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NEVER ON SUNDAY: THE BLUE LAWS CONTROVERSY

NEIL J. DILLOFF*

No day of the week has spawned as many legal disputes as Sunday.¹ Many normal daily pursuits such as working, contracting, mailing letters and engaging in recreational activities are affected by whether or not they occur on Sunday. Limitations on these activities are a result of Sunday closing laws (or "blue laws") passed by both state and local governments. This article will discuss and analyze the most commonly litigated Sunday restriction — restrictions imposed on the sale of merchandise to the public.

Sunday closing laws are enacted pursuant to a state's police power² to preserve the health, safety, and welfare of its citizenry. As such, the laws are generally presumed to be a valid exercise of this power.³ Blue laws are unique, however, because they impose criminal sanctions on what is generally regarded as legitimate commercial enterprise, merely because such commerce occurs on a particular day of the week.

It is well established that Sunday is not only a day set aside for religious observance⁴ but also a recognized, and often enforced, day of rest. In 1961 the United States Supreme Court rendered a series of

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1. The lawyers' debt to Sunday can best be demonstrated by a review of the separate listing of Sunday to the exclusion of any other day of the week in such legal digests as *WEST'S FEDERAL PRACTICE DIGEST 2d* (1978), *WEST'S MARYLAND DIGEST* (1966), *AMERICAN JURISPRUDENCE 2d* (1978), and *CORPUS JURIS SECUNDUM* (1977).

2. *See, e.g., Supermkt. Gen. Corp. v. Maryland*, 286 Md. 611, 616, 409 A.2d 250, 253 (1979), *cert. denied*, 101 S. Ct. 45 (1980); *see also McGowan v. Maryland*, 366 U.S. 420, 444-45 (1961).

3. *Supermkt. General Corp. v. Maryland*, 286 Md. 611, 616, 409 A.2d 250, 253 (1979), *cert. denied*, 101 S. Ct. 45 (1980).

4. *See Gallagher v. Crown Kosher Super Mkt. Inc.*, 366 U.S. 617 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1966); *Two Guys v. McGinley*, 366 U.S. 582 (1961). *See also Braunfeld v. Brown*, 366 U.S. 599 (1961).

Interestingly, the fourth commandment directs abstention from labor on the Sabbath, the seventh day of the week — Saturday. To those of the Jewish faith, Saturday remains the Sabbath, but Christians recognize Sunday as the day of rest and worship. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599 (1961).

opinions upholding Sunday closing laws in Maryland,⁵ Massachusetts,⁶ and Pennsylvania.⁷ Despite these rulings blue laws have continued to be challenged as unconstitutional under both federal and state constitutions.

At one point in time, state regulation of Sunday commerce was so prevalent that forty-six states had Sunday closing laws.⁸ Now, however, only twenty states have statewide Sunday sales restrictions.⁹ The decline in the number of jurisdictions retaining blue laws can be attributed both to state legislative repeal of the laws, and to judicial decisions declaring the particular regulatory scheme invalid. For various reasons, including unfavorable judicial decisions concerning the validity of the laws, twenty state legislatures have repealed their Sunday closing laws.¹⁰ Additionally, courts have found twenty-three

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

6. *Gallagher v. Crown Kosher Super Mkt. Inc.*, 366 U.S. 617 (1961).

7. *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

8. During the heyday of blue laws, only Alaska, Montana and Nevada were without Sunday closing statutes. Hawaii had blue laws when it was a territory, but not after it achieved statehood in 1959; the District of Columbia also had no blue laws.

9. ALA. CODE § 13-6-1 (1975); ARK. STAT. ANN. §§ 41-3852-3863 (Rep. Vol. 1977); Ky. Rev. Stat. Ann. § 436.160 (Baldwin 1975); LA. REV. STAT. ANN. § 51:191-95 (West 1965 & Supp. 1979); ME. REV. STAT. ANN. tit. 17, § 3204 (Supp. 1979); MD. ANN. CODE art. 27, § 492, *et seq.* (Repl. Vol. 1976 & Cum. Supp. 1979); MASS. GEN. LAWS ANN. ch. 136, §§ 5-6 (West 1974 & Cum. Supp. 1979); MISS. CODE ANN. §§ 97-23-63, 67 (1972); MO. ANN. STAT. § 578.100 (Vernon 1979); NEB. REV. STAT. § 28-940 (1975); N.H. REV. STAT. ANN. § 332-D:1-6 (Cum. Supp. 1975); N.D. CENT. CODE § 12.1-30-01 (1976); OKLA. STAT. ANN. tit. 21, §§ 907-08 (West 1958); R.I. GEN. LAWS § 5-23-2 (1976 & Cum. Supp. 1979); S.C. CODE §§ 53-1-40, 100 (1976); TENN. CODE ANN. § 39-4001 (1975); TEX. REV. CIV. STAT. ANN. art. 9001 (Vernon Cum. Supp. 1979) (option of choosing Saturday or Sunday); VT. STAT. ANN. tit. 13, §§ 3351-56 (Cum. Supp. 1979); VA. CODE §§ 18.2-341-2 (Supp. 1979); W. VA. CODE §§ 61-10-25, 26 (1977).

For a general discussion concerning the decline of the blue laws in the various states, see Note, *Sunday Closing Laws in the United States: An Unconstitutional Anachronism*, 11 SUFF. L. REV. 1089 (1977).

10. See CAL. PENAL CODE §§ 299-301 (West 1876) (repealed by Act of February 8, 1883, ch. 2, [1883] Cal. Stats. 1); REV. CODE DEL. § 5263 (4) (1935) (repealed by Act of March 14, 1941, ch. 238, [1941] Del. Laws 1016-17; FLA. STAT. ANN. §§ 855.01-.04, 855.06-.07 (1965) (repealed by Act of June 15, 1969 ch. 69-87, § 1, [1969] Fla. Laws 322.23); REV. LAWS HAWAII §§ 11610-11615 (1945) (repealed by 1949 Hawaii Sess. Laws, ch. 279, D-269, Act 95); IDAHO CODE ANN. § 17-2503 (1932) (repealed by Act of January 14, 1939), ch. 7 § 1, [1939] Idaho Sess. Laws 21); ILL. REV. STAT. ch. 38, § 549 (1961) (repealed by Act of July 28, 1961, art. 35 § 35-1 [1961] Ill. Laws 2044); IND. CODE ANN. § 35-1-86-1 (Burns 1975) (repealed by 1977 Ind. Acts. P.L. 26 § 25); IOWA CODE § 729 (1954) (repealed by Act of March 24, 1955, ch. 273, [1955] Iowa Acts 291); KAN. STAT. ANN. §§ 21-964 to 969 (1964) (repealed by Act of April 19, 1965, ch. 233, § 1 [1965] Kan. Sess. Laws 480); MICH. COMP. LAWS §§ 435.51-59 (1948) (repealed by Act of May 28, 1968, Pub. Act No. 58, § 1 [1968] Mich. Pub. Acts 96-97); MINN. STAT. ANN. § 325.91, *et seq.* (West 1967) (repealed by 1971 Minn. Laws, ch. 71, § 3, H.F. No. 251) (Minnesota retains a

states' schemes unconstitutional, in whole or in part,¹¹ while sixteen states have had their blue laws upheld.¹² Most recently, in *Supermar-*

statute regulating a wide range of industries however, see MINN. STAT. ANN. § 624.02 (West 1964); N.J. STAT. ANN. § 2A-171-4-5.8 (West 1971) (repealed by 1978 N.J. Laws, ch. 95 § 2C:98-2, effective September 1, 1979); N.M. STAT. ANN. § 40-44-1 to -5 (1953) (repealed by Act of March 25, 1963, ch. 303, § 30.1 [1963] N.M. Laws 907-08); OHIO REV. CODE ANN. §§ 3773.23-.24 (Page 1953) (repealed by Act of August 22, 1973, House Bill 59 § 2 [1973] Ohio Laws 1179-81); LORD'S ORE. LAWS § 2125 (1910) (repealed by an act proposed by initiative petition and approved by voters on November 7, 1916, [1920] Ore. Laws § 2125; S.D. COMP. LAWS §§ 22-26-2 (1967) (repealed by 1976 S.D. Sess. Laws, ch. 158 § 26-1); UTAH CODE ANN. §§ 76-55-1 to -2 (1953) (repealed by Act of February 12, 1970, ch. 25 § 9 [1970] Utah Laws 59); WASH. REV. CODE ANN. § 9.76.010 (1961) (repealed by Act of June 27, 1975, ch. 260, § 9A.92.010 (196-99), 1975 Wash. Laws 1st Ex. Sess. 865); WIS. STAT. §§ 351.46-.49 (1931) (repealed by Act of April 13, 1933, ch. 74, [1933] Wis. Laws 244); WYO. COMP. STAT. ANN. § 7276 (1920) (repealed by Act of March 3, 1931, ch. 73, § 179 [1931] Wyo. Sess. Laws 136-37). In several cases, the law was repealed after it was declared unconstitutional by the state court.

In five states (Connecticut, Georgia, New York, North Carolina, and Pennsylvania) general Sunday closing laws have been held unconstitutional but have not yet been repealed.

11. Entire statewide schemes have been struck down in the following cases: *Caldor's Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979); *Kelly v. Blackburn*, 95 So. 2d 260 (Fla. 1957); *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952); *Rutledge v. Gaylord's, Inc.*, 233 Ga. 694, 213 S.E.2d 626 (1975); *Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 (1964); *Arlan's Dep't Stores, Inc. v. Kelley*, 374 Mich. 70, 130 N.W.2d 892 (1964); *Minnesota v. Target Stores, Inc.*, 279 Minn. 447, 156 N.W.2d 908 (1968); *New York v. Abrahams*, 40 N.Y.2d 277, 353 N.E.2d 574 (1976); *Treasure City Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964); *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978); *Skaggs Drug Centers, Inc. v. Ashley*, 26 Utah 2d 38, 484 P.2d 723 (1971).

Courts have held local ordinances or portions of statewide schemes unconstitutional in the following cases: *Piggly-Wiggly Inc. v. City of Jacksonville*, 336 So. 2d 1078 (Ala. 1976); *Elliott v. Arizona*, 29 Ariz. 389, 242 P. 340 (1926); *Ex parte Westerfield*, 55 Cal. 550 (1880); *Ex parte Newman*, 9 Cal. 502 (1858); *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970); *Rogers v. Delaware*, 57 Del. 334, 199 A.2d 895 (1964); *Pacesetter Homes, Inc. v. Village of S. Holland*, 18 Ill. 2d 247, 163 N.E.2d 464 (1959); *West v. Town of Winstboro*, 252 La. 605, 211 So. 2d 665 (1967) (the general statewide law was upheld in *Louisiana v. Scallan*, 374 So. 2d 1232 (La. 1979)); *McKaig v. Kansas City*, 363 Mo. 1033, 256 S.W.2d 815 (1953); *Skag-Way Dep't Stores, Inc. v. City of Omaha*, 179 Neb. 707, 140 N.W.2d 28 (1966); *North Carolina v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972); *Ohio v. Grimes*, 23 Ohio Op.2d 96, 190 N.E.2d 588 (1963); *Spartan's Indus., Inc. v. Oklahoma City*, 498 P.2d 399 (Okla. 1972); *County of Spokane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966); *Nation v. Giant Drug Co.*, 396 P.2d 431 (Wyo. 1964).

12. *Woonsocket Prescription Center, Inc. v. Michaelson*, 417 F. Supp. 1250 (D.R.I. 1976); *Bill Dyer Supply Co. v. Arkansas*, 502 S.W.2d 496 (Ark. 1974); *Brown Enterprises, Inc. v. Fulton*, 192 N.W.2d 773 (Iowa 1972); *Louisiana v. Scallan*, 374 So. 2d 1232 (La. 1979); *Maine v. S.S. Kresge, Inc.*, 364 A.2d 868 (Me. 1976); *Supermkt. Gen. Corp. v. Maryland*, 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980); *Zayre Corp. v. Attorney General*, 372 Mass. 423, 362 N.E.2d 878 (1977); *Genesco, Inc. v. J.C. Penney Co.* 313 So. 2d 20 (Miss. 1975); *Opinion of the Justices*, 108 N.H. 103, 229 A.2d 188 (1967); *Vornado, Inc. v. Hyland*, 77 N.J. 347, 390 A.2d 606 (1978); *City of Bismarck v. Materi*, 177 N.W.2d 530 (N.D. 1970) (municipal ordinance); *South Carolina v. Smith*, 247 S.E.2d 331 (S.C. 1978); *Whitney Trading Corp. v. McLeod*, 255 S.C.8,176 S.E.2d 572 (1970); *Gibson Prod. Co. v. Texas*, 545 S.W.2d 128 (Tex. 1976) (5-4 decision); *Vermont v. Giant of St.*

kets General Corporation v. Maryland,¹³ the Maryland Court of Appeals sustained the validity of Maryland's blue laws.

