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Red, White, but Mostly Blue: The Validity of Modern Sunday Closing Laws Under the Establishment Clause

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Red, White, but Mostly Blue: The Validity of Modern Sunday Closing Laws Under the Establishment Clause

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I. INTRODUCTION

On a Sunday morning, the average American might hope to enjoy any number of activities: attending a church service, drinking a mimosa with brunch, shopping for clothes at the mall, looking for a new car, or hunting with friends. However, in a surprisingly large number of states, only one of these activities would be legal: going to church.

Such is the result of blue laws,¹ the colloquial term for state statutes that regulate or prohibit entertainment and commercial activities on Sundays or religious holidays.² Originating in England, blue laws were enacted throughout colonial America in an effort to protect the Christian Sabbath as mandated by the Fourth Commandment.³ Despite centuries of change and secularization, Sunday restrictions have not only survived, they have thrived, remaining in effect in a majority of states even today.⁴

This prominence, however, does not equal validity. To the contrary, blue laws frequently have been challenged as unconstitutional establishments of religion in violation of the First Amendment,⁵ most notably in the 1961 case of *McGowan v. Maryland*.⁶ Although the Supreme Court has acknowledged the overtly religious origins of blue laws, it has chosen nevertheless to uphold them as advancing the secular purpose of creating a uniform day of rest.⁷ Despite this conclusion, changes in both the Supreme Court's Establishment Clause jurisprudence and modern blue laws themselves suggest the Court would reach a very different result if a similar challenge were brought today.

Part II of this Note outlines the history of blue laws and provides an overview of their current status, specifically exploring the most frequently restricted activities. Part III examines the Supreme

1. Sunday restrictions were first called "blue laws" during the colonial period. DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, *BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS* 8 (1987). Some commentators assert that the term derives from the 1665 laws of the New Haven Colony, which were printed on blue paper. *Id.* However, other commentators argue that the term originates from the expression "true blue," a derogatory term for the Puritans that referred to their constant virtue and the strictness of their convictions. *Id.*

2. See BLACK'S LAW DICTIONARY 183 (8th ed. 2004) (defining blue laws as "statute[s] regulating or prohibiting commercial activity on Sundays"); LABAND & HEINBUCH, *supra* note 1, at 3 (describing blue laws as "laws that prohibit or restrict individuals from engaging in certain acts on Sunday"). Blue laws are also frequently referred to as "Sunday restrictions," "Sunday closing laws," or "Sunday statutes" and will be called such throughout this note. *Id.*

3. See *McGowan v. Maryland*, 366 U.S. 420, 431 (1961) (explaining that blue laws "go far back into American history, having been brought to the colonies with a background of English legislation dating to the thirteenth century"). The Fourth Commandment states:

Remember to observe the Sabbath day by keeping it holy. Six days a week are set apart for your daily duties and regular work, but the seventh day is a day of rest dedicated to the Lord your God. On that day no one in your household may do any kind of work.

Exodus 20:8-10.

4. LABAND & HEINBUCH, *supra* note 1, at 48. Although Laband and Heinbuch originally made this observation in 1985, research performed in early 2006 and outlined *infra* in Part II.B proves their statement remains accurate today.

5. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

6. *McGowan*, 366 U.S. at 420.

7. *Id.* at 431, 452.

Court's treatment of individual cases addressing blue laws and provides a summary of the Court's somewhat complicated Establishment Clause jurisprudence, attempting to extract unifying principles under which the constitutionality of governmental actions can be tested. Part IV applies the principles derived in Part III to modern blue laws, concluding that such restrictions are unconstitutional establishments of religion. Moreover, particular attention is paid to the role played by special interest groups in obtaining blue law exceptions and the effect of their influence on the Court's analysis in *McGowan*. Finally, Part V offers concluding thoughts and suggests an alternative method for providing a day of rest which would pose none of the constitutional problems created by Sunday restrictions.

II. SOMETHING BORROWED, SOMETHING KEPT: AN OVERVIEW OF AMERICAN BLUE LAWS

A. History of Blue Laws

Despite their prominence in the United States, blue laws are far from a uniquely American invention. In 321 A.D., Constantine passed the first Sunday restriction requiring that "all judges . . . city people and . . . tradesmen rest upon the *venerable day of the sun*," the pagan term for Sunday.⁸ This earliest blue law and others of similar character suggest that well before Christianity recognized Sunday as its Sabbath, pagans set it apart as a day of rest.⁹ However, as Christianity's influence grew, pagan Sunday restrictions were replaced with those meant to fulfill the Christian objective of keeping the Sabbath holy. In fact, as early as 386 A.D., blue laws began to refer expressly to Sunday as "the Lord's day."¹⁰ From then until well into the seventeenth century, Sunday restrictions were enacted throughout England for solely Christian purposes.¹¹ These laws

8. LABAND & HEINBUCH, *supra* note 1, at 9 (quoting Code Just. 3.12.3 (Constantine/321)).

9. *Id.* at 8-9.

10. *Id.* at 9-10 (quoting a proclamation from emperors Gratianus, Valentinianus, and Theodosius stating that "on the day of the sun, properly called the Lord's day" there should be no lawsuits, business, indictments, or debt collection, as such activities would violate "an institute and rite of holy religion").

11. See *McGowan*, 366 U.S. at 433 (finding that early "English Sunday legislation was in aid of the established church"); LABAND & HEINBUCH, *supra* note 1, at 10-29 (listing English Sabbath legislation passed between the fifth and seventeenth centuries). Blue laws were passed throughout England until as recently as 1950, with many remaining in effect today. *Id.* at 208.

banned a variety of activities, including attending market, playing games, and engaging in "bodily labor."¹²

As British colonists settled America, they enacted their own versions of the English blue laws, the first of which was passed by the Colony of Virginia in 1610.¹³ It declared that "[e]very man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day, and in the afternoon to divine service, and catechising."¹⁴ A colonist's first violation was punishable by the garnishment of a week's provisions and allowance, the second by garnishment and whipping, and the third by death.¹⁵ Fortunately, such extreme punishment was rare.¹⁶ However, blue laws in colonial America were both widespread and frequently enforced, most commonly through the levying of substantial fines.¹⁷ For instance, in the Plymouth, Massachusetts Bay, Connecticut, and New Haven colonies residents could not travel unnecessarily, engage in sports, or sell alcoholic beverages on Sunday.¹⁸ Maryland forbade Sunday "gaming, fishing, fowling, [and] hunting," while New York added horseracing and the "frequenting of tipping-houses" to its list of prohibitions.¹⁹ These and other colonial blue laws were based primarily on an English Sunday restriction passed in 1677 by Charles II, stating, "[f]or the better observation and keeping holy the Lord's day, commonly called Sunday . . . all and every person . . . shall upon every Lord's day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion."²⁰ All were forbidden from "exercis[ing] any worldly labor or business or work of their ordinary calling," or "expos[ing] for sale any wares, merchandise, fruit, herbs, goods, or chattels."²¹

12. See *McGowan*, 366 U.S. at 431-32 (describing Sunday restrictions passed from 1237 to the mid-seventeenth century by a variety of English rulers).

13. LABAND & HEINBUCH, *supra* note 1, at 30.

14. *Id.*

15. *Id.*

16. See WARREN L. JOHNS, DATELINE SUNDAY, U.S.A.: THE STORY OF THREE AND A HALF CENTURIES OF SUNDAY-LAW BATTLES IN AMERICA 6 (1967) (stating that most colonial blue laws were not punishable by death).

17. LABAND & HEINBUCH, *supra* note 1, at 38-39. Enforcement was so common that even newly elected President George Washington was stopped when traveling from Connecticut to New York for violating Connecticut's ban on Sunday travel. *Id.* at 38.

18. *McGowan v. Maryland*, 366 U.S. 420, 433 (1961).

19. LABAND & HEINBUCH, *supra* note 1, at 33-34.

20. *McGowan*, 366 U.S. at 432 (quoting The Sunday Observance Act, 1677, 29 Car. 2, c. 7 (Eng.)).

21. *Id.* (emphasis omitted).

Colonial blue laws survived the American Revolution and the enactment of the First Amendment relatively unscathed.²² Despite having themselves adopted constitutions that prohibited government establishment of religion, most new states reenacted their colonial Sunday restrictions,²³ abandoning only provisions like that of Virginia requiring church attendance.²⁴ These “new” blue laws continued the colonial tradition of prohibiting all Sunday labor, business, and worldly amusements,²⁵ although most states added exemptions for works of necessity and charity.²⁶ Initially, states did not stringently enforce their blue laws.²⁷ However, the increasingly religious attitude of Americans in the early nineteenth century revitalized blue law enforcement and resulted in several significant developments, including efforts to ban Sunday mail delivery and further restrict Sunday alcohol consumption.²⁸ Blue laws were updated further in the early twentieth century when many states extended their list of prohibited worldly amusements to include activities as diverse as baseball, theater, cockfighting, and fiddling.²⁹

B. Blue Laws Today

Throughout the twentieth century, American culture grew significantly more secular and the demands of business more extreme. However, blue laws have remained constant, even receiving validation from the Supreme Court in the landmark 1961 case of *McGowan v. Maryland*.³⁰ In recent years, several states have attempted to “modernize” their blue laws, increasing the number of activities exempted from their bans or repealing broad prohibitions. Some states have even entirely eliminated all non-alcohol related restrictions.³¹ Unfortunately, this encouraging trend has not led to the end of blue

22. *Id.*

23. Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 683 (2000).

24. *McGowan*, 366 U.S. at 434.

25. JOHNS, *supra* note 16, at 60.

26. King, *supra* note 23, at 683-84.

27. *Id.* at 684.

28. *See id.* at 684-85 (describing the campaign of Protestant ministers to overturn federal legislation allowing Sunday mail delivery and the temperance movement’s focus on Sunday in the nineteenth century). Efforts to eliminate Sunday mail delivery succeeded in 1912. JOHNS, *supra* note 16, at 77.

29. *See* JOHNS, *supra* note 16, at 64-65 (describing typical Sunday laws in the 1930’s and 1940’s).

30. *McGowan v. Maryland*, 366 U.S. 420 (1961). *See* discussion *infra* Part III.A.

