

**A SOBERING LOOK AT WHY SUNDAY CLOSING LAWS VIOLATE THE SHERMAN ACT**  
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*Remember to observe the Sabbath day by keeping it holy. Six days a week are set apart for your daily duties and regular work, but the seventh day is a day of rest dedicated to the Lord your God. On that day no one in your household may do any kind of work.<sup>1</sup>*

**INTRODUCTION**

On April 8, 2010, an attempt to allow liquor stores to open on Sundays was overwhelmingly defeated in the Minnesota state house.<sup>2</sup> Minneapolis Rep. Phyllis Kahn, who has unsuccessfully tried to overturn the Sunday closing laws for years, “tried to put an amendment on another liquor-related bill, but it was voted down 110-20.”<sup>3</sup> Minnesota is one of many states that maintain a ban on Sunday liquor sales, even though Sunday sales of alcohol could bring in much-needed revenues to the state. Despite a recent

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<sup>1</sup> *Exodus* 20:8-10.

<sup>2</sup> Joe Kimball, *Stock up on Saturday Night: House Defeats Sunday Liquor Sales*, MINN. POST, Apr. 9, 2010, [http://www.minnpost.com/politicalagenda/2010/04/09/17256/stock\\_up\\_on\\_saturday\\_night\\_house\\_defeats\\_sunday\\_liquor\\_sales](http://www.minnpost.com/politicalagenda/2010/04/09/17256/stock_up_on_saturday_night_house_defeats_sunday_liquor_sales).

<sup>3</sup> *Id.*

momentum in opposing these bans, which date back to the seventeenth century in the United States, they continue to persist, notwithstanding repeated constitutional and political challenges.<sup>4</sup>

Sunday closing laws, often referred to as “blue laws,”<sup>5</sup> generally “proscribe all labor, business and other commercial activities on Sunday.”<sup>6</sup> These laws prohibit activity ranging from racing motor vehicles and dogs, hunting, operating pawnbrokers, conducting “games of chance,” operating adult-oriented establishments, and selling motor vehicles.<sup>7</sup> These laws, a fundamental organizing principle of retail practices in almost every state, greatly limit consumer choice. Sunday closing laws are as blanket a prohibition on retail as can exist; they disallow consensual retail transactions for an entire day out of every week.<sup>8</sup> Thus while the laws may be resilient to political and constitutional challenges, this paper is the first to look at whether they might be challenged as violations of federal antitrust laws.

This paper does not address all Sunday closing laws in effect today, but limits its

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<sup>4</sup> One explanation for why Sunday closing laws are difficult to repeal is that they create powerful alliances. See Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REG., May-June 1983, at 12, 13-14, available at <http://www.cato.org/pubs/regulation/regv7n3/v7n3-3.pdf> (describing the unlikely political alliance between “Baptists” and “Bootleggers” in supporting blue laws, because Baptists do so for religious reasons, and bootleggers do so to gain a one-day-per-week monopoly on the sale of liquor).

<sup>5</sup> During the colonial period, the term “blue laws” came to describe the various Sunday restrictions still in effect today. See DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, *BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS* 8 (1987). One hypothesis for the term’s derivation is that the 1665 Sunday closing laws of New Haven Colony were printed on blue paper. *Id.* Other scholars suggest the term refers to the expression “true blue,” which described the Puritans’ virtue and strictness. *Id.*

<sup>6</sup> See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 422 (1961).

<sup>7</sup> 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).

<sup>8</sup> While there is no estimate of how much market activity these laws deter rather than just displace to other days of the week, one recent proposal to eliminate Sunday closing laws in Bergen County, New Jersey is expected to yield \$65 million in tax revenues. See John Reitmeyer, *Gov. Chris Christie's Bid To End Sunday Shopping Ban Draws Opposition*, NJ.COM, Apr. 12, 2010, [http://www.nj.com/news/index.ssf/2010/04/gov\\_chris\\_christies\\_bid\\_to\\_end.html](http://www.nj.com/news/index.ssf/2010/04/gov_chris_christies_bid_to_end.html).

focus to Sunday closing laws having to do with alcohol.<sup>9</sup> As states move to modernize blue laws,<sup>10</sup> the laws most difficult to repeal have been Sunday closing laws restricting the sale of alcohol on Sunday. Alcohol-related blue laws are particularly relevant statutes not only because of their staying power, but because they are subject to the Twenty-First Amendment to the Constitution.<sup>11</sup> The evolution of the Court’s jurisprudence as to the intersection of the Commerce Clause and the Twenty-First Amendment has opened the door for a challenge to Sunday laws under the Sherman Antitrust Act.<sup>12</sup>

Part I provides a brief history of Sunday closing laws in the United States. Part II discusses failed constitutional challenges to Sunday closing laws generally under the First and Fourteenth Amendments. Part III describes the Supreme Court’s evolving jurisprudence on the intersection of the Commerce Clause and the Twenty-First Amendment, showing how over time, federal interests have grown in increasing importance relative to state interests. Part IV explains the strong anticompetitive effects

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<sup>9</sup> Blue laws as a general category are anticompetitive and at odds with the federal interests promoted by the Sherman Act. Thus future analyses may look to other currently existing Sunday closing laws. One question left outstanding is whether if the argument presented in this paper is correct, statutes mandating certain hours of operations may also run afoul of federal antitrust laws. However, such inquiries are very market specific and the argument in this paper does not necessarily extend to closing hours; there may be a stronger public health and safety connection to closing hours than Sunday closing laws.

<sup>10</sup> According to one commentator, “[i]n recent years, several states have attempted to ‘modernize’ their blue laws . . . [and] have even entirely eliminated all non-alcohol related restrictions.” Lawrence-Hammer, *supra* note 7, at 1278. Lawrence-Hammer’s research indicates that “Alaska, Arizona, California, Florida, Hawaii, Montana, Nebraska, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming have eliminated all non-alcohol related blue laws.” *Id.* n.31.

<sup>11</sup> Blue laws pertaining to alcohol refer to the prohibition of the sale of alcohol *off-premise*—that is, consumption that takes place in a different location than the sale (such as when alcohol is bought in liquor or grocery stores and consumed at home). Thus many states that prohibit off-premise alcohol sales allow individuals to purchase and consume alcohol at bars and restaurants, otherwise known as *on-premise* consumption. Compare D.C. CODE § 25-723(b)(3) (2010) (on-premise), with D.C. CODE § 25-722 (2010) (off-premise). For a survey of existing off-premise and on-premise state Sunday closing laws, see the Appendix, excerpted from DISTILLED SPIRITS COUNCIL, SUMMARY OF STATE LAWS & REGULATIONS RELATING TO DISTILLED SPIRITS (2006).

<sup>12</sup> 15 U.S.C. § 1 (2006). Section 1 of the Sherman Act makes unlawful “every contract, combination or conspiracy, in restraint of trade or commerce among the several States.” Section 2 of the Sherman Act makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.”

of Sunday closing laws. Part V evaluates the countervailing state interests in Sunday closing laws, and discusses the lack of empirical literature demonstrating the efficacy of Sunday closing laws in promoting public health and safety objectives. Part VI concludes that these laws unreasonably restrain trade and might not withstand a challenge under the Sherman Antitrust Act.

## I. BRIEF HISTORY OF SUNDAY CLOSING LAWS

Sunday closing laws predate the American experiment. Found in “both books of the Bible, Codex Justinian, Codex Theodosian, the medieval councils . . . , [and] laws and canons set down by the church, [and] the statutes of English monarchs,” prohibitions on Sunday activity have an “extensive history among inhabitants of the Western world.”<sup>13</sup> The fact that Sunday laws predate Christianity has been used to argue that Sunday has been recognized as a day of rest even before it was religiously termed the “Lord’s day,” because the Sunday holiday was a part of pagan life—the “venerable day of the sun.”<sup>14</sup>

Sunday closing laws in America have their background in English legislation dating to the thirteenth century.<sup>15</sup> It is not disputed that American Sunday closing laws have an entirely religious historical basis. While Puritans may have fled to America to escape rigid religious laws in England, Sunday laws were among their first statutory

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<sup>13</sup> LABAND & HEINBUCK, *supra* note 5, at 15. For a detailed discussion of the history of Sunday closing laws, dating back to Emperor Constantine, see Franklin E. Bondonno, *First Amendment Right and Sunday Closing Laws*, 31 LINCOLN L. REV. 51 (2003).

<sup>14</sup> LABAND & HEINBUCK, *supra* note 5, at 8-9.

<sup>15</sup> *McGowan v. Maryland*, 366 U.S. 420, 431-32 (1961) (“In 1237, Henry III forbade the frequenting of markets on Sunday; the Sunday showing of wools at the staple was banned by Edward III in 1354; in 1409, Henry IV prohibited the playing of unlawful games on Sunday; Henry VI proscribed Sunday fairs in churchyards in 1444 and, four years later, made unlawful all fairs and markets and all showings of any goods or merchandise; Edward VI disallowed Sunday bodily labor by several injunctions in the mid-sixteenth century; various Sunday sports and amusements were restricted in 1625 by Charles I. Lewis. . . .”).

enactments.<sup>16</sup> While at first the laws provided for affirmative duties—Sunday Church attendance<sup>17</sup>—over time, the laws evolved to prohibit work, amusement, or time free from religious observance. In an effort to promote “religious and pious exercises,”<sup>18</sup> the statutes forbade “worldly” activities.<sup>19</sup> The affirmative legal duties to attend Church could not withstand the First Amendment anti-Establishment mandate; the prohibitions on “worldly” activities continued to persist. Over time, such laws began to move away from an explicitly stated religious purpose, stressing that their objective was to ensure “relaxation from labour [and] the cares of business” and “moral reflections.”<sup>20</sup> By the end of the eighteenth century, “Sunday legislation could not be said to have a solely religious basis.”<sup>21</sup> Instead of mandating a day to observe the Sabbath, Sunday laws took a more secular, public health purpose of providing a day of rest and recuperation from a week of work.<sup>22</sup> These laws were so far-reaching that even George Washington was not immune

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<sup>16</sup> Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 HARV. L. REV. 729, 729 (1960) (citing The Law Concerning Liberty of Conscience, 1700, 2 Pa. Stats. at Large 34 (1700), which provided that no one was to be compelled to attend church, but that all were to abstain from usual toil and labor, in accord with “the example of the primitive Christians,” in order that they might contemplate God) [hereinafter *State Sunday Laws*].

<sup>17</sup> The first Sunday law punished non-attendance at Church on Sunday with death. See AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 33 (William Addison Blakely ed., 2000) (“Every man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day . . . upon pain for the first fault to lose their provision and the allowance for the whole week following; for the second, to lose the said allowance and also be whipt; and for the third to *suffer death*.” (emphasis added)).

<sup>18</sup> E.g., Act of March 5, 1623, § 2, 1 Laws of Va. 123 (Hening 1823).

<sup>19</sup> Law of Jan. 12, 1706, 2 Pa. Stats. at Large 175-76 (1706); see also Law of 1668, Colonial Laws of Mass. 134 (Whitmore 1887).

<sup>20</sup> *State Sunday Laws*, supra note 16, at 729 (citing Act of March 8, 1792, Mass. Laws & Resolves 1791, ch. 58, at 351-52; and Act of March 3, 1797, Vt. Rev. Laws, ch. XXVI, No. 1 (1808)).

<sup>21</sup> *State Sunday Laws*, supra note 16, at 730.

