

NOTES AND COMMENTS

THE STANDARD OF REVIEW IN EQUAL PROTECTION AND DUE PROCESS CHALLENGES TO VERMONT'S BLUE LAWS

I. INTRODUCTION

Within the last ten years there has been a steady stream of litigation in state courts concerning equal protection and due process challenges to Blue Laws (or Sunday closing laws). The result is that a number of state courts have declared their states' Blue Laws unconstitutional.¹ Following this line, four Vermont District Courts have recently held that Vermont's Common Day of Rest Act² violates the equal protection and due process clauses of the United States Constitution.³ In *State v. Shop and Save Food Markets, Inc.*,⁴ an appeal from one of these decisions, the Vermont Supreme Court agreed with the District Court in part and held that a portion of the Common Day of Rest Act is in violation of the equal protection clause. This note will focus on the validity of these fourteenth amendment challenges in the context of this decision.

It must be emphasized that the purpose of this note is not to consider either the wisdom of Blue Laws in modern society or any lingering "establishment of religion" questions.⁵ These issues have

1. See cases cited notes 60-61 *infra*.

2. VT. STAT. ANN. tit. 13, §§ 3351-3356 (Supp. 1980).

3. *State v. Ludlow Supermarket, Inc.*, No. 757-79 (Vt. Dist. Ct., Bennington Cir., 1979); *State v. Shop and Save Food Markets, Inc.*, No. 440-78 (Vt. Dist. Ct., Calendonía Cir., 1978), *aff'd*, 138 Vt. 332, 415 A.2d 235 (1980); *State v. Gerry's Cash Market*, No. 726-77 (Vt. Dist. Ct., Windham Cir., 1977); *State v. Ludlow Supermarket, Inc.*, No. 1085-76 (Vt. Dist. Ct., Windham Cir., 1977).

4. 138 Vt. 332, 415 A.2d 235 (1980).

5. Blue Laws have an extensive history in the United States dating to the earliest colonial times. See *McGowan v. Maryland*, 366 U.S. 420, 431-32 (1961). Throughout most of their history, Blue Laws have been based on the religiously oriented consideration of prohibiting most activities, business and recreational, as a means of encouraging participation in sabbath religious activities. See generally C. ANTIEU, P. CARROLL & T. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* (1965); A. STOKES & L. PUFFER, *CHURCH AND STATE IN THE UNITED STATES* (1975). In recent times, however, the emphasis of these laws has shifted.

been explored in a number of recent articles.⁶ Instead, this note will focus on the *Shop and Save* decision to examine the proper role of a court in the equal protection and due process review of state socioeconomic legislation such as Blue Laws.

II. BACKGROUND TO THE *Shop and Save* DECISION

A. *Vermont's Common Day of Rest Act*

Whatever the legislative motivation in desiring to halt all commercial activities on Sundays, it is not now practical to accomplish completely this goal.⁷ There are many businesses that cannot close on Sundays, such as power, emergency, and health services; and there are others whose start up and shut down costs are so great as to make Sunday closing an onerous burden. Aside from such necessary exemptions as these, however, many states also grant exemptions for businesses whose operations are not as exceptional as those above.⁸ It is the perceived discrimination accompanying such

State legislatures have liberalized the laws by allowing more recreational activities (and the inevitable business activities catering to them) in order to comport more fully with the modern view that a day of rest is beneficial to the people regardless of whether it is used to worship God or to relax with family and friends. *McGowan v. Maryland*, 366 U.S. 420, 434-35 (1961).

In 1961 the United States Supreme Court recognized this shift in the emphasis of Blue Laws away from religious advocacy when it held in *McGowan* that the religious history of modern Blue Laws does not necessarily invalidate them in the face of a first amendment establishment of religion challenge. *Id.* at 446-53. The Court determined that it is well within the police power of states to regulate the days on which businesses may open in order to provide the public with a common day of rest. *Id.* at 443-44. Since *McGowan* there have been no successful first amendment challenges to Blue Laws.

6. See, e.g., Note, *Sunday Blue Laws: A New Hypocrisy*, 54 NOTRE DAME LAW. 716 (1979); Note, *Sunday Closing Laws in the United States: An Unconstitutional Anachronism*, 11 SUFFOLK U. L. REV. 1089 (1977).

7. In no jurisdiction in the United States are all business activities prohibited by a Sunday closing law.

8. Examples of the extent to which states will attempt to go in tailoring their Blue Laws to the economic realities of their constituents are many. E.g., MASS. GEN. LAWS ANN. ch. 136, § 6(1)-6(50) (West 1972 & Supp. 1980) (contains fifty exemptions to the ban on Sunday business activities, including the operation of a store during the Sundays between Thanksgiving and Christmas, *id.* § 6(50)9; ME. REV. STAT. ANN. tit. 17, § 3204 (West Supp. 1980-81) (exempting stores "wherein no more than 5 persons, including the proprietor, are employed in the usual and regular conduct of business; stores which have no more than 5,000 square feet of interior customer selling space, excluding back room storage, office and processing space.")

exemptions which forms the basis of equal protection and due process challenges to Blue Laws.

