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CONSTITUTIONAL LAW

I. EQUAL PROTECTION

A. *Limitation of Actions Against Architects, Professional Engineers, and Contractors*

In *Broome v. Truluck*¹ the South Carolina Supreme Court held unconstitutional as violative of the equal protection clauses of the South Carolina² and Federal³ Constitutions a statute⁴ requiring that actions against architects, professional engineers, or contractors for the recovery of damages arising from “any deficiency in the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, an improvement to real property” must be brought within ten years after substantial completion of such an improvement.⁵ Relying primarily on a decision of the Illinois Supreme Court,⁶ the South Carolina court stated that “architects, engineers, and contractors are singled out for preferential treatment” over owners and materialmen when “[n]o rational basis appears for making such a distinction.”⁷

Historically, architects and engineers enjoyed the protection of the privity of contract doctrine, which insulated them from third-party liability.⁸ This immunity was severely criticized,⁹ however, and numerous exceptions were created to ameliorate its

1. 270 S.C. 227, 241 S.E.2d 739 (1978).

2. S.C. CONST. art. I, § 3.

3. U.S. CONST. amend. XIV, § 1.

4. S.C. CODE ANN. § 15-3-640 (1976).

5. *Id.* The statute provides:

All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, an improvement to real estate, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such improvement within ten years after substantial completion of such an improvement.

Id.

6. *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

7. 270 S.C. at 231, 241 S.E.2d at 740.

8. *See Daugherty v. Herzog*, 145 Ind. 255, 44 N.E. 457 (1896); *Curtain v. Somerset*, 140 Pa. 70, 21 A. 244 (1891).

9. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 85 (2d ed. 1955). *See* *RESTATEMENT OF TORTS* § 385 (1934).

harsh results.¹⁰ Finally, beginning with *Inman v. Binghamton Housing Authority*,¹¹ the privity doctrine was judicially abrogated and third-party liability was imposed; this new rule of liability rapidly gained widespread acceptance.¹² Consequently, "for architects and contractors, the extension of liability was not merely one of breadth, but also in some instances a significant extension in duration."¹³ Because a third party's cause of action does not arise until some injury is suffered,¹⁴ an architect or builder theoretically would be liable for an indefinite period after the completion of his work.¹⁵

In response to this open-ended liability, the American Institute of Architects, the National Society of Professional Engineers and the Associated General Contractors began to push for legislation limiting the duration of liability.¹⁶ "In the span of approximately two years, 1965-67, thirty jurisdictions enacted or amended statutes of limitation specifically for architects, engineers, and builders."¹⁷ Although the statutes vary somewhat in coverage and time limitations, the South Carolina statute is representative.

Prior to *Broome*, such statutes had been challenged in nine jurisdictions, with the decisions split on the constitutional issue. Arkansas,¹⁸ New Jersey,¹⁹ Oregon,²⁰ Pennsylvania,²¹ and Washing-

10. *E.g.*, *Bryson v. Hines*, 268 F. 290 (4th Cir. 1920) (fraud or intentional concealment); *Kendrick v. Mason*, 234 La. 271, 99 So. 2d 108 (1958) (structure constitutes a nuisance).

11. 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

12. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 93 (3d ed. 1964); Brown, *Building Contractor's Liability After Completion and Acceptance*, 16 CLEV.-MAR. L. REV. 193 (1967).

13. Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 CATH. U.L. REV. 361, 361 (1969).

14. *Inman v. Binghamton Housing Authority*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

15. Comment, *supra* note 13, at 363; Comment, *Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers, and Builders*, 60 KY. L.J. 462, 464 (1972).

16. *Hearings on H.R. 6527, H.R. 6678 and H.R. 11544 Before Subcomm. No. 1 of the House Comm. on the District of Columbia*, 90th Cong., 1st Sess. 34 (1967).

17. Comment, *supra* note 15, at 464.

18. *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970); *appeal dismissed*, 401 U.S. 901 (1971).

19. *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972).

20. *Josephs v. Burns*, 260 Or. 493, 491 P.2d 203 (1971).

21. *Freezer Storage, Inc. v. Armstrong Cork Co.*, 234 Pa. Super. 441, 341 A.2d 184 (1975).

ton²² have upheld similar statutes against equal protection challenges, while Illinois,²³ Hawaii,²⁴ Kentucky,²⁵ and Wisconsin²⁶ have declared their statutes unconstitutional. In *Skinner v. Anderson*,²⁷ the Illinois Supreme Court found the classification arbitrary because "architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons."²⁸ The majority opinion in *Broome* explicitly adopted this reasoning.²⁹ This approach, however, disregards "vital distinction[s] . . . between owners or suppliers and those engaged in the professions and occupations of design and building."³⁰ First, because an important consideration underlying statutes of limitation is the problem of proof, "the legislature could reasonably have concluded that evidentiary problems facing the architect and contractor are greater than those facing the materialmen."³¹ These problems involve both the issues in dispute³² and the production of evidence on those issues.³³ Second, the period of latency and the professional standards applicable to defects in design, compared with those applicable to defects in material, may render architects and engineers more susceptible to stale or fraudulent claims.³⁴ "It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need that at some definite time there be an end to potential litigation."³⁵ Third, after completion and acceptance of the improvement, the owner is in a better position than the architect to monitor its condition. Moreover, "[p]art of accept-

22. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 503 P.2d 108 (1972).