31. Alaska, Arizona, California, Florida, Hawaii, Montana, Nebraska, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming have eliminated all non-alcohol related blue laws.

laws. Today, the majority of states still retain some type of Sunday closing law.³² These statutes come in many forms, including both “general” and “specific” provisions.

“General” blue laws resemble traditional Sunday restrictions in their broad prohibition of all labor and business. However, unlike their colonial predecessors, modern general blue laws frequently exempt a laundry list of activities from their sweeping bans.³³ Today, at least nine states maintain such restrictions.³⁴ Alternatively, some states choose not to employ the broad language of a general Sunday restriction but achieve almost the same result by individually prohibiting the sale of virtually every item that would otherwise fall under a general ban.³⁵ Still other states maintain more limited general restrictions, choosing to prohibit a broad range of activities but only for a portion of Sunday instead of the entire twenty-four-hour period.³⁶

32. LABAND & HEINBUCH, *supra* note 1, at 48. Although Laband and Heinbuch based their observation on data from 1985, research performed in early 2006 and outlined in this section suggests their statement remains accurate today. *Id.* at 47.

33. See discussion *infra* Part IV.A.1.

34. See ALA. CODE §§ 13A-12-1 to 13A-12-2 (2006) (prohibiting any person from compelling another to “perform any labor on Sunday, except the customary domestic duties of daily necessity or comfort, or works of charity” or opening “[a]ny place where people assemble for the purchase and sale of goods, wares and merchandise, [or] provisions”); CONN. GEN. STAT. § 53-302a (2007) (stating that “[n]o person, firm or corporation shall engage in work, labor or business . . . on Sunday); KY. REV. STAT. ANN. § 436.160 (West 2006) (providing that “[a]ny person who works on Sunday . . . in labor or other business, whether for profit or amusement . . . shall be fined”); ME. REV. STAT. ANN. tit. 17, § 3204 (2006) (stating that “[a] person may not keep a place of business open to the public” on Sunday unless for “works of necessity, emergency, or charity”); MASS. GEN. LAWS ch. 136, § 5 (2007) (providing that “[w]hoever on Sunday keeps open his shop, warehouse, factory or other place of business, or sells foodstuffs, goods, wares, merchandise or real estate, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine”); N.H. REV. STAT. ANN. § 332-D:1 to D:2 (2006) (stating that “[n]o person shall do any work, business, or labor of his secular calling . . . on the first day of the week, commonly called the Lord’s Day” or “keep his shop, warehouse, cellar, restaurant or workshop open”); N.Y. GEN. BUS. LAW § 5 (McKinney 2007) (prohibiting “[a]ll labor on Sunday” except “works of necessity and charity”); OKLA. STAT. ANN. tit. 21, § 908 (West 2006) (forbidding “[s]ervile labor, except works of necessity or charity” and “[a]ll manner of public selling . . . of any commodities”); W. VA. CODE § 61-10-25 (2007) (making it unlawful “for any person to engage in work, labor or business” on Sunday “except in household or other work of necessity or charity”).

35. See MO. ANN. STAT. § 578.100 (West 2006) (prohibiting retail sale of motor vehicles, clothing, furniture, house wares, office supplies, appliances, hardware, tools, paints, building supplies, jewelry, silverware, watches, clocks, luggage, instruments, and musical recordings).

36. See N.D. CENT. CODE §§ 12.1-30-01 to 12.1-30-02 (2005) (making it a misdemeanor to “conduct business or labor for profit” or sale or rent a specific list of items before noon on Sunday); S.C. CODE ANN. §§ 53-1-5, 53-1-40, 53-1-60 (2006) (deeming it “unlawful for any person to engage in worldly work, labor, business of his ordinary calling or the selling . . . to the consumer any goods, wares or merchandise, excepting work of necessity or charity” before one-thirty p.m. on Sundays).

Outside of a general ban, many states target specific activities as uniquely worthy of Sunday restriction. For example, six states limit Sunday horseracing,³⁷ although only two restrict the racing of motor vehicles³⁸ and dogs.³⁹ At least four states prohibit various forms of hunting on Sunday,⁴⁰ two restrict the taking of oysters,⁴¹ and one bans the operation of pawnbrokers.⁴² Two states prohibit conducting “games of chance” on Sunday,⁴³ while at least one state forbids the operation of adult-oriented establishments.⁴⁴ Restrictions on the Sunday sale of motor vehicles are much more common and maintained by at least nine states.⁴⁵ However, by far the most prevalent specific blue laws are those restricting the sale of alcohol. These statutes come

37. See ARK. CODE ANN. § 23-110-402 (2006) (prohibiting all Sunday horseracing unless approved by voters in the affected jurisdiction through referendum); 230 ILL. COMP. STAT. 5/19 (2006) (prohibiting all Sunday horseracing unless approved by voters in the affected jurisdiction through referendum); LA. REV. STAT. ANN. § 4:157 (2006) (prohibiting all Sunday racing unless approved by resolution or ordinance of the governing body of the affected jurisdiction); MD. CODE ANN., BUS. REG. § 11-504 (LexisNexis 2007) (prohibiting mile thoroughbred racing on Sunday before noon); ME. REV. STAT. ANN. tit. 17, § 3205 (2006) (allowing Sunday sports when approved by referendum of a city, “except boxing, horseracing, air circuses or wrestling”); N.H. REV. STAT. ANN. § 332-D:3 (2006) (prohibiting horseracing before “midday”).

38. See CONN. GEN. STAT. § 14-164a (2007) (banning motor vehicle racing before noon on Sunday unless a permit is issued by the jurisdiction where the race will be held); TENN. CODE ANN. § 55-22-109 (2006) (prohibiting Sunday racing before noon or after six p.m.).

39. See ARK. CODE ANN. § 23-111-502 (2006) (prohibiting any dog racing on Sunday); N.H. REV. STAT. ANN. § 332-D:3 (2006) (prohibiting dog racing before “midday”).

40. See CONN. GEN. STAT. § 26-73 (2007) (declaring Sunday “a closed season except for the purpose of trapping,” although “[a]rtificially propagated birds . . . may be shot on Sundays on licensed private shooting preserves,” under discussion for amendment as of April 2007); MD. CODE ANN., NAT. RES. § 10-410 (LexisNexis 2007) (banning the hunting of game birds or mammals on Sunday unless the hunter uses state certified raptors, is part of an unarmed fox chase, or is hunting specific pen-reared game birds; under discussion for amendment as of April 2007); N.J. STAT. ANN. § 23:4-24 (West 2007) (banning hunting on Sunday unless hunting raccoon between midnight and sunrise or trapping fur-bearing animals; under discussion for amendment as of April 2007); N.C. GEN. STAT. § 103-2 (2006) (banning all hunting on Sunday unless in defense of one’s property).

41. See N.J. STAT. ANN. § 50:2-11 (West 2007) (prohibiting any person from catching clams or oysters on Sunday unless they do so on Rarian Bay, Sandy Hook Bay, Shrewsbury River, or Navesink River); VA. CODE ANN. § 28.2-530 (2007) (prohibiting persons from taking oysters on Sunday unless not more than a bushel is taken for personal use by hand or the oysters are “cultured”).

42. MICH. COMP. LAWS § 446.217 (2007).

43. See MD. CODE ANN., CRIM. LAW § 13-606(e)(2) (LexisNexis 2007) (prohibiting bingo on Sundays in Baltimore county); N.J. STAT. ANN. § 5:8-58 (West 2007) (banning “games of chance” unless allowed by a municipality’s ordinance).

44. TENN. CODE ANN. § 7-51-1402 (2006).

45. See 625 ILL. COMP. STAT. 5/5-106 (2006); LA. REV. STAT. ANN. § 51:193 (2006); ME. REV. STAT. ANN. tit. 17, § 3203 (2006); MD. CODE ANN., BUS. REG. § 18-101(d) (LexisNexis 2006) (banning Sunday sale of motor vehicles except in Howard, Montgomery, and Prince George counties); MICH. COMP. LAWS § 435.251 (2007); MINN. STAT. § 168.275 (2007) (under discussion for amendment as of April 2007); MO. ANN. STAT. § 578.120 (West 2006); OKLA. STAT. tit. 21, § 918 (2007); R.I. GEN. LAWS § 31-5-19 (2006)(under discussion for amendment as of April 2007).

in a variety of forms, including bans on the sale of “hard” liquor only;⁴⁶ bans on alcohol sales based on location, i.e. package stores versus restaurants;⁴⁷ bans on the delivery of alcohol;⁴⁸ and various limits on the hours during which certain types of alcohol can be sold, often dependent on the place of sale.⁴⁹

In both general and specific Sunday closing laws, states often provide their political subdivisions the ability to “opt out” of the state-level restrictions. For example, in Missouri, New Hampshire, and South Carolina, a municipality or county can permit an activity otherwise prohibited by the state’s general blue law by conducting a referendum or passing an ordinance authorizing the activity.⁵⁰ Kentucky provides a similar provision but still prohibits the opening of certain businesses before noon on Sunday.⁵¹ Several states also specifically provide cities and counties the opportunity to modify or opt out of alcohol restrictions.⁵² Conversely, several states allow municipalities or counties to increase the number of activities restricted on Sunday. In addition to their opt-out option, cities in Kentucky and New Hampshire can also broaden their states’ general blue law by regulating otherwise unaffected activities.⁵³ Similarly,

46. *E.g.*, TEX. ALCO. BEV. CODE ANN. § 105.01 (Vernon 2006) (under discussion for amendment as of April 2007).

47. *See, e.g.*, CONN. GEN. STAT. § 30-91(d) (2007) (prohibiting Sunday sale of “alcoholic liquor in places operating under package store permits, drug store permits, manufacturer permits for beer or grocery store beer permits”).

48. *See, e.g.*, CAL. BUS. & PROF. CODE § 25633 (West 2007) (providing that no “manufacturer, winegrower, distilled spirits manufacturer’s agent, rectifier, or wholesaler of any alcoholic beverage shall deliver . . . any alcoholic beverage to or for any person holding an on-sale or off-sale license on Sunday”).

49. *See, e.g.*, MINN. STAT. ANN. § 340A.504 (West 2007) (prohibiting sale of 3.2% malt liquor between two a.m. and ten a.m. on Sunday and “intoxicating liquor for consumption on the licensed premises” after two a.m. on Sunday unless dispensed from a hotel mini-bar or with food at a restaurant, club, bowling alley, or hotel that can seat at least thirty).

