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Sunday Laws

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Sunday Laws

In 1961, a state-wide law to prohibit engaging in certain activities on Sunday was passed by the North Carolina General Assembly. The act was declared unconstitutional by the North Carolina Supreme Court in 1962. In 1963, the act was rewritten in an effort to remove the objectionable features from it. The rewritten statute was declared unconstitutional by the court in 1964. Thus, Sunday laws are a current issue. This comment will examine them, their constitutionality, and the policy questions involved in the hope of shedding light on their future in North Carolina.

I. History

"Every effort to remodel existing Sunday legislation, or to forecast its future must be made in the light of the past." The history in recent centuries begins with the fact that secular work on Sunday was not an offense against the common law. Consequently,

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5 Soon after the cases declaring the state-wide laws unconstitutional, the court held that a city ordinance which regulated activities on Sunday met constitutional requirements. Clark's Charlotte, Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964). Local level regulations of this type are free of many of the defects contained in the state-wide acts which are the subject of this comment. For discussion of local level Sunday regulation see Note, 32 N.C.L. Rev. 552 (1954).
7 Rodman v. Robinson, 134 N.C. 503, 506, 47 S.E. 19, 20 (1904); State v. Williams, 26 N.C. 400 (1844). It is also interesting to note that Christianity is not theoretically opposed to secular work on Sunday.

[The] organic [law of Christianity] must be found in the New Testament, and there we shall look in vain for any requirement to observe Sunday, or indeed any day. The Master's references to the Sabbath were not in support but in derogation of the extreme observances of the Mosaic day of rest indulged in by the Pharisees. Rodman v. Robinson, supra at 510, 47 S.E. at 21 (Clark, C.J.) Lewis, an early writer, agreed, saying that:

The first Sunday legislation was the product of that pagan conception, so fully developed by the Romans, which made religion a de-
legal restrictions on activity based upon the fact that the day is Sunday are found in statutory law. English legislation in 1625 prohibited bear-baiting, bull-baiting, common plays, and the leaving of parishes on Sunday. This statute may have been in force in North Carolina during the seventeenth and eighteenth centuries. In 1676, the first English statute prohibiting work on Sunday was enacted. This enactment became the foundation for nearly all Sunday legislation in the United States. It read:

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

In 1715, North Carolina adopted an act “for the better observance of the Lord’s Day, called Sunday...” This statute was substantially the same as the 1676 English act. It added a preamble which clearly indicated why the statute was passed.

Forasmuch as by the great neglect in keeping holy the Lord’s Day, and the little regard had to all such other days and times appointed to be kept religiously, impiety is like to grow to a very great height (if not timely prevented) to the great dishonour of the Almighty...

...partment of the state. This was diametrically opposed to the genius of New Testament Christianity. It did not find favor in the Church until Christianity had been deeply corrupted through the influence of Gnosticism and kindred pagan errors.

Lewis, op. cit. supra note 6, at vi.

Lord’s Day Act, 1625, 1 Car. 1, c. 1.

One codifier so reported. Collection of Statutes of England in Force in N.C. 379 (Martin 1792). It is, however, questionable whether the statute was in force because this collection was not entirely accurate. It contained many statutes of England never in force in the colony. Preface to 1 Revised Statutes at xii (Nash, Iredell & Battle 1837).

Sunday Observance Act, 1676, 29 Car. 2, c. 7.


Sunday Observance Act, 1676, 29 Car. 2, c. 7. (Emphasis added.)

Laws of North Carolina Relating to the Church and Clergy 83 (Trott 1721). (Partially italicized in original.)

Laws of North Carolina Relating to the Church and Clergy 96 (Trott 1721).
The 1715 act was repealed in 1741 and replaced by a similar act. It is significant that the 1676 English act and the 1715 North Carolina act called for public and private observance of the "duties of piety and true religion." The 1741 act did not call for such private observation. Therein lay the only material difference in the three statutes. It led, however, to a sharp difference in the interpretations given the acts in England and in North Carolina. At common law, contracts made on Sunday were valid. The English courts held that the 1676 act invalidated contracts made on Sunday by persons in the exercise "of their ordinary calling." The North Carolina court held that a contract made on Sunday was valid notwithstanding the 1741 act. The court reasoned that the 1741 act only regulated public life and only prohibited noisy labor that disturbed the religious devotion of others. The significance of the 1741 act was reduced also because it lacked sufficient penalty to discourage its breach. For many years the statute was "almost completely ignored." It was repealed in 1951. North Carolina finished the decade without state-wide regulation. In other

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15 23 CLARK, THE STATE RECORDS OF NORTH CAROLINA 3 (1904).
16 N.C. Sess. Laws 1741, ch. 14; Collection of All The Public Acts 142 (Swann 1751); 23 CLARK, op. cit. supra note 15, at 173. A religiously oriented preamble is still-seen as part of the statute in 1 Public Acts 1715-90, at 52 (Martin 1804), but was dropped in 2 Manual Of The Laws of N.C. 229 (2d ed. Haywood 1808).
17 See the provisions of the English statute in text accompanying note 12 supra, and the North Carolina statute in Laws of North Carolina Relating to the Church and Clergy 96 (Trott 1721).
21 Melvin v. Easley, supra note 20, at 359-60. Furthermore, private activities on Sunday could not have been regulated by the North Carolina act because of N.C. Const. art. I, § 26: "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences . . . ."
22 The offender was not subjected to criminal indictment. State v: Brooksbank, 28 N.C. 73 (1845); State v. Williams, 26 N.C. 400 (1844). Accord, State v. Medlin, 170 N.C. 682, 86 S.E. 597 (1915); State v. White, 76 N.C. 15 (1877). The sole deterrent was a civil penalty of one dollar. 1 Revised Statutes 607 (Nash, Iredell & Battle 1837).
24 N.C. Sess. Laws 1951, ch. 73.
states, laws regulating Sunday activity were beginning to be used for new purposes. With the rise of shopping centers and large "discount houses" that operate seven days a week from their suburban and country highway locations came a revitalization of the long-forgotten Sunday laws. These statutes soon faced constitutional tests.

II. CONSTITUTIONALITY

In *McGowan v. Maryland,* the United States Supreme Court affirmed the convictions of seven employees of a large highway discount store for violating the state Sunday law. The main contention of the defendants was that the law violated the establishment clause of the first amendment to the Constitution of the United States. Before ruling on the Maryland statute, Mr. Chief Justice Warren, speaking for the Court, discussed the relation of Sunday laws in general to the establishment clause. After granting that the early Sunday laws were "motivated by religious forces," he made a search of the evolution of these laws to determine "whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character." He found that the present purpose and effect of most Sunday laws is to provide a uniform day of rest for all citizens. But it was conceded that the defendants had suffered economic injury allegedly resulting from the imposition of a tenet of the Christian religion upon them. The Court relied upon *Everson v. Board of Educ.* for the principle that a statute which has a primary secular purpose (projected into effect), consistent with constitutional guarantees, will be upheld even though it has an incidental, indirect effect that

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26 Md. ANN. CODE art. 27, § 521 (Supp. 1964). This law prohibits the Sunday sale of all merchandise except specified articles including drugs, gasoline, newspapers, and tobacco.
27 "Congress shall make no law respecting an establishment of religion . . . ." This clause was made applicable to the states via the fourteenth amendment in *Murdock v. Pennsylvania,* 319 U.S. 105 (1943).
28 366 U.S. at 431.
29 *Id.*
30 *Id.* at 445.
31 *Id.* at 430.
32 330 U.S. 1 (1947). In this case the Court upheld a statute authorizing repayment to parents of the transportation expenses of their children to public and Catholic schools. Mr. Justice Black, for the Court, recognized that a religion was incidently benefited and possibly promoted. However, the primary purpose was found to be the safety of all children and therefore the statute was valid as "public welfare legislation." *Id.* at 18.
would be unconstitutional standing alone. Therefore, it was concluded that as presently written and administered Sunday laws "bear no relationship to establishment of religion as those words are used in the Constitution of the United States." In ruling on the Maryland statute, the Court found it to have the same secular character as Sunday laws in general and therefore sustained it on the Everson principle.