Sunday closing laws have been attacked upon a variety of grounds. Claims that the laws violate the free exercise and establishment of religion clauses of the first amendment have consistently failed because courts have been virtually unanimous in finding that the blue laws have a primarily secular purpose.¹⁴ When state courts have struck down blue laws, they have done so based upon constitutional grounds, such as due process¹⁵ and equal protection,¹⁶ and other grounds such as monopoly,¹⁷ discriminatory enforcement,¹⁸ invalid delegation of legislative power to counties,¹⁹ and violations of particular state constitutional provisions prohibiting special laws.²⁰ Because many judicial decisions strike down blue laws due to the *means* by which the laws are enforced (as opposed to the state's *power to enact* them), courts have attempted to provide guidance in proper methods of enforcing Sunday trade restrictions.

To evaluate properly the validity of challenges to blue laws, and the constitutionality of state enforcement approaches, it is necessary to review briefly the history and purpose of Sunday closing legislation.

I. HISTORY AND PURPOSE

Sunday legislation has been in existence since 321 A.D. "when Constantine the Great passed an edict commanding all judges and inhabitants of cities to rest on the venerable day of the sun."²¹ Although secular work on Sunday was not violative of English common law,

Albans, Inc., 128 Vt. 539, 268 A.2d 739 (1970); *Malibu Auto Parts, Inc. v. Virginia*, 218 Va. 453, 237 S.E.2d 782 (1977); *West Virginia ex rel. Heck's, Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965).

13. 286 Md. 611, 409 A.2d 250 (1979) *cert. denied*, 101 S. Ct. 45 (1980).

14. See text at notes 24-29 and 113-26 *infra*.

15. See, e.g., *Rutledge v. Gaylord's, Inc.*, 233 Ga. 694, 213 S.E.2d 626 (1975). See also text at notes 170-187 *infra*.

16. See, e.g., *Caldor's Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979). See also text at notes 141-69 *infra*.

17. See, e.g., *Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 (1964). See also text at notes 127-40 *infra*.

18. See, e.g., *New York v. Acme Mkt. Inc.*, 37 N.Y.2d 326, 334 N.E.2d 555, 372 N.Y.S.2d 590 (1975). See also text at notes 188-97 *infra*.

19. See, e.g., *Arlan's Dep't Stores, Inc. v. Kelley*, 374 Mich. 70, 130 N.W.2d 892 (1964).

20. See, e.g., *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978) (as well as holding law unconstitutional on other grounds).

21. 83 C.J.S. *Sunday* § 3A at 800-01 (1953). See also *Missouri v. Malone*, 238 Mo. App. 939, 941, 192 S.W.2d 68, 70 (1946).

statutes were enacted beginning in 1676 prohibiting work on Sunday.²² The initial English law, which became the basis for virtually all of the Sunday closing legislation in the United States, read as follows:

For the better observation and keeping holy the Lord's day . . . all . . . persons . . . shall on every Lord's day apply themselves to the observation of the same, by exercising . . . the duties of piety and true religion, publicly and privately . . . and . . . no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings, upon the Lord's day, or any part thereof (work of necessity and charity only excepted: . . .).²³

Despite the clearly religious origins of Sunday closing laws, in *McGowan v. Maryland*²⁴ the United States Supreme Court found blue laws to have secular purposes of "provid[ing] a day of rest for working persons and an atmosphere of tranquility in which to enjoy it,"²⁵ "provid[ing] a day of rest for all citizens (presumably encompassing both working and non-working),"²⁶ and "set[ting] one day apart from all others as a day of rest, repose, recreation and tranquility — a day which all members of the family and community have the opportunity to spend and enjoy together."²⁷ These purposes "have become part and parcel of this great governmental concern wholly apart from their original [religious] purposes or connotations."²⁸ Although Sunday closing laws arguably are unnecessary in light of other federal and state constitutional and statutory provisions which prevent forced labor in violation of an individual worker's rights,²⁹ many legislatures have found it necessary to enact such laws.

Some controversy has resulted in arriving at a satisfactory definition of "the day of rest." Several states have enacted laws which do not specify a particular day of rest, but merely require that an employer

22. Sunday Observance Act, 1676, 29 Car. 2, c. 7. See Note, *Sunday Laws*, 43 N.C. L. Rev. 123, 124 (1964).

23. Note, *supra* note 22, at 124.

24. 366 U.S. 420 (1961).

25. *Id.* at 449-50.

26. *Id.* at 445.

27. *Id.* at 450.

28. *Id.* at 445.

29. See, e.g., 42 U.S.C. § 2000e(j), 2000e-2(a)(1) (1972), (*construed in Draper v. United States Pipe and Foundry Co.*, 527 F.2d 515 (6th Cir. 1975) (employer required to make reasonable efforts to accommodate employee's observation of his Sabbath); *Blakely v. Chrysler Corp.* 407 F. Supp. 1227 (E.D. Mo. 1975); MD. ANN. CODE art. 49B § 16 (1979

grant an employee one consecutive twenty-four hour period of rest per week.³⁰ The *McGowan* court, however, implied that such laws do not adequately fulfill the objective of providing a uniform day of rest because they do not insure that all members of a family will receive the same day off.³¹ Other states' laws, such as Georgia's former blue law, provide that businesses operating on both Saturdays and Sundays are required to be closed on one of the two days.³²

Like many laws which seek to protect some public interest, blue laws do not affect all people in the same way. For example, should a consumer decide to shop on Sunday in a blue law state, the state, through its blue law, essentially tells the citizen that such activity is prohibited for his "own good."³³ It is indeed ironic that blue laws may, in many cases, work to prevent a day of rest, repose and recreation for those persons who find Sunday shopping to be a recreational activity.³⁴

Rep. Vol.). See generally U.S. CONST. amend. I (freedom of religion), amend. XIII (prohibition of slavery).

In the Report of the Governor's Commission to Study the Operation of the Sunday Blue Laws (1975), the following statute was proposed as Article 85 § 65 in conjunction with a recommendation of abolition of Maryland's blue law scheme.

(A) It is the policy of the State of Maryland that a person should not be denied the opportunity to work because he does not wish to work on the Sabbath of his choosing. An employer may not deny employment to a person solely on the basis of his refusal to work on a particular day which he observes as his Sabbath or day of rest. An employer may not discharge, discipline, discriminate against, or penalize an employee for exercising his right to observe a day of rest.

(B) In order to implement the provisions of this section, the Commissioner of labor and industry shall establish a procedure for the filing of complaints based on alleged violations of subsection (A). The Commissioner shall establish a procedure for the holding of hearings on such complaints.

(C) The Commissioner may apply to a court of competent jurisdiction to enforce any order issued pursuant to this section.

(D) A person aggrieved by a decision or order of the Commissioner may seek judicial review in accordance with the Administrative Procedure Act and the Maryland Rules.

(E) Nothing in this section shall be construed to prevent a person from filing a complaint in accordance with the provisions of Article 49B of the Code.

See also MD. ANN. CODE art. 27 §§ 534H & 534J.

30. See, e.g., CAL. LABOR CODE ANN. §§ 550-56 (West 1971); ILL. ANN. STAT. ch. 48, § 8a-h (Smith Hurd 1969 & Supp. 1977); MASS. GEN. LAWS ANN. ch. 149, § 48 (West 1971); WIS. STAT. ANN. § 103.85 (West 1974).

31. *McGowan v. Maryland*, 366 U.S. 420, 450-51 (1961).

32. The Georgia blue law was declared unconstitutional in *Rutledge v. Gaylord's, Inc.*, 233 Ga. 694, 213 S.E.2d 626 (1975). The method of requiring Sunday closings on either Saturday or Sunday was criticized as a "Saturday closing or Sunday closing of Retail Business Act." *Id.* at 701, 213 S.E.2d at 631 (Gunter, J., concurring specially).

33. *Vornado, Inc. v. Hyland*, 77 N.J. 347, 366, 390 A.2d 606, 616 (1978) (Pashman, J., dissenting).

34. *Id.* at 367, 390 A.2d at 617.

In addition, employees seeking to earn extra income, as well as employers desiring to conduct business on Sundays, are prevented from doing so. The threshold problem is that Sunday legislation may infringe upon the rights of consumers, certain employees, and proprietors by attempting to protect the rights of a worker who does not desire Sunday employment. The optimal legislative goal should be to draft a law to protect these potentially conflicting interests.

Blue law schemes which are local (as opposed to statewide) in nature tend to diminish the efficacy of achieving the stated purpose of Sunday closing laws. In such situations, what may be legal in one county or municipality may be illegal in another. The effect of such a patchwork is to encourage shoppers to travel to those areas within a state which allow Sunday trade, thus protecting some, but not all, citizens from Sunday labor. This fragmented approach seems to run afoul of the basic purpose of providing *all* the citizens in a particular state with the benefits of rest and relaxation.³⁵ States which espouse this statewide purpose but which have delegated to subdivisions the authority to enact local blue laws have, in effect, determined that there is no longer a statewide governmental interest in enforcing Sunday closing legislation.

Because of the diverse methods by which states have attempted to effectuate the purported blue law goal of providing a uniform day of rest for all citizens of a state, some courts have begun to question the legislature's genuine motivation for enacting Sunday closing laws. For example, in *Skag-Way Department Stores, Inc. v. Omaha*,³⁶ the Nebraska Supreme Court said:

The real purposes of the ordinances are not to provide a uniform day of rest, nor to promote family unity, nor to encourage religious observances. Their real purposes are to enlist the power of the state to protect business interests. We submit that the ordinances are

35. In Maryland, for example, there are no Sunday prohibitions against trade in Dorchester, Montgomery, Prince Georges, or Worcester counties. See, MD. ANN. CODE art. 27 §§ 492(1), 521(k), 522(1), 534G-534J, 534T (1976 and Cum. Supp. 1978). Contingent upon a referendum to be held in Talbot County in November, 1980, similar repeal of Sunday closing restrictions may occur. Ch. 523 [1979] Md. Laws 1503. Other examples of past or present purported statewide schemes exempting certain subdivisions within the state are GA. CODE ANN. §§ 96-1201, 1204 (1974); MO. ANN. STAT. § 578.100(5) (Vernon Supp. 1979); N.J. STAT. ANN. § 2A:171-5.12 (1971) (repealed by 1978 N.J. Laws ch. 95 § 2C:98-2, effective Sept. 1, 1979) (former law effective in ten of twenty-one counties); N.C. GEN. STAT. § 14-346.2 (1969) (declared unconstitutional); VA. CODE ANN. §§ 18.2-341-2 (Supp. 1979); W. VA. CODE ANN. § 61-10-28 (1977).

36. 179 Neb. 707, 140 N.W.2d 28 (1966).

discriminatory as to those businesses included within its terms as against those who labor or sell merchandise no less harmful or no less against the public interest.³⁷

Most courts, however, have deferred to the legislature's wisdom and have refused to consider whether blue laws "are attributable to the efforts of so-called special interests . . .".³⁸

II. METHODS OF SUNDAY REGULATION

Once it is determined that a Sunday closing law is desirable, the next step is to enact the legislation. Methods adopted by state legislatures for regulating Sunday commerce have been diverse. Regulation by business size (as determined by the number of employees) has been a favored approach.³⁹ Regulation by occupation or type of business has also been a prevalent means of enforcing Sunday closings.⁴⁰ Restricting the types of commodities permitted to be sold on Sundays is yet a third popular mechanism for insuring a day of rest for all state

37. *Id.* at 712, 140 N.W.2d at 32; see also *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 525, 129 N.W.2d 475, 483 (1964).

