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### The Obsolescence of Blue Laws in the 21st Century

Ira P. Robbins

American University Washington College of Law, [robbins@wcl.american.edu](mailto:robbins@wcl.american.edu)

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# THE OBSOLESCENCE OF BLUE LAWS IN THE 21<sup>ST</sup> CENTURY

Ira P. Robbins\*

*Depending on where in the United States one is located on any given Sunday or Christian holiday, it is against the law to buy a beer or a car, go shopping, hunt, or even play Bingo. This prohibition is a direct result of Blue Laws, alternatively called Sunday Closing Laws or Lord's Day Acts. Blue Laws frustrate commerce and recreational activities. While at one time they might have aligned with societal values or served a practical secular purpose, such as providing workers with a day of rest, modern society renders Blue Laws obsolete and nonsensical.*

*Due to rapid change in societal opinion regarding religion and liquor, many states have already repealed and chipped away at liquor Blue Laws over the last decade. Modern developments in technology have also changed the way consumers shop. Consequently, Sunday Closing Laws do not effectively curb Sunday commerce, but instead assure that brick-and-mortar shops and automobile lots unfairly bear the burden of these restrictions. While Blue Laws have previously survived First and Fourteenth Amendment challenges, they have become increasingly constitutionally suspect, as they are riddled with exceptions urged by special interest groups. Moreover, federal regulatory schemes more effectively accomplish the secular goals of Blue Laws. The doctrine of desuetude further complicates the issue, given the conspicuous lack of enforcement. Due to the legally suspect basis, the development of societal mores and technology in the twenty-first century, the benefits to legislators and the judiciary in time saved, the benefits to consumers and retailers in convenience and additional profit, and the benefit to the state in increased economic activity and tax revenue, states should repeal Blue Laws across the board.*

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\* Barnard T. Welsh Scholar and Professor of Law and Justice, American University, Washington College of Law. A.B. University of Pennsylvania; J.D. Harvard University. I am more than ordinarily grateful to my superb and indispensable research assistants—Allison M. Carbonaro, Duncan Kessler, and Amanda Nannarone—whom I consider to be my colleagues and my friends. Copyright © 2022 by Ira P. Robbins. All rights reserved.

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## INTRODUCTION

What do George Washington, a New Jersey automobile dealer, a Louisiana butcher, and a Georgia brunch enthusiast have in common? Centuries-old Sunday restrictions have hampered and waylaid each of them—George Washington three centuries ago, the rest today.<sup>1</sup> Originally intended to encourage religious

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1. GA. CODE ANN. § 3-3-20 (2020) (prohibiting the sale of alcohol on Sundays, but giving county officials discretion for election days and Christmas); LA. STAT. ANN. § 33:4783 (2019) (allowing for the regulation or prohibition of Sunday operating hours for butchers and

observance on Sundays and holidays,<sup>2</sup> Blue Laws survived decades of challenges and public backlash thanks to Supreme Court decisions declaring them a legitimate use of the state's police power.<sup>3</sup> Notwithstanding the courts' continued approval, public opinion has grown increasingly hostile to Sunday restrictions, particularly with regard to Sunday liquor sales and shopping.<sup>4</sup> "Mimosa mandates" and "brunch bills" flood state and local legislatures, and online shopping has changed consumer habits and expectations.<sup>5</sup> These modifications have chipped away at the two major areas that the antiquated laws still govern—liquor and retail sales.<sup>6</sup> Further, Blue Laws governing automobile sales and recreational activities—such as Sunday hunting restrictions—have also become increasingly obsolete.<sup>7</sup>

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bakeries); N.J. STAT. ANN. § 2C:33-26 (West 2020) (prohibiting by criminal sanctions the Sunday sale of motor vehicles and motorcycles in New Jersey). George Washington, then newly elected as the first President of the United States, was stopped by a tithingman and challenged for violating Connecticut's former Sunday travel prohibition when traveling from Connecticut to a town in New York to attend a church service. See DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, *BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS* 38 (1987).

2. See Neil J. Dilloff, *Never on Sunday: The Blue Laws Controversy*, 39 MD. L. REV. 679, 683 (1980) (citing the English common law that was the basis for most of the Sunday Closing Laws in the United States) ("For the better observation and keeping holy the Lord's day . . . all . . . persons . . . shall on every Lord's day apply themselves to the observation of the same, by exercising . . . the duties of piety and true religion . . .").

3. *McGowan v. Maryland*, 366 U.S. 420, 452 (1961) ("It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion.").

4. See Kenneth A. Sommer, Note, *Sunday Closing Laws in the United States: An Unconstitutional Anachronism*, 11 SUFFOLK U.L. REV. 1089, 1090 n.6 (1977) (citing statements from judges and a chief attorney, as well as legal scholars and the actions of voters and legislators, as evidence of popular disdain); see also *infra* Part II.B.2 (Trend Toward Limiting Sunday Liquor Laws).

5. See, e.g., Colin Campbell, *From Surf City to Hendersonville, Towns Rush to Allow 10 a.m. Brunch Booze*, NEWS & OBSERVER (July 7, 2017), <https://www.newsobserver.com/news/politics-government/state-politics/article160207874.html>; Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online*, FORTUNE (June 8, 2016), <https://perma.cc/65BC-7RJA>; Roberto A. Ferdman & Christopher Ingraham, *How Brunch Became the Most Delicious—and Divisive—Meal in America*, WASH. POST: WONKBLOG (Apr. 10, 2015), <https://perma.cc/3MZ8-TNYD> (analyzing the increase in popularity of Sunday brunch from 2005 to 2015); Beth McKibben, *Atlantans Will Finally Vote on the 'Mimosa Mandate' in November*, ATLANTA EATER (Aug. 7, 2018), <https://perma.cc/UJD6-X5UL>.

6. See Lesley Lawrence-Hammer, Note, *Red, White, but Mostly Blue: The Validity of Modern Sunday Closing Laws Under the Establishment Clause*, 60 VAND. L. REV. 1273, 1279 (2007) ("However, by far the most prevalent specific Blue Laws are those restricting the sale of alcohol."); see also Susane B. Berger, *The Less We Emphasize the Christian Religion, the Further We Fall into the Abyss of Poor Character and Chaos*, 22 T. MARSHALL L. REV. 233, 233 (1997) ("The Sunday Blue Laws restrict public behavior on the first day of every week by prohibiting various activities, usually those of a commercial nature.").

7. See *infra* Part II.B.3 (Automotive Sales and Hunting Blue Laws).

This Article analyzes the current state of Blue Laws in the United States and argues that they rest on thin legal grounds, given doctrinal and technological developments. Part I provides historical and legal background to Blue Laws both in the United States and abroad. This Part explains previous legal challenges, particularly on religious and other constitutional grounds, and surveys the status of Blue Laws in various state codes. Part II addresses the impact of the twenty-first century on Blue Laws, including the exponential expansion of internet use and commensurate conflict of laws issues. This Part also considers the numerous exceptions engendered by special interests and the resulting contradictory and patchwork nature of Blue Laws today, as well as the doctrine of desuetude, which renders a statute void when it has been unenforced and openly and frequently violated. The Article concludes that Blue Laws are a relic of the past, and recommends their across-the-board repeal.

## I. THE HISTORY OF BLUE LAWS AND THEIR LEGAL CHALLENGES

### A. Sol Invictus—The Early Origins of Blue Laws

Since the Romans, Western society has restricted the sale of liquor on Sundays. What began as a pagan edict in 321 A.D. eventually took on a Christian facet as Christianity spread through the Roman Empire in 386 A.D.<sup>8</sup> In the United Kingdom, kings first proclaimed Sunday Closing Laws, and later Parliament decreed them.<sup>9</sup> The extensive colonization from Great Britain spread the Sunday sale prohibitions to Australia, North America, South Africa, and New Zealand.<sup>10</sup> Some countries in Europe restricted Sunday sales as well.<sup>11</sup>

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8. See LABAND & HEINBUCH, *supra* note 1, at 9 (“The Sunday holiday was as much a part of the pagan life as other holidays sprinkled at odd times throughout the year; the difference lay in the weekly regulation of the event. The earliest edict regarding behavior on Sunday was laid down by Constantine in the year 321 . . . . Sunday is mentioned only by its pagan name, ‘venerable day of the sun.’ Nothing is said of any relation to Christianity; no reference is made to the Sabbath or the Fourth Commandment . . . . In the year 386 a law was passed respecting Sunday behavior . . . . Later that same year the joint emperors . . . issued the first civil proclamation acknowledging both the Christian and pagan influence on behavior.”); see also *id.* at 10-29 (listing Sunday Closing Laws stretching from the fourth to the seventeenth century in England).

9. For a collection of British edicts and parliamentary decrees, see *id.* at 14-29.

10. See *id.* at 29, 215; Jerry S. Ismail, *South Africa’s Sunday Law: Finding a Compromise*, 11 IND. INT’L & COMP. L. REV. 563, 566-69 (2001) (discussing the history of South Africa’s Sunday Law); Shop Trading Hours Act 1977, s 11 (N.Z.) (repealed 1990) (text of New Zealand’s Sunday Closing Laws); Peter Clayworth, *Weekends—The Modern Weekend, 1980 to the 2000s*, TE ARA—THE ENCYCLOPEDIA OF NEW ZEALAND (Sept. 5, 2013), <http://www.TeAra.govt.nz/mi/weekends/page-4>.

11. See, e.g., Ladenschlussgesetz [LadSchlG] [Shop Closing Law], Nov. 28, 1956, BGBl I at 744, §§ 11-15 (Ger.), <https://perma.cc/FET2-HZ7Q> (text of Germany’s Sunday Closing Act). For the current situation in Poland, see *infra* note 156.

The United States incorporated Blue Laws—otherwise known as Sunday Closing Laws or Lord’s Day Acts<sup>12</sup>—into the legal landscape directly from English common law during the country’s colonization and subsequent founding.<sup>13</sup> In 1610, the Colony of Virginia was the first to pass a Blue Law, which made morning and evening attendance at Sunday church service mandatory—with the third violation punishable by death; the rest of the thirteen colonies enacted some form of their own Blue Laws shortly thereafter.<sup>14</sup> There are two competing theories on how these laws came to their colorful name. The Henman theory posits that the term stemmed from the blue-colored paper on which the New Haven colony first printed their laws; however, the Trumbull theory argues that it is a reference to the idiom “true blue will never stain,” which was a term of reproach for overly strict Puritans.<sup>15</sup> Regardless of the origin, both theories point to Blue Laws’ early colonial history.

Recognition of Sunday as a unique or honored day was subsequently woven into the U.S. Constitution, as well as many state constitutions.<sup>16</sup> As the country grew, Blue Laws spread; due to early Puritan influence, the New England and Mid-Atlantic states implemented the strictest Blue Laws.<sup>17</sup> Conversely, the Far West adopted comparatively fewer Blue Laws.<sup>18</sup> The Blue Laws of the new nation “continued the colonial tradition of prohibiting all Sunday labor, business, and worldly amusements” while maintaining exceptions for “necessity and charity.”<sup>19</sup> While enforcement of harsh penalties happened with some frequency, so too did widespread civil disobedience to early Sunday Laws.<sup>20</sup>

The Blue Laws of the early United States generally fall into two categories: (1) a general ban on Sunday activities and business; or (2) specific bans on certain activities or businesses.<sup>21</sup> General Sunday Closing Laws broadly prohibit all retail activity.<sup>22</sup> Specific Sunday restrictions delineate “specific activities as

12. See Sommer, *supra* note 4, at 1090-92.

13. See LABAND & HEINBUCH, *supra* note 1, at 29-30 (“The Act enacted by the twenty-ninth Parliament of Charles II was the prevailing law of the British colonies in America up to the time of the American Revolution. It provided the basis for most of the early American Sunday laws.”).

14. See *id.* at 30-37; see also Yael Kalman, *Thou Shalt Accommodate the Secular: Sabbath Laws’ Evolution from “Day of Rest” to “Day of Leisure”*, 27 TEMP. INT’L & COMP. L.J. 111, 133 (2013) (“All thirteen colonies had Sunday closing laws. By the end of the nineteenth century, nearly every state had at least some law prohibiting certain activities on Sunday. Laws prohibiting general retail activity on Sundays were fairly widespread as of the middle of the twentieth century.”).

15. LABAND & HEINBUCH, *supra* note 1, at 8.

16. Jaynie Randall, *Sunday Excepted*, 59 ALA. L. REV. 507, 508-11 (2006).

17. See, e.g., Sommer, *supra* note 4, at 1091.

18. *Id.*

19. See Lawrence-Hammer, *supra* note 6, at 1277.

20. See LABAND & HEINBUCH, *supra* note 1, at 37-39.

21. See Kalman, *supra* note 14, at 139.

22. See *id.* (“General laws may exempt a long list of activities from their broad bans, or alternatively, they may individually list each prohibited activity, rather than list the exempted activities. Some states contain restrictions only for a portion of the day on Sunday . . .”).

uniquely worthy of Sunday restriction.”<sup>23</sup> The most prevalent specific Blue Laws are those restricting the sale of alcohol.<sup>24</sup> Certain states even establish criminal, not just civil, sanctions for Blue Law violations.<sup>25</sup> Generally categorized as misdemeanors, these states punish violations of criminal Blue Laws through imprisonment, monetary fines, restitution, and injunctive relief.<sup>26</sup>

Despite their early ubiquity, Blue Laws began to face challenges by the mid-nineteenth century as special interest groups started exerting influence on state legislatures to create exceptions.<sup>27</sup> In 1858, Massachusetts passed the first exception to its Blue Laws—allowing licensed sports activities to operate on Sundays—and many other exceptions quickly followed.<sup>28</sup> Blue Laws expanded in the early twentieth century, when legislatures implemented new prohibitions against everything from baseball to cock-fighting.<sup>29</sup> However, political and public support for the temperance and prohibition movements, along with their puritanical undertones, waned after several years. By the mid-twentieth century, Blue Laws faced their most serious challenges in the Supreme Court.

#### B. The Sunday Cases—*McGowan* and Its Companions

Before the mid-twentieth century, the Supreme Court generally endorsed Blue Laws.<sup>30</sup> Although primarily concerned with labor restrictions involving

23. *Id.* (“Some specific restrictions include: horse racing, hunting, sale of motor vehicles, and, most commonly, sale of alcohol.”).

24. These statutes come in a variety of forms, including bans on the sale of “hard” liquor only, bans on alcohol sales based on location, bans on the delivery of alcohol, and various limits on the hours during which certain types of alcohol can be sold, often dependent on the place of sale. *See* Lawrence-Hammer, *supra* note 6, at 1279-80.

25. *See* ME. STAT. tit. 17, § 3204 (2020) (providing that violation of a Maine Sunday Closing Law covering businesses, traveling, and recreation is a Class E strict liability crime); MD. CODE ANN., NAT. RES. § 10-410 (LexisNexis 2020) (prohibiting Sunday hunting in Maryland); MD. CODE ANN., NAT. RES. § 10-1101 (LexisNexis 2020) (providing that violation of Maryland’s hunting regulations is a misdemeanor punishable by up to \$1,500 fine for the first offense and a \$4,000 fine and imprisonment of up to one year for subsequent offenses); N.D. CENT. CODE § 12.1-30-01 (2020) (providing that violation of a North Dakota Sunday business closing law is a class B misdemeanor) (repealed 2019). *But see* MASS. GEN. LAWS ch. 136, § 2 (2020) (providing that violation of a Massachusetts Sunday prohibition on unlicensed paid entertainment or dancing, excepting folk or square dancing, is punishable by up to a \$50 fine); S.C. CODE ANN. § 53-1-70 (2020) (violating South Carolina’s Sunday business closing law is punishable by a fine between \$50 and \$250 for the first offense, and a fine between \$100 and \$500 for subsequent offenses).

26. Dilloff, *supra* note 2, at 696-97 (arguing that while fines are prevalent as punishments, many fines are nominal and thus ineffective at deterring large merchants from violations of Blue Laws).

27. Sommer, *supra* note 4, at 1097.

28. *Id.* (“[T]he legislature had recognized more than fifty activities as exempt from application of the Sunday law when the laws were consolidated in the General Laws of 1932.”).

29. *See* Lawrence-Hammer, *supra* note 6, at 1277.

30. *See* *Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1884) (stating that Blue Laws were a valid police objective and therefore valid under the Constitution).

laundry businesses and discrimination, the significant case of *Soon Hing v. Crowley*<sup>31</sup> provided legal justifications for Blue Laws through a statement by Justice Field:

Laws 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. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States.<sup>32</sup>

Twelve years later, the Supreme Court decided *Hennington v. Georgia*,<sup>33</sup> a direct challenge to a Sunday regulation restricting the operation of freight trains. Faced with a Commerce Clause challenge to the law, the Court upheld the prohibition as a valid use of the state's police power to restrict transportation activity because the prohibition was neither directed at, nor did it have a significant effect on, interstate commerce.<sup>34</sup> The Supreme Court did not decide another constitutional challenge to a state's Blue Law for sixty-five years post-*Hennington*, in the seminal case of *McGowan v. Maryland*<sup>35</sup> and its three companion cases.<sup>36</sup>

In *McGowan*, seven employees from a large discount department store were convicted of violating Maryland's extensive Sunday retail restrictions for selling a three-ring, loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine.<sup>37</sup> The employees of the store challenged the constitutionality of the Sunday Closing Law on both Equal Protection and Establishment Clause grounds.<sup>38</sup> The Court ruled that the restrictive retail law did not violate the Equal Protection Clause because it was reasonably related to citizens' welfare, the statutory distinction was not invidious, and the legislature had a rational basis in passing the law rooted in local tradition and custom.<sup>39</sup> Relying in part on Justice Field's quote in *Soon Hing*,<sup>40</sup> the Court acknowledged the religious heritage of Sunday Closing Laws but found that many had sufficiently evolved into secular laws with non-religious purposes.<sup>41</sup> Regarding the particular Maryland statute in dispute, the Court reasoned that it lacked overt religious language and excepted multiple activities previously considered profane, such as Sunday Bingo and

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31. 113 U.S. 703 (1884).

