce a factor of desirability into its equal protection analysis through its "suitably furthered" language, it would be valuable to predict when this factor will be utilized in the future. Thus far, predictive indicia have not materialized. However, several factors associated with the guest statute may help to explain the decision in Primes, and may be of some predictive use in the future. These factors may be classified as undesirability (inequity, diminished need, and unworkability) and legislative impotence.

\[\text{43 Ohio St. 2d at 200-02, 331 N.E.2d at 727-28. Undoubtedly these subjective considerations underlie, at least to a small degree, most decisions testing the rationality of legislation.}\]

\[\text{Tisko v. Harrison, 500 S.W.2d at 572.}\]
In *Primes*, a general feeling can be detected among the justices that the statute is fundamentally unfair and therefore undesirable. This is evidenced by the court's discussion of the inequitable results it perceives the statute achieves at the expense of innocent parties,\(^7\) and by its interjection of the liability insurance issue.\(^7\) The court's discussion of the prevalence of insurance intimates that it feels the need for protecting the host-driver has diminished to the point where the need no longer outweighs the demands of the negligently injured guest. Unmentioned in the court's decision were the interpretative difficulties the Ohio courts have faced since the statute's inception,\(^7\) although these problems might have been a major motivation underlying the court's suitable furtherance language. Stated otherwise, the *Primes* decision might have been, in large part, the court's reaction to a generally unworkable statute.

Intertwined with these three undesirability factors may have been a feeling on the part of the court that only it could, or would, abrogate the guest statute. That is, since the legislature had repeatedly failed to amend or repeal the statute,\(^7\) the legislature was unable to act. Thus the court may have believed that it was the last body capable of remediying the perceived inequities.

These factors are obviously not applicable to every situation and are by no means exhaustive of the pertinent considerations. However, if a party is able to bring his case within the above categories of relevant factors, he might be able to convince an Ohio court that relief, perhaps not available under the traditional and intensified level of scrutiny standards of analysis, should be granted. At the very least, he will have made out a strong case for applying the intensified level of scrutiny standard, absent the desirability factor, to the challenged legislation.

### IV. CONCLUSION

"The equal protection of the laws is a 'pledge of the protection of equal law.' But laws may classify. And 'the very idea of classification is that of inequality.'"\(^7\) In resolving this paradox created by equal protection provisions, a line must be drawn which adequately

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\(^7\) Supra note 72.
\(^7\) Id.
\(^7\) See notes 46-55 and accompanying text.
\(^7\) Supra note 50.
protects the right of the legislature to classify, without abandoning the right of equality on the part of the populace. This line aids the legislature in determining the permissible extent of classificatory legislation and is used to vitiate the legislation when it goes too far. Furthermore, this line helps the practitioner determine whether his clients' rights have been violated and keeps him from pursuing fruitless litigation. Most importantly, this line provides the lower courts, which face the brunt of equal protection challenges, with workable standards to measure and determine the validity of equal protection claims. It is therefore imperative that this line be drawn with some specificity.

This note has suggested that the Supreme Court of Ohio has, in certain instances, increased its level of scrutiny of asserted rational relationships contained in challenged legislation. This note has also attempted to delineate the relevant considerations under this increased level of scrutiny standard. The issue raised by the Primes decision is whether the Ohio supreme court has added a factor of desirability to its already intensified equal protection review. It appears the court did add such a factor. As this note has indicated, such an addition was inappropriate and analytically unnecessary.

The Supreme Court of Ohio should dispel the confusion and uncertainty surrounding the area of equal protection analysis by clearly stating the appropriate method of review for challenges involving legislation not affecting fundamental rights or suspect classifications. This elucidation should include a discussion of the factors the court deems relevant to the analysis under the specified method of review, as well as a discussion of how the burden of proof should be allocated.

In essence, the lower courts, practitioners and legislators have been given a complicated tool without discernible directions for its operation. Great savings in time, energy, and economic resources can be had if these parties would be given the guidance necessary to effectively utilize that tool. If this guidance is not forthcoming, the equal protection area, like that of the guest statute, will become "a hodge-podge of anomalies, contradictions and misnomers."

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