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Recent Developments


Kroger Co. v. O'Hara Township (Pa. 1978)

O'Hara and McCandless Townships initiated formal prosecutions against appellants, Kroger Company and Great Atlantic & Pacific Tea Company, Inc., for opening their grocery stores for business on Sunday in violation of Pennsylvania's Sunday Trading Laws (Blue Laws). The store owners countered this action by petitioning the court of common pleas to enjoin the townships from enforcing the Blue Laws, claiming that the Laws were selec-


Kroger went before the Pennsylvania Supreme Court with four companion cases—Jamesway Corp. v. Conewango Township, Fishers Big Wheel, Inc. v. Williams; Commonwealth v. Gallo; Commonwealth v. DeMarchis—all of which involved constitutional objections to Pennsylvania's Sunday Trading Laws. Id. Since very few factual differences among these cases are relevant to this analysis, this note will focus on the facts of Kroger and will indicate only the significant factual distinctions between Kroger and the companion cases.


Section 7361 of Pennsylvania's Blue Laws provides:

(a) A person is guilty of a summary offense if he does or performs any worldly employment or business whatsoever on Sunday (works of necessity, charity and wholesome recreation excepted).

(b) Exception.—Subsection (a) of this section shall not prohibit:

(1) The dressing of victuals in private families, bake-houses, lodginghouses, inns and other houses of entertainment for the use of sojourners, travellers or strangers.

(2) The sale of newspapers.

(3) Watermen from landing their passengers, or ferrymen from carrying over the water travellers.

(4) Work in connection with the rendering of service by a public utility as defined in the Public Utility Law.

(5) Persons removing with their families.

(6) The delivery of milk or the necessaries of life, before nine o'clock antemeridian, nor after five o'clock postmeridian.

(7) The production and performance of drama and civil light opera for an admission charge by nonprofit corporations in cities of the second class, between the hours of two o'clock postmeridian and 12 o'clock midnight.

(8) The conducting, staging, managing, operating, performing or engaging in basketball, ice shows and ice hockey for an admission charge in cities of the first and second class, between the hours of two o'clock postmeridian and 12 o'clock midnight.


Section 7362 prohibits "buying, selling, exchanging, trading, or otherwise dealing in new or used motor vehicles or trailers, on Sunday." Id. § 7362(a). The statute further prohibits one from engaging on Sunday in the business of selling at retail "clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys." Id. § 7363(a). Section 7363 does not apply to "novelties, souvenirs and antiques." Id. § 7363(c)(1).

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tively and discriminatorily enforced against the appellants and that the Blue Laws violated the equal protection and due process provisions of the federal and state constitutions. The trial court found against the store owners on the merits but granted a stay of any further prosecutions under the Blue Laws pending adjudication of the constitutional issues by the appellate courts.

In *Kroger*, the appellants were charged with violating § 7364. Kroger Co. v. O'Hara Township, 243 Pa. Super. Ct. 479, 481, 366 A.2d 254, 255 (1976), rev'd, 481 Pa. 101, 392 A.2d 266 (1978). Section 7364 provides that it is illegal to sell or otherwise deal at retail "in fresh meats, produce and groceries on Sunday." 18 Pa. Cons. Stat. Ann. § 7364(a) (Purdon 1973). This section does not apply to retail establishments "(1) employing less than ten persons; (2) where fresh meats, produce and groceries are offered so [sic] sold by the proprietor or members of his immediate family; or (3) where food is prepared on the premises for human consumption." Id. § 7364(c). The second exception just mentioned was held unconstitutional but severable from the remainder of the section in Goodman v. Kennedy, 459 Pa. 313, 329 A.2d 224 (1974). See notes 32-38 and accompanying text infra.


3. Kroger Co. v. O'Hara Township, 243 Pa. Super. Ct. 479, 481-82, 366 A.2d 254, 256 (1976). The appellants argued that the Blue Laws were discriminatorily enforced because other retail stores were permitted to operate on Sunday. Id. at 481, 366 A.2d at 256. See note 22 infra.


The fourteenth amendment, which embodies the federal due process and equal protection provisions, provides in pertinent parts: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The equal protection provision of the Pennsylvania Constitution reads:

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts;
2. Vacating roads, town plats, streets or alleys;
3. Locating or changing county seats, erecting new counties or changing county lines:
4. Erecting new townships or boroughs, changing township lines, borough limits or school districts:
5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:
6. Exempting property from taxation;
7. Regulating labor, trade, mining or manufacturing;
8. Creating corporations, or amending, renewing or extending the charters thereof:

Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.


5. 481 Pa. at 104, 392 A.2d at 267. The trial court's stay of further prosecutions pending adjudication of the constitutional issues by the appellate courts was continued by the superior court and, on November 20, 1976, was extended by decision of the supreme court. Id. The appellants in the companion cases conducted business on Sunday in violation of the Blue Laws.
On appeal, the Pennsylvania Superior Court affirmed the trial court's decision. The store owners appealed to the Supreme Court of Pennsylvania which reversed, holding that the classification scheme of Pennsylvania's Blue Laws is so riddled with exceptions that it no longer bears a fair and substantial relationship to the statute's purpose and therefore violates the equal protection guarantees of the Pennsylvania Constitution. Kroger Co. v. O'Hara Township, 481 Pa. 101, 392 A.2d 266 (1978).