50. *See* MO. ANN. STAT. § 578.100 (West 2006) (allowing any county to exempt itself from the state Sunday restriction by adopting an ordinance after public hearing, and permitting counties or cities with a population over four hundred thousand to do the same by referendum); N.H. REV. STAT. ANN. § 332-D:4 (2006) (stating that nothing prevents “the governing body of any city or town from adopting bylaws and ordinances permitting and regulating retail business, plays, games, sports, and exhibitions on Sundays”); S.C. CODE ANN. § 53-1-160 (2006) (providing that “the county governing body may by ordinance suspend the application of the Sunday work prohibitions”).

51. KY. REV. STAT. ANN. § 436.165 (West 2006). New Jersey maintains a ban on specific activities, including the sale of clothing, building materials, furniture, and home or business furnishings; however, a municipality must vote to opt *into* the statute by referendum. N.J. STAT. ANN. § 40A:64-1 to -2 (West 2005) (under discussion for amendment as of April 2007).

52. *See, e.g.*, ARK. CODE ANN. § 3-3-210 (2006) (prohibiting the sale of “intoxicating alcoholic liquor” on Sunday unless approved by referendum of a city or county, in which case it can be sold after noon); IDAHO CODE ANN. § 23-307 to 308 (2007) (prohibiting Sunday sale or delivery of “any alcoholic liquor” unless approved by resolution of a county’s board of commissioners).

53. KY. REV. STAT. ANN. § 436.165 (West 2006); N.H. REV. STAT. ANN. § 332-D:4 (2006).

although Mississippi does not maintain a state-level general blue law, it does allow its municipalities and counties to adopt their own.⁵⁴

As these examples demonstrate, no two states maintain the same blue law scheme. Influenced by their own unique history and character, states often have widely different opinions as to which activities warrant Sunday restriction and what level of restriction that should be.⁵⁵ Not surprisingly, these same differences often result in varying levels of enforcement dependent upon the jurisdiction involved.⁵⁶ In some states, there is “a significant difference between what the law says and what it does.”⁵⁷ Outside of alcohol restrictions, law enforcement officials may find little merit in prowling store aisles in search of prohibited items offered for sale. Instead, blue law enforcement may only result when savvy businesses complain to authorities that their competitors are selling a prohibited and no doubt in-demand item on Sunday.⁵⁸ Such was the case in Massachusetts, where a competitor of Whole Foods Market complained to the state’s Attorney General that the grocery store planned to open on Thanksgiving 2005 in violation of the state’s blue law banning the operation of certain businesses on state-approved holidays.⁵⁹ Based on this complaint, the Attorney General warned not only Whole Foods but also Wal-Mart, Big Lots, and Family Dollar that state law required them to close on Thanksgiving.⁶⁰ When a Super 88 grocery store opened nonetheless, local law enforcement ordered it to close; however, five other Massachusetts Super 88s were allowed to

54. See MISS. CODE ANN. § 21-19-39 (2006) (“[T]he governing authorities of counties and municipalities may adopt . . . ordinances regulating, restricting and prohibiting the sale of goods and services at retail on the day of the week commonly called ‘Sunday.’ Such ordinances . . . may also regulate and restrict the hours during which such goods and services may be sold . . .”). Interestingly, a city in Louisiana with a population greater than twenty-five thousand can regulate or prohibit the Sunday operation of bakeries, meat markets, and butcher shops, while any municipality in New Jersey can regulate the Sunday operation of beauty parlors. See LA. REV. STAT. ANN. § 33:4783 (2006); N.J. STAT. ANN. § 40:48-2.1 (West 2006).

55. This different treatment often manifests itself by region. For example, Sunday restrictions are much more common in the East and South than the West and Midwest. LABAND & HEINBUCH, *supra* note 1, at 48.

56. *Id.* at 136.

57. *Id.*

58. *Id.*

59. Megan Tench & Chase Davis, *Bustling Stores Ask: What Blue Laws? Super 88 Says Warning Missed*, BOSTON GLOBE, Nov. 25, 2005, at A1. Although it may seem strange to view a law prohibiting an activity on Thanksgiving as “blue,” Thanksgiving is actually a religious holiday. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2149 (1996) (explaining that “[t]he Thanksgiving holiday was unquestionably a religious holiday both at Plymouth Rock and when George Washington proclaimed the first American Thanksgiving,” and that “the religious aspect . . . endures”).

60. Tench & Davis, *supra* note 59.

remain open.⁶¹ The chain of Asian food stores claimed to be unaware of the state's blue law, explaining that it had always remained open on holidays not typically celebrated by the Asian community.⁶² During Christmas of the same year, authorities again specifically monitored grocery and department stores to ensure no blue law violations occurred.⁶³

The Massachusetts experience is illustrative of blue law enforcement nationwide: although often neglected, Sunday restrictions remain on the books of most states and can be enforced at the whim of local law enforcement, state officials, or even competitors. It is true that some view this inconsistent application as proof that modern blue laws are little more than irrelevant relics from America's Puritan past.⁶⁴ However, it is just this public indifference, combined with the potential for arbitrary enforcement, that makes blue laws especially dangerous.

III. BLUE LAWS AND THE SUPREME COURT

A. Blue Law Jurisprudence

Although blue laws have existed since the country's colonization, not all Americans have readily accepted their validity. The Supreme Court heard its first blue law challenge in the 1885 case of *Soon Hing v. Crowley*.⁶⁵ In *Crowley*, the Court upheld a San Francisco ordinance prohibiting the washing or ironing of clothes in public laundries on Sunday as a valid exercise of the state's police power.⁶⁶ The Court reasoned that "[l]aws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."⁶⁷ Despite this early holding, litigation challenging blue laws continued, culminating in 1961 when the Supreme Court heard four cases dealing with the blue laws of

61. *Id.*

62. *Id.*

63. Mac Daniel, *Back and Blue: Largely Ignored, Puritan Laws Like 'Common Day of Rest' Revisited for the Holidays*, BOSTON GLOBE, Dec. 4, 2005, at B1.

64. See, e.g., King, *supra* note 23, at 676 (claiming current blue laws are "a pale reminder of a time when legislation banned Sunday work, travel, and recreation").

65. *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

66. *Id.* at 705, 710.

67. *Id.* at 710.

Maryland, Pennsylvania, and Massachusetts.⁶⁸ In each case, the Court overwhelmingly upheld the Sunday restrictions as valid.

Arguably the most significant case decided by the Court was *McGowan v. Maryland*.⁶⁹ Plaintiffs, seven employees at a large discount store, were convicted and fined for selling a three-ring binder, floor wax, stapler, staples, and a toy submarine in violation of Maryland's general blue law banning the Sunday sale of all merchandise except tobacco, confectionaries, milk, bread, fruits, gasoline, oils, greases, medicines, and periodicals.⁷⁰ Further exempted for sale in the plaintiffs' county were all foodstuffs, automobile and boating accessories, flowers, toiletries, hospital supplies, and souvenirs.⁷¹ The plaintiffs appealed their convictions, claiming Maryland's entire blue law scheme violated the Equal Protection, Due Process, Free Exercise, and Establishment Clauses of the Federal Constitution.⁷²

The Court began by rejecting the plaintiffs' equal protection challenges. The plaintiffs first claimed that the statutory classifications dictating what could and could not be sold were irrational and unrelated to the legislation's alleged purpose. Applying a rational basis standard of review, the Court disagreed, holding that the list of prohibited goods was not arbitrary but instead represented the legislature's reasonable finding that the sale of certain items was necessary "either for the health of the populace or for the enhancement of the recreational atmosphere of the day."⁷³ For instance, "a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit."⁷⁴ Moreover, "newspapers and drug products should always be available to the public."⁷⁵ The Court also dismissed the plaintiffs' claims that the statutes created unreasonable inequality either between the retailers of different counties or between different types of retailers.⁷⁶

In a brief discussion, the Court rejected the plaintiffs' claims that Maryland's blue laws were unconstitutionally vague in violation

68. *Gallagher v. Crown Kasher Super Market, Inc.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys from Harrison-Allentown, Inc., v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

69. *McGowan*, 366 U.S. at 420.

70. *Id.* at 422-23.

71. *Id.* at 423.

72. *Id.* at 422.

73. *Id.* at 425-26.

74. *Id.* at 426.

75. *Id.*

76. *Id.* at 427-28.

of the Due Process Clause, finding that "business people of ordinary intelligence . . . would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation."⁷⁷ Similarly, the Court dismissed the free exercise challenge on the basis that the plaintiffs lacked standing because they did not claim that the blue laws infringed upon their own religious beliefs.⁷⁸

The heart of the plaintiffs' case lay in their Establishment Clause claim. The Court summarized the plaintiffs' argument as follows:

Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; [and] that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day.⁷⁹

The Court acknowledged that "the original laws which dealt with Sunday labor were motivated by religious forces."⁸⁰ However, it claimed that Sunday restrictions had since "evolved"⁸¹ to become legitimate means of protecting the public welfare "wholly apart from their original purposes or connotations."⁸² Most modern blue laws, it felt, had "[t]he present purpose and effect . . . to provide a uniform day of rest for all citizens," a secular and therefore valid motivation under the Establishment Clause.⁸³ As evidence, the Court examined the various activities exempted from Maryland's blue laws, determining the exceptions were "fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose, and enjoyment."⁸⁴ Consequently, "the air of the day" was "one of relaxation rather than . . . religion."⁸⁵ The Court saw labor and trade associations' new-found support of Sunday restrictions as added proof of their recreational purpose.⁸⁶ Based on this evidence, the Court held Maryland's Sunday restrictions did not violate the Establishment Clause.⁸⁷ In a telling passage, the Court summarized its reasoning:

77. *Id.* at 428.

78. *Id.* at 429.

79. *Id.* at 431.

80. *Id.*

81. *Id.* at 435.

82. *Id.* at 445.

83. *Id.*

84. *Id.* at 448.

85. *Id.*

86. *Id.* at 435.

87. *Id.* at 452.

