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Equal Protection Under the Pennsylvania Constitution

Russell Gerney*

I. INTRODUCTION

The story of equal protection under the Pennsylvania Constitution is not a story of a steady movement to a particular position. Rather, it is the story of an often confused Pennsylvania Supreme Court, first not finding an equal protection provision under the Pennsylvania Constitution at all, and then finding an equal protection provision in one article only to decide later that it is really in another article. It is the story of the ebb and flow of equal protection analysis under the Pennsylvania Constitution as the Pennsylvania Supreme Court finds independent state constitutional grounds for equal protection beyond that offered by the federal constitution only to hold later that there is no distinction between the equal protection clause of the federal constitution and the equal protection provision of the state constitution. Finally, it is a story of both heritage and promise: the heritage of a tradition of independent judicial thinking making use of the unique properties of the Pennsylvania Constitution; the promise that such thinking can again bear the fruits of liberty promised by the Pennsylvania Constitution.

To understand the story, it is important to understand the sources of equal protection law in Pennsylvania. It is important to examine, in a chronological fashion, how those sources were used by the Supreme Court of Pennsylvania to shape equal protection law in Pennsylvania and how equal protection analysis changed over periods of time. This article will begin by examining the sources of equal protection law in both the federal and the state constitutions cited by the Pennsylvania Supreme Court over the years, followed by a decade by decade examination of leading cases in the area of equal protection under the Pennsylvania Constitution. Finally, there will be a consideration of the current state of

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equal protection analysis under the Pennsylvania Constitution and the directions it might go.

II. SOURCES OF EQUAL PROTECTION LAW IN PENNSYLVANIA

The Supreme Court of Pennsylvania has identified two primary sources of Equal Protection law available for the citizens of Pennsylvania. The first is the Constitution of the United States of America, and the second is the Constitution of the Commonwealth of Pennsylvania.

The Fifth Amendment to the Constitution of the United States is intended as a restraint upon intrusion by the federal government against personal liberties. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States protects those same liberties from intrusion by state governments.

The Pennsylvania Constitution, on the other hand, has no specific Equal Protection Clause. As such, the Supreme Court of Pennsylvania has identified sections of the Pennsylvania Constitution which provide equal protection under the law. The sections that have been identified by the Supreme Court of Pennsylvania are: Article I, Section 1; Article I, Section 17; Article I, Section 26; Article I, Section 28; and Article III, Section 32.

Article I, Section 1, of the Pennsylvania Constitution originated in the Constitution of 1776 in Chapter I, Section I. That section

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1. The Fifth Amendment to the United States Constitution provides:
   No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy or life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for the public uses without just compensation.
   U.S. CONST. amend. V.

2. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:
   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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 law.
   U.S. CONST. amend. XIV, § 1.


4. Unless otherwise specified, all references to the Pennsylvania Constitution refer to the current constitution signed on February 29, 1968.
provides “[t]hat all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.” The constitution of 1790 moved this provision to Article IX, Section I, and provided a title, “Of the equality and rights of men.” The wording of the provision was also slightly changed. The 1790 version provides “[t]hat all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.”

The constitution of 1838 left the provision in Article IX, Section I, but it changed the title to “Rights of life liberty property &c.” The wording of the provision was again slightly changed. The 1838 version provides that “[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

The 1874 constitution restored the provision to Article I, Section 1, and provided a new title, “Equality and rights of men.” The current constitution, ratified in 1968, retained the language and the placement of the provision but added a new title, “Inherent Rights of Mankind.”

Article I, Section 17, of the Constitution first appeared, for equal protection purposes, in the constitution of 1874. The clause was entitled, “Laws ex post facto or implied contracts, irrevocable grants, &c., forbidden.” It provides that “[n]o ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.” While it is true that the previous two constitutions had both prohibited ex post facto laws and laws impairing the obligation of contracts, it is the final clause of this provision, making unlawful the irrevocable grant of any special privileges or immu-

5. PA. CONST. of 1776, art. I, ch. I.
6. PA. CONST. of 1790, art. IX, § I.
7. Id.
8. PA. CONST. of 1838, art. IX, § I.
9. Id.
nities, which is new. This provision was retained in the current constitution, at the same place and with no change in language, except for the title which was changed to "Ex Post Facto Laws; Impairment of Contracts."¹³

Article I, Section 26, of the Pennsylvania Constitution first appeared on May 16, 1967, as an amendment to the constitution of 1874 bearing the title "No Discrimination by Commonwealth and Its Political Subdivisions."¹⁴ The provision provides that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."¹⁵ This provision was retained at Article I, Section 26 with no change in either its language or title.

Article I, Section 28, of the Pennsylvania Constitution was added by amendment to the current constitution on May 18, 1971.¹⁶ Entitled "Prohibition Against Denial or Abridgment of Equality of Right Because of Sex," this provision provides that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."¹⁷

The final section providing equal protection is Article III, Section 32. This provision was originally in Article III, Section 7, of the 1874 constitution. Entitled "Limitations of special legislation, &c." it provides:

The General Assembly shall not pass any local or special law Authorizing the creation, extension or impairing of liens; Regulating the affairs of counties, cities, townships, wards, boroughs, or school districts; Changing the names of persons or places; Changing the venue in civil or criminal cases; Authorizing the laying out, opening altering or maintaining roads, highways, streets, or alleys; Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State; Vacating roads, town-plats, streets or alleys; Relating to cemeteries, graveyards, or

¹³. PA. CONST. art. I, § 17.
¹⁵. Id.
public grounds not of the State; Authorizing the adoption of legitimatization of children; Locating or changing county seats, erecting new counties or changing county lines: Incorporating cities, towns, villages, or changing their charters; For the opening and conducting of elections, or fixing or changing the place of voting; Granting divorces; Erecting new townships or boroughs, changing township limits or school districts. Creating offices, or prescribing the powers and duties of officers in counties, cities, boroughs, townships, election or school districts; Changing the law of descent of succession; Regulating the practice of jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before the courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate; Regulating the fees, or extending the powers and duties of aldermen, justices of the peace, magistrates or constables; Regulating the management of public schools, the building or repairing of school houses, and raising of money for such purposes; Fixing the rate of interest; Affecting the estates of minors or persons under disability, except after due notice to all parties in interest, to be recited in the special enactment; Remitted fines, penalties, and forfeitures, or refunding moneys legally paid into the treasury; Exempting property from taxation; Regulating labor, trade, mining, manufacturing; Creating corporations, or amending, renewing or extending the charters thereof; Granting to any corporation, association, or individual any special or exclusive privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track; Nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed: Nor shall any law be passed granting powers or privileges in any case where the granting of such powers and privileges shall have been provided for by the general law, nor where the courts have jurisdiction to grant the same or give the relief asked for. 18

This rather lengthy provision was revised and moved to Article III, Section 32, in the 1968 constitution. Entitled "Certain Local and Special Laws," it now provides:

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.¹⁹

Each of the listed sections has been utilized in equal protection analysis at one time or another since the ratification of the current constitution in 1968. However, in order to get the best sense of the history of equal protection analysis under the current constitution, the best approach is a chronological examination of equal protection cases.

¹⁹ PA. CONST. art. III, § 32.
III. EQUAL PROTECTION IN THE 1970s—THE ROAD TO KROGER

During the 1970s, the majority of equal protection analyses in Pennsylvania were conducted pursuant to Article III, Section 32, of the constitution. Article I, Section 1, was used often in zoning cases in substantive due process analyses. Other sections of the Pennsylvania Constitution appear infrequently in equal protection discussions.

The first cases to consider, however, pre-date the current constitution. There was, of course, equal protection analysis in Pennsylvania prior to 1968. Two cases are worth noting. The first is *Seabolt v. Commissioners of Northumberland County.* 20 This case was decided pursuant to, *inter alia,* Article III, Section 7, of 1874 constitution. The case concerned an act by the General Assembly authorizing county commissioners to restore certain bridges which had been destroyed by "ice, flood or otherwise (as e.g., by fire)." 21 *Seabolt* is relevant because it is the genesis of the rational basis test in Pennsylvania. The court held that:

Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is not wisdom, but good faith in the classification. 22

This language was cited in the case of *Dufour v. Maize.* 23 In *Dufour,* a strip mining company challenged an act by the General Assembly requiring it to reclaim land upon which strip mining had taken place. 24 The strip mining company argued that the act created an unconstitutional classification subjecting strip mining companies to regulations not applied to drift or deep mining operations. 25 The Supreme Court of Pennsylvania found the classifi-

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20. 41 A. 22, 23 (Pa. 1898).
22. *Id.*
23. 56 A.2d 675 (Pa. 1948).
24. *Dufour,* 56 A.2d at 676.
25. *Id.* at 677-78.
cation to be constitutional. Although the term "rational basis" was not specifically used in either the Seabolt or the Dufour opinions, both were cited in Freezer Storage, Inc. v. Armstrong Cork Company in the context of rational basis analysis under the Pennsylvania Constitution.