38. *New York v. Abrahams*, 40 N.Y.2d 277, 283, 353 N.E.2d 574, 577, 386 N.Y.S. 2d 661 n.4 (1976). See also *Supermkt. Gen. Corp. v. Maryland*, 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980); *Minnesota v. Target Stores, Inc.*, 279 Minn. 447, 156 N.W.2d 908 (1968); *Genesco, Inc. v. J.C. Penney Co.*, 313 So. 2d 20, 24 (Miss. 1975).

39. See, e.g., statutes considered in *Woonsocket Prescription Center, Inc. v. Michaelson*, 417 F. Supp. 1250 (D.R.I. 1976); *Piggly-Wiggly, Inc. v. City of Jacksonville*, 336 So. 2d 1078 (Ala. 1976); *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979); *Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 (1964); *Maine v. S.S. Kresge, Inc.*, 364 A.2d 868 (Me. 1976); *Supermkt. Gen. Corp. v. Maryland*, 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980); *Giant of Md., Inc. v. State's Attorney*, 267 Md. 501, 298 A.2d 427 (1973), *appeal dismissed*, 412 U.S. 915 (1973); *Richard's Furniture Corp. v. Board of County Comm'rs.*, 233 Md. 249, 196 A.2d 621 (1964); *Zayre Corp. v. Attorney General*, 372 Mass. 423, 362 N.E.2d 878 (1977); *Opinion of the Justices*, 108 N.H. 103, 229 A.2d 188 (1967); *City of Bismarck v. Materi*, 177 N.W.2d 530 (N.D. 1970); *Bertera's Hopewell Foodland, Inc. v. Masters*, 428 Pa. 20, 236 A.2d 197 (1967), *appeal dismissed*, 390 U.S. 597 (1968).

40. See, e.g., statutes considered in *Elliott v. Arizona*, 29 Ariz. 389, 242 P. 340 (1926); *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970); *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979); *Rogers v. Delaware*, 57 Del. 334, 199 A.2d 895 (1964); *Kelly v. Blackburn*, 95 So. 2d 260 (Fla. 1957); *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952); *Rutledge v. Gaylord's, Inc.*, 233 Ga. 694, 213 S.E.2d 626 (1975); *Zayre Corp. v. Attorney General*, 372 Mass. 423, 362 N.E.2d 878 (1977); *Genesco, v. J.C. Penney Co.*, 313 So. 2d 20 (Miss. 1975); *North Carolina v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972); *Spartan's Indus., Inc. v. Oklahoma City*, 498 P.2d 399 (Okla. 1972); *County of Spokane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966); *Malibu Auto Parts, Inc. v. Virginia*, 218 Va. 453, 237 S.E.2d 782 (1977).

citizens.⁴¹ Additionally, some states have attempted to regulate Sunday trade by a maximum hours limitation,⁴² by geographic area,⁴³ by the clientele permitted to purchase goods on Sunday,⁴⁴ or by a blanket prohibition against all business activity on Sunday.⁴⁵ As can be anticipated, each of these methods of regulation has given rise to various objections by challengers. The following analysis will help in understanding the various ways by which states regulate Sunday sales, the challenges to those restrictions, and the permissible scope of the regulations.

A. Regulation by Size of Establishment

Courts have generally upheld, as consistent with the law's objective, the regulation of Sunday trade based upon the size of the business establishment.⁴⁶ This regulatory method usually focuses upon the number of persons to be employed at a particular establishment on Sunday.⁴⁷ While blue laws normally limit the number of permissible Sunday employees to no more than five or six,⁴⁸ some courts have

41. See, e.g., statutes considered in *McGowan v. Maryland*, 366 U.S. 420 (1961); *Bill Dyer Supply Co. v. Arkansas*, 255 Ark. 613, 502 S.W.2d 496 (1974); *Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 (1964); *Minnesota v. Target Stores, Inc.*, 279 Minn. 447, 156 N.W.2d 908 (1968); *Spartan's Indus., Inc. v. Oklahoma City*, 498 P.2d 399 (Okla. 1972); *Gibson Prod. Co., Inc. v. Texas*, 545 S.W.2d 128 (Tex. 1976); *West Virginia ex rel Heck's, Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965).

42. *Woonsocket Prescription Center, Inc. v. Michaelson*, 417 F. Supp. 1250 (D.R.I. 1976).

43. *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970); *Treasure City v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964).

44. *County of Spokane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966).

45. *Pacesetter Homes, Inc. v. Village of S. Holland*, 18 Ill. 2d 247, 163 N.E.2d 464 (1959).

The cases are split on whether total prohibition is constitutional. Compare *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952) and *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978) (Larson, J., concurring) with *Pacesetter Homes, Inc. v. Village of S. Holland*, 18 Ill. 2d 247, 163 N.E.2d 464 (1959).

46. *Woonsocket Prescription Center, Inc. v. Michaelson*, 417 F. Supp. 1250 (D.R.I. 1976); *Maine v. S.S. Kresge Inc.*, 364 A.2d 868 (Me. 1976); *Giant of Md., Inc. v. State's Attorney*, 267 Md. 501, 298 A.2d 427 (1973); *Opinion of the Justices*, 108 N.H. 103, 229 A.2d 188 (1967); *City of Bismarck v. Materi*, 177 N.W.2d 530 (N.D. 1970); *Bertera's Hopewell Foodland, Inc. v. Masters*, 428 Pa. 20, 236 A.2d 197 (1967), *appeal dismissed*, 390 U.S. 597 (1968); *South Carolina v. Smith*, 271 S.C. 317, 247 S.E.2d 331 (1978).

47. Size regulation gauged by the amount of interior customer selling space also has been employed and upheld. *Opinion of the Justices*, 108 N.H. 103, 229 A.2d 188 (1967). *But see Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 (1964).

48. See statutes considered in *Maine v. S.S. Kresge, Inc.*, 364 A.2d 868 (Me. 1976) (five or less employees); *Giant of Md., Inc. v. State's Attorney*, 267 Md. 501, 298 A.2d 427 (1973) (six or less employees); *Opinion of the Justices*, 108 N.H. 103, 229 A.2d 188 (1967) (five or less employees); *City of Bismarck v. Materi*, 177 N.W.2d 530 (N.D. 1970) (three or less employees); *South Carolina v. Smith*, 271 S.C. 317, 247 S.E.2d 331 (1978) (three or less employees).

upheld schemes which permit employment of up to ten persons on Sunday.⁴⁹ Judicial approval of regulation by the number of permissible employees is typified by *Richard's Furniture Corp. v. Board of County Commissioners*.⁵⁰ In *Richard's* the Maryland Court of Appeals upheld a distinction prohibiting the operation of any retail establishment on Sunday which employed "more than one person, not including the owner or proprietor."⁵¹ This numerical distinction was justified on the grounds that "[T]he operation of large commercial markets or department stores on Sunday would materially interfere with the recreational atmosphere of the day, while small retail operations will not."⁵²

For those states that utilize the size method of regulation, the most problematic area has been defining the word "employee": disagreement arises as to who is and who is not an "employee." For example, in Maryland, whether or not a security guard is to be included as an "employee" has resulted in variations in statutes within the state.⁵³

Despite the fact that regulation by size has met with more success than has any other method of regulation, it is not without its critics.⁵⁴ In *Piggly-Wiggly of Jacksonville v. City of Jacksonville*,⁵⁵ the Supreme Court of Alabama struck down a size-regulatory closing law as being arbitrary and unrelated to the purpose of the county blue law. The court found "no rational reason to distinguish between large stores, i.e., stores with more than four regular employees [at any time], and small stores, i.e., stores with less than four regular employees [at any time]."⁵⁶

49. *Woonsocket Prescription Center, Inc. v. Michaelson*, 417 F. Supp. 1250 (D.R.I.U.¹⁹⁷⁶) (no more than ten employees); *Bertera's Hopewell Foodland, Inc. v. Masters*, 428 Pa. 20, 236 A.2d 197 (1967), *appeal dismissed*, 390 U.S. 597 (1968) (less than ten employees).

50. 233 Md. 249, 196 A.2d 621 (1964).

51. *Id.* at 256, 196 A.2d at 629 (*quoting* MD. ANN. CODE art. 27 § 521(b) *as amended* (1962)).

52. *Id.* at 263, 196 A.2d at 629.

53. *Compare, e.g.*, MD. ANN. CODE art. 27, §§ 521(e) (1976) (Kent County) and 534R(c)(19) (Cum. Supp. 1978) (Harford County) (explicitly excluding security personnel as an "employee") with 534L(c)(3) (1976) (Baltimore County) and 534N(c)(3) (1976) (Anne Arundel and Calvert Counties) (not excluding security personnel as an "employee").

54. *Piggly-Wiggly v. City of Jacksonville*, 336 So. 2d 1078 (Ala. 1976); *Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 (1964); *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 129 N.W.2d 475 (1964).

55. 336 So. 2d 1078 (1976).

56. *Id.* at 1081. The law was held unconstitutional because it violated the federal equal protection clause, and the federal and state due process clauses.

[S]uch a designation is not germane to the stated purpose of the legislation . . . [because] [t]he number of regular employees who are required to be at work from Monday through Saturday is in no way relevant to the number of employees who are unable to rest on Sunday as a result of the store by which they are employed remaining open on Sunday.⁵⁷

Similarly, in *Boyer v. Ferguson*,⁵⁸ the Supreme Court of Kansas held unconstitutional a classification which allowed grocery stores employing not more than three employees to be open on Sundays but prohibited all other such stores.⁵⁹ The court found that the exemption for so-called "Mom and Pop" stores "would . . . force customers to cease doing their business at certain stores, and to shop at other places of business which are favored under the [law]."⁶⁰ Thus, the court concluded that such a statutory scheme would impermissibly eliminate competition between smaller grocery stores and grocery stores employing more than three employees.⁶¹

Empirically, there seems to be a justifiable rationale for distinguishing between large stores (or shopping centers) and small stores in deciding which ones should be permitted to open on Sunday — the operation of large stores may detract from the tranquility of Sunday. However, the question to be answered is *whose* tranquility is being preserved? Certainly workers in small stores have been given no "protection" against Sunday labor, while employees of large establishments who may desire to work are prohibited from so doing. In those cases upholding regulation by size, it seems that the primary group of persons whose tranquility is to be preserved is not the workers, but those persons near large stores who otherwise might be disturbed by the traffic and noise attendant to Sunday shopping. Because regulation by size protects workers in "large" businesses and nonworkers near such businesses, courts appear to have concluded that, despite the failure to protect employees of small stores, this regulatory method substantially achieves the objective of providing a day of rest.

57. *Id.*

58. 192 Kan. 607, 389 P.2d 775 (1964).

59. *Id.* at 614, 389 P.2d at 781.

60. *Id.* at 612, 389 P.2d at 779.

61. *Id.* The law was found unconstitutional based upon a Kansas constitutional provision prohibiting special laws.

B. *Regulation by Type of Business*

Another common method of achieving the stated purpose of Sunday closing laws is to restrict Sunday openings by occupation or type of business.⁶² This method has met with considerable judicial resistance.⁶³ In *Caldor's, Inc. v. Bedding Barn, Inc.*,⁶⁴ the Supreme Court of Connecticut struck down that state's blue laws which permitted many types of businesses to open on Sunday irrespective of size, but imposed size limitations solely on retail food stores. Additionally, Connecticut's blue law had been amended over time to exempt twenty-four categories of businesses from Sunday prohibitions. Admitting that "[o]ne way to achieve [the state's] objective would be to permit only a relatively small number of small establishments, employing only a relatively small number of employees, to remain open on Sundays,"⁶⁵ the court stated that such a rationale had been undermined by the continual addition of new classes of enterprises which had been exempted from the Sunday closing law.⁶⁶ Thus, the court held that the statute unlawfully discriminated against retail food stores,⁶⁷ and was unconstitutional under both state and federal constitutional guarantees of due process and equal protection. After a thorough examination of Connecticut's blue law, and of decisions of other states interpreting their respective laws, the court commented:

[The infirmity in the Connecticut law] only demonstrates once again the ambiguity inherent in the objective of Sunday closing laws. In our complex modern society, it is difficult for legislatures to achieve consensus about rest and recreation without becoming enmeshed in distinctions and discriminations that unfairly impose penal sanctions on legitimate commercial enterprises.⁶⁸

The primary difficulty with regulation by type of business is determining which businesses or occupations are consistent with rest

62. See generally Annot., 57 A.L.R.2d 975 (1958).

63. *E.g.*, *Elliott v. Arizona*, 29 Ariz. 389, 242 P. 340 (1926); *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970); *Caldor's Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979); *Rogers v. Delaware*, 57 Del. 334, 199 A.2d 895 (1964); *Kelly v. Blackburn*, 95 So. 2d 260 (Fla. 1957); *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952); *Rutledge v. Gaylord's, Inc.*, 233 Ga. 694, 213 S.E.2d 626 (1975); *Spartan's Indus., Inc. v. Oklahoma City*, 498 P.2d 399 (Okla. 1972).