<sup>22</sup> For extensive documentation of cases and statutes concerning the observance of Sunday closing laws before the twentieth century, see GEORGE E. HARRIS, A TREATISE ON SUNDAY LAWS: THE SABBATH—THE LORD’S DAY, ITS HISTORY AND OBSERVANCE, CIVIL AND CRIMINAL (1892). See also JAMES T. RINGGOLD, LEGAL ASPECTS OF THE FIRST DAY OF THE WEEK (1891).

from prosecution under Sabbath laws in 1789, as he was challenged for traveling between New York<sup>23</sup> and Connecticut (ironically) to attend a worship service.<sup>24</sup>

## II. THE FAILURE OF PREVIOUS CONSTITUTIONAL CHALLENGES TO SUNDAY CLOSING LAWS

In light of their overtly religious origins, it is not surprising that Sunday closing laws have frequently been challenged as unconstitutional establishments of religion in violation of the First Amendment.<sup>25</sup> And yet, despite the Supreme Court's recognition that such laws originally had religious purposes,<sup>26</sup> the Court has repeatedly upheld them against an onslaught of constitutional challenges.<sup>27</sup> The Court has accepted that these laws currently have a secular purpose of creating a uniform day of rest. In the Court's words, "the air of [Sunday] is one of relaxation rather than one of religion."<sup>28</sup>

The first Supreme Court case that addressed the constitutionality of Sunday closing laws was in 1885, *Soon Hing v. Crowley*.<sup>29</sup> A San Francisco ordinance that prohibited laundry services on Sunday was upheld as a valid exercise of the state's police power. The Court reasoned that "[l]aws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral

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<sup>23</sup> For a case study of New York Sunday closing laws, see Marc A. Stadtmauer, *Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause*, 12 CARDOZO ARTS & ENT. L.J. 213 (1994).

<sup>24</sup> LABAND & HEINBUCK, *supra* note 5, at 38 (citing *The President and the Tithing-man*, COLUMBIAN CENTINEL, Dec. 1789).

<sup>25</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion."); *see, e.g.*, *McGowan v. Maryland*, 366 U.S. 420 (1961).

<sup>26</sup> *McGowan*, 366 U.S. at 431 ("[T]he original laws which dealt with Sunday labor were motivated by religious forces.").

<sup>27</sup> *See id.*; *see also* *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Koshier Super Market, Inc.*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown, Inc., v. McGinley*, 366 U.S. 582 (1961).

<sup>28</sup> *McGowan*, 366 U.S. at 448; *see also id.* at 452 ("Sunday is a day apart from all others. The cause is irrelevant; the fact exists.").

<sup>29</sup> 113 U.S. 703 (1885).

debasement which comes from uninterrupted labor.”<sup>30</sup> Decades of litigation against Sunday laws followed after *Soon Hing*, and in each instance the Sunday law was upheld as having a sufficiently secular purpose.<sup>31</sup> Then in 1961, in what might be deemed the zenith of Supreme Court discourse on Sunday closing laws, the Supreme Court heard four cases on the constitutionality of the laws.

In the first of the major line of cases, *McGowan v. Maryland*, seven defendants were convicted for operating department stores in violation of Maryland’s Sunday closing laws.<sup>32</sup> The plaintiff-defendants argued that the laws violated the Equal Protection Clause of the Fourteenth Amendment for several reasons. First they contended, “the classifications contained in the statutes concerning which commodities may or may not be sold on Sunday are without rational and substantial relation to the object of the legislation.”<sup>33</sup> They argued that it was “capricious” to criminalize various amusements but allow “slot machines, pin-ball machines, and bingo” on Sundays.<sup>34</sup> The Court rejected this argument, stating that the “record is barren of any indication” that the legislature could not reasonably “find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day.”<sup>35</sup> Second, plaintiffs argued that the statute unfairly

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<sup>30</sup> *Soon Hing*, 113 U.S. at 710.

<sup>31</sup> *Stadtmauer*, *supra* note 23, at 223 n.59 (citing *Hennington v. Georgia*, 163 U.S. 299 (1896) (upholding blue laws regulating freight train operation); *Petit v. Minnesota*, 177 U.S. 164 (1900) (upholding blue laws regulating barber shops); *North Carolina v. McGee*, 75 S.E.2d 783 (N.C. 1953) (upholding blue laws regulating drive-in movie theaters); *Gundaker Central Motors, Inc. v. Gassert*, 127 A.2d 566 (N.J. 1956) (upholding blue law regulation of automobile dealers); *People v. Friedman*, 96 N.E.2d 184 (N.Y. 1950) (upholding Sunday closing laws as not per se in violation of either the First Amendment or the Equal Protection Clauses); *Ohio v. Kidd*, 150 N.E.2d 413 (Ohio 1958) (affirming convictions of a storekeeper under Sunday closing law)).

<sup>32</sup> They were indicted for the Sunday sale of a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine. *McGowan*, 366 U.S. at 422.

<sup>33</sup> *McGowan*, 366 U.S. at 425.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 426.

discriminated against different retailers because it would privilege certain areas when granting exceptions to Sunday retail. The Court rejected this argument because it had previously “held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite.”<sup>36</sup> Finally, the plaintiffs argued to permit “only certain vendors . . . to sell merchandise customarily sold at [certain] places while forbidding its sale by other vendors of this merchandise,” violated the Equal Protection Clause.<sup>37</sup> The Court found that “these commodities, [might reasonably be found] necessary for the health and recreation of its citizens, should only be sold on Sunday by those vendors at the locations where the commodities are most likely to be immediately put to use.”<sup>38</sup>

The Court then turned to evaluate whether the laws violated the Establishment Clause of the First Amendment. The Court described the history of Sunday closing laws, conceding their overtly religious origins. But after tracing the trajectory of the laws through history, the Court found that recent laws have secular purposes such as “making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week’s work to come.”<sup>39</sup> While the Court acknowledged the dangers of allowing religious Establishment, it “is equally true that the ‘Establishment’ Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some

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<sup>36</sup> *Id.* at 427.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 428.

<sup>39</sup> *Id.* at 434.



or all religions.”<sup>40</sup> Thus the dual purpose of Sunday closing laws saved them from being struck down on First Amendment grounds.

In a companion case to *McGowan*, in *Two Guys from Harrison-Allentown, Inc. v. McGinley*<sup>41</sup> the Court examined a Sunday closing law very similar to the one in *McGowan*, but with different “provisions for exemptions from the general proscription of Sunday sales and activities.”<sup>42</sup> Appellant challenged the Sunday closing laws as violating the Equal Protection Clause “because, without rational basis, the statute singles out only twenty specified commodities.”<sup>43</sup> Relying heavily on *McGowan*, the Court once again upheld the Sunday restrictions because “[i]t was within the power of the legislature to have concluded that these businesses were particularly disrupting the intended atmosphere of the day.”<sup>44</sup> It then upheld the laws as consistent with the First Amendment, as “neither the statute’s purpose nor its effect is religious.”<sup>45</sup>

In a slight variation on these cases, in *Braunfeld v. Brown*<sup>46</sup> and *Gallagher v. Crown Kosher Super Market*,<sup>47</sup> Orthodox Jewish merchants closed their stores on Saturdays, in keeping with the tenets of their Jewish religion.<sup>48</sup> They therefore opened their stores on Sunday, to make up for lost business, directly violating Sunday closing laws.<sup>49</sup> The Court, in both cases, reiterated “the evolution of Sunday closing laws from

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<sup>40</sup> *Id.* at 442 (“Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy.”).

<sup>41</sup> 366 U.S. 582 (1961).

<sup>42</sup> *McGinley*, 366 U.S. at 584. For a detailed discussion of the Sunday prohibitions in the Pennsylvania law, see *McGinley*, 366 U.S. at 586-87.

<sup>43</sup> *Id.* at 589.

<sup>44</sup> *Id.* at 591.

<sup>45</sup> *Id.* at 598.

<sup>46</sup> 366 U.S. 599 (1961).

<sup>47</sup> 366 U.S. 617 (1961).

<sup>48</sup> For more extensive discussion of these cases, see Bondonno, *supra* note 13.

<sup>49</sup> The basic argument the appellants put forth is that the enforcement against them of the Pennsylvania Sunday closing law will prohibit the free exercise of their religion. This is because, “due to the statute’s

wholly religious sanctions to legislation concerned with the establishment of a day of community tranquility,”<sup>50</sup> and that the state is rightfully preoccupied “with improving the health, safety, morals and general well-being of [its] citizens.”<sup>51</sup> Ultimately, the Court, in both cases, did not view the Sunday closing laws as a prohibition on religious practice. Rather, they viewed the laws as making religious observance more expensive, “[f]ully recognizing that the alternatives . . . —retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice.”<sup>52</sup> Yet the Court found this “wholly different than when the legislation attempts to make a religious practice itself unlawful.”<sup>53</sup> While the Court endorsed the policy of giving an exception from Sunday regulations for individuals who entertained a day of rest other than Sunday, the Court’s ultimate “concern is not with the wisdom of legislation but with its constitutional limitation.”<sup>54</sup> Commentators have disagreed with this viewpoint, explaining that “[i]t appears . . . the Supreme Court has lowered the ‘preferred place’ on which a vital First Amendment guarantee rests, by allowing a state indirectly to compel a person to choose between diligent practice of his religion and economic survival in his

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compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday.” *Braunfeld*, 366 U.S. at 602. The appellants argued that this would either compel appellants to give up their Sabbath observance, or put appellants at a serious economic disadvantage were they to adhere to their Sabbath. The underlying premise to these arguments is that “if the free exercise of appellants’ religion is impeded, that religion is being subjected to discriminatory treatment by the State.” *Id.*

<sup>50</sup> *Id.* at 602.

<sup>51</sup> *Id.* at 603.

<sup>52</sup> *Id.* at 605-06.

<sup>53</sup> *Id.* at 606.

<sup>54</sup> *Id.* at 606; *see also* *Whitney Stores, Inc. v. Summerford*, 280 F. Supp. 406 (D.C.S.C. 1968) (upholding Sunday closing laws against an Eight Amendment challenge that the criminal fines were “cruel and unusual” punishment).

chosen occupation.”<sup>55</sup> Despite this criticism, there are four major Supreme Court precedents upholding the constitutionality of Sunday restrictions.

Admittedly, the Supreme Court’s First Amendment jurisprudence has changed since the 1960s line of Sunday closing cases, most notably with the *Lemon* test of *Lemon v. Kurtzman*.<sup>56</sup> And some recent scholars have argued that the evolution of the Supreme Court’s Establishment doctrine would lead to decisions that reject the constitutionality of Sunday laws on First Amendment grounds.<sup>57</sup> And yet, there seems to be a “willingness of the Courts to work around established constitutional standards to preserve Sunday Legislation.”<sup>58</sup> Thus far, there is not much momentum or hope that these laws will be overturned on Equal Protection or First Amendment grounds, so long as courts insist that these laws are secular in nature and purpose. Thus this paper offers another avenue for attacking these laws in the form of federal antitrust legislation.

### III. THE TWENTY-FIRST AMENDMENT: HOW IT RELATES TO THE COMMERCE CLAUSE

Antitrust is a very industry-specific discipline. For that reason, this paper focuses on alcohol restrictions to make the argument that some Sunday closing laws are in violation of the Sherman Antitrust Act. While the anticompetitive effects of Sunday closing laws can be described generally, alcohol provides a particularly interesting case study because its regulation is directly provided for in the Constitution through the Twenty-First Amendment.

