

# REMEMBER THE SABBATH? THE NEW YORK BLUE LAWS AND THE FUTURE OF THE ESTABLISHMENT CLAUSE\*

*The less we emphasize the Christian religion, the further we fall into the abyss of poor character and chaos.*<sup>1</sup>

## I. INTRODUCTION

Few laws illustrate the contention that America is a Christian nation more vividly than the "Blue Laws." Defined as any statute "regulating entertainment activities, work, and commerce on Sundays,"<sup>2</sup> they are actually much more. The Blue Laws symbolize the place that Christianity holds in America today and, by implication, the lesser status of Jews, Muslims, and other non-Christians.

Despite the conflict between the Establishment Clause of the First Amendment<sup>3</sup> and the Blue Laws,<sup>4</sup> the Supreme Court has

\* © 1993 Marc A. Stadtmauer.

This Essay was originally prepared for a course at the Benjamin N. Cardozo School of Law entitled "Religion Clauses Seminar" and taught by Professor Marci A. Hamilton. The author wishes to express his thanks to Professor Hamilton for her assistance in preparing this Essay for publication, and to Professor Burton N. Lipshie, whose invaluable instruction in legal research and writing made this work possible.

<sup>1</sup> Mississippi Governor Kirk Fordice, arguing that America is "a Christian nation." *Perspectives*, NEWSWEEK, Nov. 30, 1992, at 25.

<sup>2</sup> BLACK'S LAW DICTIONARY 173 (6th ed. 1990). There are at least two theories as to the origin of the term "Blue Laws." The most prominent theory is that the term "originated in 1781, when the Sunday laws of New Haven, Connecticut were printed on blue paper." Kenneth A. Sommer, *Sunday Closing Laws in the United States: An Unconstitutional Anachronism*, 11 SUFFOLK U. L. REV. 1089, 1089 n.1 (1977) (citing Yehudi Cohen, *Blue-Laws Sociology*, N.Y. TIMES, May 30, 1976, at 34). The second theory is that the term "blue" is a synonym for "puritanical" or "strict." *Ask the Globe*, BOSTON GLOBE, July 5, 1993, at 22.

<sup>3</sup> The Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

<sup>4</sup> In 1960, all but three states had some sort of Sunday closing legislation. *State Sunday Closing Laws and the Religious Guarantees of the Federal Constitution*, 73 HARV. L. REV. 729, 732 (1960). Since then, Sunday closing laws have been rescinded or declared unconstitutional in many states, including: Massachusetts (repealed in 1983, see *Ban on Sunday Sales Ends Today in Massachusetts*, N.Y. TIMES, Mar. 27, 1983, at A25. Note, however, that the repeal did not apply to retail sales on Sunday mornings or holidays. *State House Roundup Legal Holidays Not Included*, BOSTON GLOBE, May 19, 1983. In addition, Massachusetts still bans the sale of alcohol before noon on Sundays. Sally Jacobs, *Beantown Bedtime Comes Early It's Lights Out Here As Other Cities Party*, BOSTON GLOBE, July 11, 1993, (Metro), at 1. The District of Columbia, Virginia, and parts of Maryland also ban the sale of hard liquor on Sundays. Tom McNichol, *The Seventh Day*, WASHINGTON POST, Aug. 1, 1993, at W16); Louisiana (judicially struck in 1984); Pennsylvania (repealed in 1978, see Karen Heller, *The Urbane Suburbs Bookstores Cum Coffee Shops, Art-Houses, Sophisticated Restaurants. Something is Happening Here*, PHILADELPHIA INQUIRER, Feb. 21, 1993, at L1); Arkansas (declared unconstitutional in 1982); Georgia (overturned in court, see *The Crazy Quilt of Blue Laws*, N.Y. TIMES, Aug. 29, 1984, at C6); Texas (repealed in 1986, see *24-Year Texas Blue Law Ends*, N.Y. TIMES, Sept. 3, 1985, at D20); and Connecticut (repealed most of its Blue Laws in 1986, see

consistently upheld the Blue Laws over numerous constitutional challenges.<sup>5</sup> Recently, with the Court's decision in *Lee v. Weisman*<sup>6</sup> and the resultant reshaping of the constitutional tests for establishment clause violations, new hope for successful challenges to these statutes has surfaced.

While the history of the New York Blue Laws is not necessarily representative of Sunday closing laws throughout the country, it is both fascinating and informative. Although New York, unlike most other states, provides some exceptions for observers of other holy days,<sup>7</sup> the history of Blue Laws in New York suggests the problematic nature of enforcing these arcane and often unfair rules.

Part II of this Essay will trace the history of the New York Sunday closing laws and illustrate some of the inequities and absurdities involved in their application. Part III will explore the Supreme Court's jurisprudence in this area, with an emphasis on the current test employed by the Court and the philosophical implications of that test. Part IV will conclude that under the Supreme Court's current construction, and the subsequent interpretations of lower courts, Blue Laws may no longer withstand constitutional scrutiny, which could represent a victory for equal religious rights in America.

## II. SINGING THE BLUES IN THE EMPIRE STATE

### A. *New York's Blue Laws*

New York's Sunday closing laws date back to 1695.<sup>8</sup> The current format<sup>9</sup> is substantially similar to the one that was in effect in

---

Lucy V. Katz, *Caesar, God and Mammon: Business and the Religion Clauses*, 22 GONZ. L. REV. 327, 341-42 (1987).

Some states, like Virginia, North Carolina, Tennessee, Mississippi, and New Jersey, have made Sunday closings a local option, and Oklahoma forbids only the sale of liquor and cars on Sundays. See *The Crazy Quilt of Blue Laws*, *supra*. In New England, Maine is the only state with a Sunday closing law in effect.

Today, 23 states still have some form of Blue Laws in effect. John O'Dell, *Costa Mesa Dealership to Close on Sunday*, L.A. TIMES, Jan. 14, 1993, at D5.

<sup>5</sup> For a discussion of the history of the Supreme Court's prior treatment of Sunday closing legislation, see *infra* notes 57-71 and accompanying text.

<sup>6</sup> 112 S. Ct. 2649 (1992). See discussion *infra* notes 102-09 and accompanying text.

<sup>7</sup> See *infra* notes 9-11. In 1958, only about one-third of all states which prohibited Sunday activity created defenses to Blue Law prosecution for observers of other holy days. Eugene P. Chell, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 12 RUTGERS L. REV. 505, 507 n.12 (1958).

<sup>8</sup> In 1695, New York adopted "an Act against profanation of the Lord's Day, called Sunday." Act of Oct. 22, 1695, ch. 52, 1695 N.Y. Colonial Laws 356. This Act was replaced in 1788 by the "Act for suppressing immorality," Act of Apr. 14, 1815, Ch. 168, 1815 N.Y. Laws 170. A final revised version of the Act was located in the New York Penal Code at 1881 N.Y. Laws §§ 259-71.

<sup>9</sup> Essentially, these laws consist of five sections:

1. Section 2, the introduction. "The first day of the week being by gen-

1881, though in 1965, these laws were moved from the Penal Code to the General Business Law.<sup>10</sup> The subject of most of the litigation has been Section 9,<sup>11</sup> which prohibits selling on Sunday.

### B. *The Early Years*

The New York Court of Appeals affirmed the constitutionality of the Blue Laws as early as 1950.<sup>12</sup> Yet litigation continued

eral consent set apart for rest and *religious* uses . . . ." N.Y. GEN. BUS. LAW § 2 (McKinney 1992) (emphasis added);

2. Section 5, prohibiting labor on Sunday. "All labor on Sunday is prohibited, excepting the works of necessity and charity." *Id.* § 5;

3. Section 6, an exemption from section 5 for persons "uniformly keep[ing] another day of the week as holy time . . . [provided that] the labor complained of was done in such manner as *not to interrupt or disturb other persons observing the first day of the week as holy time.*" *Id.* § 6 (emphasis added);

4. Section 9, prohibiting public selling on Sunday, with numerous exceptions; *Id.* § 9 and

5. Sections 4 and 12, providing that "Sabbath breaking is a misdemeanor," *id.* § 4, and that "all property and commodities exposed for sale . . . shall be forfeited." *Id.* § 12.

<sup>10</sup> For the sake of simplicity, all references hereinafter will be to the current section in the New York General Business Law, even if, at the time referred to, the proper reference was to the Penal Code.