Vermont's current Blue Laws⁹ had their genesis in a model Sunday closing law proposed in the *Harvard Journal on Legislation*.¹⁰ The text of the Act is, in fact, derived verbatim from the model law except for the addition of a number of exemptions for certain businesses. In total, the Act contains forty-two exemptions to the blanket ban on the conduct of business activities,¹¹ including exemptions for those whose business is "agriculture or the harvesting of timber,"¹² "greenhouse[s] or nurseries,"¹³ and "automatic self-service laundries."¹⁴ Of particular importance in considering the recent challenges to the Vermont law are two of the exemptions added to the model law by the Vermont legislature. Exempted are all stores "wherein no more than seven persons . . . are employed on the premises at any one time in the usual and regular week-day conduct of the business"¹⁵ (hereinafter the "seven employee exemption"). Also separately exempted are those establishments primarily engaged in the sale of food which are not required to comply with the provisions of the unit pricing act¹⁶ (hereinafter the "unit pricing exemption"). The stores exempted from compliance with the unit pricing act¹⁷ (and thus the Common Day of Rest Act) are those stores which "during the immediately preceding calendar year had gross revenues of less than \$500,000.00, or which are owned and operated by one owner and members of his immediate family" except such stores which are part of a chain having revenues of \$1,000,000 in the preceding year.¹⁸ Violators of the Common Day of Rest Act are subject to the imposition of criminal penalties.¹⁹

9. Vermont's previous Blue Law was contained in VT. STAT. ANN. tit. 13, § 3301 (1960).

10. 3 HARV. J. LEGIS. 345 (1965-66).

11. VT. STAT. ANN. tit. 13, § 3354 (Supp. 1980).

12. *Id.* § 3354(6).

13. *Id.* § 3354(7)(Q).

14. *Id.* § 3354(7)(R).

15. *Id.* § 3354(7)(P).

16. *Id.* § 3354(7)(JJ).

17. VT. STAT. ANN. tit. 6, §§ 681-87 (Supp. 1980).

18. *Id.* § 686(1).

19. VT. STAT. ANN. tit. 13, § 3356 (Supp. 1980).

Shop and Save Food Markets, Inc. is one of the larger supermarkets in Vermont, and, as such, did not fall under any of the exemptions to the Common Day of Rest Act. In June, 1978 Shop and Save was open for business on a Sunday, and an investigator made a retail purchase.²⁰ This resulted in the filing of a criminal complaint on July 5, 1978 which alleged a violation of the Act.²¹

In *State v. Shop and Save* figures supplied by the Vermont Retail Grocers Association showed that of 700 retail grocery stores in Vermont, 665 are members of the Association, and 510 of these are legitimately open on Sundays as a result of either the seven employee or the unit pricing exemption, or both.²² Based on this apparent discrimination, the defendant asserted three defenses to charges brought against it that are relevant to this inquiry: (1) that the scheme of the Common Day of Rest Act taken as a whole violates the equal protection clause of the United States Constitution; (2) that the seven employee and unit pricing exemptions taken alone violate the equal protection clause; and (3) that the seven employee and unit pricing exemptions violate the due process clause of the United States Constitution in that they fail to comport with the avowed purpose²³ of the Common Day of Rest Act.²⁴

In answer to these defenses the State of Vermont asserted that even though the sole declared purpose of the Sunday closing law is "to establish a common day of rest by means of the general cessa-

20. *State v. Shop and Save Food Markets, Inc.*, 138 Vt. 332, 334, 415 A.2d 235, 235 (1980).

21. *Id.*

22. Printed Case of the Appellant at 37, *State v. Shop and Save Food Markets, Inc.*, 138 Vt. 332, 415 A.2d 235 (1980).

23. The purpose of the Act is recited at VT. STAT. ANN. tit. 13, § 3352 (Supp. 1980): "The purpose of this chapter is to establish a common day of rest by means of the general cessation of work."

24. Printed Case of the Appellant at 7, 43, *State v. Shop and Save Food Markets, Inc.*, 138 Vt. 332, 415 A.2d 235 (1980). The defendant asserted two additional defenses not relevant to this inquiry which were decided against the defendant at trial and not reached by the Supreme Court on appeal: (1) that because the Act had been twice ruled unconstitutional by Vermont district courts, the defendant was entitled to rely on those rulings; and (2) that the Act violates the due process clause because it fails to give notice to a person of ordinary intelligence that his conduct is against the law. *Id.*

tion of work,"²⁵ this "preamble or declaration of purpose is no more than a boilerplate lifted verbatim from the *Harvard Journal on Legislation*."²⁶ The State contended that the discrimination against larger stores resulting from the Common Day of Rest Act serves many purposes, including, but not limited to, the establishment of a day of rest. Among the secondary objectives of the statute, the state asserted, is an attempt by the legislature "to preserve a diverse mix of small and large businesses by mitigating the competitive disadvantages of 'Ma and Pa' stores, in effect, helping to maintain a way of life,"²⁷ and a cultural tradition in largely rural Vermont. The state argued that it is to this secondary purpose that both the seven employee and the unit pricing exceptions are directed and that this purpose is constitutional as being within the police power of the state.²⁸

B. *The Traditional Equal Protection and Due Process Standards of Review*

The essence of the legislative function is the making of policy determinations based on the objectives of the legislators participating in the process. Through these policy determinations and the sanctions enforcing them, the activities of the populace are regulated under the police power of the state to provide for the general welfare, health, safety, and morals of the public.²⁹ As a check to this regulatory power of the state is the fourteenth amendment to the United States Constitution which says simply that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."³⁰ The United States Supreme Court has used the equal protection clause and, less frequently, the due process clause to place

25. VT. STAT. ANN. tit. 13, § 3352 (Supp. 1980).

26. Reply Brief of the Appellant at 2, *State v. Shop and Save Food Markets, Inc.*, 138 Vt. 332, 415 A.2d 235 (1980).

27. *Id.* at 3.

28. *Id.* at 4.

29. See *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424-25 (1952); *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 31 N.W.2d 477, 487 (1949), *aff'd*, 335 U.S. 525 (1949).

30. U.S. CONST. amend XIV, § 1.

certain limits on the extent to which state legislatures may achieve their regulatory objectives either by making classifications among their citizens or regulating certain activities of their citizens.³¹ The primary consideration in evaluating the validity of the equal protection and due process challenges to Vermont's Blue Laws and an essential background to an understanding of the impact of the *Shop and Save* decision is the standard of review upon which a court should proceed.