"Sunday is a day apart from all others. The cause is irrelevant; the fact exists."⁸⁸

The Supreme Court relied heavily on *McGowan* in its other 1961 blue law decisions. In *Two Guys from Harrison-Allentown, Inc. v. McGinley*, a large discount department store challenged a Pennsylvania blue law prohibiting all "worldly employment," business, and sports on Sunday, not including works of necessity and charity, wholesome recreation,⁸⁹ milk and necessities delivery during certain time periods, and public utility work.⁹⁰ Citing the standards it articulated in *McGowan*, the Court rejected the plaintiff's equal protection challenge, finding it within the legislature's power to determine that certain commodities and types of sale were particularly disruptive to the "intended atmosphere of the day."⁹¹ Similarly, the Court turned to *McGowan* in determining that the Pennsylvania statute did not violate the Establishment Clause.⁹² It acknowledged that "the connection between religion and the original Pennsylvania Sunday closing statutes was obvious and indisputable" and that "the present statutory sections still contain[ed] some traces of the early religious influence."⁹³ However, it held "neither the statute's purpose nor its effect [was] religious," relying primarily on the legislative history of recent amendments for support.⁹⁴ As it did in *McGowan*, the Court also found the plaintiff lacked standing to bring a free exercise claim.⁹⁵

Such was not the case in *Braunfeld v. Brown*, which also involved a challenge to Pennsylvania's general blue law.⁹⁶ Unlike the plaintiffs in *McGowan* and *Two Guys*, those in *Braunfeld* did complain that the state's blue laws infringed upon their personal religious beliefs; therefore, they had standing to bring a free exercise claim.⁹⁷ Plaintiffs were Orthodox Jewish merchants whose religious beliefs

88. *Id.*

89. Wholesome recreation was defined as "golf, tennis, boating, swimming, bowling, basketball, picnicking, shooting at inanimate targets or similar healthful or recreational exercises and activities." *Two Guys from Harrison-Allentown, Inc., v. McGinley*, 366 U.S. 582, 585 (1961).

90. *Id.*

91. *Id.* at 589-92.

92. *Id.* at 592-98.

93. *Id.* at 592, 594. Those traces included several provisions referring to Sunday as "the Lord's day" or "Sabbath Day." However, the Court found these lacked significance since the "traces that have remained are simply the result of legislative oversight in failing to remove them." *Id.* at 594.

94. *Id.* at 598.

95. *Id.* at 592 (stating that appellant lacks standing to allege "that the statute discriminates against certain religions").

96. *Braunfeld v. Brown*, 366 U.S. 599, 600-01 (1961).

97. *Id.* at 601-02.

required them to close their stores on Saturday.⁹⁸ However, Pennsylvania law also forbade them from opening on Sunday.⁹⁹ As a result of remaining closed on both days, the plaintiffs claimed to suffer substantial economic loss that prevented them from freely exercising their religion.¹⁰⁰ In rejecting their claim, the Court again relied on *McGowan*, noting the evolution of Sunday laws from “wholly religious sanctions to legislation concerned with the establishment of a day of community tranquility, respite and recreation.”¹⁰¹ It noted that the Pennsylvania statute did not make the plaintiffs’ religious practices illegal but “simply regulate[d] a secular activity” that made “the practice of their religious beliefs more expensive.”¹⁰² This indirect burden on the plaintiffs’ religion did not invalidate the statute since legislating to provide a common day of rest, the statute’s purpose, was within the state’s police power.¹⁰³ Moreover, the Court would not require Pennsylvania to exempt those who observed a non-Sunday Sabbath from its blue laws.¹⁰⁴ Although this might be “the wiser solution,” the Supreme Court found legitimate reasons why a state might choose not to adopt it.¹⁰⁵

The last case of the blue law quartet also involved Orthodox Jewish plaintiffs, this time challenging Massachusetts Sunday closing laws.¹⁰⁶ In *Gallagher v. Crown Kosher Super Market*, the Supreme

98. *Id.* at 601.

99. *Id.*

100. *Id.* at 601-02.

101. *Id.* at 602.

102. *Id.* at 605.

103. *Id.* at 607.

104. *Id.* at 608.

105. *Id.* at 608-09. Today, many states have taken the Supreme Court’s advice and enacted statutes that exempt those who celebrate a Saturday Sabbath from blue law prosecution; however, these statutes do not apply to those who do not observe a Sabbath. See CONN. GEN. STAT. § 53-303 (2007) (exempting liability for a person who “conscientiously believes” in a Saturday Sabbath and “actually refrains from work, labor or business” on that day); 820 ILL. COMP. STAT. 140/4 (2006) (requiring employers to designate a day of rest for each employee that is to work on Sunday); KY. REV. STAT. ANN. § 436.160 (West 2006) (exempting from liability persons who observe as a Sabbath one day out of each seven days); ME. REV. STAT. ANN. tit. 17, § 3209 (2006) (exempting persons “conscientiously believing” in a Saturday Sabbath and “refraining from secular business and labor on that day” so long as they “do[] not disturb other persons”); MASS. GEN. LAWS ch. 136, § 6 (2007) (exempting, among other things, persons who observe a Saturday Sabbath and close all of their business located within the Commonwealth during that twenty-four hour period; under discussion for amendment as of April 2007); N.Y. GEN. BUS. LAW § 6 (McKinney 2007) (exempting persons who “uniformly keep[] another day of the week as holy time;” under discussion for amendment as of April 2007); N.D. CENT. CODE § 12.1-30-01 (2005) (exempting persons who close their place of business from midnight until noon on the day observed as the Sabbath); OKLA. STAT. tit. 21, § 909 (2007) (allowing as a defense that “the accused uniformly keeps another day of the week as holy time”); S.C. CODE ANN. § 53-1-40 (2006) (providing for a Saturday Sabbath defense only within Charleston County).

106. *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617 (1961).

Court again rejected the plaintiffs' equal protection challenge under a rational basis standard of review, finding exceptions to the state's blue laws were not arbitrary but "useful in adding to Sunday's enjoyment" and increasing "the day's special character."¹⁰⁷ Similarly, although "the Massachusetts statutes have an unmistakably religious origin," the Court held they were not an establishment of religion because their present purpose was "to provide an atmosphere of recreation."¹⁰⁸ Finally, the Court summarily rejected the plaintiffs' free exercise claim, relying on its decision in *Braunfeld*.¹⁰⁹

Justice Douglas dissented vigorously in all four cases, addressing each in a single opinion.¹¹⁰ He disagreed with the majority's contention that blue laws had somehow "evolved"¹¹¹ from their original religious purpose, stating, "[n]o matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities."¹¹² In his view, the Court could not simply dismiss as "irrelevant" the state's reasoning for choosing Sunday as the day of rest; rather, "the cause of Sunday's being a day apart is determinative."¹¹³ To illustrate the continuing connection between blue laws and Christianity, Justice Douglas hypothesized the public reaction if Jews or Seventh-Day Adventists controlled the legislature and made it criminal to work on Saturday.¹¹⁴ Would Baptists, Catholics, Methodists, and Presbyterians willingly accept this as a day of rest? Or would they bring the same complaints as the plaintiffs in *McGowan* and *Braunfeld*? To Justice Douglas, the purpose of Sunday closing laws was clear: to "force minorities to obey the majority's religious feeling of what is due and proper for a Christian community."¹¹⁵ Because these laws "compel minorities to observe a second Sabbath, not their own" they "prefer one religion over another" in violation of the First Amendment.¹¹⁶

107. *Id.* at 622-23.

108. *Id.* at 624, 627.

109. *Id.* at 630-31.

110. *McGowan v. Maryland*, 366 U.S. 420, 561 (1961) (Douglas, J., dissenting). Justice Frankfurter wrote a separate concurrence also applying to all four cases. *Id.* at 459 (Frankfurter, J., concurring).

111. *Id.* at 435 (majority opinion).

112. *Id.* at 572-73 (Douglas, J., dissenting).

113. *Id.* at 573 n.6.

114. *Id.* at 565.

115. *Id.* at 576.

116. *Id.* at 577 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

B. Current Establishment Clause Analysis

The Supreme Court has decided no significant cases addressing the constitutionality of blue laws after *McGowan* and its companions in 1961.¹¹⁷ However, since that time the Court's treatment of Establishment Clause claims has changed significantly. Even today exactly what test the Court will apply when determining establishment issues remains an unsettled question. Therefore, in order to understand the constitutional status of modern blue laws, it is necessary to examine the various approaches utilized by the Supreme Court when deciding Establishment Clause claims: the *Lemon*, endorsement, and coercion tests.

1. The *Lemon* Test

Ten years after it decided *McGowan v. Maryland*, the Supreme Court set forth its most influential and controversial Establishment Clause test.¹¹⁸ In *Lemon v. Kurtzman*, the Court determined that a statute could only survive an Establishment Clause challenge if it (1) had "a secular legislative purpose," (2) produced a "principal or primary effect" that did not advance or inhibit religion, and (3) did "not foster 'an excessive government entanglement with religion.'" ¹¹⁹ The Court arrived at this three-pronged "*Lemon* test" by combining various criteria it had articulated in previous cases.¹²⁰ Notably, the secular purpose prong seems a "direct descendent" of the Court's opinion in *McGowan*.¹²¹

Although many courts have frequently relied upon the *Lemon* test when deciding Establishment Clause challenges, it has also been the subject of severe criticism from both commentators and Supreme Court Justices.¹²² One of the most common complaints is that of workability.¹²³ Specifically, many claim that determining legislative

117. See discussion *supra* Part III.A.

118. See *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971) (holding that state statutes providing financial aid to religious schools were unconstitutional).

119. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

120. *Id.*

121. See Marc A. Stadtmauer, *Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause*, 12 CARDOZO ARTS & ENT. L.J. 213, 227-28 (1994) (examining the constitutionality of New York's blue laws).

122. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1501 (5th ed. 2005) (noting that although the *Lemon* test "has not been formally repudiated by the Supreme Court [,] a majority of the justices sitting in 2005 have criticized it); Stadtmauer, *supra* note 121, at 226-27 (stating that the "*Lemon* test became the standard by which many cases were evaluated" but noting the "fairly scathing criticism" it has received from commentators and Supreme Court justices).