<sup>11</sup> Section 9 provides in its entirety:

All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows:

1. Articles of food may be sold, served, supplied and delivered at any time before ten o'clock in the morning;

2. Meals may be sold to be eaten on the premises where sold at any time of the day;

3. Caterers may serve meals to their patrons at any time of the day;

4. Prepared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souvenirs, items of art and antiques, newspapers, magazines, gasoline, oil, tires, cemetery monuments, drugs, medicine and surgical instruments may be sold and delivered at any time of the day;

5. Grocers, delicatessen dealers and bakeries may sell, supply, serve and deliver cooked and prepared foods, between the hours of four o'clock in the afternoon and half-past seven o'clock in the evening, in addition to the time provided for in subdivision one hereof, and, elsewhere than in cities and villages having a population of forty thousand or more, delicatessen dealers, bakeries and farmers' markets or roadside stands selling fresh vegetables and other farm produce, and fishing tackle and bait stores may sell, supply, serve and deliver merchandise usually sold by them, at any time of the day;

6. Persons, firms or corporations holding licenses and/or permits issued under the provisions of the alcoholic beverage control law permitting the sale of beer at retail, may sell such beverages at retail on Sunday before three ante-meridian and after twelve noon for off-premises consumption to persons making purchases at the licensed premises to be taken by them from the licensed premises;

7. Sale at public auction of thoroughbred, standardbred and quarter horse racehorses.

The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods or meats, fresh or salt, at any hour or time of the day. Delicatessen dealers shall not be considered as caterers within subdivision three hereof.

N.Y. GEN. BUS. LAW § 9 (McKinney 1992).

<sup>12</sup> *People v. Friedman*, 96 N.E.2d 184 (N.Y. 1950) (*per curiam*), *appeal dismissed*, 341 U.S.

through the 1960s, as offenders challenged their convictions on Establishment Clause grounds. Although these claims were met with remarkable judicial sympathy, they were generally unsuccessful.<sup>13</sup>

The case of Hyman Finkelstein provides an example. Finkelstein was the sole-proprietor of a grocery store in Brooklyn, New York.<sup>14</sup> Through the operation of his store, Finkelstein earned approximately eighty-five dollars per week, which was the sole source of income for his wife, three children, and himself. He was also a devout Orthodox Jew who scrupulously kept Saturdays as his Sabbath, and eighty to eighty-five percent of his customers were Jewish. In accordance with the practices of his faith, Finkelstein's store was closed on Saturdays.<sup>15</sup>

---

907 (1951). In *Friedman*, New York's highest court held that the Blue Laws were constitutional. The court unanimously held that despite the religious origin of the Blue Laws, they are not an infringement on religious freedom, since the laws

do[ ] not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion.

*Id.* at 186. Instead, they recognize that the first day of the week is "set apart 'for rest'" by "general consent" for the "physical and moral welfare of the members of [the] State." *Id.*

<sup>13</sup> See, e.g., *People v. Paine Drug Co.*, 254 N.Y.S.2d 492 (4th Dep't 1964) (holding that despite "selective" enforcement of the Sunday closing laws, they were not unconstitutional), *aff'd*, 208 N.E.2d 176 (N.Y.), *cert. denied*, 382 U.S. 838 (1965); *People v. Seuss*, 313 N.Y.S.2d 552, 555 (New Rochelle City Ct. 1970) (agonizing over the distinction between a coin-operated laundromat, for which an exception existed, and an automatic car wash, for which no exception existed, yet convicting for the operation of a car wash on Sunday); *People v. Federal Builders & Home Modernization Corp.*, 317 N.Y.S.2d 942, 944 (App. Term, 2d Dep't 1971) (refusing to strike defendant's conviction, though recognizing that the "Sabbath laws . . . merit a reappraisal in light of present day realities"); *People v. Cooks of New York, Inc.*, 318 N.Y.S.2d 960, 965 (Onondaga County Ct. 1971) (holding that the constitutional invalidity of the Sunday closing laws has not been shown beyond a reasonable doubt, despite the fact that they are "observed more in the breach than in the observance").

<sup>14</sup> *People v. Finkelstein*, 239 N.Y.S.2d 835 (Kings County Crim. Ct. 1963), *aff'd*, 198 N.E.2d 265 (N.Y.), *cert. denied*, 377 U.S. 1006 (1964).

<sup>15</sup> Jewish law requires total abstinence from all business and work on the Sabbath, which extends from Friday evening until Saturday night. See *Exodus translated in THE PENTATEUCH AND HAFTORAH* 373 (D.J. H. Hertz ed. & trans., 2d ed. 1979) 35:2 ("Six days shall work be done, but on the seventh day there shall be to you a holy day, a sabbath of solemn rest to the Lord; whosoever doeth any work there in shall be put to death"); see also *Isaiah* 58:13 and Commentary of Rabbi David Kimhi *ad loc.* (One should not pursue business matters on the Sabbath). Christianity's transition from celebrating Sabbath on Saturday to celebrating it on Sunday was gradual and not completed until the seventeenth century.

Sunday first took on significance as the day of Jesus's resurrection. *John* 20:1 *et seq.* In the early church, a struggle ensued over the preeminence of Sunday over Saturday. See MARCEL SIMON, *VERUS ISRAEL* 315 (H. McKeating trans., 1986). By the fourth century, Sunday had been transformed into a day of rest. As Justinian writes, "[a]ll judges, city-people and craftsmen shall rest on the venerable day of the Sun." *CODIX JUSTINIANUS*, III. xii. 3., *translated in DOCUMENTS OF THE CHRISTIAN CHURCH* 18 (Harry Betterson ed. & trans., 2d ed. 1963). In the seventeenth century, Puritans began to identify Sunday with the Jewish Sabbath and observe those laws prescribed in the Hebrew Bible. *Id.* at 283. This identification

On Sunday, November 4, 1962, at about 1:00 p.m., Finkelstein sold two quarts of milk, a loaf of bread, two bars of soap, and some canned food to a customer. Later he sold milk, bread, corn flakes, and crackers to another customer. Then he was arrested. Under New York's Blue Laws at that time "all manner of public selling"<sup>16</sup> was forbidden on Sundays.

At his trial, testimony revealed that nearly twenty-five percent of Finkelstein's gross income came from sales on Sundays, and the court found that Finkelstein could not "survive economically without conducting business on Saturday after sundown and Sunday."<sup>17</sup> The court expressed "sympath[y] to the plight of the defendant" and "decr[ie]d] the unfortunate position in which the defendant" found himself, but convicted him nonetheless.<sup>18</sup>

### C. *The Dark Ages of Discriminatory Enforcement*

In the early 1960s, the United States Supreme Court attempted to put the issue of the constitutionality of the Blue Laws to rest. In *McGowan v. Maryland*<sup>19</sup> and its companion cases,<sup>20</sup> the Supreme Court appeared to surround the Blue Laws with "an impenetrable bulwark of constitutionally protected righteousness."<sup>21</sup> Those charged under the laws, however, seized upon the fact that the Blue Laws had fallen into disuse among law-enforcement officials. They argued that the Blue Laws' discriminatory enforcement denied them equal protection as defined by the Supreme Court in *Yick Wo v. Hopkins*.<sup>22</sup>

In *People v. Acme Markets, Inc.*,<sup>23</sup> the defendant challenged its

---

is coincidental with the introduction of the Blue Laws in the Colony of New York. See *supra* note 8.

<sup>16</sup> N.Y. GEN. BUS. LAW § 9. For complete text, see *supra* note 11.

<sup>17</sup> 239 N.Y.S.2d at 836.

<sup>18</sup> *Id.* at 837. The exception for observers of other days as Sabbath applied only to labor and not to public selling. See *infra* note 47.

<sup>19</sup> 366 U.S. 420 (1961). For a discussion of the Supreme Court's holding in this case, see *infra* notes 60-62 and accompanying text.

<sup>20</sup> See *infra* notes 63-68 and accompanying text.

<sup>21</sup> Note, *The Blue Laws Revisited—1972*, 36 ALB. L. REV. 782, 788 (1972).

<sup>22</sup> 118 U.S. 356 (1886). In *Yick Wo*, the Court dealt with a San Francisco ordinance, which provided that a laundry must either be located in a brick or stone building or else have the consent of the board of supervisors to continue its business. Of the 320 laundries in San Francisco, 310 were located in buildings made of wood. Of the many laundry proprietors that applied for the consent of the board of supervisors, all of the applications submitted by caucasians were granted. However, only one out of the more than 200 applications from proprietors who were also "subjects of China" was granted. *Id.* at 359-61.

In reversing *Yick Wo*'s conviction, the Supreme Court held that "[t]hough the law itself be fair on its face . . . if it is applied and administered by public authority with an evil eye and an unequal hand, . . . the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373-74.

<sup>23</sup> 334 N.E.2d 555 (N.Y. 1975).

conviction under the Blue Laws on discriminatory enforcement grounds. It was the policy of the state police of Erie County not to pursue violators of the Blue Laws unless complaints were filed by private citizens.<sup>24</sup> From 1966 until 1972, the Buffalo District Attorney's office did not initiate a single prosecution for violation of the Sunday closing laws.<sup>25</sup> The Deputy Police Commissioner for the City of Buffalo testified that in thirty-five years of service he could not recall a single Sunday sales prosecution initiated by a police officer's complaint.<sup>26</sup>

In 1972, the Meatcutters Union employed the Blue Laws in an attempt to dissuade Acme Markets from hiring non-union part-time employees for Sunday work, thereby reducing work hours for senior members.<sup>27</sup> On two separate Sundays, union members and officials purchased proscribed items from various supermarkets and then filed complaints with the authorities, who subsequently prosecuted.<sup>28</sup> Clearly, the union's purpose was to force the supermarkets either to comply with the union's demands or suffer the consequences of consistent Sunday closing law violations. Finding that this was an unusually clear case of discriminatory enforcement, and without reaching the first amendment issue, the Court of Appeals struck down the convictions.<sup>29</sup>

#### D. Void for Vagueness

Even if discriminatory enforcement could not be demonstrated, a defendant might attack the Blue Laws as unconstitutionally vague. For example, in 1970, Weston's Shopper's City ("Weston's") was charged with violating the Blue Laws by selling a pair of earrings and a cartridge of film on Sunday.<sup>30</sup> Weston's defenses were that the items in question were "souvenirs," which fall into an exception in Section 9,<sup>31</sup> and, in the alternative, that the term "souvenir" was unconstitutionally vague in violation of the

---

<sup>24</sup> *Id.* at 556.