23. *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

24. *Fujioka v. Kam*, 55 Haw. 7, 514 P.2d 568 (1973).

25. *Saylor v. Hall*, 497 S.W.2d 218 (Ky. App. 1973).

26. *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

27. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

28. *Id.* at 460, 231 N.E.2d at 591.

29. 270 S.C. at 231-32, 241 S.E.2d at 740.

30. *Carter v. Hartenstein*, 248 Ark. at 1176, 455 S.W.2d at 921.

31. Comment, *supra* note 13, at 371.

32. *Id.*

33. *Vandall, Architects Liability in Georgia: A Special Statute of Limitations*, 14 GA. B.J. 164, 166 (1978); Comment, *supra* note 15, at 468. These problems include the unavailability of witnesses and the inadequacy of record-keeping procedures.

34. *Freezer Storage, Inc. v. Armstrong Cork Co.*, 234 Pa. Super. at 448, 341 A.2d at 187; *Vandall, supra* note 33, at 166.

35. *Josephs v. Burns*, 260 Or. at 503, 491 P.2d at 208.

ance is to accept some future responsibility for the condition of the premises.”³⁶ After completion and acceptance, the architect no longer has an ongoing connection with the structure, and “[t]he passage of time increases the likelihood that improper maintenance, rather than faulty design or construction, is the proximate cause of injury.”³⁷ Last, as previously indicated, “the class of persons for whose benefit this law was enacted has become subject to an extension of potential liability”³⁸ that has not been imposed on owners and materialmen. Clearly, a number of legitimate differences exist between the class of architects and engineers on one hand, and that of owners and materialmen on the other.

Even if these differences were less than substantial, the statute could have been upheld by a number of constructional devices. This approach would seem to be dictated by the fundamental preference for constitutional interpretations in statutory construction.³⁹ For example, in *Carter v. Hartenstein*,⁴⁰ the Supreme Court of Arkansas noted that some materialmen may fall within the purview of the statute if they perform any design function.⁴¹ The Supreme Court of Washington went even further,⁴² holding that the Washington statute was “not limited as to vocation”⁴³ because it did not expressly mention particular occupational statuses.⁴⁴ A similar approach would have been available in South Carolina, where the statutory protection was directed to “any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with . . . an improvement [to real property]”⁴⁵ An expansive interpretation of this language would not be limited to architects, engineers, and contractors and could conceivably include materialmen, particularly if the components they furnish involve any aspect of design or construction. By interpreting the statute to remove the class distinctions, a court

36. *Carter v. Hartenstein*, 248 Ark. at 1175, 455 S.W.2d at 920.

37. *Vandall*, *supra* note 33, at 166. *See also* Comment, *supra* note 15, at 468.

38. *Rosenberg v. Town of North Bergen*, 61 N.J. at 201, 293 A.2d at 667.

39. *E.g.*, *United States v. Vuitch*, 402 U.S. 62 (1970).

40. 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971).

41. *Id.* at 1175, 455 S.W.2d at 920.

42. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 503 P.2d 108 (1972).

43. *Id.* at 532, 503 P.2d at 111.

44. *See* WASH. REV. CODE ANN. § 4.16.300 (Cum. Supp. 1978).

45. S.C. CODE ANN. § 15-3-640 (1976) (emphasis added).

could obviate the equal protection challenge.

Perhaps more important, the equal protection clause "permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently from others."⁴⁶ Courts generally will afford deference to any legislatively perceived distinction. The classification must neither be purely arbitrary⁴⁷ nor rest "on grounds wholly irrelevant to the achievement of the State's objective,"⁴⁸ but these are not stringent standards. Furthermore, "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that in practice their laws result in some inequity. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."⁴⁹ The previously enumerated differences between the class of architects, engineers and contractors, and class of owners and materialmen would seem to provide the legislature with a sufficient basis to draw a distinction between the protection afforded to these classes.

The standards and presumptions normally utilized by the supreme court in approaching equal protection problems are curiously absent in *Broome*. Justice Littlejohn's dissent, adopting the well-researched order of Judge Coleman,⁵⁰ advanced the applicable standards and discussed other jurisdictions' resolution of the constitutional issue. Unfortunately, the laudatory motive of providing a remedy for the injury suffered by this particular plaintiff resulted in the adoption of an approach inconsistent with other recent equal protection pronouncements of the court.