For almost three centuries, Pennsylvania law has prohibited certain commercial activities on Sunday. Three major theories for attacking these prohibitions have been fashioned from the state and federal constitutions.

First, the religious origin of these Laws has sparked challenges under because they assumed that the supreme court's continuance of the stay had state wide effect. Id. at 105, 392 A.2d at 268.

6. Kroger Co. v. O'Hara Township, 243 Pa. Super. Ct. at 485, 366 A.2d at 257. The superior court summarily dismissed appellants' constitutional objections maintaining that "it is well established that such laws are constitutional." 243 Pa. Super. Ct. at 482, 366 A.2d at 256, citing Two Guys, Inc. v. McGinley, 366 U.S. 582 (1961). Addressing the issue of discriminatory enforcement by appellees, the superior court stated that the appellants had failed to prove the necessary element of intentional discrimination. 243 Pa. Super. Ct. at 482-83, 366 A.2d at 256. The court further noted: "Common sense dictates that if proof of non-enforcement against others was a valid defense for the violation of criminal statutes then each and every criminal proceeding would be bogged down in a plethora of defense evidence citing others who escaped prosecution under a particular criminal statute." Id.

7. For a statement of the Blue Law's purpose, see note 37 infra.

8. 481 Pa. at 123, 392 A.2d at 277. For the text of the equal protection provision of the Pennsylvania Constitution, see note 4 supra.


The colonial roots of Pennsylvania's Blue Laws are not unique to Pennsylvania. See McGowan v. Maryland, 366 U.S. 420, 543-50 app. (1961) (Frankfurter, J., concurring). Sunday laws which prohibit some form of conduct that is otherwise legal on weekdays are not, however, confined to colonial states but exist to some degree in the vast majority of the states. Id. at 495. For an overview of state Sunday closing laws, see id. at 551-60 app.


11. See Bertera's Hopewell Foodland, Inc. v. Masters, 428 Pa. at 26, 236 A.2d at 200. In Bertera's, Justice Musmanno stated that Pennsylvania's Blue Laws trace an ancestry back to the Ten Commandments culminated from the smoking top of Mt. Sinai, proclaiming in the Eighth, Ninth and Tenth provisions thereof: "Remember the
federal and state constitutional prohibitions relating to church and state. As long ago as 1848, the Supreme Court of Pennsylvania rejected such an attack based on Pennsylvania's constitutional provision concerning freedom of religion by disavowing the Blue Laws' alleged religious purposes and characterizing the Laws as civil regulations. More recently, two United States Supreme Court cases have upheld Pennsylvania's Blue Laws against claims that they respected the establishment of religion and abridged the free exercise of religion in violation of the first amendment to the United States Constitution.

sabbath day to keep it holy. Six days shalt thou labor and do all thy work: but the seventh day is the sabbath of the Lord thy God. In it thou shalt not do any work.” 


13. Specht v. Commonwealth, 8 Pa. 312, 327 (1848). Appellant, a member of the Seventh Day Baptist Congregation which observed Saturday as the sabbath, was fined for engaging in employment on Sunday in violation of the Act of Apr. 22, 1794, ch. 1746, § 1, 1791-1802 Pa. Laws 177-78 (current version at 18 Pa. CONS. STAT. ANN. § 7361 (Purdon 1973)). 8 Pa. at 313. See note 9 supra. He argued that the act violated the religious freedom granted under the Pennsylvania Constitution which provides:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; no man can, of right, be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishment or modes of worship.

PA. CONST. art. 9, § 3 (1838) (current version of PA. CONST. art. 1, § 3). See also PA. CONST. art. 1, § 4 (religious belief not a bar to holding public office).

14. 8 Pa. at 323. In analyzing the purpose of the Blue Laws, the court stated:

In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labour, it is not surprising that the day should have received the legislative sanction. . . . Yet this does not change the character of the enactment. It is still, essentially, but a civil regulation made for the government of man as a member of society.


15. Two Guys, Inc. v. McGinley, 366 U.S. 582 (1961). Appellant contended that "the Pennsylvania Sunday Closing Law is one respecting an establishment of religion because it commemorates the Resurrection, obliges everyone to honor this basic doctrine of the major Christian denominations by abstaining from work and encourages Christian religious worship." 

Id. at 592. After carefully examining the history of the Blue Laws, the Court disagreed with the appellant and held that "neither the statute's purpose nor its effect is religious." Id. at 598.

16. See Braunfeld v. Brown, 366 U.S. 599 (1961). Appellants, merchants and members of the Orthodox Jewish faith, were required by the tenets of their religion to close their businesses from nightfall on Friday to nightfall on Saturday. Id. at 601. Since they were also required to close their stores on Sunday because of the Blue Laws, appellants contended that they were
Pennsylvania's Blue Laws have also been attacked on the ground that they are vague and therefore violate the due process clause of the fourteenth amendment to the United States Constitution.17 This contention was rejected in Commonwealth v. American Baseball Club18 where Pennsylvania's highest court opined that the Laws have a sufficiently clear meaning so as not to be unconstitutionally vague.19

The final constitutional objection, and the one that has been the vehicle for the majority of recent attacks against Pennsylvania's Blue Laws, is that the Laws' classification scheme violates the equal protection provisions of the state and federal constitutions.20 This contention was raised under the fed-

placed in an economic position inferior to their non-Jewish competitors. Id. at 601-02. The merchants contended that the dilemma of being forced to choose between following their religious beliefs and suffering economic disadvantage prohibited the free exercise of their religion. Id. In resolving this issue, the Court stated:

If the purpose or the effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. at 607 (footnote and citation omitted).