<sup>25</sup> *Id.*

<sup>26</sup> In fact, each year Buffalo held an open-air art festival and bazaar that clearly violated the Blue Laws. This festival was sanctioned by the Common Council and patrolled by as many as seventy police officers. *Id.* at 556-57 & n.1.

<sup>27</sup> *Id.* at 558.

<sup>28</sup> *Id.* at 556.

<sup>29</sup> *Id.* at 558.

<sup>30</sup> *People v. Weston's Shopper's City, Inc.*, 317 N.Y.S.2d 812 (Albany County J. Ct.), *rev'd*, 326 N.Y.S.2d 685 (Sup. Ct. 1971), *aff'd*, 281 N.E.2d 840 (N.Y. 1972).

<sup>31</sup> Section 9 creates an exception, *inter alia*, for "[p]repared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, *souvenirs*, items of art and antiques, newspapers, magazines, gasoline, oil, tires, cemetery monuments, drugs, medicine and surgical instruments." N.Y. GEN. BUS. LAW § 9, ¶ 4 (McKinney 1992) (emphasis added). For complete text, see *supra* note 11.

due process clause of the Fourteenth Amendment.<sup>32</sup> While the County Court found Weston's argument "persuasive,"<sup>33</sup> the Court of Appeals upheld the State Supreme Court's reversal, and held that the term "souvenir," as used in the statute, was not so unconstitutionally vague as to constitute a deprivation of due process or equal protection.<sup>34</sup> After losing its case, Weston's erected signs in its stores proclaiming:

#### A Statement of Policy

In February of this year the highest court in the State of New York determined that our 100 year old "Blue Laws" were not unduly vague. Specifically, the court said that ordinary reasonable men and women could determine for themselves the meaning of the term "souvenirs." We at Weston's are asking you today to make such an interpretation.

It is Weston's policy not to sell or to offer for sale on Sunday any items which are prohibited by the law.

"Souvenirs" may be sold on Sunday.

Webster's Dictionary defines a "souvenir" as "something that serves as a reminder or a memento." If any item you select and purchase today reminds you, or someone to whom you intend to give it, of a person, place, or event, then it would constitute a "souvenir" within the dictionary definition (Christmas gifts are but one of many examples of this).

We are going to assume that any item which you select and attempt to checkout qualifies as a "souvenir" in your mind. The decision is yours and yours alone. We will respect your decision, and our cashiers, under this assumption, are instructed to checkout all articles, brought to the cash register by you. If, however, you feel that any item you select does not create a remembrance of a person, place or event, please tell the cashier and she will arrange to return that item to our shelves, for, as indicated above, we do not offer for sale and do not intend to sell any prohibitive items on Sunday.

Respectfully yours,  
Weston's Shopper's City, Inc.<sup>35</sup>

---

<sup>32</sup> 317 N.Y.S.2d at 813.

<sup>33</sup> *Id.* at 815.

<sup>34</sup> *People v. Weston's Shopper's City, Inc.*, 281 N.E.2d 840 (N.Y. 1972). This logic is reminiscent of the Supreme Court's logic in *McGowan*, where the defendant argued that exemption from the Sunday closing law of "merchandise essential to, or customarily sold at . . . bathing beaches" was unconstitutionally vague. 366 U.S. at 428. The Supreme Court held that it was not vague because "business people of ordinary intelligence . . . would be able to know what exceptions are encompassed by the statute . . . by simply making a reasonable investigation at a nearby bathing beach . . ." *Id.*

<sup>35</sup> *People v. Kur*, 350 N.Y.S.2d 990, 996 (Oneida County Ct. 1974). Samuel Kur was the manager of Weston's. *Id.* at 991.

On a Sunday in November 1972, a competitor of Weston's purchased merchandise at the store and then filed a complaint.<sup>36</sup> The items purchased were a perma-press men's shirt, a package of Dura-Soap pads, and a gallon of Prestone.<sup>37</sup> The manager of Weston's was thereupon convicted of violating the Blue Laws. On appeal, the appellate term affirmed the conviction.<sup>38</sup> Though its opinion noted that Weston's attempt to allow the purchaser to determine whether a purchase was a "souvenir," by posting the sign, was "not seriously argued" on appeal, the court nevertheless expressed a sincere desire for the guidance of higher courts in interpreting these laws.<sup>39</sup>

### E. *The Pen Is Mightier Than the Sword*

When appellate action finally came in 1976, the Blue Laws in New York had met their match. Holding that Section 9 was unconstitutionally vague, the New York Court of Appeals stated, in *People v. Abrahams*,<sup>40</sup> that Section 9

contains a polyglot of exceptions to the general closing mandate which is essentially devoid of rhyme or reason. . . . [These] helter-skelter collection of exceptions . . . render[ ] it unenforceable and consequently popularly flouted. . . . In our view the

---

<sup>36</sup> This entire episode was a single battle in a larger trade war. The Albany Law Review commented that:

*Utica* evolved out of what is now an historical pattern of economic competition. The battle lines have been drawn well between the downtown retail merchants and the large discount houses located on major highway arteries in the suburbs. The discount houses do an excellent business when they remain open on Sundays in violation of the state Sunday closing law. The downtown department stores usually do not remain open on Sunday, not because they have a higher regard for the law, but simply because they couldn't attract enough customers to make the day's opening a profitable one. Such stores rely for the vast majority of their customers on office workers who are only in the inner city during the week. While at home on the weekend, these people are more likely to go to the nearby shopping center rather than travel to the center of the city where parking space is scarce. Consequently, the downtown merchants exert pressure on the local law enforcement agents to prosecute violators under the antiquated Sunday closing laws.

Note, *supra* note 21, at 789-90 (footnote omitted).

<sup>37</sup> *Kur*, 350 N.Y.S.2d at 996.

<sup>38</sup> *Id.* at 997.

<sup>39</sup> The court wrote that "an appellate review might be of considerable value to all the courts of our State as well as to the law enforcement agencies." *Id.* at 998.

<sup>40</sup> 353 N.E.2d 574 (N.Y. 1976). In *Abrahams*, an employee of a pharmacy was charged with selling a ceramic bank on Sunday. The trial court dismissed the information on the grounds that the statute was vague, ambiguous, and inconsistent. The Appellate Term reversed, reinstating the information, and the Court of Appeals reversed, upholding the trial court's ruling and striking the statute. *Id.* at 575. It is interesting to note that the defendant did not assert the defense of discriminatory enforcement because the enforcement was *random*, and hence constitutional. *Id.* at n.2.

only solution is to declare [it] unconstitutional . . . .<sup>41</sup>

The court also voided the forfeiture clauses in Section 12.<sup>42</sup>

This view of the New York law was hardly new. In 1963, one New York judge described Section 9 in a more colorful way, writing that "[s]crambled eggs have more symmetry,"<sup>43</sup> and in 1975, another judge argued that the law was "wholly irrational."<sup>44</sup>

Although the *Abrahams* decision was laudable, it left one gaping hole. The court extended the legislature an invitation to re-write the statute "[s]hould the Legislature continue to deem a Sunday closing law desirable."<sup>45</sup>

#### F. *The Current State*

From the preceding discussion, it may appear that the Blue Laws in New York have been effectively nullified and, furthermore, that there is no longer any valid constitutional ground for attacking them. In this author's opinion, however, two constitutionally suspect provisions remain in effect in the New York Sunday closing laws, and are therefore subject to review under the Establishment Clause.

The first problematic provision is the exception provided in Section 6, which perhaps was intended to benefit Sabbatarians.<sup>46</sup> Section 6 exempts those who keep Sabbath on another day of the week from the law prohibiting labor on Sunday.<sup>47</sup> This sounds innocuous, even generous. The statute, however, goes on to qualify this exemption as applying only where "the labor complained of was done in such manner as not to interrupt or disturb other persons observing the first day of the week as holy time."<sup>48</sup>

This provision calls for constitutional review on two grounds. The first is the requirement that to avoid a criminal conviction under Section 5,<sup>49</sup> the defendant must carry the burden of prov-

<sup>41</sup> *Id.* at 578-79.

<sup>42</sup> *Id.* at 579-80.

<sup>43</sup> *Finkelstein*, 239 N.Y.S.2d at 847 (Shalleck, J., dissenting). For a discussion of this case, see *supra* notes 14-18 and accompanying text.