B. Blue Laws

In *State v. Smith*,⁵¹ the supreme court again⁵² upheld the constitutionality of South Carolina blue laws against an equal protection challenge. South Carolina Code section 53-1-40 provides in part:

46. *State v. Smith*, 271 S.C. 317, 320, 247 S.E.2d 331, 332 (1978).

47. *Hunt v. McNair*, 255 S.C. 71, 177 S.E.2d 362 (1970).

48. *State v. Solomon*, 245 S.C. 550, 572, 141 S.E.2d 818, 830 (1965).

49. *State v. Smith*, 271 S.C. at 320, 247 S.E.2d at 332 (1978); *State v. Solomon*, 245 S.C. at 572, 141 S.E.2d at 830.

50. 270 S.C. at 233-38, 241 S.E.2d at 741-44.

51. 271 S.C. 317, 247 S.E.2d 331 (1978).

52. See *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965).

On the first day of the week, commonly called Sunday, it shall be unlawful for any person to engage in worldly work, labor, business of his ordinary calling or the selling or offering to sell, publicly or privately or by telephone, at retail or at wholesale to the consumer any goods, wares, or merchandise or to employ others to engage in work, labor, business or selling or offering to sell any goods, wares or merchandise, excepting work of necessity or charity.⁵³

Plaintiff specifically challenged the exception to this provision contained in section 53-1-50 of the code, which states in pertinent part: "Section 53-1-40 shall not apply to . . . grocery stores which do not employ more than three persons including the owners or proprietors at any one time"⁵⁴ Observing that the purpose of the statute was "to provide a uniform day of rest for all citizens,"⁵⁵ the court emphasized that the legislature is permitted much discretion in delineating classifications and concluded that "[b]y limiting the workers to three, the statute insures that the day of rest is extended to the maximum number of citizens, while at the same time making necessary food items available."⁵⁶ In a strong dissent, Justice Ness stated that the statute "blatantly discriminates against larger grocery stores in favor of smaller ones . . . [and] therefore has the effect of treating persons engaged in the same business differently."⁵⁷

Although constitutional challenges to Sunday closing laws date back at least to the 19th century,⁵⁸ the statutes have historically withstood such challenges. The modern view, advanced by the United States Supreme Court in a quartet of cases decided in 1961,⁵⁹ has generally upheld blue laws against both establishment of religion and equal protection claims, although successful challenges on those grounds have not been totally precluded.⁶⁰ Nonetheless, some courts have recognized that the laws are held

53. S.C. CODE ANN. § 53-1-40 (1976).

54. *Id.* § 53-1-50.

55. 271 S.C. at 320, 247 S.E.2d at 332 (quoting *State v. Solomon*, 245 S.C. at 566, 141 S.E.2d at 827).

56. 271 S.C. at 320, 247 S.E.2d at 332.

57. *Id.* at 322, 247 S.E.2d at 333 (Ness, J., dissenting).

58. *Hennington v. Georgia*, 163 U.S. 299 (1896); *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

59. *Gallagher v. Crown Kosher Super Mkt.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

60. *See* 366 U.S. at 425 (1961).

in "popular disdain,"⁶¹ and fifteen states have repealed their Sunday restrictions.⁶² Moreover, in addition to this legislative abrogation of blue laws, a number of state courts have struck down blue laws on equal protection grounds.⁶³

Most of the challenged exceptions to Sunday closing laws have been "commodity" exceptions, based on the nature of the business and the character of the merchandise sold;⁶⁴ however, a few courts have adjudicated the constitutionality of "employee limitation" exceptions. The recent decision of the Supreme Court of Alabama in *Piggly-Wiggly of Jacksonville, Inc. v. City of Jacksonville*,⁶⁵ cited by the dissent, is directly on point. In holding an employee limitation exception unconstitutional, the court stated:

All food stores, regardless of size, should find their Sunday operation governed by the legislative purpose of protection of health and welfare, and therefore should be included in the same class. The classification chosen by the legislature, four regular employees, seems to us to be an arbitrary classification for which no relation to purpose has ever been provided.⁶⁶

Courts that have upheld the constitutionality of such exceptions have generally pointed to the "traffic, noise and activity"⁶⁷ associated with larger establishments; however, this does not directly relate to the general legislative purpose of providing a uniform day of rest. Furthermore, other activities that produce noise and traffic, such as amusement parks,⁶⁸ sporting events sponsored by colleges or universities,⁶⁹ machine shops,⁷⁰ and manufacturing

61. *Peysle v. Abrahams*, 40 N.Y.2d 277, 285-86, 353 N.E.2d 574, 579, 386 N.Y.S.2d 661, 666 (1976).

62. Note, *Sunday Closing Laws in the United States: An Unconstitutional Anachronism*, 11 SUFFOLK U.L. REV. 1089, 1090-91 n.7 (1977).