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<sup>55</sup> Jerome A. Barron, *Sunday in North America*, 79 HARV. L. REV. 42, 53 (1965) (comparing Canadian and U.S. Sunday closing legislation).

<sup>56</sup> 403 U.S. 602 (1971).

<sup>57</sup> Lawrence-Hammer, *supra* note 7, at 1305 (“Nonetheless, even when looking beyond the general purpose of the Establishment Clause to the specific tests employed by the Supreme Court, blue laws cannot withstand constitutional challenge.”).

<sup>58</sup> Bondonno, *supra* note 13.

While the Twenty-First Amendment is known best for its role in abolishing the Prohibition established in the Eighteenth Amendment,<sup>59</sup> its legal substance lies in Section 2 of the Amendment. Section 2 of the Twenty-First Amendment states, in its entirety, that “[t]he transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”<sup>60</sup> The text of the Amendment does not by itself make clear where the Twenty-First Amendment ends and the reach of the Commerce Clause begins. Judges and academics have long debated whether Section 2, in granting states the authority to regulate interstate commerce in alcoholic beverages, trumps the Commerce Clause grant of such power to the federal government for interstate commerce generally.<sup>61</sup> This question is critical to this paper’s argument because if the Twenty-First Amendment gave unfettered control to states to regulate alcohol, irrespective of federal interests, then the Sherman Antitrust Act should have no bearing on Sunday closing laws pertaining to liquor.

After the end of Prohibition, the prevailing sentiment was that states and localities controlled the regulation of liquor sales.<sup>62</sup> This reading of the Amendment came into conflict with the ever-expansive view of the Commerce Clause, which affirmatively grants to Congress the power to “regulate Commerce . . . among the Several States.”<sup>63</sup> The Twenty-First Amendment was also seen as running afoul of the Dormant Commerce

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<sup>59</sup> U.S. CONST. amend. XXI, § 1 (“The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”).

<sup>60</sup> U.S. CONST. amend. XXI, § 2.

<sup>61</sup> See, e.g., Vijay Shanker, Note, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 372-83 (1999) (remarking on the historical development of Twenty-First Amendment and Commerce Clause jurisprudence).

<sup>62</sup> See Sidney J. Spaeth, Note, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 179-80 (1991).

<sup>63</sup> U.S. CONST. art. I, § 8, cl. 3.

Clause, the negative corollary to the Commerce Clause that prohibits states from passing laws that burden interstate commerce.<sup>64</sup> To avoid this conflict, the Supreme Court in *State Board of Equalization v. Young's Market Co.* found the Twenty-First Amendment to create an exception to the Dormant Commerce clause for alcohol, and found that states had plenary authority to regulate alcohol.<sup>65</sup> The case dealt with a statute that imposed a license-fee of \$500 for the privilege of importing beer to any place within a state's borders. While the Court acknowledged that such a fee would have otherwise been struck down as an unconstitutional violation of the Commerce Clause, the Twenty-First Amendment effectively "confer[ed] upon the state the power to forbid all importations which do not comply with the conditions which it prescribes."<sup>66</sup> This line of reasoning was reaffirmed three years later in *Indianapolis Brewing Co. v. Liquor Control Commission*,<sup>67</sup> making clear that with respect to the Commerce Clause, alcohol was different. Whatever federal interest existed in the regulation of liquor commerce, it gave way to the constitutional allocation of power that granted states great authority to regulate the sale and importation of liquor within their borders.

This unfettered state dominance over alcohol regulation did not withstand the test of time. Twenty years after the *Young's Market* decision, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,<sup>68</sup> the Court took a strong stand against the idea that the Twenty-First Amendment repudiated the Commerce Clause. The Court described such a notion as

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<sup>64</sup> See *Lewis v. BT Inv. Managers*, 447 U.S. 27, 35-36 (1980).

<sup>65</sup> 299 U.S. 59 (1936).

<sup>66</sup> *Id.* at 62.

<sup>67</sup> 305 U.S. 391 (1939) (upholding Michigan statute that banned liquor dealers from selling any beer manufactured in a state that legally discriminated against Michigan beer).

<sup>68</sup> 377 U.S. 324 (1964).

“patently bizarre,” and “an absurd oversimplification.”<sup>69</sup> Rather, the Court recognized that “[b]oth the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”<sup>70</sup> Thus the Court struck down a statute that prohibited a company from selling bottles of liquor to passengers at New York airports for delivery upon their arrival at their foreign destinations. The Court granted that New York had “broad power under the Twenty-First Amendment to supervise and regulate the transportation of liquor through its territory,” and yet the state completely failed to establish “the diversion of so much as one bottle of plaintiff’s merchandise to users within the state of New York.”<sup>71</sup> *Idlewild* ushered in a new reading of the Twenty-First Amendment, one that sought to balance state and federal interests. As the next Section will show, this balancing increasingly looked to empirical studies to help evaluate the strength of the federal and state interests in liquor regulation.

#### A. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*

This balancing hinted at in *Idlewild* was formally described in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*,<sup>72</sup> a leading case defining the interplay between the Twenty-First Amendment and the Commerce Clause. *Midcal* had to do with resale price maintenance in the wine industry. The issue in the case was whether state laws that effectively promoted resale price maintenance, which at the time was per se a

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<sup>69</sup> *Id.* at 332 (citing *Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173 (1939) (holding that the Court sees “no substance in th[e] contention” that the “Twenty-first Amendment . . . gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause . . .”).

<sup>70</sup> *Id.* at 332.

<sup>71</sup> *Id.* at 328.

<sup>72</sup> 445 U.S. 97 (1980).

violation of the Sherman Act, could be upheld. It was clear to the Court that the state was acting in a way precluded by the Commerce Clause.<sup>73</sup> The question for the Court was whether the state's anticompetitive practice was protected either by the "state action" doctrine of *Parker v. Brown*<sup>74</sup> or Section 2 of the Twenty-First Amendment.

First the *Midcal* Court entertained the possibility that the state's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker v. Brown*, a case standing for the proposition that the Sherman Act did not intend to nullify state powers. In *Parker*, the Court found that because the Sherman Act is directed against "individual and not state action,"<sup>75</sup> the Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."<sup>76</sup> On the other hand, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."<sup>77</sup> Thus, for a regulatory program to receive *Parker* immunity, the state has to establish (1) that the challenged restraint was "clearly articulated and affirmatively expressed as state policy"; and (2) the policy is "actively supervised" by the state itself.<sup>78</sup>

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<sup>73</sup> See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407 (1911) (observing that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]").

<sup>74</sup> 317 U.S. 341 (1943).

<sup>75</sup> *Id.* at 352.

<sup>76</sup> *Id.* at 350-51.

<sup>77</sup> *Id.* at 351 (citing *Northern Securities Co. v. United States*, 193 U.S. 197 (1904)).

<sup>78</sup> *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 100, 105 (1980) (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)); see also Stephen C. Sherrill, Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898, 916 (1977).

In light of this test, the *Midcal* Court did not find that the liquor policies under review were sufficiently overseen by California to merit immunity from the Sherman Act:

The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any “pointed reexamination” of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.<sup>79</sup>

Having decided that California did not meet the criteria for *Parker* immunity, the *Midcal* Court then entertained whether California’s system of wine pricing was protected under the Twenty-First Amendment.

The Court acknowledged its early decisions that “each State holds great powers over the importation of liquor from other jurisdictions,” citing *Young’s Market*.<sup>80</sup> It went on, however, to say that “even when the States had acted under the explicit terms of the Amendment,” the Court resisted the contention that Section 2 “freed the States from all restrictions upon the police power to be found in other provisions of the Constitution.”<sup>81</sup> This “wide latitude” given to state liquor regulation does not obviate the need to take into consideration federal interests in liquor-related matters.<sup>82</sup> Thus, while the Federal government’s power is “directly qualified by [Section] 2,” the Commerce Clause still

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<sup>79</sup> *Midcal*, 445 U.S. at 106.

<sup>80</sup> *Id.* at 107 (citing *State Board v. Young’s Market Co.*, 299 U.S. 59 (1936)).

<sup>81</sup> *Id.* at 108.

<sup>82</sup> *Id.* The Court then cited cases establishing that the Twenty-First Amendment did not trump other constitutional Amendments. *See* *Craig v. Boren*, 429 U.S. 190 (1976) (finding the Twenty-First Amendment does not trump Equal Protection under Fourteenth Amendment); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (finding the Twenty-First Amendment does not trump Equal Protection under Fourteenth Amendment); *Dep’t of Revenue v. James Beam Co.*, 377 U.S. 341 (1964) (finding the Twenty-First Amendment does not trump Export-Import Clause); *Nippert v. Richmond*, 327 U.S. 416, 425 n.15 (1946) (“[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State’s regulation squarely conflicts with regulation imposed by Congress . . .”).



reserves some authority to the federal government over liquor.<sup>83</sup> The Court then outlined the “pragmatic effort to harmonize state and federal powers,” citing several “decisions [that] demonstrate . . . there is no bright line between federal and state powers over liquor.”<sup>84</sup> While states have tremendous latitude, their regulations may be subject to the federal commerce power “in appropriate situations.”<sup>85</sup> The Court found that a case-by-case analysis was the appropriate analytical tool because the “competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a ‘concrete case.’”<sup>86</sup>

*Midcal* then went on to stress that “[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”<sup>87</sup> While the federal interest is expressed statutorily rather than constitutionally, the Sherman Act has its grounding in the Commerce Clause. Thus when the Court weighed California state interests, it cast them in light of the critical importance it gave to the Sherman Act’s pro-competition objectives. The stated interests California put forth for its resale maintenance policy were “to promote temperance and orderly market conditions.”<sup>88</sup> Then, and most critically for purposes of this paper, the Court evaluated the empirical evidence in support of the state’s interest. The Court “found little correlation between resale price maintenance and temperance,”<sup>89</sup> by relying on a state study “showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in

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<sup>83</sup> *Midcal*, 445 U.S. at 108.

<sup>84</sup> *Id.* at 109.

<sup>85</sup> *Id.* at 110.

<sup>86</sup> *Id.* (citing *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964)).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 112.

<sup>89</sup> *Id.*

effect.”<sup>90</sup> This study, and others with similar results “raise a doubt regarding the justification for such laws on the ground that they promote temperance.”<sup>91</sup> It cited other studies to reject the idea that resale price maintenance protected orderly market conditions.<sup>92</sup> Thus the Court concluded, “We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition.”<sup>93</sup> The “unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.”<sup>94</sup>

The legacy of *Midcal* is that the states no longer have such unfettered power over the regulation of alcohol that they can ignore federal interests. For a state policy to be protected by Section 2 of the Twenty-First Amendment when there is a strong countervailing federal interest, the state must provide not only important state interests, but also empirically justify the link between its policy and those interests. Thus the continuation of Sunday closing laws requires some showing that they are serving a purpose that is sufficient to overcome the federal pro-competition interests espoused in the Sherman Act.

### *B. Granholm v. Heald*

Recently, the Court has gone even further in articulating the weight that federal interests deserve when courts evaluate state regulations under Section 2 of the Twenty-First Amendment. In *Granholm v. Heald*,<sup>95</sup> the Supreme Court examined New York and Michigan regulations of wine sale and importation that allowed in-state—but not out-of-

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* 112-13.

<sup>93</sup> *Id.* at 113.

<sup>94</sup> *Id.* at 114.