<sup>44</sup> *Acme Markets, Inc.*, 334 N.E.2d at 558 (Wachtler, J., concurring). For a more in depth discussion of this case, see *supra* notes 23-29 and accompanying text.

<sup>45</sup> 353 N.E.2d at 579.

<sup>46</sup> A Sabbatarian is "one who regards and keeps the seventh day of the week [Saturday] as holy in conformity with the letter of the decalogue." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1994 (1986).

<sup>47</sup> Section 6 provides in relevant part, "It is a sufficient defense to a prosecution for work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day . . . ." N.Y. GEN. BUS. LAW § 6 (McKinney 1992).

<sup>48</sup> *Id.*

<sup>49</sup> Section 5 of the Blue Laws prohibits labor on Sunday. The last reported conviction

ing, "by a preponderance of the evidence,"<sup>50</sup> his religious affiliation and his adherence to the tenets of that religion.<sup>51</sup> As a result, the courts are placed in the position of ruling on the standards of observance necessary to be a legally sufficient Jew, Muslim, or Seventh Day Adventist. This section is also suspect because it exempts only work that does not interrupt or disturb other persons who observe a Sunday Sabbath. Even if a defendant can prove that he observes another day, he must also show that his Sunday labor is quiet and innocuous.<sup>52</sup> While apparently serving the interests of religious tolerance, no parallel provision requires that Christians who labor on Saturday do so quietly to avoid disturbing Jews, or that Jews who labor on Friday not interrupt Muslims observing their Sabbath on that day.

The second provision implicating the Establishment Clause is the same provision that the Court of Appeals previously struck down: Section 9.<sup>53</sup> The Court of Appeals voided the statute on vagueness grounds, while inviting the legislature to rewrite the statute.<sup>54</sup> Should the legislature accept the court's invitation, the statute will again be subject to first amendment challenges.<sup>55</sup>

---

under this statute appears to be the case of *People v. Federal Builders & Home Modernization Corp.*, 317 N.Y.S.2d 942 (App. Term, 2d Dep't 1971). Federal Builders was convicted of violating section 9 by opening its showroom on Sunday. The court affirmed the conviction on the ground that the propriety of this law "is a matter for the Legislature and not for the courts." *Id.* at 944 (citing *Friedman*, 96 N.E.2d at 184).

Later that same year, a trial court in Onondaga County declared Section 5 unconstitutional. The court found the "works of necessity" exception to be overly broad to the point that "there is scarcely an item in creation which on any given day, . . . is not a necessity in some person's life . . ." *People v. Fay's Drug Co. of Fairmont*, 326 N.Y.S.2d 311, 314 (Onondaga County J. Ct. 1971). Accordingly, the court "conclude[d] that [section 5] is contrary to the First Amendment of the United States Constitution and, therefore, unenforceable." *Id.* at 317.

This case was never reviewed by an appellate court, nor has any appellate court subsequently addressed the same issue. Thus, while its constitutionality appears to be legitimately in question, Section 5 remains in effect throughout the state except in Onondaga County. Its enforcement, however, appears to be lax.

<sup>50</sup> The standard of proof for affirmative defenses in New York State is "by a preponderance of the evidence." N.Y. PENAL LAW § 25 (McKinney 1992).

<sup>51</sup> See, e.g., *People v. Adler*, 160 N.Y.S. 539, 541 (2d Dep't 1916). Mr. Adler, the proprietor of a boot and shoe factory, was arrested and convicted of violating the Blue Laws by operating his factory on Sunday. Though he was a strict Sabbatarian, and therefore exempt from the no-labor-on-Sunday law, he was convicted because he could not show that his labor "was done in such manner as not to interrupt or disturb other persons in observing the first of the week as holy time." *Id.*

<sup>52</sup> This requirement has been strictly adhered to by the courts. See *id.*

<sup>53</sup> *Abrahams*, 353 N.E.2d at 578-79; see *supra* notes 40-41 and accompanying text.

<sup>54</sup> See *supra* text accompanying note 45.

<sup>55</sup> At one time, the New York Legislature attempted to reinstate the Blue Laws. In 1977, the bill was reported out of the State Assembly Committee on Commerce, Industry and Economic Development, where it received bipartisan support. The stated primary goal of that legislation was to keep big stores closed on Sundays in order to help in the nation's energy conservation effort. Isadore Barmash, *Albany Bill Heats Sunday Trade Issue*, N.Y. TIMES, May 26, 1977, at D1. The bill was eventually vetoed by Governor Carey, who

For these reasons, an establishment clause challenge to a conviction under the New York laws would not be moot (or at least may not be moot if the legislature rewrites section 9).<sup>56</sup> Therefore, an examination of the United States Supreme Court's jurisprudence in this area is appropriate.

### III. SUPREME COURT JURISPRUDENCE

#### A. *The Early Years*

The United States Supreme Court first mentioned the Blue Laws in *Soon Hing v. Crowley*,<sup>57</sup> in 1885. In that case, Justice Field held that such laws were valid enactments under the state's police power, and wrote that

[l]aws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependant

...<sup>58</sup>

Despite Justice Field's comment, litigation of this issue was to continue.<sup>59</sup>

In the early 1960s, the Supreme Court attempted to settle the

---

said that it would cost jobs. Martin Waldron, *Supreme Court in Jersey Upholds Blue Law in Effect in 10 Counties*, N.Y. TIMES, July 19, 1978, at B2.

<sup>56</sup> See also *supra* note 49 (citing a trial court's holding that Section 5 violates the First Amendment).

<sup>57</sup> 113 U.S. 703 (1885). *Soon Hing*, an employee of a Chinese public laundry in San Francisco, was arrested and imprisoned for washing and ironing clothing during prohibited hours. His *habeas corpus* petition alleged that the law under which he was convicted was passed solely for the purpose of putting San Francisco's Chinese laundries out of business. These laundries, he claimed, were required to operate on Sundays in order "to gain a livelihood." The petition was rejected and the Supreme Court affirmed. *Id.* at 704-06.

<sup>58</sup> *Id.* at 710.

<sup>59</sup> The following Blue Laws cases reached the Supreme Court in the years between *Soon Hing* in 1885 and *McGowan* in 1961: *Hennington v. Georgia*, 163 U.S. 299 (1896) (upholding a law forbidding the operation of freight trains on any railroad in the state on Sunday); *Petit v. Minnesota*, 177 U.S. 164 (1900) (holding that a legislature did not exceed the limits of its police powers by declaring that as a matter of law, barber shops could be open on Sundays, while all other kinds of labor were prohibited); *Friedman*, 96 N.E.2d at 184 (holding that Sunday closing laws are not *per se* in violation of either the First Amendment or the Equal Protection Clauses, nor are they unconstitutionally discriminatory); *North Carolina v. McGee*, 75 S.E.2d 783 (N.C.) (holding that prohibiting the operation of all but specified businesses on Sunday is not arbitrary, unreasonable, or discriminatory as applied to a drive-in motion picture theater), *appeal dismissed*, 346 U.S. 802 (1953); *Gundaker Central Motors, Inc. v. Gassert*, 127 A.2d 566 (N.J. 1956) (singling out automobile dealers and prohibiting their business operation on Sunday is not an unconstitutional exercise of power by the state), *appeal dismissed*, 354 U.S. 933 (1957); *Ohio v. Kidd*, 150 N.E.2d 413 (Ohio) (affirming convictions of a storekeeper and clerk under Sunday closing law), *appeal dismissed*, 358 U.S. 132 (1958).

issue of the constitutionality of the Blue Laws in light of the Establishment and Free Exercise clauses. In *McGowan v. Maryland*,<sup>60</sup> the Court acknowledged the religious origin of Sunday closing laws, but held that "[t]he present purpose and effect of most [Sunday laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals."<sup>61</sup> In addition to this "secular goal" argument, the Court discussed the history of these laws in depth and concluded that because they have evolved "through the centuries," and have a "more or less recent emphasis upon secular considerations," Sunday closing laws are "of a secular rather than of a religious character, and [ ] presently [ ] bear no relationship to establishment of religion as those words are used in the Constitution of the United States."<sup>62</sup>

While *McGowan* and its companion case, *Two Guys From Harrison-Allentown, Inc. v. McGinley*,<sup>63</sup> did not present free exercise problems, two other cases decided at the same time surely did. In both *Braunfeld v. Brown*<sup>64</sup> and *Gallagher v. Crown Kasher Super Mkt.*,<sup>65</sup>

---

<sup>60</sup> 366 U.S. 420 (1961). In *McGowan*, seven employees of a large department store in Maryland were convicted of selling a loose-leaf binder, a stapler, and a can of floor wax on Sunday in violation of that state's Blue Laws. The employees argued that the law under which they were convicted was a law respecting an establishment of religion contrary to the First Amendment. *Id.* at 430.