The dilemma articulated by the appellants in Braunfeld was, however, partially ameliorated by the Pennsylvania legislature in 1967 when it added the following provision to the Sunday Trading Laws:

No individual who by reason of his religious conviction observes a day other than Sunday as his day of rest and actually refrains from labor or secular business on that day shall be prohibited from selling on Sunday in a business establishment which is closed on such other day the articles specified in subsection (a) of this section.


19. Id. at 143, 138 A. at 500. Appellant, a baseball franchise, played a professional baseball game on Sunday in violation of the "parent Blue Law" which prohibited "worldly employment or business" on Sunday. Id. at 140-141, 138 A. at 498-99, quoting Act of Apr. 22, 1794, ch. 1746, § 1, 1791-1802 Pa. Laws 177-78 (current version at 18 Pa. Cons. Stat. Ann. § 7361 (Purdon 1973)). The appellant argued that the statute was vague and that conducting a professional baseball game did not fall within the meaning of "worldly employment or business." Id. at 140-43, 138 A. at 499-500. Addressing the vagueness issue, the court stated that the act "has been on the statute books for 133 years and has been the subject of much judicial consideration. When its language is given its ordinary meaning not a strained construction, its meaning we think is plain." Id. at 143, 138 A. at 500.

eral equal protection clause in *Two Guys, Inc. v. McGinley*. In examining the Blue Laws and their numerous exceptions, the United States Supreme Court applied a standard of review known as the "rational basis" test and concluded that the Laws were constitutional since they were rationally related to the state's interest in providing a day of rest and tranquility.

One year later, in *Bargain City U.S.A., Inc. v. Dilworth*, the Pennsylvania Supreme Court addressed the issue of whether the same section of the Blue Laws upheld by the *Two Guys* Court violated Pennsylvania's equal protection provision which prohibits the General Assembly from enacting special or local laws regulating labor or trade. Although the

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22. Id. at 586-587. Appellant's equal protection argument was based on the fact that the statute applied to only twenty commodities and to only retail operations. Id. at 589. Appellant urged that this limited applicability was "without rational basis" and defeated the alleged statutory purpose of providing "a day of rest and tranquility for all." Id. See note 26 infra for the provision of the Blue Laws challenged by the appellant.
23. 366 U.S. at 590. The Court stated that "[t]he standards for evaluating [Blue Laws under the equal protection clause] have been set out in *McGowan v. Maryland...*" Id. In *McGowan*, the Court stated:

The standards under which this [equal protection challenge to Maryland's Sunday trading laws] is to be evaluated have been set forth many times by this Court. 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 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 statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.


24. 366 U.S. at 590-92. In examining the statute's scheme of classifications, the Court stated that it was "within the power of the legislature to have concluded that these businesses were particularly disrupting the intended atmosphere of the day because of the great volume of motor traffic attracted, the danger of their competitors also opening on Sunday and their large number of employees." Id. at 591 (footnotes omitted).
27. 407 Pa. at 131, 179 A.2d at 441. For the text of the "equal protection" provision of Pennsylvania's constitution, see note 7 supra.

The appellant also attacked the Blue Laws under the Federal Constitution, but the court held that these issues were foreclosed by the holding of the United States Supreme Court in *Two Guys*. 407 Pa. at 131, 179 A.2d at 441.
court noted that the state provision closely corresponds to the equal protection clause of the fourteenth amendment. It stated that it was not compelled to follow the standard of review or holding of Two Guys. Nevertheless, the court applied a standard of review which it maintained was not "significantly different" from the federal standard. The court upheld the constitutionality of the statute stating that, if "the classification is reasonable and founded upon a genuine distinction," it passes constitutional muster.

With the constitutionality of the pre-1961 provisions of the Blue Laws seemingly settled, store owners began attacking the newly enacted "Grocery Act" which, with certain exceptions, prohibited the retail sale of groceries on Sundays. In Goodman v. Kennedy, Pennsylvania's highest court considered, inter alia, whether a 1972 amendment to the "Grocery Act," which granted an exception to all family businesses regardless of their size, de-
nied appellants equal protection of the laws.\textsuperscript{35} The court held that the classification of businesses solely on the basis of family status is not rationally related\textsuperscript{36} to the statute's objective\textsuperscript{37} and is, therefore, violative of the federal and state equal protection provisions.\textsuperscript{38}

Against this background, the \textit{Kroger} court considered the issue of whether the Blue Laws, in their entirety, violated the "special law" provision of the state constitution.\textsuperscript{39} The court distinguished the \textit{Kroger} case from previous state and federal Blue Law cases on the ground that the prior cases involved challenges to selected portions of the Blue Laws while the instant case questioned the constitutionality of the entire legislative scheme.\textsuperscript{40} Noting this absence of controlling precedent, the court looked to decisions from other states where the constitutionality of Blue Laws similar

\textsuperscript{35} 459 Pa. at 325-27, 329 A.2d at 231. In \textit{Goodman}, the appellants also argued that the "Grocery Act's" exemption for non-family owned stores employing less than ten persons violated the federal and state equal protection provisions. \textit{Id.} at 319, 329 A.2d at 227. In rejecting this contention and holding that this exception is rationally related to the Act's purpose, the court stated that "[t]he legislature is to be given wide discretion in classifying." \textit{Id.} at 325, 329 A.2d at 230 (citations omitted). The court further maintained that the "classification need not be made with 'mathematical nicety.' Inequalities may result as long as some reasonable basis is apparent for the classification." \textit{Id.} (citations omitted).