Meanwhile, Appeal of Girsh was the first in a line of cases in the 1970's wherein the Supreme Court of Pennsylvania used Article I, Section 1, for purposes of making a substantive due process analysis. This was specifically stated in Surrick v. Zoning Board of the Township of Upper Providence, where the court stated that "this Court has employed a substantive due process analysis in reviewing zoning schemes. . . ." This line of cases is significant insomuch as it was part of the development of the rational basis review in Pennsylvania.

However, before looking at the line of cases decided pursuant to Article III, Section 32, it is appropriate to consider McIlvaine v. Pennsylvania State Police. This was an age discrimination case in which the plaintiff argued that the Pennsylvania State Police's mandatory retirement age violated Article I, Section 26, of the Pennsylvania Constitution. The majority, in a rather unremarkable opinion, noted some procedural irregularities and then affirmed the decision of the Commonwealth Court without addressing the issue of equal protection. In a vigorous dissent, Justice Roberts opined that "the right to employment free from age discrimination is a civil right protected by both the Human Relations Act and the 1968 Constitution." Furthermore, according to Justice Roberts, mandatory retirement based solely on age was discriminatory and therefore violated Article I Section 26 of the Constitution. Justice Roberts also argued that the mandatory retirement age also violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. However, he distinguished his equal protection argument from his

26. Id.
28. Freezer Storage, 382 A.2d at 718.
31. Surrick, 382 A.2d at 108.
33. McIlvaine, 309 A.2d at 802.
34. Id. at 803.
35. Id. at 805 (Roberts, J., dissenting).
36. Id.
37. Id. at 807.
argument pursuant to Article I, Section 26, by writing that there were two separate and distinct grounds for his dissent.  

Justice Roberts did not openly argue that Article I, Section 26, of the Pennsylvania Constitution provided equal protection under the law and thus was the equal protection clause of the Pennsylvania Constitution. In fact, it could be argued that because he distinguished Article I, Section 26, from the Fourteenth Amendment, he actually argued that Article I, Section 26, did not serve as Pennsylvania's equal protection clause. However, his analysis under Article I, Section 26, did have some of the hallmarks of an equal protection analysis. He wrote about civil rights, discriminatory denial of civil rights, classifications and placing the burden of justifying the classification on the Commonwealth. All of these are terms, phrases and ideas often found in federal equal protection analyses.

Justice Roberts' dissent, however, does not appear to have had a significant impact on equal protection analysis in Pennsylvania. Article I, Section 26, did not become important in equal protection analysis until over a decade later.

True equal protection analysis under the Pennsylvania Constitution seems to have its genesis in a 1974 case—*Estate of Cavill*. Although Article III, Section 32, was mentioned only in a footnote, it was mentioned in the same context as the Equal Protection Clause of the Fourteenth Amendment. Furthermore, the Supreme Court of Pennsylvania engaged in a discussion of the tests to be used in an equal protection analysis. While it is true that these discussions were in the context of the Fourteenth Amendment, the tests discussed later will be used by the Supreme Court of Pennsylvania in interpreting the Pennsylvania Constitution.

The majority opinion, written by Justice Roberts, provided that the appropriate test in an equal protection case is whether or not a classification is "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation." Here, the majority quoted language from a 1920 case decided by the Supreme Court of the

38. *Id.* at 807 n.12.


42. *Cavill*, 329 A.2d at 505 n.7.

43. *Id.* at 505.
United States—Royster Guano Co. v. Virginia. In his dissent, Justice Pomeroy argued that the proper test is the rational basis test, as articulated by the Supreme Court of the United States in a line of cases from the late 1960's and early 1970's. The dissent also acknowledged a second test (although it did not use the term "strict scrutiny") that must be used when a suspect classification or a fundamental right is implicated.

While this case did almost nothing to further equal protection analyses under the Pennsylvania Constitution itself, it did present the relevant tests and the dichotomy between the "fair and substantial relationship" test of Royster Guano and the "rational basis" test later articulated by the Supreme Court of the United States. This dichotomy would continue for some years in the Supreme Court of Pennsylvania despite the fact that the Supreme Court of the United States had essentially disavowed the "fair and substantial relationship" test of Royster Guano in favor of the "rational basis" test.

The next significant case was Tosto v. Pennsylvania Nursing Home Loan Agency. In this case the plaintiff argued that a law passed by the Legislature which provided money in the form of loans to nursing homes that met all the Federal and state regulations for acceptance of Medicaid patients, while denying those moneys to nursing homes which did not meet those regulations, was unconstitutional under the Pennsylvania Constitution. Here, the majority held that the Legislature was not forbidden from creating special laws provided that the law has "some rational relationship to a proper state purpose." Again, we see terminology associated with equal protection analysis, even though the Pennsylvania Supreme Court still did not identify it as such in this case. However, only a few months later, the court found that it was doing equal protection analysis in Tosto when it decided Baltimore & Ohio Railroad Co. v. Commonwealth.

44. 253 U.S 412 (1920).
46. Cavill, 329 A.2d at 507 n.3 (Pomeroy, J., dissenting).
49. Tosto, 331 A.2d at 204.
50. Id.
51. 334 A.2d 636 (Pa. 1975)
In *Baltimore & Ohio Railroad Co.*, the railroad argued that a law passed by the Legislature, directing it to adopt weekly pay periods for certain employees,\(^{52}\) violated, *inter alia*, the Fourteenth Amendment to the U.S. Constitution and Article III, Section 32, of the Pennsylvania Constitution because the law discriminated against the railroad without any rational basis for the distinction.\(^{53}\) The Supreme Court of Pennsylvania found the law to be constitutional.\(^{54}\)

There were several important holdings in *Baltimore & Ohio Railroad Co.* The first was that content of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Article III, Section 32, of the Pennsylvania Constitution were not significantly different.\(^{55}\) The second was a reiteration of the “rational relationship to a proper state purpose” standard.\(^{56}\) Again, the Supreme Court of Pennsylvania refused to openly state that it was doing an equal protection analysis pursuant to the state constitution while it used equal protection terminology.

Finally, in July, 1975, the Supreme Court of Pennsylvania explicitly announced the existence of an equal protection provision in the Pennsylvania Constitution in *Moyer v. Phillips*.\(^{57}\) *Moyer* involved a challenge to a state survival statute, which provided that all causes of action survived the death of the defendant except actions in slander or libel.\(^{58}\) The plaintiff brought an action for libel against the defendant, but the defendant died before the matter went to trial.\(^{59}\) The trial court dismissed the plaintiff’s case on the basis that the cause of action died with the defendant.\(^{60}\) The plaintiff argued that the exception of libel from the survival statute was an arbitrary denial of equal protection.\(^{61}\) The Supreme Court of Pennsylvania agreed.\(^{62}\)

Specifically, the court held that reputation was a fundamental right.\(^{63}\) It also held that both the United States and Pennsylvania

52. *Baltimore & Ohio Railroad Co.*, 334 A.2d at 638.
53. *Id.*
54. *Id.* at 639.
55. *Id.* at 643.
56. *Id.*
57. 341 A.2d 441 (Pa. 1975).
59. *Id.* at 441.
60. *Id.*
61. *Id.* at 442.
62. *Id.*
constitutions contain an equal protection provision.\textsuperscript{64} The majority opinion, however, did not identify where the equal protection provision of the Pennsylvania Constitution was located.\textsuperscript{65} Furthermore, despite the fact that the majority held that reputation is a fundamental right,\textsuperscript{66} the test used to find the statute unconstitutional was the "fair and substantial relationship" test of \textit{Royster Guano}, rather than a strict scrutiny test.\textsuperscript{67}

Nevertheless, despite its faults, \textit{Moyer} was a highly significant opinion. For the first time, the Supreme Court of Pennsylvania openly held that the Pennsylvania Constitution had an equal protection provision, and that this provision was within Article III, Section 32.

The next important decision by the Supreme Court of Pennsylvania, \textit{Adoption of Walker},\textsuperscript{68} involved Article I, Section 28. While Article I, Section 28, was specifically written to prohibit discrimination based on sex, rather than on a broader equal protection basis, the decisions of the Supreme Court of Pennsylvania pursuant to this section are part of, and add to, the general corpus of equal protection case law in this Commonwealth.