32. *Id.* at 710.

33. 163 U.S. 299 (1896).

34. *Id.* at 318.

35. 366 U.S. 420 (1961).

36. *Gallagher v. Crown Kosher 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).

37. *See McGowan*, 366 U.S. at 422.

38. *Id.* at 429-31.

39. *See id.* at 426, 428.

40. *See supra* note 32 and accompanying text.

41. *See McGowan*, 366 U.S. at 436, 444.



baseball, which evidenced an intent to promote rest and relaxation—a valid secular purpose.<sup>42</sup>

Decided on the same day, *Two Guys from Harrison-Allentown, Inc. v McGinley*<sup>43</sup> also featured a department store challenging a state's retail Blue Laws on Equal Protection and Establishment Clause grounds.<sup>44</sup> The Court upheld the restrictions that prohibited large retailers from selling on Sunday, but not smaller ones, under the notion that different types of businesses may need different kinds of regulation to promote tranquility.<sup>45</sup> Additionally, the Court affirmed that Pennsylvania's Sunday Closing Law was secular in nature and thus not a violation of the Establishment Clause.<sup>46</sup>

While the first two cases dealt with plaintiffs who simply suffered economic harm from losing sales one day a week, both *Gallagher v. Crown Kosher Super Market, Inc.*<sup>47</sup> and *Braunfeld v. Brown*<sup>48</sup> featured Orthodox Jewish plaintiffs caught between the mandates of their religious beliefs and the law of the state, forcing them to close their shops for two days of the week.<sup>49</sup> Again facing Equal Protection and Establishment Clause challenges, the Court in *Gallagher* found the exceptions in the Sunday ban to be a permissive use of the state's police power because they were rationally related to the secular purpose of a day of rest.<sup>50</sup> The Justices recognized the religious origin of the law but found it did not go so far as to establish religion, nor did the economic burden faced by the Jewish deli owners constitute a state prohibition against their religion.<sup>51</sup> Likewise, *Braunfeld* featured a suit from Orthodox Jewish merchants in Philadelphia who challenged the law on First and Fourteenth Amendment grounds.<sup>52</sup> The Court found the merchants did not suffer an economic disadvantage that constituted a prohibition against religion, as all regulation may indirectly affect members of different religious communities with varying practices.<sup>53</sup> The law in this specific case was secular and not religious in nature and only affected members of the Jewish Orthodox community who found it necessary to work on Sunday, not all Orthodox Jews.<sup>54</sup> The Court has had opportunities to revisit these decisions, but

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42. *Id.* at 448-50.

43. 366 U.S. 582 (1961).

44. *Id.* at 583-84, 589, 592.

45. *Id.* at 589-92.

46. *Id.* at 596-98 (examining the current legislation and the history of Blue Laws tracing back to the Pennsylvania Supreme Court's first defense of them in 1848).

47. 366 U.S. 617 (1961).

48. 366 U.S. 599 (1961).

49. Jewish Orthodox members strictly observe the Jewish Sabbath, starting on Friday at sundown and continuing until Saturday at sundown, and work is prohibited during the Sabbath. *Sabbath*, BBC, <https://perma.cc/P5RF-YDKH> (last updated July 15, 2009).

50. *Gallagher*, 366 U.S. at 623-24.

51. *Id.* at 624-25, 630-31.

52. *See Braunfeld*, 366 U.S. at 600-02.

53. *See id.* at 606-09.

54. *See id.*

ultimately has adhered to its ruling that Blue Laws are a valid use of state power.<sup>55</sup>

### C. Subsequent Challenges and Critiques of Blue Laws

In the years following *Braunfeld* and *McGowan*, Blue Laws have faced numerous challenges in both state and federal courts. Further, multiple scholars have reanalyzed these laws in light of developments in First and Fourteenth Amendment jurisprudence, and others have questioned the validity of Blue Laws under novel forms of examination. This Subpart surveys existing Blue Law jurisprudence and scholarly critiques arising under state and federal constitutions, federal preemption, and policy arguments. Later, this paper will reexamine how modern changes in society, technology, and the law further nullify the already minimal societal function of Blue Laws.

#### 1. First Amendment

Unsurprisingly, the most common critique is that Blue Laws violate the First Amendment's guarantee of free exercise of religion and its prohibition of state-sanctioned religion. Some have found the dissent's argument in *McGowan* persuasive and have flatly stated that the Supreme Court got the holding wrong.<sup>56</sup> Kenneth Sommer argues that Blue Laws violate the Establishment Clause because of their clear religious purpose and origins.<sup>57</sup> Additionally, these laws "protect businesspersons who choose, for religious reasons, to refrain from working on Sunday by preventing virtually all competition on that day while imposing a severe economic penalty upon non-Sunday sabbath observers by reducing their business week to five days."<sup>58</sup> By mandating Sunday as the day of rest, the state deprives non-Sunday Sabbatarians of the freedom to both pursue their livelihood and practice their religion, thus inhibiting their free exercise of religion guaranteed in the First Amendment.<sup>59</sup>

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55. See *Supermarkets Gen. Corp. v. Maryland*, 449 U.S. 801 (1980) (dismissing the appeal of a Maryland Court of Appeals' decision that Maryland's Blue Laws were valid and constitutional, for want of a federal question).

56. See Sommer, *supra* note 4, at 1103 ("Because they promote religious observance by members of the dominant Christian sects to the detriment of religious minorities, Sunday Blue Laws violate the command of the establishment clause that there be a wall of separation between church and state.").

57. *Id.* ("Modern courts disregard history by dismissing earlier judicial admissions of the religious purposes of Sunday laws merely as dicta.").

58. *Id.*

59. *Id.* at 1106 (explaining how Sunday Laws effectively force observers of a non-Sunday Sabbath to choose between their businesses and their religion) ("If they choose their businesses, and thus work on the day deemed sacred by their faith so that they may remain in a competitive position with their Christian counterparts, they must abandon their religious convictions.").

Other scholars have similarly argued that the rationale upholding Blue Laws in *McGowan* would no longer pass constitutional muster.<sup>60</sup> James A. Kushner notes the Court's decisions in several subsequent cases would likely lead to a different ruling in *McGowan* if it were decided today.<sup>61</sup> He argues that the liberalization of standing principles and the decreased deference to legislatures in the context of Equal Protection for religious minorities and fundamental rights means that Sunday worshippers and nonreligious individuals now should qualify to litigate the interests of non-Sunday Sabbatarians, and that courts would rule in their favor.<sup>62</sup> Kushner argues that Justice Harlan's dissent in *Sherbert v. Verner*<sup>63</sup> explicitly arguing for the overruling of *Braunfeld*, as well as the "less restrictive alternative" analysis used by the Court in that case, would suggest a different outcome should Blue Laws be challenged today.<sup>64</sup> While the Establishment Clause may be the expected avenue to invalidate Blue Laws, others have found more creative ways to challenge them.

## 2. Second Amendment

Perhaps surprisingly, some Blue Laws have faced challenges under the Second Amendment. Hunting enthusiasts, upset at states preventing hunting on one of the most convenient days to do so, have banded together to challenge hunting

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60. For a statute to survive an Establishment Clause challenge under the *Lemon* test, the Supreme Court stated, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). See James A. Kushner, *Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Cases Revisited*, 35 Sw. L.J. 557, 559 (1981-1982) ("The conclusion reached is that 'strict neutrality' in religious questions rarely is permissible in a society constitutionally committed to religious freedom."); see also Steven L. Lane, Note, *Liquor and Lemon: The Establishment Clause and State Regulation of Alcohol Sales*, 49 VAND. L. REV. 1491, 1516-21 (1996) (arguing Sunday liquor sales would be invalidated under the Court's *Lemon* test); Lawrence-Hammer, *supra* note 6, at 1303 ("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."); 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, 231-34 (1994) (noting the adoption of Justice O'Connor's "no endorsement" modification to the *Lemon* test, and arguing that Blue Laws would fail under all versions of the Supreme Court's establishment clause jurisprudence).

61. See Kushner, *supra* note 60, at 564.

62. See *id.* at 565 ("The claims of religious minorities ought to be permitted to be litigated under the doctrine of constitutional *jus tertii*, the doctrine allowing surrogate litigants to raise the rights of third parties because of the difficulty for such third parties to assert their own rights."); see also *id.* at 566-72 (discussing the Supreme Court's changing judicial standard for Equal Protection claims).

63. 374 U.S. 398, 421 (1963) (Harlan, J., dissenting).

64. See Kushner, *supra* note 60, at 570-71.

Blue Laws.<sup>65</sup> Insofar as these suits have featured Second Amendment challenges, courts have been unconvinced.<sup>66</sup> The United States District Court for the Middle District of Pennsylvania, while considering a Second Amendment challenge to Pennsylvania's hunting Blue Law, was unable to find support for recreational hunting as a legally protected interest.<sup>67</sup> Despite Justice Scalia's assertion in *District of Columbia v. Heller*<sup>68</sup> that "[t]he prefatory clause [of the Second Amendment] does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting,"<sup>69</sup> the Court did not find that such an "oblique" reference to hunting created a nexus strong enough to establish that *Heller* recognized a fundamental right to hunt.<sup>70</sup>

### 3. Equal Protection, Discriminatory Enforcement, and Due Process

While the Second Amendment may be a creative avenue, the Fourteenth Amendment has been the more popular path. Critics have challenged Blue Laws under the doctrines of discriminatory enforcement, vagueness, equal protection, and substantive due process as a violation of the Fourteenth Amendment and state constitutions. At times these approaches have been successful; however, the judiciary is typically reluctant to second-guess the police or open the courts up to frequent litigation by adopting a broad reading of the Equal Protection Clause. Therefore, courts usually defer to legislatures and impose heavy burdens on defendants.

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65. Mike Balestra, Note, *Thou Shall Not Hunt: A Historical Introduction to and Discussion of the Modern Debate over Sunday Hunting Laws*, 96 KY. L.J. 447, 458 (2007).

66. *Hunters United for Sunday Hunting v. Pa. Game Comm'n*, 28 F. Supp. 3d 340, 346 (M.D. Pa. 2014) (holding that the challenges on Second and First Amendment grounds fail because the Second Amendment does not extend to recreational gun use and there is no standing for the First Amendment claim); Allie Humphreys, Note, *Has Blue Overshadowed Green?: The Ecological Need to Eradicate Hunting Blue Laws*, 40 WM. & MARY ENVTL. L. & POL'Y REV. 623, 624 (2016) ("Because state legislators traditionally saw hunting as a less pressing state issue than other Blue Law restrictions, Sunday hunting bans remain in effect in many areas where the legislation lifted other Blue Laws.").

67. *Hunters United*, 28 F. Supp. 3d at 340 ("Because the Court can find no legal support for Plaintiffs' argument that Second Amendment protections extend to recreational hunting the Court declines to find that Section 2303(a) restricts conduct protected by the Second Amendment and need not proceed to evaluate it under any means-based test.") (citing *United States v. Marzarella*, 614 F.3d 85, 90 (3d Cir. 2010)).

68. 554 U.S. 570 (2008).

69. *Id.* at 599 (dicta).

70. *Hunters United*, 28 F. Supp. 3d at 346; see also Balestra, *supra* note 65, at 457 ("They show that . . . [the] Equal Protection Clause [is] of little use in overturning the laws as long as there is some reasonable explanation for the law that supports a legislative purpose. . . . [S]uch a purpose can be readily found and may be as simple as providing an opportunity for non-hunters to enjoy the outdoors without disturbance one day per week during hunting season.").

### i. Fourteenth Amendment Challenges

Under the doctrine of Equal Protection, discriminatory enforcement has been a successful avenue for attacking Blue Laws. A court's deferential approach toward Blue Law legislation creates unusually sharp inequalities when the law is contrary to public opinion because such a law is often sporadically, and most likely discriminatorily, enforced. While discriminatory enforcement can be a hard-won challenge to Blue Laws, it may be successful "when law enforcement officials only enforce the law when asked to do so by merchant-competitors or other special interest groups."<sup>71</sup> Thus, several of the most effective challenges to Blue Laws have been Equal Protection defenses arguing discriminatory enforcement.<sup>72</sup>

In addition to discriminatory enforcement, others have argued that, under the Fourteenth Amendment, Blue Laws and their numerous exceptions are too vague to be adequately enforced. The doctrine of vagueness, also known as the void-for-vagueness doctrine, requires "that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."<sup>73</sup> While specific Blue Laws may appear clear, in practice individuals often find it difficult to delineate what they may or may not do or purchase.

Some also argue that modern Blue Laws are so riddled with exceptions that they would fail the rational basis test of the Fourteenth Amendment.<sup>74</sup> Courts

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71. See Dilloff, *supra* note 2, at 711.

72. For background information on previously cited cases, see *supra* Part I.C (Subsequent Challenges and Critiques of Blue Laws); see also *Sheriff of Houston Cnty. v. Albertson's, Inc.*, 402 So. 2d 912 (Ala. 1981) (concluding that uneven enforcement of an Alabama law that prohibited grocery stores with more than four employees from opening on Sunday violated the U.S. Constitution and the Alabama Constitution); *State v. Anonymous*, 364 A.2d 244, 249 (Conn. Super. Ct. 1980) (holding that the prosecution of those who violate Blue Laws at the insistence of an interest group for its private purposes constituted discrimination violative of the Equal Protection Clauses of the federal and state constitutions); *People v. Acme Markets, Inc.*, 334 N.E.2d 555, 558 (N.Y. 1975) (holding that the enforcement of a Sunday Closing Law was discriminatory when it was only enforced against certain supermarkets); *People v. Tornatore*, 46 Misc. 2d 908, 912-13 (N.Y. City Ct. 1965) (dismissing a claim on the grounds that the statute was not enforced in fourteen years and therefore the sudden arrest and application of the Sabbath law to the defendant was discriminatory). *Cf. Retail Merchants Ass'n. v. Handy Dan Hardware, Inc.*, 696 S.W.2d 44, 52 (Tex. App. 1985) (finding that a Texas retail Blue Law was not unconstitutionally vague or violative of the Fourteenth Amendment despite its exceptions).

73. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

74. See Sommer, *supra* note 4, at 1106-07, 1111-12 ("For example, it is difficult to imagine how the state's goal of providing a day of rest is furthered by a law permitting the sale of plants and fertilizers, antiques, and residential real property, while prohibiting the sale of most consumer goods, hardware, and clothing. There is no conceivable set of facts justifying the conclusion that the purchase of a television set is more likely to promote unrestful activity than the purchase of a rhododendron."); see also Dilloff, *supra* note 2, at 686-93, (highlighting that there is no rational distinction between establishments based upon the type of business they conduct or products they sell).

have found that Sunday Closing Laws contain arbitrary exemptions and definitions without providing any rational basis for their implementation.<sup>75</sup> Under the Due Process test, a law must bear a “real and substantial relation” to the public welfare; under the Equal Protection test a law will be upheld if any state of facts reasonably may be conceived to justify it.<sup>76</sup> Blue Laws have evolved from general bans on Sunday activities to laws that selectively and arbitrarily prohibit the operation of certain businesses and the sale of particular commodities on Sunday.<sup>77</sup> This transformation is not rooted in legislating for the public welfare; instead, this trend arose as the result of lobbying pressure exerted upon state legislatures by special interest groups.<sup>78</sup> Thus, Blue Laws may not pass the rational basis test under Equal Protection jurisprudence.

Whether for discriminatory enforcement or vagueness due to arbitrary exceptions, advocates and scholars alike frequently attack Blue Laws for violating the Fourteenth Amendment on both Equal Protection and Due Process grounds.

## ii. State Constitutional Challenges

Beyond federal constitutional challenges, opponents have also found some success challenging Blue Laws on state Equal Protection and Due Process grounds. Generally, courts have not taken issue with state-imposed common days of rest, viewing them as a valid exercise of the state legislature’s police power. However, some state courts have struck down or modified Blue Laws for vagueness or difficulties in enforcement.

On one side of the spectrum, some state courts have determined that a state’s Blue Law, in its entirety, violates the state’s constitution. In Pennsylvania, several townships cited two companies, Great Atlantic & Pacific Tea Company and Kroger, for violating the Sunday Closing Laws.<sup>79</sup> Great Atlantic and Kroger challenged the constitutionality of the trading laws, and the court held that the Pennsylvania law was unconstitutional because the number of exceptions diluted the

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75. *See* *Caldor’s, Inc. v. Bedding Barn, Inc.*, 417 A.2d 343, 351-54 (Conn. 1978) (holding that a Connecticut Sunday Closing Law failed the rational connection test because its classifications were too arbitrary, discriminatory, and unreasonable to conform with equal protection and due process requirements). *But see* *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 50-51 (1st Cir. 2003) (determining that the existence of numerous exceptions to Sunday Closing Laws does not inherently lend itself to discriminatory enforcement); *State ex rel. Guste v. K-Mart Corp.*, 462 So. 2d 616, 620 (La. 1985) (holding that a Blue Law was not unconstitutionally vague despite selective enforcement).