\textsuperscript{36} 36. The court stated that the "rational basis" test was appropriate for determining the validity of legislative classifications under both the federal and the state equal protection provisions. \textit{Id.} at 321, 329 A.2d at 228-29.

It should be noted that although the Pennsylvania Supreme Court consistently applied the "rational basis" test in equal protection challenges to the Blue Laws, in the 1970's it began to use the more demanding "fair and substantial relationship" test in other types of cases brought under the state equal protection provision. \textit{See, e.g., Moyer v. Phillips}, 462 Pa. 395, 341 A.2d 441 (1975) (statute that permitted all causes of action to survive the death of the parties unless the action was for libel or slander held unconstitutional); \textit{In re Estate of Cavill}, 459 Pa. 411, 329 A.2d 503 (1974) (mortmain statute held unconstitutional).

\textsuperscript{37} 37. The Supreme Court of Pennsylvania has explained that the purpose of the Blue Laws is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which may visit friends and relatives who are not available during the working days. \textit{Bertera's Hopewell Foodland}, Inc. \textit{v. Masters}, 428 Pa. 20, 32-33, 236 A.2d 197, 203-04 (1967), \textit{appeal dismissed}, 390 U.S. 597 (1968), \textit{quoting McGowan v. Maryland}, 366 U.S. 420, 450 (1961).

\textsuperscript{38} 38. \textit{Goodman v. Kennedy}, 459 Pa. at 326-27, 329 A.2d at 231. The \textit{Goodman} court distinguished \textit{Bertera's Hopewell Foodland}, Inc. \textit{v. Masters}, 428 Pa. 20, 236 A.2d 197 (1967), \textit{appeal dismissed}, 390 U.S. 597 (1968), on the basis that \textit{Bertera's} did not consider whether a classification based solely upon family status furthers the goals of the Blue Laws. 459 Pa. at 326, 329 A.2d at 231. \textit{Bertera's} had merely held that a classification exempting a family owned grocery store employing less than ten persons was not unconstitutional. \textit{See} note 32 \textit{supra}. As was indicated \textit{supra}, however, the family owned grocery store exemption which the \textit{Goodman} court construed did not contain the requirement that the store employ less than ten persons. \textit{See} note 34 \textit{supra}.

\textsuperscript{39} 39. 481 Pa. at 115, 392 A.2d at 273. For the "special law" provision of the state constitution, \textit{see note 4 \textit{supra}}.

\textsuperscript{40} 40. 481 Pa. at 122, 392 A.2d at 276-77. The court further distinguished \textit{Two Guys} because it was decided solely on federal grounds, whereas \textit{Kroger} was brought under the state and federal equal protection provisions. \textit{Id.}
to those of Pennsylvania had been the subject of judicial scrutiny.\textsuperscript{41} The court noted that twelve states had held the Laws or some portion thereof unconstitutional,\textsuperscript{42} while seven states had upheld the Laws’ constitutional-
ity.\textsuperscript{43}

Turning its attention to the history of Pennsylvania’s Blue Laws, the court noted that the Laws developed in a “patchwork fashion which leave[s] us with a wide variety of statutory prohibitions, permission and restrictions on Sunday activity.”\textsuperscript{44} Since the classification scheme under the Blue Laws affected some businesses while exempting others,\textsuperscript{45} and since the state constitution forbids “special laws” regulating trade,\textsuperscript{46} the court found the Laws to be susceptible to a state equal protection challenge.\textsuperscript{47} The court thus proceeded to set forth the appropriate standard of review for determining whether the Blue Laws did in fact violate the state constitution.\textsuperscript{48}

\textsuperscript{41} Id. at 109-10, 392 A.2d at 270-71. In discussing the persuasiveness of these cases, the court stated: “Since the laws of each state obviously vary, decisions in other jurisdictions may be instructive but of course are not controlling in exercising our obligation to protect the constitutional rights of our citizens under the Pennsylvania Constitution.” Id. at 110, 392 A.2d at 270.


Contrary to the Kroger court’s finding, it is submitted that the states which overruled their Blue Laws do not greatly outnumber those states which upheld such laws. For additional cases that overruled the Blue Laws on equal protection grounds, see West v. Town of Winnnoski, 252 La. 605, 211 So. 2d 665 (1968); Opinion of the Justices, 108 N.H. 103, 229 A.2d 188 (1967); Bookout v. City of Chattanooga, 59 Tenn. App. 576, 442 S.W.2d 658 (1969). For additional cases that upheld the constitutionality of Blue Laws against equal protection challenges, see Bill Dyer Supply Co. v. State, 255 Ark. 613, 502 S.W.2d 496 (1973); Brown Ent., Inc. v. Fulton, 192 N.W.2d 773 (Iowa 1971); Giant of Maryland, Inc. v. State, 267 Md. 501, 298 A.2d 427, appeal dismissed, 412 U.S. 915 (1973); State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972); City of Bismarck v. Materi, 177 N.W.2d 530 (N.D. 1970); State v. Smith, S.C. 247 S.E.2d 331 (1978); State v. Spartan’s Indus., Inc., 447 S.W.2d 407 (Tex. 1969), appeal dismissed, 397 U.S. 590 (1970).