64. 177 Conn. 304, 417 A.2d 343 (1979).

65. *Id.*, 417 A.2d at 353.

66. *Id.*

67. *Id.*, 417 A.2d at 354.

68. *Id.*, 417 A.2d at 353-54.

and relaxation and which are not.⁶⁹ Because of judicial deference to state legislatures, laws have been upheld even when distinction has been made within the same business. For example, in *Malibu Auto Parts, Inc. v. Virginia*,⁷⁰ the Supreme Court of Virginia upheld the conviction of a corporate vendor of automotive parts and supplies who sold a quart of motor oil on Sunday. The statute prohibiting the sale, however, did authorize the "[s]ervicing, fueling and emergency repair of motor vehicles . . . including the selling of such parts and supplies for such emergency repairs."⁷¹ The defendant argued that, "because 80% of the items it stock[ed], including motor oil, could fall into the category which could be considered for an emergency purpose,"⁷² it was exempt under the statute and should be allowed to operate on Sunday in order to sell these emergency repair items.⁷³ The court rejected this argument and found that, as a "mere seller of automotive parts and supplies, . . . even if 80% of its stock consist[ed] of emergency repair items,"⁷⁴ the exemption for those businesses engaged in the servicing, fueling and emergency repair of motor vehicles was not available.⁷⁵

One effect of allowing only certain categories of businesses to operate on Sunday is that one establishment is permitted to sell certain items of merchandise while another establishment, which might sell the *same* item, is precluded from opening solely because it is a different "type" of business.⁷⁶ Such laws lessen competition between "different" businesses which sell identical items. Unless the type of business operation being regulated has inherent in its nature a limited size, or clearly can be said not to further the goals of rest and relaxation on Sundays, no rational distinction can be drawn between establishments based upon the type of business they conduct. Legislatures which have recognized this problem have restricted all businesses from opening

69. Seemingly harmless professions, such as barbering have been determined to be inimical to the day of rest. When the legislatures of Colorado and Delaware determined that Sunday barbering was inconsistent with the goal of rest and relaxation and made its practice a criminal offense, the state courts struck down the laws as violative of equal protection. *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970); *Rogers v. Delaware*, 57 Del. 334, 199 A.2d 895 (1964).

70. 218 Va. 467, 237 S.E.2d 782 (1977).

71. *Id.* at 469, 237 S.E.2d at 784, citing VA. CODE ANN. § 18.2-341(a)(4) (1950) (emphasis deleted).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* See also MD. ANN. CODE art. 27, § 492 (works of necessity and charity excepted).

76. See also text at notes 131-35 and 139-40 *infra*.

except those which are clearly related to furthering the day of rest or those necessary for certain emergencies.⁷⁷

C. Regulation by Type of Commodity Sold

A third method utilized by legislatures to achieve the blue laws' objectives has been the regulation of the type of commodities which can be legally sold on Sundays.⁷⁸ Using the commodities approach, legislatures seek to exempt from blue law restrictions the sale of those goods which are consistent with the law's purpose, such as "necessaries" or recreational items.⁷⁹ "Necessary" commodities include drugs, food, gasoline and oil; items in the recreational category would be books, newspapers, magazines, and sporting goods.⁸⁰ Legislatures which have chosen to list items exempt from Sunday prohibitions, however, have been faced with an almost impossible subjective task. Such an approach requires the legislature to list individually every item which legally can be sold on Sunday. On the other hand, legislatures which have attempted to define exempt items generically have been faced with challenges that such descriptions are too vague.⁸¹

77. See, e.g., ALA. CODE § 13-6-1 (1975); KY. REV. STAT. ANN. ch. 436.160(1) (Baldwin 1975); ME. REV. STAT. ANN. tit. 17 § 3204 (Supp. 1979); W. VA. CODE ANN. 61-10-25, 26 (1977).

78. See generally Annot., 57 A.L.R.2d 969, 975 (1958).

79. See, e.g., *Vornado, Inc. v. Hyland*, 77 N.J. 347, 357, 390 A.2d 605, 611-12 (1978). Pennsylvania's former blue law, declared unconstitutional in *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978), defined "wholesome recreation" (which was excepted from Sunday prohibitions) as including golf, tennis, boating, swimming, bowling, basketball, picnicking, shooting at inanimate targets, and similar healthful or recreational exercises and activities. *Id.* at 107, 392 A.2d at 273. North Dakota's Supreme Court while acknowledging that "[m]any activities (such as shopping) have a double aspect: providing entertainment or recreation for some [while] entailing labor and workday tedium for others," nevertheless held that the legislature's broad discretion should be upheld. *City of Bismarck v. Materi*, 177 N.W.2d 530, 539 (N.D. 1970).

80. *But see Genesco, Inc. v. J.C. Penney Co.*, 313 So. 2d 20 (Miss. 1975) in which the court upheld a blue law which prohibited the sale of sports clothing and paperback books on Sunday.

81. *Whitney Stores, Inc. v. Summerford*, 280 F. Supp. 406 (1968) (three-judge court), *aff'd*, 393 U.S. 9 (1968); *Minnesota v. Target Stores, Inc.*, 279 Minn. 447, 156 N.W.2d 908 (1968); *New York v. Abrahams*, 40 N.Y.2d 277, 353 N.E.2d 574, 386 N.Y.S. 2d 661, (1976); *Skagg's Drug Centers, Inc. v. Ashley*, 26 Utah 2d 38, 484 P.2d 723 (1971). In *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 18, 320 A.2d 266, 268 (1974), Maryland's highest court discussed the meaning of a statutory provision allowing "[d]rugstores whose basic business is the sale of drugs and related items" (emphasis added) to be open on Sundays. A company in the home center business (selling lumber, hardware and other general merchandise) challenged the exemption given a drugstore, because the drugstore "sold over 67% of the items, in a generic sense, sold by" the home center store, while the latter business was required to remain closed. *Id.* at 19, 320 A.2d at 268. The court held that while the related items need not be all drug related, the drugstore's basic business was clearly not the sale of drugs. Accordingly, the drugstores were subject to the statutory limitation of six employees or less. See also *State v. Cranston*, 59 Idaho 561, 85 P.2d 682 (1938).

Curious results often occur where the state legislature has failed to require uniformity in the commodities which can be sold on Sunday. For example, in certain Maryland counties, retailers are allowed to sell butter, eggs, cream, soap, meats, toilet goods, camera film, souvenirs, flowers and shrubs.⁸² In other counties, retailers are prohibited from selling these identical items.⁸³ It is difficult to justify such inconsistency on the grounds of local custom, tradition and need, when all county laws are supposed to be consistent with a solitary statewide purpose.

Perhaps the most persuasive criticism of the "commodity approach" is contained in *Terry Carpenter, Inc. v. Wood*.⁸⁴ In a concurring opinion Justice Carter of the Supreme Court of Nebraska stated:

Legislatures over the country then attempted to solve the matter by the commodity approach. But with the coming of the chain store, and the intermingling of goods in businesses that were formerly engaged in sales of merchandise in one particular line or field, the problem became so complex that the commodity approach was beyond solution. As examples, drug stores sold groceries, grocery stores sold hardware, and chain stores sold groceries, drugs, garden tools, and most anything else that could be crowded into the place of business. Difficulties arose about remaining open to sell permitted commodities and at the same time being prevented from selling prohibited commodities. Contradictions that were completely ludicrous resulted. Under some laws a store could sell camera film but not a camera; it could sell lipsticks but not a mirror; it could sell comic books but not toys; it could sell a pet bird but not a cage. Untangling the perplexities of such a situation is comparable to untangling a barrel of fish hooks. The commodity approach became confusing, irrational, and inconsistent when measured by the yardstick of uniform classifications.⁸⁵

Despite the definitional problems involved in the commodity method of regulation, the state courts are split on the validity of this approach.⁸⁶ As a result, several states continue to utilize this method of enforcing Sunday closing laws.

82. MD. ANN. CODE art. 27, § 521(b) (1976).

83. *Id.* § 521 (a).

84. 177 Neb. 515, 129 N.W.2d 475 (1964).

85. *Id.* at 528-29, 129 N.W.2d at 482-83. Justice Carter also stressed that "[t]he impracticability of classifying by the business or commodity approach is almost insurmountable." *Id.* at 529, 129 N.W.2d at 483.

86. The following courts have upheld the commodity approach: *McGowan v. Maryland*, 366 U.S. 420 (1961); *Whitney Stores, Inc. v. Summerford*, 280 F. Supp. 406 (1968) (three-judge court), *aff'd*, 393 U.S. 9 (1968), *Bill Dyer Supply Co. v. Arkansas*, 255

D. Other Methods of Regulation

In seeking to promote Sunday as a day of rest, legislatures have also sought to employ other methods of regulation. For example, Rhode Island has enacted a "maximum hours limitation" which allows licensed establishments to open on Sundays if they do not have eighty hours of employment per day in the aggregate for all employees for three months prior to the date of the license application.⁸⁷ Colorado attempted to regulate trade by geographic area, though its highest court held such regulation unconstitutional under the state and federal constitutions.⁸⁸ In Washington, a local ordinance which permitted Sunday sales to out-of-state residents, but not to state residents,⁸⁹ was declared unconstitutional.⁹⁰ Maryland has recently enacted a law, applicable to the Baltimore metropolitan area, which permits unrestricted Sunday shopping on the four Sundays before Christmas but restricts trade during the remaining Sundays of the year.⁹¹ Surprisingly, what would appear to be the most uniform method of regulating Sunday trade — prohibiting all business activity on Sundays — was declared unconstitutional by the Supreme Court of Illinois because it penalized both "harmful" and "harmless" businesses.⁹²

The complexity of Sunday regulation increases when a state incorporates several methods of regulation at once. In Maryland, for

Ark. 613, 502 S.W.2d 496 (1974), *Maine v. Karmil Merchandising Corp.*, 158 Me. 450, 186 A.2d 352 (1962); *Supermkt. Gen. Corp. v. Maryland*, 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980); *Minnesota v. Target Stores, Inc.*, 279 Minn. 447, 156 N.W.2d 908 (1968) (upholding commodity approach but striking law for vagueness in defining exempt commodities); *Gibson Prods. Co., v. Texas*, 545 S.W.2d 128 (Tex. Inc. 1976); *Vermont v. Giant of St. Albans Inc.*, 128 Vt. 539, 268 A.2d 739 (1970); *Mandell v. Haddon*, 202 Va. 979, 121 S.E.2d 516 (1961); *West Virginia ex. rel. Heck's v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965).

The following courts have struck down the commodity approach: *Hughes v. Reynolds*, 223 Ga. 727, 157 S.E.2d 746 (1967); *Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 (1964); *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 129 N.W.2d 475 (1964); *New York v. Abrahams*, 40 N.Y.2d 277, 353 N.E. 2d 574, 386 N.Y.S. 2d 661, (1976); *Treasure City v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964); *Spartan's Indus., Inc. v. Oklahoma City*, 498 P.2d 399 (Okla. 1972); *Skaggs Drug Centers, Inc. v. Ashley*, 26 Utah 2d 38, 484 P.2d 723 (1971); *County of Spokane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966); *Nation v. Giant Drug Co.*, 396 P.2d 431 (Wyo. 1964).

87. *Woonsocket Prescription Center, Inc. v. Michaelson*, 417 F. Supp. 1250, 1254 (D.R.I. 1976) (citing R.I. GEN. LAWS § 5-23-2, as amended effective July 1, 1976).

88. *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970). See also *Treasure City Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964).