In developing equal protection and due process limitations on legislative choices the Court has traditionally employed a "two-tier" method of analysis.³² In the context of equal protection the upper level of analysis, "strict scrutiny," is reserved for legislative classifications based on personal traits such as race,³³ national ancestry,³⁴ and ethnic origin³⁵ (the "suspect classifications") and those involving a "fundamental interest." Fundamental interests are those traceable in some manner to provisions in the Constitution³⁶ or those that the Court feels are "preservative of other basic civil and political rights."³⁷ The strict scrutiny test, as it has been formulated by the United States Supreme Court, is comprised of two elements: "first, the classification must be necessary . . . and second, the goals must be not merely legitimate but 'compelling.'"³⁸ The choice of the strict scrutiny test is extreme in that it is generally outcome determinative; very rarely is a statutory classification upheld under this test.³⁹

31. See notes 32-59 and accompanying text *infra*.

32. For a discussion of the so-called middle tier mode of analysis see note 55 *infra* and accompanying text.

33. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

34. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879).

35. *Id.*

36. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969) (held that a one year state residency requirement for the receipt of state welfare benefits denied equal protection because it discouraged interstate travel, a right implied in the Constitution).

37. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1966) (held that requiring the payment of a tax before voting violates the equal protection clause because the voting franchise is a fundamental right).

38. Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 So. CAL. L. REV. 689, 693 (1977).

39. An exception is *Korematsu v. United States*, 323 U.S. 214 (1944), where the Court invoked the language of the strict scrutiny test, *id.* at 216, but then held that it was proper

In an analogy to the strict scrutiny review under the equal protection clause the Supreme Court has in the past used the due process clause to limit certain legislative objectives.⁴⁰ This substantive due process, however, has been largely abandoned since the late 1930's in all but a limited number of cases in which the Court has sought to protect a fundamental right traceable to, but not specifically articulated in, the Constitution.⁴¹

Traditionally, all statutory provisions that do not create suspect classifications or involve fundamental rights have been subjected to a standard of review far more deferential to legislative prerogatives: the "rational relationship" or "mere rationality" test.⁴² This lower standard of review applies to a broad range of social and economic legislation which includes Blue Laws.⁴³ The test is identically formulated in regard to both equal protection and due process analysis.⁴⁴ This can be seen from the classic statement of the test with regard to economic legislation in the leading case of *Williamson v. Lee Optical of Oklahoma, Inc.*⁴⁵ In *Lee Optical* the Supreme Court upheld, against both equal protection and due process challenges, an Oklahoma statute which made it unlawful "for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist"⁴⁶ but which exempted all sellers of ready-to-wear glasses.⁴⁷ In answering the due process challenge, which asserted that the entire statutory

for the government to order the forced evacuation of Japanese-Americans from certain areas of the West Coast during the Second World War. *Id.* at 220.

40. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

41. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (prohibiting states from regulating a woman's right to terminate her pregnancy in the first trimester); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (prohibiting states from interfering with the use of contraceptives by married persons, based on a right to marital privacy).

42. See, e.g., *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491 (1955).

43. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

44. *Bice*, *supra* note 38, at 709-10.

45. 348 U.S. 483 (1955).

46. *Id.* at 485.

47. *Id.*

scheme deprived Lee Optical of due process, the Court said: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."⁴⁸ All the Court requires to uphold a statute is that it can conceive of a legitimate legislative objective behind the statute and that the statute be a rational way of achieving that end. The Court continued: "it is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it."⁴⁹

The equal protection portion of the challenge in *Lee Optical* was based on the apparent discrimination engendered by the single exemption of sellers of ready-to-wear glasses from operation of the Oklahoma law. In dealing with this contention, the Court expanded on its concept of the latitude to be given legislatures under the minimum rationality test:

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.⁵⁰

Thus, it can be seen from *Lee Optical* that even though the focus of the equal protection clause is improper classification and the focus of the due process clause is improper regulation of activities that may not be regulated, the standard of review is identical.⁵¹

The Supreme Court applied the rational relationship test to equal protection and due process challenges to Blue Laws with predictable results in *McGowan v. Maryland*.⁵² There the Court

48. *Id.* at 488.

49. *Id.* (emphasis added).

50. *Id.* at 489 (citations omitted).

51. See Bice, *supra* note 38, at 709.

52. 366 U.S. 420 (1961).

upheld the Maryland Blue Law despite the fact that it had numerous exemptions. The Court cited *Lee Optical* among other cases and said that

[t]he constitutional safeguard is offended only if the classification rests solely 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.⁵³

Under the Warren Court the imposition of the deferential rational relationship test was as outcome determinative as the imposition of the strict scrutiny test; a statute was struck down only once when this standard was used.⁵⁴ Under the Burger Court, however, there have been decisions indicating that in certain circumstances the Court will apply a test with more teeth than traditional rational relationship to invalidate statutes which do not trigger strict scrutiny, the so-called "middle tier" mode of analysis.⁵⁵ Any hopes that this new standard would be extended to legislation that is purely economic in nature (such as Blue Laws), however, were disappointed by the 1975 decision of *New Orleans v. Dukes*.⁵⁶ There the Court clearly indicated that it would continue to use minimal scrutiny in reviewing economic legislation. In that case it upheld a city ordinance that exempted from a prohibition against the selling of food from pushcarts by vendors in the French Quarter those who had been so occupied for more than eight years. The Court reaffirmed the rational relationship mode of analysis when it said:

53. *Id.* at 425-26 (citations omitted) (emphasis added).