<sup>95</sup> 544 U.S. 460 (2005).

state—wineries to make direct sales to consumers.<sup>96</sup> Out-of-state plaintiffs claimed this scheme violated the Commerce Clause. New York, Michigan, and in-state wholesalers argued the ban was a valid exercise of state power under the Twenty-First Amendment. The Court found that each state’s law violates the Commerce Clause in a manner that is “neither authorized nor permitted by the Twenty-first Amendment.”<sup>97</sup>

Justice Kennedy launched his legal analysis stating “[t]ime and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’”<sup>98</sup> This widely-held tenet of Constitutional law, that “citizens [have a] right to have access to the markets of other States on equal terms,” motivated Justice Kennedy’s opposition to a law that “risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid.”<sup>99</sup> But more than just restating a well-established proposition of Dormant Commerce Clause

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<sup>96</sup> This case has led to a spike in scholarship about the intersection of the Commerce Clause and the Twenty-First Amendment. *See, e.g.*, Gerald B. Mcnamara, *Free the Grapes: The Commerce Clause Versus the Twenty-First Amendment with Regard to Interstate Shipment of Wine in America*, 43 DUQ. L. REV. 113 (2004); Jason E. Prince, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, The Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563 (2004); Clause Thomas E. Rutledge, *Who’s Selling the Next Round: Wines, State Lines, the Twenty-First amendment and the Commerce Clause*, 33 N. KY. L. REV. 1 (2006); Nancy Williams, *The Dormant Commerce Clause and the Twenty-First Amendment—Reconciling the Two Constitutional Provisions To Allow the Direct Shipment of Wine*, 75 MISS. L.J. 619 (2006); Michael A. Chichester, Jr., Note, *The Twenty-First Amendment Accommodates the Dormant Commerce Clause: Did the Supreme Court Awaken a Sleeping Giant with its Decision in Granholm v. Heald?*, 84 U. DET. MERCY L. REV. 161 (2007); Robert L. Jones III, Note, *Well-Aged and Finally Uncorked: The Supreme Court Decides Whether the Twenty-First Amendment Grants States the Power To Avoid the Dormant Commerce Clause*, 28 U. ARK. LITTLE ROCK L. REV. 483 (2006); Justin Lemaire, Note, *Unmixing a Jurisprudential Cocktail: Reconciling the Twenty-First Amendment, The Dormant Commerce Clause, and Federal Appellate Jurisprudence to Judge the Constitutionality of State Laws Restricting Direct Shipment of Alcohol*, 79 NOTRE DAME L. REV. 1613 (2004); Lisa Lucas, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899 (2005).

<sup>97</sup> *Granholm*, 544 U.S. at 466.

<sup>98</sup> *Id.* at 472 (citing *Ore. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Ore.*, 511 U.S. 93, 99 (1994)).

<sup>99</sup> *Id.* at 473.

jurisprudence, *Granholm* went further than *Midcal* in setting the limits of what states can justifiably do under Section 2 of the Twenty-First Amendment.

Justice Kennedy briefly traced the long history of the temperance movement and its effect on Supreme Court jurisprudence.<sup>100</sup> Specifically, Justice Kennedy focused on the 1890 Wilson Act,<sup>101</sup> which empowered “the States to regulate imported liquor on the same terms as domestic liquor,”<sup>102</sup> and the 1913 Webb-Kenyon Act,<sup>103</sup> which empowered states “to forbid shipments of alcohol to consumers for personal use, provided that the States treated in-state and out-of-state liquor on the same terms.”<sup>104</sup> Ultimately, Justice Kennedy found that when the Twenty-First Amendment was enacted, Section 2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts: “The wording of § 2 of the Twenty-First Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers’ clear intention of constitutionalizing the Commerce Clause framework established under those statutes.”<sup>105</sup> Thus, “[t]he Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-

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<sup>100</sup> See *Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding state laws banning sale of alcohol beverages prior to either the Eighteen or Twenty-first Amendments). Afterwards, “the ratification of the Eighteenth Amendment in 1919 provided a brief respite from the legal battles over the validity of state liquor regulations. With the ratification of the Twenty-first Amendment 14 years later, however, nationwide Prohibition came to an end.” *Granholm*, 544 U.S. at 484.

<sup>101</sup> An Act To Limit the Effect of the Regulations of Commerce Between the Several States and with Foreign Countries in Certain Cases [Wilson Act], 26 Stat. 313 (codified at 27 U.S.C. § 121 (2006)) (“All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”).

<sup>102</sup> *Granholm*, 544 U.S. at 478.

<sup>103</sup> An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases [Webb-Kenyon Act], 37 Stat. 699 (codified at 27 U.S.C. § 122 (2006)) (“The shipment or transportation . . . of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State . . . into any other State . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited.”).

<sup>104</sup> *Granholm*, 544 U.S. at 481.

<sup>105</sup> *Id.* at 484.

state goods, a privilege they had not enjoyed at any earlier time.”<sup>106</sup> The Court reaffirmed that the Twenty-First Amendment did not save state laws that violated the Constitution,<sup>107</sup> or abrogate Congressional authority over liquor regulation,<sup>108</sup> or limit the nondiscrimination principle of the Commerce Clause.<sup>109</sup> That is, “[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.”<sup>110</sup>

Notably, the Court once again refused to end its inquiry before evaluating the empirical evidence supporting the states’ purported interest in its direct-shipment laws. The states had offered two primary justifications for restricting direct shipments from out-of-state wineries: “keeping alcohol out of the hands of minors and facilitating tax collection.”<sup>111</sup> The Court found that the states did not provide sufficient evidence that the “purchase of wine over the Internet by minors is a problem,” and even cited “some evidence to the contrary.”<sup>112</sup> The Court needed “concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors,” so as not to rely solely on “the States’ unsupported assertions.”<sup>113</sup> The Court concluded that its Commerce Clause jurisprudence “demand[s] more than mere speculation to support discrimination against

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<sup>106</sup> *Id.* at 484-85.

<sup>107</sup> *See* sources cited *supra* note 82.

<sup>108</sup> *Granholm*, 544 U.S. at 487.

<sup>109</sup> *Id.* (citing *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst.*, 491 U.S. 324 (1989)).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 489.

<sup>112</sup> *Id.* at 490 (“A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors’ increased access to wine. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who . . . want instant gratification.”).

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

out-of-state goods.”<sup>114</sup> The Twenty-First Amendment could not insulate a state’s regulatory agenda from Commerce Clause scrutiny.

*Granholm* has two major implications for states seeking to justify the continued existence of Sunday closing laws. First, the Court evaluates the empirical link between a states’ purported interest in a policy and the policy’s actual effects. Second, there has been an increasing tendency for the Court to prioritize the federal interests protected by the Sherman Act, especially where a state policy discriminates between in-state and out-of-state interests. In light of these recent doctrinal developments concerning the Commerce Clause and the Twenty-First Amendment, states will have a more difficult time defending Sunday Laws that so clearly restrain trade.

#### IV. THE ANTICOMPETITIVE EFFECTS OF SUNDAY CLOSING LAWS

The Supreme Court has held in *Liquor Corp. v. Duffy*,<sup>115</sup> that “the federal antitrust laws preempt state laws authorizing or compelling private parties to engage in anticompetitive behavior.”<sup>116</sup> That is, where “private actors are . . . granted ‘a degree of private regulatory power’ . . . the regulatory scheme may be attacked under § 1” as a “hybrid” restraint.”<sup>117</sup> Courts will inquire whether the state legislation “mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.”<sup>118</sup>

There is a strong case to be made that Sunday closing laws meet this standard and are “in restraint of trade or commerce” within the meaning of Section 1 of the Sherman

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<sup>114</sup> *Id.* at 492.

<sup>115</sup> 479 U.S. 335 (1987).

<sup>116</sup> *Id.* at 345 n.8.

<sup>117</sup> *Id.* (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) (Stevens, J., concurring)).

<sup>118</sup> *Rice*, 458 U.S. at 661.

Act. Sunday closing laws limit consensual interactions and consumer welfare by artificially restricting the consumption of goods to certain days. In fact, Justice Holmes dissenting in *Lochner v. New York*, specifically cited Sunday closing laws as an example (along with usury laws) as 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>119</sup>

There are several reasons that Sunday closing laws are anticompetitive. First, Sunday laws restrain *sale* of alcohol, not *consumption* of alcohol. This means that individuals may still drink on Sunday provided they are able to plan around Sunday closing restrictions by purchasing alcohol on other days, or willing to pay the associated costs of drinking on-premises where alcohol may be served. Sunday closing laws treat on-premise and off-premise sale differently,<sup>120</sup> granting market power to licensed restaurants, hotels, and bars to sell alcohol when liquor stores, grocery stores, and gas stations cannot. Thus Sunday closing laws distort the alcohol retail market by allowing a few types of market participants near-monopoly power in alcohol sales on Sundays.

One consequence of this market intervention may be to preference in-state economic interests over out-of-state economic interests. However it is hard to make this claim about Sunday closing laws *generally* because state regulations vary widely with respect to who can sell liquor in the state. For example, in the nineteen alcoholic beverage control (“ABC”) states, the state government exclusively runs the specialty

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<sup>119</sup> 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>120</sup> See the Appendix for an overview of the statutory differences between on-premise and off-premise Sunday closing laws.

liquor stores<sup>121</sup> (although there are recent proposals to privatize these stores).<sup>122</sup> By contrast, many other states, such as Louisiana, Missouri, Nevada, New Mexico, California, and Wisconsin, do not subscribe to this state-monopolization of liquor sales. In non-ABC states, Sunday closing laws have the potential to preference in-state dining establishments with liquor licenses over out-of-state privately-owned liquor stores.

Sunday restrictions also increase the price of alcohol in many ways. First, the prohibition on Sunday alcohol sales reduces the supply of alcohol, which results in a new average equilibrium price,  $P'$ , that is higher than the old price  $P$  (Figure 1). Moreover, by shifting off-premise sale of alcohol to other days of the week, which may be less suitable from a consumer's perspective, the price of purchasing alcohol is increased because consumers cannot take advantage of the economies of scale that result from running errands at once. For example, if a person had an engagement party to attend on a Sunday and wanted to bring a gift, they would suffer the increased cost of having to procure the alcohol at an earlier, less convenient time. Moreover, to the extent that certain restaurants or hotels are exempted from Sunday closing laws, an individual seeking to drink will have to pay the price of alcohol at those venues, which are marked up from retail price of alcohol. They may be forced to purchase food and pay services charges, all in an effort to drink what would otherwise be available for purchase at liquor stores.

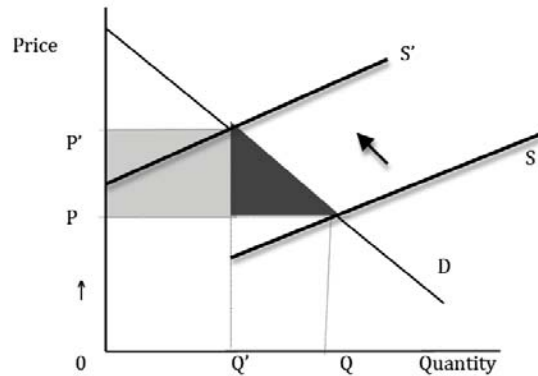
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<sup>121</sup> National Alcohol Beverage Control Association, The Control States, <http://www.nabca.org/States/States.aspx#> (last visited Apr. 20, 2010).