\textit{Walker} dealt with the Adoption Act passed by the Legislature, which provided that in the case of an illegitimate child, the consent of the natural father was not necessary should another person wish to adopt that child.\textsuperscript{69} In \textit{Walker}, the parental rights of the natural father were terminated despite the fact that he received no notice of proceedings to terminate those rights, and thus, his child was adopted without his consent.\textsuperscript{70} The Pennsylvania Supreme Court held that the Adoption Act violated Article I, Section 28, of the Pennsylvania Constitution because the Act made an impermissible distinction between unwed mothers and unwed fathers based solely on sex.\textsuperscript{71} The court also noted that the Act violated the Fourteenth Amendment because the Act denied equal protection of the laws to unwed fathers as opposed to all other types of parents.\textsuperscript{72}

\textsuperscript{64} \textit{Id.}
\textsuperscript{65} That piece of information comes from the concurring opinion of Justice Roberts who locates it in Article III, Section 32. \textit{Id.} at 447 n.5.
\textsuperscript{66} \textit{Id.} at 443.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} 360 A.2d 603 (Pa. 1976).
\textsuperscript{69} \textit{Walker}, 360 A.2d at 605.
\textsuperscript{70} \textit{Id.} at 605.
\textsuperscript{71} \textit{Id.} at 606.
\textsuperscript{72} \textit{Id.} at 606 n.11.
Again, we see the Supreme Court of Pennsylvania making an equal protection type analysis without specifically holding that it was in fact doing so. Thus, *Walker* suggests that Article I, Section 28, implicated equal protection without making a specific holding that it does so. The result was a lack of clarity regarding the analysis to be used where Article I, Section 28, was implicated. It would be some time later before the Supreme Court of Pennsylvania would clarify how Article I, Section 28, should be analyzed.

Meanwhile, the Supreme Court of Pennsylvania continued its general equal protection analysis pursuant to Article III, Section 32. In *Freezer Storage*, the court considered the constitutionality of a statute of repose, which afforded protection to builders (i.e., engineers, architects, contractors and the various tradesmen involved in constructing a building), while not affording the same protection to others involved in the improvement of real estate, such as landowners and suppliers of building materials. The Pennsylvania Supreme Court held that the statute did not offend the Pennsylvania Constitution. The problem with *Freezer Storage* is that it is very difficult to ascertain whether the Court was doing an equal protection analysis, or if it decided the case on the more narrow "special law" ground also found in Article III, Section 32. On the one hand, the *Freezer Storage* court focused closely on the term "special law," which was found in Article III, Section 32. However, on the other hand, it used an equal protection test in finding the statute constitutional.

The opinion was authored by Justice Roberts, who also authored the majority opinion in both *Estate of Cavill* and *Baltimore and Ohio Railroad*. Justice Roberts did not find an equal protection provision within the Pennsylvania Constitution in those earlier opinions, and he failed to do so here. The irony is that even though he carefully avoided using the term "equal protection" and he avoided any mention of the Fourteenth Amendment, he did use an equal protection test in doing his analysis, thus setting the stage for an equal protection decision based solely upon the Pennsylvania Constitution and independent of any analysis promulgated by the Supreme Court of the United States.

73. *Freezer Storage*, 382 A.2d at 718.
74. *Id.*
75. *Id.*
76. *Id.*
The Pennsylvania Supreme Court did just that in *Kroger Co. v. O'Hara Township.* In *Kroger,* the court was asked to decide the constitutionality of Pennsylvania’s Sunday Trading Laws, commonly called Blue Laws, which criminalized many commercial and business activities if they were performed on Sundays. The court held that the Blue Laws denied Kroger (and the other appellants in the case) “the equal protection guaranteed by our Pennsylvania Constitution....” Here, the Pennsylvania Supreme Court, finally and explicitly, held that the equal protection provision of the Pennsylvania Constitution was in Article III, Section 32. Furthermore, the *Kroger* court reiterated that the test to be used in examining a statute, when challenged on an equal protection ground, was the “fair and substantial relationship” test. Finally, in yet another show of judicial independence, the Pennsylvania Supreme Court acknowledged the federal test for examining state statutes that touch upon explicit or implicit constitutional rights, but then proceeded to use the “fair and substantial relationship” test it had articulated in *Estate of Cavill* and *Moyer.* The end result was a decision solely based upon the state constitution using an equal protection test adopted by the Commonwealth’s highest court. This was truly equal protection analysis under the Pennsylvania Constitution.

The next significant case was *In re “B,”* decided about a year after *Kroger.* The issue in *In re “B”* was whether a psychiatrist could be compelled by a court to release psychiatric records without the consent of the patient. The Supreme Court of Pennsylvania held that a patient’s right to prevent the disclosure of such records was constitutionally based as part of an individual’s right of privacy. Furthermore, the court held that, in certain respects, the Pennsylvania Constitution provided “more rigorous and explicit protection for a person’s right of privacy” than the U.S. Constitution.

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77. 392 A.2d 266 (Pa. 1978).
78. *Kroger,* 392 A.2d at 267.
79. *Id.* at 273.
80. *Id.*
81. *Id.* at 275.
82. *Id.* at 274-75
83. 394 A.2d 419 (Pa. 1978).
84. *In re “B,”* 394 A.2d at 420-21.
85. *Id.* at 425.
86. *Id.*
While finding a right of privacy was not itself groundbreaking, the important aspect of In re "B" was the fact that the Court indicated that the Pennsylvania Constitution provided more protection for the right than the U.S. Constitution. Thus, by way of logical extension, the Pennsylvania Supreme Court's holding provided that the courts of this Commonwealth need not be bound by the rulings of the Supreme Court of the United States in the area of right of privacy, provided that the grounds for their rulings were based on the state constitution and that such rulings did not provide less protection than that afforded by the federal constitution.

The final significant case of the 1970's was Danson v. Casey. The dissent was another step forward for independent equal protection analysis under the Pennsylvania Constitution. The majority opinion, however, was a foreshadowing of the coming retreat from the boldness of Kroger.

In Danson, the appellants argued that because the Philadelphia School District had and would continue to have inadequate revenues, the pupils of the schools in that district were receiving a truncated and limited program of educational services. The appellants' arguments focused on two sections of the Pennsylvania Constitution—Article III, Section 32, and Article III, Section 14, which provided that "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." The majority opinion found no constitutional violation in the way the Philadelphia School District was funded, and thus, it affirmed the decision of the Commonwealth Court dismissing appellants' action.

The majority's opinion was remarkable in what it did not say. Despite the fact that Article III, Section 32, had been identified as the equal protection provision of the Pennsylvania Constitution, the majority quoted language from that section which prohibited the General Assembly from regulating, inter alia, the affairs of school districts. There was no equal protection analysis in the majority opinion. Furthermore, aside from mentioning that appellants' contended that Article III, Section 14, was also implicated, the majority did not analyze that constitutional provision.

87. 399 A.2d 360 (Pa. 1979).
88. Danson, 399 A.2d at 362.
89. Id. at 362.
90. Id. at 367.
91. Id. at 362 n.2.
In his dissent, Justice Manderino, on the other hand, stated that the appellants had in fact challenged the funding of the Philadelphia School District on an equal protection ground. Furthermore, Justice Manderino opined that pursuant to Article III, Section 14, of the Pennsylvania Constitution, education was a fundamental right, and thus, the funding of the school district must be strictly scrutinized.

The dichotomy of this opinion was representative of the forces that shaped equal protection analysis in Pennsylvania during the 1970's. On the one hand, the majority opinion, authored by the same Justice Roberts who authored the majority opinions in Estate of Cavill, Baltimore and Ohio Railroad and Freezer Storage, sought to limit the scope of Article III, Section 32, and use it only in its narrower, literal meaning. The dissent, authored by Justice Manderino, who had also authored the majority opinions in Kroger and In re "B," sought to read not just Article III, Section 32, but the entire Pennsylvania Constitution in a broader, more expansive manner.

In the long run, however, it seems that during the 1970's, the Pennsylvania Supreme Court more often read the Pennsylvania Constitution in a more expansive manner in the area of equal protection. In the 1970's, the court declared that both reputation and privacy were fundamental rights protected by the Pennsylvania Constitution, and that the Pennsylvania Constitution afforded greater protection of the right of privacy than the U.S. Constitution. Furthermore, the court published a dissenting opinion stating that education was also a fundamental right. While that was not binding precedent, it could be used as a persuasive opinion at a later date.

The 1970's also produced significant decisions in terms of equal protection. The Pennsylvania Supreme Court also identified Article III, Section 32, as the equal protection provision in the Pennsylvania Constitution and provided that the appropriate test under that provision was the "fair and substantial relationship" test.