89. Presumably the ordinance was to protect state citizens from the evils of Sunday shopping.

90. *County of Spokane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966).

91. MD. ANN. CODE art. 27, § 534L-1(b) (Cum. Supp. 1980).

92. *Pacesetter Homes, Inc. v. Village of S. Holland*, 18 Ill. 2d 247, 163 N.E.2d 464 (1959).

example, Sunday sales are simultaneously regulated by the number of employees,⁹³ the type of business,⁹⁴ the type of commodity,⁹⁵ and by the time of the year.⁹⁶ Maryland's blue law problems are further compounded by the utilization of different regulatory methods in different counties, and by the abolition of Sunday closing laws in several of its counties.⁹⁷

III. SANCTIONS FOR VIOLATION

Legislatures and courts have struggled not only with determining correct means for achieving blue laws' objectives, but also with selecting appropriate and effective sanctions for violations of those laws. Blue laws violations usually are characterized as misdemeanors and, as such, there are several possible penalties: imprisonment, monetary fines, and mandatory restitution. Additionally, injunctive relief usually is available to prevent future violations of the law.

The most effective method for deterring Sunday openings appears to be injunctive. This method directly furthers the purpose desired by preventing Sunday trade. Failure to obey an injunction can result in imprisonment for contempt of court. Injunctions are authorized by many blue laws schemes and have proven to be an effective tool when used.⁹⁸ In the spirit of "concerned citizens," competitors have "assisted" law enforcement officials by filing suit to enjoin other competitors from violating the law.⁹⁹ Surprisingly, injunctions have not been as extensively used by law enforcement officials as might be expected.

Despite the utility of an injunction, the most common penalty is a fine.¹⁰⁰ Many states use a sliding scale whereby each violation results in the imposition of a higher fine.¹⁰¹ For example, in Maryland, under one of its typical county laws, a first violation results in a maximum fine of \$100, a second violation results in a maximum fine of \$500, and a third violation results in a maximum fine of \$500 per employee over the

93. See, e.g., MD. ANN. CODE art. 27, § 534L(c)(3) (1976).

94. See, e.g., MD. ANN. CODE art. 27, § 534L(b) (1976).

95. See, e.g., MD. ANN. CODE art. 27, § 521 (1976).

96. MD. ANN. CODE art. 27, § 534L-1(b) (Cum. Supp. 1980).

97. See, e.g., MD. ANN. CODE art. 27, §§ 534H & 534J (1976).

98. See, e.g., *Gibson Prods. Co. v. Texas*, 545 S.W.2d 128 (Tex. 1976). See also *Giant of Md., Inc. v. State's Attorney*, 274 Md. 158, 334 A.2d 107 (1975). See generally *Annot.*, 76 A.L.R.2d 874 (1961).

99. See, e.g., *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 320 A.2d 266 (1974); *Genesco, Inc. v. J.C. Penney Co.*, 313 So. 2d 20 (Miss. 1975).

100. See, e.g., MD. ANN. CODE art. 27, § 521(c) (1976).

101. See, e.g., MD. ANN. CODE art. 27, § 492, *et seq.* (1976); S.C. CODE ANN. § 53-1-40, -100 (1976).

permitted number.¹⁰² Depending on the interpretation of "a violation," such fines can be substantial when applied to chain stores that have multiple branches open on Sunday.¹⁰³ Furthermore, fines for an initial blue law offense can vary greatly — in Maryland the fine for a first offense ranges from a minimum of \$20 to a maximum of \$10,000.¹⁰⁴

The harsh nature of large fines and the disparity in the amounts within the same jurisdiction have given rise to claims that such fines constitute cruel and unusual punishment within the prohibition of the eighth amendment or, that they violate the due process clause of the fourteenth amendment. In *Whitney Stores, Inc. v. Summerford*,¹⁰⁵ a three-judge federal district court held that, fines may constitute cruel and unusual punishment, but the fines imposed under South Carolina's blue law (ranging from \$50 to \$250 in the case of a first violation and \$100 to \$500 for each subsequent violation) did not violate the eighth amendment.¹⁰⁶ The *Whitney Stores* court found that "[a] substantial fine is necessary in situations of this nature in order to prevent businesses from operating at a large profit and paying a small fine."¹⁰⁷ Similarly, in *Two Guys v. McGinley*,¹⁰⁸ the Supreme Court rejected arguments that variations in fines (depending upon the locality of the violation within a state) violate the equal protection and due process clauses of the Constitution. The Court found such variations permissible so long as the fines reasonably relate to enforcement of the law.¹⁰⁹

Fines have been relatively ineffective in deterring blue laws offenses. Usually, because fines are nominal, large merchants (the main target of most blue law schemes) tend to view them as an acceptable cost of doing business. However, when fines escalate for subsequent violations, merchants may be less likely to view these increased fines as acceptable.

102. MD. ANN. CODE art. 27, § 534T (1976).

103. Balt. Sun, Dec. 28, 1978 § C at 1, col. 1. However, it appears that, at least in Baltimore County, the state has determined that only a single violation can be charged even though a corporate entity may have multiple branches open on a particular Sunday. Balt. Sun, Mar. 19, 1980 § C at 2, col. 4.

104. Harford County can impose the most severe fine for an initial violation of its blue laws — \$10,000. MD. ANN. CODE art. 27, § 534R (1976). At the other end of the scale, a violation of Maryland's general closing law results in a \$20 minimum fine for a first offense. MD. ANN. CODE 27, § 521(c) (1976).

105. 280 F. Supp. 406 (D.S.C. 1968), *aff'd*, 393 U.S. 9 (1968).

106. *Id.* at 411.

107. *Id.*

108. *Two Guys v. McGinley*, 366 U.S. 582 (1961).

109. *Id.* at 590–91. See also *Tinder v. Clarke Auto Co.*, 238 Ind. 302, 149 N.E.2d 808 (1958). For a further discussion of equal protection challenges to blue laws, see text at notes 141–70 *infra*.

Imprisonment is another frequently authorized sanction for blue laws violations. This penalty is rarely imposed, and often the sanction is unavailable until after the occurrence of several offenses.¹¹⁰ When imprisonment is decreed, it is usually short-term.

Another penalty requires forfeiture of all commodities illegally exposed for sale on Sundays. New York's highest court invalidated such a provision on grounds of unconstitutional vagueness.¹¹¹ This sanction has been rarely enacted.

On balance, because large merchants may disregard nominal fines, and imprisonment is rarely appropriate, injunctive relief appears to be the most effective method of deterring blue laws violations. Usually, large merchants advertise Sunday openings in advance and it seems relatively simple to obtain injunctive relief since the intention of the potential violator is documented.

IV. LEGAL CHALLENGES TO SUNDAY CLOSING LAWS

Clearly, it is much easier to proclaim Sunday a day of rest than to enact legislation which fairly achieves the desired goal. Once enacted, enforcement is difficult. Because of these problems, a torrent of litigation attacking blue laws schemes has resulted.

There have been three principal objections to blue laws: (1) *substantive* — challenges to the stated purpose of the law; (2) *procedural* — challenges to the means chosen by the legislature to effectuate the stated purpose; and (3) *preemptive* — challenges that a state blue law conflicts with, and is therefore preempted by, a federal statute. The primary substantive challenges have been claims that the laws violate freedom of religion and unlawfully restrain trade. In light of their religious origin, it is not surprising that legal attacks on Sunday closing legislation have focused on violation of the first amendment's freedom of religion clauses. Because such laws have a direct impact on business enterprise, it is predictable that substantive challenges have been mounted on grounds of unfair competition or restraint of trade. The bulk of the litigation has focused on the procedures used to implement the legislation. Procedural challenges have asserted federal and state equal protection and due process violations, discriminatory enforcement and impermissible delegation; these assertions have been litigated with varied success. The newest

110. See, e.g., MD. ANN. CODE art. 27, § 521(c) (1976). But see *Ex parte Newman*, 9 Cal. 502 (1858).

111. *New York v. Abrahams*, 40 N.Y.2d 277, 286-87, 353 N.E.2d 574, 579-80, 386 N.Y.S. 2d. 661, 667 (1976).

attack claims that blue laws are preempted by conflicting federal legislation, notably the Sherman Act.¹¹² The diverse results of these challenges and the seemingly endless litigation demonstrate the difficulties of drafting effective and legally permissible Sunday closing laws.

A. Substantive Challenges

1. Religion

The first amendment to the United States Constitution prohibits "law[s] respecting an establishment of religion, or prohibiting the free exercise thereof."¹¹³ In *McGowan v. Maryland*¹¹⁴ and its companion cases,¹¹⁵ the Supreme Court rejected the proposition that blue laws violate these clauses. Writing for an eight to one majority in *McGowan*, Mr. Chief Justice Warren held that the state had a secular interest in setting one day apart as a day of rest, repose, recreation and tranquility.¹¹⁶ Accordingly, the Court found that Maryland's Sunday blue laws did not violate the establishment clause of the first amendment.¹¹⁷ Mr. Justice Douglas, accepting the district court judge's opinion in the companion case of *Gallagher v. Crown Kasher Super Market*,¹¹⁸ dissented. He agreed that the characterization of Massachusetts' Sunday closing law as a civil regulation was "an ad hoc improvisation made because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state Constitution if the religious motivation of the statute were more explicitly avowed."¹¹⁹

Braunfeld v. Brown,¹²⁰ decided at the same time as *McGowan*, held that a state's interest in making Sunday the uniform day of rest superceded the interest of Orthodox Jewish merchants who closed on Saturday but opened on Sunday. The Court therefore concluded that the

112. 15 U.S.C. § 1 (1976).

113. U.S. CONST., amend. 1.

114. 366 U.S. 420 (1961).

115. *Gallagher v. Crown Kasher Super Mkt.*, 366 U.S. 617 (1961); *Two Guys, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

116. 366 U.S. at 445-50. See also Report of Maryland Senate Comm'n "to study and investigate the problems of Sabbath observance in [Maryland]" (1959).

117. 366 U.S. at 569. The Court also found that appellants lacked standing to claim that the law violated the free exercise clause. *Id.* at 429-30.

118. *Id.* at 617 (1961).

119. 366 U.S. at 569 (Douglas, J., dissenting), quoting *Gallagher v. Crown Kasher Super Mkt.*, 176 F. Supp. 466, 473 (1959).

120. 366 U.S. 599 (1961).

free exercise clause of the first amendment had not been violated by the Pennsylvania statute.

The only reported appellate case holding that a state's blue law violated freedom of religion was a pre-*McGowan* case, *Ex parte Newman*.¹²¹ In *Newman* a Jewish clothing merchant brought a habeas corpus action after having been convicted and imprisoned for violating a state Sabbath closing law. Perhaps because of the severe sanction imposed,¹²² California's Supreme Court held that the law violated the state constitution's prohibition of compulsory religious observance and released the petitioner from custody. However, the *Newman* holding was subsequently overruled in *Ex parte Andrews*.¹²³

The issue of the blue laws' infringement of religion has been conclusively rejected by the Supreme Court; it therefore, seldom has been raised by post-*McGowan* challengers. Expectedly, when it has been raised it has not met with success.¹²⁴ Federal and state judiciaries have concluded, notwithstanding the blue laws' religious origins, that the laws have been secularized and have a defensible purpose applicable to all citizens irrespective of religion.¹²⁵ Despite this universal conclusion, many of the most fervent advocates for the maintenance of blue laws continue to come from organized religion.¹²⁶ To some extent it appears that the public continues to perceive the blue laws as religious in nature, thereby adding validity to Mr. Justice Douglas' conclusion that the judicial theory of secularization over time is merely an "ad hoc improvisation."

2. *Restraint of Trade*

Sunday closing legislation most directly affects those legitimate business establishments prohibited from operating on Sundays. Because lawful competition generally is thought to be healthy and in the public

121. 9 Cal. 502 (1858).

122. *Id.* at 504. Accused was imprisoned for failure to pay fine and costs imposed for violation of Sunday closing law.

123. 18 Cal. 678 (1861). California's Supreme Court subsequently held the law unconstitutional on other grounds in *Ex parte Westerfield*, 55 Cal. 550 (1880). In 1883, the California legislature repealed the law.