<sup>122</sup> The State Column, Liquor Bills Considered in North Carolina, Washington and New Hampshire, [http://thestatecolumn.com/articles/04\\_19/privatizing\\_liquor\\_seen\\_as\\_a\\_means\\_of\\_closing\\_budget\\_gap\\_6281.php](http://thestatecolumn.com/articles/04_19/privatizing_liquor_seen_as_a_means_of_closing_budget_gap_6281.php) (last visited Apr. 19, 2010).



FIGURE 1



Additionally, there is deadweight loss to society resulting from restricted Sunday alcohol sales, illustrated as the inner black triangle in Figure 1. There is a loss to society because certain consumers of secular activities (like drinking alcohol) refuse to engage in religious worship or rest on Sunday when alcohol is banned. Thus the Sunday bans prevent consensual exchanges between liquor stores and liquor consumers, with no countervailing interest being served for a segment of the population.

The idea that Sunday closing laws are anticompetitive and may violate the Sherman Act has been alluded to in scholarship.<sup>123</sup> And yet this argument has only been raised in one case, *Gibson Distributing Co., v. Downtown Development Ass'n*,<sup>124</sup> which entertained whether Texas Sunday closing legislation “is invalid because it deals with restraint of trade, a field which, it is argued, has been preempted by the Congress and its Sherman Antitrust Act.”<sup>125</sup> The Texas Supreme Court summarily rejected the challenge to the legislation, granting Texas *Parker* immunity: “Congress, by enacting the Sherman Act, did not intend to prohibit a valid exercise of the police power of the States, as this

<sup>123</sup> Ronald W. Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 ANTITRUST L.J. 950 (1970) (citing Sunday closing laws, among a dozen other possibly state anti-competitive laws).

<sup>124</sup> *Gibson Distrib. Co., Inc. v. Downtown Dev. Ass'n of El Paso, Inc.*, 572 S.W.2d 334 (Tex. 1978).

<sup>125</sup> *Id.*

Court has held the statute in question to be.”<sup>126</sup> The court gave very short shrift to the argument that Sunday closing laws violated the Sherman Act, explaining that “the lines of demarcation under *Parker v. Brown* are discussed in” two cases (neither of which concerned alcohol), and then immediately concluding that “in the light of these opinions, it is our conclusion that [the Texas Sunday law] is not preempted by the Sherman Act.”<sup>127</sup> *Gibson* made no mention of the Twenty-First Amendment, no mention of the Commerce Clause, and in a two-page opinion disposed of the complicated question discussed in this paper on *Parker* immunity grounds.

#### A. *Parker Immunity*?

There is no doubt that opponents of Sunday closing laws face a doctrinal hurdle in *Parker*. Blue laws are only one example of state regulations that can have anticompetitive effects that may be protected by the state action doctrines. As early as 1986, now-D.C. Federal Judge Merrick Garland described that the state action “doctrine currently immunizes the regulatory policies of states from attack under the Sherman Act” and that several scholar “revisionists” urge courts to “substantially narrow the scope of state action immunity to permit the preemption of a greater number of economically inefficient state regulations.”<sup>128</sup> As Professor Wiley notes, the Sherman Act could clearly take issue with much of “traditional state and local laws,” as “market prohibitions on prostitution,

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<sup>126</sup> *Id.* at 335.

<sup>127</sup> *Id.* (citing *Bates & O’Steen v. State Bar of Arizona*, 433 U.S. 350 (1977); *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211 (6th Cir. 1977)).

<sup>128</sup> Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 486 (1987). For examples of the revisionist scholars Garland cites, see John Cirace, *An Economic Analysis of the ‘State-Municipal Action’ Antitrust Cases*, 61 TEX. L. REV. 481 (1982); Gregory J. Werden & Thomas A. Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1, 58-72 (1982); Ronald E. Kennedy, *Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 NW. U.L. REV. 31 (1979); Richard A. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71, (1974).

marijuana, and baby-selling; restrictions on gun, firework, and drug sales; and limitations such as rent, usury, and condominium conversion controls” could all become actionable.<sup>129</sup> This revisionist school of thought has not yet been widely adopted by courts. Nevertheless, there is a strong argument that Sunday closing laws would not survive the two-stage *Parker* immunity test established in *Midcal*: “First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.”<sup>130</sup>

It is hard to argue that Sunday closing laws fail the first prong for *Parker* immunity; it is clear that Sunday closing laws are codified in state statutes.<sup>131</sup> But are the laws actively supervised by the state itself? In light of *Midcal*’s reasoning that the resale price maintenance regime was not actively supervised—because the “State does not monitor market conditions or engage in any ‘pointed reexamination’ of the program”<sup>132</sup>—it is hard to make the case that states are “actively” supervising a policy that is an outright prohibition that is rarely reviewed. The post-*Parker* debate has left open the question of just how much state involvement suffices to merit state action immunity. *Patrick v. Burget*<sup>133</sup> articulated well the reason for the active supervision requirement:

The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State . . . . The mere presence of some state

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<sup>129</sup> John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 765 (1986); see also *Donnem*, *supra* note 123, at 951 (“Sunday closing and other blue laws, . . . state taxation schemes which discriminate among competitors, building and construction regulations which favor some competitors over others, zoning ordinances . . . [and] occupational licensing.”).

<sup>130</sup> *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 100, 105 (1980).

<sup>131</sup> See, e.g., CONN. GEN. STAT. 30-91a (2010); DEL. CODE tit. 4, §709 (2009); GA. CODE § 3-3-20(a) (2009).

<sup>132</sup> *Midcal*, 445 U.S. at 106.

<sup>133</sup> 486 U.S. 94 (1988).

involvement or monitoring does not suffice . . . The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.<sup>134</sup>

While such concerns are admittedly less strong in ABC states, as the state is only precluding its own stores from operating on Sundays, the divergence between the state's regulatory objective and private interests can be strong in license states. Sunday closing laws grant tremendous market power to establishments that have Sunday on-premise alcohol licenses. It would not be difficult for off-premise establishment owners (such as grocery stores) to diversify their holdings and profit from the fact that there are limited alcohol consumption opportunities on Sunday. The "national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially"<sup>135</sup> coordinated restriction of alcohol output that has been the status quo of many states since their founding.

What is also clear is that the *Gibson* court gave short shrift to the complicated questions raised by Sunday closing laws. *Gibson* made no mention of *Midcal* and did not go through the two-prong *Parker* analysis. Nor did it discuss the *Midcal* and *Granholm* language that state interests will not, without an empirical basis, trump the strong national interest in promoting competition. The next Part argues that alcohol-related Sunday closing laws lack empirical justification; the little empirical evidence evaluating such laws does not support the public safety and health benefits that the laws are meant to promote.

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<sup>134</sup> *Id.* at 100-01.

<sup>135</sup> *Midcal*, 445 U.S. at 106.

## V. EMPIRICAL EVIDENCE ON THE EFFECTS OF SUNDAY CLOSING LAWS

As discussed in Part III, a significant part of why Sunday closing laws have survived Establishment Clause challenges is that courts have found such laws consistent with a state's police powers. The Court has justified "[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."<sup>136</sup> It is very intuitive to think that Sunday closing laws will have public health benefits. In light of the theoretical and empirical link between alcohol and various health and safety consequences, what could be more public-health promoting than having one less day that alcohol can be consumed? Yet if the era of Prohibition has taught America anything, it is that laws *meant* to restrict alcohol consumption do not always do so, and do not necessarily promote public safety and health as theoretically expected.<sup>137</sup> For that reasons, there has been tremendous scholarly attention examining the effects of alcohol availability on consumption patterns and associated health and safety outcomes.<sup>138</sup> And admittedly, in many studies, availability has been shown to increase alcohol consumption, drunk driving fatalities and accidents, crime and violence, and other social problems.<sup>139</sup>

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<sup>136</sup> *Id.* at 710.

<sup>137</sup> *See, e.g.*, Jeffrey A. Miron & Jeffrey Zwiengel, *Alcohol Consumption During Prohibition*, 81 AM. ECON. REV. 242 (1991); *see also* Jeffrey A. Miron, *Violence and the U.S. Prohibitions of Drugs and Alcohol*, AM. L. & ECON. REV., Fall 1999, at 1.

<sup>138</sup> *See, e.g.*, Jeffrey A. Miron & Elina Tetelbaum, *Does the Minimum Drinking Age Save Lives?*, 47 ECON. INQUIRY 317 (2009).

<sup>139</sup> U.S. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, CENTER FOR SUBSTANCE ABUSE PREVENTION, PREVENTING PROBLEMS TELATED TO ALCOHOL AVAILABILITY: ENVIRONMENTAL APPROACHES (1999), *available at* <http://www.ncbi.nlm.nih.gov/bookshelf/br.fcgi?book=hssamhsapep&part=A15922>; P.J. Gruenewald, *Alcohol Problems and Control of Availability: Theoretical and Empirical Issues*, in ECONOMICS AND THE PREVENTION OF ALCOHOL-RELATED PROBLEMS 59 (M.E. Hilton & G. Bloss eds, 1993).

It is important not to predicate the balance between the Sherman Act and the Twenty-First Amendment based on outdated studies that fail to integrate the lessons that decades of econometric progress has established. In general, many earlier studies have failed to adequately control for the macroeconomy, omitting several key variables, such as state unemployment rates, which likely determine both the levels of alcohol consumption as well as health outcomes. Furthermore, many earlier studies are limited in scope; they either analyze cross-sectional data from one year, or time-series data on health-related variables in one state. In both cases, there exist omitted variables that bias the results. As just one example, without controlling for state trends in traffic fatalities, or cross-state variation in road conditions and other traffic-related determinants, the early literature does not shed much light on the relationship between alcohol policies and traffic-fatality-rates.<sup>140</sup>

Moreover, the economic empirical literature on blue laws—especially focused on alcohol sales—is very thin. Few studies have examined the effects of Sunday alcohol sales restrictions on alcohol consumption or alcohol-related outcomes. There are certainly studies that suggest that Sunday closing laws have positive health effects. A 2008 study by Jon P. Nelson suggests that “several regulatory variables have a negative effect on drinking prevalence and bingeing by youth and young adults,” including Sunday closing laws.<sup>141</sup> Garnett McMillan and Sandra Lapham find an increase in Sunday fatalities in New Mexico after its 1995 Sunday sales liberalization.<sup>142</sup> Jonathan Gruber and Daniel

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<sup>140</sup> For a discussion of omitted variables in previous studies on alcohol-related traffic fatalities, see Thomas Dee, *State Alcohol Policies, Teen Drinking and Traffic Fatalities*, 72 J. PUB. ECON. 289, 304-05 (1999).

<sup>141</sup> John P. Nelson, *How Similar Are Youth and Adult Alcohol Behaviors? Panel Results for Excise Taxes and Outlet Density*, 36 ATLANTIC ECON. J. 89 (2008).

<sup>142</sup> Garnett P. McMillan & Sandra Lapham, *Legalized Sunday Packaged Alcohol Sales and Alcohol-Related Traffic Crashes and Crash Fatalities in New Mexico*, 96 AM. J. PUB. HEALTH 1944 (2006).