123. See *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rebnquist, J., dissenting) (arguing that the *Lemon* test should be abandoned because it "has no basis in the history of the amendment it

“purpose” is an impossible task,¹²⁴ while ascertaining the “primary or principal effect” of a statute is almost as difficult.¹²⁵ Additionally, some object to *Lemon’s* entanglement prong, suggesting it contradicts the other two requirements since “some administrative entanglement is essential to ensure that government aid does not excessively promote religious purposes.”¹²⁶ Such widespread criticism and discord within the Court itself have resulted in a decreased reliance on *Lemon* in recent years.¹²⁷

However, the Supreme Court has refused to abandon the *Lemon* framework entirely, as demonstrated in the 2005 Ten Commandments cases, *McCreary County v. ACLU*¹²⁸ and *Van Orden v. Perry*.¹²⁹ In *McCreary*, plaintiffs challenged displays of the Ten Commandments in two Kentucky county courthouses as violating the Establishment Clause.¹³⁰ A majority of the Court agreed, relying heavily on *Lemon’s* purpose prong in reaching its decision.¹³¹ The Court explained that considerations of “secular legislative purpose” had been a “common” element of the Court’s Establishment Clause analysis ever since *Lemon* was decided.¹³² Moreover, it stated that, although it had been “seldom dispositive,” the purpose inquiry “nevertheless serves an important function” of determining whether the government has acted neutrally towards religion as required by the Establishment Clause.¹³³

Applying its analysis, the Court found the Kentucky counties had displayed the Ten Commandments for expressly religious purposes in violation of the Establishment Clause, a fact indicated by legislative history, the nature of the original display, and

seeks to interpret, is difficult to apply and yields unprincipled results”); Lisa M. Kahle, Comment, *Making “Lemon-Aid” from the Supreme Court’s Lemon: Why Current Establishment Clause Jurisprudence Should be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 363 (claiming “all three prongs of the *Lemon* test contain inherent flaws that prevent the test from being practically workable in a satisfactory manner”).

124. See *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (stating that “discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task”).

125. Kahle, *supra* note 123, at 359-60.

126. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1547 (15th ed. 2004) (internal quotations omitted).

127. *Id.*

128. *McCreary County v. ACLU*, 545 U.S. 844 (2005) (holding that two Kentucky displays of the Ten Commandments violated the Establishment Clause).

129. *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that a Texas display of the Ten Commandments did not violate the Establishment Clause).

130. *McCreary*, 545 U.S. at 852.

131. *Id.* at 859-65.

132. *Id.* at 859-60.

133. *Id.*

modifications made to it after litigation had begun.¹³⁴ Although the plaintiffs claimed “true ‘purpose’ is unknowable,” the Court disagreed, stating that “[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the county.”¹³⁵ Far from being unworkable, *Lemon’s* purpose prong is a “straightforward” test that only finds a religious purpose when such is the “commonsense conclusion,” as was the case here.¹³⁶

In *Van Orden v. Perry*,¹³⁷ the Supreme Court relied less on *Lemon* than it did in *McCreary*, although the *Lemon* test did not go entirely without mention. *Van Orden* involved a challenge to a Ten Commandments monument located on the grounds of the Texas State Capitol.¹³⁸ The monument was part of a larger exhibit involving twenty-one historical markers and seventeen other monuments located throughout the grounds.¹³⁹ Unlike in *McCreary*, the Court held this display did *not* violate the Establishment Clause.¹⁴⁰ However, no majority agreed on the reasoning for its decision. Writing for the plurality, Chief Justice Rehnquist did not apply the *Lemon* test, finding “it not useful in dealing with the sort of passive monument that Texas has erected.”¹⁴¹ However, he left open the possibility of applying the test in the future.¹⁴² Justice Breyer, the unlikely swing vote in the two cases, wrote in his concurrence that “no single mechanical formula . . . can accurately draw the constitutional line in every case.”¹⁴³ Instead, he advocated the use of the Court’s prior tests as “guideposts.”¹⁴⁴ Although he felt Texas’s display might pass the *Lemon* test, he explained that his decision relied “less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment’s Religion Clauses themselves.”¹⁴⁵

McCreary and *Van Orden* clearly demonstrate *Lemon’s* uncertain future. Add to this the recent addition of two new Supreme Court Justices, and the uncertainty only increases. The *Lemon* test, however, has weathered frequent and vigorous attack, surviving for

134. *Id.* at 868-74.

135. *Id.* at 861.

136. *Id.* at 862-63.

137. *Van Orden v. Perry*, 545 U.S. 677 (2005).

138. *Id.* at 681.

139. *Id.*

140. *Id.*

141. *Id.* at 686.

142. *See id.* (stating that “[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence,” it was inapplicable to the facts of this case).

143. *Id.* at 699 (Breyer, J., concurring).

144. *Id.* at 700.

145. *Id.* at 703-04.

over thirty-years. It is highly unlikely that its influence will cease now.

2. The Endorsement Test

Justice O'Connor proposed an alternative Establishment Clause test in her concurrence to *Lynch v. Donnelly*. In that 1984 case, plaintiffs challenged the constitutionality of a nativity scene exhibited by a Rhode Island city as part of a larger Christmas-themed display.¹⁴⁶ The majority found the display constitutional through an application of the *Lemon* test, although it emphasized its "unwillingness to be confined to any single test or criterion in this sensitive area" of Establishment Clause claims.¹⁴⁷ With regard to *Lemon's* first prong, the Court found the city had erected the nativity scene in order to celebrate a holiday and depict its origins, a "legitimate secular purpose."¹⁴⁸ Similarly, the principal or primary effect of the display did not advance religion, at least no more so than other "benefits and endorsements previously held not violative of the Establishment Clause."¹⁴⁹ The city also passed *Lemon's* final entanglement prong, since it had no contact with church authorities concerning the display and spent no public funds regarding it, apart from the initial purchase.¹⁵⁰

Justice O'Connor agreed with the majority's result but not its mode of analysis.¹⁵¹ Rather than apply the traditional *Lemon* test, she focused on "institutional entanglement" and government "endorsement or disapproval of religion."¹⁵² To Justice O'Connor, the majority's focus had been misplaced: in this case, entanglement was not a "central" issue; rather, endorsement was.¹⁵³ Justice O'Connor explained that determining whether endorsement has occurred

146. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984). Throughout its opinion, the Supreme Court refers to the nativity scene by its formal name, crèche. Beyond the nativity scene itself, the display also included a Santa Claus house, sleigh, Christmas tree, carolers, elephant, teddy bear, and a "Seasons Greetings" banner. *Id.*

147. *Id.* at 679, 687.

148. *Id.* at 681.

149. *Id.* at 682. The other benefits and endorsements mentioned include spending public money on textbooks and transportation for students in church-sponsored schools, providing grants to church-sponsored colleges and universities, exempting church properties from certain taxes, allowing legislative prayers, allowing a release time program from religious training, and, notably, maintaining Sunday Closing Laws. *Id.* at 681-82.

150. *Id.* at 684.

151. *See id.* at 687 (O'Connor, J., concurring) (stating that she "write[s] separately to suggest a clarification of [the Court's] Establishment Clause doctrine").

152. *Id.* at 689.

153. *See id.* at 689-90 (finding no entanglement with religion and describing as the "central issue in this case" whether the city endorsed Christianity by displaying a nativity scene).

requires the Court to examine both the government's intended purpose for acting and the message actually conveyed by those actions.¹⁵⁴ Although this analysis derives from combining *Lemon's* purpose and effect prongs, Justice O'Connor felt it more representative of the Establishment Clause's meaning than the traditional test.¹⁵⁵ To her, "[t]he Establishment Clause prohibits government from making adherence to religion relevant in any way to a person's standing in the political community."¹⁵⁶ However, government endorsement of religion does just that, "send[ing] a message to nonadherents that they are outsiders, not full members of the political community."¹⁵⁷

When Justice O'Connor applied her endorsement test to the dispute at hand, the city's actions still passed constitutional muster.¹⁵⁸ She found that the city had not intended to endorse Christianity by displaying the nativity scene but only to celebrate "a public holiday through its traditional symbols," a legitimate secular purpose.¹⁵⁹ Moreover, the display did not have the effect of communicating a message of government endorsement of religion, since most members of society understand the "very strong secular components and traditions" associated with the Christmas holiday.¹⁶⁰ Therefore, no endorsement had occurred.¹⁶¹

Five years after *Lynch*, a majority of the Court adopted Justice O'Connor's endorsement test as a legitimate analytical framework through which to examine Establishment Clause claims.¹⁶² In *County of Allegheny v. ACLU*, plaintiffs challenged the constitutionality of a nativity scene exhibited in a county courthouse and a Chanukah menorah placed outside a building owned jointly by the city and county.¹⁶³ Unlike in *Lynch*, the nativity scene was not part of a larger display,¹⁶⁴ although the menorah was accompanied by a Christmas tree and "Salute to Liberty" sign.¹⁶⁵ The Court began its opinion by

154. *Id.* at 690.

155. *See id.* at 688-90 (explaining that "[i]t has never been entirely clear . . . how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause").

156. *Id.* at 687.

157. *Id.* at 688.

158. *Id.* at 694.

159. *Id.* at 691.

160. *Id.* at 692.

161. *Id.* at 694.

162. *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989). That majority included Justices Blackmun, Brennan, Marshall, Stevens, and O'Connor.

163. *Id.* at 578.

164. *See id.* at 580-81 (explaining that beyond the nativity scene, the display only included a fence, poinsettias, and two small evergreen trees).

165. *Id.* at 581-82.

explaining that since *Lemon*, it had “refined the definition of governmental action that unconstitutionally advances religion,” paying “particularly close attention” in recent cases “to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion.”¹⁶⁶ Moreover, the Court stated that the word “endorsement” derives its meaning from other terms frequently employed when examining the Establishment Clause, including “favored,” “preferred,” and “promotion.”¹⁶⁷

In a series of opinions, the Court found the nativity scene unconstitutional but not the menorah.¹⁶⁸ Four Justices joined Justice Blackmun in applying the endorsement test to the nativity display, finding that it had “the effect of endorsing a patently Christian message.”¹⁶⁹ Conversely, six Justices found the menorah display valid. In separate opinions, Justices Blackmun and O’Connor agreed that, unlike the nativity scene, the menorah did not amount to a government endorsement of religion.¹⁷⁰ The critical difference was context: while the nativity scene stood alone, the menorah was part of larger holiday display that included references to Christmas.¹⁷¹ Justices Brennan, Marshall, and Stevens also applied the endorsement test but found the menorah display did not meet its requirements.¹⁷² Finally, Justices Kennedy, Rehnquist, White, and Scalia agreed that the menorah display was constitutional but refused to apply the endorsement test, claiming it “reflects an unjustified hostility toward religion.”¹⁷³

Like *Lemon*, the future of the endorsement test is unclear, especially considering its central proponent’s recent departure from the Court. However, it has garnered support from a majority of the

166. *Id.* at 592.