In the McGowan case, the appellants were held to lack standing to raise the "free exercise" of religion issue because they did not allege injury to their religious practices. They alleged economic injury which was only sufficient to raise the "establishment" issue. The Court did consider the "free exercise" issue in Braunfeld v. Brown. Appellants were Jewish merchants who sued to enjoin the enforcement of the 1959 Pennsylvania Sunday law. One of the appellants alleged that since his religion required closing on Saturday, it was economically necessary for him to be open on Sunday; that enforcement of the Sunday law would force him to choose between his religion and his trade; and that the effect would be a

83 366 U.S. at 442-45.
84 Id. at 444.
84a "[T]he statute's present purpose and effect is not to aid a religion but to set aside a day of rest and recreation," Id. at 449. Accord, Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961). Mr. Justice Frankfurter substantially concurred with the views of the majority, but decided the establishment issue without relying on the Everson case. The test used by Frankfurter would allow a stronger religious purpose and effect than did that of the majority. He looked for the "primary end achieved." 366 U.S. at 466 (separate opinion). If no secular ends served were "wholly independent of the advancement of religion" the "primary end achieved" would be religious and unconstitutional. Ibid. This test would uphold a statute with two independent, primary ends—one secular and one religious. However, this permissiveness is qualified by his second, cumulative test: if the statute primarily furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone it cannot be upheld. Id. at 466-67. The tests of Frankfurter are a concession to the fact that, in practice, the dissection of the direct and indirect motivating purposes of the legislature—where one purpose is constitutional and another unconstitutional—is slippery business with the possibility of misadventure great. Nevertheless, he too searched for purpose and found it to be the same as did the majority. Id. at 470-505.

85 See the discussion by the Court, 366 U.S. at 429. See also Two Guys From Harrison-Allentown, Inc. v. McGinley, supra note 34a, at 592. Frankfurter agreed with the Court that the appellants in McGowan and Two Guys lacked standing to raise the "free exercise" issue. McGowan v. Maryland, 366 U.S. 420, 468 n.6 (1961).
87 PA. STAT. ANN. tit. 18, § 4699.10 (1963).
88 366 U.S. at 601.
violation of the free exercise clause of the first amendment. Mr. Chief Justice Warren, announcing the judgment of the Court, found that the direct purpose of the statute was to achieve a secular goal, i.e., a uniform day of rest, that the "indirect burden" on appellant's religious practice could not be eliminated by adequate alternative means to the secular end, and that implementation of the direct purpose was valid notwithstanding that there was an indirect burden on appellant's religious practice. Mr. Justice Frankfurter

"Congress shall make no law . . . prohibiting the free exercise [of religion]. . . . This clause was made applicable to the states via the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940).

Id. at 608. Most of the commentators have disagreed with this finding. They maintain that a statute allowing an exemption for those who close on another day for religious reasons would be sufficient to provide a uniform day of rest. See Hopp, Sunday Laws—The McGowan Decision, 13 Baylor L. Rev. 225, 231 (1961); O'Toole, The Sunday Laws, 74 Commonweal 343, 345 (1961); 30 Geo. Wash. L. Rev. 363, 368 (1961); 40 Texas L. Rev. 702, 707 (1962); 23 U. Pitt. L. Rev. 222, 229 (1961). But see 7 Utah L. Rev. 537, 545 (1961). Warren granted that this exemption "may well be the wiser solution to the problem," but went on to say that it was not constitutionally necessary to validate the statute. 366 U.S. at 608-09. He reasoned that the exemption would not help eliminate the atmosphere of commercial noise and activity; enforcement problems would be more difficult; an economic advantage might be gained by those allowed to open on Sunday; and employment problems would arise—"exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a state might feel to be opposed to its general policy prohibiting religious discrimination in hiring." Id. at 609. In a separate opinion, Brennan said that the difficulties were "more fanciful than real." Id. at 615. "[T]he Court . . . has exalted administrative convenience to a constitutional level high enough to justify making one religion . . . disadvantageous." Id. at 615-16. The administrative problems are not overwhelming in view of the fact that twenty-one of thirty-four states having general Sunday laws have exemptions of this kind. Id. at 614. England also has the exemption. Shops Act, 1950, 14 Geo. 6, c. 28, § 53. The exemption was suggested in conjunction with the 1961 North Carolina Sunday law, N.C. Gen. Stat. § 14-346.2 (Supp. 1963), but after little discussion was not adopted. Raleigh News and Observer, June 22, 1961, p. 6, col. 4.

Id. 366 U.S. at 607. Accord, Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961). The test applied by the Court changes the test for first amendment freedoms which was theretofore in use, and to which Douglas, Brennan, and Stewart would adhere; that is, first amendment freedoms are susceptible to restriction only to prevent great and immediate danger to interests the state may lawfully protect. See Kovacs v. Cooper, 336 U.S. 77, 88 (1949); Saia v. New York, 334 U.S. 558, 561 (1948); Thomas v. Collins, 323 U.S. 256, 300 (1945); West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). For discussion of this "preferred position" test for first amendment freedoms, see 40 Texas L. Rev. 702 (1962).

Has the Court lost the substance of the issue in the direct-indirect test? A license tax of $15 per year on distributors of religious literature was
concurred in a separate opinion, treating the "free exercise" issue as a balancing question. He found that the secular purpose outweighed and justified the religious injury inflicted.48

The four Sunday law cases44 place singular emphasis on the search for purpose. They hold that the valid purpose which Sunday laws may serve is that of providing a uniform day of rest. However, whether any particular statute has a valid purpose in fact is difficult to determine. Appropriate to the Sunday law question is a warning of the Court in a different context: "It is impossible for us to shut our eyes to the fact that many of the laws . . . , while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed for other motives."46 The conclusion reached by the Court concerning the direct purpose of the Sunday laws has been severely criticized for its imperceptiveness.46 The common defect in these

held unconstitutional in Follett v. Town of McCormick, 321 U.S. 573 (1944), because it was a direct burden on religion. In Braunfeld the indirect burden was much greater—the possible loss of an entire business enterprise. The burden imposed on minority religions which was upheld in Braunfeld is "certainly more serious economically" than the burden held unconstitutional in Follett. Pfeffer, CHURCH, STATE, AND FREEDOM 235 (1953), quoted with approval in McGowan v. Maryland, 366 U.S. 420, 578 (1961) (dissenting opinion). For further discussion see Donaldson, Freedom of Religion and the Recent Sunday Closing Law Cases, 3 WILLIAM & MARY L. REV. 384, 392 (1961); 30 GEO. WASH. L. REV. 363 (1961); 7 UTAH L. REV. 537 (1961).

44 McGowan v. Maryland, 366 U.S. 420, 520-22 (1961) (separate opinion applicable to the Braunfeld case). Douglas disagreed, finding that the first amendment freedoms are absolute and admit of no balancing. Brennan and Stewart agreed to the balancing test but differed with Frankfurter in application. "[T]he law requires a person 'to choose between religious faith and his economic survival.' This is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness." Braunfeld v. Brown, 366 U.S. 599, 615 (1961) (separate opinion of Stewart, J.).


44 Lochner v. New York, 198 U.S. 45, 64 (1905) (dictum). This case held that a labor law of the State of New York which provided that no employees in bakeries would be permitted to work more than sixty hours in a week, or ten hours in a day, was not a legitimate exercise of the police power of the state. The Lochner case was overruled by Bunting v. Oregon, 243 U.S. 426 (1917). Nevertheless, the merit of the quoted dictum is apparent.

Douglas dissented in all four cases. He said that the present Sunday laws have not outgrown their religious foundations. 366 U.S. at 572-73 & n.6. "The Court picks and chooses language from various decisions to bolster its conclusion that these Sunday laws in the modern setting are
criticisms is that they are mere conclusions. The underlying evidentiary facts need to be explored at some length.