76. Dilloff, *supra* note 2, at 710.

77. LABAND & HEINBUCH *supra* note 1, at 47-49.

78. *See, e.g.*, Danielle M. Teagarden, Note, *Brewing Tension: The Constitutionality of Indiana’s Sunday Beer-Carryout Laws*, 47 IND. L. REV. 335, 336-38 (2014) (pointing out how brewers in Indiana successfully lobbied for a narrow exception to Indiana’s Sunday liquor law); *see also* LABAND & HEINBUCH, *supra* note 1, at 47-49.

79. *Kroger Co. v. O’Hara Twp.*, 392 A.2d 266, 277 (Pa. 1978) (repealing 18 PA. CONS. STAT. ANN. §§ 7361-7364 (Purdon 1973)).

secular purpose such that it violated the Equal Protection Clause of the Pennsylvania Constitution.<sup>80</sup> The Pennsylvania Court stated that, while it was constitutional to legislate exceptions to create a coherent statute that achieved a uniform day of rest, “when a law which prohibits business activity is riddled with exception after exception, a time comes when the general scheme is so diluted that it violates the equal protection of the laws.”<sup>81</sup> Accordingly, the court repudiated the entire statute.

In the middle of the spectrum, some state courts have taken a more guarded approach, upholding some Blue Laws while striking down others. In *Rutledge v. Gaylord’s, Inc.*,<sup>82</sup> the Georgia Supreme Court looked at whether the state’s “Common Day of Rest Act,” which mandated that businesses close on either Saturday or Sunday, violated the Equal Protection Clause of the Georgia Constitution.<sup>83</sup> The court held that the statute as a whole was not unconstitutional, but that “provisions of the Act which arbitrarily require[d] certain businesses to close on one of the two days” were.<sup>84</sup> In *Piggly Wiggly of Jacksonville v. City of Jacksonville*,<sup>85</sup> Blue Laws at both the state and county level faced constitutional challenges. The Supreme Court of Alabama struck down the Calhoun County Blue Law while simultaneously upholding Alabama’s state-wide day-of-rest Blue Law.<sup>86</sup> The court held that the county Blue Law that prohibited large grocery stores from opening on a Sunday violated the Fourteenth Amendment and the Alabama Constitution because the law was unconstitutionally vague according to the established guidelines regarding the construction of criminal statutes.<sup>87</sup> While the court found that the Alabama state law appropriately delegated the authority to pass Blue Laws to the counties, the county statute was vague, indefinite, and contained an unreasonable classification because there were no guidelines for defining “large grocery store.”<sup>88</sup>

On the other end of the spectrum, some courts have upheld Blue Laws when faced with similar Equal Protection challenges to those mentioned above. In *State ex rel. Guste v. K-Mart Corp.*,<sup>89</sup> the Supreme Court of Louisiana dealt with

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80. *Id.* at 272-73.

81. *Id.* at 273.

82. 213 S.E.2d 626 (Ga. 1975).

83. *See id.* at 627-30 (citing “The Common Day of Rest Act of 1974” GA. L. 1974); GA. CONST. art. I, § 1, para. 2 (2013). There were thirty-six enumerated exceptions to the statute, and the regulation did not apply to transactions between individuals.

84. *Id.* at 629-30.

85. 336 So. 2d 1078 (Al. 1976).

86. *Id.* at 1080-81 (upholding the state-wide day-of-rest Blue Law as a valid exercise of legislative power).

87. *See id.* at 1080 (“[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State’s secular goals, the statute is valid despite its indirect burden on religious observances unless the State may accomplish its purpose by means which do not impose such a burden.”) (quoting *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

88. *Id.* at 1081.

89. 462 So. 2d 616 (La. 1985).

three consolidated challenges to the state's retail Blue Law, which contained twenty-six exemptions.<sup>90</sup> Home Depot, K-Mart, and Gaylord National Corporation claimed the law violated the Equal Protection Clause for being unnecessarily vague.<sup>91</sup> Despite applying a stricter standard because the law was criminal and not civil in nature, the court nonetheless upheld the law, asserting the prohibited categories of items were not sufficiently vague to be unconstitutional.<sup>92</sup> The court in its holding stated that rather than being vague, the categories of items prohibited were "relatively easy to define with the help of a dictionary and commonsense."<sup>93</sup>

Despite the varying outcomes, the common thread among these cases is that there has yet to be a successful Equal Protection challenge to the idea of a common day of rest, when the law contains few exceptions. Courts have been reluctant to find a constitutional issue with a state-sponsored secular day of rest, finding instead that it is a valid exercise of the state's police power. When the law is riddled with exceptions, some courts are less deferential to the legislature than others when assessing the rationality or arbitrariness of Blue Laws. These challenges on the basis of vagueness have been more successful because courts recognize that the enumerated exceptions or the lack of enforcement makes them increasingly difficult to justify under the guise of promoting a common day of rest. Yet, there is a lack of uniformity over the difficult line-drawing problem when determining an unconstitutional quantity of exceptions. Due to this uncertainty on state constitutional grounds, various legal scholars suggest alternatively challenging Blue Laws under the Commerce Clause and the Twenty-First Amendment.

#### 4. Commerce Clause and Twenty-First Amendment

Recent Commerce Clause jurisprudence may invalidate Blue Laws that effectively discriminate against out-of-state liquor producers, although the Twenty-First Amendment complicates this analysis.<sup>94</sup> In 2005, the Supreme Court decided *Granholm v. Heald*,<sup>95</sup> which held that Michigan and New York laws that benefited in-state wineries to the detriment of out-of-state wineries violated the Commerce Clause, and that section two the Twenty-First Amendment

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90. *Id.* at 617-18 ("Section 192 contains the twenty-four exemptions listed in Act 18 of 1886, plus exemptions for art galleries (added in 1979) and the World's Fair (added in 1983). The exemptions range from 'places of resort for recreation and health' to drug stores, livery stables, markets, hotels, book stores, restaurants, etc.").

91. *Id.* at 620-21.

92. *Id.* at 621.

93. *Id.*

94. See Teagarden, *supra* note 78, at 342 ("Nevertheless, when evaluating alcohol-related legislation, the Commerce Clause may not be viewed in isolation. Rather, because of the deeply entrenched 'moral nature' of alcohol and its express treatment through the Eighteenth and Twenty-First Amendments, the requisite analysis is not as clear.").

95. 544 U.S. 460 (2005).



did not provide an exception.<sup>96</sup> Teagarden has further suggested that, post-*Granholm*, Indiana's Blue Laws may violate the Commerce Clause by discriminating against out-of-state producers because of the exception it grants to in-state producers.<sup>97</sup>

Teagarden points out that, although *Granholm* established a nondiscrimination principle for the sale of alcohol, it also provided that section two of the Twenty-First Amendment somewhat insulates states from Commerce Clause challenges that may arise from discrimination within a state's three-tier regulation system for the distribution of alcohol.<sup>98</sup> As the brewing industry in Indiana doubled between 2004 and 2010, brewers lobbied Indiana's state legislature for an exception to Indiana's law prohibiting liquor producers from selling their products to consumers for off-premise use.<sup>99</sup> Teagarden claims that this exception allows brewers to occupy two spaces in the three-tier distribution system, Producers and Retailers, while out-of-state brewers can act only as Producers.<sup>100</sup> While this exception has yet to be challenged in court,<sup>101</sup> Teagarden suggests that it may well violate the Commerce Clause post-*Granholm* because the exception goes beyond the Twenty-First Amendment's protection of the three-tier system<sup>102</sup> and because there is a "reasonably non-discriminatory alternative"<sup>103</sup> to the law—namely prohibiting all Sunday carry-out sales, as the state previously

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96. See *id.* at 476.

97. See Teagarden, *supra* note 78, at 338 ("As a result of the change, certain brewers now have the exclusive ability to sell their own beers on Sundays for off-premises consumption. In other words, if consumers want to purchase beer and bring it home on a Sunday, Indiana breweries are their only in-state option.").

98. *Id.* at 349-52. For clarification, the three-tier regulation system consists of the distributor or manufacturer, the wholesaler, and the retailer. In a three-tier distribution system, the producer tier (brewery) makes beer, sells it to wholesalers, and the wholesaler delivers and sells that beer to retailers. The beer-loving public can then purchase the beverages from the retailer. Mar Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You*, CRAFTBEER.COM (Mar. 6, 2017), <https://perma.cc/NAM2-28EA>.

99. Teagarden, *supra* note 78, at 336-38.

100. *Id.* at 352-53. With the explosion in popularity of the craft brewing industry, challenges to the traditional three-tier distribution system are becoming more common in other states. See, e.g., Luke Basha, *It's Still 1970 Somewhere: How North Carolina's Small Craft Breweries Hope to "Craft Freedom" from Antiquated Statutes Friendly to Distributors and National Macrobreweries*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 340 (2018). Insofar as these states also limit Sunday sales, legislatures should be aware of potential Commerce Clause issues when granting exceptions. See Adam Star, Note, *Getting a Handle on Growler Laws*, 39 SEATTLE U. L. REV. 1079, 1106-07 (2016) (discussing passage of Minnesota law allowing breweries to sell growlers on Sunday).

101. This may just be a matter of time. Opponents have begun to challenge other aspects of Indiana's liquor regulatory scheme under the Commerce Clause. See, e.g., *Ind. Petroleum Marketers & Convenience Store Ass'n v. Huskey*, No. 1:13-CV-00784-RLY-DML, 2014 U.S. Dist. LEXIS 81878 (S.D. Ind. June 16, 2014) (granting Indiana's motion for summary judgment against a Commerce Clause challenge, along with Fourteenth Amendment and other constitutional challenges).

102. Teagarden, *supra* note 78, at 353.

103. *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

did.<sup>104</sup> Moreover, Teagarden contends that given the massive popularity of Sunday sales, Indiana could also open up its liquor market and allow all retailers to engage in Sunday carry-out sales, equalizing the playing field between in-state and out-of-state contributors.<sup>105</sup> While it remains to be seen how successful Twenty-First Amendment and Commerce Clause challenges will be, there are still other legal challenges that may succeed against Sunday Closing legislation.

### 5. Preemption by Federal Regulation

Some scholars suggest a novel pathway to challenge Blue Laws: federal regulation preemption. For example, Elina Tetelbaum argues that Sunday Closing Laws are anti-competitive because they limit consensual interactions and harm consumer welfare by artificially restricting the consumption of goods to certain days.<sup>106</sup> In fact, Justice Holmes, dissenting in *Lochner v. New York*,<sup>107</sup> specifically cited Sunday Closing Laws as an example of state laws that “regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical . . . [and] interfere with the liberty to contract.”<sup>108</sup> Because Sunday Closing Laws may restrain trade or commerce, they may violate the Sherman Act.<sup>109</sup>

Accordingly, opponents may take several approaches when arguing Sunday liquor laws are anti-competitive. First, Sunday Laws restrain the sale of alcohol, not the consumption of alcohol. This means that individuals may still drink on Sunday provided they can plan around Sunday closing restrictions by purchasing alcohol on other days, or they are willing to pay the associated costs of drinking on premises serving alcohol.<sup>110</sup> Sunday liquor laws typically treat sales for on- and off-premises consumption differently, granting market power to licensed restaurants, hotels, and bars to sell alcohol when liquor stores, grocery stores, and gas stations cannot.<sup>111</sup>

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104. Teagarden, *supra* note 78, at 358.

105. *Id.* at 359.

106. Elina Tetelbaum, *A Sobering Look at Why Sunday Liquor Laws Violate the Sherman Act*, 2011 UTAH L. REV. 625, 642 (2011).

107. 198 U.S. 45 (1905).

108. Tetelbaum, *supra* note 106, at 641 (citing *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)).

109. *See id.*

110. *Id.* at 643; *see also* Growler, ONLINE ETYMOLOGY DICTIONARY, <https://perma.cc/V98X-S6KJ> (archived July 11, 2022) (“‘Pitcher or other vessel for beer,’ 1885, American English slang . . . . The thing itself owes its popularity to laws prohibiting sale of liquor on Sundays and thus the tippler’s need to stock up.”).

111. Tetelbaum, *supra* note 106, at 641-42 (arguing that Sunday liquor laws distort the alcohol retail market by granting some market participants near-monopoly power in alcohol sales on Sundays). Additionally, there is deadweight loss to society resulting from restricted Sunday alcohol purchases because certain consumers of secular activities (like drinking alcohol) refuse to engage in religious worship or rest on Sunday even when alcohol is banned.

Courts that have considered the question of state-created monopolies have limited their scope of review to determine whether such restrictions were reasonably required for the protection of some public interest.<sup>112</sup> Courts uphold such restrictions when they promote public welfare.<sup>113</sup> *Supermarkets General Corp. v. Maryland*<sup>114</sup> is one example of an unsuccessful monopoly-grounded attack on state Blue Laws.<sup>115</sup> In that case, the Maryland Court of Appeals upheld Maryland's Blue Laws scheme and found the laws did not violate the state's constitutional prohibition of monopolies.<sup>116</sup> The court held that because businesses were free to locate or relocate to counties that permitted Sunday operations, there was no suppression of competition and no exclusion of large merchants from the Sunday market.<sup>117</sup> However, the court ignored the economic and practical concerns associated with relocation.<sup>118</sup>

On the other hand, two states have implied that Sunday Closing Laws unlawfully restrain trade. In *Boyer v. Ferguson*,<sup>119</sup> the Supreme Court of Kansas struck down the state's Blue Laws, holding that "[t]he effect of this Act on the general public would be to force customers to cease doing their business at certain stores, and to shop at other places of business which are favored under the Act."<sup>120</sup> Similarly, in *Kroger Co. v. O'Hara Township*,<sup>121</sup> the Pennsylvania Supreme Court strictly scrutinized the state's Sunday trading laws under state constitutional provisions that prohibit the legislature from passing any special law regulating trade.<sup>122</sup>

Blue Laws also potentially interfere with federal labor and employment regulations. Several Delta Airlines employees sued the airline under Rhode Island's Blue Laws claiming they were due time-and-a-half for their work on Sunday.<sup>123</sup> Delta responded that a section of the federal Airline Deregulation Act of 1978 (ADRA)<sup>124</sup> preempted the Rhode Island Blue Law and thus the provision was not applicable to Delta, and the case was remanded to an agency hearing for further

112. *Id.* at 641.

113. *See, e.g.*, *Gibson Distrib. Co. v. Downtown Dev. Ass'n*, 572 S.W.2d 334, 335 (Tex. 1978) (upholding a state statute's constitutionality against equal protection and federal preemption claims).

114. 409 A.2d 250 (Md. 1979).

115. *See* Dilloff, *supra* note 2, at 700.

116. *See Supermarkets Gen.*, 409 A.2d at 258.

117. *See* Dilloff, *supra* note 2, at 701 (citing *Supermarkets Gen.*, 409 A.2d at 258-59).

118. *Id.* (citing *Supermarkets Gen.*, 409 A.2d at 258-59).

119. 389 P.2d 775 (Kan. 1964).

120. *See id.* at 779.

121. 392 A.2d 266 (1978).

122. *See id.* at 274.

123. *Ramirez v. R.I. Dep't of Lab. & Training*, 2014 R.I. Super. LEXIS 121 \*1-2 (Sept. 3, 2014), *aff'd* by *Brown v. Delta Airlines, Inc.*, 2016 R.I. Super. LEXIS 113 \*1 (Oct. 3, 2016) and *Brindle v. R.I. Dep't of Labor & Training*, 211 A.3d 930 (R.I. 2019).

124. 49 U.S.C. § 41713(b)(4)(A) (2018) ("[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . .").

findings.<sup>125</sup> Ultimately, the Rhode Island Supreme Court affirmed the lower courts' rulings that the ADRA preempted Rhode Island's premium Sunday wage law because the rates would substantially affect Delta's pricing, available routes, and services it would be able to offer.<sup>126</sup>

Furthermore, Sunday Closing Laws may interfere with protections guaranteed by Title VII of the Civil Rights Act,<sup>127</sup> which mandates that employers must reasonably accommodate religious needs and respect their employees' rights to free exercise of religion.<sup>128</sup> Both the Supreme Court in *Trans World Airlines, Inc. v. Hardison*<sup>129</sup> and James A. Kushner contemplate the potential discriminatory effects of neutral employment practices such as one-in-seven rules. Title VII requires more than the employer refraining from hiring, firing, or making promotion decisions because of the applicant's or employee's religion.<sup>130</sup> It demands that the employer accommodate the employee's free exercise of religious practices under all circumstances, except when the employer would suffer "undue hardship."<sup>131</sup> Therefore, the traditional secular justification for Blue Laws, namely the benefits that come from a communal day of rest, is inapplicable. Beyond legal challenges, some scholars have argued that the legislature should overturn Blue Laws on policy grounds.

#### 6. Environmental and Economic Benefits Through Repeal of Hunting Blue Laws

There are also environmental and economic policy arguments for the repeal of Blue Laws. Pointing to the explosion of the white-tailed deer population, Allie Humphreys and Mike Balestra argue for the repeal of Sunday hunting restrictions as a matter of ecological and economic policy.<sup>132</sup> On the East Coast, where most

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125. *Ramirez*, 2014 R.I. Super. LEXIS 121 at \*1-2.