Hungerman<sup>143</sup> discuss the historical experience of U.S. blue laws, and show how blue law repeals affect charitable giving and other outcomes. While the focus of the Gruber and Hungerman article is not on alcohol consumption, they find that blue law repeals increased drinking alcohol by about sixteen percent among individuals who had previously attended church services.<sup>144</sup> Finally, Mark Stehr claims to demonstrate that liberalization of Sunday bans on alcohol sales increases state-specific sales of spirits.<sup>145</sup> Nevertheless, Stehr attributes much of the increase in sales of beer as a continuation of pre-existing trends of increased alcohol consumption in those states that repealed their bans. This correlation could be explained if the states in which there was enough political will to repeal the laws may have already seen a lack of enforcement and public efforts to circumvent Sunday alcohol bans.

Yet there is strong evidence, empirical and theoretical, that Sunday Laws can have little effect at best, or harmful effects at worst. As one commentator wrote, “Sunday closing laws . . . appear to protect the public against drinking on the Sabbath, but in reality may only shift alcohol purchases from legitimate stores to illegal moon-shiners. The net impact of the Sunday closing law on public health could be perverse if the bootleggers produce a more potent or contaminated product, or engage in violence.”<sup>146</sup> Moreover, Sunday closing laws may not reduce alcohol consumption, but rather create inter-temporal substitution that may be harmful for several reasons:

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<sup>143</sup> Jonathan Gruber & Daniel M. Hungerman, *The Church vs the Mall: What Happens When Religion Faces Increased Secular Competition?*, 123 Q.J. ECON. 831 (2008).

<sup>144</sup> It is notable that this increase is found only among the initially religious individuals who were affected by the blue laws, limiting the reach of their results.

<sup>145</sup> Mark Stehr, *The Effect of Sunday Sales Bans and Excise Taxes on Drinking and Cross-Border Shopping for Alcoholic Beverages*, 60 NAT'L TAX J. 85 (2007).

<sup>146</sup> Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L.J. 749 (1999).

First, alcohol in the body does not dissipate quickly. The concentration of alcohol in the bloodstream (the standard measure of intoxication) does not reach its maximum until one-half to one hour (on an empty stomach) after the last unit of alcohol is consumed). Thus, the effects of increased drinking in the period prior to the regulated period may carry over into the regulated period. Second, the level of intoxication during any period depends on the rate of consumption as well as the volume. Thus, even if there is not a one-for-one substitution of consumption from the restricted period to the adjacent unregulated periods, average intoxication taken over the adjacent and restricted periods can increase. Third, studies indicate that the probability of having a traffic accident increases at an increasing rate with the level of intoxication. Thus, the social costs of drinking and driving in unregulated periods may increase.”<sup>147</sup>

Other harm comes from creating distortions in alcohol consumption. One study of homeless individual found that “[a]lcohol-related seizures occurred with greater frequency on Mondays, presumably due to a lack of commercial availability and short supply of alcohol on Sundays.”<sup>148</sup> The authors speculate that the deaths tended to occur on Sunday or Monday morning because blue laws made alcohol unavailable and “people suffering from alcoholism were placed at a higher risk of the consequences of acute alcohol withdrawal syndrome on that particular day of the week.”<sup>149</sup>

The key insight from the literature is that far from affecting aggregate consumption and behavior, the laws create day-specific effects. One recent study by Christopher Carpenter and Daniel Eisenberg demonstrates, using a Canadian sample set, that Sunday closing laws did not affect overall population drinking rates. The authors rule out effects on population drinking larger than about five percent.<sup>150</sup> While allowing

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<sup>147</sup> William J. Boyes & Roger L. Faith, *Temporal Regulation and Intertemporal Substitution: The Effect of Banning Alcohol at College Football Games*, 77 PUB. CHOICE 595 (1993).

<sup>148</sup> Niels K. Rathlev et al., *Etiology and Weekly Occurrence of Alcohol-related Seizures*, 9 ACAD. EMERG. MED. 824 (2006).

<sup>149</sup> *Id.* Also of note, all of these individuals had a medical history of abusing Listerine, which has an alcohol content of 27% and is easily available on Sundays.

<sup>150</sup> Christopher S. Carpenter & Daniel Eisenberg, *The Effects of Sunday Sales Restrictions on Overall and Day-Specific Alcohol Consumption: Evidence from Canada*, 70 J. STUD. ALCOHOL & DRUGS 126 (2009).



Sunday alcohol sales increases alcohol consumption outcomes on Sundays,<sup>151</sup> these sales “induce substitution and spillover effects in drinking intensity across days—particularly a substitution from Saturday drinking to Sunday drinking and spillovers to drinking on Tuesdays.”<sup>152</sup> The authors conclude “the overall health costs of liberalization are likely to be low, considering that the policy change is not associated with a large increase in overall drinking. The slight increase we observed may, in fact, correspond to a health benefit because drinking was more evenly smoothed across the days of the week.”<sup>153</sup>

Thus it is difficult to empirically disentangle the effectiveness of Sunday closing restrictions, and reason to believe they come with perverse public health and safety outcomes.<sup>154</sup> That these studies point in different directions on the health and safety benefits of Sunday closing laws suggests that states will have a difficult time putting forth a state interest to overcome the federal interest in promoting competition.

## VI. CONCLUSION

Sunday closing laws have withstood constitutional attacks under the First and Fourteenth Amendments. These laws have survived a civil war, two world wars, and a war on terror. While budget crises in states may incentivize liberalizing Sunday alcohol prohibitions, eliminating alcohol-related blue laws through the political process may not be feasible in the near future. The state of Supreme Court jurisprudence concerning the

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<sup>151</sup> The authors concede this finding is subject to omitted variable bias from such difficult to measure variables such as religiosity levels, that lead to both the likelihood that a province has a Sunday sales restriction and lower Sunday alcohol consumption.

<sup>152</sup> *Id.* at 132.

<sup>153</sup> *Id.* at 133. The authors note that they “observed reduced drinking on Saturdays, one of the heaviest drinking days.” *Id.*

<sup>154</sup> One final argument in favor of Sunday closing laws is that even if they do not reduce alcohol consumption, they promote a day of rest. *But see* Bondonno, *supra* note 13 (discussing results of one study on effects of Sunday closing laws on employment, finding, for example, no significant differences in the time Sunday workers spent with their children, number of memberships in clubs and other organizations, or frequency of participation in free-time activities). The article concludes “the results of the University of Toronto Study do not show a ‘compelling state interest’ adequate to justify Sunday Blue Laws.” *Id.*

relationship between the Twenty-First Amendment and the Commerce Clause makes clear there is strong reason to believe Sunday laws violate the Sherman Act. Only one case, *Gibson Distributing Co., v. Downtown Development Ass'n*,<sup>155</sup> has ever entertained such a challenge, and was too cursory in its reasons for rejecting the argument. This paper has demonstrated that states cannot establish that the public is being sufficiently served by alcohol-related Sunday closing laws so as to justify their violation of federal antitrust laws.

The strength of the antitrust line of attack is that courts, for better or worse, have seemed to accept the secular purpose of alcohol blue laws. While acknowledging the overtly religious origins of Sunday closing legislation, the line of cases from *Soon Hing v. Crowley*<sup>156</sup> to *Gallagher v. Crown Kosher Super Market*<sup>157</sup> makes clear that the Court is committed to the idea that having a day of rest and temperance is a legitimate secular objective within a state's police power. However, while Establishment Clause challenges may not make any headway, viewing the laws as a violation of federal antitrust interests may be in keeping with recent trends to prioritize federal pro-competition policy over "unsubstantiated state concerns" that are nowhere near in "stature as the goals of the Sherman Act."<sup>158</sup>

Gone are the days when the Twenty-First Amendment meant carte blanche for states to regulate liquor within their borders. The recent trend of Supreme Court cases shows that the Court is willing to strike down state alcohol regulations as unreasonable

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<sup>155</sup> *Gibson Distrib. Co., Inc. v. Downtown Dev. Ass'n of El Paso, Inc.*, 572 S.W.2d 334 (Tex. 1978).

<sup>156</sup> *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

<sup>157</sup> 366 U.S. 617 (1961).

<sup>158</sup> *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 100, 114 (1980).

restraints on trade in its “pragmatic effort to harmonize state and federal powers.”<sup>159</sup> The Court will subject state regulations to the federal commerce power “in appropriate situations,”<sup>160</sup> after a case-by-case analysis of the “competing state and federal interests.”<sup>161</sup> In light of the inefficient and distortionary effects of Sunday closing laws on consumer and producer behavior, and in light of the tenuous relationship between Sunday closing laws and public health and safety outcomes, this paper concludes that it is “appropriate” to subject Sunday closing legislation to federal preemption.

The other relevant trend in Supreme Court review is that the Court increasingly evaluates empirical evidence supporting whether a policy is bringing about its stated objectives. For example, in a recent case *Leegin Creative Leather Prods. v. PSKS*,<sup>162</sup> the Court overruled its holding in *Dr. Miles*<sup>163</sup> that vertical resale price maintenance arrangements per se violated the Sherman Act. The Court relied on new empirical evidence from “respected authorities in the economics literature [that] suggest the per se rule is inappropriate, and [that] there is now widespread agreement that resale price maintenance can have procompetitive effects.”<sup>164</sup> Because of this change in the Court’s understanding of facts, it concluded that “Stare decisis . . . does not compel our continued adherence to the per se rule against vertical price restraints.”<sup>165</sup> Similarly, in an alcohol-related antitrust case, *Midcal*, the Court relied on a report that “raise[d] a doubt regarding

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<sup>159</sup> *Id.* at 109.

<sup>160</sup> *Id.* at 110.

<sup>161</sup> *Id.* (citing *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964)).

<sup>162</sup> 551 U.S. 877 (2007).

<sup>163</sup> *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>164</sup> *Leegin*, 551 U.S. at 900.

<sup>165</sup> *Id.*

the justification for [resale price maintenance laws] on the ground that they promote temperance.”<sup>166</sup>

The empirical link between Sunday closing laws and its various secular purposes is tenuous at best. At the very least, increased empirical efforts should be undertaken, exploiting the recent repeal of such laws in several states. However, this empirical approach suffers from policy endogeneity issues, as it is likely that increases in Sunday drinking may increase the political will to eliminate Sunday closing laws. It would be difficult to disentangle these overlapping trends, and conflate correlation with causation when repeal in Sunday laws are associated with increased Sunday drinking. Sophisticated econometric techniques may overcome this empirical challenge to evaluating the effectiveness of alcohol-related Sunday legislation, but the current state of knowledge simply does not suffice to withstand a challenge to the laws under the Sherman Act.

The most relevant insight for future research is that it does not suffice to look at changes in behavior on Sunday alone: while there may be visible increases in heavy drinking or traffic fatalities on Sunday after the elimination of Sunday closing laws, these costs may be more than compensated for by reductions in drinking and fatalities throughout the rest of the week. There is reason to believe that smoothing the consumption of alcohol across the week would promote health and safety by reducing binge drinking.

There is also a strong possibility that Sunday closing laws, in channeling liquor-sale business from off-premise to on-premise establishments, discriminate against out-of-state interests as strongly condemned in *Granholm*. Further research could evaluate the proportion of off-premise sale that is out-of-state owned, and compare it to the proportion

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<sup>166</sup> *Id.*

of on-premise sale that is out-of-state owned. This inquiry would reveal whether Sunday closing laws were burdening out-of-state economic interests in favor of in-state economic interests. The results of this inquiry would differ from state to state, depending on the composition of retail venues that are licensed to sell liquor: Does the state have local hotels or Hiltons? Does the state have liquor stores that are state-operated or privately owned? Does the state have local grocery stores or Walmarts? Such questions will reveal which parties are benefitted by the shift from off-premise to on-premise alcohol sales. Thus even if Sunday closing laws were not generally deemed as discriminating against out-of-state interests, any individual state's Sunday liquor restrictions may be evaluated in light of the strong pro-commerce *Granholm* decision.