Finally, the 1970's also produced a significant decision in the area of gender discrimination. In Walker, the Pennsylvania Supreme Court held that under Article I, Section 28, unwed fathers must be afforded the same protection as unwed mothers under the law.

92. Id. at 369 (Manderino, J., dissenting).
93. Danson, 399 A.2d at 371 (Manderino, J., dissenting).
IV. EQUAL PROTECTION IN THE 1980'S—THE SWITCH IN PARKER WHITE METAL

The 1980's can be divided into two parts: before Parker White Metal and after Parker White Metal. In Parker White Metal, the Supreme Court of Pennsylvania found that the equal protection provision of the Pennsylvania Constitution was not in Article III, Section 32, but in Article I, Section 26.

However, there were important cases in the 1980's which predated Parker White Metal. The first of these was Pittsburgh Corning Corporation v. Bradley. This case dealt with a challenge to the constitutionality of Philadelphia County's Court of Common Pleas decision to create a separate docket with special rules to handle asbestos litigation. The Philadelphia Court of Common Pleas allowed the asbestos calendar judge on the asbestos docket to assign any asbestos case to a judge for a bench trial, after which either party could demand a de novo jury trial. The petitioner's contention was that because these special rules only applied to asbestos litigation, they were "violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article III, Section 32, of the Pennsylvania Constitution." The Pennsylvania Supreme Court found no violation of either section.

The interesting part of this decision is the way in which the equal protection issue was couched. Looking at the language quoted above, it seems that Justice Roberts found that equal protection was only in the Fourteenth Amendment rather than in both the Fourteenth Amendment and Article III, Section 32. It is also worthy to note that Justice Manderino had died, and thus, he was no longer serving on the Supreme Court of Pennsylvania when this decision was handed down.

While it may seem to be an exercise in minutiae to examine one phrase in a decision, that phrase is important because it was indicative of the way Article III, Section 32, would become minimized by the Pennsylvania Supreme Court during the 1980's. This minimization continued in Commonwealth v. Hicks, where

95. 453 A.2d 314 (Pa. 1982).
96. Pittsburgh Corning, 453 A.2d at 315.
97. Id.
98. Id. at 317.
99. Id.
100. 466 A.2d 613 (Pa. 1983).
Chief Justice Roberts noted the tests used by the United States Supreme Court in making an equal protection analysis. He then referred to the "prohibition against special legislation contained in Article III, Section 32," and cited Baltimore and Ohio Railroad. His cite, however, was not to the part of that decision which held that the content of the Equal Protection Clause and Article III, Section 32, were not significantly different, but rather, he cited to the part of that decision where the court discussed the appropriate test to use. In so doing, Chief Justice Roberts attempted to separate Article III, Section 32, from equal protection analysis. This separation, however, does not appear to be an attempt to establish an independent state constitutional ground for equal protection claims; rather, it seems an attempt to limit equal protection claims in Pennsylvania to federal law grounds and the decisions of the United States Supreme Court.

This separation continued in a case decided only two days after Hicks: Astemborski v. Susmarski. Ironically, this case also signaled a return to independent equal protection analysis. Astemborski involved a constitutional challenge to a statute of limitations which provided that all actions to establish the paternity of a child born out of wedlock must be commenced within six years of the child's birth. The Pennsylvania Supreme Court identified the primary issue as "whether the six year statute of limitations violate[d] equal protection guarantees of the Fourteenth Amendment to the United States Constitution and of Article I, [Section] 26, of the Pennsylvania Constitution." Furthermore, this case reinstated a judgment that had been vacated by the United States Supreme Court, although the Pennsylvania Supreme Court held that their original holding had been correct under federal law. This case was significant for several reasons. First, and most obviously, there was an explicit declaration by Pennsylvania's highest court that Article I, Section 26, of the Pennsylvania Constitution was the equal protection provision. Second, this case was important due to the fact that a vacated judgment was reinstated.

101. Hicks, 466 A.2d at 615.
102. Id. (citing B&O Railroad, 334 A.2d at 636, 643).
103. B&O Railroad, 334 A.2d at 643.
104. Hicks, 466 A.2d at 615.
106. Astemborski, 466 A.2d at 1019.
107. Id.
108. Id. at 1018-19.
At first glance, the reinstatement of a vacated judgment would seem to indicate an independence from federal equal protection analysis; however, a close reading of the case clearly shows that the Pennsylvania Supreme Court continued to rely on federal case law in making its decision. Nevertheless, while this does not have the significance of a reinstatement based upon equal protection under the Pennsylvania Constitution, it does indicate a small level of independence from federal equal protection analysis.

The spirit of independent analysis in Astemborski was also seen in Hartford Accident and Indemnity Company v. Insurance Commissioner of the Commonwealth of Pennsylvania. In Hartford, a complaint was lodged with the Insurance Commissioner by a male driver who contended that Hartford’s policy of charging unmarried men higher premiums than those charged to unmarried women was in violation of the Rate Act’s prohibition of “unfairly discriminatory” rates. The Insurance Commissioner, interpreting the Rate Act’s prohibition in light of Article I, Section 28, of the Pennsylvania Constitution agreed. Hartford filed a petition for review with the Commonwealth Court, which affirmed the Insurance Commissioner’s decision. The Supreme Court of Pennsylvania affirmed the decision of the Commonwealth Court.

The most important part of the decision involved a discussion of the “state action” doctrine, where Chief Justice Nix wrote the following:

Further, the notion that the interpretation of this insurance statute involves the concept of “state action” is incorrect in this context. The “state action” test is applied by the courts in determining whether, in a given case, a state’s involvement in private activity is sufficient to justify the application of a federal constitutional prohibition of state action to that conduct. The rationale underlying the “state action” doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law.

110. Hartford, 482 A.2d at 543-44.
111. Id. at 544.
112. Id.
113. Id. at 549.
The language of that enactment, not a test used to measure the extent of federal constitutional protections is controlling.  

Clearly, the Pennsylvania Supreme Court was making this decision based upon independent state constitution grounds. Thus, in the narrower area of equal protection in terms of gender, the Court showed a willingness to eschew federal case law and looked to the constitution and case law of Pennsylvania.

Meanwhile, as applied to the other areas of equal protection, the Pennsylvania Supreme Court seems not to have known which section of the Pennsylvania Constitution provided equal protection. This confusion is amply demonstrated when Astemborski is compared to Pennsylvania Liquor Control Board v. Spa Athletic Club.

The issue in Spa Athletic Club concerned the revocation of the club's liquor license pursuant to a Pennsylvania statute, which provides that an establishment's liquor license must be returned to the Pennsylvania Liquor Control Board (PLCB) for safekeeping if, for some reason beyond the licensee's control, the establishment is not in operation for fifteen consecutive days. If the establishment was a private club the licensee had two years to resume operations, but a non-club establishment had an indefinite period of time provided that the resumption of operation remained beyond the licensee's control. The Spa Athletic Club had had its license revoked by the PLCB after the club remained inoperative for two consecutive years. The Court of Common Pleas of Erie County found the statute to be an unconstitutional denial of equal protection. The Supreme Court of Pennsylvania reversed the decision of the Erie court and reinstated the decision of the PLCB.

There were two significant holdings in this decision. The first was that "the equal protection clause and the prohibition of special legislation [were] substantially similar." This first holding, made approximately a year after the Astemborski Court found the equal protection provision of the Pennsylvania Constitution to be in Article I, Section 26, unfortunately only added confusion to

114. Id. at 549 (emphasis added).
116. Spa Athletic Club, 485 A.2d at 733-34.
117. Id. at 734.
118. Id. at 733-34.
119. Id. at 734.
120. Id. at 736.
121. Spa Athletic Club, 485 A.2d at 734.
equal protection analysis. The second significant holding, however, provided greater clarity in the area of equal protection under the Pennsylvania Constitution.

In its second holding, the Pennsylvania Supreme Court quoted \textit{James v. Southeastern Pennsylvania Transportation Authority},\textsuperscript{122} and reiterated the standards of judicial review to be used in an equal protection analysis:

The first type—classifications implicating neither suspect classes nor fundamental rights—will be sustained if it meets a “rational basis” test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. Finally, in the third type of cases, if “important” though not fundamental rights are affected by the classification, or if “sensitive” classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review.\textsuperscript{123}

Furthermore, the court spoke to allocation of burden by holding that “[t]he burden must remain upon the person challenging the constitutionality of the legislation to demonstrate that it does not have a rational basis. Whether the Pennsylvania Supreme Court’s interpretation of federal law was accurate is irrelevant to this discussion because the court used these three standards to interpret not just the federal constitution, but also the Pennsylvania Constitution, as evidenced by its holding that because the Fourteenth Amendment and Article II, Section 32, are substantially similar, they are to be treated “together in our discussion of the constitutional issue.”\textsuperscript{124}

The Pennsylvania Supreme Court clarified the dichotomy, created by \textit{Astemborski} and \textit{Spa Athletic Club} in equal protection law a year later in \textit{Fisher v. Department of Public Welfare},\textsuperscript{125} and in so doing, the court provided a clear and concise opinion of equal protection law in Pennsylvania.