126. *Brindle*, 211 A.3d at 938.

127. 42 U.S.C. § 2000e-2 (2012); see Kushner, *supra* note 60, at 577.

128. 29 C.F.R. § 1605.2 (2019).

129. 432 U.S. 63 (1977). In *Hardison*, the Court upheld an employer's discharge of a member of the Worldwide Church of God for his religion-based refusal to work on Saturday. The Court noted that the statutory definition of religion in Title VII under the 1972 amendments includes not only belief, but all aspects of religious observance and practice; however, some discrimination may be allowed if an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. See *id.* at 73-75.

130. See Kushner, *supra* note 60, at 568.

131. See 42 U.S.C. § 2000e-2 (2012). In *Hardison*, the Court found that the existence of a collectively-bargained seniority system, whereby no employee had to forego a Saturday off for *Hardison*, and a neutral work rule prohibiting more than one job transfer within a six-month period constituted more than a de minimis burden. See *Hardison*, 432 U.S. at 68 (Marshall, J., dissenting) (arguing that the definition of "undue hardship" on the part of the employer was too permissive and characterized the majority opinion as presenting "the cruel choice of surrendering . . . religion or . . . job.").

132. Humphreys, *supra* note 66, at 640; see also Balestra, *supra* note 65, at 462-63 (arguing that Sunday hunting restrictions should be repealed on economic grounds, particularly

Blue Laws originated and remain most strongly in force, the deer population is booming.<sup>133</sup> This deer boom has the potential to cause environmental disequilibrium and damage.<sup>134</sup> Hunting is one of the main ways Eastern states efficiently and cheaply regulate the deer population, and Sunday bans effectively limit weekend hunting to one day a week.<sup>135</sup> The recent surge of information concerning the negative environmental effects of white-tailed deer overpopulation creates a state interest significant enough to motivate politicians on both the political right and the left.<sup>136</sup> One day a week is hardly enough to substantially affect white-tailed deer populations; repealing the Sunday restrictions would double the amount of time available for most hunters in Blue Law states.<sup>137</sup> This means the potential for twice the amount of current deer control.<sup>138</sup> Further, from an economic perspective, more days to hunt generates more revenue for the state.<sup>139</sup>

While this policy argument and the various legal arguments discussed are engaging, before proceeding to their reanalysis in light of twenty-first century social and legal changes, we must first outline the laws and social developments as they stand currently and the forces that shape them.

#### D. Evolution of the Modern Status of Blue Laws in the Twenty-First Century

This Subpart explores the effect that special interest groups and changing societal views have had in shaping Blue Laws and provides an expansive survey of current Blue Laws and their exceptions, as well as an overview of recent cases. Further, this Subpart explains how the underlying modern trends in society and technology have rendered modern Blue Laws outmoded under both the legal and policy arguments presented in the previous Subpart as well as several novel approaches.

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as concerns private landowners).

133. Humphreys, *supra* note 66, at 624.

134. *Id.* at 625 (“The sobering reality is that unchecked white-tailed deer populations have the capacity to drive numerous plant and animal species to extinction. Without prompt legislative action, the deer overpopulation problem is likely to change the state of eastern forests forever.”).

135. Bad weather or other personal obligations on Saturday may further limit hunters, making Sunday hunting even more needed. *See id.* at 625 (“Eliminating Sunday hunting laws would double the amount of viable hunting time for the majority of recreational hunters, providing twice the opportunity for low-cost, active deer population management.”); *see also* Balestra, *supra* note 65, at 458 (“A common and perhaps most obvious argument in favor of lifting state bans on Sunday hunting is that doing so would allow sportsmen an extra day to enjoy the outdoors. Losing one weekend day is very significant to hunters.”).

136. *See* Humphreys, *supra* note 66, at 638.

137. *Id.* at 639.

138. *Id.*

139. Balestra, *supra* note 65, at 460 (“[T]he same legislative study in Pennsylvania that predicted hunters would hunt 4.7 additional days per season if the ban were lifted estimated that such action ‘would stimulate \$184 million in hunters’ expenditures on travel, lodging, meals and equipment,’ and generate ‘\$5.4 million in additional state tax revenue.’”).

### 1. Special Interest Influence

The influence of special interest groups has been a persistent driving force behind Blue Law legislation, repeal, and their numerous exceptions. Special interest groups that are economically impacted by the regulations fiercely fight for or oppose many of the exceptions for Sunday Closing Laws, particularly those dealing with retail business operations. The attempt to carve out special exceptions is not new—even the first Sunday Closing Law excepted those engaged in agricultural pursuits.<sup>140</sup> However, the increased influence of special interest groups in the political process makes exceptions to Blue Laws even more prevalent today.<sup>141</sup>

Despite their aggressive lobbying and political influence, special interest support has not proven to be an absolute bulwark for Sunday Closing Laws. Price and Yandle analyze Blue Laws through a public-interest perspective, arguing that both their endurance and demise rely on the general public's support in the former situation and opposition in the latter, not just the support or opposition of special interest groups.<sup>142</sup> Not all businesses that benefit from exceptions to Sunday Closing Laws necessarily support the laws,<sup>143</sup> and often times, repeal movements may be further driven by businesses whose interests are harmed by the laws.<sup>144</sup> The stances of special interest groups, which frequently do not merge with societal views at large, and conflicting interests between businesses within the same industry have created a web of Blue Laws and exceptions that benefit few and are typically disfavored by the public.

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140. See CODE JUST. 3.12.2 (Crispus & Constantine 321); THE CODEX OF JUSTINIAN: A NEW ANNOTATED TRANSLATION WITH PARALLEL LATIN AND GREEK TEXT 642-43 (Bruce W. Frier ed., 2016) (“All judges and the people in the city should rest, and the work in all crafts should cease, on holy Sunday. But the people in the country may freely and lawfully apply themselves to cultivating their fields, so that the benefit conferred by the providence of God may not perish in an instant, since it often happens that grain can be sown in the furrows and vines planted in the trenches on no better day.”) (translation by Fred H. Blume); LABAND & HEINBUCH, *supra* note 1, at 154 (“That first civil Sunday law commanded all men to rest on the ‘venerable day’ of the sun—EXCEPT those engaged in agricultural pursuits. Here was the first step down that tortuous exemption trail, with all its irrational turnings.”) (quoting Roland P. Hegstad, editor of *Liberty*).

141. LABAND & HEINBUCH, *supra* note 1, at 222 (“Regardless of their original intent, such laws have, for years, been supported by a politically well-organized minority, to the detriment of the larger population of would-be consumers and restricted sellers.”).

142. Jamie Price & Bruce Yandle, *Labor Markets and Sunday Closing Laws*, 8 J. LAB. RES. 407, 408 (1987).

143. Teagarden, *supra* note 78 at 359 (“Indeed, according to one brewer, in-state breweries as a whole have ‘absolutely done better with carryout sales’ due to the change in legislation, but isolation from competition was not the intent in seeking Sunday carryout privileges. When asked about the impact an open Sunday might have on business, one brewer noted, ‘For the business, I like us having the ability and them not, but personally I really don’t see it as a big deal . . . I’m not worried about our sales decreasing.’”).

144. LABAND & HEINBUCH, *supra* note 1, at 222 (“To the rising clamor for repeal of blue laws was added the voice of political clout of organized businessmen . . .”).

## 2. Societal Views

For as long as Sunday Closing Laws have been around, they have been unpopular with the public.<sup>145</sup> The old English edicts highlight frequent public disobedience.<sup>146</sup> Ironically, while the founders of colonial America were seeking religious freedom, colonial Blue Laws were quite severe and invited widespread defiance.<sup>147</sup> Further, the enforcement of Blue Laws against the public was outlandish, which may have contributed to their unpopularity. Consider the case of “Captain Kemble of Boston, Massachusetts, [who] in 1656 was locked in the public stocks for two hours for kissing his wife on the Sabbath after spending three years at sea.”<sup>148</sup> After the founding of the United States, the public challenged Sunday Closing Laws as early as the second half of the nineteenth century.<sup>149</sup> California was an early adopter of the “one day in seven” rule and dropped any reference to Sunday in 1893 legislation after decades of litigation and public dispute.<sup>150</sup>

Already unpopular, Blue Laws faced additional erosion due to societal pressures as American society transformed through the twentieth and twenty-first centuries. Arguably, the rise of a consumerist lifestyle is the driving force behind the widespread dissatisfaction with Sunday Closing Laws.<sup>151</sup> The demand for an additional day of shopping has largely influenced the rising support for repeal.<sup>152</sup>

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145. LABAND & HEINBUCH, *supra* note 1, at 7 (“[T]here is ample evidence from all periods of time that civil disobedience to this regulation of individual activity on Sunday has been the rule rather than the exception.”).

146. *Id.* at 16, 27 (“1579: And seeing that the Sabbath day is now commonly violated and broken,” and “1661: The King’s Majesty, considering how much it concerns the honor of God that the Sabbath day be duly observed, and all abuses thereof restrained . . . the said day has been much profaned by salmon-fishing, running of salt-pans, mills and kilns, hiring of shearers, and using of merchandise on that day, and other ways.”).

147. *Id.* at 39 (“Despite the severity of the law, the specificity of their application, and the not-so-occasional meting out of punishment, there exists ample evidence of widespread civil disobedience to the early English and colonial American Sabbath laws. The titles of, and preambles to, a great many of these early statutes state the unambiguous intention of curbing the rampant profanation of the Lord’s Day.”).

148. *See id.* at 37.

149. *See* Jeremy Zeitlin, *What’s Sunday All About? The Rise and Fall of California’s Sunday Closing Law*, 7 CAL. LEGAL HIST. 355, 379 (2012) (“By 1882, the Sunday closing law enjoyed an unassailable legal foundation within the state’s authority to regulate health, welfare, and morals through its police power. The citizens of California held a contrary opinion of the Sunday closing law.”).

150. *See* 1893 Cal. Stat. 54; Zeitlin, *supra* note 149, at 378-79.

151. *See generally* Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 J. CHURCH & ST. 13, 32-33 (1994) (arguing that an increasingly consumerist lifestyle drove the repeal of retail closing laws); Sommer, *supra* note 4, at 1090 n.6 (citing examples of widespread public dissatisfaction with Blue Laws among the citizens of multiple states).

152. LABAND & HEINBUCH, *supra* note 1, at 141 (“[T]here is evidence of strong popular support for the removal of all restrictions on Sunday shopping. Recent surveys conducted in America and abroad indicate that popular sentiment favors a complete repeal of such restrictions by a consistent, roughly two-to-one, margin. The data suggest that Sunday shopping

As America's religious landscape has diversified to include Seventh Day Baptists, Seventh Day Adventists, and various Orthodox Jewish communities, Blue Laws have faced increasing challenges from members of these communities.<sup>153</sup> The increasingly irreligious makeup of the United States may add to the discordance between Blue Laws and public opinion going forward.<sup>154</sup> Blue Laws also face additional challenges in their popularity as the United States' demographics change and more diverse business owners who are not familiar with the largely Western practice populate the landscape.<sup>155</sup> The persistent unpopularity of Blue Laws, the legacy of their relaxation, and the increasing diversity of the United States' populace demonstrate their continued dissonance with societal views.<sup>156</sup> The influence of special interest groups and a changing society has led to the patchwork nature of Blue Laws we see today.

#### i. Current Laws and Exceptions

The combination of targeted exceptions spearheaded by special interest groups and an increasingly dissatisfied public, more interested in Sunday recreation than rest, creates a patchwork of Blue Laws with peculiar and irregular exceptions. Like their early predecessors, these laws can be roughly categorized

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would be very popular, if permitted.”).

153. See *supra* Part I.B (The Sunday Cases—*McGowan* and Its Companions) (discussing Orthodox Jewish community).

154. See “*Nones*” on the Rise, PEW RESEARCH CENTER (Oct. 9, 2012), <https://perma.cc/3EVE-HZQG> (enumerating the sharp decline in religious participation in the United States). *But see* Rob Port, *Senate Votes down Blue Laws amid Bizarre Rants About Atheists*, WEST FARGO PIONEER (Mar. 17, 2017), <https://perma.cc/7QPZ-PE6F> (discussing atheism in the context of a debate about North Dakota's Blue Laws).

155. See, e.g., Megan Tench & Chase Davis, *Bustling Stores Ask: What Blue Laws? Super 88 Says Warning Missed*, BOSTON GLOBE (Nov. 25, 2005), <https://perma.cc/L5DJ-QT59> (“Super 88 officials reached yesterday said the warnings were news to them . . . Chen said in a telephone interview that the store he managed was always open on Thanksgiving, that he was not aware of the law, and that he had never received complaints. ‘All the businesses in Chinatown are open. The whole community,’ he said. ‘On holidays, when we have nothing else to do, we go into Chinatown . . . They are the only businesses that are open.’”).

156. While this may be the case in the United States, it is worth noting that Blue Laws have seen a resurgence in Poland. Poland will begin by banning almost all Sunday trading for just two Sundays a month, expanding to every Sunday by 2020. Whether this is a reflection of their popularity in Poland or a more symbolic action by Poland's far-right government remains to be seen. See *Poland's Sunday Trading Ban Takes Effect*, THE GUARDIAN (Mar. 11, 2018), <https://perma.cc/ZZE3-7KBE> (“The change is stirring up a range of emotions in a country where some feel workers are exploited but many others see consumer freedom as one of the most tangible benefits of the free market era.”). *But see* Maria Wilczek, *Growing Opposition to Poland's Sunday Trading Ban As It Comes into Full Effect*, NOTES FROM POLAND (Feb 18, 2020), <https://perma.cc/VCF4-RUQH> (reporting that 48% of survey respondents favor abolishing Polish Blue Laws compared to 36% who do not, an increase from 41.5% in favor of abolishing in 2018).



as Sunday and holiday restrictions on retail,<sup>157</sup> automobile<sup>158</sup> or liquor sales,<sup>159</sup> recreation,<sup>160</sup> and hunting.<sup>161</sup> Modern Sunday liquor laws frequently just outlaw

157. See KY. REV. STAT. ANN. § 436.160 (West 2020); ME. STAT. tit.17, § 3204 (2020); MASS. GEN. LAWS ch. 136, §§ 5, 6 (2020); MO. REV. STAT. § 578.100(1)-(4) (2020); N.J. STAT. ANN. § 40A:64-1 (West 2020); N.Y. GEN. BUS. LAW §§ 8, 9, 10 (McKinney 2020); N.D. CENT. CODE §§ 12.1-30-01 to 12.1-30-03 (2020) (repealed by 2019 N.D. Laws 463 § 2); S.C. CODE ANN. §§ 53-1-40 to 53-1-150 (2020).

158. See COLO. REV. STAT. § 44-20-302 (2020) (repealed by COLO. REV. STAT. § 44-20-304); IND. CODE § 24-4-6-1 (2020); IOWA CODE § 322.3 (2020); LA. STAT. ANN. § 51:193 (2019); MINN. STAT. § 168.275 (2020); MO. REV. STAT. § 578.120 (2020); N.J. STAT. ANN. § 2C:33-26 (West 2020); N.D. CENT. CODE § 39-22-07.1 (2020); OKLA. STAT. tit. 21, § 918 (2020); 18 PA. CONS. STAT. § 7365 (2020) (repealed in part by 2011 Pa. Laws 65). *But see* N.J. STAT. ANN. § 39:10-38 (West 2020) (exempting motorcycles from automobile sale ban).

159. See ALA. CODE § 28-3-24 (2020); ARK. CODE ANN. § 3-3-210 (2020); CONN. GEN. STAT. ANN. § 30-91 (West 2020); DEL. CODE ANN. tit. 4, § 709 (2020); GA. CODE ANN. § 3-3-20 (2020); IDAHO CODE § 23-308 (2020); IND. CODE § 7.1-3-1-14 (2019); IOWA CODE §§ 123.27, 123.36, 123.134, 123.150 (2019); KAN. STAT. ANN. § 41-712 (2020); KY. REV. STAT. ANN. § 244.290 (West 2020); MASS. GEN. LAWS ch. 138, § 33 (2020); MICH. COMP. LAWS § 436.2113 (2020); MINN. STAT. § 340A.504 (2019); MISS. CODE ANN. § 67-1-83 (2020); NEB. REV. STAT. § 53-179 (2020); N.H. REV. STAT. ANN. § 177:5 (2020); N.M. STAT. ANN. § 60-7A-1 (West 2020) (Sunday and Christmas restrictions repealed in 2021); OHIO REV. CODE ANN. § 4301.22 (LexisNexis 2020); 47 PA. STAT. AND CONS. STAT. §§ 4-406, 4-412, 4-432 (West 2020); S.C. CODE ANN. §§ 61-4-120, 61-4-620 (2020); TENN. CODE ANN. § 57-5-301 (2020); TEX. ALCO. BEV. CODE ANN. § 105.01 (West 2019); VA. CODE ANN. §§ 4.1-123, 4.1-129 (2019); *see, e.g.*, MD. CODE ANN., ALCOHOLIC BEVERAGES §§ 17-2003, 11-2003 (LexisNexis 2020) (Cecil County and Anne Arundel County's Sunday Laws). Maryland delegates authority to promulgate Sunday liquor sales laws to each county. Because Maryland has twenty-three counties and one independent city (Baltimore City), which functions as a county, an exhaustive list would be excessive. MARYLAND MANUAL ON-LINE: A GUIDE TO MARYLAND AND ITS GOVERNMENT, <https://perma.cc/M48J-KAGK> (archived July 13, 2022).