\textsuperscript{44} 481 Pa. at 112, 392 A.2d at 271. See also People v. Abrahams, 40 N.Y.2d 277, 386 N.Y.S.2d 661, 333 N.E.2d 574 (1976) (New York’s Blue Laws which developed in a patchwork fashion held unconstitutional).

\textsuperscript{45} See 481 Pa. at 119-20, 392 A.2d at 275. The court characterized the Blue Laws as being “riddled with exception after exception.” Id. at 116, 392 A.2d at 273.

\textsuperscript{46} Id. See Pa. Const. art. 3, § 32, quoted at note 4 supra.

\textsuperscript{47} 481 Pa. at 116, 392 A.2d at 273.

\textsuperscript{48} Id. at 117-19, 392 A.2d at 274-75.
Although the majority believed that federal precedent permitted a “strict scrutiny” test under the facts of *Kroger*, it adopted the less demanding “fair and substantial relationship” test. This test, according to the court, requires that a statutory classification be “reasonable and not arbitrary” and “rest upon some ground difference which has a *fair and substantial relation* to the object of the legislation,” so that all persons similarly situated are treated alike.

Applying this test to the Blue Laws, the court declared the Laws unconstitutional. According to the court, the proliferation of exceptions to the Laws had so diluted the legislative scheme that the Laws no longer bore a fair and substantial relation to the objective of providing a uniform day of rest and relaxation.

49. *Id.* at 118, 392 A.2d at 274. The court’s analysis of federal cases dealing with the standard of review in equal protection cases began with *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Kroger court maintained that in *San Antonio*, “the United States Supreme Court concluded that when a right is explicitly or even implicitly guaranteed by the Federal Constitution, the Court has a duty to strictly scrutinize any state statute interfering with such a right before declaring such a statute constitutional.” 481 Pa. at 117, 392 A.2d at 274. The Kroger court stated that it should be guided by the same principles when interpreting equal protection issues under Pennsylvania’s constitution. *Id.* The court concluded that since the Sunday Blue Laws govern trade, and since the state constitution prohibits special laws regulating trade, there is a constitutionally protected right being affected and the “strict scrutiny” test would be appropriate according to the *San Antonio* principle. *Id.* The court, however, did not find it necessary to apply the “strict scrutiny” test in determining the constitutionality of the Sunday Trading Laws since it concluded that they were unconstitutional even under the less demanding “fair and substantial relationship” test. *Id.* at 118, 392 A.2d at 274-75.

50. 481 at 118, 392 A.2d at 275. The court stated:

> The equal protection clause of both constitutions does not deny the State the power to treat different classes of persons in different ways, but does deny the right to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the particular statute. The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation* to the object of the legislation so that all persons similarly circumstanced shall be treated alike.


The court clearly rejected the “rational basis” test which had been employed in other challenges to the Blue Laws brought under the state equal protection provision. 481 Pa. at 120-21, 392 A.2d at 276. For a statement of the “rational basis” analysis, see *Goodman v. Kennedy*, 459 Pa. 313, 321, 329 A.2d 224, 228 (1974). Under the rational basis test, the reviewing court will uphold the statute so long as there was a state of facts reasonably conceivable to justify it. *Id.* The Kroger court rejected this standard of review stating that “it cannot be left to a particular judge’s imagination as to whether he can conjure any relationship between a uniform day of rest and recreation and a hodgepodge of classifications.” 481 Pa. at 120, 392 A.2d at 276.

52. 481 Pa. at 121, 392 A.2d at 276.

53. *Id.* The court reasoned:

There is no fair and substantial relationship between the objective of providing a uniform day of rest and recreation and in permitting the sale of novelties but not Bibles and bathing suits; in permitting the sale of fresh meat patties but not frozen meat patties; or in permitting the installation of an electric meter but not a T.V. antenna.
Justice Nix concurred in the majority's holding but wrote a separate opinion emphasizing that the "holding does not question the power of the legislature to hereafter enact Sunday Trading laws which may be compatible with constitutional mandates." Justice Larsen, also concurring, disagreed with Justice Nix, stating that all Blue Laws are "absolutely unconstitutional."

Chief Justice Eagen, joined by Justice Pomeroy, dissented, maintaining that the "rational basis" test is the appropriate test to apply in assessing the constitutionality of Blue Laws under the equal protection provision of the Pennsylvania Constitution. The dissent contended that under such a test, the Laws would certainly have survived judicial scrutiny. The majority's adoption of the "fair and substantial relationship" test, according to the dissent, was at variance with both federal and state precedent.