The Court acknowledged the strongly religious origin of these laws, *id.* at 434, but argued that there were many secular justifications also, including the state's desire to "set one day apart from all others as a day of rest . . . on which people may visit friends and relatives who are not available during working days." *Id.* at 450. Leaving open the possibility that Sunday legislation may violate the Establishment Clause if "it can be demonstrated that its purpose . . . is to use the State's coercive power to aid religion," *id.* at 453, the Court affirmed the convictions.

<sup>61</sup> *Id.* at 445.

<sup>62</sup> *Id.* at 444.

<sup>63</sup> 366 U.S. 582 (1961). This case involved a department store in Pennsylvania, which sued the Lehigh County District Attorney seeking an injunction preventing enforcement of the state's Blue Laws. The Supreme Court found this case to be "essentially the same as *McGowan*," see *McGinley*, 366 U.S. at 584, and decided it in the same way. *Id.* at 598.

<sup>64</sup> 366 U.S. 599 (1961). Orthodox Jewish Merchants sued the City of Philadelphia to enjoin it from enforcing its Blue Laws of the statute against the merchants. The merchants argued that the application of the statute to them would inhibit free exercise of religion in that they would "either [be] compel[led] . . . to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or [be] put . . . at a serious economic disadvantage if they continue[d] to adhere to their Sabbath." *Id.* at 602.

The Supreme Court, while conceding that the merchants were burdened by the Sunday closing law, held the statute valid because it "does not make unlawful any religious practices [, but] . . . simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605.

<sup>65</sup> 366 U.S. 617 (1961). Patrons of a kosher meat market in Massachusetts, and the officers of that market, sued the state for an injunction preventing the enforcement of the Blue Laws against the market. The patrons argued that "because their religious beliefs forbid their shopping on the Jewish Sabbath, the statutes' effect is to deprive them, from Friday afternoon until Monday of each week, of the opportunity to purchase the kosher food sanctioned by their faith." *Id.* at 630.

Orthodox Jewish merchants kept their stores closed on Saturdays in accordance with their religion. On Sundays, the merchants opened their stores to make up for lost business, in direct violation of Sunday closing laws. The merchants then applied for injunctions restraining the appropriate authorities from enforcing the respective criminal provisions of the Massachusetts and Pennsylvania Blue Laws.<sup>66</sup> The lower courts denied the injunctions, and the Supreme Court affirmed in both instances. The Court, in *Braunfeld*, held that the Blue Laws do not exert direct pressure on the religious practices of Sabbatarians, but only indirect economic pressure.<sup>67</sup> This type of pressure was held not to amount to a constitutionally prohibited inhibition of their free exercise of religion.<sup>68</sup>

Justice Douglas dissented in all four of these Supreme Court cases. He observed that "[n]o matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities."<sup>69</sup> In addition, he noted that "[t]he 'establishment' clause protects citizens . . . against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it."<sup>70</sup>

Douglas' "selection" test was never adopted by the Court. However, in essence and application, this test seems to be very similar to the "no endorsement" test, which was later developed by Justice O'Connor, and which appears to have been ultimately adopted by the Court.<sup>71</sup>

### B. The "Lemon" Test

The Supreme Court's decision in *Lemon v. Kurtzman*<sup>72</sup> estab-

---

The Court held that "[t]hese allegations are similar, although not as grave, as those made by appellants in *Braunfeld*. . ." *Id.* at 631. Since those arguments were rejected in *Braunfeld*, they were rejected once again with no further explanation.

<sup>66</sup> Note, *supra* note 21, at 785.

<sup>67</sup> *Braunfeld*, 366 U.S. at 606. The *Braunfeld* Court found that the Sunday closing statute "may well result in some financial sacrifice in order [for some people] to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful." *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *McGowan*, 366 U.S. at 572-73.

<sup>70</sup> *Id.* at 564 (emphasis added). Douglas was especially concerned with the *criminal* nature of the penalties imposed by the Blue Laws. *Id.* at 565.

<sup>71</sup> See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); see also *infra* notes 93-95, 100-01 and accompanying text.

<sup>72</sup> 403 U.S. 602 (1971). *Lemon* involved two state statutes governing the distribution of aid to parochial schools: one in Rhode Island and the other in Pennsylvania. The Rhode Island statute provided for a 15% salary supplement to teachers in certain non-public

lished a three-part test in an effort to standardize the evaluation of possible establishment clause violations. While originally introduced not as "tests" in any limiting sense of that term," but as "standards [which] should . . . be viewed as guidelines,"<sup>73</sup> the *Lemon* test became the standard by which many cases were evaluated. The three prongs of the *Lemon* test state that to avoid establishment clause violations, "[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, . . . [and] finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>74</sup>

Though a small minority of commentators consider the *Lemon* test to be "insightful and consistent with establishment clause purposes,"<sup>75</sup> many others have subjected the test to fairly scathing criticism. For example, Judge Easterbrook of the Seventh Circuit, complained that this approach "requir[es] scrutiny more commonly associated with interior decorators than with the judiciary. When everything matters, when nothing is dispositive, when we

---

schools, provided that the teacher specifically agreed not to teach any course in religion. *Id.* at 607-08 (citing R.I. GEN. LAWS § 16-15-1, *et seq.* (1970)). The Pennsylvania statute authorized the Superintendent of Public Instruction to purchase certain educational services from non-public schools. *Id.* at 609-10 (citing PA. STAT. ANN. tit. 24, §§ 5601-09 (1971)). This statute had the effect of reimbursing parochial schools for teachers' salaries, textbooks, etc. It restricted reimbursement to courses in secular subjects, subject to the approval of the Superintendent. *Id.* at 609-10.

The Supreme Court found that there was no indication that the legislative purpose in either state was to advance religion and declined to decide if there was a principal or primary effect on religion. *Id.* at 613. Nevertheless, the Court held both statutes to be not only unconstitutional but also examples of "excessive entanglement between government and religion." *Id.* at 614.

<sup>73</sup> *Tilton v. Richardson*, 403 U.S. 672, 678 (1971). This case involved the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 711-721 (repealed 1972), which provided for federal grants to universities for the construction of academic facilities. The Act excluded grants for any facility "used or to be used for sectarian instruction or as a place for religious worship . . ." 403 U.S. at 675 (quoting 20 U.S.C. § 751(a)(2) (Supp. V 1964) (repealed 1972)). Nevertheless, universities with religious affiliations benefited from the Act. *Id.* at 676-77.

The Court applied the three prong *Lemon* test and concluded that: (1) the legislative purpose was a legitimate secular one (to encourage growth among the nation's institutions of higher education), *id.* at 678-79; (2) owing to effective administration, the effect of the Act was not to advance any religion, *id.* at 680-81; and (3) there was little danger of excessive government entanglement with religion because (a) college students are generally skeptical, *id.* at 685-86; (b) the aid that the government provides is "nonideological," *id.* at 687; and (c) the government aid is "a one-time, single-purpose construction grant." *id.* at 688.

<sup>74</sup> *Lemon*, 403 U.S. at 612-13 (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 generally Jeffrey R. Wagener, Comment, *A Survey of the Supreme Court's Approach to the Establishment Clause in Light of County of Allegheny v. American Civil Liberties Union*, 35 St. Louis U. L.J. 169, 173-74 (1990).

<sup>75</sup> See, e.g., Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1085, 1103 (1989).

must juggle incommensurable factors, a judge can do little but announce his gestalt.<sup>76</sup> Additionally, four<sup>77</sup> of the Supreme Court's current members (Justices Rehnquist,<sup>78</sup> O'Connor,<sup>79</sup> Scalia,<sup>80</sup> and Kennedy<sup>81</sup>) have suggested revising or replacing the *Lemon* test.<sup>82</sup>

While the future of the *Lemon* test is in severe doubt, it is in-

<sup>76</sup> *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting). When the City of Chicago erected a nativity scene in its city hall during the holiday season, the American Jewish Congress sued the City for injunctive and declaratory relief, arguing that the display violated the Establishment Clause. The district court granted summary judgment in favor of the City on the grounds that the Supreme Court had decided in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that such displays were constitutional. (For a discussion of the Supreme Court's holding in *Lynch*, see *infra* note 89). The Seventh Circuit distinguished *Lynch* and reversed, finding that the nativity scene "unavoidably fostered the inappropriate identification of the City of Chicago with Christianity, and therefore violated the Establishment Clause." 827 F.2d at 128.

In his dissent, Judge Easterbrook described at length the difficulties of applying the Supreme Court's current establishment clause doctrine. He concluded, however, that "even the [Supreme] Court's current understanding of the Establishment Clause does not support the plaintiffs. Chicago may exhibit *all* of the traditional symbols of Christmas during Yuletide." *Id.* at 140. He would, therefore, have granted summary judgment to the City. *Id.* at 129.

<sup>77</sup> Justice White, who recently retired from the Court, also criticized the *Lemon* test. See *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (White, J., dissenting) ("I would support a basic reconsideration of our precedents."); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring) ("I am no more reconciled now to *Lemon I* than I was when it was decided"); *Lemon*, 403 at 661 (White, J., concurring in part, dissenting in part).