160. See ALA. CODE § 45-32-150.07 (2020) (prohibiting racing on Sundays in Greene County); DEL. CODE ANN. tit. 28, § 906 (2020) (prohibiting all horse racing Easter Sunday & Good Friday); N.J. STAT. ANN. § 5:8-58 (West 2020) (prohibiting games of chance on a Sunday, unless an allowance has been made in an establishment's gaming license); N.Y. GEN. BUS. LAW § 7 (McKinney 2020) (limiting public sports on Sundays, also "pari-mutuel" betting); N.Y. GEN. MUN. LAW § 485 (McKinney 2020) (prohibiting Bingo on Sunday, except as permitted by license); 18 PA. CONS. STAT. § 7105 (2020) (limiting pool and billiards to the hours of 1:00 PM-10:00 PM on Sunday and prohibiting the same from 1:00 AM-6:00 AM on all days); S.C. CODE ANN. § 53-1-110 (2020) (allowing the production of textiles on Sunday but establishing that no person is required to work on Sunday who is conscientiously opposed to Sunday work); TEX. LAB. CODE ANN. § 52.002 (West 2019) (prohibiting requiring employees to work on Saturday or Sunday if they worked at the establishment before the Sabbath law was repealed in 1985).

161. See DEL. CODE ANN. tit. 7, § 712 (2020) (prohibiting hunting on Sunday, but exempting deer hunting on private land and on public lands as may be designated by the applicable government agency); MD. CODE ANN., NAT. RES. § 10-410 (LexisNexis 2020) (prohibiting hunting on Sundays with various exceptions, such as allowing for unarmed fox chases and hunting nuisance animals as mandated by certain counties); MASS. GEN. LAWS ch.131, § 57 (2020) (banning hunting of both birds and mammals on Sundays); N.J. STAT. ANN. § 23:4-24 (West 2020) (allowing farmers to hunt nuisance animals such as raccoons on Sundays despite a general ban); 34 PA. CONS. STAT. § 2303 (2020) (excepting foxes and coyotes from a general Sunday hunting ban and allowing hunting on three additional Sundays each year); W. VA. CODE § 20-2-5 (2020) (establishing unlawful methods of hunting on a Sunday).

Sunday morning sales,<sup>162</sup> but they may also range from stringent, full-day prohibitions<sup>163</sup> to *de minimis*, early morning closings.<sup>164</sup> Regardless of the prohibition, the fact remains that Sunday is still set aside from all other days of the week in these laws. The modern sales restrictions have been so altered by exceptions over the years that, rather than providing a common day of rest for shoppers, they open stores to possible civil and criminal liability for stocking the wrong item. While more limited in their amount and scope, modern recreation and hunting Blue Laws still hamper hunters and gamblers on one of the most convenient days to engage in their otherwise lawful interests.

## ii. Recent Adjudications

Although not nearly as heavily adjudicated as they were in the decades following *McGowan*, Blue Laws continue to face challenges in the twenty-first century. In a recent First Circuit decision, the panel upheld a Maine prohibition on Sunday business, finding that the existence of numerous exceptions to a Sunday Closing Law did not inherently lend itself to discriminatory enforcement.<sup>165</sup> The Maine law generally prohibited doing business on Sunday and imposed on first-time offenders “a fine of not more than \$100 or [ ] imprisonment for 30 days, or [ ] both,”<sup>166</sup> and included increased penalties for repeat offenders.<sup>167</sup> Additionally, the law contained numerous exceptions, such as allowing for the sale of recreational vehicles on a Sunday.<sup>168</sup> The Maine legislature classified motorcycles as a motor vehicle, not a recreational vehicle, and thus motorcycles were subject to the Sunday sales ban. Kittery, a motorcycle dealership, argued that Maine’s Sunday Closing Laws were unconstitutional as they applied to motor vehicles because the exceptions failed to be rationally related to the government’s stated purpose.<sup>169</sup> The First Circuit held that the legislature did not act irrationally when it chose to classify motorcycles as motor vehicles, even though the law had numerous exceptions.<sup>170</sup> The legislature could have treated motorcycles the way it treats recreational vehicles for Sunday sales purposes but chose not to, and the court declined to change the classification.<sup>171</sup>

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162. See, e.g., MICH. COMP. LAWS § 436.2113 (2020); NEB. REV. STAT. § 53-179 (2020).

163. See, e.g., KAN. STAT. ANN. § 41-712 (2020) (disallowing Sunday liquor sales without prior local approval); TENN. CODE ANN. § 57-5-301 (2020) (“No such beverage shall be sold between twelve o’clock midnight (12:00) on Saturday and eleven fifty-nine o’clock p.m. (11:59 p.m.) on Sunday.”).

164. See, e.g., MD. CODE ANN., ALCOHOLIC BEVERAGES § 17-2004 (LexisNexis 2020) (pushing Cecil County, Maryland Sunday sales back by only two hours compared to other days).

165. *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 51 (1st Cir. 2003).

166. *Id.* at 46.

167. See *id.*

168. *Id.* at 47.

169. *Id.*

170. See *id.*

171. *Id.* at 50.

The Louisiana Supreme Court in 2011 decided a Blue Law conflict of laws issue concerning the Sunday sale of liquor in *Silver Dollar Liquor, Inc. v. Red River Parish Police Jury*.<sup>172</sup> Red River Parish, Louisiana Code section 3-18 prohibited the sale of liquor on Sunday.<sup>173</sup> Louisiana state law allowed for the prohibition of Sunday sales under section 51:191 of the Louisiana Code so long as voters at a local election approved it.<sup>174</sup> Under section 26:493, however, the police jury had the ability to regulate sale of alcoholic beverages.<sup>175</sup> Silver Dollar argued that the Louisiana state legislature intended to preempt county and municipal authorities by enacting section 51:191 and that because Red River Parish did not have a local election, the ordinance prohibiting Sunday sales was invalid.<sup>176</sup> The Louisiana Supreme Court ruled that although both laws applied to Red River Parish and because section 26:493 was the more specific of the two statutes, it controlled and Red River Parish could prohibit the Sunday sale of liquor.<sup>177</sup>

In Rhode Island, employees of Delta Airlines at the T. F. Green Airport in Warwick, filed complaints alleging that Delta violated a Rhode Island Sunday labor regulation<sup>178</sup> by failing to pay them time-and-a-half (premium pay) for the hours they worked on Sundays and holidays.<sup>179</sup> The court held that the Airline Deregulation Act (ADA)<sup>180</sup> preempted the portion of the law requiring premium pay for work done on Sundays and holidays because, in dictating how the airline could employ workers, the Rhode Island statute substituted state policy for competitive market forces, undermining the purpose of the ADA.<sup>181</sup> The court considered the fact that the Act had a substantial impact on an airline's rates, routes, and services.<sup>182</sup> Requiring Rhode Island air carriers to comply with a state premium pay provision in addition to the federal regulations would influence airlines' decisionmaking processes regarding discretionary services, customer interaction, and staffing and, as a result, make them less competitive with airlines

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172. 74 So. 3d 641 (La. 2011).

173. *Id.* at 642.

174. *Id.*

175. *Id.*

176. *Id.* at 646-47.

177. *Id.* at 648-50.

178. 25 R.I. GEN LAWS § 25-3-3 (2020).

179. *Brown v. Delta Airlines, Inc.*, No. PC 12-3075, 2016 R.I. Super. LEXIS 113, at \*1 (Oct. 3, 2016), *aff'd*, *Brindle v. R.I. Dep't of Labor & Training*, 211 A.3d 930 (R.I. 2019).

180. 49 U.S.C. § 41713(b)(1) (2018).

181. *Brown*, 2016 R.I. Super. LEXIS 113, at \*15 (noting that by enacting the ADA, Congress deregulated domestic air transport. Congress also included a preemption clause within the Act to ensure that it both achieved its purpose and that the States would not undo federal deregulation with regulation of their own).

182. *Id.* at \*1.

in other states.<sup>183</sup> The Rhode Island Supreme Court affirmed the ADA's preemption of Rhode Island's Blue Law, and the United States Supreme Court denied certiorari.<sup>184</sup>

In the most recent case involving Blue Laws, a Massachusetts Superior Court held that call centers were not a store or shop engaged in the sale of retail goods and thus were not subject to Massachusetts' Sunday Laws.<sup>185</sup> Specifically at issue was chapter 149, section 148 of the Massachusetts General Laws,<sup>186</sup> which exempted from the Sunday Closing Law shops or stores that sold goods.<sup>187</sup> The statute required "business[es] with more than seven employees to compensate those employees at a rate of time and a half for any work on Sunday."<sup>188</sup> The employees of the call center challenged the employer's failure to compensate them with the Sunday rate. The court held that a call center did not fit the ordinary meaning of a "shop or store," and therefore the employer did not need to provide higher wages as the work did not fall under the exemption for Sunday retail laws.<sup>189</sup>

These recent cases demonstrate that antiquated Blue Laws continue to raise important legal questions. Further, the range of the legal issues in these cases—conflict of laws issues in *Silver Dollar Liquor, Inc.*, federal preemption in *Brown*, statutory definition and interpretation issues in *Basset* and *Kittery*—reflect that *McGowan* and its sister cases were not the final nail in the coffin that the Supreme Court intended. Blue Laws still consume courts' time, energy, and resources decades later. Rapidly changing societal attitudes and technology further complicate Blue Laws.

## II. THE IMPACT OF THE TWENTY-FIRST CENTURY ON BLUE LAWS

Changes brought by the internet, legal and cultural developments, and shifting societal mores profoundly impact Blue Laws and necessitate reanalyzing their present value while considering the legal theories discussed above. The legal doctrine of desuetude and the potential conflict of laws issues add to the legally suspect nature of Blue Laws. Furthermore, the growing trend of modifying and repealing Sunday liquor laws renders most Blue Laws impotent, unnecessarily criminalizing Sunday automobile sales and traditional recreational activities. This patchwork of laws is riddled with complicated, ineffectual exceptions that seem to have no expressed purpose and follow no logical pattern.<sup>190</sup> Lastly,

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183. *Id.* at \*20.

184. *Brindle*, 211 A.3d at 930, *cert. denied*, 140 S. Ct. 908 (2020).

185. *Bassett v. Triton Techs., Inc.*, No. SUCV2016-3475 BLS 2, 2018 Mass. Super. LEXIS 29, at \*1, \*2. (Feb. 12, 2018).

186. MASS. GEN. LAWS ch. 149 § 148 (2018).

187. *Bassett*, 2018 Mass. Super. LEXIS 29, at \*1, \*2.

188. *Id.* at \*1, \*4.

189. *Id.* at \*1, \*4.

190. *See supra* Part I.D.2.i (Current Laws and Exceptions).

state legislatures should consider repeal of Blue Laws based on policy concerns related to changing societal norms in addition to the issues previously raised.

#### A. Twenty-First Century Legal Developments & Novel Blue Law Challenges

Previous arguments against Blue Laws have often failed. Given changes to the law and society in the twenty-first century, however, some of these arguments require renewed attention. This Subpart revisits the earlier arguments against Blue Laws discussed above in light of these changes and adds further analysis derived from the legal doctrine of desuetude.

##### 1. First Amendment and the Establishment Clause

The new millennium brought new developments in the arena of religious freedom legislation and First Amendment litigation. Notably, the Supreme Court revisited an Establishment Clause claim in *Burwell v. Hobby Lobby, Inc.*,<sup>191</sup> and states began adopting legislation related to religious freedom following the Court's ruling in *City of Boerne v. Flores*.<sup>192</sup> The Supreme Court held that RFRA infringed upon states' rights by going beyond the remedial enforcement power granted through section five of the Fourteenth Amendment.<sup>193</sup> These new laws could provide merchants who observe Saturday Sabbaths a future basis to challenge Sunday Closing Laws as burdensome.

The *Hobby Lobby* decision was a narrow holding, however, and it remains to be seen whether Blue Laws could survive challenges under the Religious Freedom Restoration Act (RFRA).<sup>194</sup> “[T]he *Hobby Lobby* Court nowhere stated that RFRA would protect the *Braunfeld* merchants . . . . Interpreting RFRA to provide that protection . . . would seem to repudiate *Braunfeld* as well, since the Court was allegedly using strict scrutiny there.”<sup>195</sup> In *Hobby Lobby*, the Court indicated merely that under RFRA, if Jewish Orthodox merchants raised the same issue they raised in *Braunfeld* “against a jurisdiction still subject to the Act (for example, the District of Columbia) . . . the merchants would be entitled to be heard.”<sup>196</sup> Such a claim would be limited in scope as to jurisdiction, and “entitled to be heard” merely suggests that the claim would pass the standing hurdle; this language does not necessarily indicate that such a claim would have any new merit.

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191. 573 U.S. 682, 719 (2014) (concluding that “a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA” in that it cannot substantially burden religious practice).

192. 521 U.S. 507 (1997).

193. *Id.* at 511.

194. See Mark Strasser, *Narrow Tailoring, Compelling Interests, and Free Exercise: On ACA, RFRA and Predictability*, 53 U. LOUISVILLE L. REV. 467, 500 (2016).

195. *Id.*

196. *Hobby Lobby*, 573 U.S. at 706.

However, since the nationwide reach of RFRA was struck down in *City of Boerne*,<sup>197</sup> numerous states have passed their own versions of the law.<sup>198</sup> Insofar as these states also detrimentally limit the economic activity of Saturday Sabbath holders on Sunday, states leave themselves open to Blue Law challenges under their respective religious freedom laws. Repeal would clip potential challenges stemming from this line of reasoning.

## 2. Challenges to Hunting Blue Laws

No Second Amendment challenge to hunting Blue Laws has yet succeeded. In the absence of a more expansive reading of the Second Amendment from the Supreme Court, or an explicit acceptance of a ‘right to hunt,’ it appears that future Second Amendment challenges are likely to fail. However, the current trend of creating exceptions to these laws provides a cogent argument for further liberalizing hunting provisions. While Balestra and Humphreys’ policy argument focuses on deer,<sup>199</sup> the many exceptions for nuisance or pest animals show that legislatures are already amenable to altering Sunday hunting laws to curb the impact of certain species.

Many state Sunday hunting laws only apply in expressly defined circumstances.<sup>200</sup> Maine is on one side of the spectrum and has a strict Sunday hunting prohibition with no exceptions.<sup>201</sup> Virginia’s law is also strict, allowing only an exception for raccoon hunting on Sunday.<sup>202</sup> Likewise, New Jersey’s Sunday hunting law allows some latitude for farmers to hunt nuisance species, such as raccoons, on their property.<sup>203</sup> On the opposite side of the spectrum, Maryland has relaxed its hunting laws and riddled them with exceptions.<sup>204</sup> Most states fall somewhere in between, limiting Sunday hunting to certain species of animals or within specified time constraints.<sup>205</sup>

However, given state legislatures’ acceptance of Sunday hunting when it comes to nuisance animals, reconsideration of all hunting Blue Laws is not only

197. 521 U.S. 507, 533-36 (1997).

198. *State Religious Freedom Restoration Acts*, NAT’L CONF. OF ST. LEGIS. (Apr. 4, 2017), <https://perma.cc/P2ZL-WXJW>.

199. See *supra* Part I.C.6 (Environmental and Economic Benefits Through Repeal of Hunting Blue Laws).

200. See Balestra, *supra* note 65, at 452.

201. ME. STAT. tit. 12, § 11205 (2020) (“A person may not: A. Hunt wild animals or wild birds on Sunday; or B. Possess any wild animal or wild bird taken in violation of paragraph A except as otherwise provided in this Part. . . . A person who violates subsection 1 commits a Class E crime.”).

202. VA. CODE ANN. § 29.1-521 (West 2020).

203. N.J. STAT. ANN. § 23:4-24 (West 2020).

204. See *generally* MD. CODE ANN., NAT. RES. § 10-410 (LexisNexis 2020).

205. Compare DEL. CODE ANN. tit. 7, § 712 (West 2020) (allowing the hunting of specifically red foxes only with dogs on Sundays), with 34 PA. CONS. STAT. § 2303 (2020) (allowing the hunting of specific nuisance species, identifying foxes and coyotes), amended 2019 (allowing the Game Commission to choose three Sundays on which to allow hunting).

a small step to take but could prove beneficial for economic and environmental reasons as well. Thus, while hunters may not find support in court, legislators may be more willing to provide the relief sought than in previous eras.

### 3. Federal Preemption and Title VII Challenges

As the population continues to secularize and diversify, the prior, albeit flimsy, secular justification for Blue Laws becomes increasingly problematic. Additionally, as Title VII challenges continue to increase,<sup>206</sup> Blue Laws may face new tests in the twenty-first century. By mandating that businesses close on Sundays, Blue Laws prohibit employers from effectively accommodating the religious practices of employees whose day of rest falls on another day of the week, serving as the grounds for a Title VII challenge. However, some courts have held that closing one day a week already places a burden on store owners,<sup>207</sup> and accommodating individuals who need a day off other than Sunday would likely qualify as an undue hardship under Title VII, allowing employers to ignore their employees requests for religious accommodations.<sup>208</sup> Thus, these Blue Laws force employees to choose between their livelihood and religious observance.<sup>209</sup>

In a contrasting opinion, Justice Scalia, writing for the majority in *EEOC v. Abercrombie & Fitch Stores, Inc.*,<sup>210</sup> addressed this very issue. In 2015, the Supreme Court, contemplating whether Abercrombie & Fitch's refusal to hire a Muslim woman because her headscarf violated their "look policy," affirmed that "religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated" under Title VII.<sup>211</sup> In establishing this principle, Justice Scalia wrote:

For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires

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206. See *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021*, EEOC, <https://perma.cc/VUE4-YCY92021> (showing an increase in percentage and total claims of religion-based EEOC claims from 1997 to 2021).