54. *Morey v. Doud*, 354 U.S. 457 (1957), was the only case in the last fifty years in which the Court held that an economic regulation was unconstitutional solely on equal protection grounds. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). The *Dukes* case specifically overruled *Morey v. Doud*. *Id.* at 306.

55. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (state discrimination against unmarried persons in the distribution of contraceptives violates the equal protection clause); *Reed v. Reed*, 404 U.S. 71 (1971) (the provision of state probate code which set up a preference for males over females in the selection of estate administrators violated the equal protection clause).

56. 427 U.S. 297 (1976).

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.⁵⁷

In announcing the continued life of the rational relationship standard as applied to economic regulation, the Court went so far as to overrule *Morey v. Doud*,⁵⁸ "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds."⁵⁹ The intent of the Supreme Court in these cases is clear: if the facts of a case do not somehow trigger a higher standard of review, the Court will apply the rational relationship test which will validate any statute so long as the Court can conceive of any legitimate legislative objective to the accomplishment of which the statute is rationally related.

C. Criticism of Application of the Rational Relationship Standard to Invalidate Statutes

Despite the clear delineation in *Lee Optical*, *McGowan*, and *Dukes* of the highly deferential standard that courts are to use in evaluating economic legislation such as Blue Laws, the state courts since *McGowan* have not been consistent in their application of this standard to Blue Laws. In many states the laws have been declared to violate, at least in part, the equal protection clause, the due process clause, or both.⁶⁰ In numerous other states, however, the laws have been upheld even though they have generally been similar to those overturned in other states.⁶¹ When application of

57. *Id.* at 303.

58. 354 U.S. 457 (1957).

59. 427 U.S. at 306.

60. *See, e.g.*, *State v. Anonymous*, 33 Conn. Supp. 141, 366 A.2d 200 (C. P. 1976); *Rutledge v. Gaylord's, Inc.*, 233 Ga. 694, 213 S.E.2d 626 (1975); *People v. Abrahams*, 40 N.Y.2d 277, 353 N.E.2d 574, 386 N.Y.S.2d 661 (1976); *Spartan's Industries, Inc. v. Oklahoma City*, 498 P.2d 399 (Okla. 1972); *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978).

61. *See, e.g.*, *Vornado v. Hyland*, 77 N.J. 347, 390 A.2d 606 (1978), *appeal dismissed*, 439 U.S. 1123 (1979); *Zayre Corp. v. Attorney General*, 372 Mass. 423, 362 N.E.2d 878 (1977); *Gibson v. Downtown Development Corp.*, 572 S.W.2d 334 (Tex. 1978), *appeal dis-*

the rationality standard is examined closely, it becomes clear that there are many conceptual difficulties which accompany its use by a state court to invalidate a statute rather than to uphold it.

It must be noted initially that if the rational relationship test is to be used for the substantive review of statutory discrimination it has been misleadingly named and formulated. When the rational relationship test is used for the substantive review of statutory provisions, the true focus of the test is not the rational relationship (or "means" component); rather it is a substantive choice on the part of the court as to what constitutes the proper legislative objectives of a given statute (the "ends" component).⁶² In actuality, then, this type of substantive rationality review examines the legitimacy of the government's policy choice, not the rationality of the statute.⁶³ As one commentator has noted:

[A]s to the notion that either [the equal protection or due process] clause commanded legislation to be rational, not merely in the sense of avoiding self-contradiction and impossibility of compliance, but as a reasonable means to an end, these phrases seem an unlikely way to state such a command on the part of men who were eminently able to put their legal and political prescriptions into English.⁶⁴

The above becomes more clear when it is realized that the presence or absence of the rational relationship will always be determined by the level of generality with which the court chooses to view the legislative objectives.⁶⁵ The objectives of a given statute may be viewed as on a scale. On one end is located the objective of securing the general welfare; on the other end is located the tautological objective of doing exactly what the words of the statute express. Thus,

[i]f a burden or a benefit is placed on a group that shares a

missed, 439 U.S. 1000 (1978); *Gibson v. State*, 545 S.W.2d 128 (Tex. 1976), cert. denied, 431 U.S. 955 (1977); *State v. Giant of St. Albans*, 128 Vt. 539, 268 A.2d 739 (1970).

62. See Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L. J. 123 (1972).

63. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 207 (1976).

64. *Id.* at 238.

65. P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING*, 565-66 (1975).

trait that can be named, at least one purpose for doing so can always be to burden or benefit those that share the trait. To be sure, it might be an unconstitutional purpose [classifications that trigger strict scrutiny because they are suspect or because they involve fundamental rights] . . . but the purpose still exists. The rationality test . . . does not itself contain standards for labeling certain purposes illegitimate; it merely requires a rational fit between purpose and statutory means.⁶⁶

Whenever a court has invalidated a statute on the basis of the rationality test, it could have found a rational relationship by defining the legislative goal more narrowly⁶⁷ or by recognizing that any statutory formulation will be the product of a compromise between the numerous competing objectives that constitute the legislative process.⁶⁸ Thus, if courts are honest about their decision-making process, "in the end, the constitutional question will be whether the aim of the law is out of bounds, not whether it will miss its target—a question of legitimacy, not of rationality."⁶⁹

Once it is recognized that the focus of the rational relationship test when it is used to invalidate a statute is on the propriety of the legislative objectives, the points remaining to be made are two. First, it is important to establishing a reasoned decisionmaking process based on the equal protection and due process clauses that courts not make substantive choices as to permissible legislative objectives under the cover of rational relationship language.⁷⁰ If a court is intent on invalidating a particular legislative objective, it should clearly indicate (as courts do in the case of suspect classifications and fundamental rights under the strict scrutiny standard of review) that this is what it is doing.