Justice Ginsburg, who has recently taken Justice White's seat on the Court, has not yet had an opportunity to address the *Lemon* test while on the Supreme Court, and did not address it while sitting on the District of Columbia Circuit Court of Appeals. The only establishment clause decision which she wrote while sitting on the Court of Appeals, *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 906 (1990), was actually decided on equal protection grounds (much to the chagrin of the dissent, see *id.* at 1468 (Buckley, J., dissenting)), and did not address the *Lemon* test at all.

In her previous position as the director of the ACLU's Women's Rights Project, Justice Ginsburg became known for advocating a litigation strategy based primarily on the Equal Protection Clause of the Fourteenth Amendment. See Nadine Strossen, *The American Civil Liberties Union and the Women's Rights*, 66 N.Y.U. L. REV. 1940, 1950 (1991); See also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985). Since Justice Ginsburg has applied this reasoning to religious questions as well (see, e.g., *Olsen*, *supra*) she could potentially lead the Court in a new direction for analysis of establishment clause jurisprudence.

<sup>78</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (criticizing the *Lemon* test because it "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results . . .").

<sup>79</sup> See *Aguilar v. Felton*, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting) ("I question the utility of entanglement as a separate Establishment Clause standard in most cases.")

<sup>80</sup> See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence . . ."); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("I think the pessimistic evaluation that THE CHIEF JUSTICE [(Rehnquist)] made of the totality of *Lemon* is particularly applicable to the 'purpose' prong . . ."). Justice Scalia also stressed that "[t]o look for the *sole purpose* of even a single legislator is probably to look for something that does not exist." *Id.* at 637; see also *supra* note 78.

<sup>81</sup> See *County of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part and dissenting in part) ("I . . . do not wish to be seen as advocating, let alone

formative to note that the test's first prong is a direct descendant of *McGowan*,<sup>83</sup> the Court's leading—and latest—Blue Laws decision. There, the Court found that the Blue Laws had a valid secular purpose—to provide a uniform day of rest for all citizens.<sup>84</sup> The second and third prongs were derived from *Board of Educ. v. Allen*<sup>85</sup> and *Walz v. Tax Comm'n*,<sup>86</sup> respectively, both of which were decided years after *McGowan*. Significantly, this means that the Court has never had the opportunity to apply the second and third prongs of the *Lemon* test to the Blue Laws.

### C. Squeezing Lemon

The Supreme Court deviated from the *Lemon* test in *Larson v. Valente*,<sup>87</sup> and abandoned it altogether in *Marsh v. Chambers*.<sup>88</sup> In 1984, the shortcomings of the *Lemon* test became obvious in *Lynch*

---

adopting, that test ([*Lemon*]) as our primary guide in this difficult area. . . . Substantial revision of our Establishment Clause doctrine may be in order. . . .")

<sup>82</sup> Timothy V. Franklin, *Squeezing the Juice Out of the Lemon Test*, 72 W. EDUC. L. REP. 1, 3 (1992). Additionally, a fifth justice, Justice Thomas, joined in Justice Scalia's dissent in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), where Justice Scalia described the *Lemon* test as "not deriv[ing] from, but positively conflict[ing] with, our long-accepted constitutional traditions." *Id.* at 2678.

<sup>83</sup> See Franklin, *supra* note 82, at 3 & n.39. For a discussion of *McGowan*, see *supra* notes 60-63 and accompanying text.

<sup>84</sup> 366 U.S. 420, 444-49 (1961).

<sup>85</sup> 392 U.S. 236 (1968). New York Education Law § 701 required local public school authorities to lend textbooks free of charge to all students in grades seven through twelve; students attending parochial schools were included. *Id.* at 238. The Court, relying on its decision in *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947) (upholding New Jersey's "spending [of] tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it [paid] the fares of pupils attending public and other schools"), held that the principle and primary effect of the New York statute was to further educational opportunities available to the young, a valid "secular legislative purpose . . . that neither advances nor inhibits religion." *Allen*, 392 U.S. at 243 (quoting *Abington School Dist. v. Schempp*, 314 U.S. 203, 222 (1963) (citing *Everson*)).

<sup>86</sup> 397 U.S. 664, 666 (1970) (holding that granting property tax exemptions to religious organizations for religious properties used solely for religious worship was not an excessive government entanglement with religion).

<sup>87</sup> 456 U.S. 228 (1982). Minnesota's Charitable Solicitations Act required that religious organizations receiving more than half of their total contributions from non-members (the "fifty percent rule") register with the state. In order to maintain their registration, such organizations had to file detailed reports with the state, including their total income, receipts, management costs, and other expenses. *Id.* at 231-32.

The Holy Spirit for the Unification of World Christianity was required to register under the Act, and challenged the Act's constitutionality on Establishment Clause grounds. The Court held that the *Lemon* test was inapplicable because the "fifty percent rule" discriminated among religions, and the *Lemon* test was intended to apply only "to [those] laws [which] afford[ ] a uniform benefit to all religions . . ." *Id.* at 252. Nevertheless, the Court struck down the "fifty percent rule" as "official denominational preference" not in "furtherance of any compelling governmental interest . . ." *Id.* at 255.

<sup>88</sup> 463 U.S. 783 (1983). The Nebraska Legislature starts each day with a prayer offered by a chaplain whose salary is paid out of public funds. While the chaplain is chosen every six months, for the previous sixteen years running, only one denomination—Presbyterian—had been selected. *Id.* at 793. Ernest Chambers, a member of the Nebraska Legislature and a taxpayer, sought to enjoin this practice as violative of the Establishment Clause.

*v. Donnelly*,<sup>89</sup> where both the majority and the dissent applied the "same" *Lemon* test to achieve opposite results. The dissenters found that a municipality's nativity scene violated all three prongs of the test,<sup>90</sup> while the majority held that the scene did not violate any of the prongs.<sup>91</sup> It became obvious, therefore, that "for the [*Lemon*] test to be of any real use to the Court, . . . [it] needed further definition."<sup>92</sup>

In her concurrence in *Lynch*, Justice O'Connor proposed that to address this problem a new focus be superimposed onto the existing *Lemon* formulation.<sup>93</sup> She suggested that the "proper inquiry under the purpose prong of *Lemon* [should not examine whether there are any possible secular objectives, but rather] whether the government intends to convey a message of endorsement or disapproval of religion."<sup>94</sup> She also suggested that the primary effect prong should test whether, "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."<sup>95</sup>

In her concurrence in *Wallace v. Jaffree*,<sup>96</sup> Justice O'Connor amended her "no endorsement" test to add two important elements: legislative deference and the objective observer standard.<sup>97</sup>

---

The Eighth Circuit applied the *Lemon* test to this practice and found that the prayer violated all three prongs. 675 F.2d 228, 234-35 (8th Cir. 1982).

The Supreme Court reversed the Eighth Circuit and allowed the prayers. The Court found that "[t]he opening of sessions of legislative . . . bodies with prayer is deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. Because of this "unbroken practice" in the national Congress, Nebraska, and many other states, "there is no real threat [of unconstitutional establishment of religion] while this Court sits." *Id.* at 795 (citation omitted). Unlike the lower court, the Supreme Court did not attempt to apply the *Lemon* test.

<sup>89</sup> 465 U.S. 668 (1984). Each year, the City of Pawtucket, Rhode Island, erects a Christmas display consisting of a nativity scene and a large banner that reads "SEASONS GREETINGS." The district court enjoined the practice as an appearance of official sponsorship of religion, 525 F. Supp. 1150, 1178 (1981), and the First Circuit affirmed. 691 F.2d 1029 (1st Cir. 1982). The Supreme Court reversed, holding that despite the religious significance of the crèche, there had been no establishment clause violation. *Lynch*, 465 U.S. at 687.

<sup>90</sup> *Id.* at 694-727 (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting).

<sup>91</sup> *Id.* at 670-87.

<sup>92</sup> *Titshaw*, *supra* note 75, at 1103.

<sup>93</sup> *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 690.

<sup>96</sup> 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

<sup>97</sup> *Id.* at 76, 78. An Alabama statute, ALA. CODE § 16-1-20, established a "1-minute period of silence in all public schools." *Id.* at 40. A second statute, enacted three years later in 1981, extended the purpose of the original statute to allow voluntary prayer during that period. ALA. CODE § 16-1-20.1. The Supreme Court held that since the stated purpose of the statute was only to "return [ ] voluntary prayer to the public schools" and had "no other purpose," *id.* at 57, the statute was an unconstitutional establishment of religion. *Id.*

In her concurrence, Justice O'Connor wrote that in passing on the constitutionality of such laws, courts should generally defer to the stated legislative intent. Though citing Justice Rehnquist's objection that such a mode of inquiry would mean little since "it only

The first element requires that deference be given to legislative intent for inquiries under the purpose prong.<sup>98</sup> The second element inquires whether an "objective observer" would perceive the state's action as an endorsement or disapproval of religion.<sup>99</sup>

The Court apparently adopted O'Connor's refinement of the *Lemon* standard in the 1989 case of *County of Allegheny v. ACLU*,<sup>100</sup> where it held that the endorsement test "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."<sup>101</sup>

#### D. *Renaissance: The Dawn of a New Era on the Court*

Recently, in *Lee v. Weisman*,<sup>102</sup> the Supreme Court surprised many commentators by holding that a rabbi's invocation at a public secondary school graduation violated the Establishment Clause.<sup>103</sup> The conventional wisdom had been that the Court's conservative majority would remain together and "accommodate" the minor intrusion. However, while the decision provoked a scathing dissent from four justices (Scalia, Rehnquist, White, and

---

requires the legislature to express any secular purpose and omit all sectarian references," *id.* at 108 (Rehnquist, J., dissenting), Justice O'Connor argued that to require a legislature to "manifest a secular purpose and omit all sectarian endorsements" is "not a trivial matter." *Id.* at 75 (O'Connor, J., concurring). In support of this standard, Justice O'Connor added that the "relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute would perceive it as a state endorsement of prayer in public school." *Id.* at 76. The Alabama statute, she wrote, could not withstand this scrutiny. *Id.* at 84.