207. See Kushner, *supra* note 60, at 569 n.82 ("The Sunday closing requirement may put some marginal non-Sunday Sabbatarian entrepreneurs out of business; others may be unaffected.").

208. See *supra* notes 127-31 and accompanying text; see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73, 81, 84 (1977) (finding that the employer was not required under Title VII to do more than make a "reasonable accommodation of the employee's beliefs by giving him the opportunity to secure a replacement for his Sunday work" or "bear more than a de minimis cost," and that requiring the employer to deny the rights of another employee in favor of accommodating one employee's religious beliefs would be an undue hardship).

209. See Kushner, *supra* note 60, at 558 ("Blanket Sunday closing laws have an invidious effect on people who, for religious reasons, choose to observe some day other than Sunday as a day of rest. These non-Sunday Sabbatarians are forced to choose between working on their observed Sabbath or refraining from work and suffering the economic consequences.").

210. 575 U.S. 768 (2015).

211. *Id.* at 775.

an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.<sup>212</sup>

Sunday Laws that restrict sales, and thus days available for employees, may spawn Title VII challenges or Equal Employment Opportunity Commission (EEOC) complaints if companies are unwilling to hire non-Sunday Sabbatarians. While it is uncertain whether these complaints will ultimately succeed, they would be time-consuming and costly to defend. Given the increasing dominance of Title VII in religious protections and the relative withering of Blue Law regimes, repeal of Blue Laws would preclude these potential controversies.

#### 4. Issues Raised by Blue Law Exceptions

As societal views regarding religion have changed and technology has rendered many Blue Laws ineffective,<sup>213</sup> state legislatures have gone out of their way to create even more carve-outs to these regulations.<sup>214</sup> The result is an incongruous mixture of discriminatory exceptions creating classifications of businesses and merchandise that may violate the Equal Protection Clause of the Fourteenth Amendment.<sup>215</sup> Some legislatures have recognized the problematic imbalance that Sunday Closing Laws create between businesses and have thus sought to repeal them.<sup>216</sup>

As years pass and Blue Laws gain an ever-increasing number of exceptions, what was once considered a valid Sunday Closing Law may become invalid. This trend toward "Swiss-Cheesing" Blue Laws also brings to light new constitutional problems. The absence of a real and substantial relation between most of the exceptions to modern Sunday Closing Laws and the purported objective to provide a day of rest is strikingly apparent when a typical Sunday Closing Law scheme is examined.<sup>217</sup> By creating nonsensical classifications of permissible Sunday commercial transactions, Sunday Blue Laws arbitrarily determine that

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212. *Id.* at 773-74.

213. *See infra* Part II.B.2 (Trend Toward Limiting Sunday Liquor Laws).

214. *See, e.g.*, MASS. GEN. LAWS ch. 136, § 6(31) (2020) (providing an exception to its Sunday Closing Law in order to accommodate Amazon's warehouse); *see also* Michael Bodley, *Blue Laws Won't Hold Amazon Back in Mass.*, BOST. GLOBE (Aug. 16, 2016, 6:13 PM), <https://perma.cc/59JH-SHVG> (stating that a bill signed by Massachusetts Governor Charlie Baker "makes it easier for [Amazon's] warehouses to operate on Sunday"); H.B. 1540, 110th Gen. Assemb., 2d Reg. Sess. (Tenn. 2018) (amending TENN. CODE ANN. § 57-3-811 (2019), to allow Sunday liquor sales in grocery stores); McKibben, *supra* note 5.

215. Sommer, *supra* note 4, at 1106-07, 1112-13; *see supra* notes 165-171 and accompanying text.

216. *See Relating to Sunday Closing Laws: Hearing on H.B. 1097 Before the S. Pol. Subdivisions Comm.*, 2019 Leg., 66th Assemb. 2 (N.D. 2019) (statement of Rep. Shannon Roers-Jones) ("[T]here are some businesses that are being treated preferentially to other businesses which are required to be closed.").

217. Sommer, *supra* note 4, at 1106-07, 1111-12.



some persons are legally entitled to a day of rest while others are not afforded such a right.<sup>218</sup>

For example, as states begin liberalizing their Sunday liquor laws by granting exceptions,<sup>219</sup> and the brewing industry increases in popularity and influence,<sup>220</sup> legislatures need to remain vigilant of potential Commerce Clause problems, particularly when their exceptions target a singular part of the three-tier distribution system.<sup>221</sup> In the twenty-first century, the alcohol industry is seeing a boom of producers, and consumers have an increased interest in buying local.<sup>222</sup> The effect of these trends has been codifying the favoritism of in-state alcohol producers through exceptions to the state statutes—exceptions that may prove problematic.<sup>223</sup> The Commerce Clause problems to which Teagarden alludes<sup>224</sup> will only increase as these trends continue. Rather than wasting legislative and court resources in litigating and redrafting exceptions that preference local breweries' and distilleries' Sunday sales, legislatures should simply eliminate the Blue Law problem. The alternative—eliminating a popular Sunday activity—would be odious to both their constituents and the alcohol industry.

## 5. Desuetude

Finally, one remaining area of analysis that courts have yet to consider in relation to Blue Laws is the doctrine of desuetude, which renders a statute void when it has been unenforced, openly and frequently violated, and deals with a

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218. *Id.* at 1112.

219. *See infra* Part II.B.2 (Trend Toward Limiting Sunday Liquor Laws).

220. *See, e.g., What is Craft Beer?*, CRAFTBEER.COM, <https://perma.cc/B5N4-D2F6> (archived July 13, 2022).

221. *See supra* Part I.C.4 (Commerce Clause and Twenty-First Amendment).

222. Griffin Bower, *What's Keeping Us from Going Local?*, THE FARM PROJECT (May 14, 2018), <https://perma.cc/YKM9-C6ZC> (discussing the growth of the local food movement); Rex Hammock, *Why Shoppers Prefer Local and Small Retailers*, SMALLBUSINESS.COM (June 11, 2015), <https://perma.cc/UUP4-ESGY> (“[A] new survey reveals that 93% of shoppers prefer local and small retailers over large, national chains.”).

223. *See* S.C. CODE ANN. § 61-4-120(B) (2020) (authorizing Sunday sale of wine “if the wine is produced using grapes grown in [South Carolina], [and] the grapes are harvested, processed, fermented, bottled, and sold at the same contiguous location”); VICTORIA, MINN., CODE OF ORDINANCES § 4-2 (2018) (authorizing the Sunday sale of beer in growlers in small breweries only); *see also* DEL. CODE ANN. tit. 4, § 709(g) (2018) (exempting Delaware wineries from the Sunday sale prohibition) (repealed 2015).

224. *See supra* note 78 and accompanying text.

transgression that is not inherently wrong (*malum prohibitum* as opposed to *malum in se*).<sup>225</sup> Although the doctrine's vitality in U.S. law has been often debated,<sup>226</sup> it has seen a resurgence in the latter half of the twentieth century and the early twenty-first century.<sup>227</sup> For example, courts may apply the doctrine when considering whether a government official can assert qualified immunity.<sup>228</sup> Courts have also used it to overturn convictions and invalidate statutes.<sup>229</sup> Although it may seem paradoxical that an unenforced law may find itself before

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225. Comm'n. on Legal Ethics of W. Va. State Bar v. Printz, 416 S.E.2d 720, 726 (W. Va. 1992); see also Poe v. Ullman, 367 U.S. 497, 501 (1961) (discussing open and notorious violation and lack of enforcement of contraception ban); DANIEL KORNSTEIN, KILL ALL THE LAWYERS?: SHAKESPEARE'S LEGAL APPEAL 47 (2005) ("Desuetude means that a law has been nullified through disuse.").

226. Some scholars argue that desuetude does not belong in American legal jurisprudence as it violates the concept of separation of powers by giving the courts authority to act in place of the legislature. See Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 3-4 (1966) ("Accordingly, it is accepted dogma that the notion of judicial power to declare a statute inoperative on the ground of desuetude 'remains contrary to every principle of American or English common law.'). Alternatively, some scholars argue that desuetude provides a viable solution to the legislative challenges of overturning unenforced, obsolete regulations. Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 390 (1963) ("An administrative emasculation of an obsolete statute may be far easier to achieve, and a great deal less painful, than its legislative abrogation. This is true because of an observable reluctance among legislators to repeal existing enactments."); see also *United States v. Agriprocessors, Inc.*, No. 08-CR-1324-LRR, 2009 U.S. Dist. LEXIS 64592, at \*53 (N.D. Iowa July 27, 2009) ("Commentators and courts are divided as to [the doctrine of desuetude's] status under American law, and the Supreme Court has not squarely addressed the question.").

227. See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1071 (10th Cir. 1985) (discussing Utah's polygamy laws); *Agriprocessors, Inc.*, 2009 U.S. Dist. LEXIS 64592 at \*53-56 (raising the doctrine of desuetude on its own volition and recognizing it has a related due process concern); *United States v. Jones*, 347 F. Supp. 2d 626, 629 (E.D. Wis. 2004) (declining to allow a defense of desuetude); *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1083 (D. Colo. 1999) (assuming the doctrine's vitality but finding it inapplicable on the merits); *State ex rel. Canterbury v. Blake*, 584 S.E.2d 512, 661 (W. Va. 2003) (finding a West Virginia statute void through desuetude); *Printz*, 416 S.E.2d at 720 (dismissing charges arising under a statute found to be desuetude); *State v. Legrand*, 20 A.3d 52, 74 (Conn. App. Ct. 2011) (refusing to apply the doctrine of desuetude due to a lack of evidence supporting the statute's disuse).

228. See *Lawrence v. Reed*, 406 F.3d 1224, 1231 n.3 (10th Cir. 2005); *Roska v. Peterson*, 328 F.3d 1230, 1253 (10th Cir. 2003); *Grossman v. City of Portland*, 33 F.3d 1200, 1209 n.19 (9th Cir. 1994).

229. *Printz*, 416 S.E.2d at 720; see also *Franklin v. Hill*, 444 S.E.2d 778, 782 (Ga. 1994) (Sears-Collins, J., concurring) ("[C]ourts should be reluctant to declare statutes void as obsolete. However, that power is justified in rare instances. Certainly, in this case, where the constitutionality of the statute is doubtful, where the statute is woefully out of step with current legal and societal standards, and where the statute has been rarely used, the court should not hesitate to declare the statute void so as to give our General Assembly the opportunity to reexamine the statute in its entirety.").

a court, the doctrine deals with laws that have long outlived their reason for existence and are so customarily violated they present issues of selective enforcement and overbroad administrative discretion.<sup>230</sup>

Courts have held that the mere fact that a statute has not been enforced for some time is not enough to apply the principle; the court must judge each statute individually to determine if it is void.<sup>231</sup> The Supreme Court of West Virginia in *Printz* established three factors for determining when a statute is void under desuetude: (1) the nature of the statute; (2) an open, notorious, and pervasive violation of the statute for a long period;<sup>232</sup> and (3) a conspicuous policy of nonenforcement.<sup>233</sup> According to the *Printz* court, crimes that are *malum in se* will not lose their criminal character through desuetude, but crimes that are *malum prohibitum* may.<sup>234</sup> “These criteria allow only those statutes whose enforcement would violate due process to die a desuetudinal death. Furthermore, the Legislature may revitalize any statute simply by repassing it.”<sup>235</sup>

Blue Laws clearly deal with pursuits that are *malum prohibitum*. In our modern, secular society, there is nothing morally or intrinsically wrong with conducting an activity on a Sunday or a Christian holiday as opposed to any other day. To identify whether there has been open, notorious, and pervasive violation of the statutes and whether there is a conspicuous policy of nonenforcement, we look to the different categories of Blue Laws.

Liquor businesses face hefty regulation and strict enforcement; it is unlikely that enforcement of store hours and times of sale have fallen by the wayside. Thus, these laws would not be void under the doctrine of desuetude.<sup>236</sup> Commercial sales restrictions, however, particularly those saddled with exceptions, are less likely to be enforced, as they would require policing of specific items, and not whole industries.<sup>237</sup> Further, retail sales deal with items that are generally less

230. *United States v. Elliott*, 266 F. Supp. 318, 325-26 (S.D.N.Y. 1967).

231. *See id.* at 326; *Printz*, 416 S.E.2d at 726.

232. *Printz*, 416 S.E.2d at 726.

233. *Id.*

234. *Id.*

235. *Id.*

236. Alcohol sales, businesses that produce and distribute alcohol, and the use of alcohol in society—from underage drinking to drunk driving to public drunkenness—are heavily regulated and enforced. *See The Laws & Regulations About Alcohol*, AM. ADDICTION CTR., <https://perma.cc/P8WW-G5D5> (providing an overview of the areas that alcohol rules and regulations govern); *see also Shocking Statistics & Facts About Alcohol-Related Crimes*, ADDICTION RESOURCE, <https://perma.cc/BX6Z-3YZE> (archived July 13, 2022) (giving statistics on alcohol’s involvement in other crimes). It has been some time since alcohol enforcement around Sunday Laws in particular has been a singular focus, however. *See MAYOR STOY ARRESTED. Atlantic City Official Up for Not Enforcing Sunday Closing Law*, N.Y. TIMES, Sept. 5, 1909, <https://perma.cc/Y9TF-YRS4>.

237. Nowadays, in the age of large superstores, enforcing some of these retail laws would require an officer posted at every cashier. Brian Hicks, *Blue Laws Aren’t South Carolina’s Dumbest Rules, but They’re Close*, THE POST AND COURIER (Feb. 14, 2015), <https://perma.cc/2JFJ-FTFS> (“There are some statutory exemptions to these blue laws. According to the South Carolina code, it is perfectly legal on Sunday morning to sell tobacco,

hazardous than alcohol, warranting less oversight.<sup>238</sup> The state usually enforces these laws only when someone (usually a business competitor) calls in the violation; such a practice would constitute a policy of non-enforcement.<sup>239</sup> Furthermore, retailers continue to open on holidays or Sundays and make no effort to eliminate or otherwise separate sellable goods from banned-on-that-day goods, in open and widespread violation of the law.

Hunting Blue Laws, which regulate an activity that occurs individually and rurally, are even more likely to see widespread disregard and open violation.<sup>240</sup> While some hunting violations, such as poaching and nighttime hunting, see regular enforcement, it is unclear how frequently states that limit or prohibit Sunday hunting enforce the laws.<sup>241</sup> Today, hunters are rarely cited for Sunday hunting violations; and even when they are, the citation is usually added to another more commonly enforced violation, further suggesting a general policy of non-enforcement.<sup>242</sup> Despite Sunday restrictions on hunting, the general acceptance of hunting nuisance animals renders these restrictions of little use, encouraging their repeal.

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light bulbs, souvenirs, as well as hosiery and undergarments.”).

238. *Overview*, NLLEA, <https://perma.cc/Y55T-XEC8> (archived July 13, 2022) (“[The United States and Canada] recognize that alcoholic beverages, while legal, are potentially hazardous products, subject to special controls and conditions not applied to other commercial products.”).

239. Blue Law restrictions on retailers are often neither well-known nor enforced despite complaints. *See Hicks, supra* note 237 (“This ordinance . . . will do away with one of the last vestiges of arcane colonial law that no one paid much attention to anyway. In fact, Berkeley County spokesman Michael Mule says there have been no complaints. Most calls the county has received are along the lines of ‘Welcome to the 21st Century.’ That, or ‘I didn’t know that was still a law.’”); Tench & Davis, *supra* note 155 (reporting that one store was asked to close in violation of the Blue Laws pursuant to a police tip but five other Super 88 stores remained open despite similar tips).

240. *Facts—Wildlife*, ANIMAL MATTERS, <https://perma.cc/PS2W-4TPE> (archived July 13, 2022) (“Thousands of individuals are arrested for poaching in the United States each year. However, experts believe that only between one and five percent of poachers are caught.”) (quoting the Humane Society Wildlife Land Trust).

241. *Reasons to Lift the Bans on Sunday Hunting*, NRA, <https://perma.cc/5NQG-UX8Q> (archived July 13, 2022) (listing the states that have Sunday hunting exceptions).