\textsuperscript{122} 477 A.2d 1302 (Pa. 1984).
\textsuperscript{123} \textit{Spa Athletic Club}, 485 A.2d at 734 (quoting \textit{James}, 477 A.2d at 1302 (citations omitted)).
\textsuperscript{124} \textit{Id.} at 734.
\textsuperscript{125} 502 A.2d 114 (Pa. 1985).
The case had its genesis in a provision of the Public Welfare Code, which provided that no public funds would be expended to provide abortions, except where a physician certified in writing that the procedure was necessary to protect the life of the mother or in cases where the pregnancy was the result of rape or incest, provided that the rape was reported to the police within 72 hours, or the incest was reported to the police within 72 hours from when the woman first learned she was pregnant.126 Trial was held before the Commonwealth Court. The presiding judge held that the statute violated the Pennsylvania Constitution and that portions of it also violated both federal and state rights to privacy.127 The Commonwealth Court, sitting en banc, affirmed the trial judge's decision regarding the rape and incest provisions of the statute, but it overturned the judge's decision regarding the restricting of funding for abortions only to life threatening situations.128 The plaintiffs appealed from the en banc panel's holding regarding the restriction on abortion funding on equal protection grounds based on Article I, Section 1, and Article III, Section 32, non-discriminatory grounds as provided by Article I, Section 26, and on gender equality grounds based on Article I, Section 28.129 The Pennsylvania Supreme Court began its analysis pursuant to the state constitution by holding that Article III, Section 32, when combined with Article I, Section 1, of the Pennsylvania Constitution, provided equal protection under the law for citizens of Pennsylvania.130 The court then reaffirmed its earlier holding in PLCB v. Spa Athletic Club by again stating that there were three standards of review applicable in an equal protection case: strict scrutiny, intermediate scrutiny and rational basis.131 The court then held that strict scrutiny applies when a right is fundamental, that is, a right found in the Pennsylvania Constitution, or when the statute affects a suspect class, and that in order to survive strict scrutiny, the state must be able to show a compelling interest.132 Intermediate scrutiny applies when either an important interest, generally described as a liberty interest or a benefit vital to the individual, has been affected or when a sensitive, though

126. Fisher, 502 A.2d at 117.
127. Id.
128. Id.
129. Id. at 117-18.
130. Id. at 120.
131. Fisher, 502 A.2d at 121.
132. Id. at 121-22.
not suspect, classification has been made.\textsuperscript{133} To survive intermediate scrutiny, the governmental interest must be important, the classifications must be drawn so as to be closely related to the objectives of the legislation and a person denied a benefit must be permitted to challenge that denial “on the grounds that his particular denial would not further the governmental purpose of the legislation.”\textsuperscript{134} Lastly, the court held that in order for a classification within a piece of legislation to survive a constitutional attack under the rational basis test, the classification “need only be directed at the accomplishment of a legitimate governmental interest, and to do so in a manner which is not arbitrary or unreasonable.”\textsuperscript{135}

While it is true that none of these holdings are ground-breaking, the Pennsylvania Supreme Court had not previously provided such clear direction in the field of equal protection analysis. In that regard, this decision is significant.

The Pennsylvania Supreme Court then moved on to interpret Article I, Section 26. Here, the court held that Article I, Section 26, made “more explicit the citizenry’s constitutional safeguards not to be harassed or punished for the exercise of their constitutional rights. It can not however be construed as an entitlement provision . . . .”\textsuperscript{136} Thus, “Article I, [Section] 26, does not in itself define a new substantive civil right.”\textsuperscript{137} The proper standard of review when analyzing this section is what “has sometimes been referred to as the ‘penalty’ analysis, whereby the focus is whether a person has been somehow penalized for the exercise of a constitutional freedom.”\textsuperscript{138}

Lastly, the Pennsylvania Supreme Court looked to Article I, Section 28, commonly known as the Equal Rights Amendment. First, the court cited and reaffirmed an earlier decision which held the following:

The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal

\textsuperscript{133} Id. at 122.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Fisher, 502 A.2d at 123.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 124.
rights and legal responsibilities. The law will not impose different burdens upon the members of a society based on the fact that they may be man or woman.\textsuperscript{139}

The Pennsylvania Supreme Court then noted that distinctions which "rely on and perpetuate stereotypes as to the responsibilities and capabilities of men and women are an anathema to the principles of the [Equal Rights Amendment]."\textsuperscript{140} That is tempered, however, with the holding that "the [Equal Rights Amendment] 'does not prohibit differential treatment among the sexes when, as here that treatment is reasonable and genuinely based on physical characteristics unique to one sex.'"\textsuperscript{141} To illustrate the difference, the court noted that it struck down a school district regulation which required women who were more than five months pregnant to resign on the presumption that such women were disabled as a result of their pregnancy while not requiring men, who might be temporarily disabled from a variety of illnesses, to resign from their employment.\textsuperscript{142} Whereas, in the instant matter, "the decision whether or not to carry a fetus to term is so unique as to have no concomitance in the male of the species."\textsuperscript{143}

The Pennsylvania Supreme Court seems to be saying that the key aspects of an analysis under Article I, Section 28, are whether the distinctions merely perpetuate old stereotypes or whether they are based on genuine physiological differences between men and women.

It is also significant to note that this was a unanimous decision by the Pennsylvania Supreme Court—there were neither dissenting nor concurring opinions. While it is true that a holding does not carry greater precedential weight or value because of a unanimous court, it is also true that such holdings carry a certain moral force. On a practical level, a unanimous decision precludes a later party from taking up a dissenting or concurring opinion and asking a court to change the law based upon that dissent or concurrence. The \textit{Fisher} court, because it was a unanimous court and because it fully analyzed the relevant parts of the Pennsylvania Constitution and provided the standards of review to be used, provided a level of clarity to equal protection analysis here-
tofore unseen in Pennsylvania. No matter what a person's position on abortion, this decision added a great deal in clarifying and regularizing equal protection analysis in Pennsylvania.

Finally, it should be noted that the Pennsylvania Supreme Court found no violation of any provision of the Pennsylvania Constitution and affirmed the holding of the Commonwealth Court en banc.\textsuperscript{144}

The clarity provided by the Fisher Court in December of 1985, however, was short-lived. In October, 1986, the Pennsylvania Supreme Court decided two cases which, while not explicitly overruling Fisher, completely changed equal protection analysis in Pennsylvania.

The first case, which will be touched upon only briefly, was Smith v. City of Philadelphia.\textsuperscript{145} This case, decided on October 3, 1986, provided an important holding and an important point in the dissent. In the majority opinion, Justice Flaherty reaffirmed that Article III, Section 32, was the equal protection provision of the Pennsylvania Constitution.\textsuperscript{146} However, Justice Larsen, in his dissent, wrote that the equal protection provision in the Pennsylvania Constitution is in Article I, Section 26.\textsuperscript{147} Six days later, the Pennsylvania Supreme Court decided Commonwealth v. Parker White Metal Co.\textsuperscript{148}

Parker White Metal sounds the death knell for equal protection analysis under Article III, Section 32, of the Pennsylvania Constitution. While the demise of equal protection analysis pursuant to Article III, Section 32, would take almost a decade to complete, and while those death throes wrought havoc on orderly equal protection analysis, the beginning of the end can be traced to the decision in Parker White Metal.

Parker White Metal dealt with a statute which proscribed identical conduct, the dumping of solid waste or hazardous waste without a permit, but which provided for two vastly different penalties.\textsuperscript{149} The Erie County Court of Common Pleas found that the statute violated Article I, Section 26, of the Pennsylvania Constitution.\textsuperscript{150} The Commonwealth appealed, and the matter was

\textsuperscript{144} Id.
\textsuperscript{145} 516 A.2d 306 (Pa. 1986).
\textsuperscript{146} Smith, 516 A.2d at 310.
\textsuperscript{147} Id. at 313 (Larsen, J. dissenting).
\textsuperscript{148} 515 A.2d 1358 (Pa. 1986).
\textsuperscript{149} Parker White Metal, 515 A.2d at 1360-61.
\textsuperscript{150} Id. at 1361.
brought before the Supreme Court of Pennsylvania because it has exclusive jurisdiction of appeals from final orders of courts of common pleas where a statute has been held to be unconstitutional.\footnote{151}{Id. at 1362.}

The majority opinion, written by Justice Larsen, held that the equal protection provision of the Pennsylvania Constitution is Article I, Section 26.\footnote{152}{Id.} Justice Larsen also wrote, in a footnote, that Article III, Section 32, contains additional equal protection guarantees.\footnote{153}{Id. at 1363 n.8.} Nevertheless, despite this footnote, Justice Larsen changed equal protection analysis in Pennsylvania.