Ultimately, the larger role the state takes in evaluating and enforcing the Sunday liquor restrictions, the stronger case it can make that its actions should be subject to *Parker* immunity. While the state action doctrine may certainly save Sunday closing laws, it has not saved other state-sanctioned alcohol-pricing arrangements where the Court felt there was a “a gauzy cloak of state involvement.”<sup>167</sup> Especially considering that there is an independent line of cases specifically policing the boundary between the Twenty-First Amendment and the Commerce Clause, alcohol Sunday laws may be easier targets for antitrust enforcement than the vast array of non-alcohol related Sunday closing laws. This may be the ideal scenario, as alcohol blue laws have been most resilient against political repeal.

It may reasonably be argued that even if federal antitrust policy could strike down state blue laws, federalism interests would caution against such an approach. Sunday legislation predates the Constitution and has organized retail and consumption practices

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<sup>167</sup> *Midcal*, 445 U.S. at 106.

in a way deeply embedded into the cultural fabric of the United States. Yet for this very reason, it is hard to imagine that repealing Sunday liquor laws would affect the vast majority of individuals who have grown to enjoy having a restful day during the week. Rather eliminating Sunday liquor restrictions promises to reduce the deadweight loss to society from individuals who derive no utility from Sunday restrictions.

But more than advocating for an antitrust attack on alcohol blue laws, this paper seeks to redress the insufficient academic attention to whether Sunday liquor restrictions could survive a federal antitrust challenge. The analysis this paper provides strongly indicates they might not. Having a clearer understanding of the legal tools available to challenge alcohol blue laws is critical, if there is to be any chance that the American experiment with the “day of rest” can one day be put to rest.

APPENDIX

DISTILLED SPIRIT COUNCIL OF THE UNITED STATES  
SUMMARY OF STATE LAWS & REGULATIONS RELATING TO DISTILLED SPIRITS (APRIL  
2006)

LICENSE STATES

	Sunday	
	On-Sale (Prohibitions for on-premises sales)	Off-Sale (Prohibitions for off-premises sales)
<b>ALASKA</b>	5 a.m. to 8 a.m.; local regulation may reduce hours of operation. ALASKA STAT. § 04.16.010	
<b>ARIZONA</b>	2 a.m. to 10 a.m. ARIZ. STAT. § 4-244(15)	
<b>ARKANSAS</b>	All day; unless applicant obtains Sunday mixed drink permit, new licensee obtains temporary permit or local option. ARK. CODE §§ 3-3-210, 3-9-215, 3-9-216.	All day.
<b>CALIFORNIA</b>	2 a.m. to 6 a.m. CAL. BUS. & PROF. CODE § 25631	
<b>COLORADO</b>	Midnight until 8 a.m. COLO. REV. STAT. § 12-47-901(5)(b)(I) & (II) [Considered a repeal of Sunday closing laws].	
<b>CONNECTICUT</b>	2 a.m. to 11 a.m., except 3 a.m. to 11 a.m. if January 1; town may reduce hours further except at airports. CONN. GEN. STAT. § 30-91(a).	All day. CONN. GEN. STAT. § 30-91(d).
<b>DELAWARE</b>	All day, except (i) with Sunday sale license (\$500 fee), 1 a.m. to 9 a.m. subject to earlier closing hour by ordinance of municipal corporation, or (ii) for taproom before noon and after 8 p.m., subject to municipality of at least 50,000 enacting ordinance limiting to maximum of 4 hours open. DEL. CODE tit. 4, § 709(a), (c) & (d)	<u>Off-Sale/Store/Restaurant/Hotel</u> : Before 1pm and after 6pm, subject to municipality of at least 50,000 enacting ordinance limiting number of hours open. DEL. CODE TIT. 4, §709I, (d)
<b>DISTRICT OF COLUMBIA</b>	3 a.m. to 10 a.m. D.C. CODE § 25-723(B)(3)	Before 9 am and after 10pm, with off-premises retailer's license, class B. D.C. Code §§ 25-722(b) & 25-112
<b>FLORIDA</b>	<u>On-sale and off-sale</u> : Midnight to 7:00 a.m. unless otherwise set by city or county. Does not apply to sales to passengers for consumption in railroad cars. FLA. STAT. § 562.14(1). <u>On-sale</u> : Unless otherwise set by city or county: If principal business is sale of product, on-sale retailer may not rent, lease or otherwise use premises during prohibited hours of sale; except if Sunday after 8 a.m.	
<b>GEORGIA</b>	All day, except: (i) where authorized by local authority in certain circum-stances, (ii) in certain localities at public stadiums, coliseums and auditoriums, and/or motor sport road race track facilities, or (iii) at a festival in a municipality in a county with more than 400,000 persons. GA. CODE §§ 3-3-7 & 3-3-20(a) & (d)	All day. GA. CODE § 3-3-20(a) & 3-1-2(19); Ga. Comp. R. & Regs. R. 560-2-3-.38(1)(a)
<b>HAWAII</b>	<u>Honolulu</u> : dispenser, club, restaurant, caterer, vessel, special – 2 a.m. to 6 a.m.; cabaret license – 4a.m. to 10 a.m.; off-sale retailer – midnight to 6 a.m.; hotel – 4 a.m. to 6 a.m.; the Honolulu Liquor Control Commission may provide exceptions. Hon. Liq. Regs. §§ 38-19 to 38-2. <u>Maui</u> : dispenser, club, restaurant, caterer, vessel – 2 a.m. to 8 a.m.; cabaret license – 4a.m. to 8 a.m.; off-sale retailer – 11 p.m. to 6 a.m.; hotel – 4 a.m. to 6 a.m.; the Maui Liquor Control Commission may provide exceptions. Maui Liq. Regs. §§ 08-101-25	

<b>ILLINOIS</b>	All day unless otherwise authorized by local authority; but 3 a.m. to noon in certain municipality exceeding 1 million population unless 14-days prior written notice of intent (to alderman of ward) to make application for such license or privilege. 235 ILCS Ch. 5, para. 6-14 & 4-1	
<b>INDIANA</b>	Before 10 a.m. (sales allowed after 10 a.m. until 12:30 a.m. Monday – or if Sunday is New Year’s, until 3 a.m. Monday). IND. CODE § 7.1-3-1-14(b). Up to 1 hour prior to scheduled starting time of an event, or prior to noon if the scheduled starting time is on or after 1 p.m., for a permit to sell at an athletic or sports event on a premise that is (1) a stadium, theater, civic or convention center, etc. under IND. CODE § 7.1-3-1-25(a), (2) a facility used in connection with a paved racetrack at least 2 miles length used primarily for auto racing, or (3) used for a professional or amateur tournament. IND. CODE § 7.1-3-1-14(c)	After 3 a.m. Ind. Code § 7.1-3-1-14(a)
<b>KANSAS</b>	2 a.m. to 9 a.m., drinking establishments or clubs; 2 a.m. to 6 a.m., caterers. KAN. STAT. § 41-2614	All day; except before noon and after 8 p.m. in cities and townships that enact Sunday sales ordinance. KAN. STAT. § 41-712.
<b>KENTUCKY</b>	All day, except (i) may be allowed by locality and (ii) allowed 1 p.m. to prevailing weekday closing time for Extended Hours Supplemental License (convention center, horse track or commercial airport), except 4 p.m. closing for commercial airport. KY. REV. STAT. §§ 244.290(2)-(6), 244.295 & 244.050.	All day, except may be allowed by city (1 <sup>st</sup> – 4 <sup>th</sup> classes) or county containing same. KY. REV. STAT. §§ 244.290 (2)-(6).
<b>LOUISIANA</b>	No Sunday Closing Laws.	
<b>MARYLAND</b>	Hours and restrictions for certain licensees vary among localities. See MD. CODE [ALC. BEV.], Art. 2B, §§ 11-403 (general provisions and some localities) & 11-501 to 11-524 (separate provision for each locality)	Subject to variation by localities, midnight to 6 a.m. See MD. CODE [ALC. BEV.] § 11-303 (general provisions and some localities) & §§ 11-501 to 11-524 (separate provision for each locality, each of which also covers holiday hours, except New Year’s Day/localities which is covered by § 11-402).
<b>MASSACHUSETTS</b>	1 a.m. to noon (or 2 a.m. and/or 11 a.m. per local authority); except: (i) all day per city/town or (ii) tavern licensees after 1 a.m. or, per local authority, after 2 a.m. MASS. GEN. L. Ch. 138, §§ 33 to 33B & 12, & Ch. 136, § 6(52).	Until noon; except: (i) all day per city/town or (ii) if licensee open on Sunday, it may choose to close 1 day per week. MASS. GEN. L. Ch. 138, §§ 33 & 15, & Ch. 136, § 6(52).
<b>MINNESOTA</b>	After 2 a.m.; except 2 a.m. to 10 a.m. (or later hour as regulated by municipality) with Sunday license issued by municipality (maximum \$200 annual fee; food must be sold). Bottle clubs, no consumption 1 a.m. to noon. Minn. Stat. § 340A.504(2), (3) & (5)	All day. Minn. Stat. § 340A.504(4)
<b>MISSOURI</b>	After 1:30 a.m.; except: (1) midnight to 9 a.m. with special license (special license/\$200 fee/and possible local fee), at (a) restaurant bar (except midnight to 8 a.m. in certain professional sports stadium in certain counties) or overnight establishment (at least 40 rooms), (b) amusement place (certain facilities for billiards, volleyball, indoor golf, bowling, soccer, dancing), or (c) place of entertainment in certain localities. MO. REV. STAT. §§ 311.097, 311.098, 311.102, 311.104, 311.220. (2) midnight to 9 a.m. entertainment district. § 311.086. (3) 3 to 11 a.m. (to 8 a.m. in St. Louis city) with license (special license/\$300 fee/and possible local fee), at convention trade area in certain localities. § 311.174, 311.76 & 311.178, 311.220. (4) 1:30 to 11 a.m. (special license/\$200 fee/and possible local fee) at certain dance rooms in St. Louis city. § 311.093. (5) 1:30 a.m. to 6 a.m. on 1/1, 3/17, 7/4, 13/31, Sunday before Memorial Day and Labor Days, and Super Bowl Sunday. MO. REV. STAT. § 311.298	After 1:30 a.m.; except midnight to 9 a.m. (special license/\$200 fee/possible local fee up to \$300 but not over local fee for Sunday on-sale). MO. REV. STAT. §§ 311.293 & 311.290