Id. at 119, 392 A.2d at 275. Continuing, the court noted that "[t]he objective of providing a uniform day of rest and recreation . . . is also undermined by the exception which gives to some a right to open their business and sell prohibited merchandise on a Sunday if they close their business on some other day." Id. at 120, 392 A.2d at 275, citing 18 Pa. Cons. Stat. Ann. § 7363(c)(2) (Purdon 1973). See note 15 supra.

481 Pa. at 123, 392 A.2d at 277 (Nix, J., concurring). Noting that "[t]he principle that working people should have one day a week set aside for rest, recreation and contemplation has become as much a part of the public policy of the nation as the principles enunciated in the Declaration of Independence," Justice Nix stressed that it is within the legislature's prerogative to "rewrite these laws so that their defects are cured." Id. at 124, 392 A.2d at 277, quoting Bertera's Hopewell Foodland, Inc. v. Masters, 428 Pa. at 31, 236 A.2d at 203.

481 Pa. at 124-25, 392 A.2d at 278 (Larsen, J., concurring) (emphasis supplied by Justice Larsen). Since Justice Larsen believed that all Sunday Trading Laws were unconstitutional, he stated that "no legislation can be fashioned to cure this impediment." Id. Justice Larsen did not, however, articulate his reasons for concluding that the Laws were necessarily unconstitutional.

56. Id. at 125, 392 A.2d at 279 (Eagen, C.J., dissenting).


58. 481 Pa. at 130, 392 A.2d at 280-81 (Eagen, C.J., dissenting). After noting that this statute had survived other equal protection attacks, Chief Justice Eagen stated that "[t]he difference in result on the occasion of this most recent challenge to the 'Blue Laws' may be attributed to the majority's use of a different standard of review." Id. at 127, 392 A.2d at 279 (Eagen, C.J., dissenting). Applying the "rational basis" test to this case, the dissent concluded that the Blue Laws are constitutional because "they are neither arbitrary nor capricious, nor do they sink to the level of invidious discrimination." Id. at 130, 392 A.2d at 280-81 (Eagen, C.J., dissenting).

59. See notes 50-52 and accompanying text supra.

60. Id. at 125-29, 392 A.2d at 278-80 (Eagen, C.J., dissenting). The dissent disagreed with the majority's suggestion that federal precedent required the application of the "strict scrutiny" test. Id. at 126-27, 392 A.2d at 279 (Eagen, C.J., dissenting). The necessary prerequisite to this test is interference with a "fundamental right" which, according to the dissent, did not exist in this case. Id. at 127, 392 A.2d at 279 (Eagen, C.J., dissenting). With regard to the majority's use of article 3, § 32 of Pennsylvania's constitution as a source of such a fundamental right, Chief Justice Eagen stated that "an equal protection clause cannot be regarded as 'fundamental' for purposes of an equal protection analysis since it is not the source of any substantive rights or liberties." Id.
Furthermore, the dissent maintained that the application of the "fair and substantial relationship" test failed to give adequate deference to the legislature's judgments.62

Although it is within a state court's prerogative to adopt any standard of review it desires for determining whether a statute violates a state equal protection provision,63 it is submitted that the Kroger court's choice of the "fair and substantial relationship" standard was based upon a questionable analysis of federal case law,64 lacked adequate support in Pennsylvania precedent,65 and departed from strong precedent favoring the application of the "rational basis" test.66

The dissent also insisted that federal precedent mandates application of the "rational basis" test in this type of case. Id. at 128, 392 A.2d at 279 (Eagen, C.J., dissenting). In support of this contention, the dissent cited Two Guys, Inc. v. McGinley, 366 U.S. 582 (1961), and New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam). Id. For a discussion of Two Guys, see notes 20-24 and accompanying text supra. In Dukes, the Court upheld an ordinance that prohibited the sale of food by pushcart vendors in one section of New Orleans unless the vendor had sold in that area for more than eight years. 427 U.S. at 304-06 (per curiam).

61. 481 Pa. at 126-29, 392 A.2d at 278-80 (Eagen, C.J., dissenting). The dissent stated that "(i)n each of the earlier constitutional challenges the United States and Pennsylvania Supreme Courts applied the same standard in evaluating the statute's prohibitions and exceptions made thereto—i.e., the 'rational basis' test . . . ." Id. at 126, 392 A.2d at 279 (Eagen, C.J., dissenting).

Chief Justice Eagen also noted that the "rational basis" test has been consistently used by the Pennsylvania Supreme Court in reviewing equal protection claims that do not involve "fundamental interests" or "suspect classifications." Id. at 128, 392 A.2d at 280 (Eagen, C.J., dissenting), citing Baltimore & Ohio R.R. v. Commonwealth, 461 Pa. 68, 334 A.2d 636 (1975); Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 331 A.2d 198 (1975); In Re Estate of Cavill, 459 Pa. 411, 329 A.2d 503 (1974); Stottlemeyer v. Stottlemeyer, 458 Pa. 503, 329 A.2d 592 (1974).

62. 481 Pa. at 130, 392 A.2d at 280-81 (Eagen, C.J., dissenting). The dissent showed its preference for judicial deference to legislative judgments, by stating that since the Blue Laws "were passed by the General Assembly as a reasonable exercise of its powers and in good faith, the Sunday trading laws must pass constitutional muster." Id. at 130, 392 A.2d at 281 (Eagen, C.J., dissenting), citing Bargain City U.S.A., Inc. v. Dilworth, 407 Pa. 129, 179 A.2d 439 (1962). Chief Justice Eagen intimated that courts which apply the "fair and substantial relationship" test come dangerously close to acting as "super legislatures which judge the wisdom of statutes or invalidate them because they might have been drafted differently." 481 Pa. at 129, 392 A.2d at 280 (Eagen, C.J., dissenting).