The opinion reaffirmed that the Pennsylvania Supreme Court still used the three classifications—strict scrutiny, intermediate scrutiny and rational basis—when doing an equal protection analysis.\footnote{154}{Parker White Metal, 515 A.2d at 1363.} The opinion also added one new item to equal protection analysis—specifically, the need to determine if a classification has actually been created.\footnote{155}{Id.}

Perhaps the most ironic part of this opinion is that Justice Flaherty joined it even though, only less than a week earlier, he had written the majority opinion in Smith, which held that the equal protection provision was in Article III, Section 32.\footnote{156}{Id.}

A few weeks after the decision in Parker White Metal, on October 23, 1986, the Pennsylvania Supreme Court handed down its decision in Lyles v. Commonwealth of Pennsylvania Department of Transportation,\footnote{157}{516 A.2d 701 (Pa. 1986).} in which the court addressed the question of whether the statutory limit on damages recoverable against the Commonwealth was constitutional.\footnote{158}{Id.} In its discussion, the court made a reference to the equal protection provision of the Federal Constitution and Article III, Section 32, of the Pennsylvania Constitution.\footnote{159}{Id.} What is lacking in this opinion is a footnote or quotation from an earlier case stating that Article III, Section 32, was substantially similar to the Equal Protection Clause of the Four-
teenth Amendment to the United States Constitution. In the pre-
Parker White Metal cases, such a reference was commonplace.\textsuperscript{160}

About a year later, in \textit{Barasch v. Pennsylvania Public Utility Commission},\textsuperscript{161} the Pennsylvania Supreme Court again held that Article III, Section 32, was "sufficiently similar to the equal protection clause of the United States Constitution as to warrant like application."\textsuperscript{162} However, there was no separate analysis of the state constitutional provision. The \textit{Barasch} Court merely held that the state constitutional argument failed for the exact same reasons as the federal equal protection argument failed.\textsuperscript{163} This opinion, while invoking Article III, Section 32, only showed how far in esteem that provision had fallen as demonstrated by the \textit{Barasch} Court's failure to do a separate equal protection analysis under the state provision.

While Article III, Section 32, continued to fall into disuse, certain previous holdings were being affirmed and revitalized. In a case involving alleged defamation, the Pennsylvania Supreme Court had to balance the fundamental right of reputation against Pennsylvania's Shield Law protecting the confidential sources of newspersons.\textsuperscript{164} The Supreme Court of Pennsylvania reaffirmed that reputation is a fundamental right, and held that in a defamation of a public official case, the plaintiff could discover unpublished information provided that information which would lead to the discovery of the names of confidential sources could be removed.\textsuperscript{165} The court determined that such a holding would permit the plaintiff to make a more meaningful inquiry into whether or not "actual malice" (i.e., that it was made with knowledge of its falsity or with reckless disregard for whether it was false or not) existed.\textsuperscript{166} Here, the court maintained the integrity of the right of reputation while still protecting both confidential media sources and freedom of the press.

The next important equal protection case was \textit{Commonwealth v. Hardcastle}.\textsuperscript{167} In this case, the appellant was convicted of two

\begin{itemize}
\item \textsuperscript{161} 532 A.2d 325 (Pa. 1987).
\item \textsuperscript{162} \textit{Barasch}, 532 A.2d at 339.
\item \textsuperscript{163} \textit{Id}.
\item \textsuperscript{164} Hatchard v. Westinghouse Broad. Co., 532 A.2d 346 (Pa. 1987).
\item \textsuperscript{165} \textit{Hatchard}, 532 A.2d at 351.
\item \textsuperscript{166} \textit{Id}. at 349.
\item \textsuperscript{167} 546 A.2d 1101 (Pa. 1988).
\end{itemize}
counts of murder and sentenced to death. Appellant challenged his conviction on equal protection grounds, claiming that the prosecuting attorney had improperly exercised the government's peremptory challenges against twelve of the fourteen black jurors interviewed. Using federal case law, the majority upheld both the conviction and the sentence.

It is the dissent of Chief Justice Nix which is of greater interest in this case. Chief Justice Nix found the use of peremptory challenges unconstitutional under Article I, Section 26, because of the arbitrary nature of peremptory challenges.

Chief Justice Nix's dissent is one of the very few places where the Pennsylvania Supreme Court used the state constitution to analyze a race-based equal protection challenge. While this dissent obviously did not become precedent, it allowed future appellants to make a colorable state constitution claim. In that regard, Chief Justice Nix's dissent was groundbreaking.

The next case, Gondleman v. Commonwealth, is interesting only insomuch as it added yet more confusion to the already murky area of equal protection under the Pennsylvania Constitution. In this case, the Pennsylvania Supreme Court found that the equal protection provision of the Pennsylvania Constitution is in Article I, Section 1, and that Article I, Section 26, merely reinforces Article I, Section 1.

The Pennsylvania Supreme Court continued to muddy equal protection analysis in Klein v. Commonwealth of Pennsylvania State Employees' Retirement Board, in which it addressed the issue of whether the Commonwealth could pay judges who performed the same functions and duties different rates of compensation based solely upon the date the judge entered office. The majority held that the payment scheme violated the equal protection provision of the Pennsylvania Constitution.

In its discussion of equal protection, the majority opinion (written by Justice Larsen) held that the equal protection provisions of the Pennsylvania Constitution were in Article III, Section 32; Ar-

168. Hardcastle, 546 A.2d at 1103.
169. Id.
170. Id. at 1112.
171. Id. at 1114.
173. Gondleman, 554 A.2d at 903.
175. Klein, 555 A.2d at 1217.
176. Id.
Justice Larsen cited all three sections which, at one time or another, were held to be the equal protection provision in the Pennsylvania Constitution. Unfortunately, Justice Larsen’s shotgun approach to finding the equal protection provision in the Pennsylvania Constitution did little to clarify equal protection analysis. To the majority’s credit, however, the opinion reaffirmed the three standards of review to be used in equal protection analysis—strict scrutiny, intermediate scrutiny and rational basis.

The 1980’s were a time of both clarity and confusion in equal protection analysis. On the one hand, there was the clarity of Fisher. On the other hand, however, there was the confusion brought about by Parker White Metal. Out of this mix came several important holdings. The most important was the adoption of the three standards of review. Almost as important was the Pennsylvania Supreme Court’s holding in Hartford that it would not be bound by federal case law in the area of gender discrimination. Next was the reaffirmation of reputation as a fundamental right in Hatchard. Finally, there was Chief Justice Nix’s dissenting opinion in Hardcastle in which he contended that peremptory challenges violate the equal protection provision of the Pennsylvania Constitution.

V. EQUAL PROTECTION IN THE 1990’S—THE RETREAT FROM INDEPENDENT ANALYSIS OF THE PENNSYLVANIA CONSTITUTION

The 1990’s begin with the Pennsylvania Supreme Court charging not only itself, but the entire Pennsylvania judiciary and bar, with the responsibility to analyze claims under the Pennsylvania Constitution with vigor and independence. The 1990’s ended with the court retreating into the safety of taking federal case law and applying it to a given case without seriously considering equal protection under the state constitution.

The promise of the 1990’s began with Commonwealth v. Edmunds. Although not an equal protection case per se, it had wide ranging implications that included equal protection analysis. The Edmunds Court made a number of holdings intended to serve as guideposts for those bringing state constitution claims. The first was: “[W]e have stated with increasing frequency that it is

177. Id. at 1224.
178. Id.
important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated.\(^{180}\) Furthermore, the Pennsylvania Supreme Court held that while it may accord weight to federal decisions, "we are free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution."\(^{181}\) However, when doing so, the United States Supreme Court, pursuant to *Michigan v. Long*,\(^{182}\) required the state supreme court to make "a 'plain statement' of the adequate and independent state grounds upon which we rely, in order to avoid any doubt that we have rested our decision squarely upon Pennsylvania jurisprudence."\(^{183}\) In order to achieve that goal, the Supreme Court of Pennsylvania directed litigants to brief and analyze the following four factors: "1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."\(^{184}\) Lastly, the supreme court held that "an examination of related federal precedent may be useful as part of the state constitutional analysis, not as binding authority, but as one form of guidance."\(^{185}\)

This is, in many ways, a remarkable opinion. The Pennsylvania Supreme Court provided clear and concise guidance to those bringing state constitution claims, spelling out what it wanted and how it was to be presented. This opinion also provided precedent for the court to find greater protections of rights and liberties in the state constitution than those provided in the federal constitution.