63. *E.g.*, *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952); *Pacesetter Homes, Inc. v. Village of South Holland*, 18 Ill. 2d 247, 163 N.E.2d 464 (1960); *Skag-Way Dep't Stores, Inc. v. City of Omaha*, 179 Neb. 707, 140 N.W.2d 28 (1966); *Two Guys v. Furman*, 32 N.J. 199, 160 A.2d 265 (1960); *People v. Abrahams*, 40 N.Y.S. 277, 353 N.E.2d 574, 386 N.Y.S.2d 661 (1976).

64. *See generally* Annot., 57 A.L.R. 975 (1958).

65. 336 So. 2d 1078 (Ala. 1976).

66. *Id.* at 1081.

67. 271 S.C. at 320, 247 S.E.2d at 332. *See also* Opinion of the Justices, 159 Me. 410, 191 A.2d 637 (1963); *Bertera's Hopewell Foodland, Inc. v. Masters*, 428 Pa. 20, 236 A.2d 197 (1967).

68. S.C. CODE ANN. § 53-1-30 (1976).

69. *Id.* § 53-1-20.

70. *Id.* § 53-1-100.

plants requiring continuous operation⁷¹ are excluded from the prohibition of section 53-1-40. As previously stated, a concomitant justification advanced by the supreme court is to extend "the day of rest . . . to the maximum number of citizens."⁷² If the rationale is "to provide a uniform day of rest for *all* citizens,"⁷³ a distinction based on greater or lesser degrees of "uniformity" seems somewhat specious. Other statutory exceptions appear unconcerned with the number of persons affected.⁷⁴ Indeed, the operation of a few large grocery stores could provide necessary items to the public by employing fewer total employees than required for the operation of many smaller stores. As the Supreme Court of Nebraska observed in *Terry Carpenter, Inc. v. Wood*,⁷⁵

[s]o far as the general public is concerned, there will be no change in buying habits, merely a little inconvenience. The public may still shop on Sunday. It can still buy the same articles it has always bought on that day. The only difference is that in some instances it will be necessary to trade at different establishments than those patronized in the past. How this can promote the declared purpose of [the statute] is in the realm of speculative conjecture. We are unable to perceive how it can possibly be promotive of the health and welfare of the people of the state . . . to prohibit the operation of retail outlets having more than two employees from Sunday activity while permitting those with two employees to operate⁷⁶

Although the question presented by *State v. Smith* is a close one and the position taken by the court is defensible, it is interesting to note that the court emphasized the discretion afforded the legislature in constructing classifications in *Smith* while avoiding such emphasis in other recent equal protection cases.⁷⁷ Whether this emphasis precedes or follows the court's appraisal of the merits of the case is unclear. In any case, the continuing controversy surrounding South Carolina's blue laws suggests that some action, whether legislative or judicial, should be forthcoming.

71. *Id.* § 53-1-130.

72. 271 S.C. at 320, 247 S.E.2d at 332.

73. 245 S.C. at 566, 141 S.E.2d at 827 (emphasis added).

74. See generally S.C. CODE ANN. §§ 53-1-10 to -140 (1976 & Cum. Supp. 1978).

75. 177 Neb. 515, 129 N.W.2d 475 (1964).

76. *Id.* at 525, 129 N.W.2d at 481.

77. See *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978); *Marley v. Kirby*, 271 S.C. 122, 245 S.E.2d 604 (1978).

C. Comparative Negligence

In *Marley v. Kirby*,⁷⁸ the supreme court invalidated on equal protection grounds the portion of the South Carolina Automobile Reparation Reform Act of 1974⁷⁹ that applied comparative negligence principles to motor vehicle accidents.⁸⁰ Although recognizing "the validity of comparative negligence statutes of general application,"⁸¹ the court relied on a 1965 decision of the Florida Supreme Court, *Georgia Southern & Florida Railway v. Seven-Up Bottling Co.*,⁸² to conclude that "a comparative negligence statute applying only to a limited class of defendants is unconstitutional."⁸³ Employing a strict equal protection approach similar to that in *Broome v. Truluck*,⁸⁴ the court held that there was "no rational basis for separating injuries from motor vehicle accidents from injuries from other torts."⁸⁵

Since the nineteenth century, statutes have provided for the apportionment of damages⁸⁶ in limited classes of cases according "to the type of accident or the grouping of persons and goods"⁸⁷ affected. The most influential early comparative negligence statute of limited application was the Federal Employers' Liability Act,⁸⁸ passed in 1908,⁸⁹ which was restricted in operation to railroad employees engaged in interstate commerce; the statute "set off a flood of labor legislation of the same general kind."⁹⁰ Similar provisions were incorporated in the Jones⁹¹ and Death on the High

78. 271 S.C. 122, 245 S.E.2d 604 (1978).

79. S.C. CODE ANN. §§ 15-1-300, 56-11-10 to -800 (1976 & Cum. Supp. 1978).

80. S.C. CODE ANN. § 15-1-300 (1976). The section provides as follows:

In any motor vehicle accident, contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such contributory negligence was equal to or less than the negligence which must be established in order to recover from the party against whom recovery is sought.

Id.

81. 271 S.C. at 124, 245 S.E.2d at 606.