124. *See, e.g., Piggly-Wiggly v. City of Jacksonville*, 336 So. 2d 1078 (Ala. 1976) (court declared law unconstitutional on equal protection grounds, but held that law did not violate first amendment religion clauses); *New York v. Acme Mkt.*, 37 N.Y.2d 326, 333, 334 N.E.2d 555, 558-59, 372 N.Y.S.2d 590, 596, (1970); *Vermont v. Giant of St. Albans, Inc.*, 128 Vt. 539, 268 A.2d 739 (1970); *West Virginia ex rel. Heck's Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965); *Atlantic Dep't Store, Inc. v. State's Attorney*, 22 Md. App. 381, 323 A.2d 617 (1974). *See also* Opinion of the Justices, 108 N.H. 103, 229 A.2d 188 (1967).

125. *See*, notes 115 and 124 *supra*.

126. *See, e.g., Balt. Sun*, Mar. 21, 1979 § A at 18, col. 4.

welfare, both federal and state governments have enacted various laws prohibiting restraints of trade. Under the Sherman Act,¹²⁷ conspiracies to restrain trade or to monopolize business are prohibited by federal law. Likewise, various state constitutional provisions, as well as state statutes, declare monopolies contrary to the principles of commerce and prohibit them.¹²⁸

Perhaps because blue laws are presumably enacted for the protection of the public welfare, they are seldom challenged as unlawful restraint of trade. Courts which have considered the question of state created monopolies have limited their scope of review to the determination of whether such restrictions were reasonably required for the protection of some public interest.¹²⁹ When such restrictions have been found to be in the public welfare, the schemes have been upheld.¹³⁰

*Supermarkets General Corp. v. Maryland*¹³¹ is one example of an unsuccessful monopoly-grounded attack on state blue laws. In *Supermarkets General* the Maryland Court of Appeals held, *inter alia*, that Maryland's blue laws scheme did not violate the state's constitutional prohibition of monopolies.¹³² The defendants, large merchants charged with violating two county blue laws, argued that a statewide monopoly had been created in favor of certain businesses because Sunday business operations were permitted in some counties, yet prohibited in the

127. 15 U.S.C. § 1 (1976). Section 1 provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal. . . ."

128. See, e.g., ARK. CONST. art. II § 19; MISS. CONST. art. VII § 198; TEX. CONST. art. I § 26; VA. CODE ANN. § 18.2-499 (1975); WASH. CONST. art. XII § 22; MD. CONST., DECL. OF RIGHTS, art. 41; MD. COMM. LAW CODE ANN. § 11-204 (1975 & 1979 Cum. Supp.).

129. *Raney v. County Comm'rs*, 170 Md. 183, 183 A. 548 (1936).

130. See, e.g., *Supermkt. Gen. Corp. v. Maryland*, 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980).

131. 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980).

132. Maryland's constitutional prohibition against monopolies is contained in article 41 of its Declaration of Rights. In *Levin v. Sinai Hosp.*, 186 Md. 174, 46 A.2d 298 (1946), the Court of Appeals defined monopoly:

A monopoly within the prohibition of our Declaration of Rights, is a privilege or power to command and control traffic in some commodity, or the operation of a trade or business to the exclusion of others, who otherwise would be at liberty to engage therein, necessarily implying the suppression of competition, and ordinarily causing a restraint of that freedom to engage in trade or commerce which the citizens enjoys by common right. A monopoly is more than a mere privilege to carry on a trade or business or to deal in a specified commodity. It is an exclusive privilege which prevents others from engaging therein. A grant of privileges, even though monopolistic in character, does not constitute a monopoly in the constitutional sense when reasonably required for protection of some public interest, or when given in return for some public service, or when given in reference to some matter not of common right. *Id.* at 182-83, 46 A.2d at 302.

counties where the defendants operated. The defendants contended that all customers desiring to do business with large retail establishments in the state were required to travel to certain counties where such large establishments could operate. The court, however, held that because large businesses were free to locate or relocate to counties which permitted Sunday operations, there was no suppression of competition and no exclusion of these large merchants from the Sunday market.¹³³ The court dismissed the economic and practical reasons against relocation as "matter[s] of business judgment."¹³⁴ Thus the court held that the state scheme which permitted certain counties to have no blue laws was not violative of Maryland's constitutional prohibition against monopolies.¹³⁵

At least two states have rejected the Maryland court's reasoning and have implied that Sunday closing laws unlawfully restrain trade. In *Boyer v. Ferguson*,¹³⁶ the Supreme Court of Kansas struck down that state's blue laws, stating:

The effect of this Act on the general public would be to force customers to cease doing their business at certain stores, and to shop at other places of business which are favored under the Act. Insofar as the appellees are concerned, the general public can buy anything that it could buy before the Act, except that the purchasers would have to look for one of the favored "persons" under the statute to purchase such items as the appellees are prohibited from selling. Instead of eliminating any evil a statute will create or commit evil — that is, it will eliminate the

133. 286 Md. at 626-27, 409 A.2d at 258-59.

134. *Id.* at 626, 409 A.2d at 258.

135. The implications of the Maryland court's ruling to the business community and the consumer are substantial. The suggested remedy for the large stores located in counties prohibiting their Sunday operation is for them to move to other jurisdictions within the state which would permit Sunday operations. Were such a mass exodus to blue laws sanctuaries to occur, Maryland's retail industry would become concentrated in certain counties while the blue laws counties would lose taxes, and their residents would lose jobs and shopping facilities. This state of affairs certainly would be inconsistent with the public welfare.

Recent legislative changes in Maryland's blue laws affecting Baltimore City and neighboring counties allow Christmas season shopping on the four Sundays preceding Christmas. See text and note at note 91 *supra*. While such a change has been welcomed by large merchants in areas where prohibitions previously precluded Sunday operations year round, and while this encourages local businesses to remain in their present locales, one cannot help but wonder how such a qualitative change is consistent with the stated purpose of the law.

136. 192 Kan. 607, 389 P.2d 775 (1964).

competition presently afforded by the appellees and others similarly situated.¹³⁷

Similarly, in *Kroger Co. v. O'Hara Township*,¹³⁸ the Pennsylvania Supreme Court strictly scrutinized that state's Sunday trading laws under state constitutional provisions which prohibit, *inter alia*, the legislature from passing any special law regulating trade.

While courts, for the most part, have ignored the economic realities of Sunday closing laws, business groups have used these laws to engage in a war of economic competition.¹³⁹ Small merchants seek to exclude large merchants from Sunday commerce; merchants selling certain goods seek to exclude competitors selling the same types of goods on Sundays; and certain types of businesses seek to gain an economic advantage over other types of businesses irrespective of their common clientele. From an economic standpoint, such a state of affairs raises serious questions as to whether blue laws are in fact, in the public interest — they prevent open competition among all merchants and may encourage higher prices on Sundays because of the lack of competition. Furthermore, in jurisdictions such as Maryland, where an individual can purchase virtually any item he wishes on Sundays, provided he is willing to travel to the particular county in which Sunday commerce is allowed, the motivation behind the maintenance of such laws seems to be that of economic favoritism under the guise of providing a uniform day of rest.¹⁴⁰ Mr. Justice Douglas' "ad hoc improvisation" theory seems to apply to the economic effects as well as to the religious motivations behind blue laws legislation.

B. *Procedural Challenges*

1. *Equal Protection*

Perhaps the most frequent attack on the various blue law schemes has been the claim that such enactments violate the equal protection clauses of both federal and state constitutions. While this issue was raised in *McGowan*, diverse methods of implementing Sunday closing legislation have resulted in different holdings depending on the type of scheme. Most state courts have adopted *McGowan's* "rational basis

137. *Id.* at 612, 389 P.2d at 779. The court specifically refused to consider the fourteenth amendment challenge, holding only that the laws violated the Kansas Constitution's prohibition of special laws.

138. 481 Pa. 101, 392 A.2d 266 (1978).

139. Balt. Sun, Feb. 2, 1980, § A at 14, col. 1. See also Note, *Sunday Laws*, 42 N.C. L. Rev. 148 (1964).

test," but have not felt constrained to follow *McGowan's* holding. The "rational basis test" set forth in *McGowan* states:

[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.¹⁴¹

Even though blue laws must be upheld if any state of facts reasonably may be conceived to justify them, a majority of state courts have determined that classifications in their state's respective schemes rest on grounds wholly irrelevant to the achievement of the state's objective.¹⁴²

Despite almost universal acceptance of the rational basis test as applied to Sunday closing legislation, in *Kroger Co. v. O'Hara Township*,¹⁴³ Pennsylvania's Supreme Court applied a more strict test to its blue laws when it considered a challenge based upon the state constitution's guarantee of equal protection. The court suggested that blue laws might be subject to a "strict scrutiny" test which requires a state to show a compelling interest in order to justify a statutory scheme creating distinctions.¹⁴⁴ However, the court adopted an intermediate test (between strict scrutiny and *McGowan's* rational basis) when it required Pennsylvania's blue laws to demonstrate "a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike."¹⁴⁵ A majority held that "we would not

140. Courts have been reluctant to consider the economic motivations and special interests in connection with blue laws. See, e.g., *New York v. Abrahams*, 40 N.Y.2d 277, 283, n.4, 353 N.E.2d 574, 577 n.4, 386 N.Y.S. 2d 661, 667 n.4 (1976), ("[I]t is beyond the province of the judiciary to hypothesize about the motives of legislators and whether or not portions of a statute are attributable to the efforts of so-called special interests.") *Genesco, Inc. v. J.C. Penney Co.*, 313 So. 2d 20 (Miss. 1977). *Contra*, *Skag-Way Dep't Stores, Inc. v. Omaha*, 179 Neb. 707, 140 N.W.2d 28 (1966); *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 129 N.W.2d 475 (1964).

141. 366 U.S. at 425-26. *Accord*, *New Orleans v. Dukes*, 427 U.S. 297 (1976).

142. See note 11 *supra*.

143. 481 Pa. 101, 392 A.2d 266 (1978).

144. *Id.* at 117, 392 A.2d at 274. The "strict scrutiny" test ordinarily is applied to "inherently suspect" classifications, such as race or religion. See P. FREUND, *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS* 914-16 (4th ed. 1977).

145. 481 Pa. at 119, 392 A.2d at 275.

be discharging our obligation to protect the constitutional guarantees were we not to require the statutory classifications to substantially further the statutory objective."¹⁴⁶

Equal protection challenges to Sunday closing law schemes necessarily have focused on the alleged absence of relevance to the state's objective. Many of the schemes have been accused of no longer furthering their objective because myriad exceptions have been engrafted upon the law. Additionally, it has been claimed that the entire scheme is violated when the state enacts county blue laws and allows some, but not all, counties within the state to approve the laws by referendum.¹⁴⁷ Finally, statutory distinctions pertaining to businesses or commodities excluded from Sunday closing laws have been attacked as lacking a rational relationship to the purported objective of the laws.¹⁴⁸

Several recent cases have found statewide Sunday closing legislation to be violative of equal protection. In *New York v. Abrahams*,¹⁴⁹ the New York Court of Appeals struck down New York's prohibitions against sales on Sunday. In recognizing that "the notion of a quiet Sunday is unquestionably valid in principle,"¹⁵⁰ the court held that the "gallimaufry of exceptions [to the law had] obliterated any natural nexus" between the law and its purpose.¹⁵¹ After tracing the progressive deterioration of the law and acknowledging that "there may be arbitrary distinctions as part of a rational pattern,"¹⁵² the court determined that "a modicum of rationality [was] required for the statute to be valid."¹⁵³ In a concurring opinion, Judge Fuchsberg advanced a warning to legislatures that constantly tamper with their blue laws:

[T]he statute is not the product of a single, conceptually cohesive legislative plan, but, instead, the consequence of years of patching and filling by the Legislature as it attempted to keep up with rapidly changing societal patterns and needs. Under such circumstances, it was almost inevitable that a time would come when the

146. *Id.* at 122, 392 A.2d at 276. The dissent criticized the majority's abandonment of the *McGowan* test. *Id.* at 128-30, 392 A.2d at 279-80.

147. *See, e.g.*, *Supermktks. Gen. Corp. v. Maryland*, 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980).

148. *Id.* at 617, 409 A.2d at 253.

149. 40 N.Y.2d 277, 353 N.E.2d 574, 366 N.Y.S. 2d. 661 (1976).