242. *See* Press Release, DNREC Public Affairs Office, New Castle County Man Arrested for Hunting Illegally on Sunday, Multiple Deer Violations (Oct. 12, 2015), <https://perma.cc/6AGG-TN33> (charging the hunter with seven other violations in addition to Sunday hunting); Wes Bunch, *Kingsport Man Arrested on Poaching Charges; Police Say He Was Seen Shooting Turkeys from His Car*, KINGSPORT TIMES NEWS (May 3, 2013), <https://perma.cc/Y4CS-6P8B> (charging the hunter with five other hunting violations in addition to Sunday hunting); Bill Trotter, *Eastbrook Man Charged with More than 50 Hunting Violations*, BANGOR DAILY NEWS (Jan. 29, 2015), <https://perma.cc/7RY8-C7TR> (charging the hunter with forty-nine other violations in addition to Sunday hunting); *Accused Poacher to Face January Trial*, CECIL WHIG (Nov. 18, 2008), <https://perma.cc/UGU5-TK9L> (charged with three other hunting violations in addition to Sunday hunting). *But cf.*, *Prosecutions Reported*, MAINE WOODS, Nov. 5, 1914, at 3 (reporting that Ernest O. Day was sentenced only for hunting on a Sunday over a century ago); *An Important Arrest. W.H. Russell, LL. D., Apprehended for Hunting on Sunday*, N.Y. TIMES, Oct. 3, 1861 (reporting on an arrest solely for Sunday hunting over a century ago).

Recreational Blue Laws are probably the most susceptible to the doctrine of desuetude. Arrests for violations of playing pool or billiards, Bingo, or games of chance on Sunday do not occur, though these activities remain popular.<sup>243</sup> As with other antiquated laws that remain on the books,<sup>244</sup> courts applying the desuetude test outlined in *Printz* would most likely find the recreational Blue Laws void.<sup>245</sup> In addition to these modern legal changes, shifts in societal practices and technology in the twenty-first century urge the repeal of Blue Laws.

#### B. Twenty-First Century Society's Effect on Sunday Closing Laws

The end of the twentieth century brought the internet to the mainstream, and the "Internet of Things" has drastically altered society and commerce.<sup>246</sup> From phones to cars, classrooms to restaurants, the internet is a ubiquitous aspect of society that has fundamentally altered how the world conducts itself.<sup>247</sup> This is particularly apparent in the realm of commerce.<sup>248</sup> The increase in online shopping, as well as other technological advancements, significantly impacts the relevance and purpose of Blue Laws.

Further, Blue Laws face additional challenges to their relevance following evolving attitudes toward Sunday morning drinking. "Brunch"—both a meal occupying the space of breakfast and lunch and now a weekend social event—was

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243. *Billiards Industry Outlook*, BILLIARD CONG. OF AM., <https://perma.cc/88XE-DD7S> ("According to SGMA, with its 36 million participants, billiards is one of the most popular activities measured by American Sports Data.").

244. *E.g.*, IDAHO CODE § 18-6603 (2019) (making it a crime for two unmarried people to have sexual intercourse); N.M. STAT. ANN. § 12-4-1 (2019) (disallowing members of the Communist Party to be in the state without registering); *see also* *Edwards v. Moore*, 699 So. 2d 220, 222-23 (Ala. Civ. App. 1997) (invalidating a law that gave a father a cause of action against a man for "seducing" the father's unmarried daughter, regardless of the daughter's age).

245. *See, e.g.*, *Printz*, 416 S.E.2d at 727; *see also supra* note 227 and accompanying text.

246. Scott R. Pepett, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEX. L. REV. 85, 89 (2014) ("Conservative estimates suggest that over 200 billion connected sensor devices will be in use by 2020, with a market size of roughly \$ 2.7 trillion to \$ 6.2 trillion per year by 2025."); Manuel Castells, *The Impact of the Internet on Society: A Global Perspective*, MIT TECH. REV. (Sept. 8, 2014), <https://perma.cc/CB5X-DXC8> (noting how the spread of the internet through the twenty-first century is drastically reshaping society).

247. Paul Bevan, *Internet of Things*, BLOOR RESEARCH, <https://perma.cc/K7DX-G6JV> (last updated Jan. 28, 2019) (describing the Internet of Things and labeling it as the "emerging disruptive technology for the [twenty-first] Century").

248. Burke T. Ward et al., *Internet Jurisdiction for E-commerce*, 15 J. INTERNET COMMERCE 1 (2016) (highlighting predictions that retail e-commerce sales will increase to \$2.5 trillion or 8.8% of sales by 2018).

historically not often observed outside of Easter Sunday, Mother's Day, or certain coastal cities like New York or San Francisco.<sup>249</sup> In the early 2000s, however, brunch grew in popularity and societal relevance.<sup>250</sup> Even if brunch is just a fad, it has impacted generational expectations as well as the legal landscape. The Subparts below explore the tensions between modern society and Blue Laws.

### 1. The Ineffectiveness of Sales Restrictions in the Internet Age

The rise of the internet and subsequent explosion of online shopping has greatly changed the U.S. economy.<sup>251</sup> In today's society, everyone from large retailers to independent artists and craftspeople can sell their products online.<sup>252</sup> In some jurisdictions, consumers can even buy liquor online.<sup>253</sup> As such, states have had to adjust their economic regulatory environment to respond to these changes.<sup>254</sup>

Retail restrictions caused by Sunday Closing Laws have an outsized effect on brick-and-mortar operations and those businesses incapable of selling or unwilling to sell online.<sup>255</sup> Retail employees prohibited from working on Sunday

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249. See Ferdman & Ingraham, *supra* note 5 (“Originally conceived for the wealthy as a drawn-out, elaborate affair, brunch, like a runny egg, soon dribbled out into the mainstream.”); see also Lavanya Ramanathan, *‘You Can Never Have Too Many Mimosas’: How Brunch Became the Day-Wrecking Meal That America Loves to Hate*, WASH. POST (Apr. 25, 2018), <https://perma.cc/WFT4-SYN4> (“Brunch has waxed . . . as our interest in religion has waned.”).

250. Ferdman & Ingraham, *supra* note 5 (analyzing the increase in popularity of Sunday brunch from 2005 to 2015).

251. See *supra* Part I.D.2 (Societal Views).

252. E.g., BED BATH & BEYOND, <https://perma.cc/ZXP5-5G54> (archived Jul, 13, 2022) (selling its large inventory both in brick-and-mortar shops and online); EBAY, <https://perma.cc/B67U-YDZK> (archived July 13, 2022) (auctioning products by independent sellers in an online-only website); ETSY, <https://perma.cc/4MSJ-XPLN> (archived July 13, 2022) (featuring products by independent craftspeople in an online-only marketplace); TARGET, <https://perma.cc/6KUV-2HR5> (archived July 13, 2022) (selling both in brick-and-mortar shops and online); WALMART, <https://perma.cc/V8Q4-SJ2Z> (archived July 13, 2022) (same); WAYFAIR, <https://perma.cc/74CU-PCMV> (archived July 13, 2022) (selling furniture only online).

253. See generally James Melton, *Alcohol by App: Online Sales of Beer, Liquor and Wine Grew by 32.7% in 2017*, DIGITAL COMMERCE 360 (Mar. 15, 2018), <https://perma.cc/VN36-YYZU>; Kathryn White, *IBISWorld Industry Market Research: The U.S. Online Beer, Wine & Liquor Sales Industry Is Expected to Earn Revenue of \$614.0 million in 2016*, PR NEWSWIRE (Nov. 21, 2016, 10:37 AM), <https://perma.cc/9Z3X-DGPP>.

254. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099-2100 (2018) (overruling the physical presence rule and allowing South Dakota to enact legislation that requires remote sellers to remit sales tax on goods and services delivered to the state).

255. Some brands and retailers have refused to sell online. Dhani Mau, *Why Some Luxury Brands Still Don't Sell Online*, FASHIONISTA (Apr. 11, 2014), <https://perma.cc/TQ6D-TFYF>. Conversely, some sellers that have traditionally been technology-averse, such as the Amish, have embraced the online marketplace, albeit indirectly. LEHMAN'S,

may face potential job loss as their employers suffer from uneven competition.<sup>256</sup> Further, larger online retailers, such as Amazon, are more capable of manipulating local statutes in Blue Law states to obtain exceptions to the laws, as well as other benefits.<sup>257</sup> While courts allow retail restrictions as a valid exercise of state power to enforce a uniform day of rest, the current economic reality is that Sunday Closing Laws inhibit the competitive potential of brick-and-mortar shops in favor of online giants.<sup>258</sup> This is particularly the case since many people work a nine-to-five, Monday-to-Friday job and may only be able to shop at a brick-and-mortar store on the weekend.<sup>259</sup> Further, as online retailers increasingly move to automated services, the impact of these laws may be less to enforce a mandatory day of rest and more to contribute to the layoff of workers and the closing of businesses that cannot compete.<sup>260</sup> While protecting online retailers, Blue Laws

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<https://perma.cc/S6HV-CLTK> (archived July 13, 2022) (selling Amish-made goods). Nonetheless, e-commerce has certainly been a major factor in the demise of brick-and-mortar retail. Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017*, ATLANTIC (Apr. 10, 2017), <https://perma.cc/7APT-JG2P> (pointing to the rise of e-commerce and subsequent change in shopping habits as a major factor in the closing of brick-and-mortar stores); see also Lisa Marie Segarra, *Amazon Prime Day Suppresses Foot Traffic at Other Retailers*, *Study Finds*, FORTUNE (July 14, 2018, 1:40 PM PDT), <https://perma.cc/9JF3-7SZU>.

256. E-commerce has had an effect on retail jobs generally, while increasing jobs in the IT sector. See *Are E-commerce Jobs Replacing Retail Jobs?*, BURNING GLASS TECH. (May 15, 2017, 11:16 AM), <https://perma.cc/U5GE-NMWE>; *The Decline of Established American Retailing Threatens Jobs*, ECONOMIST (May 13, 2017), <https://perma.cc/ZHU7-9ZEB>.

257. See *Blue Laws Won't Hold Amazon Back in Mass.*, *supra* note 214. Additionally, Amazon faced heavy criticism over the bidding process for its second headquarters as city officials rushed to offer taxpayer-funded initiatives in an attempt to woo the tech giant. See, e.g., Richard Florida, *The Hypocrisy of Amazon's HQ2 Process*, CITYLAB (May 10, 2018, 8:18 AM PDT), <https://perma.cc/J779-ULJM>.

258. See Michiel van Blommestein, *Poland Now Shuts Shops on Sundays but Forgets How Tech Can Get Round Law*, ZDNET (Mar. 14, 2018), <https://perma.cc/J779-ULJM> (pointing out that Poland's law exempts internet retailers, which may lead other retailers to attempt new technology-driven models); *Open All Hours? The Arguments over Sunday Trading*, BBC (July 7, 2015), <https://perma.cc/3WJX-6W54> ("Chancellor George Osborne has now said the time is right for [Sunday Closing Laws] to be reconsidered via a consultation process, citing the challenge to 'bricks and mortar' outlets from the growth of online shopping . . .").

259. *Traffic Patterns*, NAT'L REAL EST. INV. (July 1, 2003), <https://perma.cc/V5MN-SKKQ> ("Between the hours of 2 PM and 4 PM on any given Saturday or Sunday, you can find 11.6 percent of Americans out shopping, according to data compiled by Simmons Market Research Bureau. The second highest amount of traffic occurs during the weekend lunch rush from noon to 2 PM.").

260. While the rise of e-commerce may have contributed to a boost in warehousing jobs, this growth may be short-lived as businesses and warehouses move increasingly to automation. See BURNING GLASS TECH., *supra* note 256 (pointing to an 11% growth in the warehouse retail sector that was "suggestive" of e-commerce's contribution); Danielle Paquette, *He's One of the Only Humans at Work—and He Loves It*, WASH. POST (Sept. 10, 2018), <https://perma.cc/TF48-6RVT> (detailing the rise of automated warehouses and indicating that a large swath of the labor market involving tasks that follow patterns may soon be lost to robots); James Vincent, *Welcome to the Automated Warehouse of the Future*, VERGE (May 8, 2018, 7:01 PM EDT), <https://perma.cc/7S8M-7FKA> ("Estimates for how many jobs might be lost to robots and AI vary, but a recent study by the OECD suggested that around 14 percent

can lead to the criminal sanction of brick-and-mortar stores.<sup>261</sup> Given the economic realities of the internet age, Blue Laws are now more outdated than ever. The burden on brick-and-mortar sales and the ineffectiveness in discouraging shopping or providing days of rest for workers suggests that legislatures should repeal Blue Laws now more than ever.

## 2. Trend Toward Limiting Sunday Liquor Laws

Beyond the growing ineffectiveness of Sunday retail restrictions, Sunday liquor laws have become increasingly outmoded in the twenty-first century. While the judiciary has continuously recognized Blue Laws as a legitimate exercise of state police power to regulate the health and safety of the public<sup>262</sup>—particularly when it comes to regulating liquor, as evidenced by the fact that a large portion of Blue Laws, both past and present, deal with alcohol restrictions<sup>263</sup>—legislatures have grown increasingly wary. In the last decade, liquor laws have vastly changed; new exceptions allow Sunday or holiday sales where they were not previously allowed or expand Sunday and holiday sale options, particularly Sunday morning sales.<sup>264</sup> Reflecting these changing attitudes, in recent years, states have further chipped away at their Sunday liquor laws with laws colloquially termed “brunch bills” or “mimosa mandates.”<sup>265</sup>

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of occupations in developed countries (like the US, Canada, and Japan) are at high risk. And a big chunk of these are in logistics and related fields like warehousing, distribution, and fulfillment.”).

261. See, e.g., Tench & Davis, *supra* note 155 (detailing Blue Law enforcement against Super 88 store for being open in violation of Massachusetts’ holiday Blue Law).

262. See *supra* Part I.B (The Sunday Cases—*McGowan* and Its Companions).

263. See *supra* note 159.

264. See H.B. 1540, 110th Gen. Assemb., 2d Reg. Sess. (Tenn. 2018) (amending TENN. CODE ANN. § 57-3-811 (2019) to allow Sunday liquor sales in grocery stores); NAT’L ALCOHOL BEVERAGE CONTROL ASSOC., *SUNDAY ALCOHOL SALES: HISTORY AND ANALYSIS* (2017), <https://perma.cc/ZB5L-5854>; Lizzie Alfs, *You Can Buy Wine at Tennessee Grocery Stores on Sundays, Beginning in January*, TENNESSEAN (Dec. 9, 2019, 11:02 AM CT), <https://perma.cc/5DE9-43F2> (“We look forward to being able to provide our customers the convenience of being able to purchase wine on Sundays come January 6th . . . Sunday has become the biggest shopping day of the week in most cases, so we know this change will be well received.”); cf. Liz Gelardi, *Colorado Doesn’t Allow Liquor Store Sales on Christmas. Should That Change?*, DENVER CHANNEL (Dec. 24, 2018, 9:04 AM), <https://perma.cc/M5NA-3S3R> (“Colorado used to ban liquor store sales on Sundays and Election Day but even though that has changed, the Christmas Day law remains on the books.”).

265. See Campbell, *supra* note 5; Eric Eyre, *WV Senate OKs ‘Brunch Bill’ for Earlier Sunday Alcohol Sales*, CHARLESTOWN GAZETTE-MAIL (Feb. 16, 2016), <https://perma.cc/K3L4-JZB9> (“‘This bill is about freedom,’ said Sen. Chris Walters, R-Putnam. ‘It’s about giving people the right to brunch in West Virginia.’”); McKibben, *supra* note 5.



Some states have added exceptions to their laws and opened Sunday sales for the first time.<sup>266</sup> Other jurisdictions, like Connecticut and the District of Columbia, have taken their Sunday Laws completely off the books.<sup>267</sup> Most have greatly liberalized their Sunday Closing Laws.<sup>268</sup> Public sentiment has also grown increasingly hostile to these laws.<sup>269</sup> The effect is a clear trend toward eliminating liquor Blue Laws. Rather than tackle the issue piecemeal—either by slowly chipping away at the hours restricted or by approaching the issue at a city or county level—state legislatures should pay heed to the prevailing winds and simply repeal the laws, treating Sunday and Christian holidays no different than any other day. Besides eliminating an outdated mode of economic protectionism based on religious belief, such action would conserve state resources and legislators’ time by driving the final nail in the coffin of Blue Laws all at once instead of slowly whittling them away.

### 3. Automotive Sales and Hunting Blue Laws

While increasingly outmoded retail and liquor laws encompass the bulk of Sunday Closing Laws, the remaining patchwork largely deal with automobile sales and traditional recreational activities. Some argue that automobile Blue Laws still make sense because banks are closed on Sunday.<sup>270</sup> Current practice in other jurisdictions, however, does not support this argument.<sup>271</sup> Additionally, automobile Blue Laws have not been immune from the “Swiss-Cheesing” effect of exceptions that have plagued other Sunday Closing Laws; they too contain

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266. See ARK. CODE ANN. § 3-3-210 (2022); CONN. GEN. STAT. § 30-91 (2022); GA. CODE ANN. § 3-3-7 (2019); IND. CODE § 7.1-3-1-14 (2022); MINN. STAT. § 340A.504 (2022). For the bills amending these statutes, see S.B. 923, 87th Gen. Assemb., Reg. Sess. (Ark. 2009); H.B. 5021, Gen. Assemb., Reg. Sess. (Conn. 2012); S.B. 10, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); S.B. 1, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018); H.B. 30, 2017 Leg., 90th Sess. (Minn. 2017). Cf. Mark Norris, *From Craft Brews to Craft Booze: It’s Time for Home Distillation*, 64 CASE W. RES. L. REV. 1341, 1361 (2014) (“Notably, only one state, Indiana, still prohibits the Sunday sale of beer, wine, and liquor at grocery and package stores.”).