82. 175 So. 2d 39 (Fla. 1965).

83. 271 S.C. at 124, 245 S.E.2d at 606.

84. 270 S.C. 227, 241 S.E.2d 739 (1978).

85. 271 S.C. at 124, 245 S.E.2d at 606.

86. See, e.g., GA. CODE § 2979 (1860-62).

87. Turk, *Comparative Negligence on the March* (pt. 2), 28 CHI.-KENT L. REV. 304, 335 (1950).

88. 45 U.S.C. § 53 (1976).

89. 35 Stat. 66 (1908).

90. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 478 (1953).

91. 46 U.S.C. § 688 (1976).

Seas⁹² Acts, applying to maritime employees.⁹³ Additionally,

[t]he provision was repeated in substance in a series of state "employers' liability acts," covering railroad employees engaged in intrastate commerce, which were adopted in Colorado, Iowa, Kansas, Kentucky, Minnesota, Montana, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wyoming. Broader statutes of the same kind were made applicable to employees engaged in certain specified occupations, usually hazardous, such as mining or lumbering, in Arizona, Florida, Iowa, and Oregon, and to all employees of intrastate corporations in Arkansas. . . . In Florida and Iowa the provision was made applicable to any injury inflicted by a railroad. In Virginia it has been applied to accidents at crossings arising out of the railroad's failure to give the required signals. . . .⁹⁴

Thus, most comparative negligence statutes are not general in operation, but are restricted in application according to classifications based on the nature of the injury, the cause of the accident, or the characteristics of the persons or property affected.⁹⁵ "There are altogether some thirty special statutes on the books, applicable to particular classes of plaintiffs or defendants, or to particular situations. . . ."⁹⁶ Of these statutes, only one has been held to violate the principle of equal protection.⁹⁷ The South Carolina Supreme Court chose to predicate *Marley* on that single instance.

Georgia Southern & Florida Railway v. Seven-Up Bottling Co. is not only atypical, but a careful review of the decision reveals that the South Carolina Supreme Court's reliance on it may be somewhat misplaced. Although the case invalidated on equal protection grounds a comparative negligence statute that applied only to railroad accidents, the irrationality of the classification was not a result of the limited application of the statute *per se*, but rather stemmed from "changes in the conditions to which it

92. *Id.* § 766 (1976).

93. 41 Stat. 1007 (1920) (Jones Act); 41 Stat. 537 (1920) (Death on the High Seas Act).

94. Prosser, *supra* note 90, at 478-80.

95. Turk, *supra* note 87, at 335-37.

96. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 67 at 436 (4th ed. 1971).

97. *Georgia Southern & Fla. Ry. v. Seven-Up Bottling Co.*, 175 So. 2d 39 (Fla. 1965). See also *Missouri Pac. Ry. v. Castle*, 224 U.S. 541 (1912); *Mondou v. New York, N.H. & H. Ry.*, 223 U.S. 1 (1912); *Chicago, M. & St. P. Ry. v. Solan*, 169 U.S. 133 (1898); *Seaboard Air Line Ry. v. Watson*, 103 Fla. 477, 137 So. 719 (1931).

applie[d]."⁹⁸ Indeed, the Florida Supreme Court acknowledged that the statute had been "valid when enacted."⁹⁹ Its constitutionality previously had been upheld against an equal protection challenge.¹⁰⁰ Its defect was merely the result of changed circumstances. When the statute was passed, "some ten years before the first patent was issued in this country for a gasoline-driven automobile,"¹⁰¹ it was "predicated upon a classification having substantial basis in the dangers incident to the operation of railroad trains."¹⁰² As Professor Turk has observed, it was the hazards associated with the railroad industry "that did the most to stimulate the growth of the statutory comparative negligence doctrine in this country."¹⁰³ The development of the automobile, however, introduced another "peculiarly dangerous"¹⁰⁴ instrumentality, comparable to railroads.¹⁰⁵ Thus, despite its limited application, the comparative negligence statute was valid when enacted, but became "a discriminatory and burdensome exercise of the police power because of changed conditions"¹⁰⁶ Clearly, *Georgia Southern* stands not only for the proposition that a comparative negligence statute of limited application may violate the guarantee of equal protection, but also for the proposition that such a statute may survive constitutional scrutiny.

Thus, the relevant case law does not support the contention that a comparative negligence statute of limited application is *per se* violative of equal protection. The court's assertion to the contrary¹⁰⁷ is belied by *Boyleston v. Southern Ry.*,¹⁰⁸ which held that while "[o]rdinarily, the doctrine of comparative negligence is not recognized in this state,"¹⁰⁹ "[t]his general rule is subject to the exception that the doctrine of comparative negligence exists by statute in this state in the matter of railroad employers' liability."¹¹⁰ Comparative negligence statutes of limited applica-

98. 175 So. 2d at 40.

99. *Id.*

100. *Loftin v. Crowley's, Inc.*, 150 Fla. 836, 8 So. 2d 909 (1942).