150. *Id.* at 279-80, 353 N.E.2d at 575, 386 N.Y.S. 2d. at 662.

151. *Id.*

152. *Id.* at 284, 353 N.E.2d at 578, 386 N.Y.S. 2d. at 669.

153. *Id.* The court did not indicate whether the blue laws were infirm under a federal or state equal protection guarantee.

patchwork no longer made any sense. I share my brother Judges' view that that moment has arrived.¹⁵⁴

Similarly, the Pennsylvania Supreme Court struck down its state's patchwork of blue laws in *Kroger Co. v. O'Hara Township*.¹⁵⁵ The *Kroger* holding is interesting because in an earlier case, *Two Guys v. McGinley*,¹⁵⁶ the United States Supreme Court upheld a portion of the laws against a federal equal protection challenge. The majority in *Kroger* attempted to distinguish *Two Guys* (and other Pennsylvania Supreme Court cases which upheld the laws) by asserting that *Kroger* raised, for the first time, a state constitutional challenge to the state scheme *in its entirety*, as opposed to federal challenges aimed at specific provisions. The dissent found this distinction unpersuasive and noted that the statute struck down by the majority differed little from those provisions upheld by the Supreme Court in *Two Guys*.¹⁵⁷ Although the majority purported to rely on Pennsylvania constitutional law, they apparently no longer found *Two Guys* persuasive but instead chose to follow the trend of other state courts that have held their blue laws to be unconstitutional.

In *Caldor's, Inc. v. Bedding Barn, Inc.*,¹⁵⁸ Connecticut's highest court held its statewide Sunday closing law to be violative of state and federal equal protection due to "the steady addition of new classes of enterprises exempted from the . . . law."¹⁵⁹ The law exempted some twenty-four categories of businesses, regardless of their size, which could sell almost any item, but imposed size restrictions on retail food stores. The court found such exemptions too arbitrary, discriminatory and unreasonable to comport with equal protection and due process.¹⁶⁰

In contrast, Massachusetts' Sunday closing laws were upheld in *Zayre Corp. v. Attorney General*¹⁶¹ despite the court's acknowledgment that the law's forty-nine exceptions could not be said to comprise a "cohesive" scheme. Even though the court evaluated the exemptions qualitatively with respect to their relationship to the law's objective, the

154. *Id.* at 289-90, 353 N.E. at 581-82, 386 N.Y.S. 2d. at 669.

155. 481 Pa. 101, 392 A.2d 266 (1978).

156. 366 U.S. 582 (1961).

157. 481 Pa. 101, 130, 392 A.2d 266, 280 (1978) (Eagen, C.J., dissenting).

158. 177 Conn. 304, 417 A.2d 343 (1979).

159. *Id.*, 417 A.2d at 353.

160. *Id.* The court did suggest that "[o]ne way to achieve the [blue law's] objective would be to permit only a relatively small number of small establishments, employing only a relatively small number of employees, to remain open on Sundays." *Id.* See also text accompanying notes 65-69 *supra*.

161. 372 Mass. 423, 362 N.E.2d 878. (1977).

court seemed to recognize the quantitative threshold stated in *Abrahams* that exemptions may become "so numerous that Sunday [becomes] a day of rest in name only."¹⁶²

Likewise, in *Supermarkets General Corp. v. Maryland*,¹⁶³ two statutes comprising but a small part of Maryland's extensive and varied blue law scheme were upheld despite an equal protection "patchwork" challenge. Relying on Maryland's legislative practice to enact local laws, and the legislature's prerogative to allow each county to determine Sunday closings by local option, the court refused to find that wide disparities in county laws violated equal protection or due process.¹⁶⁴ The county laws at issue allowed establishments employing fewer than six or eight persons to open on Sundays; the only other establishments permitted to open on Sundays were those few businesses which the court found were either rationally related to health or recreation, or whose nature required operation during all seven days of the week.¹⁶⁵ The Maryland Court of Appeals upheld the Baltimore and Anne Arundel County laws, reasoning that "[t]he limitation of the number of persons on a shift assures that a number of employees of large establishments will be afforded the day of rest sought by the laws."¹⁶⁶ The *Supermarkets General* court also found that equal protection was not violated because the legislature permitted some, but not all, Maryland counties to hold referenda on the abolition of blue laws.¹⁶⁷

Unlike the Massachusetts, Pennsylvania, and New York courts, the Maryland court in *Supermarkets General* declined to acknowledge that numerous changes or exceptions to blue laws could, at some point,

162. *Id.* at 435, 362 N.E.2d at 885.

163. 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980).

164. *Id. Accord*, *Salsburg v. Maryland*, 346 U.S. 545, 552 (1954); *Steimel v. Board of Election Supervisors*, 278 Md. 1, 357 A.2d 386 (1976).

The court found that the laws violated neither the fourteenth amendment to the Constitution, nor article 24 of Maryland's Declaration of Rights (state due process provision).

165. 286 Md. at 618-19, 409 A.2d at 254.

166. *Id.*

167. *Id.* at 620-23, 409 A.2d at 255-57. In all other states known to provide for a county-by-county determination on blue laws for citizens of that locality, legislatures have given *all* counties in the state an equal opportunity to enact or nullify such laws. See *Rutledge v. Gaylord's Inc.*, 233 Ga. 694, 213 S.E.2d 626 (1975); *Maine v. S.S. Kresge Inc.*, 364 A.2d 868 (Me. 1976); *Vornado, Inc. v. Hyland*, 77 N.J. 347, 390 A.2d 606 (1978). See also *Malibu Auto Parts, Inc. v. Virginia*, 218 Va. 467, 237 S.E.2d 782 (1977), where the issue was raised for the first time on appeal, and for that reason the court refused to rule on it.

destroy the law's rationality.¹⁶⁸ Instead the court suggested that the legislature should remedy possible defects:

The Maryland Sunday Blue Laws have been soundly denounced by some persons. They have been characterized as unwise, complex, a patchwork, a crazy quilt, a labyrinth, a legal maze, unnecessarily befuddling statutory crabgrass, an inconvenience, a hypocrisy. But even if they were, they could not for those reasons be voided by the judiciary. As we have indicated, absent some constitutional infirmity the judiciary simply has no power to interfere. We have determined that § 534L and § 534N, contrary to appellants' contentions, are constitutionally valid. *The statutes must stand firm until the General Assembly of Maryland changes them.* If it concludes that the public welfare requires that Sunday business activities no longer be proscribed in Baltimore County and Anne Arundel County, or in fact in any other county, or city or town, *it has the power and the means to effectuate its conclusion.*¹⁶⁹

Equal protection remains a potentially successful avenue to attack blue laws schemes which have become so riddled with exceptions that they no longer bear a rational relation to the law's purpose. Crucial to such analysis is the scope of the legislation to be reviewed. The New York, Pennsylvania, and Connecticut courts chose to review *entire* state schemes; the wide scope of analysis presented the courts with numerous exceptions and disparities to invalidate their laws. The analysis used by these courts in dealing with "patchwork" blue laws is persuasive, and the quantitative standards they applied lend themselves to precedential use in other states. In contrast, Maryland's refusal to acknowledge the erosive effects of numerous exceptions to a blue law scheme seems to be premised solely upon excessive deference to the legislature. It would seem beyond dispute that any law may violate its *raison d'être* when exceptions to the law become the rule.

2. *Due Process*

A corollary to the equal protection challenge is the claim that blue laws violate due process. In *Supermarkets General Corp. v. Maryland*,¹⁷⁰ the court stated:

168. *Id.* at 620-24, 409 A.2d at 255-57.

169. *Id.* at 629, 409 A.2d at 260 (emphasis added). In the Report of the Governor's Commission to Study the Operation of the Sunday Blue Laws (1975), see note 29 *supra*, the Commission recommended the repeal of the entire state scheme.

170. 286 Md. 611, 409 A.2d 250 (1979), *cert. denied*, 101 S. Ct. 45 (1980).

The test for constitutionality under the due process clause is whether a statute, as an exercise of the state's police power, bears a real and substantial relation to the public health, morals, safety, and welfare of the citizens of the state The exercise by the Legislature of the police power will not be interfered with unless it is shown to be exercised arbitrarily, oppressively or unreasonably. (citation omitted).¹⁷¹

Despite the assertion by Maryland's highest court that "[t]here is no practical distinction between the grounds [of equal protection and due process]"¹⁷² some courts have found separate violations of due process without relying on equal protection. For example, in *Kelly v. Blackburn*,¹⁷³ Florida's Supreme Court struck down its state blue law which prohibited all Sunday commerce except the operation of movie theatres and the printing and sale of newspapers, finding that even such limited exemptions were not sufficiently related to the "public health, safety, morals or general welfare."¹⁷⁴ The court reiterated a statement from a previous Florida case that the closing of *all* businesses on Sunday did bear "rational and reasonable relationship to the public health, safety, morals or general welfare because . . . protection is afforded all citizens from the evils attendant upon uninterrupted labor."¹⁷⁵ Paradoxically, in *Pacesetter Homes, Inc. v. Village of South Holland*¹⁷⁶ the Supreme Court of Illinois reached the same result but for another reason. In *Pacesetter*, a blue law which prohibited all business activity *per se* was held to be arbitrary because it prohibited the operation of "harmless" as well as "harmful" businesses.¹⁷⁷ The court found that those businesses which had no tendency to affect or endanger the public health, safety, morals, or general welfare could not be prohibited from Sunday commerce under the state's police power. Thus, even in the presumably simple case of uniform prohibition, the courts are in disagreement.

171. *Id.* at 618, 409 A.2d at 254, quoting *Bowie Inn v. City of Bowie*, 274 Md. 230, 236, 335 A.2d 679, 683 (1975). *Accord*, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124-25 (1978).

172. 286 Md. at 618, 409 A.2d at 254.

173. 95 So. 2d 260 (Fla. 1957). For other cases striking down blue laws on due process grounds, see *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952); *Spartan's Indus., Inc. v. Oklahoma City*, 498 P.2d 399 (Okla. 1972); *Nation v. Giant Drug*, 396 P.2d 431 (Wyo. 1964). See also *County of Spoane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966). *Contra*, *Gibson Prods. Co., v. Texas*, 545 S.W.2d 128 (1976).

174. 95 So. 2d at 262.

175. *Id.*

176. 18 Ill. 2d 247, 163 N.E.2d 464 (1959).

177. *Id.* at 255, 163 N.E.2d at 469.

Several state courts have reviewed statutory language claimed to be vague and therefore violative of due process.¹⁷⁸ For example, Minnesota's provision restricting the sale of certain commodities on Sunday was held unconstitutionally vague, and thereby violative of fourteenth amendment due process, in *Minnesota v. Target Stores, Inc.*¹⁷⁹ The court held that the designation of certain restricted commodities as "home appliances" and "home furnishings" was so unclear that it failed to give merchants proper notice of prohibited items.¹⁸⁰ Similarly, the Supreme Court of Utah, in *Skaggs Drug Centers, Inc. v. Ashley*,¹⁸¹ struck down its state's Sunday closing law on vagueness grounds, the court held that exemptions for "goods or the rendering of services necessary to the maintenance of health, safety or life, such as . . . medical or hospital goods or services or prescription medicine"¹⁸² were impermissibly vague and violated due process.

On the other hand, arguably "vague" designations such as "garden and lawn supplies" were upheld against a due process challenge in *Genesco, Inc. v. J. C. Penney Co.*¹⁸³ Likewise, in *Malibu Auto Parts v. Virginia*,¹⁸⁴ Virginia's Supreme Court held that the term "emergency," when applied to motor vehicle repairs on Sunday, was sufficiently precise to withstand a vagueness challenge. In *McGowan v. Maryland*¹⁸⁵ the Supreme Court rejected a claim that portions of Maryland's 1961 blue laws were unconstitutionally vague; rather, the Court found that "business people of ordinary intelligence would be able to know what exceptions are encompassed by the statute . . . as a matter of ordinary commercial knowledge."¹⁸⁶

While there is disagreement among cases regarding what is acceptable regulatory language, some general propositions emerge.

178. See generally Annot., 91 A.L.R.2d 763 (1963).

179. 279 Minn. 447, 156 N.W.2d 908 (1968). See also *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952) (Drew, J., concurring).