167. *Id.* at 593.

168. *Id.* at 579.

169. *Id.* at 601.

170. *See id.* at 620 (explaining that “the city’s overall display must be understood as conveying the city’s secular recognition of different traditions for celebrating the winter-holiday season”); *id.* at 637 (O’Connor, J., concurring) (finding that the city’s display “had neither the purpose nor the effect of endorsing religion”).

171. *See id.* at 616 (majority opinion) (finding by Blackmun that the menorah’s purpose was to “recogniz[e] that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society”); *id.* at. 635-36 (O’Connor, J., concurring) (explaining that “a reasonable observer would . . . appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief”).

172. *See id.* at 637-38 (Brennan, J., concurring in part and dissenting in part) (labeling as unsound the premises Justice Blackmun relied on to reach his conclusion that no endorsement had occurred).

173. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).

Court on several occasions since *Allegheny*,¹⁷⁴ suggesting that questions of endorsement will continue to shape Establishment Clause jurisprudence for the foreseeable future.

3. The Coercion Test

The coercion test asks whether the government has “coerce[d] anyone to support or participate in religion or its exercise.”¹⁷⁵ Its most frequent use has been in school prayer cases, since the Court has viewed the school environment as uniquely capable of exerting “subtle coercive pressures” on students.¹⁷⁶ For example, in *Lee v. Weisman*, the Court struck down as violating the Establishment Clause a public school policy allowing principals to select clergy to deliver prayers at graduation ceremonies.¹⁷⁷ It found that the school’s “supervision and control” of the ceremony “places public pressure, as well as peer pressure, on attending students to stand up as a group or, at least, maintain respectful silence during the invocation and benediction.”¹⁷⁸ Although it is “subtle and indirect,” this pressure “can be as real as any overt compulsion.”¹⁷⁹

In recent cases, some Justices have applied the coercion test in situations beyond school prayer, as Justice Thomas did in his *Van Orden v. Perry* concurrence.¹⁸⁰ When addressing the constitutionality of Texas’s Ten Commandment display, he argued that the Court should “abandon the inconsistent guideposts it has adopted in addressing Establishment Clause challenges and return to the original meaning of the Clause,” that establishment must involve coercion.¹⁸¹ Since the Ten Commandments display did not compel the

174. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 291 (2000) (holding that a policy allowing student-led prayer at public school football games was unconstitutional in part because it “involve[d] both perceived and actual endorsement of religion”).

175. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that allowing prayer at a public school graduation was unconstitutional).

176. *Id.* at 588; *see also Engel v. Vitale*, 370 U.S. 421, 431 (1962) (invalidating a school’s practice of daily prayer because “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain”).

177. *Lee*, 505 U.S. at 586, 599.

178. *Id.* at 593.

179. *Id.*

180. *Van Orden v. Perry*, 545 U.S. 677, 692-98 (2005) (Thomas, J., concurring); *see discussion supra* Part III.B.1.

181. *Id.* at 693. Thomas explains that the constitutional framers understood establishment to involve legal coercion, like mandatory religious observance or payment of taxes supporting ministers. *Id.*

plaintiff to do anything, it was not a violation of the Establishment Clause.¹⁸²

Although not as widely applied as other Establishment Clause tests, the coercion analysis has become a favorite of several Justices, including Justices Kennedy,¹⁸³ Thomas,¹⁸⁴ and Scalia.¹⁸⁵ As a result, its future seems slightly more certain than the endorsement test. How widely it will be applied, however, remains to be seen.

C. Purpose and Effect: Unifying Establishment Clause Tests

As evident from the discussion above, the Supreme Court's Establishment Clause jurisprudence is far from clear.¹⁸⁶ However, it is possible to extract common elements from the *Lemon*, endorsement, and coercion tests in order to better understand the Establishment Clause's requirements. Specifically, when applying any of the three tests currently employed by the Court, it is necessary to examine either (1) the government's purpose in acting or (2) the effect of its actions.

In the *Lemon* and endorsement tests, the purpose and effect factors are readily apparent. *Lemon*'s first prong asks whether there exists "a secular legislative purpose" and its second whether the "principal or primary effect" of the government action advances or inhibits religion.¹⁸⁷ Similarly, the endorsement test's revision of *Lemon* requires determining if the government intended to endorse religion or had the effect of communicating a message of endorsement.¹⁸⁸ True, the terminology regarding permissible and impermissible purposes and effects differs: while *Lemon* speaks of "secular" purposes and effects "advancing" religion, the endorsement test refers to purposes that "endorse" religion and effects that give the appearance of "endorsement." However, Justice O'Connor made it clear in *Lynch* that the concepts behind the terms are essentially the same when she characterized *Lemon*'s purpose and effect prongs as representing the endorsement considerations.¹⁸⁹ Because of these

182. *Id.*

183. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

184. *Van Orden*, 545 U.S. at 693-94 (Thomas, J., concurring).

185. *See Lee*, 505 U.S. at 642 (Scalia, J., dissenting) (agreeing with the majority's use of the coercion test but finding it wrongly applied).

186. *See discussion supra* Part III.B.

187. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see discussion supra* Part III.B.1.

188. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *see discussion supra* Part III.B.2.

189. *Id.* at 690; *see discussion supra* Part III.B.2

similarities, reconciling the *Lemon* and endorsement tests is relatively easy.

Unfortunately, bringing the coercion test into line presents more difficulty. Unlike the *Lemon* and endorsement tests, a coercion analysis involves no consideration of legislative purpose.¹⁹⁰ In fact, it is just this aspect that has attracted many of its proponents.¹⁹¹ However, the coercion test necessarily requires examining effect, since the Court must decide if the government's action had the *effect* of coercing someone into supporting or participating in religion.¹⁹² Again, the coercive effect at issue in this test differs from the effect of religious advancement or endorsement looked for in the *Lemon* and endorsement tests. Moreover, the coercion standard is significantly stricter than the other two tests, applying to a much narrower category of governmental activities. For instance, while displaying the Ten Commandments could be viewed as a government endorsement of religion,¹⁹³ it may not necessarily result in coercion since it does not compel anyone to act.¹⁹⁴ Such a difference means applying the coercion test will often produce different results than those reached through the *Lemon* and endorsement tests.

Despite the inherent dissimilarities among the three tests, a comparison of all reveals that one of two factors will be determinative in deciding whether an Establishment Clause violation has occurred: the government's purpose in acting or the effects of those actions. Identifying common elements that must be examined regardless of the test applied allows the constitutionality of a state action to be determined with much less speculation. Those concerned that a state action violates the Establishment Clause can focus less on which Justices might apply which standard and instead ask whether the state action has a secular purpose and/or the effect of endorsing religion or coercing its practice.

190. See Michele Hyndman, *Tradition Is Not Law: Advocating a Single Determinative Test for Establishment Clause Cases*, 31 T. MARSHALL L. REV. 101, 119-20 (2005) (explaining that, "[u]nder the coercion test, a court could find a government practice constitutional when the facts reveal that the purpose of the government practice was of a religious nature").

191. See *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting) (attacking the purpose prong of the *Lemon* test).

192. See Hyndman, *supra* note 190, at 119-20. Although Hyndman sees the coercion test's focus on effect as making it "drastically different" from the *Lemon* and endorsement tests, this Note views it as a factor that unifies the three tests. *Id.* at 119.

193. See *McCreary County v. ACLU*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) (stating that "[t]he purpose behind the [Ten Commandments] display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer").

194. See *Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (explaining that "the mere presence of the monument along [Van Orden's] path involves no coercion and thus does not violate the Establishment Clause" because "[i]n no sense does Texas compel [him] to do anything").

IV. APPLYING THE COMMON THREADS: BLUE LAWS AS UNCONSTITUTIONAL ESTABLISHMENTS OF RELIGION

After examining the elements of each of the Supreme Court's current Establishment Clause tests, it becomes evident that modern blue laws are unconstitutional establishments of religion. As discussed below, not only do they lack a secular legislative purpose, but they also have the effect of both endorsing religion and coercing citizens to participate in a religious exercise, namely, observing the Christian Sabbath. Therefore, modern blue laws violate the Lemon, endorsement, and coercion tests.

A. The Religious Purpose of Blue Laws

According to the *Lemon* and endorsement tests, a government action must have a secular legislative purpose in order to be valid under the Establishment Clause.¹⁹⁵ This purpose requirement derives from *McGowan v. Maryland*, where the Supreme Court's decision to uphold the state's Sunday restrictions rested primarily on legislative purpose.¹⁹⁶ Although the Court found the original motivation behind the state's laws to be overtly religious, it believed the statutes had "evolved" to represent the legislature's new desire to create a uniform day of rest.¹⁹⁷ If another blue law challenge were brought today, it may seem that this same analysis should apply. After all, if Sunday restrictions had achieved a secular purpose in 1961, could they have somehow devolved back to their original religious motivations in 2007? The simple answer is no: they never "evolved" in the first place. This conclusion becomes evident after examining the changes blue laws have undergone since *McGowan*, specifically, which activities states have chosen to exempt from their prohibitions and which remain illegal.

1. Special Interest Groups and Blue Law Exceptions

When determining in *McGowan* that Maryland's Sunday restrictions had a secular purpose, the Court put great weight on the fact that the activities exempted from the state's blue laws were "fashioned for the purpose of providing a Sunday atmosphere of

195. See discussion *supra* Part III.B.1-2. Although the endorsement test requires that the government cannot have the purpose of "endorsing" religion, the consideration is sufficiently synonymous to *Lemon's* "secular purpose" prong to justify using the terms interchangeably. See discussion *supra* Part III.C.

196. *McGowan v. Maryland*, 366 U.S. 420 (1961); see discussion *supra* Part III.A.