63. See 481 Pa. at 117, 392 A.2d at 274 (guidelines for interpreting the Federal Constitution not binding on state court when interpreting state constitution); Bargain City U.S.A., Inc. v. Dilworth, 407 Pa. at 132, 197 A.2d at 441-42 (state constitutional questions decided independently from federal law).

64. See notes 67-71 and accompanying text infra.

65. See notes 72-76 and accompanying text infra.

66. See notes 72-79 and accompanying text infra.

It is submitted that the court could have overturned the Blue Laws without adopting the "fair and substantial relationship" standard and could, thereby, have averted many of the analytical difficulties of its decision. In People v. Abrahams, 40 N.Y.2d 277, 386 N.Y.S.2d 661, 353 N.E.2d 574 (1976), a case discussed by the Kroger court, New York's highest court held that state's Blue Laws to be violative of the federal equal protection provision under the "rational basis" test. Id. at 284-86, 386 N.Y.S.2d at 665-66, 353 N.E.2d at 578-79. This is particularly significant since the Kroger court's analysis closely parallels Abrahams' discussion of the development and present inadequacy of the Blue Laws. Compare 481 Pa. at 112, 392 A.2d at 271 with People v. Abrahams, 40 N.Y.2d at 285-86, 386 N.Y.S.2d at 666, 353 N.E.2d at 578-79.
The major justification provided by the majority for using the "fair and substantial relationship" test was its determination that federal precedent suggests that the more stringent "strict scrutiny" analysis would be appropriate in a case such as this.\(^6^7\) The majority arrived at its conclusion by noting that federal courts apply the "strict scrutiny" test whenever a state statute interferes with a right explicitly or even implicitly guaranteed by the Federal Constitution.\(^6^8\) By analogy, the court concluded that the same test would apply under Pennsylvania's constitution.\(^6^9\) It is submitted, however, that the majority's application of federal principles to Pennsylvania's constitution led to a conclusion that is at variance with federal case law.

For instance, under the Kroger court's analysis, the "strict scrutiny" test is appropriate for equal protection challenges to Sunday Trading Laws; however, the United States Supreme Court has consistently used the "rational basis" test in its Blue Law cases.\(^7^0\) Furthermore, the Kroger court's analysis results in extending the "strict scrutiny" test to economic regulations when, under federal law, these statutes are usually considered under the "rational basis" test.\(^7^1\)

It is further submitted that the majority's use of the "fair and substantial relationship" test was based upon tenuous state precedent.\(^7^2\) The case used

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\(^6^7\) See 481 Pa. at 118, 392 A.2d at 274-75. It should be noted that although the majority concluded that federal precedent required the "strict scrutiny" test, it refused to decide whether this standard was required under the state constitution since it determined that the Blue Laws were unconstitutional under the less rigorous "fair and substantial relationship" analysis. Id. See note 49 supra.

\(^6^8\) See 481 Pa. at 117, 392 A.2d at 274; note 49 supra.

\(^6^9\) 481 Pa. at 117-18, 392 A.2d at 274. Under the court's analysis, when a statute interferes with a right guaranteed by the Pennsylvania Constitution, it should receive closer scrutiny than that required under the "rational basis" test. Id. The court proceeded to find such a protected right under article 3, § 32 of the state constitution. Id. It is submitted that such a determination creates analytical difficulties because, as the dissent notes, the equal protection provision is being used as a source of "fundamental rights" for the purpose of an equal protection analysis. See id. at 127, 392 A.2d at 279 (Eagen, C.J., dissenting). Furthermore, it could be argued that an equal protection provision is not the source of substantive rights. See San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 59 (Stewart, J., concurring); note 60 supra.


\(^7^1\) See, e.g., New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam), where the United States Supreme Court stated:

Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.


\(^7^2\) The court cited two cases in support of its choice of the "fair and substantial relationship" test—Moyer v. Phillips, 462 Pa. 395, 341 A.2d 441 (1975) and In re Estate of Cavill, 459 Pa. 411, 329 A.2d 503 (1974). 481 Pa. at 119, 392 A.2d at 275. In Moyer, the court used the
by the majority in support of employing this test was In re Estate of Cavill, where the Pennsylvania Supreme Court applied the "fair and substantial relationship" standard in overturning Pennsylvania's mortmain statute.73 Relying solely upon federal precedent to justify its use of this more demanding test,74 the Cavill court adopted a standard of review that had not theretofore been used by Pennsylvania courts.75 The propriety of the Cavill court's use of the "fair and substantial relationship" test was undermined when the dissent noted that federal precedent did not in fact support that standard of review.76

Not only does the Kroger court's use of the "fair and substantial relationship" test lack support under federal and state case law, it is also at variance with strong state precedent which favors the "rational basis" test.77 In all of the court's previous Blue Law cases involving equal protection challenges, the court has applied the "rational basis" test rather than the more demanding test employed in Kroger.78 It is submitted that the majority's

"fair and substantial relationship" test to strike down a statute that provided: "All causes of action . . ., except actions for slander or libel, shall survive the death of the plaintiff or of the defendant. . . ." 462 Pa. at 397-98, 341 A.2d at 442, quoting 20 Pa. Cons. Stat. Ann. § 3371 (Purdon 1975). The Moyer court, without any discussion of why the "fair and substantial relationship" test was appropriate, simply cited Cavill and several federal cases to justify the use of this standard of review. 462 Pa. at 400, 341 A.2d at 443, citing In re Estate of Cavill, 459 Pa. 411, 329 A.2d 503 (1974).