180. 279 Minn. at 468-69, 156 N.W.2d at 921-22.

181. 26 Utah 2d 38, 484 P.2d 723 (1971).

182. *Id.* at 41, 484 P.2d at 724, citing *Laws of Utah* 25 § 5(1) (1970).

183. 313 So. 2d 20, 22 (Miss. 1975). In *Genesco*, a microcosm of the irrationality in certain blue laws was Mississippi's particularly mystifying distinction between non-power operated toiletries, showering and grooming supplies which were permitted to be sold on Sundays and similar items which were prohibited because they were operated by power. See also *Whitney Trading Corp. v. McLeod*, 255 S.C. 8, 176 S.E.2d 572 (1970) (holding that commodity classifications in law were not unconstitutionally vague).

184. 218 Va. 467, 237 S.E.2d 782 (1977).

185. 366 U.S. 420 (1961).

186. *Id.* at 428. See also *Giant of Md., Inc. v. State's Attorney*, 267 Md. 501, 298 A.2d 427 (1973), *appeal dismissed*, 412 U.S. 915 (1973), (upholding other sections of Maryland's blue laws against a vagueness attack).

When state regulations list specific items which can or cannot be sold on Sundays, and when such designations bear a rational relationship to the blue law's purpose, those provisions will likely be defensible against a vagueness attack. Conversely, statutory language is more vulnerable to a vagueness challenge when it attempts to exempt certain businesses by type or describes general categories of goods permissible for Sunday sale.

Although closely related to equal protection, due process remains as a distinct and viable tack to challenge blue laws. One important factor is the difference in tests. The test for a violation of due process, while strict, may be more easily satisfied than *McGowan's* rational basis test.¹⁸⁷ Under the due process test the law must bear a "real and substantial relation" to the public welfare, while under the test for equal protection the law will be upheld if any state of facts reasonably may be conceived to justify it.¹⁸⁸

3. *Discriminatory Enforcement*

Validly enacted blue laws sometimes have been challenged on grounds that the laws have been enforced in an arbitrary and discriminatory manner. As stated by the New York Court of Appeals in *New York v. Acme Markets, Inc.*¹⁸⁹

Discriminatory enforcement as a defense to a criminal action derives from the Federal and State constitutional guarantee of equal protection of the law. . . . The underlying concept is elemental — that persons similarly situated should be treated the same and that criminal justice should and must be evenly and equally dispensed.¹⁹⁰

In *Acme Markets* the court found that the blue law in question violated the equal protection clauses of the federal and state constitutions because there was no policy of general enforcement, a history of disuse of the law, and a policy of prosecution only when private citizens complained to enforcement authorities.¹⁹¹ Similarly, in *City of Ashland*

187. See text accompanying note 141 *supra*.

188. Compare text accompanying note 171 *supra* with text accompanying note 141 *supra*.

189. 37 N.Y.2d 326, 334 N.E.2d 555, 372 N.Y.S.2d 590 (1975).

190. *Id.* at 330, 334 N.E.2d at 557, 372 N.Y.S.2d at 593.

191. *Id.* at 331-32, 334 N.E.2d at 558, 372 N.Y.S.2d at 594. Three members of the court stated that the law was unconstitutional because of a "polyglot of exceptions to the general closing mandate." *Id.* at 333, 334 N.E.2d at 559, 372 N.Y.S.2d at 596. The majority, while expressing reservations about the rationality of the statute, failed to reach

v. Heck's, Inc.,¹⁹² the Kentucky Court of Appeals found discriminatory enforcement of that state's blue laws. Although the court acknowledged the facial validity of Kentucky's Sunday closing law, it granted an injunction in favor of a department store, finding that the store was the only entity in the city found guilty of violating the law in twenty-five years.¹⁹³

Mere lack of uniformity in enforcing blue laws is insufficient to establish discriminatory enforcement;¹⁹⁴ only purposeful or intentional discrimination is prohibited.¹⁹⁵ Discriminatory purpose will not be presumed¹⁹⁶ and a heavy burden is placed upon those claiming discriminatory enforcement (in part because of the violator's "lack of clean hands").¹⁹⁷ Accordingly, discriminatory enforcement is a difficult defense on which to prevail. It appears that this defense is most successful when law enforcement officials only enforce the law when asked to do so by merchant-competitors or other special interest groups.¹⁹⁸

4. *Claims Based Upon Particular State Constitutional Provisions*

In addition to the procedural challenges based upon federal statutory and constitutional provisions, there are also numerous other potential attacks based upon unique state constitutional provisions. Sunday closing legislation has been challenged on grounds that the

the issue of constitutionality on this basis, but struck the law down on the grounds of discriminatory enforcement. *Id.* at 331, 334 N.E.2d at 558, 372 N.Y.S.2d at 594. One year later in *New York v. Abrahams*, 40 N.Y.2d 277, 353 N.E.2d 574 (1976), the law was struck down as an unconstitutional "patchwork" no longer having a rational relationship to the purpose of the law.

192. 407 S.W.2d 421 (Ky. 1966).

193. *Id.* at 424. The court noted that other establishments such as pharmacies, groceries and car washes were permitted to open on Sundays. Despite leaving its blue law intact, the court characterized the law as a "poor" one.

194. *Giant of Md., v. State's Attorney*, 267 Md. 501, 517, 298 A.2d 427, 436 (1973); *Zayre Corp. v. Attorney General*, 372 Mass. 423, 441, 362 N.E.2d 878, 888 (1977); *New York v. Acme Mkts., Inc.* 37 N.Y.2d 326, 330, 334 N.E.2d 555, 557, 372 N.Y.S.2d 590, 594 (1975).

195. *New York v. Acme Mkts., Inc.*, 37 N.Y.2d 326, 330, 334 N.E.2d 555, 557, 372 N.Y.S.2d 590, 594 (1975); *Whitney Trading Corp. v. McNair*, 255 S.C. 8, 12, 176 S.E.2d 572, 574 (1970).

196. *Whitney Trading Corp. v. McNair*, 255 S.C. 8, 12, 176 S.E.2d 572, 574 (1978).

197. *See, e.g., New York v. Acme Mkts., Inc.*, 37 N.Y.2d 326, 331, 334 N.E.2d 555, 557-58, 312 N.Y.S.2d 590, 594 (1975); *City of Ashland v. Heck's Inc.*, 407 S.W.2d 421, 426 (Ky. 1966) (Montgomery, J., dissenting).

198. *See, e.g., New York v. Acme Mkts., Inc.*, 37 N.Y.2d 326, 334 N.E.2d 555, 312 N.Y.S.2d 590 (1975).

enacted laws constitute an impermissible delegation of legislative power to counties,¹⁹⁹ that the laws violate state constitutional provisions prohibiting special laws,²⁰⁰ and that the laws violate state constitutional provisions requiring all laws of a general nature to have a uniform operation throughout the state.²⁰¹ Because such claims are based upon a precise state constitutional provision and a state's particular blue law, many of these challenges are of limited precedential value outside of the borders of the particular state. It is worth emphasizing, however, that should a state court find challenges based upon the Federal Constitution unpersuasive, provisions of the particular state constitution might remain available as a ground to challenge the Sunday closing legislation.

C. Preemptive Challenges

Recently, Sunday closing legislation has been attacked on the basis of the supremacy clause of the Federal Constitution, contained in article IV, section 2. The supremacy clause provides that the Constitution and the laws of the United States made pursuant thereto "shall be the supreme Law of the Land." Appellants in *Gibson Distributing Co. v. Downtown Development Association*,²⁰² argued that Texas' blue laws were preempted by the Sherman Act,²⁰³ a federal act passed pursuant to the Constitution. The Texas Supreme Court rejected this argument holding, that under *Parker v. Brown*,²⁰⁴ "state action affecting commerce is generally considered to be exempted from the Sherman Act."²⁰⁵ While recognizing that "[n]ot every act of a state or local subdivision necessarily comes within the exception to the Sherman Act,"²⁰⁶ the court determined that Sunday blue laws were not preempted by the federal law. Accordingly, Texas' blue laws were upheld.

No other reported case has raised this issue. However, this new approach indicates the continuing opposition to Sunday closing legislation and the constant search for new grounds upon which to challenge such laws.

199. *Arlan's Dep't. Stores v. Kelley*, 374 Mich. 70, 130 N.W.2d 892 (1964).

200. See, e.g., *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978); *McKair v. Kansas City*, 363 Mo. 1033, 256 S.W.2d 815 (1953); *Treasure City v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964).

201. *Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 (1964); *Brown Enterprises v. Fulton*, 192 N.W.2d 773 (Iowa 1972).

202. 572 S.W.2d 334 (Tex. 1978), *appeal dismissed*, 439 U.S. 1000 (1978).

203. See text accompanying note 127 *supra*.

204. 317 U.S. 341 (1943).

205. 572 S.W.2d at 335.

206. *Id.*

V. CONCLUSION

While Sunday closing laws have been consistently upheld when they properly implement the legitimate state purpose of providing rest, relaxation and tranquility, the plethora of litigation demonstrates a variety of problems in achieving the state objective by use of the criminal law. The threshold question is whether such laws carry out their stated purpose.

Despite unequivocal assertions by both the United States Supreme Court and state supreme courts that *all* citizens are to be protected, many laws do not carry out this purpose. There seem to be two primary groups protected by blue laws: those persons who, but for the legislation, would be required by their employer to work on Sundays; and those persons who, while not required to labor on Sunday, nevertheless would be denied rest, relaxation and tranquility by the disruptive activities of fellow citizens. The overwhelming majority of laws, while paying lip service to their purported objective, do not, in fact, protect all citizens in the particular jurisdiction. In states allowing only small businesses to open on Sundays, employees working for such businesses must still work on the day of rest. Other statutes, such as article 27, Section 534J of the Annotated Code of Maryland, totally ignore the segment of the population who, despite not laboring on Sunday, arguably have their day of rest disrupted. Pursuant to Maryland's law, businesses are allowed to operate without restriction subject to the rights of employees to choose Sunday or their Sabbath as a day of rest. Such a law protects only workers, not nonworkers, and therefore does not guarantee a day of rest for *all* citizens.

The split of judicial authority on the validity of various legal schemes makes it apparent that state legislatures are the branch of government primarily responsible for rectifying alleged injustices of certain blue laws. The fact that legislatures have had so much difficulty enacting or repealing Sunday closing laws is not surprising since the public constituency is divided. Business establishments prohibited from Sunday operation, willing Sunday workers, recreational shoppers and persons who are unable to shop during the week favor the abolition of blue laws. Many religious organizations, employees who may have to work on Sundays, and businesses exempted under the law favor the laws' continued existence. As with other controversial public issues, perhaps a referendum (either statewide for state laws, or local for local laws) would be a preferable method of determining the will of the public.

Enforcement of laws prohibiting what is lawful commercial activity six days of the week but unlawful one day of the week, saps precious

resources. Instead of performing other more necessary duties, police are required to gather evidence, issue citations against business establishments and managerial employees, and appear at trials of violators. Certainly, the waste of valuable police and judicial time and effort brings into question the use of the criminal law to further a day of rest.

Perhaps the most persuasive argument against Sunday closing laws is neither a legal nor an administrative one: why must citizens be restricted under penalty of criminal sanctions from engaging in what otherwise would be lawful business activity — to shop on Sundays, or to work on Sundays to gain extra income? If the true goal of the legislature is to prevent forced Sunday labor, that objective can be achieved in a more limited fashion. Certainly it can no longer be persuasively argued that the closing of businesses alone transforms Sunday into a peaceful day. With a multitude of other activity on Sunday, the interest of the populace in seeking rest and relaxation needs no criminal enforcement. No one is required to shop on Sundays; no one is required to leave the peace and quiet of his residence.

The patchwork of exceptions to blue laws not only demonstrates the influence of certain economic groups, but also shows the futility of applying a three hundred year old religious law to today's modern society. When various subdivisions within a state scheme are allowed to have widely divergent laws, all containing their own exceptions, it is obvious that the law has become a tool for special interests, rather than a law benefiting all citizens.

Each state legislature must determine its true objective, evaluate its law in light of that objective, and if deemed appropriate, enact legislation to achieve the goal in the most narrow fashion so as to prevent interference with the rights of others. So long as Sunday closing legislation exists in its present form, legal challenges likely will continue.