197. *McGowan*, 366 U.S. at 435, 445.

recreation, cheerfulness, repose and enjoyment.”¹⁹⁸ These exceptions included the Sunday sale of tobacco, milk, bread, periodicals, boating accessories, and souvenirs.¹⁹⁹ In specific counties, the Sunday operation of beaches, bathhouses, and amusement parks was allowed, as was the sale of any merchandise incidental to those operations.²⁰⁰ Moreover, certain areas of the state also permitted sports like football, lacrosse, car racing, and pool.²⁰¹ As the Court observed, these activities do seem connected to rest and recreation.²⁰² However, the massive exceptions states now provide to their blue laws do not exhibit this same recreational character. Rather, modern blue law exceptions seem more the result of special interest group pressure or other economic considerations than an attempt by the state to create a common day of rest.²⁰³

For instance, South Carolina provides several exceptions to its general ban on Sunday “worldly work, labor [and] business” before one-thirty p.m. that have little to do with recreation.²⁰⁴ A prime example is the broad exception given to the entire industries of rubber and plastic mold-making²⁰⁵ and textile manufacturing.²⁰⁶ Such exceptions are not required because the businesses are “necessities” or continuously operated, since these contingencies are provided for in other statutory provisions.²⁰⁷ Instead, the state has simply decided—most likely for economic reasons—that employees in these industries should not be part of the otherwise common day of rest. Perhaps even more significant is the specific exemption South Carolina provides for counties hoping to reduce their property tax burden by expanding their sales tax base.²⁰⁸ When a county collects more than \$900,000 in property tax in one year, it is automatically exempt from the state’s Sunday restrictions.²⁰⁹ This allows counties to offset high, and no doubt unpopular, property taxes with a sales tax base increased by an additional day on which to shop. Though such an exemption is admirable in its recognition of the consequences caused by general

198. *Id.* at 448.

199. *Id.* at 422-23.

200. *Id.* at 423.

201. *Id.* at 424.

202. *Id.* at 426.

203. See LABAND & HEINBUCH, *supra* note 1, at 48 (explaining that exceptions to Sunday restrictions “have been granted to special interest groups with strong enough lobbying influence in the corridors of the state capital [sic]”).

204. S.C. CODE ANN. §§ 53-1-5, 53-1-40 (2006).

205. *Id.* § 53-1-100.

206. *Id.* § 53-1-110.

207. *Id.* §§ 53-1-40, 53-1-130.

208. *Id.* § 53-1-150.

209. *Id.*

Sunday restrictions, i.e., a decreased sales tax base, it also effectively undermines any recreational justification for a Sunday ban in other localities, since a significant *economic* need can invalidate the public need for a day of rest.

Other states with general Sunday prohibitions also maintain exemptions entirely unrelated to recreation. For example, Maine provides a plethora of exceptions to its broad ban on Sunday business, including exemptions for monument dealers, real estate brokers, satellite facilities, and mobile home sales representatives.²¹⁰ Additionally, during the very profitable shopping season that occurs between Thanksgiving and Christmas, any business can open on Sunday between noon and five p.m., notwithstanding the normal statutory requirement to the contrary.²¹¹ Similarly, West Virginia exempts from its general prohibition on Sunday “work, labor, or business”²¹² the “operation of a retail outlet for the exclusive sale of its products by an industry located in West Virginia.”²¹³ Moreover, in New Jersey, “no person shall dredge upon, or throw, cast or drag an oyster dredge” on Sunday unless doing so in one of four specific bodies of water, most likely singled out because of the income they produce or the pressure exerted by companies that work there.²¹⁴

Alcohol restrictions may provide the most glaring examples of interest group pressure. For instance, Connecticut forbids the sale or consumption of “alcoholic liquor” on Christmas unless that liquor is sold with food, or, more tellingly, at a casino.²¹⁵ Additionally, although any town may reduce the hours during which “alcoholic liquor” may be sold, such towns cannot do so for sales at airports.²¹⁶ Similarly, several states maintain broad prohibitions on Sunday alcohol sales but specifically exclude wineries.²¹⁷ In many states, the influence of interest groups is most evident in the types of alcohol prohibited on Sunday. For instance, before Nashville became the home of the NFL team the Tennessee Titans, alcohol by the drink could not be sold in

210. ME. REV. STAT. ANN. tit. 17, § 3204 (2006).

211. *Id.* § 3204 (1)(A)(2).

212. W. VA. CODE § 61-10-25 (2007).

213. *Id.* § 61-10-26.

214. N.J. STAT. ANN. § 50:2-11 (West 2007).

215. CONN. GEN. STAT. § 30-91(a)(4) (2007).

216. *Id.* § 30-91(b).

217. See COLO. REV. STAT. § 12-47-901 (2006) (prohibiting the Sunday sale of “malt, vinous, or spirituous liquors . . . except that, for a limited winery or vintner’s restaurant licensee, sales of vinous liquors in sealed containers or by the glass shall be permitted on Sunday beginning at 8 a.m. until 12 midnight”); DEL. CODE ANN. tit. 4, § 512A(l) (2007) (exempting from the Sunday prohibition on alcohol sales wineries or farm wineries, although sales can only occur from noon until six p.m.).

the state before noon.²¹⁸ However, football games frequently started earlier than this.²¹⁹ Consequently, the law quickly changed to appease thirsty football fans, allowing alcoholic drinks to be sold starting at ten a.m.²²⁰ Despite this change to Tennessee's by-the-drink laws, the retail sale of beer and other low grade alcohol on Sunday was still limited to after noon,²²¹ and the retail sale of liquor and wine on Sundays remained completely prohibited.²²² As commentators have noted, these decisions reflect the relative power and success of the liquor, beer, and sports lobbies in Tennessee, not state concerns regarding public health or safety.²²³

Many of the exceptions detailed above reflect the unfortunate realities of a modern business world. To companies concerned with the bottom line, ceasing all work for an entire day once a week is simply not economically feasible.²²⁴ As a result, interest groups pressure the legislature for blue law exemptions, and legislators, concerned with their state's prosperity or their own chances of reelection, agree. The wisdom of this exchange as a policy matter is not at issue; however, the government's motive in granting exemptions is crucial in understanding the constitutionality of Sunday restrictions. No longer can exceptions to blue laws be used as evidence of a legislature's purpose to create a day of rest as they were on *McGowan*. In fact, modern exceptions do the exact opposite: By allowing more industries to operate on Sunday, they ensure more employees will be working. Therefore, states must now look to other sources to demonstrate the secular purpose behind their blue laws.

218. Jaime Sarrio, *Liquor Stores Close Doors for New Year's Eve Sunday*, TENNESSEAN, Dec. 27, 2006, at 1A, available at <http://www.tennessean.com/apps/pbcs.dll/article?AID=/20061227/NEWS01/612270417>.

219. *Id.*

220. *Id.*

221. See TENN. CODE ANN. § 57-5-301 (2006) (allowing for limited sale of beer and other alcoholic beverages containing less than five percent alcohol).

222. See *id.* § 57-3-101 (defining "alcoholic beverage" to include "alcohol, spirits, liquor, [and] wine" other than beer; "under discussion for amendment as of April 2007"); *id.* § 57-3-406 (prohibiting the retail sale of "alcoholic beverages" between eleven p.m. on Saturday and eight a.m. on Monday).

223. See *Fresh Thinking on Sunday Sales*, MEMPHIS COM. APPEAL, Dec. 11, 2005, at V6 (explaining that liquor is not sold in Tennessee on Sunday because of the lobbying pressure of liquor wholesalers, who see the system as keeping prices high, and beer distributors, who like reduced competition).

224. Such interference with the marketplace is why many free-market economists oppose blue laws. See JOHNS, *supra* note 16, at 217 (explaining that "the arbitrary restraint on commerce and competition demanded by Sunday-observance laws mock free enterprise"); LABAND & HEINBUCH, *supra* note 1, at 4 (explaining that Laband, as a free-market economist, had to overcome his own bias towards blue laws because of their interference with the marketplace).

2. Nowhere Else to Turn: The Lack of a Secular Legislative Purpose

Without the support of recreation-related exemptions, there is little evidence to contradict the overtly religious purpose of modern Sunday restrictions. For instance, many blue laws still refer to Sunday as the “Lord’s Day,” including Maine and New Hampshire.²²⁵ New York calls Sunday the “Sabbath,” a day it claims “general consent set apart for rest and religious uses.”²²⁶ Similarly, under a section of its laws entitled “Sunday to be observed,” Oklahoma states that because “very general consent set[s] apart” Sunday “for rest and religious uses, the law forbids on that day certain acts deemed useless and serious interruptions of the repose and religious liberty of the community.”²²⁷ Both New York and Oklahoma refer to blue law violations as “Sabbath-breaking.”²²⁸ In *Two Guys from Harrison-Allentown, Inc. v. McGinley*, the Supreme Court dismissed similar language in Pennsylvania’s blue laws as “the result of legislative oversight in failing to remove” the provisions.²²⁹ However, it is unlikely that the legislature has continued to overlook this religious language for thirty years, especially given the existence of a Supreme Court opinion pointing it out.

Beyond containing blatant religious references, modern blue laws also frequently prohibit solely recreational activities. For example, while the statutes at issue in *McGowan v. Maryland* permitted sports like car racing and pool,²³⁰ modern blue laws in Tennessee²³¹ and Pennsylvania²³² expressly restrict them. Additional activities that would otherwise increase Sunday’s recreational character are also limited in many states, including horse and dog racing;²³³ tennis, baseball, football, and polo;²³⁴ hunting;²³⁵ and

225. See ME. REV. STAT. ANN. tit. 17, § 3201 (2006) (defining the “Lord’s Day” to include “the time between 12 o’clock on Saturday night and 12 o’clock on Sunday night” in a subchapter entitled “Holy Days”); N.H. REV. STAT. ANN. § 332-D:1 (2006) (prohibiting “work, business, or labor . . . on the first day of the week commonly called the Lord’s Day”).

226. See N.Y. GEN. BUS. LAW § 2 (McKinney 2007) (explaining why activities are prohibited on “[t]he first day of the week” in a section entitled “The Sabbath”; under discussion for amendment as of April 2007).

227. OKLA. STAT. tit. 21, § 907 (2007).

228. *Id.*; N.Y. GEN. BUS. LAW § 3 (McKinney 2007).