The language used in these statutes aids the search for purpose. It indisputably shows the religious purposes of the early statutes. History reveals the gradual disappearance of the religiously oriented language. The Supreme Court has used this disappearance as an indication of the disappearance of religious purpose. But such a conclusion does not follow necessarily. For instance, the North Carolina Supreme Court, after the 1951 repeal of the 1741 Sunday 'civil regulations.' This shows that the language is helpful though inconclusive in Sunday laws. Professor Hanft seems to agree, saying that "[Sunday observance laws] are a part of a continuing stream of religious thought and expression in the life of the nation." Hanft, The Prayer Decisions, 42 N.C.L. Rev. 567, 575 (1964). Professor Louissell praised the Douglas position. He said: "May not ultimately there be in this kind of . . . more real hope for a modus vivendi in the dilemmas of American religious pluralism, than in judicial make-believe such as that Sunday laws are secular?" Louissell, Douglas on Religious Freedom, 73 Yale L.J. 975, 998 (1964).

The laws . . . reflect the belief of those who formulate them in a personal God and their acceptance of the age-old tradition that one day in seven should be set aside as the Lord's Day. It is extremely disturbing, therefore, to be confronted with this new trend of thought according to which Sunday is to become legally recognized as a day on which people may if they choose seek respite from their ordinary labors.


For similar thought, see Johnson & Yost, op. cit. supra note 6, at 231, 255; Pfeffer, op. cit. supra note 42, at 229; 8 N.Y.L.F. 403 (1962); 15 Okla. L. Rev. 177 (1962).

Justice Frankfurter treats the language as helpful though inconclusive in Sunday laws. 366 U.S. at 497-98 (separate opinion). It has been suggested that the language used be accorded more weight. See Hopp, supra note 41, at 228.

See note 28 supra and accompanying text. The early cases in North Carolina also reflect the religious purpose. Chief Justice Ruffin spoke of "the legal injunction of all persons to apply themselves on Sunday to the duties of religion," in Sloan v. Williford, 25 N.C. 307, 309 (1843) (dictum). (Emphasis added.) However, Ruffin recognized that Sunday laws also served the purpose of providing relaxation and refreshment. State v. Williams, 26 N.C. 400, 401, 403-04 (1844). See generally Blakey, American State Papers Bearing on Sunday Legislation 53 (1911); Johnson & Yost, op. cit. supra note 6, at 222.

See, e.g., text within note 16 supra. At the time of its repeal, only the phrase "the Lord's day" remained to give religious connotation to the 1741 North Carolina Sunday law. See N.C. Gen. Stat. § 103-1 (1950).

observed act, said that “its repeal in no sense should be construed as a legislative intent to place the stamp of approval upon the profanation of the Sabbath.” This statement indicates that, notwithstanding the disappearance of the religious language, the original religious purpose of the 1741 act survived until its repeal in 1951.

Sunday laws for religious purposes early presented constitutional difficulties in North Carolina. In 1844, Chief Justice Ruffin said that “however clearly the profanation of Sunday might be against the Christian religion, it is not and could not here be made, merely as a breach of religious duty, an offense . . . .” He held the 1741 act valid, however, because the Legislature looked upon its violation as detrimental to the State as well as a breach of religious duty. More emphasis was put on balancing the needs of society and the individual in 1904 when Chief Justice Clark said: “The only ground upon which ‘Sunday laws’ can be sustained is that in pursuance of police power the State can and ought to require a cessation of labor upon specific days to protect the masses from being worn-out by incessant and unremitting toil.” Thus, the rationale that Sunday laws provide a needed rest from labor did not originate with the 1961 Supreme Court cases. It arose during the last century when the needs of labor were truly great and before laws favorable to labor became common. In 1886, a twelve hour work day with neither Sunday nor holiday the year round was prevalent in some occupations. At the turn of the century, the

See text accompanying notes 15-24 supra.


Id. at 407.

Ibid.

Rodman v. Robinson, supra at 508, 47 S.E. at 21. Nevertheless, religious reasons continue to induce the enactments. For example, a Charlotte city councilman after voting to enact a Sunday ordinance said in support of his action, “I have been brought up to keep the Sabbath holy.” Charlotte Observer, March 7, 1964, § A, p. 1, col. 7, at 2, col. 1.

Lescohier & Brandeis, 3 History of Labor in the United States 101 (1935). In 1887 North Carolina children six years old worked as much as twelve and a half hours a day. Davidson, Child Labor Legislation in the Southern Textile States 105 (1939).
states had grave doubts about the validity of labor-hours regulation. In North Carolina, organized labor had no leverage; the general trend was in opposition to legislation touching any labor problem. The theory and practice of allowing employers and employees to agree upon whatever terms the labor market dictated continued into the early part of the twentieth century. No doubt the masses needed any rest the Sunday laws might lend. But has the situation remained so desperate? During the twentieth century, the shift away from judicial and governmental inaction has been so great that a complete cycle in labor relations has occurred. Forty-three states have labor laws regulating either maximum daily hours, maximum weekly hours, or both. "Federal legislation and collective bargaining contracts have created whole weekends of leisure for most American workers . . . ." These are the true factors that

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57 LESCOHIER & BRANDEIS, op. cit. supra note 56, at 667.
58 DAVIDSON, op. cit. supra note 56, at 109, 112-13. The first attempts at labor legislation in North Carolina were toward the establishment of a ten-hour day in 1887. The bill was speedily tabled. Id. at 103. See generally id. at 102-21.
60 "[Y]ellow dog contracts were originally upheld [1915], state legislation interfering with private contracts, by providing for maximum hours of work, denounced [1905], and minimum wages legislation for women invalidated [1923]." FORKOSCH, LABOR LAW 15 (1953). See generally PHILLIPS, FELIX FRANKFURTER REMINISCES 94-104 (1960).
69 The "theory [that Sunday laws provided a day of rest] had particular significance during this nation's period of industrial advancement when laborers were at a bargaining disadvantage in respect to management." Note, 39 B.U.L. REV. 543, 544 (1959). In practice it is doubtful whether they had any significant effect because they were not enforced. E.g., State v. McGee, 237 N.C. 633, 638, 75 S.E.2d 783, 786, appeal dismissed, 346 U.S. 802 (1953). See also State v. Atlantic Coast Line R.R., 149 N.C. 470, 62 S.E. 755 (1908). Sunday laws are not given a significant role in labor history. E.g., LESCOHIER & BRANDEIS, op. cit. supra note 56, at 673. The authors seem uncertain as to whether Sunday laws have any relation to the protection of labor. There is no treatment of Sunday laws in either DAVIDSON, op. cit. supra note 56; FORKOSCH, op. cit. supra note 59; LIEN, LABOR LAW AND RELATIONS (1938); or OAKES, LAW OF ORGANIZED LABOR (1927).
61 The dominant idea today is that of governmental planning for our resources and labor to yield the maximum social welfare. ROTTSCHEFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE 203 (1948).
62 U.S. DEP'T OF LABOR, GROWTH OF LABOR LAW IN THE UNITED STATES 74 (1962). See, e.g., N.C. GEN. STAT. § 95-17 (Supp. 1963). This statute, originally enacted in 1937, provides in part:
No employer shall employ a female person for more that forty-eight hours in any one week . . . or on more than six days in any period of seven consecutive days.
No employer shall employ a male person for more than fifty-six hours in any one week, or more than twelve days in any period of fourteen consecutive days . . . .
protect the laboring classes. Whatever relation Sunday laws had in former times to the public's health, little remains today.64

Further insight into the purpose served by the recent Sunday laws can be had by examining the major proponents of the legislation. These proponents are usually the downtown merchants associations.65 There have been charges that the Sunday laws have become "a lethal weapon in the economic war of competition."66 Today the downtown merchants cannot compete with the highway discount houses that remain open on Sunday. This fact is true whether the downtown merchants open on Sunday or retain their

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65 Nader, Blue-Law Blues, 192 NATION 499, 508 (1961). By 1940 the Department of Labor had discounted the usefulness of Sunday laws to labor. Ibid.
The best solution to the downtown merchants' problem is to seek legislation to eliminate the Sunday market, thereby causing the billions of dollars now spent yearly on Sundays to be spent on other days, when the downtown merchants are not at such a competitive disadvantage. Could this be the reason these special interest groups seek Sunday closing laws? Statements on behalf of the downtown merchants indicate that if legislation is not passed removing Sunday competition they will themselves open on Sunday in an effort to capture at least part of the Sunday market. Therefore, in proper perspective it seems that competition, not labor, is in the forefront of the proponents' collective mind.