101. 175 So. 2d at 41.

102. *Grace v. Geneva Lumber Co.*, 71 Fla. 31, 34, 70 So. 774, 775 (1916).

103. Turk, *supra* note 87, at 334.

104. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 445, 86 So. 629, 631 (1920).

105. *Atlantic Coast Line Ry. v. Ivey*, 148 Fla. 680, 5 So. 2d 244 (1941).

106. *Georgia Southern & Fla. Ry. v. Seven-Up Bottling Co.*, 175 So. 2d at 42.

107. See note 83 and accompanying text *supra*.

108. 211 S.C. 232, 44 S.E.2d 537 (1947).

109. *Id.* at 238, 44 S.E.2d at 539.

110. *Id.* This statute presently remains in force. S.C. CODE ANN. § 58-17-3730 (1976).

tion are only invalid, therefore, if the classification scheme employed is "purely arbitrary."¹¹¹

The court stated in *Marley* that it could not "perceive the rational justification for singling out persons injured in automobile accidents as different from all others injured in negligent torts";¹¹² however, a number of distinctions could be hypothesized. Automobiles have been held to be dangerous instrumentalities,¹¹³ which would seem to distinguish automobile accidents from many other torts. Moreover, motor vehicles are governed by special insurance¹¹⁴ and licensing and registration¹¹⁵ regulations, as well as automobile guest statutes.¹¹⁶ The mere fact that automobiles provide such a constant and profuse source of accidents should allow the legislature to distinguish them from other less significant sources. As in *Broome v. Truluck*, the wide scope of discretion and presumption of constitutionality normally afforded the legislature¹¹⁷ are conspicuously absent, and that absence is crucial to the outcome of the constitutional challenge.

D. Conclusion

The recent equal protection cases appear to be irreconcilable. The supreme court's dispositions of the constitutional claims in *Broome v. Truluck*, *State v. Smith*, and *Marley v. Kirby*, while each defensible in itself, are marred by the inconsistency of standards employed in the analyses. The standards applicable to the constitutional guarantee of equal protection have become little more than incantations, ritualistically preceding the court's determination of the merits of a particular case. Until the court advances a more uniform approach, only uncertainty and inconsistency can result, with inconclusive decisions stimulating more litigation. The importance of this constitutional protection demands a more thoughtful approach.

111. *Hunt v. McNair*, 255 S.C. 71, 83, 177 S.E.2d 362, 368 (1970).

112. 271 S.C. at 125, 245 S.E.2d at 606.

113. *E.g.*, *Stovall v. Sawyer*, 181 S.C. 379, 187 S.E. 821 (1936); *Heslep v. State Highway Dept.*, 171 S.C. 186, 171 S.E. 913 (1933).

114. S.C. CODE ANN. §§ 38-37-10 to -1510 (1976 & Cum. Supp. 1978).

115. *Id.* §§ 56-3-10 to -2520.

116. *E.g.*, S.C. CODE ANN. § 15-1-290 (1976).

117. See notes 46-49 and accompanying text *supra*.

II. MAGISTRATES' COURTS

The constitutionality of several aspects of South Carolina's magisterial court system was tested in a group of cases consolidated for review in *State ex rel McLeod v. Crowe*.¹¹⁸ Nine of the cases were brought in the original jurisdiction of the supreme court pursuant to the Uniform Declaratory Judgments Act¹¹⁹ by the attorney general "in order to determine the constitutionality of a number of statutes enacted by the South Carolina General Assembly both before and after April 4, 1973, the effective date of new Article V of the South Carolina Constitution";¹²⁰ the remaining case, although brought by private parties, presented "identical"¹²¹ questions. The "pivotal issues"¹²² in all of the actions, as enumerated in the court's per curiam opinion, were: "(1) whether magisterial courts are included in this State's uniform judicial system; (2) whether legislation establishing varying territorial jurisdictions is unconstitutional; (3) whether fees charged in magisterial courts must be uniform; and (4) whether judicial officers may accept fees derived from their performance of judicial acts."¹²³ The court's resolution of these issues has had an immediate and pervasive effect on the state's judicial system, and in this respect the decision is one of the most significant of 1978. The issues of territorial and administrative uniformity of both the magistrates' courts and the so-called "check clearing houses" and the issue of magistrates' pecuniary interest in the disposition of civil cases shall be treated separately.

A. Unified Judicial System

In 1972, the judiciary article of the South Carolina Constitution was extensively revised, and a "unified judicial system"¹²⁴ was created. Section 1 of article V provides: "The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law."¹²⁵ Mag-

118. 272 S.C. 41, 249 S.E.2d 772 (1978).

119. S.C. CODE ANN. §§ 15-53-10 to -140 (1976 & Cum. Supp. 1978).

120. Brief of Plaintiff at 5, *State ex rel. McLeod v. Crowe*, 272 S.C. 41, 249 S.E.2d 772 (1978).

121. 272 S.C. at 53, 249 S.E.2d at 778.