229. *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 594 (1961).

230. *McGowan v. Maryland*, 366 U.S. 420, 424 (1961).

231. See TENN. CODE ANN. § 55-22-109 (2006) (forbidding automobile racing on Sunday unless it occurs after noon).

232. See 18 PA. CONS. STAT. ANN. § 7105 (West 2006) (prohibiting operation of public pool or billiard rooms on Sunday unless in a city of the first class, when the establishment can open after one p.m.).

233. See *supra* notes 37, 39 and accompanying text.

bingo.²³⁶ Little explanation exists for banning such recreational activities on what is allegedly a day of rest other than encouraging church attendance, a fact acknowledged by the Court in *Two Guys*.²³⁷ Similarly, Sunday restrictions that only apply to the first half of the day exhibit no connection to recreation but instead seem solely directed at prohibiting activities that might otherwise interfere with morning church services.²³⁸

Finally, the prevalence of blue laws directed at activities considered by most Christian sects to be “immoral” suggests the purpose of Sunday prohibitions is a religious one. The clearest examples are alcohol restrictions. There would be little disagreement that consuming alcohol is a recreational activity; however, whether it is a morally appropriate one is subject to argument. Similarly, horse and dog racing, games of chance, and the operation of pawnbrokers are all activities thought by many to be morally corrupt. Consequently, they are frequently the subject of blue law prohibitions.

In deciding to create such restrictions, it appears states have reached a compromise: instead of totally banning activities disliked by the religious majority, they simply prohibit them on Sunday. Again, the wisdom of this choice is not in question. However, its constitutionality is highly suspect. As shown in *McGowan v. Maryland*, the validity of blue laws under the Establishment Clause depends heavily on their purpose.²³⁹ Modern blue laws, however, exhibit no evidence that they were enacted to create a common day of

234. See 4 PA. CONS. STAT. ANN. §§ 82, 152, 182 (West 2006) (prohibiting (1) baseball or football between two p.m. and six p.m. on Sunday unless approved by voters in the effected municipality, (2) polo before one p.m. if voters in the effected municipality voted against allowing it, and (3) tennis games that charge admission before one p.m. regardless of what the effected municipality wants).

235. See *supra* note 40 and accompanying text.

236. See *supra* note 43 and accompanying text.

237. See *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 595 (1961) (explaining that allowing recreational exercises on Sunday is inconsistent with aiding church attendance).

238. See KY. REV. STAT. ANN. § 436.165 (West 2006) (allowing municipalities to regulate retail sales on Sunday as long as those sales do not occur between six a.m. and noon); MICH. COMP. LAWS § 436.2113 (2007) (providing that a county legislative body or municipality by referendum can allow “spirits and mixed spirit drink” to be sold on Sunday for on-site consumption, presuming such consumption occurs after noon); NEB. REV. STAT. § 53-179 (2006) (allowing a city or county to permit the sale of liquor on Sunday, but not between six a.m. and noon); N.D. CENT. CODE §§ 12.1-30-01 to 12.1-30-02 (2005) (making it a misdemeanor to “conduct business or labor for profit” or sale or rent a specific list of items before noon on Sunday); S.C. CODE ANN. §§ 53-1-5, 53-1-40, 53-1-60 (2006) (deeming it “unlawful for any person to engage in worldly work, labor, business of his ordinary calling or the selling . . . to the consumer any goods, wares, or merchandise . . . excepting work of necessity or charity” before one-thirty p.m. on Sundays).

239. See discussion *supra* Part III.A.

rest. Instead, they employ religious terminology, prohibit recreational activities, and offer exemptions not to create an “atmosphere of recreation” but to appease special interest groups. These factors suggest that, unlike the Court held in *McGowan*, blue laws were never intended to create a day of rest. Rather, the passage of time has revealed states’ true motives: to ensure that the Christian Sabbath remains holy, at least until so doing affects their pocketbooks. Such a purpose is far from secular. As a result, a challenge to modern blue laws would fail the *Lemon* and endorsement tests.

B. *The Effect of Modern Blue Laws*

In order to determine the constitutionality of blue laws, it is necessary not only to examine their purpose but also their effect, a central element in all three Establishment Clause analyses. Under the *Lemon* and endorsement tests, the effect of a government action can neither advance nor endorse religion,²⁴⁰ while the coercion test requires that no one be coerced into supporting or participating in a religious exercise.²⁴¹ However, modern blue laws do both.

If examined under either the *Lemon* or endorsement tests, the unconstitutionality of Sunday restrictions is readily apparent. By prohibiting otherwise legal activities only on the Christian Sabbath, states are effectively placing their stamp of endorsement on one set of religious beliefs. As Justice Douglas asked in his *McGowan* dissent, why not ban all work on Saturday?²⁴² Such a choice would undoubtedly provide citizens with a uniform day of rest; however, it would also conflict with the Christian majority’s belief that Sunday is the appropriate Sabbath. Moreover, by decreasing the number of activities available to compete with church services for participants, blue laws advance the religious goal of encouraging church attendance. Therefore, even though blue laws need not fail both the purpose and effect prongs of the *Lemon* and endorsement tests to be invalid establishments of religion,²⁴³ they do just that.

Surprisingly, blue laws’ unconstitutionality seems equally as certain when examined under the coercion test. In *Lee v. Weisman*, the Supreme Court found prayer at a public school graduation unconstitutionally coercive since students were pressured to stand or

240. See discussion *supra* Part III.B.1-2.

241. See discussion *supra* Part III.B.3.

242. *McGowan v. Maryland*, 366 U.S. 420, 565 (1961) (Douglas, J., dissenting).

243. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (explaining that “an affirmative answer to either [*Lemon’s* purpose or effect inquires] should render the challenged practice invalid” when applying the endorsement test).

“maintain respectful silence.”²⁴⁴ When states ban activities on Sunday that might compete with churches for participation, they are exerting a similar pressure on citizens to attend Christian religious services. Moreover, blue laws can be characterized as much more than mere pressure; they actually *force* businesses and citizens to observe the Christian Sabbath by not participating in certain otherwise legal activities. True, no states have expressly mandated that citizens attend a church service, but such is not required for blue laws to violate the Establishment Clause. Instead, the government’s action must only coerce someone “to participate in religion or its exercise.”²⁴⁵ The Christian Sabbath is defined by the Fourth Commandment as a “day of rest” on which “no one in [the] household may do any kind of work.”²⁴⁶ By using blue laws to prohibit non-recreational activities on Sunday, states are effectively requiring their citizens to observe their own “day of rest.” This mandated inaction could be interpreted as a religious observance when the state demands that it occur on Sunday, the Christian Sabbath. Therefore, in enacting and maintaining blue laws, states are requiring their citizens to participate in a religious exercise, a clear violation of the coercion test.

As shown by the discussion above, modern blue laws fail each of the Supreme Court’s three Establishment Clause tests. Consequently, exactly which framework the Court might use to determine the constitutionality of blue laws is somewhat irrelevant. Regardless of the test employed, the result will be the same: Sunday closing laws violate the Establishment Clause and should be invalidated accordingly.

V. CONCLUSION

America is a predominantly Christian nation. As such, legislative policies often represent the desires of the Christian majority, a fact no better illustrated than in the continued existence of Sunday closing laws.²⁴⁷ However, the Establishment Clause was meant to protect citizens “against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it.”²⁴⁸ Regardless of the analysis applied, modern blue laws cannot be found consistent with such a requirement.

244. *Lee v. Weisman*, 505 U.S. 577, 593 (1992); *see also* discussion *supra* Part III.B.3.

245. *Lee*, 505 U.S. at 587.

246. *Exodus* 20:8-10.

247. *See* Stadtmauer, *supra* note 121, at 214 (stating that “[f]ew laws illustrate the contention that America is a Christian nation more vividly than the ‘Blue Laws’”).

248. *McGowan v. Maryland*, 366 U.S. 420, 564 (1961) (Douglas, J., dissenting).

Nonetheless, even when looking beyond the general purpose of the Establishment Clause to the specific tests employed by the Supreme Court, blue laws cannot withstand constitutional challenge. As evidenced by the litany of exceptions states have granted for entirely economic purposes, modern blue laws have little concern with the secular goal of creating a day of rest. If such were the legislature's true purpose, it could have just as easily enacted a "one-day-in-seven law," guaranteeing all employees one day of work off a week but leaving the choice of day up to the individual. Such statutes are already employed in some states, including Texas, which requires that no retail employer may "deny an employee at least one period of 24 consecutive hours of time off for rest or worship in each seven-day period."²⁴⁹ While one-day-in-seven laws would promote an atmosphere of recreation and encourage a more productive work force, they would not force employees to observe a particular religion's Sabbath.

However, as the Court pointed out in *McGowan v. Maryland*, one-day-in-seven laws do not create a *uniform* day of rest, "a day which all members of the family and community have the opportunity to spend and enjoy together [in] . . . relative quiet and dissociation from the everyday intensity of commercial activities."²⁵⁰ Unfortunately, neither do modern blue laws. With their vast exemptions and inconsistent application, Sunday restrictions require that many members of the community work on Sunday even while forbidding their neighbors and family members from doing so. Certainly, this can be no more of a "uniform" day of rest than that provided by a one-day-in-seven law. The existence of such an alternative measure through which to create a day of rest only further emphasizes the legislature's true motive in enacting blue laws: "to observe the Sabbath day by keeping it holy."²⁵¹

249. TEX. LAB. CODE ANN. § 52.001 (Veron 2006).

250. *McGowan*, 366 U.S. at 450.

251. *Exodus* 20:8.

When concluding its opinion in *McGowan*, the Court emphasized the limited nature of its holding. It stated, “[f]inally, we should make clear that this case deals only with the constitutionality of . . . the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the ‘Establishment’ Clause if it can be demonstrated that its purpose . . . is to use the State’s coercive power to aid religion.”²⁵² As this Note has argued, such a demonstration can be made today. Given the changes that Sunday restrictions have undergone since 1961 and the Supreme Court’s own evolving Establishment Clause jurisprudence, it is clear that the time has come to reevaluate the constitutionality of blue laws.

*Lesley Lawrence-Hammer**

252. *McGowan*, 366 U.S. at 453.

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