If the primary purpose of the Sunday laws is to enable the downtown merchants to compete, with certain religions and labor benefitting only incidentally, can the act withstand the constitutional tests, assuming the purpose is projected into effect? Generally, the courts give considerable weight to the decision of the legislature when the police power is involved.

67 Most downtown stores could not compete beyond the city limits by opening their own doors on Sunday. Some were forbidden to do so under ordinances that did not apply in adjacent areas; even if there was no legal bar to opening, the downtown location was a handicap on a day when families took to the road. A number of big stores tried to meet the competition by taking telephone orders for articles advertised in the Sunday newspapers. Others opened branches in the suburbs to get the Sunday trade.

68 "If these seven-day discount stores are permitted to continue to remain open on Sunday and the other six days of the week, it will become necessary for other stores to likewise open on Sunday to compete." Brief for the North Carolina Merchants Ass'n as Amicus Curiae, p. 20. Treasure City, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964). "The retail mercantile field is highly competitive. If one store is wide open... others must follow." Raleigh News and Observer, Nov. 20, 1961, p. 1, col. 4 (attorney for appellee in oral argument of Treasure City). See State v. Fair Lawn Service Center, Inc., 20 N.J. 468, 476, 120 A.2d 233, 237 (1956) (Jersey City Merchants Council solution—a new state Sunday law). The President of the Raleigh Merchants Bureau said: "Rose's in Charlotte does some $60,000 on Sunday... A man has to protect himself and remain open or seek legislation." Raleigh News and Observer, May 24, 1962, p. 40, col. 3. To the same effect see Charlotte Observer, March 10, 1964, ¶ A, p. 1, col. 8, at 2, col. 3 (President of Charlotte Merchants Association).


70 In Tyson v. Banton, Mr.
Justice Holmes said

the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.72

Mr. Justice Holmes's fear that the courts will dip into political questions should not, however, prevent courts from recognizing the limitations upon the use of the police power.

To justify the State in ... interposing its authority ... it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.73

Essential for the exercise of police power is that protection of a specific public interest is more important than the social interest in personal liberty.74 The public interest to be protected by the present Sunday laws is a vague, general one.75 On the other hand,

72 Id. at 446 (dissenting opinion).
73 Lawton v. Steele, 152 U.S. 133, 137 (1894). This is the classic statement of the specific criteria for a valid exercise of the police power. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).
74 See Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 111-113 (1928); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924); Aaron v. McKinley, 173 F. Supp. 944, 950 (E.D. Ark.), aff'd sub nom. Faibus v. Aaron, 361 U.S. 197 (1959). The balancing problem is discussed in State v. Lawrence, 213 N.C. 674, 684, 197 S.E. 586, 592 (1938) (dissenting opinion). In State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949), the court relied on the dissent "of acknowledged power and force of reason" in Lawrence to hold that a statute which required professional photographers to be licensed was beyond the police power. Id. at 767, 51 S.E.2d at 733. See generally WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 728 (1936); Brown, Due Process of Law, Police Power, and the Supreme Court, 40 HAV. L. REV. 943 (1927).
75 In the Braunfeld case, Brennan asked what overbalancing need is so weighty in the constitutional scale that it justifies this substantial ... limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society ... . It is not even the interest in seeing that everyone rests one day a week ... . It is the mere convenience of having everyone rest on the same day. 366 U.S. at 614 (separate opinion).
the very real and positive benefits to the particular group at the expense of a loss of liberty by citizens generally is quite tangible. It seems axiomatic that the police power cannot be used where the primary purpose is not the health, safety, welfare, or morals of the public but rather is to suppress competition. When the primary

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In State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940), Justice Seawell warned against the efforts of pressure groups. [T]he importance of personal liberty is under constant attrition, in the desire for more sweeping governmental control in private affairs and in the development of pressure groups which are unable to reach their objectives through voluntary association and, for reasons not entirely altruistic, demand the powerful aid of the law. The usual symptom is an endemic desire to have the public protected . . . although the public is not sensible of any harm . . . or any need of protection. This beau geste should not blind the Court to the fact, when it exists, that the kind of protection afforded . . . is more related to obvious benefits accorded to the group in its private character than to the merely colorable advantage to the public.

Id. at 762, 6 S.E.2d at 865. (Emphasis added.) See also Hanft & Hamrick, Haphazard Regimentation Under Licensing Statutes, 17 N.C.L. Rev. 1, 10 (1938). This article shows that many licensing statutes, while ostensibly for the protection of public welfare, are for the real motive of keeping down competition. As long as the legislature continues to serve the aims of pressure groups in the name of public welfare "a horde of guardians of the public health, safety, morals, and welfare will continue to crowd forward." Id. at 18.

H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 538 (1949); Buck v. Kuykendall, 267 U.S. 307, 315 (1925). In Ex parte Boehme, 12 Cal. App. 2d 424, 55 P.2d 559 (Dist. Ct. App. 1936), D was convicted under a Sunday law prohibiting barber shop operation more than six days a week. The court reversed the conviction. Citing the State's one-in-seven labor law to show that the barber shop closing law was not to provide a uniform day of rest, the court said: "It seems apparent to us that the real object . . . was not to prescribe one day of rest in seven for barbers, but plainly to restrict competition among the owners of the shops. Such an object is certainly not within the police power . . . ." Id. at —, 55 P.2d at 562.

However, many courts have not agreed with the finding of the Boehme case. See Two Guys from Harrison, Inc. v. Furman, 32 N.J. 199, 160 A.2d 265 (1960). In this case, the court dismissed the allegation that the statute sought to protect the urban merchant from his highway adversary by declaring that it had no way of knowing that such was the purpose, and that this contention was in the realm of conjecture. Id. at 227-28, 160 A.2d at 280. In Gundaker Central Motors, Inc. v. Gassert, 23 N.J. 71, 127 A.2d 566 (1956), the court reasoned that since all sellers of the proscribed goods were required to close there was no economic advantage gained and therefore the guarantee of equal protection was met. Id. at 81, 127 A.2d at 572. The reasoning is not sound. Suppose A and B compete in X industry. A adopts a new practice to gain a competitive advantage over B which B cannot make up by also adopting the same practice. B seeks and gets police power legislation barring the use of the practice in X industry. Can it be said that no economic advantage has been gained by B? See note 67 supra for the indication that the supposition is a true reflection of the facts surrounding the present Sunday law controversies between the
purpose of an act is to suppress competition, the fact that the act would incidentally serve an end permissible to the state, i.e., providing a day of rest, ought not save it.78

III. WHERE NORTH CAROLINA STANDS

The success of the merchants associations in North Carolina, proposers of the recent Sunday sales acts,79 has been prevented only by the North Carolina Supreme Court. The 1961 act80 was a substantial copy of the Pennsylvania Sunday law81 upheld by the United States Supreme Court in the 1961 cases.82 A day of rest is ordered

highway discount houses (represented by A) and the downtown merchants (represented by B).