<b>NEBRASKA</b>	1 a.m. to noon for Class C or I license. (Class C issued in cities and villages for on-sale and off-sale, in original package only; Class I is on-sale.) NEB. REV. STAT. §§ 53-179(1) & (2) & 53-124I & (g)	After 1 a.m., except if local authorities decide to permit after noon; not applicable after noon to nonprofit corporation and Class C (Package stores are Class D; Class C is issued in cities and villages for on-sale and off-sale, in original package only.) NEB. REV. STAT. §§ 53-179(2) & 53-124I & (g)
<b>NEVADA</b>	No restrictions unless by local authorities. NEV. REV. STAT. § 244.350(1) & (2)(b)	
<b>NEW JERSEY</b>	By local authority. See N.J. Admin. Code tit. 13, §§ 2-38.1 & 2-38.2.	10 p.m. to 9 a.m., subject to local option. Cities of first class may establish separate hours of sale for each type of retail license, and separate hours for each type of retail license for on-sale and off-sale consumption. If city of first class prohibits Sunday/on-sale consumption, then Sunday/off-sale consumption also prohibited. N.J. ADMIN. CODE tit. 13, §§ 2-38.1(a) & (c) & 2-38.2(b)
<b>NEW MEXICO</b>	After 2 a.m.; except per local option and with Sunday permit (\$100), dispenser (for on-sale on Sunday only), restaurant and club open noon to midnight (2 a.m. Monday if December 31). N.M. STAT. § 60-7A-1(A)(3), (C) & (E). (Note: Dispenser license includes off- and on-sale. N.M. STAT. § 60-3A-3(H).) Notwithstanding other state law, sales allowed (i) noon to 11 p.m. during racing season on public horse racing track licensed by state racing commission, (ii) midnight to 2 a.m. and noon to midnight by dispenser whose licensed premises are in certain resorts, and (iii) if wet jurisdiction and per local ordinance, on Indian land or pueblo wholly inside state. N.M. STAT. §§ 60-7A-1(A) & (G) & 60-7A-2	After 2 a.m.; except per local option and with Sunday permit (\$100), dispenser or retailer (for off-sale on Sunday only) open noon to midnight (2 a.m. Monday if December 31). N.M. STAT. §§ 60-7A-1(A)(3) & (H). (Note: Dispenser license includes off- and on-sale. N.M. Stat. § 60-3A-3(H))
<b>NEW YORK</b>	4 a.m. to noon; subject to further county restriction. N.Y. [ALCO. BEV. CONT.] LAW §§ 17 (11) & 106(5).	Before noon and after 9 p.m. N.Y. [ALCO. BEV. CONT.] LAW §§ 60(4), 63, 105(14)(A)(i), & 17(11)
<b>NORTH DAKOTA</b>	2 a.m. to noon, subject to local authority. N.D. CENT. CODE §§ 5-02-05 & 5-02-09.	2 a.m. to noon, subject to local authority. N.D. Cent. Code §§ 5-02-05 & 5-02-09
<b>OKLAHOMA</b>	If county option to prohibit. Okla. Constitution, Article 28, § 6; Okla. Stat. tit. 37, § 591	All day. Okla. Constitution, Article 28, § 6; Okla. Stat. tit. 37, § 537I
<b>RHODE ISLAND</b>	After 1 a.m. and prior to noon for Class B licensee (victualler and tavern) or Class D (club), except as provided by law. All day for Class C (on-sale premise also selling pre-packaged food prepared elsewhere), except if allowed by local license board and subject to notice provisions. R.I. GEN. LAWS § 3-8-1.	Before noon and after 6 p.m. R.I. GEN. LAWS § 3-8-1
<b>SOUTH CAROLINA</b>	All day, unless allowed by local referendum and with special license. S.C. CODE §§ 61-6-1610 & 61-6-4160	All day. S.C. CODE § 61-6-4160
<b>SOUTH DAKOTA</b>	After 2 a.m. Except: 2 a.m. to 7 a.m. with local approval. S.D. CODIFIED LAWS §§ 35-4-81 & 35-4-2.1	All day unless local authority allows. S.D. CODIFIED LAWS § 35-4-81.1
<b>TENNESSEE</b>	3 a.m. to noon, except some hotels and restaurants 1 a.m. to noon; subject to Commission allowing longer open hours in jurisdictions with on-sale licensing in light of factors such as hours of sales in contiguous states and the need to compete with other jurisdictions in the U.S. for convention and tourism business. TENN. CODE § 57-4-203(D)	All day. TENN. CODE § 57-3-406(e)

<b>TEXAS</b>	1 a.m. to 10 a.m. (during 10 a.m. to noon food must be served with alcohol); except 2 a.m. to 10 a.m. in certain localities with late hours permit. TEX. [ALCO. BEV.] CODE § 105.03. Notwithstanding other provisions, sales allowed 10 a.m. to noon at (i) licensed or permitted premises in a “sports venue,” (a public entertainment facility property primarily designed and used for live sporting events; per TEX. [ALCO. BEV.] CODE § 108.73) and (ii) a festival, fair or concert. TEX. [ALCO. BEV.] CODE §§ 105.07 & 105.08	All day. TEX. [ALCO. BEV.] CODE § 105.01 (a)(1)
<b>WISCONSIN</b>	2:30 a.m. to 6 a.m. WIS. STAT. § 125.68(4)	No sales before 9 a.m. or after 8 p.m. WIS. STAT. § 125.68 (4)

### CONTROL STATES

Sunday		
	On-Sale (Prohibitions for on-premises sales)	Off-Sale (Prohibitions for off-premises sales)
<b>ALABAMA</b>	After 2 a.m. in public place (thus this prohibition does not include clubs); except if local ordinance or if general law of local application allows. ALA. CODE § 28-3A-25(a)(20) & (21)	All day for state stores. Ala. Admin. Code r.20-X-4.01(1).
<b>IDAHO</b>	1 a.m. Sunday to 10 a.m. Monday, except (i) on non-prescribed holiday Sunday, licensee may have banquet area or meeting room facilities, separate from bar and public dining room (unless dining room closed to public) open 2 p.m. to 11 p.m. for banquets, receptions, conventions, or (ii) county ordinance may allow Sunday sales and/or may extend closing hour to 2 a.m. City or county may further restrict. IDAHO CODE § 23-927	All day unless authorized by county option. IDAHO CODE §§ 23-307 & 23-308 to 23-308C
<b>IOWA</b>	After 2 a.m.; except 8 a.m. to 2 a.m. if Sunday permit. IOWA CODE §§ 123.49(2)(b), 123.36(6) & 123.30(3)(e)	8 a.m. to 2 a.m. with permit. IOWA CODE §§ 123.49(2)(b), 123.36(6) & (9), & 123.30
<b>MAINE</b>	1 a.m. to 9 a.m. ME. LIQ. CODE § 4	State and agency stores may be open after 9 a.m. notwithstanding local option to contrary. 28-A M.R.S.A. § 353
<b>MICHIGAN</b>	2 a.m. to midnight, unless county elects to sell on Sunday, in which case allowed after noon to midnight. MICH. COMPILED LAW §§ 436.2113 and 436.2115; Mich. Admin. Code r.436.1403(1).	
<b>MISSISSIPPI</b>	All day; except may be allowed by Commission upon locality’s petition.	All day. MISS. CODE § 67-1-83(3).
<b>MONTANA</b>	2 a.m. to 8 a.m.; municipal ordinances may further restrict. MT. CODE § 16-3-304	All day (agency stores) (MT. CODE § 16-2-104(1)).
<b>NEW HAMPSHIRE</b>	1 a.m. to 6 a.m., unless further restrictions by Commission. N.H. REV. STAT. § 179:17(II)(b)	All day for state stores, except if Commission decides to open (actual open hours vary but frequently 10 a.m. to 5 p.m.) if on main traffic route and heavy traffic. For licensees and agency stores, 11:45 p.m. to 6 a.m., unless further restrictions by Commission. N.H. REV. STAT. §§ 177:5 & 179:17(II)(a).
<b>NORTH CAROLINA</b>	2 a.m. to noon., subject to local option that can allow retail on-premises sale from noon to 7am on following Monday. N.C. GEN. STAT. § 18B-1004	All day. N.C. GEN. STAT. § 18B-802

<b>OHIO</b>	1 a.m. or 2:30 a.m. to midnight, except to 10 a.m. or 1 p.m. if Sunday permit (D6) where local option allows (depending on hours approved in local option vote). OH. ADMIN. CODE § 4301:1-1-49; OH. REV. CODE §§ 4301.22(C) & 4303.182	Agency stores (over 21%): All day, except midnight to 10 a.m. or 1 p.m. if local option and Division of Liquor Control amends the store's contract to allow Sunday sales. C-2 retail permittees (not over 21% ABV): After 1 a.m., unless Sunday permit (where local option allows). OH. ADMIN. CODE § 4301:1-49; OH. REV. CODE §§ 4301.22(C), 4301.351 & 4303.182
<b>OREGON</b>	2:30 a.m. to 7:30 a.m.	Midnight to 7 a.m. and 10 p.m. and after. Or. Admin. R. 845-015-0140
<b>PENNSYLVANIA</b>	Hotels, restaurants and most other on-premise licensees: after 2 a.m., except 2 a.m. to 11 a.m. with Sunday sales permit. Hotels and restaurants, with no special Sunday sales permit required: 2 a.m. to 1 p.m. if Sunday on Dec 31 or Super Bowl Sunday; and 2 a.m. to 7 a.m. if Sunday on St. Patrick's Day Clubs, 3 a.m. to 7 a.m. 47 PA. STAT § 4-406	All day; except noon until 5p.m. at up to 25% of State stores (at Board discretion).
<b>UTAH</b>	Clubs, 1 a.m. to 10 a.m.; restaurants, midnight to noon; airport lounges, midnight to 8 a.m. UTAH CODE §§ 32A-4-106, 32A-4-206, 32A-4-307, 32A-5-107, & 32A-10-206	All day. UTAH CODE §§ 32A-2-103(6) & 32A-3-106(10)
<b>VERMONT</b>	2 a.m. to 8 a.m.; extended for 1 hour on New Year's Day. VT. LIQ. REGS.: Hours of Sale § 1	Hours vary from agency to agency. Vt. Dept. of Liquor Control website at Retail Outlets; see VT. LIQ. REGS.: Hours of Sale § 3 (second paragraph)
<b>VIRGINIA</b>	2 a.m. to 6 a.m.; except no restrictions on club licensees. 3 VAC 5-50-30	State stores: All day; except midnight to 1 p.m. at certain stores, as determined by the Board, in (i) certain Northern Virginia localities (cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park; and counties of Arlington, Fairfax, Loudoun, and Prince William) and (ii) cities of Virginia Beach and Norfolk. <u>Licensed retailers</u> selling spirits not over 7.5% alcohol by volume: Midnight to 6 a.m. VA. CODE § 4.1-120; 3 VAC 5-50-30
<b>WASHINGTON</b>	2 a.m. to 6 a.m., except if locality more restrictive. WASH. ADMIN. CODE § 314-11-070	All day; except (i) 20 (of 160 total) state stores selected by Board for minimum of 5 open hours daily and (ii) agency stores (158 total) at their option may open. The Board shall track Sunday sales and expenses of the 20 state stores, examine Sunday sales of state and agency stores in proximity to the 20 state stores, and submit this information to the appropriate legislative committees by 1/31/07. WASH. REV. CODE § 66.16.080 & H.B. 1379 (effective 4/28/05; REV. CODE Ch. 66.08).
<b>WEST VIRGINIA</b>	Private club: 3 a.m. to 1 p.m. W. VA. CODE § 60-7-12(a)(5); W.Va. Reg. § 175-2-4.7	All day. W.VA. CODE § 60-3A-18; W.Va. Reg. § 175-1-3.1.2
<b>WYOMING</b>	Local authority determines but at least 2 a.m. to 6 a.m., except (i) clubs may be exempt from this per local ordinance or regulation and (ii) open 24 hours beginning 6 a.m. up to 4 days per year for city or county fairs, rodeos, pageants, jubilees, special holiday, or similar public gatherings per licensing authority's resolution or agreement. Wyo. Stat. § 12-5-101.	