74. 459 Pa. at 417, 329 A.2d at 506. The federal cases cited by the court were Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Royster Guano Co. v. Virginia, 233 U.S. 412 (1920).


76. 459 Pa. at 418, 329 A.2d at 506-07 (Pomeroy, J., dissenting). Justice Pomeroy stated that the United States Supreme Court "has consistently held that when considering an equal protection challenge to a state legislative classification scheme which does not involve either a 'suspect' classification or a 'fundamental right,' the proper test to apply is whether the classification bears some rational relationship to a permissible state objective." Id. (emphasis added), citing Dandridge v. Williams, 397 U.S. 471 (1970); McDonald v. Board of Election, 394 U.S. 802 (1969); Levy v. Louisiana, 391 U.S. 68 (1968). Continuing, Justice Pomeroy stated that "[t]he rational basis test is particularly appropriate when the economic or social legislation in issue pertains to matters the regulation of which rests peculiarly within the province of state or local government." 459 Pa. at 418, 329 A.2d at 507 (Pomeroy, J., dissenting), citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Lebine v. Vincent, 401 U.S. 532, 538 (1971).


failure to either distinguish these cases with respect to the appropriate standard of review, or to overrule them, results in the existence of conflicting precedent and hence confusion over which test the court will employ in future cases challenging economic regulations on equal protection grounds.  

The obvious result of the Kroger decision is that Pennsylvania's Blue Laws have been relegated to mere historical significance. While the religious and sociological effects of Kroger are not yet known, it is clear that Sundays in Pennsylvania have been "commercialized." Although Justice Nix asserted that the legislature is free to cure the Blue Laws' defects and enact constitutionally viable Sunday Trading Laws, the majority left the question open by merely assuming that the legislature has such authority. It is therefore uncertain whether the legislature is capable of drafting Blue Laws which will permit the amount of Sunday business demanded by society and still pass constitutional muster.

The majority's pronouncement of the appropriate standard of review in state equal protection challenges may create more problems than the court anticipated. Many pieces of economic legislation will be threatened if the "fair and substantial relationship" test is going to be employed by the court when considering equal protection challenges to such regulations.

79. Although Kroger conflicts with state precedent concerning the appropriate standard of review, it is submitted that the court adequately distinguished the holdings of the prior Blue Law cases by noting that this particular case involved the entire Sunday trading statute while the previous decisions focused on individual provisions of the laws. See 481 Pa. at 122-23, 392 A.2d at 276-77. This distinction is important because the equal protection analysis examines the correspondence between the statute's content and the purpose of the statute. See generally id. at 121, 392 A.2d at 276. Thus, while a court may find that a single exception from the Blue Laws does not prevent the attainment of the statute's purpose, an examination of all the exemptions under the Laws could reveal that there is little or no correspondence between the statute and its purpose. Therefore, a court could logically conclude that a particular classification under a statute was constitutional but that a group of such exemptions was unconstitutional.

80. 481 Pa. at 116, 392 A.2d at 273. Although the Blue Laws have been ruled unconstitutional, this does not affect the validity of other statutes regulating Sunday activities. See, e.g., PA. STAT. ANN. tit. 4, § 82 (Purdon 1963) (municipalities may prohibit baseball and football on Sunday except between 2:00 p.m. and 6:00 p.m.); 18 PA. CONS. STAT. ANN. § 4651 (Purdon 1973) (pool rooms prohibited from opening on Sunday).


82. 481 Pa. at 123, 392 A.2d at 277 (Nix, J., concurring). See note 54 and accompanying text supra.

83. 481 Pa. at 118, 392 A.2d at 274. The court stated: "The justification for the Sunday Trading Laws is to provide Pennsylvanians with a uniform day of rest and recreation. This objective is not here challenged. We therefore assume the constitutional propriety of this objective." Id. (emphasis supplied by the court).

84. See id. at 120-22, 392 A.2d at 279 (Eagen, C.J., dissenting). Chief Justice Eagen alluded to the possibility of increased judicial activism resulting from the use of the "fair and substantial relationship" test when he stated that "[c]ourts applying the 'rational basis' test may not sit as super legislatures which judge the wisdom of statutes." Id. at 129, 392 A.2d at 280 (Eagen, C.J., dissenting). See note 60 supra. Furthermore, Justice Pomeroy, when dissenting from the court's use of the "fair and substantial relationship" test in Castill, stated: "[T]he majority comes perilously close to assuming the posture of a super-legislature which judges the wisdom rather
While the decision's effect upon Pennsylvania's "uniform day of rest and recreation" may be important, it is suggested that the more critical impact of Kroger could come from the court's adoption of a stricter standard of review for challenges to economic regulations under Pennsylvania's equal protection provision.

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