Armed with the precedent of *Edmunds*, the Pennsylvania Supreme Court turned its attention to *Love v. Borough of Stroudsburg*,\(^{186}\) in which it considered an ordinance passed by the Borough of Stroudsburg that restricted parking in a certain residential area to only those persons with permits for that residential area.\(^{187}\)

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181. *Id.* at 895.
184. *Id.*
185. *Id.*
Visitors to that area were allowed to park for one hour, but after that hour passed, such visitors were subject to a fine for illegal parking. On October 4, 1988, appellant received a ticket indicating he had violated the parking ordinance, thus subjecting him to a fifteen dollar fine. Appellant filed an action for declaratory relief in the Court of Common Pleas of Monroe County. The action was dismissed by that court, and that dismissal was affirmed by the Commonwealth Court.

On appeal, a majority of the Pennsylvania Supreme Court first recognized that the equal protection provision of the Pennsylvania Constitution was embodied in Article I, Section 1, and Article I, Section 26. The court then held that the state equal protection provision was to be analyzed under the same standards used by the United States Supreme Court when analyzing an equal protection claim under the Fourteenth Amendment. The Supreme Court of Pennsylvania then reaffirmed the three standards of review—strict scrutiny, intermediate scrutiny and rational basis. Lastly, the court found that the ordinance impacted neither suspect classes nor fundamental rights, and as such, it would be analyzed under the rational basis test. The court found that the ordinance passed the rational basis test, and thus, was constitutional.

About a year later, the Pennsylvania Supreme Court heard the case of Harristown Development Corp. v. Commonwealth of Pennsylvania Department of General Services. This case involved a statute passed by the General Assembly that provided that a nonprofit corporation which collected over $1,500,000.00 in proceeds from the rental of property to the Commonwealth would be subject to the terms of the Sunshine Act and the Right to Know Law. The interesting part of this case was the way Justice Flaherty inserted Article III, Section 32, into the equal protection discussion. The opinion provided that the appellant initially argued that the

188. Id.
189. Id.
190. Id.
191. Id.
193. Id.
194. Id.
195. Id.
196. Id.
statute violated, *inter alia*, Article I, Sections 1, 17, and 26, of the Pennsylvania Constitution. The Commonwealth Court initially seems to have raised Article III, Section 32, but that court held that the statute was not unconstitutional as a *special law* rather than on an equal protection basis. Only when coming before the Supreme Court of Pennsylvania did the appellant raise Article III, Section 32, in an equal protection context—and even then it appeared to have couched its argument in terms of the prohibition against special laws provided by that section rather than in terms of equal protection *per se*. It was Justice Flaherty who discussed Article III, Section 32, in terms of equal protection.

This was the last significant equal protection case implicating Article III, Section 32. From this case on, Article III, Section 32, would be distinguished from equal protection analysis and used pursuant to the "special law" language within the section.

A case illustrating this new analysis of Article III, Section 32, is *Wilkinsburg Police Officers Association v. Commonwealth*. The issue in this case involved the Financially Distressed Municipalities Act (commonly known as Act 47) and its implementation in the municipality of Wilkinsburg. The Wilkinsburg Police Officers Association ("Association") argued that fiscal recovery plan adopted by the Borough of Wilkinsburg ("Borough") violated the Pennsylvania Constitution in that it impinged upon the collective bargaining agreement between the Association and the Borough and thus violated or impaired contract rights, it violated Article III, Section 31, of the Pennsylvania Constitution and it violated Article III, Section 32, because section 252 of Act 47 was a special law regulating labor. The Pennsylvania Supreme Court held that the Association had not pled sufficient facts in order to establish a violation of Article III, Section 32. In its somewhat limited discussion of this section, the court held that "this constitutional prohibition [against special laws] requires that any statutory clas-

199. *Id.*
200. *Id.* (emphasis added).
201. *Id.* at 1131.
202. *Id.*
204. *Wilkinsburg Police Officers Ass'n*, 636 A.2d at 135.
205. *Id.* at 136.
206. *Id.*
207. *Id.* at 137.
208. *Id.* at 139-40.
sification have a rational relationship to a proper state purpose.\footnote{209} The court was very careful not use any equal protection language. It also cited \textit{Tosto v. Pennsylvania Nursing Home Loan Agency},\footnote{210} another case where the court, rather than use Article III, Section 32, for equal protection purposes, couched its holdings in terms of the "special laws" clause in Section 32.\footnote{211}

The Pennsylvania Supreme Court, in the meantime, began to firm up the notion that the equal protection provision of the Pennsylvania Constitution existed in a combination of Article I, Section 1 and Article I, Section 26 in \textit{McCusker v. Workmen's Compensation Appeal Board (Rushton Mining Company)}.\footnote{212} In \textit{McCusker}, the supreme court considered whether or not a section of the Workmen's Compensation Act, which provided that the widow or widower of a deceased employee would have his or her benefits terminated if it was ascertained that the living spouse had entered into a meretricious relationship, violated the equal protection provision of the Pennsylvania Constitution.\footnote{213} The court first reaffirmed that Article I, Sections 1 and 26, form the equal protection provision in the Pennsylvania Constitution.\footnote{214} The court also reaffirmed the three standards of review—strict scrutiny, intermediate scrutiny and rational basis—and the threshold question of whether or not a classification has been created.\footnote{215} The court concluded by finding that the section in question did not violate the Pennsylvania Constitution.\footnote{216}

The Pennsylvania Supreme Court then took what may be described as a brief equal protection frolic. The court looked to Article I, Section 17, of the Pennsylvania Constitution, and for a brief period of time, it indicated that this section might also be a source of equal protection law in this Commonwealth.

In \textit{Hoffman v. Township of Whitehall},\footnote{217} the Pennsylvania Supreme Court examined the use of veteran's preferences in the state civil service promotions.\footnote{218} The court held that, under the 1874 Constitution, such promotions were found to be unconstitu-
tional pursuant to Article III, Section 7.\(^\text{219}\) The majority in this opinion found that, under general equal protection principles and pursuant to Article I, Section 17, the preferences remained unconstitutional.\(^\text{220}\)

Although it is a bit of a stretch to find much equal protection analysis in this decision, it is appropriate to consider it when one remembers the early cases decided pursuant to Article III, Section 32.\(^\text{221}\) However, the possibility of equal protection analysis under Article I, Section 17, was to be short-lived.

First, in a case decided about a year after \textit{Hoffman}, the Pennsylvania Supreme Court reaffirmed that Article I, Section 17, is the contracts clause of the Pennsylvania Constitution, much like Article I, Section 10 is the contracts clause of the United States Constitution.\(^\text{222}\) Then, about three years after \textit{Hoffman}, in another case about veteran's preferences, the Pennsylvania Supreme Court held that the \textit{Hoffman} court's analysis of Article I, Section 17, was mere dicta, and furthermore, that the dicta misconstrued Article I, Section 17.\(^\text{223}\) These two decisions effectively shut-off any future attempts to use Article I, Section 17, in an equal protection context.

Meanwhile, the Pennsylvania Supreme Court continued to distinguish Article III, Section 32, from equal protection analysis. A clear example of this is \textit{Torbik v. Luzerne County}.\(^\text{224}\) In this case, the appellants were hotel owners who brought a constitutional challenge against an act of the General Assembly and a Luzerne County ordinance which allowed Luzerne County to tax hotel rooms in order to finance a convention center.\(^\text{225}\) The appellants brought, \textit{inter alia}, an equal protection claim.\(^\text{226}\) The Pennsylvania Supreme Court addressed the equal protection claim strictly on Fourteenth Amendment grounds and found no violation of the Fourteenth Amendment.\(^\text{227}\) The court then addressed Article III, Section 32, and found that the act and ordinance were not special

\(^{219}\) Id. at 1202.
\(^{220}\) Id. at 1202-03.
\(^{221}\) See supra notes 41-56 and accompanying text.
\(^{222}\) Bible v. Commonwealth of Pennsylvania Dep't of Labor and Indus., 696 A.2d 1149, 1151 (Pa. 1997).
\(^{224}\) 696 A.2d 1141 (Pa. 1997).
\(^{225}\) \textit{Torbik}, 696 A.2d at 1142-43.
\(^{226}\) Id. at 1144.
\(^{227}\) Id. at 1145-46.
laws in violation of that section of the Pennsylvania Constitution.\textsuperscript{228}

This case, much like \textit{Wilkinsburg Police Officers Association}, distinguished Article III, Section 32, from equal protection analysis and limited its authority to "special laws." It seemed clear that, from this point forward, equal protection analyses were to be done pursuant to Article I, Sections 1 and 26.