78 Stress must be laid on the use of the word "incidentally" here. The word is used in the sense that the unconstitutional, primary purpose and effect so overshadow the indirect effect that the indirect effect does not bear a reasonable relation to the service of an end permissible to the state. An example is Pierce v. Society of Sisters, 268 U.S. 510 (1925). In this case an Oregon law which made it compulsory for children to attend public schools was held to be beyond the limits of the police power and therefore unconstitutional. Although some public good might have come from the act, the infringement upon the private interests of parochial schools so overshadowed the possible public good that the act was held to bear no reasonable relation to a purpose within the competency of the state. Id. at 535.

The police power is in derogation of personal liberty, and extends only to those measures enacted for the good of all citizens that have a substantial (not merely an incidental) relation to the public health, morals, safety, or general welfare. State v. Williams, 253 N.C. 337, 117 S.E.2d 444 (1960) (statute requiring license to solicit students for private schools held unconstitutional); State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959) (aesthetic conditions alone insufficient to support police power); Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957) (exercise of police power to require a license to lay tile unconstitutional); State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949) (police power requiring license to practice photography unconstitutional).

See note 65 supra.

80 N.C. Sess. Laws 1961, ch. 1156, § 1. It provides in part:
Any person, firm or corporation who engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, excluding novelties, toys, souvenirs, and articles necessary for making repairs and performing services, shall, upon conviction thereof be fined or imprisoned in the discretion of the court.

only for those who sell at retail a specific list of goods, harmless in themselves. All of the items prohibited from sale on Sunday may be manufactured or processed on Sunday; all of the myriad other articles may be made, processed, advertised, and sold on Sunday; every form of worldly employment may be pursued except the sale of the condemned items. The idea that the 1961 act is designed to protect a day of rest when it only partly closes the places that sell the specified goods, allows the sale of countless other articles, and virtually grants a public license to all other forms of commercial and industrial business to operate on that day with actual financial advantage, contains within itself its negation.

The pretension that the statute is to provide a day of rest should not be allowed to hide the obvious fact that the statute is aimed at highway discount houses.

In *G I Surplus Stores, Inc. v. Hunter*, four highway discount houses operating on Sunday sought to enjoin enforcement of the 1961 act on the sole ground that it was unconstitutionally vague, uncertain, and indefinite. On appeal from a judgment below dismissing the action, the North Carolina Supreme Court reversed. The clause in the act allowing the sale of "articles necessary for making repairs and performing services" was deemed so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Therefore, said the court, the act violated article I, section 17, of the North Carolina Constitution and the due process clause of the fourteenth amendment to the federal constitution. The reasoning of the court centered the vagueness charge on the word "necessary." Much reliance was placed on a 1962 Kansas case which held the phrase "other

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8 These arguments were made against a similar statute in Two Guys from Harrison, Inc. v. Furman, 32 N.J. 199, 250-52, 160 A.2d 265, 292-93 (1960) (dissenting opinion).
8* As the Court said in *Two Guys*, "[T]he types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute." 366 U.S. at 590-91 (appellant operated a large highway discount department store).
85 257 N.C. 206, 125 S.E.2d 764 (1962).
86 See note 80 supra.
87 257 N.C. at 213, 125 S.E.2d at 769.
88 This section of the constitution provides: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."
articles of immediate necessity" unconstitutionally vague. Although the North Carolina court expressly decided only that the means used to implement the end were unconstitutional, considerable insight into the feeling of the court concerning the nature and constitutionality of that end can be had by a closer examination of the decision.

The court might easily have avoided declaring the act unconstitutional. The discount houses sought a constitutional test of the act in an injunctive suit. The general rule is that the constitutionality of an act cannot be challenged in a suit to enjoin its enforcement. The court, however, said an exception to the rule is allowed "when it clearly appears . . . that . . . fundamental human rights are denied in violation of constitutional guarantees." There are few cases extending this exception to the general rule to suits based on the "void for vagueness" doctrine, perhaps because freedom from vagueness was not always recognized as a constitutional guarantee. It was originally only a non-decisive part of the rule of strict construction of criminal statutes. Today, however, it has crystallized into an imposing doctrine of constitutional law based either on the requirement of separation of powers or a section of

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88 State v. Hill, 189 Kan. 403, 369 P.2d 365 (1962). The Kansas court said "necessity" has no generally understood objective meaning; that it only had relative, subjective meaning. Therefore it failed to inform men of common intelligence what conduct would render them liable to penalties.
89 257 N.C. at 214, 125 S.E.2d at 770.
90 Ibid.
91 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4920, at 448 (3d ed. 1943). However, such is not to say that the extension is not presently recognized as sound, for in Baggett v. Bullitt, 377 U.S. 360 (1964), state loyalty oath statutes were declared unconstitutional for vagueness in an injunctive suit. Accord, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961). This point concerning the form of action is raised merely to shed light on the inclination of the North Carolina court.
92 United States v. Evans, 333 U.S. 483, 486 (1948). For instance, in Patten v. Aluminum Castings Co., 105 Ohio St. 1, 136 N.E. 426 (1922), 21 MICH. L. REV. 831, a statute was declared void for vagueness independently of constitutional restriction upon legislative action since the required number of judges did not concur in order to declare a statute unconstitutional. See generally Collings, Unconstitutional Uncertainty—An Appraisal, 40 CORNELL L.Q. 195 (1955); Note, 23 IND. L.J. 272 (1948); Note, 109 U. PA. L. REV. 67 (1961); 38 HARV. L. REV. 963 (1925).
93 If the statute is so uncertain that a court would have to rewrite it to enforce it, the court should refuse to usurp the legislative function. Cline v. Frink Dairy Co., 274 U.S. 445 (1927). See generally Collings, supra note 92.
It is usually stated: The terms of a penal statute creating an offense must be sufficiently explicit to inform with reasonable certainty those who are subject to it what conduct is to be penalized. This is the pot calling the kettle black, for the doctrine is itself too vague to command any consistency in the cases. A court may rely on often repeated phrases either to strike down a statute or to uphold it without really making a pene-

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94 See, e.g., N.C. Const. art. I, § 17, quoted in note 86a supra.
95 E.g., G I Surplus Store, Inc. v. Hunter, 257 N.C. 206, 211, 125 S.E.2d 764, 768 (1962).
96 “[B]oth sides cite and rely on the same cases to support their . . . diametrically opposed, positions.” Harvey v. Priest, 366 S.W.2d 324, 327 (Mo. 1963).
97 “The dividing line between what is lawful and unlawful cannot be left to conjecture.” Connally v. General Constr. Co., 269 U.S. 385, 393 (1926). “[T]he will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the results.” Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927). For similar rationale, see State v. Hill, 189 Kan. 403, 369 P.2d 365 (1962); G I Surplus Store, Inc. v. Hunter, 257 N.C. 206, 212, 125 S.E.2d 764, 769 (1962).
98 “That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.” United States v. Petrillo, 332 U.S. 1, 7 (1947). “[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it.” Nash v. United States, 229 U.S. 373, 377 (1913) (Holmes, J.). Compare the quotations cited in note 97 supra. Compare Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 371, 126 S.E.2d 92, 95 (1962) and State v. Hales, 256 N.C. 27, 33, 122 S.E.2d 768, 773 (1961) (shoplifting statute held not vague), with G I Surplus Store, Inc. v. Hunter, 257 N.C. 206, 212-13, 125 S.E.2d 764, 768-69 (1962).