Based upon this understanding of the rational relationship test, many recent commentators have suggested that a court's inquiry should be limited to a determination of the relationship be-

66. Note, *supra* note 62, at 131.

67. *Id.* at 132; P. BREST, *supra* note 65, at 565-66.

68. Linde, *supra* note 63, at 212.

69. *Id.*

70. Note, *supra* note 62, at 154.

tween the statute and any legislative objective offered by the state in justification of it.⁷¹ Under this view the rationality test would have no substantive function outside the correction of inadvertent legislative arbitrariness,⁷² those situations when the legislation has had unanticipated effects which the state cannot, or chooses not, to justify. This is the approach that the United States Supreme Court has apparently taken in the *Lee Optical*, *McGowan*, and *Dukes* line of cases.⁷³ It has also been suggested that the test applied in this way would not be totally functionless in that it would still serve to force states to publicly justify their statutes.⁷⁴

The second point is that the invalidation of legislative objectives by a court when neither a suspect classification nor a fundamental right is involved raises questions about the extent to which courts should substitute their judgment for that of the legislature.⁷⁵ A full exploration of the question of how actively a court should engage in equal protection and due process "ends" analysis is beyond the scope of this note. It will depend, however, on policy decisions as to both the authority and competence of the judiciary to substitute its judgment for that of the legislature in those areas that do not require strict scrutiny. For its part, the Supreme Court has declared definitively that in the area of economic regulation, it will defer to legislative determinations of policy.⁷⁶ Nevertheless, whatever the decision of a state court as to the degree it is willing to substantively review legislative enactments, it is important that it discuss honestly the basis of its finding that a certain legislative enactment is improper and not hide behind the smokescreen of the rational relationship language.

The tension that exists between the different views of courts

71. E.g., Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 35 (1972).

72. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1074 (1979).

73. See text accompanying notes 45-59 *supra*.

74. See Gunther, *supra* note 71, at 44-48.

75. For an in depth discussion of this question see R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

76. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

concerning the rationality standard is illustrated by two recent decisions concerning Blue Laws. In the leading case of *People v. Abrahams*⁷⁷ the New York Court of Appeals found that state's Blue Laws to be in violation of the equal protection clause of the fourteenth amendment. Initially, the *Abrahams* court noted that the many exceptions to the antiquated New York statute were the product "of centuries of evolutionary mutation,"⁷⁸ "utterly lacking in cohesive scheme,"⁷⁹ and "essentially devoid of rhyme or reason."⁸⁰ The court was careful to cite *McGowan*, and indicated that it would apply a simple rational relationship test.⁸¹ The court, however, then determined that a rational relationship was lacking between the statute and the legislative objective in that the large number of exemptions in the statute prevented only a small number of stores from opening, thus not relating rationally to the goal of securing a common day of rest.⁸²

It is clear that the basis of the *Abrahams* decision was a determination by the court that the legislature was limited to only one permissible goal in this statute: to "produce an atmosphere appropriate for a common day of rest."⁸³ The court chose not to look at the specific provisions of the statute and also not to discuss the reasons why it was not a legitimate objective for the statute to accomplish exactly what its words indicated. By limiting the permissible objectives of the statute to assuring a common day of rest and by ignoring the secondary legislative goals that were implicit in the exemptions, the *Abrahams* court was able to demonstrate that the Blue Law had failed the rational relationship test.⁸⁴

The essence of the test used by the New York court in *Abrahams* (though said to be consistent with *McGowan*) is not rationality, but a substantive decision by the court as to what are the

77. 40 N.Y.2d 277, 353 N.E.2d 574, 386 N.Y.S.2d 661 (1976).

78. *Id.* at 280, 353 N.E.2d at 575, 386 N.Y.S.2d at 663.

79. *Id.* at 285, 353 N.E.2d at 578, 386 N.Y.S.2d at 665.

80. *Id.* at 285, 353 N.E.2d at 578, 386 N.Y.S.2d at 666.

81. *Id.* at 285, 353 N.E.2d at 578, 386 N.Y.S.2d at 665.

82. *Id.* at 285, 353 N.E.2d at 578, 386 N.Y.S.2d at 666.

83. *Id.* at 286, 353 N.E.2d at 579, 386 N.Y.S.2d at 666.

84. *Id.* at 284-86, 353 N.E.2d at 578-79, 386 N.Y.S.2d at 665-67.

permissible objectives of the statute with no discussion as to why certain legislative goals are *constitutionally* impermissible. It is interesting to note that the *Abrahams* court at one point implicitly admits this substantive evaluation of legislative goals when it says that a proper Blue Law would not only have to be rationally related to establishing a common day of rest, but would have to be one "which is consonant with today's needs and mores."⁸⁵

In contrast to *Abrahams* is the Massachusetts case of *Zayre Corp. v. Attorney General*.⁸⁶ The *Zayre* court, after citing both *Dukes* and *Lee Optical*, announced that it would apply the traditional rational relationship principles.⁸⁷

The reasons for this devolve not from an abdication of the judicial role, but a recognition of its proper place in our system of government. This principle of judicial restraint includes recognition of the inability and undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature.⁸⁸

In upholding a Blue Law containing forty-nine exemptions, the *Zayre* court, while asserting that the proper purpose of the statute was to establish a common day of rest, acknowledged that there are many competing legislative considerations which combine to constitute the final product: "The process of balancing the various social and economic factors which influence the provisions of a common day of rest law calls for local legislative judgments as to the desirability, necessity or lack thereof of certain activities."⁸⁹ This is directly in line with the opinions of the United States Supreme Court and evinces a clear understanding of the rational relationship standard.

III. VERMONT CASE LAW PRIOR TO THE *Shop and Save* DECISION

In general the Vermont Supreme Court has closely followed

85. *Id.* at 286, 353 N.E.2d at 579, 386 N.Y.S.2d at 666.