267. See D.C. CODE § 25-112 (2022); Norris, *supra* note 266, at 1361 (“In May 2012, Connecticut effectively repealed its ‘blue laws’ prohibiting Sunday alcohol sales. The new law expands the days and hours for off-premises alcohol sales, including allowing sales on Sundays. It also allows retailers who sell alcohol for off-premises consumption to sell one item below cost each month and establishes a task force to study Connecticut’s liquor laws compared with surrounding states.”). For the Emergency Act amending the D.C. Code, see Omnibus Alcoholic Beverage Regulation Emergency Amendment Act of 2012, D.C. 1101, 19th Period (D.C. 2012). 266

268. Norris, *supra* note 266, at 1361 (“The majority of states now allow alcohol sales on Sunday, with sixteen states having changed from not allowing such sales since 2002.”).

269. See, e.g., Samantha J. Gross, *Do ‘Blue Laws’ Still Exist in the Lone Star State? Curious Texas Investigates*, DALL. NEWS (Aug. 29, 2018, 6:00 AM CDT), <https://perma.cc/T88H-69JS> (“It annoys me that I can’t buy liquor on Sundays if I run out of champagne for mimosas. It feels like we legislate morality.”).

270. See, e.g., Jamie LaReau, *Never on Sunday*, AUTO. NEWS (May 4, 2015), <https://perma.cc/FZ5H-KAS5>.

271. See *id.*

numerous exceptions for motorized vehicles such as mobile homes and motorcycles.<sup>272</sup> Given the proliferation of e-commerce, these exceptions make little sense, especially if the rationale is that banks are closed or that companies want to give their employees a day off.<sup>273</sup> As both online car-shopping and online financial services increase, these laws are not immune to the internet's rise.<sup>274</sup> Given this economic reality, bans on automobile sales suffer from many of the same issues that affect other retail Blue Laws—they unnecessarily limit the ability of consumers to shop on one of the most convenient days while penalizing sellers who operate physical car lots, giving digital car sellers a boon. As such, repealing automobile Blue Laws would balance the competitive market while helping consumers purchase cars.

Hunting Blue Laws may also be outmoded. Environmental regulations protecting or curtailing the population of certain animals are increasingly preempting hunting Blue Laws.<sup>275</sup> States also have an economic incentive to give hunters, whose work schedules may prevent them from hunting on other days, an additional day to hunt, thereby raising revenue through hunting fees, travel expenses, and other costs related to the activity.<sup>276</sup> While some states have gone to great lengths to preserve these antiquated laws, enacting countless exceptions and revisions,<sup>277</sup> doing so has removed the efficacy of the hunting laws and evinces the changing attitude in favor of Blue Laws repeal.

Further, the advent of new technology and the internet creates a novel conflict of laws problem regarding hunting Blue Laws.<sup>278</sup> Professor Grimmelmann poses an interesting hypothetical involving internet-connected, remote-controlled drones used for hunting on a plot in Texas.<sup>279</sup> If a person in Illinois uses this service in violation of Illinois or Texas law, can they be prosecuted?<sup>280</sup> While this may seem theoretical, drones are already starting to mix with hunting and fishing.<sup>281</sup> In 2015, a teenager in Connecticut prompted police investigation and

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272. See IND. CODE § 24-4-6-1 (2020); MINN. STAT. § 168.275 (2020); MO. REV. STAT. § 578.120 (2020); N.J. STAT. ANN. § 39:10-38 (2021).

273. See generally Doug DeMuro, *Why Can't You Buy a Car on Sunday?*, AUTOTRADER (Feb. 2017), <https://perma.cc/S9JG-Q886>.

274. See, e.g., CARVANA, <https://perma.cc/7GGQ-GV97> (archived July 13, 2022) (conducting the purchase and sale of used cars online).

275. See Humphreys, *supra* note 66, at 640; see also Balestra, *supra* note 65, at 462-63.

276. Humphreys, *supra* note 66, at 635; NRA, *supra* note 241 (“[H]unting is part of America’s heritage and hunters contribute billions of dollars to wildlife and conservation programs, through license fees and revenues generated through purchases of firearms, ammunition and archery equipment.”); see also Balestra, *supra* note 65, at 462-63.

277. See *infra* Part II.B.4 (The Contradictory and Patchwork Nature of Remaining Blue Laws).

278. JAMES GRIMMELMANN, *INTERNET LAW: CASES & PROBLEMS* 72 (8th ed. 2018).

279. *Id.*

280. *Id.*

281. See David Grossman, *This Robot Will Hunt Lionfish to Save Coral Reefs*, POPULAR MECH. (Aug. 27, 2018), <https://perma.cc/Y4CB-6K83>; Darren Warner, *Do Drones and Deer Hunting Mix?*, GAME & FISH MAG. (Sept. 26, 2017), <https://perma.cc/K63U-G79M>.

an FAA probe when he attached a gun to a drone.<sup>282</sup> If a hunter in one state uses a drone to scout or hunt an animal on a Sunday in another state, and one of these states has a hunting Blue Law on the books, has the hunter violated the law? And if so, did the violation occur in the hunter's location or the animal's? The complications for hunting Blue Laws posed by advancing technology further suggest repeal.<sup>283</sup>

It may be that these Blue Laws, particularly hunting restrictions, are largely on their way out.<sup>284</sup> Some of the more obscure leisure restrictions,<sup>285</sup> however, receive little attention. If these remaining laws serve any purpose, it just appears to be to criminally ensnare ignorant leisurists—hardly a legitimate governmental objective.

#### 4. The Contradictory and Patchwork Nature of Remaining Blue Laws

Many of the remaining laws allow counties and municipalities to derive their own restrictions, seemingly going against their asserted purpose of providing a statewide day of rest. Apparently concerned with the plight of bakers and butchers in its cities, Louisiana grants to its municipalities of over 25,000 people the ability to regulate Sunday shop hours of butchers and bakers through penal ordinances, and further allows municipalities of over 100,000 to prohibit the delivery of baked goods on Sundays.<sup>286</sup> How these laws serve to provide a day of rest for all is unclear; these laws appear merely to be relics of a bygone era that add confusion to law enforcement officials and residents alike.

Other laws provide arbitrary exceptions for alcohol sales, hunting of nuisance species, and special interests. Pennsylvania limits Sunday sale of alcohol, with exceptions for Super Bowl Sunday and for when Groundhog Day or St. Patrick's Day falls on a Sunday.<sup>287</sup> New Jersey attempts to provide its hunters

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282. Michael Martinez, *Handgun-Firing Drone Appears Legal in Video, but FAA, Police Probe Further*, CNN (July 21, 2015, 8:15 PM EDT), <https://perma.cc/PGX8-XEEX>.

283. According to the Humane Society of the United States, internet hunting allows computer users to aim and fire a gun from a mounted, mechanized tripod at a remote location. Accordingly, the NRA has condemned this practice and 38 states that have passed bans on using this hunting technology. *Internet Hunting Fact Sheet*, HUMANE Soc'Y U.S., <https://perma.cc/UXX9-SCZ6> (archived July 13, 2022).

284. See Priscilla Liguori, *Group Works to Make Sunday Hunting Laws Less Restrictive*, ABC NEWS (Mar. 26, 2018, 11:20 AM EDT), <https://perma.cc/U3TK-9SF8>.

285. For example, Bingo, raffles, and pool. See N.J. STAT. ANN. § 5:8-31 (West 2021) (prohibiting Bingo on Sundays); N.J. STAT. ANN. § 5:8-58 (West 2021) (banning raffles on Sundays); 18 PA. CONS. STAT. § 7105 (2020) (restricting pool or billiards before 1:00 PM or after 7:00 PM).

286. LA. STAT. ANN. § 33:4783 (2020) (regulating the Sunday business hours of butchers and bakers).

287. 47 PA. STAT. AND CONS. STAT. ANN. § 4-406 (West 2022). Similarly, in 2013, Maine passed a law granting an exception to its alcohol Blue Law that would allow for sale of alcohol starting at 6 AM when St. Patrick's Day, arguably one of the biggest drinking days in the United States, falls on a Sunday—although Maine fully repealed its Sunday alcohol sales restrictions in 2015. See ME. STAT. tit. 28-A, § 4 (2020); Freya Drohan, *St. Patrick's Day Is Now*

with a mandatory common day of rest on Sunday — unless they are shooting raccoons.<sup>288</sup> Bowing to the powerful tech giant, Massachusetts has effectively neutralized its Sunday shopping law with a recent exception aimed at Amazon and other online retailers.<sup>289</sup> Delaware, in its attempt to legislate and enforce a common day of rest, makes it unlawful to “take or attempt to take shellfish, except crabs, conchs (whelks) and clams, for commercial purposes on Sundays,” while duplicatively providing that “clams may not be taken for commercial purposes on any Sunday” during the summer.<sup>290</sup>

While only a sampling of current Blue Laws, these exceptions show both the power of special interest groups in shaping the law as well as the random, and at times seemingly contradictory, nature of Blue Laws in the twenty-first century. Given the increasingly geographical and temporal exceptions inserted into these laws, the potential for both violation and wrongful enforcement of these laws increases. Repeal would simplify these laws, making it easier on the citizen to obey the law and on officers to enforce various regulations.

### 5. Crime and Economy

As states have repealed liquor Blue Laws in the twenty-first century, there has been some attempt to analyze the effect repeals have had on crime in the area. While there is conflicting evidence depending on the crime involved, the general accord is that repeal of Sunday liquor sales results in a slight uptick in crime, consistent with more availability to alcohol. Not surprisingly, there has been a commensurate increase in state revenue.

One Georgia study, examining the effect of Sunday liquor law repeals on teen drinking, found no evidence of increased underage drinking, nor any effect on the perception of alcohol access for teens.<sup>291</sup> Further, this study suggested economic benefits such as increased tax revenue and increased consumer welfare resulting from reduced deadweight loss and increased employment.<sup>292</sup> Another study, on repeal of Virginia’s liquor Blue Laws, found a 5% increase in property and public-order crime and a 10% increase in alcohol-related serious crime.<sup>293</sup> The paper also noted that the “social costs of these crimes are roughly equivalent

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*the Fourth Most Popular ‘Drinking Day’ in the U.S.*, IRISH CENT. (Mar. 9, 2018), <https://perma.cc/GZ2K-9DUF>; Matthew Stone, *LePage Signs St. Patrick’s Bill*, BANGOR DAILY NEWS (Mar. 16, 2013), <https://perma.cc/68CM-LQ5F>.

288. N.J. STAT. ANN. § 23:4-24(a)(1) (West 2021).

289. MASS. GEN. LAWS ch. 136, §§ 5, 6(31) (2020).

290. DEL. CODE ANN. tit. 7, § 1904 (2020).

291. Brendan Meany et al., *The Effect of Sunday Alcohol Sales Bans on Teen Drinking in Georgia*, 40 APPLIED ECON. PERSP. & POL’Y 461, 477 (2018) (“The results of this research have policy implications for the remaining twelve states that defend the efficacy of Blue laws targeting alcohol. The rationale of imposing a Sunday sales ban is becoming difficult to defend on economic grounds. We further demonstrate that the repeal of such laws does not increase teens’ self-reported drinking behaviors, either.”).

292. *Id.*

293. Paul Heaton, *Sunday Liquor Laws and Crime*, 96 J. PUB. ECON. 42, 50 (2012).

to the state revenues generated through additional alcohol sales.”<sup>294</sup> A study on the repeal of Connecticut Sunday liquor laws found a 12% increase in overall crime with a 13-15% increase in crime near stores selling package alcohol.<sup>295</sup> The study did not explicitly look at benefits, but did note that wider availability can result in “additional convenience for consumers, increased competition in alcohol retail markets, and increased tax revenues” and suggested that the “[r]elatively small increases in crime can likely be controlled with additional law enforcement efforts.”<sup>296</sup> Municipalities should therefore “ earmark any increases in tax revenue from alcohol sales to local law enforcement.”<sup>297</sup> A study on the repeal of Pennsylvania Blue Laws in Philadelphia found an increase in total crime and property crimes around liquor stores on Sunday.<sup>298</sup> However, this study noted that there was no increase in violent crime, no consistent pattern of the displacement of crime, and crime increases were specific to low socioeconomic neighborhoods.<sup>299</sup> Finally, Laband notes that during the 1970s, “the rate of violent crime commission appears to be slightly higher in non-blue law states than in blue law states.”<sup>300</sup>

While these studies show a slight increase in some areas of crime associated with the repealing of Blue Laws, they are complicated by factors such as socioeconomic status, racial inequality, and the availability of liquor at bars and restaurants.<sup>301</sup> Further, increases in crime can be balanced with economic benefits to both the state and the consumer.<sup>302</sup> It is certainly not remarkable that more opportunity to commit crimes involving liquor stores results in a marginal increase in criminal activity. That alcohol contributes to crime is not in question. But if the goal of liquor Blue Laws is to limit crime, the elimination of only one day—or only a couple hours—of a minor contributing factor is an underwhelming solution.<sup>303</sup> The wholesale elimination of alcohol sales has been tried and

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294. *Id.*

295. Ian Morall, *Blue Laws, Liquor Stores, and Crime*, 1, 3 (Oct. 29, 2017) (unpublished job-market paper), <https://perma.cc/6H4Z-UE6Y>.

296. *Id.* at 21.

297. *Id.* at 20-21.

298. SeungHoon Han et al., *The Effect of a Sunday Liquor-Sales Ban Repeal on Crime: A Triple-Difference Analysis*, 40 *ALCOHOLISM CLINICAL & EXPERIMENTAL RSCH.* 1111, 1118 (2016).

299. *Id.*

300. LABAND & HEINBUCH, *supra* note 1, at 165-66; *see also* Michael F. Lovenheim & Daniel P. Steefel, *Do Blue Laws Save Lives? The Effect of Sunday Alcohol Sales Bans on Fatal Vehicle Accidents*, 30 *J. POL’Y ANALYSIS & MGMT.* 798, 818 (2011) (studying the effect of Sunday liquor law repeals in fifteen states on automobile crash fatalities, and finding that “[o]verall, our results are inconsistent with a significant public safety benefit from alcohol-related blue laws, at least with respect to traffic fatalities”).

301. *See* Han, *supra* note 297, at 1119; Meany, *supra* note 291, at 477-78.

302. *See* Heaton, *supra* note 293, at 50; Meany, *supra* note 291, at 477; Morall, *supra* note 295, at 20-21.

303. Meany, *supra* note 291, at 478 (“Furthermore, there is a rift in logic in banning sales for only one day. If a benefit of Sunday bans were to be identified, it may be the case that a ban pertaining to more or all days of the week is optimal. In this light, a Sunday ban is

failed.<sup>304</sup> Repealing liquor Blue Laws can be accompanied with legislation that devotes gains in state budgets to law enforcement and social policies that more effectively address the causes and results of crime.

#### CONCLUSION

For the last two millennia, Blue Laws have frustrated the public. In the twenty-first century, they have become so riddled with exceptions, sidestepped by technology, and disregarded by society at large that their original purpose of encouraging church attendance and subsequent justification of providing a uniform day of rest is now null. While Blue Laws survived previous First and Fourteenth Amendment challenges, they have become increasingly constitutionally suspect. Developing First Amendment jurisprudence and state passage of Religious Freedom Restoration Acts may leave Blue Laws open to challenges by Saturday Sabbath observers. Numerous exceptions promoted by special interest groups have left Blue Laws easily challengeable under state constitutions' and the U.S. Constitution's Equal Protection Clauses for being difficult to enforce or unconstitutionally vague. Additionally, the creation of Title VII and subsequent jurisprudence raise federal preemption concerns. Further, the Commerce Clause and state laws governing liquor distribution present conflicts regarding liquor sale Blue Laws. The increasingly recognized doctrine of desuetude likewise complicates the issue. Given the open violation of many Blue Laws and lack of enforcement of these *malum prohibitum* offenses, jurisprudence governing the doctrine of desuetude suggests that many Blue Laws may be utterly invalid.

Growing secularization, religious diversity, and changing societal opinions regarding religion and liquor, particularly on Sunday mornings, has resulted in a rapid trend of states repealing or eroding liquor Blue Laws. This trend suggests that full-scale repeal of alcohol Blue Laws would not only be popular, but would also save legislative time and resources, while increasing tax revenue. While recent studies have found some evidence toward a small uptick in crime on Sunday following repeal of Sunday liquor laws—consistent with greater opportunity to purchase liquor—socioeconomic factors and racial inequality complicate these studies. The scholarship also suggests that the increase in revenue to the state and benefit to consumers outweighs the costs of repeal. Moreover, repeal of Sunday hunting Blue Laws would not only be popular due to the nine-to-five, Monday-to-Friday work week that limits most hunters to weekend hunting already, but also would be economically valuable due to increased licensing and tagging fees and equipment sales. Further, repeal may be environmentally beneficial given the explosion of white-tailed deer populations.

Given the legally suspect basis of most holiday and Sunday Closing Laws, the development of societal mores and technology in the twenty-first century, the benefit to legislators and the judiciary in time saved, the boons to consumers and

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rather arbitrary.”).

304. See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

retailers in convenience and additional profit, and the value to the state in increased economic activity and tax revenue, Blue Laws should be repealed. And with the rise of the internet, brick-and-mortar shops and automobile lots unfairly bear the burden of current Blue Laws. These laws do little to change church attendance, particularly today. Only narrow special interest groups continue to advocate for exemptions, profiting from the laws at the expense of their competitors. The time has come for across-the-board Blue Law repeal.