Line-drawing distinctions based on particular words used in a statute do not completely account for the lack of consistency in the cases. The line-drawing technique usually explores the countervailing pressures which require a line to be drawn somewhere. Those countervailing pressures in the vagueness are on the one hand to allow the legislature to use flexible standards to insure effective application of legislative policy and on the other hand to insure that the standards used provide workable guidelines for those administering and subject to them. The “void for vagueness” cases have not generally reflected these line-drawing pressures. See Cardinal Sporting Goods Co. v. Eagleton, 213 F. Supp. 207, 219 (E.D. Mo. 1963). Their “habitual lack of informing reasoning” gives them a “pool-rack-hung-up appearance.” Note, 109 U. Pa. L. Rev. 67, 70-71 (1960). In the G I Surplus case the North Carolina court did not discuss whether the phrase “necessary for making repairs and performing services” resulted from the nature of the subject matter, which may impose limitations on exactitude in phrasing in order to implement policy, or from sloppy draftsmanship—which often happens with “floor” amendments; nor whether the vital word “necessary” had been previously employed with success by the legislature; nor whether the phrase must be sufficiently certain to the average man or only to the trained minds of judges. See generally 45 Harv. L. Rev. 160
This possibility makes the concept of vagueness an "available instrument in the service of other . . . judicially felt needs and pressures" that control the cases and relegate the vagueness of the statutory words to incidental significance. These "spurious void for vagueness" cases seem to have their actual basis in either of two settings: (1) a state imposing more prohibitory regulation than it has a constitutional right to impose, or (2) a court actually deciding policy questions avoided in the written opinion as "political questions." These uses of the doctrine, although tending to minimize the number of occasions a court must expressly reach issues of ultimate power, tend to veil the real issue when used in the first kind of case and usurp the legislative function when used in the second.

Evidence that the North Carolina Supreme Court had the first of these uses at least "in the back of its mind" in the G I Surplus case is not wanting. It is found in the language quoted with approval by the court: "'[A]rbitrary interference with private business and unnecessary restrictions upon lawful occupations are not within the police powers of the state.'"

(1931) (arguing that certainty to judges is sufficient). Is it not just as prejudicial to an individual to measure his rights by vague standards as it is to penalize him with vague statutes?

Mr. Justice Holmes said that "it is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Hyde v. United States, 225 U.S. 347, 391 (1912) (dissenting opinion).

The void-for-vagueness doctrine may be regarded less as a principle regulating the permissible relationship between written law and the potential offender than as a practical instrument mediating between, on the one hand, all of the organs of public coercion of a state and, on the other, the institution of federal protection of the individual's private interests.


2 SUTHERLAND, STATUTORY CONSTRUCTION § 4920, at 447 (3d ed. 1943) ("antagonisms to legislative policy rather than uncertainty concerning legislative meaning"); Collings, supra note 92, at 195; Note, 23 Ind. L.J. 272, 284 (1948).


257 N.C. at 210, 125 S.E.2d at 767. The Supreme Court upheld a Pennsylvania Sunday law which only prohibited "certain business activities" in Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961). However, the Court made it clear that in Pennsylvania the statute simply supplemented prior regulation which prohibited all worldly
The questionable application of the vagueness doctrine to the phrase "necessary for making repairs and performing services" also indicates that the court was doing more than merely insuring fair notice. Words that have a long history of use are generally not declared vague. The concept of excepting necessary activities from the operation of Sunday laws dates from the 1676 English act and today appears in all states that have some sort of general Sunday law. A substantial body of courts, including the North Carolina Supreme Court, have construed the exception for necessary activity without finding it so desperately unworkable as to be unconstitutional. Most courts today reject the vagueness attack because they find the word "necessary" in the context of Sunday laws sufficiently definite. Indeed, the United States Supreme Court.

employment. *Id.* at 590. The North Carolina court spent three paragraphs of the *G I Surplus* opinion to point out that the 1961 act does not prohibit "all occupations generally" on Sunday, but only "certain business activities." 257 N.C. at 210-11, 125 S.E.2d at 767 (1962). This has nothing to do with vagueness. It is apparent recognition of the trend in other jurisdictions to hold that "Sunday closing laws which are less than universal in their application are unrelated to a universal day of rest in any manner substantial enough to satisfy due-process requirements." Comment, 4 St. Louis U.L.J. 465, 471 (1957) (citing cases from California, Colorado, Florida, Nebraska, New York and Oklahoma).


*See text accompanying note 12 supra.*


Court did not find the "necessary" exception contained in one of the two acts challenged in *Two Guys From Harrison-Allentown, Inc. v. McGinley* to be vague. In that case, the Court upheld two Pennsylvania Sunday acts. The first of these acts did not contain an exception for necessary activity. With the addition of the "necessary" exception, it is the act that North Carolina adopted. The North Carolina General Assembly obviously adopted a copy of the Pennsylvania act because the act had been upheld against constitutional attack. The addition of the "necessary" exception was not thought of as endangering the constitutionality of the act. The legislature's confidence was justified because the second Pennsylvania act involved in *Two Guys* contained a "necessary" exception that was upheld also. Although the second act was not expressly attacked as being void for vagueness, the Court must have ruled on the issue inferentially. Since the core of the "void for vagueness" doctrine is that the act is so vague as to be unworkable and meaningless, the Court by implication rejected that view merely by finding the act to be valid and workable.


112 PA. STAT. ANN. tit. 18, §§ 4699.4, .10 (1963).
113 PA. STAT. ANN. tit. 18, § 4699.10 (1963).
115 See ESSER, RESPONSIBILITY OF COUNTY BOARDS OF COMMISSIONERS UNDER CHAPTER 1156, 1961 SESSION LAWS 3 (1962) (on file N.C. Institute of Government Library), saying that "obviously this amendment [the "necessary" exception] is vague and subject to a wide range in interpretation but there is no indication in the opinions of the [United States] Supreme Court that addition of the exclusion would result in tipping the scales toward invalidity."
117 Mr. Chief Justice Marshall rejected the "absolutely indispensable" definition of "necessary" as used in the necessary and proper clause of the United States Constitution. He said:
Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description.
118 See Overman & Co. v. Maryland Cas. Co., 193 N.C. 86, 136 S.E.
domestic relations, municipal corporation expenditures, labor, possession of real property, pleading and parties, taxation, and wills. Furthermore, in State v. Black-

250 (1927) (candies, tobacco not necessaries under surety bond of highway contract).

See Denny v. Mecklenburg County, 211 N.C. 558, 191 S.E. 26 (1937) (dwellings for the use of teachers were not "necessary equipment" within statute allowing county bonds for same).

E.g., Berry v. Henderson, 102 N.C. 525, 528, 9 S.E. 455, 456 (1889) (dictum concerning "necessities" husband has duty to provide).

In Barger v. M & J Finance Corp., 221 N.C. 64, 18 S.E.2d 826 (1942), an infant was allowed to recover money paid on a contract during minority because the article purchased was not "among those necessaries for which a minor may be held liable." Id. at 66, 18 S.E.2d at 827. Accord, Jordan v. Coffield, 70 N.C. 110 (1874).

There are a great many North Carolina cases construing the "necessary expense" provision of N.C. CONST. art. VII, § 7. This provision forbids North Carolina municipal corporations spending tax money on expenses other than "necessary expenses" without a vote of the people. Compare Mayo v. Commissioners of Town of Washington, 122 N.C. 5, 29 S.E. 343 (1898) (finding that street lights were not a necessary expense), with Fawcett v. Town of Mt. Airy, 134 N.C. 125, 45 S.E. 1029 (1903) (overruling the Mayo case).


Swink v. Horn, 226 N.C. 713, 717, 40 S.E.2d 353, 356 (1946) (necessity required to recover property subject to wartime rent controls).


"There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." INT. REV. CODE of 1954, § 162(a). See Mich. Improvement Ass'n v. Rockwood, 60-1 U.S. Tax Cas. ¶ 9380 (D.N.D. 1960); Montgomery v. United States 63 Ct. Cl. 588 (1927). See generally 1964 P-H FED. TAX SERV. ¶ 11033.

In Whitfield v. Garris, 134 N.C. 24, 45 S.E. 904 (1903), the court said "that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." Id. at 26, 45 S.E. at 905. (Emphasis added.)