The next important equal protection case was \textit{Small v. Horn}.\textsuperscript{229} In this case, inmates confined in a state prison brought suit after the Department of Corrections revoked their permission to wear civilian clothing when housed in the general population.\textsuperscript{230} Although the Pennsylvania Supreme Court found the prisoners were not entitled to any relief,\textsuperscript{231} the opinion did define the suspect classes entitled to strict scrutiny and the sensitive classes entitled to intermediate scrutiny.\textsuperscript{232} The court held that "[s]uspect classes are race and national origin, and, for purposes of state (as opposed to federal) laws alienage."\textsuperscript{233} The court went on to note that "[q]uasi-suspect classes are gender, and legitimacy. This court has used the term 'sensitive classification' when referring to quasi-suspect classifications."\textsuperscript{234}

Again, while this was not necessarily a groundbreaking holding, it is important considering the confused state of equal protection analysis in Pennsylvania for the ten years after the \textit{Parker White Metal} decision. Furthermore, this restatement of suspect and sensitive classes places these terms into Pennsylvania jurisprudence, and thus, it would allow them to be used in terms of a strict state constitution equal protection challenge.

The last significant case of the 1990's was \textit{Smith v. Coyne}.\textsuperscript{235} The case was a consolidation of a number of landlord-tenant cases all of which raised the same issue: whether the requirement by a tenant to post a bond of three months rent or the amount of rent in arrears, whichever is less, in order to secure supersedeas actually acted as a barrier to low-income tenants barring them from having a trial by jury in a landlord-tenant action.\textsuperscript{236} The Pennsyl-

\begin{footnotesize}
\textsuperscript{228} \textit{Id.} at 1146-47.
\textsuperscript{229} 722 A.2d 664 (Pa. 1998).
\textsuperscript{230} \textit{Small}, 722 A.2d at 666.
\textsuperscript{231} \textit{Id.} at 673.
\textsuperscript{232} \textit{Id.} at 672.
\textsuperscript{233} \textit{Id.} at 672 n.14 (citations omitted).
\textsuperscript{234} \textit{Id.} at 672 n.15 (citations omitted).
\textsuperscript{235} 722 A.2d 1022 (Pa. 1999).
\textsuperscript{236} \textit{Coyne}, 722 A.2d at 1023.
\end{footnotesize}
vania Supreme Court found that while the right to a trial by jury was a fundamental right worthy of having any legislation impinging upon it subject to strict scrutiny, there was no constitutional right to housing, and thus, the proper equal protection analysis in this matter was rational basis.237

The significant portion of this decision was the fact that the equal protection analysis was done pursuant only to the Fourteenth Amendment. There was no mention of the equal protection provision in the Pennsylvania Constitution. This was a harbinger of things to come.

The 1990's began with the promise of Edmunds and ended with the whimper of Smith v. Coyne. In Love, the Pennsylvania Supreme Court held that the equal protection provision of the Pennsylvania Constitution is embodied in Article I, Sections 1 and 26. Also, in that same decision the supreme court reaffirmed the three standards of review used in equal protection analysis. In McCusker, the concept of the threshold question of whether or not a classification is created was reaffirmed. There was the brief equal protection detour into Article I, Section 17. Lastly, the court explicitly identified suspect classes and sensitive classes in Small v. Horn. Yet, there was, overall, a retreat from independent equal protection analysis under the Pennsylvania Constitution. This retreat continued in the new millennium.

VI. EQUAL PROTECTION IN THE 2000'S—THE CONTINUING RETREAT FROM INDEPENDENT ANALYSIS OF THE PENNSYLVANIA CONSTITUTION

The turn of the millennium has, so far, done little to further equal protection analysis under the Pennsylvania Constitution. In fact, unlike the 1970's and 1980's, where there was a growth and an independence in equal protection analysis under the Pennsylvania Constitution, the 1990's seemed to represent a stagnation and the 2000's, so far, seem to represent an actual decline.

The first important case of the new millennium, however, showed signs of growth in state constitutional jurisprudence. In that case, Harrisburg School District v. Hickok,238 the issue of whether an act of the General Assembly which provided that school districts that performed poorly be identified and assisted by

237. Id. at 1025-26.
the Department of Education was constitutional "insofar as it single[d] out schools in Harrisburg for special treatment" was presented to the Pennsylvania Supreme Court. The court held that the act violated Article III, Section 32, in that it was special legislation designed to single out the school districts in Harrisburg and the classification was not based on real distinctions.

The most important part of this decision, however, was located in a footnote. The Pennsylvania Supreme Court revived the reasonable relationship standard pursuant to analysis under Article III, Section 32. This was important because the reasonable relationship test was more demanding than the rational basis test. Furthermore, while Article III, Section 32, may no longer be useful in terms of equal protection analysis, utilizing a test unique to that section helps to give it a vitality that had been lost.

Meanwhile, equal protection analysis once again grew murky. In Commonwealth v. Means, the Pennsylvania Supreme Court held that the equal protection provision of the Pennsylvania Constitution was only in Article I, Section 1. This was contrary to a number of previous holdings in which the equal protection provision was found to be embodied in Article I, Sections 1 and 26, combined.

The next blow to independent equal protection analysis under the Pennsylvania Constitution was Erfer v. Commonwealth. Although this case does relocate the state equal protection provision in Article I, Sections 1 and 26, the court held that when a claim "is predicated on the equal protection guarantee contained in [Article 1, Sections] 1 and 26, this court has previously determined that this right is coterminous with its federal counterpart." The Erfer court claimed as authority Love v. Borough of Stroudsburg, but that does not appear to be correct. In Love, the supreme court held "[t]he equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when review-

239. Harrisburg School Dist., 761 A.2d at 1134.
240. Id. at 1136.
241. Id. at 1136 n.2.
242. STONE, supra note 39, at 570.
244. Means, 773 A.2d at 147.
245. 794 A.2d 325 (Pa. 2002).
246. Erfer, 794 A.2d at 328.
247. Id. at 332.
ing equal protection claims under the Fourteenth Amendment. The word "coterminous," on the other hand, means, "(of ideas or events) coextensive in time and meaning." Love stands for the idea that the same standards are used in both federal and state equal protection analysis, but that does not mean that the two provisions are the same. Erfer, on the other hand, does seem to stand for the proposition that the state and the federal equal protection provisions are the same. The difference is of great significance. Under Love, the Pennsylvania Supreme Court was free to find that a certain right was fundamental or important or that a certain classification was suspect or sensitive and provide greater protection than the United States Supreme Court while still staying within the framework of the three standards of review. Erfer provided no such leeway because the two provisions were the same, and thus, the Pennsylvania Supreme Court could not find that the Pennsylvania Constitution provided greater equal protection than the federal constitution.

The general decline of independent equal protection analysis under the Pennsylvania Constitution was well illustrated by a case decided on November 20, 2002. That case, Commonwealth v. Harris, was another case where a man convicted of a capital crime brought an equal protection challenge to his conviction based upon the prosecution's allegedly unconstitutional use of peremptory challenges. The significance of this case was the fact that the state constitution equal protection provision was not even cited and the majority of the case law cited was federal case law.

While it is possible that the appellant did not raise state constitutional grounds, it seems unlikely considering the dissent of Chief Justice Nix in Hardcastle, where he opined that peremptory challenges are per se unconstitutional under Article I, Section 26. Furthermore, the fact that the dissent in Harris did not mention state equal protection grounds, even in passing, also showed the extent of the decline of independent state constitution equal protection analysis in Pennsylvania.
The decline in independent equal protection analysis under the Pennsylvania Constitution does not have to continue. First, none of the cases discussed here have been explicitly overturned. While *Kroger* and its progeny under Article III, Section 32 may be, for all intents and purposes, overturned, the basic idea that equal protection under the Pennsylvania Constitution is important *per se* can be revitalized. Even after *Parker White Metal*, the Pennsylvania Supreme Court continued to do equal protection analysis under the Pennsylvania Constitution. Second, the court has recently held that the Pennsylvania Constitution provides greater protection of freedom of expression than does the federal constitution.255 If the Pennsylvania Constitution provides greater protection in the area of freedom of expression, it may also provide greater protection than the federal constitution in other areas as well—such as equal protection. Finally, as a matter of public policy, the Supreme Court needs to do independent equal protection analysis under the Pennsylvania Constitution. Lively debate about equal protection under the Pennsylvania Constitution can only strengthen general legal scholarship and the Pennsylvania Constitution itself.