86. 372 Mass. 423, 362 N.E.2d 878 (1977).

87. *Id.* at 433, 362 N.E.2d at 884.

88. *Id.* (citations omitted).

89. *Id.* at 437, 362 N.E.2d at 886.

the lead of the United States Supreme Court in applying the rational relationship test to purely economic legislation. In 1970, the Vermont court upheld the predecessor to the state's current Blue Law in *State v. Giant of St. Albans*⁹⁰ by citing *McGowan* and saying that "[s]ince we are dealing with an acknowledged power in the legislature to enact regulatory measures, it is not for this Court to pass upon the propriety of the legislative election to exercise that power, nor to question the wisdom of resort to it."⁹¹

More recently the court has had occasion to decide equal protection issues in cases involving economic regulations other than Blue Laws. In each case the court's decision was consistent with the view that the only proper use of the rational relationship standard is the invalidation of inadvertent legislative discrimination.⁹² *Andrews v. Lathrop*⁹³ upheld the constitutionality of a land gains tax that taxed the gain derived from the sale or exchange of land held by the transferor less than six years, with the rate of tax being directly proportional to the percentage of the gain and inversely proportional to the holding period. The court said: "[I]f any reasonable policy or purpose for the legislative classification may be conceived of, the enactment will be upheld."⁹⁴ Recognizing that the primary question in rational relationship analysis is the way in which the legislative objective of a statute is determined, the *Andrews* court looked to "the whole of the statutory provision . . . , its subject matter, its effect and consequences."⁹⁵ It was then an easy matter for the court to determine that the purpose of the statute was to discourage speculation in real estate that had recently been driving up prices in the state and that the statute was rationally related to the achievement of this goal.⁹⁶

The only recent case in which the Vermont court has declared an economic regulation to be unconstitutional as a violation of

90. 128 Vt. 539, 268 A.2d 739 (1970).

91. *Id.* at 544, 268 A.2d at 742.

92. See text accompanying notes 70-73.

93. 132 Vt. 256, 315 A.2d 860 (1974).

94. *Id.* at 258, 315 A.2d at 862 (emphasis supplied).

95. *Id.* at 260, 315 A.2d at 863.

96. *Id.*

equal protection is *Pabst v. Commissioner of Taxes*.⁹⁷ In *Pabst* the court struck down a single provision of the Vermont gift tax which deprived the plaintiff of using his \$30,000 federal lifetime exemption against the Vermont tax while allowing virtually all others to use this exemption.⁹⁸ The court, after recognizing the existence of the discrimination, could find no reason for it, and *the state could offer none*. Only after it became clear that the state could not even offer a purpose justifying the discrimination did the court overrule that provision of the statute.⁹⁹ This was an instance of a statute which created a discrimination that was both unintended and misunderstood by the legislature at the time that it passed the law.¹⁰⁰

IV. THE *Shop and Save* DECISION

In *State v. Shop and Save Food Markets, Inc.*¹⁰¹ the district court had granted a motion to dismiss the charges against the defendant, agreeing with Shop and Save that the exemptions to the Common Day of Rest Act provided by both the seven employee and unit pricing exemptions violate the equal protection and due process clauses of the United States Constitution.¹⁰² The court did not, however, agree with the defendant that the Act as a whole violated the equal protection clause.¹⁰³ With the permission of the trial court the state raised an interlocutory appeal to the Vermont Supreme Court based on this adverse ruling. The defendant simultaneously received permission to conduct a cross appeal on the issues decided adversely to him.¹⁰⁴ All of the initial issues at trial were thus preserved for appeal.

In its opinion, the Vermont Supreme Court first noted that the standard of review was to be the same that it had used to validate the predecessor to the current Blue Law in *State v. Giant of*

97. 136 Vt. 126, 388 A.2d 1181 (1978).

98. *Id.* at 140, 388 A.2d at 1188-89.

99. *Id.* at 133, 388 A.2d at 1185.

100. *Id.*

101. 138 Vt. 332, 415 A.2d 235 (1980).

102. *Id.* at 334, 415 A.2d at 236.

103. *Id.*

104. *Id.*

*St. Albans*¹⁰⁵ and that the United States Supreme Court had used in *McGowan v. Maryland*:¹⁰⁶ "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."¹⁰⁷ The court also pointed out the presumption of constitutionality which accompanies all state economic legislation.¹⁰⁸ The court qualified this, however, by saying that "[i]t is also essential to understand that the mere fact of classification by the legislature does not establish, by itself, that the enactment is rationally related to a permissible state purpose."¹⁰⁹

After the above introductions to the standard of review which it would employ, the court began its evaluation of the Common Day of Rest Act by looking for the rational relationship between the statute and its express purpose: to establish a common day of rest.¹¹⁰ The court took notice¹¹¹ of the stipulation between the parties that ninety percent of the food stores in Vermont are legally capable of opening on Sundays as a result of both the seven employee and unit pricing exemptions.¹¹² The court then pointed out that the objective of these two provisions was apparently to exempt "small" stores from the closing requirement in that the seven employee exemption places a limitation on the number of employees a store can have and still be exempted,¹¹³ and the unit pricing exemption places a limitation on the amount of income a store can have and still be exempted.¹¹⁴ The court did not "take issue with the initial policy determination that it is appropriate to allow some food stores to open"¹¹⁵ so that "the prohibition does not work a

105. *Id.* at 335, 415 A.2d at 236 (citing *State v. Giant of St. Albans*, 128 Vt. 539, 268 A.2d 739 (1970)). For further discussion see the text accompanying notes 90-91 *supra*.

106. *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)).

107. *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

108. *Id.* at 334, 415 A.2d at 236.