Although some of these uses do not involve criminal statutes, it does not seem that they should be distinguished on that fact alone. The rationale of State v. Hill, 189 Kansas 403, 411, 369 P.2d 365, 371 (1962); State v. Hales, 256 N.C. 27, 33, 122 S.E.2d 768, 772-73 (1961), that the "void for vagueness" doctrine requires criminal statutes to be more certain than civil statutes is not entirely sound. It has modern basis in the principle that "clearer warning should be given where the conduct will invoke sanctions of greater severity." Note, 62 HARV. L. REV. 77, 85 (1948). A light criminal fine is not as severe as many civil consequences resulting from
the North Carolina Supreme Court upheld a superior court determination that a municipal ordinance which prevented the selling of a meal on Sunday was an "oppressive . . . unreasonable exercise of the police power . . ." The rationale of the supreme court is contained in one sentence: "[T]he ordinance in question makes no exception as to 'works of necessity,' among which is generally listed, 'keeping open a . . . dining-room.'"

Therefore, it can be concluded that the court in the GI Surplus case could have held the injunctive suit not proper for a decision on the constitutionality of the act; that the court used a doctrine to declare the act unconstitutional which has previously seen substantial use in expressing motivating forces not explicitly spelled out in the decisions; and that such forces may have motivated the decision in the GI Surplus case since the application of the doctrine to the 1961 act—solely as a means of getting rid of a vague statute—was highly questionable. The court has been criticized for not trying to construe the clause held vague in GI Surplus.

construction of the word "necessary" in a statute. See Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958) ("ordinary and necessary" expense decision involving $41,000); Lilly v. Commissioner, 343 U.S. 90 (1952) (same involving $124,000). It should be noted here, however, that civil fines do not always carry the onerous consequences of a criminal record.

128 186 N.C. 561, 120 S.E. 196 (1923).
129 Id. at 563, 120 S.E. at 197.
130 Ibid. The court in Blackwelder seems to make the "necessary" exception a constitutional mandate. If so it has the support of McQuillin, who says "certain exceptions [to Sunday law prohibitions] must be made. For example, articles or works of necessity . . . may and must be excepted." 6 McQuillin, Municipal Corporations § 24.193, at 777 (1949). Yet in GI Surplus the court said the statute violated constitutional guarantees because it contained the "necessary" exception. Affording Blackwelder the least possible weight, it can be said that the court approved of the exception for "works of necessity." "Works of necessity" might include endless types of work—not merely selling, endless types of sales—not merely retail sales of specific articles, and endless types of necessity—not merely necessary repairs and services. It seems, then, that the phrase deemed essential by the court in Blackwelder could be considered more vague than the phrase involved in the GI Surplus decision.

the lack of emphasis the court put on construction can be attributed to the use of the vagueness doctrine more for the purpose of removing an economic weapon from statutory sanction than for the purpose of insuring fair notice to potential offenders.\textsuperscript{132} If such a use is the substance of the \textit{GI Surplus} case, the result reached is to be applauded. However, the means used to reach the result are unfortunate because the vagueness issue veils this inferable holding and reduces the value of the case as a precedent. Viewed solely as a vagueness case, it can be "hung on the rack" to be factually distinguished in future cases. Hopefully, the many forces which seem to have forged and shaped the opinion will be appreciated.\textsuperscript{133}

The decision in \textit{GI Surplus}, however, did not daunt the Sunday law proponents. Within a year, the 1961 act was rewritten.\textsuperscript{134} The "vague" phrase exempting "necessary activity" was not made more certain; it was deleted. The policy which stood back of the phrase was totally abandoned. Also, a provision in the 1961 act which

\textsuperscript{132} Clark's Charlotte, Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964); State v. Towery, 239 N.C. 274, 79 S.E.2d 513, appeal dismissed, 347 U.S. 925 (1954); and State v. McGee, 237 N.C. 633, 75 S.E.2d 783, appeal dismissed, 346 U.S. 802 (1953), do not detract from this conclusion. These cases uphold municipal ordinances prohibiting all occupations generally on Sunday with exceptions allowing certain business activities. The ordinances were attacked on the ground that they contained unreasonable classification distinction between stores allowed to open on Sunday and stores required to close. The cases assume that the purpose of the Sunday ordinances involved is to promote public health and welfare. See Clark's Charlotte, Inc. v. Hunter, \textit{supra} at 228, 231, 134 S.E. at 368, 370. On that basis they allow unlimited classification of types of businesses. If a search revealed that the purpose and effect of the ordinances is more to suppress competition than to provide a day of rest, the result should be the same as that which can be inferred from \textit{GI Surplus}—that the purpose underlying the Sunday laws is unconstitutional. See generally text accompanying notes 70-78 \textit{supra}. The cases have avoided the search. They uniformly say that competition between the classes is not the test of reasonableness of the classification. This reasoning overlooks the fact that competition between the classes might have fostered the classification, whereas differences in the types of businesses are only incidentally involved. The reasoning of the court upholds an ordinance where all businesses of a particular type (for instance department stores) are required to close. Is this a sufficient test? Some stores within the type might reap great economic advantage even though they have to remain closed. See text accompanying notes 67-68 \textit{supra}. Labor might only incidentally benefit.\textsuperscript{135}

\textsuperscript{133} The "working room" of the court was partially restricted by the pleadings. The sole attack on the statute was upon the vagueness charge. Finding that two other jurisdictions (Kansas and Ohio) had accepted the contention, the court did not go beyond it to expressly settle the ultimate power issue.

\textsuperscript{134} N.C. GEN. STAT. § 14-346.2 (Supp. 1963). The new act retained the substance of the 1961 act except as hereinafter noted.
allowed local government units to exempt themselves from the act was abandoned in response to a warning in *GI Surplus*\(^\text{135}\) that it might raise constitutional questions. But the effect of the latter provision—lack of uniformity throughout the state—was partially retained. The 1963 act exempted twenty-five counties totally and portions of four others from its operation. The legislature justified the exemption as being to meet the needs of people visiting "resort or tourist" areas.\(^\text{136}\) This justification was expressly rejected in *Treasure City, Inc. v. Clark.*\(^\text{137}\) In this case the court, in reviewing the 1963 act, said:

> Consideration of the articles of merchandise to which the 1963 act applies (e.g., business or office furnishings) dispels the suggestion that there exists in a resort area or in a tourist area a need for the sale of such merchandise on Sunday sufficiently distinctive to constitute a reasonable basis for the separate classification of such areas with reference to the sale of such articles of merchandise.\(^\text{188}\)

Another explanation of the exemption of the large areas from the act may be possible. The exemption may show that these otherwise unprotected areas are in no need of this type of legislation; that the Sunday sale of the proscribed articles in these areas is not really inimical to either the public health, safety, morals, or welfare.\(^\text{189}\) If this is the reason behind the exemption, the conclusion that recent Sunday laws are a solution to private rather than public problems is strengthened.\(^\text{140}\)

The *Treasure City* case held the 1963 act unconstitutional. The express holding was based on article II, section 29 of the North Carolina Constitution, which provides in part:

\[\text{135} \] 257 N.C. at 211, 125 S.E.2d at 768.


\[\text{137} \] 261 N.C. 130, 134 S.E.2d 97 (1964).

\[\text{138} \] Id. at 134-35, 134 S.E.2d at 100. The court might well have added that the bill to rewrite the 1961 act had itself been amended to exempt many of the counties before further amendment classified the exempted counties as "resort or tourist areas." See Institute of Government Legislative Service, Daily Bulletin, March 14, April 19, 22, May 9, 10, 17, 22 (1963) (legislative history of S.B. 141).

\[\text{139} \] The thought was suggested in *GI Surplus Stores, Inc. v. Hunter*, 257 N.C. 206, 211, 125 S.E.2d 764, 767-68 (1962).

\[\text{140} \] The fact that the General Assembly also expanded county powers by allowing them for the first time to pass Sunday laws, N.C. GEN. STAT. § 153-9(55) (1964), does not explain the exemptions in the 1963 act. Sixteen counties and portions of three others are excepted from both N.C. GEN. STAT. § 14-346.2, and N.C. GEN. STAT. § 153-9(55). These areas are without effective Sunday laws.
The General Assembly shall not pass any local, private or special act or resolution ... regulating labor [or] trade. ... The General Assembly shall have power to pass general laws regulating matters set out in this section.