122. *Id.* at 46, 249 S.E.2d at 775.

123. *Id.*

124. S.C. CONST. art. V, § 1.

125. *Id.*

isterial courts are specifically included within this system by article V, section 23.¹²⁶ Reading the two provisions together, the court held that "it clearly appears . . . magisterial courts are vested with judicial power and are, therefore, a part of the State's uniform judicial system."¹²⁷ Hence, magistrates' courts must conform to the uniformity requirements set out in sections 1 and 23¹²⁸ of article V.

In a previous interpretation of these constitutional provisions, the court had stated that "[t]he people in approving article V mandated a uniform system of courts for the administration of justice in South Carolina."¹²⁹ Furthermore, in *State ex rel McLeod v. Civil and Criminal Court of Horry County*,¹³⁰ the court held that "Article V, Section 1, directs that a unified and uniform judicial system be created; and any alteration or extension of the present system, other than as so mandated, is unconstitutional."¹³¹ Historically, the magisterial court system in South Carolina has developed rather haphazardly through a gradual process of accretion,¹³² with numerous and sometimes conflicting legislative enactments creating a "crazy quilt pattern of territorial jurisdiction"¹³³

For example, in some counties magistrates have countywide jurisdiction; in other counties magistrates have jurisdiction in magisterial districts which are less than countywide in territory; others have magistrates with countywide civil jurisdiction and district wide criminal jurisdiction; while another has a magistrate who has exclusive criminal and civil jurisdiction within his district and at the same time concurrent jurisdiction throughout the county.¹³⁴

126. The Governor, by and with the advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law. The General Assembly shall provide for their terms of office and their civil and criminal jurisdiction. The terms of office need not be uniform throughout the State but shall be uniform within each county.

S.C. CONST. art. V, § 23.

127. 272 S.C. at 46, 249 S.E.2d at 775.

128. Application of the maxim of statutory construction *expressio unius est exclusio alterius* suggests that article V, § 23 requires statewide uniformity of all aspects of magistrates' courts except term of office. See Brief of Plaintiff at 17-18.

129. *Cort Indus. Corp. v. Swirl, Inc.*, 264 S.C. 142, 145, 213 S.E.2d 445, 446 (1975).

130. 265 S.C. 114, 217 S.E.2d 23 (1975).

131. *Id.* at 116, 217 S.E.2d at 24.

132. Brief of Plaintiff at 35 n.23, *State ex rel McLeod v. Crowe*, 272 S.C. 41, 249 S.E.2d 772 (1978).

133. *Id.* at 31.

134. 272 S.C. at 47, 249 S.E.2d at 776.

Clearly, "[u]nder the present statutes the territorial jurisdiction of magistrates varies in many instances among the counties and between magistrates within the same county."¹³⁵ Magistrates' courts must conform to the constitutional requirements of uniformity, and in *Crowe* the court held unequivocally that "[s]uch uniformity can only be accomplished through legislation which grants all magistrates uniform countywide jurisdiction."¹³⁶ Thus, the court's decision renders constitutionally defective any legislation that provides for magisterial jurisdiction of other than countywide extent, thereby lacking uniformity within a county, or that provides for magisterial jurisdiction varying in statewide application, thereby lacking uniformity between counties.

The court also considered the question of administrative uniformity and the relation of magisterial fee schedules to the constitutional mandates of sections 1 and 23 of article V. In attacking the validity of Act 1245 of 1970 and Act 172 of 1973, which created special fee schedules applicable to Greenwood and Lexington counties, the attorney general had argued that the legislation was constitutionally proscribed by both the requirements of uniformity in article V and the prohibition of special legislation in article III, section 34, subdivision IX. The court, however, explicitly refused to reach the latter issue,¹³⁷ concluding that "[l]egislation establishing disparate fee schedules for magistrate courts over the state conflicts with the uniformity requirements of article V."¹³⁸ The court reasoned that

[s]ection 23 of article V, interpreted in conjunction with section 1 of that Article, empowers the General Assembly to provide for the jurisdiction of magistrates in a uniform manner only. The exercise of such jurisdiction is materially affected by the fees allowed to be charged or assessed. Since the fees for magistrate courts affect the exercise of jurisdiction, they must be enacted on a uniform basis.¹³⁹

Special fee schedules, therefore, are inconsistent with the dictates of sections 1 and 23 of article V, and cannot withstand constitutional scrutiny. Accordingly, the court specifically invalidated both of the contested enactments.

135. *Id.* at 47, 249 S.E.2d at 775.

136. *Id.*

137. *Id.* at 53, 249 S.E.2d at 779.

138. *Id.* at 47, 249 S.E.2d at 776.

139. *Id.* at 47-48, 249 S.E.2d at 776.