109. *Id.* at 335, 415 A.2d at 236-37 (citing *Pabst v. Commissioner of Taxes*, 136 Vt. 126, 131-34, 388 A.2d 1181, 1184-85 (1978)); *State v. Cadigan*, 73 Vt. 245, 252-53, 50 A. 1079, 1081-82 (1901); Vt. Const. ch. I, art. 7).

110. 138 Vt. at 336-37, 415 A.2d at 237.

111. *Id.* at 336, 415 A.2d at 237.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 337, 415 A.2d at 237.

hardship on the public."¹¹⁶ Nor did the court "find it irrational to make that distinction based on the size of the store in question."¹¹⁷ Bothersome to the court, however, was that the unit pricing exemption also served to exempt from operation of the statute all family owned and operated food stores not part of a chain of stores no matter what their size and income.¹¹⁸ The court called this classification "one of unjustified overinclusiveness"¹¹⁹ and said: "Nothing has been advanced to us nor can we conceive of any rational basis that demonstrates how the expressed ends of the Act are advanced in the slightest by a classification which permits family owned stores of almost any size to remain open."¹²⁰

In view of the deferential standard of review which the court announced it would apply, the interpretations of that standard by the United States Supreme Court,¹²¹ and the criticisms leveled by numerous commentators against the use of the rationality standard for the invalidation of other than inadvertent discrimination,¹²² this holding by the Vermont Supreme Court is disturbing. Indeed, the court itself had noted that "[p]resumably, practical limitations on the size and industriousness of one family place some finite, if undefined, limitation on the size of such businesses."¹²³ Shortly after pointing this out, however, the court discounted the possibility that the legislature may have determined that requiring businesses to be family owned *and* operated was a sufficient size limitation on stores to satisfy even the avowed purpose of the Act.¹²⁴ Here the language of the rationality standard must be reiterated: "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."¹²⁵ The court has dismissed this particular justification of the provision without according that

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See text accompanying notes 42-59 *supra*.

122. See text accompanying notes 62-76 *supra*.

123. 138 Vt. at 336, 415 A.2d at 237.

124. See note 22 *supra*.

125. 138 Vt. at 335, 415 A.2d at 236.

dismissal the discussion necessary to a decisionmaking process sufficiently reasoned to be of assistance in predicting future decisions of the court when faced with similar situations.

The *Shop and Save* court's analysis of the Common Day of Rest Act did not terminate, however, with the finding that there was not a rational relationship between the unit pricing exemption and the express purpose of the Act. The court correctly asserted that in evaluating the rationality of the exemptions "we are not limited to the Act's express purpose, but look to any legitimate public policy objective which can be asserted in its defense."¹²⁶ The state had argued in brief that the Act was, in fact, complex economic legislation with at least one objective being the promotion of small businesses in Vermont.¹²⁷ The court, in answer to this argument, said:

Presumably, that would be a permissible state objective. As we noted above, this is not the objective promoted by this classification. The distinctions among food stores created by [the seven employee and unit pricing exemptions] do not rest on size. They do exclude some large stores from Sunday operation, but only those which are not family operated. Since the classification is not rationally related to the end of promoting small business, that end cannot justify it.¹²⁸

Again, the court has ignored its own previous point that the legislature could have found that the "family owned and operated" requirement places a limit on the size of food stores sufficient to support the statute.¹²⁹

Finally, the court attempted to address squarely the question whether it was a permissible state objective for the statutory provision to accomplish exactly what its words express: to place a burden on all stores in a certain category except those owned and operated by one family. The court said that this clearly would serve

126. *Id.* at 337, 415 A.2d at 237.

127. See text accompanying notes 25-28 *supra*.

128. 138 Vt. at 337, 415 A.2d at 238.

129. See text accompanying note 124 *supra*.

to promote the family ownership of business.¹³⁰ Yet when faced with deciding the constitutionality of such a statutory objective, the Vermont court simply said that "economic discrimination based solely on consanguinity is impermissible"¹³¹ and cited *Goodman v. Kennedy*,¹³² a case decided by the Pennsylvania Supreme Court.

It must be noted that the United States Supreme Court has never indicated that discrimination to promote family ownership is a suspect classification or in any way warrants a higher standard of review than other economic classifications. Indeed, in the 1974 case of *Village of Belle Terre v. Boraas*,¹³³ the Court upheld against equal protection challenges a village zoning ordinance which limited the permissible occupancy of single family houses to traditional families or to persons not legally related so long as any group of such persons did not exceed two individuals.¹³⁴ The Court deferred to the legislative classification by invoking the rational relationship test.¹³⁵ Additionally, *Goodman v. Kennedy*,¹³⁶ cited by the Vermont Supreme Court in support of its proposition, relied

130. 138 Vt. at 337, 415 A.2d at 238.

131. *Id.* at 338, 415 A.2d at 238.

132. 459 Pa. 313, 327, 329 A.2d 224, 231 (1974).

133. 416 U.S. 1 (1974).

134. *Id.* at 2.

135. *Id.* at 7-8. The Court defended the statute against constitutional attack in the following way:

It is not aimed at transients. *Cf. Shapiro v. Thompson*, 394 U.S. 618. It involves no procedural disparity inflicted on some but not on others such as was presented by *Griffin v. Illinois*, 351 U.S. 12. It involves no "fundamental" right guaranteed by the Constitution, such as voting, *Harper v. Virginia Board*, 383 U.S. 663; the right of association, *NAACP v. Alabama*, 357 U.S. 449; the right of access to the courts, *NAACP v. Button*, 371 U.S. 415, or any rights of privacy, *cf. Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438, 453-54. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "'reasonable, not arbitrary'" (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415) and bears "a rational relationship to a [permissible] state objective." *Reed v. Reed*, 404 U.S. 71, 76.

Id.