<sup>98</sup> *Id.* at 74-75 (O'Connor, J., concurring).

<sup>99</sup> *Id.* at 76.

<sup>100</sup> 492 U.S. 573 (1989). The County of Allegheny erected two holiday displays on public property in downtown Pittsburgh. One was a nativity scene placed on the Grand Staircase of the courthouse. The other, a Chanukah menorah, was placed just outside a county building next to a Christmas tree and a sign saluting liberty. The Supreme Court held that the crèche violated the Establishment Clause while the menorah did not. The nativity scene was found unconstitutional because it sits in the "most beautiful part" of the . . . seat of county government" and thus "sends an unmistakable message that [the county] supports and promotes the Christian . . . religious message." *Id.* at 599-600. The menorah, on the other hand, was next to a Christmas tree and a sign saluting liberty. Thus, in this particular context, "the display of the menorah [was] not an endorsement of religious faith but simply a recognition of cultural diversity." *Id.* at 619.

While Justice O'Connor did not join in Justice Blackmun's majority opinion, Blackmun relied on O'Connor's "no endorsement" test and her definition of endorsement from her concurrences in *Wallace* and *Lynch*. See *County of Allegheny*, 492 U.S. at 593-94 (citing *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring in judgment); *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). Thus, for the first time, the "no endorsement" test found its way into a majority opinion.

<sup>101</sup> *County of Allegheny*, 492 U.S. at 593 (quoting *Wallace*, 472 U.S. at 70) (emphasis omitted).

<sup>102</sup> 112 S. Ct. 2649 (1992).

<sup>103</sup> See, e.g., Franklin, *supra* note 82, at 16 (referring to "when the Supreme Court reverses the First Circuit Court of Appeals' *Weisman* decision.") (emphasis added). The Supreme Court, of course, affirmed the appellate court's decision. 112 S. Ct. at 2661.

Thomas), a tenuous coalition of the remaining five justices held that the invocation violated the Establishment Clause.<sup>104</sup>

Unlike the decision of the court of appeals below, the Supreme Court's decision did not rely on the *Lemon* test.<sup>105</sup> Instead, the Court relied on the "divisiveness" and "religious animosity" that is engendered when the government becomes involved with religion.<sup>106</sup> The Court explained its decision by referring to the fact that while "to most believers [the invocation] may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, . . . [this] may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."<sup>107</sup> Though not explicitly endorsing any particular test, apparently the Court was actually applying Justice O'Connor's "no endorsement" test, as modified by her concurring opinion in *Wallace*.<sup>108</sup> The "nonbeliever or dissenter" test appears to be merely a paraphrase of Justice O'Connor's *Wallace* test, for which the relevant issue was whether an "objective observer" would perceive the state's action as an endorsement of religion.<sup>109</sup>

#### E. *The Rejection of "Civil Religion"*

In addition to the adoption of Justice O'Connor's "no endorsement" test and the apparent abandonment of the *Lemon* test, the Court also struck at a well-accepted philosophical justification for previous establishment clause doctrine, the idea of "civil religion."

Civil religion theory attempts to explain why, in America's supposedly secular society, public life is replete with tolerated religion.<sup>110</sup> Examples include: pledging allegiance to a "nation under

---

<sup>104</sup> Justice Kennedy delivered the opinion of the Court, in which Justices Blackmun, Stevens, O'Connor, and Souter joined. *Id.* at 2652. Justices Blackmun and Souter each filed separate concurring opinions, both of which were joined by Justices Stevens and O'Connor. *Id.* at 2661, 2667.

<sup>105</sup> *Weisman v. Lee*, 908 F.2d 1090, 1094-96 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992).

<sup>106</sup> 112 S. Ct. at 2655-56.

<sup>107</sup> *Id.* at 2658.

<sup>108</sup> 472 U.S. at 76 (O'Connor, J., concurring).

<sup>109</sup> *Id.*; see *supra* notes 96-99 and accompanying text.

<sup>110</sup> The idea of a civil religion as a means of justifying establishment clause doctrine has its genesis in a 1986 student Note. See Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986). This philosophy was adopted by the Sixth Circuit, in *Stein v. Planwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (holding that the invocations and benedictions at two public high school graduation commencements did not violate the Establishment Clause), as a means of applying the Supreme Court's holding in *Marsh v. Chambers*, 463 U.S. 783 (1983). For a discussion of the holding in *Marsh*, see *supra* note 88.

The *Stein* court compared the high school commencement invocations to the legisla-

God," having a statutorily mandated National Day of Prayer,<sup>111</sup> and retaining "In God We Trust" as a national motto.<sup>112</sup> The answer, according to this theory, is that American society itself is a religion that follows the "forms and structures of Judeo-Christianity in general, and Protestantism in particular, [and that this religion] finds expression in . . . [the] political culture of the citizenry."<sup>113</sup>

While attractive as an empirical observation, the civil religion theory cannot be allowed to govern the application of the establishment clause guarantees.<sup>114</sup> The theory assumes that what has become mainstream thought and belief should be tolerated by the Constitution. Since American "civil religion" is essentially Protestantism—because that is the religion to which a majority of Americans subscribe—the theory simply restates the principle that "the majority rules." If such a principle governed the application of the Establishment Clause, the very essence of the First Amendment would be called into question. The legislative process would be free to anoint the religion of the majority as the unofficial religion of the United States.

Instead, the First Amendment must be understood to guarantee the rights of the *minority*—those who do *not* subscribe to the thoughts and beliefs of mainstream society.<sup>114</sup> Thus, the courts

---

tive session prayers which were found constitutional in *Marsh*. The court then interpreted the *Marsh* decision to mean that these sorts of invocations were constitutional so long as they were "civil" or "secularized" and did not go "beyond 'the American civil religion.'" *Stein*, 822 F.2d at 1409. The definition of "the American civil religion" was that of Mirsky's Note. *Stein*, 822 F.2d at 1409 n.5.

Note that the *Weisman* dissent in the First Circuit also seized upon this same theory to argue that the religious intrusion of the rabbi's invocation should be tolerated. See *Weisman*, 908 F.2d at 1098 (Cambell, J., dissenting). Judge Cambell wrote that even though the invocation mentioned a deity (and was therefore of a religious nature), the message was "tolerant, benign, nonsectarian . . . , and surely inoffensive." *Id.* He went on to argue that *Marsh* should be understood to apply to all cases of "nonsectarian" (read "civil") prayers. *Id.*

<sup>111</sup> See 36 U.S.C. § 169h (1988) ("The President shall set aside and proclaim the first Thursday in May in each year as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals."); see also 3 C.F.R. 14 (1992) (Former President George Bush proclaimed Thursday, May 7, 1992 to be a National Day of Prayer).

<sup>112</sup> Mirsky, *supra* note 110, at 1238.

<sup>113</sup> *Id.* at 1252.

<sup>114</sup> The origin of this theory of judicial activism lies in Justice Stone's famous Footnote 4 in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). This footnote suggested that a level of scrutiny beyond the "rational basis" test might be appropriate when "statutes [are] directed at particular religious . . . minorities . . ." *Id.*

One recent commentator interpreted the new standard as follows:

Various groups [ ] cannot participate effectively in the political process. . . . [T]he judiciary must function in a countermajoritarian fashion in protecting the individual rights of members of those groups. The judiciary's function in this capacity serves to ameliorate the dysfunctional results of the otherwise legitimate majoritarian system. Accordingly, the judiciary [must] . . . review with

should guard against the oppression of a minority view, or the imposition of a majority practice upon a resistant minority, when deciding establishment clause cases.

Justice O'Connor's "no endorsement" test comes closest to protecting minority rights without trampling upon those of the majority. A government act will be tolerated only if it avoids even the appearance of improperly favoring or endorsing one religion over another. Thus, in *Weisman*, the Court's adoption of that test and the rejection of the civil religion philosophy is encouraging. This may have been what Justice Kennedy was referring to when he wrote in *Weisman* that "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."<sup>115</sup>

#### IV. CONCLUSION

In one recent case, *Jones v. Clear Creek Indep. School Dist.*,<sup>116</sup> the Fifth Circuit applied the *Weisman* precedent to an essentially similar fact pattern, yet arrived at an opposite result. Like *Weisman*, *Jones* involved a high school graduation invocation, which parents sued to enjoin as a government establishment of religion. Unlike *Weisman*, however, the court held that the invocation did not violate the Establishment Clause. Primarily, the court reached this result by drawing an ultra-fine distinction based on the fact that, in *Jones*, the school's graduating class decided who was to give the invocation and what its content should be, while in *Weisman*, it was the school's principal who directed the rabbi to pray.