*B. Pecuniary Interest of Magistrates
in Litigation*

The final issue addressed by the court in *Crowe* was the constitutionality of fee compensation systems for magistrates in civil litigation. The state's challenges to South Carolina Code sections 27-437,¹⁴⁰ empowering Pickens County magistrates to retain fees as compensation in certain civil proceedings, and 27-422,¹⁴¹ permitting "magistrates in certain counties to collect fees from defendants whose prosecutions for violation of the fraudulent check statute . . . are discontinued by settlement or compromise,"¹⁴² were "based on the theory that such pecuniary interest deprives the litigants of due process of law."¹⁴³ The court held that "[t]o the degree such statutes vest judicial officers with a pecuniary interest in the proceedings before them, they violate Article I, Section 3 of the South Carolina Constitution and are likewise impermissible under the Fourteenth Amendment of the United States Constitution."¹⁴⁴

The proscription of judicial officers' pecuniary interest in criminal prosecutions is well established. In South Carolina, magistrates are statutorily precluded from receiving fees in criminal cases by code sections 22-7-30 and 22-7-40. Moreover, federal case law prohibits on due process grounds any judge from becoming financially interested, either directly¹⁴⁵ or indirectly,¹⁴⁶ in the outcome of a criminal action before him. The constitutional standard enunciated by Justice Brennan in *Ward v. Monroeville*,¹⁴⁷ and specifically adopted by the South Carolina Supreme Court in *Crowe*, focuses on "[w]hether the . . . situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to not hold the balance nice, clear and true between the State and the accused.'"¹⁴⁸ This standard is based on "[t]he potential for deprivation of due process";¹⁴⁹ the

140. S.C. CODE ANN. § 27-437 (1962).

141. *Id.* § 27-422

142. 272 S.C. 41, 52, 249 S.E.2d 772, 776.

143. *Id.* at 48, 249 S.E.2d at 776.

144. *Id.* at 49, 249 S.E.2d at 776-77.

145. *Turney v. Ohio*, 273 U.S. 510 (1927).

146. *Ward v. Monroeville*, 409 U.S. 57 (1972).

147. *Id.*

148. 409 U.S. at 60 (quoting *Turney v. Ohio*, 273 U.S. 510, 532 (1927)).

149. 272 S.C. at 48, 249 S.E.2d at 776 (emphasis added).

court emphasized that its conclusion was "not predicated upon an actual showing of abuse by . . . [the] magistrates."¹⁵⁰

In extending this constitutional principle to civil litigation the court relied primarily on two recent decisions of the West Virginia Supreme Court.¹⁵¹ According to *State ex rel Shrewsbury v. Poteet*,¹⁵² "[i]t is essential to the fair and proper administration of justice that courts, whether the highest in the land or the most minor, be completely independent, absolutely free from influence and wholly without any pecuniary interest, however remote, in *any* matter before them."¹⁵³ The rationale for this proscription in civil matters, as expressed by one commentator, is that

[i]n order to encourage complainants to institute actions in his court, and to discourage them from forum shopping to find another judicial officer more sympathetic to complaining parties, a [magistrate] may feel compelled to please the people who bring cases to his court. Since in civil cases the plaintiff is pleased only when he wins, judicial bias may be created in favor of plaintiffs. The potential for judicial bias may be strongest when the complaining party, such as a large creditor, can create a considerable volume of judicial business.¹⁵⁴

Stating that "the potential for deprivation of due process also exists in civil matters where judicial officers possess a pecuniary interest in the outcome of litigation,"¹⁵⁵ the South Carolina Supreme Court struck down the challenged statute.

C. Conclusion

The "hodge podge of local laws"¹⁵⁶ establishing magistrates' courts, with its conflicting and inconsistent provisions, is in unmistakable disharmony with the dictates of the South Carolina Constitution. This disharmony is emphasized by the magisterial courts' position as the most numerous and perhaps most visible

150. *Id.* at 52, 249 S.E.2d at 778.

151. *State ex rel Shrewsbury v. Poteet*, 202 S.E.2d 628 (W. Va. 1974); *State ex rel Reece v. Gies*, 156 W. Va. 729, 198 S.E.2d 211 (1973).

152. 202 S.E.2d 628 (W. Va. 1974).

153. *Id.* at 631.

154. Note, *The Fee System Courts: Financial Interest of Judges and Due Process*, 31 WASH. & LEE L. REV. 474, 483 (1974).

155. 272 S.C. at 48, 249 S.E.2d at 776.

156. Brief of Plaintiff at 35, *State ex rel McLeod v. Crowe*, 272 S.C. 41, 249 S.E.2d 772 (1978).

subdivision of the state's judicial system. The supreme court's sweeping pronouncements in *Crowe* should largely eliminate the "current balkanization of our [judicial] system."¹⁵⁷ The magisterial court system envisioned by the court, uniform and financially detached, presents an appealing and commendable goal; it now remains for the General Assembly to effectuate this goal.

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157. *Cort Indus. Corp. v. Swirl, Inc.*, 264 S.C. 192, 196, 213 S.E.2d 445, 446 (1975).