136. 459 Pa. 313, 329 A.2d 224 (1974).

for its holding¹³⁷ on the United States Supreme Court decision in *Morey v. Doud*,¹³⁸ which was specifically overruled in *New Orleans v. Dukes*.¹³⁹ The result of the *Shop and Save* decision in Vermont is essentially to create a new suspect classification in consanguinity, which will now be an impermissible legislative classification along with race and national origin.¹⁴⁰ This was done in the *Shop and Save* case with virtually no detailed discussion as to why the equal protection clause prohibits such classifications.

Based on its finding that the unit pricing exemption was not rationally related to a permissible state objective, the *Shop and Save* court determined that this portion of the statute should be severed from the remainder.¹⁴¹ In severing the offending provision, however, the court chose only to delete the exception clause of the unit pricing exemption,¹⁴² leaving the statute to read that any business will now be exempted so long as it is primarily engaged in "the sale of food for human consumption."¹⁴³ The court continued by saying:

This determination alone is sufficient to require affirmance of the trial court order. We therefore have no occasion to consider the broader grounds advanced by defendant to challenge the validity of the entire scheme of the Common Day of Rest Act, although these questions are not free from doubt.¹⁴⁴

Justices Daley and Hill concurred in the result of the case, but would have gone further than the majority to hold that the statute as a whole violated the equal protection clause.¹⁴⁵ It is very important to note that these Justices were aware that the majority holding did not square with the United States Supreme Court precedent. The concurring opinion cited the equal protection provision

137. *Id.* at 327, 329 A.2d at 231.

138. 354 U.S. 457 (1957).

139. 427 U.S. 297 (1976). See also text accompanying notes 56-59 *supra*.

140. See text accompanying notes 32-38 *supra*.

141. 138 Vt. at 338, 415 A.2d at 238.

142. *Id.*

143. See text accompanying note 16 *supra*.

144. 138 Vt. at 338, 415 A.2d at 238.

145. *Id.* at 343-44, 415 A.2d at 241 (Daley and Hill, J.J., concurring).

of the state constitution¹⁴⁶ and said: "Therefore, although this act does not violate the undemanding test of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution . . . , We concur in the majority's subtle holding that our state constitution imposes a more rigorous test, which this act cannot meet."¹⁴⁷ While it is true that a state is free to interpret its constitution in any way which it sees fit, the *Shop and Save* case had been argued entirely on the basis of the federal constitution, and it was upon this basis that the majority opinion had been written. The concurring Justices apparently recognized the weakness of the majority opinion's use of the federal constitution and attempted to shore it up by invoking the state constitution. In any event, despite a state court's free reign to interpret its own constitution, the equal protection and due process analysis which has been suggested in this note applies to state constitutional provisions in the same way that it does to those of the federal constitution.

V. CONCLUSION

Vermont's Blue Laws were long in a state of limbo after the *Shop and Save* decision. Numerous attempts to redraft the statute resulted in a great deal of confusion as to what type of statute would satisfy the Vermont Supreme Court.¹⁴⁸ Finally, in May of 1981 the legislature adopted a new Blue Law,¹⁴⁹ one designed to overcome the constitutional objections of the *Shop and Save* case. The primary distinction of the new law is that it limits the exemption for stores to exclude from coverage only those stores "which have no more than 5,000 square feet of interior customer selling space, excluding back room storage, office and processing

146. *Id.* at 343, 415 A.2d at 241. The relevant portion of the Vermont Constitution reads: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community." VT. CONST., ch. I, art. 7.

147. 138 Vt. at 343, 415 A.2d at 241 (citations omitted) (emphasis added).

148. See *The Times Argus* (Barre-Montpelier, VT), March 23, 1981, at 9, col. 3.

149. VT. STAT. ANN. tit. 13, §§ 3351-58 (Supp. 1980) as amended by 1981 Vt. Acts 107 (Adj. Sess.).

space. . . ."¹⁵⁰ The legislature also set out plainly in the statute that one of its purposes is to "promote the economic health of small business enterprises which are essential and fundamental to the economy of the state by creating a commercial environment which allows small businesses the choice of enjoying the benefits of a common day of rest. . . ."¹⁵¹ This statute was immediately violated by some of the large chain stores in Vermont, and the state sued to close them¹⁵² under a new civil injunction section of the statute.¹⁵³ These cases will undoubtedly come before the Vermont Supreme Court within a short time.

The confusion that surrounded the drafting of a new Blue Law resulted from the decisional process employed by the *Shop and Save* court. In attempting to meet the criticisms of commentators that courts have too frequently used the rational relationship test to invalidate statutes with an improper focus on the "means" component (the rational relationship) rather than a proper focus on the "ends" component (the determination of legitimate state objectives), the Vermont Supreme Court went part of the way in at least recognizing that there should be some discussion of what constitutes proper objectives. In the *Shop and Save* decision, however, the court simply declared without further explanation that a particular statutory classification is improper. This is insufficient to give the Vermont practitioner the tools which he requires to evaluate potential future equal protection and due process challenges to economic legislation and, additionally, makes the legislative process one that is too frequently one of trial and error. It can only be hoped that the court in its upcoming determination of the merits of the challenges to the new law will give both the Vermont bar and legislature the guidance they need to fulfill their obligations to the community.

Daniel Murphy

150. *Id.* § 3355(a)(6).

151. *Id.* § 3352.

152. *State v. First National Stores, Inc.*, No. S-198-81 (Vt. Superior Ct., Washington Cty. 1981); *State v. The Grand Union Company*, No. S-197-81 (Vt. Superior Ct., Washington Cty. 1981).

153. VT. STAT. ANN. tit. 13, § 3357 (Supp. 1980) as amended by 1981 Vt. Acts 107 § 5 (Adj. Sess.).