Even more interesting than this distinction, however, is the court's understanding of the significance of *Weisman*. The court read *Weisman* as introducing a new three-part "coercion analysis" test by which governmental action would be unconstitutional when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."<sup>117</sup> Thereafter, the court proceeded to analyze the situation before it using all

---

heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.

Roberto A. Torricella, Jr., Comment, *Babalu Aye is not Pleased: Majoritarianism and the Erosion of Free Exercise*, 45 U. MIAMI L. REV. 1061, 1097-98 (1991) (citations omitted); See also Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1091 (1982) (Justice Powell wondered "how far a court may go in determining when a law, nondiscriminatory on its face, fairly may be considered as 'directed at' a particular group").

<sup>115</sup> 112 S. Ct. at 2657.

<sup>116</sup> 977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 1618 (1993).

<sup>117</sup> *Id.* at 970.

*seven* tests: The three *Lemon* standards (purpose, effect, and entanglement), the "no endorsement" test, and the new three-part "coercion" test.

Whatever the future of the various establishment clause standards, it remains clear that the time for the Supreme Court to reconsider the question of the constitutionality of the Blue Laws certainly has arrived.<sup>118</sup> It is obvious that the origin of the Blue Laws lies in the Fourth Commandment, and even the most objective observer could easily conclude that the government's choice of Sunday as a day of rest is based upon the religious significance that day holds for the majority of Americans. Thus, it appears likely that under the newly enunciated establishment clause tests, these laws can no longer withstand constitutional scrutiny.

While it is true that the New York Blue Laws have largely passed into history, other states continue to carry such laws on their books, and some even vigorously enforce them.<sup>119</sup> Though sometimes thought of as quaint or "[t]hings from 1960,"<sup>120</sup> Blue Laws can also have profoundly negative effects.<sup>121</sup>

Only one of the arguments propounded by supporters of the Sunday closing laws is particularly convincing. It holds that allowing shopping on Sundays would require workers to work on that day, and thereby deprive them of the opportunity to spend it

---

<sup>118</sup> In a recent development, the Supreme Court has agreed to hear the case of *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 618 N.E.2d 94 (N.Y. 1993), cert. granted, 62 U.S.L.W. 3368 (U.S. Nov. 29, 1993) (No. 93-517), involving a public school district created exclusively for disabled children of a Hasidic Jewish community. The granting of certiorari in this case has been taken to be a signal from the Court that they are planning to once again review the *Lemon* standard. *Justices to Hear Hasidic School District Case*, N.Y.L.J., Nov. 30, 1993, at 1. The effect that a decision in this case will have on the ever evolving area of establishment clause jurisprudence is uncertain.

<sup>119</sup> See *supra* note 4.

<sup>120</sup> Bob Talbert, *Sexy? Jet Trails, Dove Bars, Mud Wrestling*, DETROIT FREE PRESS, Jan. 27, 1993, at 7F. This article listed the Blue Laws, along with asbestos, 78 rpm records, Studebakers, and gas at 29 cents a gallon, as "[t]hings from 1960 that [a]re [h]ard to [f]ind [t]oday." *Id.*

<sup>121</sup> For example, Paris, which has Sunday closing laws similar to those in many American states, granted a special one-year exception to Virgin to sell records on the Champs Élysées. When permission expired in July 1993, Virgin elected to stay open on Sundays anyway, in violation of the law. One Sunday, Virgin was fined four million francs (about \$700,000) for their indiscretion. This prompted an angry response from the store which claimed that it could "lose 20 percent of [its] turnover" if it closed on Sundays. Sharon Waxman, *No Rest for Parisians in Sunday-Closing Debate*, CHICAGO TRIBUNE, Sept. 26, 1993, at 1C.

Closer to home, until recently, Massachusetts citizens responded to the state's ban on Sunday sales of alcohol by traveling to (and spending their money in) nearby New Hampshire, which has no such restriction. This loss of business prompted the Massachusetts government to pass a measure that allows Sunday sales of alcohol in towns located within ten miles of New Hampshire. Though a boost to stores located near the border, the measure prompted grumbling by merchants located outside the affected area. Aaron Zitner, *Communities Ponder Sunday Alcohol Sale*, BOSTON GLOBE, Aug. 12, 1990, (Metro), at 35.

with their families.<sup>122</sup> This may be the reason that organized labor has long been strenuously opposed to the repeal of Sunday closing laws.<sup>123</sup> Nevertheless, it remains obvious that the best interests of society as a whole, as well as public sentiment,<sup>124</sup> probably lie in their repeal.<sup>125</sup>

But Blue Laws in America persist. In New York, the legislature has recognized that observers of other holy days require special treatment. That exemption, however, is qualified by a requirement that they do not disturb those that observe Sundays as holy.<sup>126</sup> This, too, seems constitutionally suspect. This exemption, discussed previously,<sup>127</sup> clearly designates Sunday as having legal significance above all other days. It would be difficult to argue that there is no religious significance in such a choice. Finally, the requirement of forcing a defendant to prove his religious observance also appears to be beyond the powers of a civil code of laws.

At the very least, Blue Laws could be viewed as being "directed at" religious minorities. This should trigger a strict scrutiny stan-

---

<sup>122</sup> Such arguments are often illustrated with stories like that of "Helen," an elderly grandmother in Boston. Helen claimed that she had

always made a point of not working on Sundays because she cherished Sunday brunches with her children and, later, [with] her grandchildren.

But two years ago, after a wave of layoffs . . . Helen's boss cut back her hours so drastically that she was below the level required to qualify for health and pension benefits.

However, her boss had an "offer" for her: She could regain the hours she had lost—but only if she agreed to work on Sundays. "He had me over a barrel," Helen said. . . .

Don Aucoin, *Bosses, Workers Seem Divided on Changing Mass. Blue Laws*, BOSTON GLOBE, May 2, 1993, (Metro), at 29.

<sup>123</sup> See, e.g., Peter J. Howe, *Union Chiefs Assail Choice of Tocco for Massport*, BOSTON GLOBE, June 26, 1993, at B27, (condemning Massachusetts Governor Weld as being "anti-worker" for supporting a repeal of the Massachusetts Blue Laws).

<sup>124</sup> For example, Massachusetts Governor Weld's proposal to repeal the last vestigial remnants of Massachusetts's Blue Laws prompted much favorable response, including a positive editorial in the BOSTON GLOBE. *A Lighter Shade of Blue*, BOSTON GLOBE, April 29, 1993, at 14. When that proposal was derailed by State Representative Daniel Bosley, popular radio station WBCN awarded Bosley its unflattering "Richard Head Award." *Short Circuits*, BOSTON GLOBE, May 16, 1993, at 69.

The Massachusetts Council of Churches and the Massachusetts Catholic Conference expressed views at variance with the majority of public sentiment. They protested the repeal of the remnants of the Massachusetts Blue Laws, claiming that "[a]ny economic benefit to Sunday openings will eventually be offset by the loss to the common good, when 'all of the people never have a day of the week set apart for rest . . .'" James L. Franklin, *Weld's Economic Argument on Blue Laws Hit by Group*, BOSTON GLOBE, May 11, 1993, (Metro), at 23.

<sup>125</sup> For example, when most of Massachusetts's Blue Laws were repealed in 1983, the state experienced a financial boom. Over 6,000 new jobs were created and additional revenue of \$1.5 billion in retail sales was generated in only one year. Kenneth J. Cooper, *Sunday Shopping Architect of Blue Laws' End Reports Tax, Job Bonanza in Past Year*, BOSTON GLOBE, Mar. 28, 1984.

<sup>126</sup> See *supra* notes 46-52 and accompanying text.

<sup>127</sup> *Id.*

dard of review.<sup>128</sup>

In the final analysis, the Blue Laws must fail for an even more basic reason. At their root, the theories justifying their existence violate a basic legislative principle: a clear distinction between law and morals.<sup>129</sup> Any attempt to legislate rest on Sunday is necessarily an attempt to legislate religious observance, i.e., to legally enforce a day of rest. Though it can be argued that the Blue Laws merely legislate Sunday activities, and are therefore properly within the law-making scope, it is the theory behind them, their *raison d'être*, that will ultimately prove to be their fatal infirmity.

*Marc A. Stadtmauer*

---

<sup>128</sup> Pursuant to footnote 4 of *Carolene Prods.*, 304 U.S. at 152 n.4, and its progeny. See *supra* note 114 and accompanying text.

<sup>129</sup> See generally EDMOND CAHN, *THE MORAL DECISION*, 35-49 (2d ed. 1981).