The court found that the act regulated trade, was not a general law, and therefore violated the constitutional provision. As in GI Surplus, the court neither searched for purpose nor reached the ultimate power question of whether the purpose for which the statute was enacted was constitutional.

However, a certain aura surrounding the recent decisions cannot be overlooked. It indicates that the court is well aware that in recent years the Sunday laws have taken on a new perspective; that the banner for them is carried by business groups engaged in a war of competition; and that when irritation for such legislation comes only from particular interest groups, the objective to be served should be questioned.

No mention was made that the act regulated labor. It does so only indirectly.

The mere fact that the act involved classification was not the defect. A general law may treat different parts of the state separately. But in order for a law employing classification to be general, it must "apply to and operate uniformly 'on all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law.'" 261 N.C. at 135, 134 S.E.2d at 100. The court found that all areas distinguished by characteristics sufficiently marked and important to make them clearly a class to be treated separately were not treated equally. Many resort areas in North Carolina were not excepted. That finding alone should have been enough to declare the act unconstitutional because even though the legislature has wide discretion in making classification in statutes, it must be based on tangible, intrinsic, germane distinctions and "must affect all within the class uniformly." McIntyre v. Clarkson, 254 N.C. 510, 519, 119 S.E.2d 888, 894-95 (1961). If not it would be a denial of the equal protection of law guaranteed under the fourteenth amendment and under N.C. CONST. art. I, § 17. Therefore Treasure City should be a valuable precedent in the legislative classification field, where the courts have previously shown a notorious reluctance to supervise. Consider the classes sustained in State v. Weddington, 188 N.C. 643, 125 S.E. 257 (1924). The ordinance allowed the sale of meals on Sunday, and with them coffee, tea, or milk. Defendant was subject to criminal conviction for the sale of a Coca-Cola. Treasure City inferentially recognizes that the classification issue is the core of the case. The case arose as did GI Surplus in an injunctive suit to test constitutionality. Both cases adopted the general rule that constitutionality of an act cannot be challenged in a suit to enjoin its enforcement but took exception because it "clearly" appeared necessary to protect "fundamental human rights." GI Surplus Store, Inc. v. Hunter, 257 N.C. 206, 214, 125 S.E.2d 764, 770 (1962). It seems clear that the guarantee of equal protection is the right protected in Treasure City.
IV. Policy Considerations

When the constitutionality of an objective is questionable, policy considerations are generated. Ironically, these added policy considerations are often overlooked in an effort to draft a law which will withstand the constitutional test. The result is a law that may not be suited to the present best interests of the state. A constitution "does not tell us what is presently wise. . . . [It] can do no more than save us, in extreme cases, from folly." Therefore, more attention should be directed to these policy considerations in deciding whether this type of legislation should be enacted at all.

The legitimate end that Sunday laws allegedly achieve is the procurement of a day of rest for the public. A need for this kind of supplementation of the laws protecting labor in North Carolina has not been sufficiently shown by the proponents. Furthermore, the disadvantages which are necessarily bound up in this type legislation seem to be overbalancing. Classification distinctions allowing certain business activities to continue while most businesses are required to close are inescapable since many types of Sunday labor facilitate making Sunday a day of rest and recreation. The large majority of these classifications in the past have extended beyond the mere exemption of businesses for the purpose of making Sunday a more enjoyable day of rest and relaxation. Many distinctions made to allow one activity on Sunday and disallow another have no logical explanation. These distinctions cause responsible

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144 The proponents have generally stated their purpose in sponsoring Sunday legislation to be for "the protection and general welfare of the public as a whole and also for the protection of family life and for the general welfare of the people as a whole, including the employee class." Brief for the North Carolina Merchants Ass'n as Amicus Curiae, p. 20, Treasure City, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964).
145 This extended classification results either from surrender to special interest groups or from the use of inadvertent language which is too specific. See generally Editorial Note, 12 RUTGERS L. REV. 505, 511-12 (1958). Consider the 1962 Charlotte ordinance excepting real estate dealers; the 1961 act allowing wholesale but not retail sales; and the Asheville ordinance allowing sale of ice cream but not sherbert, milk or butter. Brief for Appellant, p. 5, State v. Trantham, 230 N.C. 641, 55 S.E.2d 198 (1949).
146 See the classifications sustained in State v. Weddington, 188 N.C. 643, 125 S.E. 257 (1927), and in State v. Trantham, supra note 146. The classifications in the Sunday closing ordinance adopted by Charlotte in 1962, CHARLOTTE, N.C., CODE § 13-56 (1964), were widely criticized. A Charlotte Observer editorial said that "under the ordinance, as we read it, a drug
public officials—even the most learned in the law—to regard the Sunday laws as "nothing short of ridiculous,"48 "a miserable farce,"49 "tyrannical,"50 and an "unbelievable hodgepodge"51 causing a "vexing state of uncertainty and widespread confusion . . . so notorious as to be the subject of judicial notice."152 The classification used in state-wide Sunday laws has also failed to recognize the fact that "the tranquility of the country town may admit of different regulations than the discordant and sometimes raucous atmosphere of the growing cities."153

The Sunday laws are conducive to sporadic enforcement,154 store may sell a Sunday patron a Band-Aid, but woe be to the food store that does. A golf shop may peddle its golf balls on Sunday, but the sporting goods section of a drug store will have to be roped off.” Charlotte Observer, Feb. 4, 1964, § B, p. 2, col. 1. Furthermore, an exemption to allow “emergency repair services” on Sunday was deleted from the final draft of the ordinance. This deletion seems to indicate, for example, that plumbing or automobile repairs would not be allowed on Sunday even in an emergency. Charlotte Observer, March 6, 1964, § C, p. 2, col. 2.

152 Harvey v. Priest, 366 S.W.2d 324, 327 (Mo. 1963).
154 Enforcement has been neglected throughout the history of Sunday laws. LEFLAR & NEWSOME, NORTH CAROLINA 125 (1954); MYER, YE OLDEN BLUE LAWS 115-16, 119 (1921); 3 SAUNDERS, THE COLONIAL RECORDS OF NORTH CAROLINA 180 (1886) (1715 act “too little regarded”). See generally WHITAKER, THE EIGHTEENTH CENTURY ENGLISH SUNDAY 52-84 (1940). Even after the 1962 Charlotte ordinance was upheld by the North Carolina Supreme Court, the Charlotte Police Chief said that police would not take the initiative nor stringently enforce it. Charlotte Observer, Feb. 3, 1964, § B, p. 1, col. 1. The fact that a short period of accommodation is a customary prelude to strict enforcement of a new penal statute may explain the statement of the Charlotte Police Chief. Correspondence From John T. Morrisey, Sr., Charlotte City Attorney, to Brown Hill Boswell, Sept. 15, 1964. The Charlotte ordinance was repealed before it grew out of this accommodation period. Ibid. However, other public officials have expressed the same general attitude toward Sunday laws which have been “in force” for periods of time long past the accommodation stage. For instance, the District Attorney of Lehigh County, Pa., admitted the intentional absence of Sunday law enforcement for many years. Nader, Blue-Law Blues, 192 NATION 499, 500 (1961). One reason for lack of enforcement is the administrative unworkability. In Spartanburg County, S.C., opponents of the Sunday laws demanded enforcement against all violators in an effort to demonstrate the administrative unworkability. In three Sundays of enforcement police netted one thousand arrests. Sheriffs and judges
which not only necessarily creates an attitude of disrespect by the public for the authority of the law, but which also is "hardly compatible with the characterization of the statute as a vehicle with which the state seeks to promote the public health and welfare." Sporadic enforcement is also inconsistent with a fundamental principle of ordered liberty: the assurance of "responsible control over the scope and probable regularity of exercise of governmental force." Another significant disadvantage of the Sunday laws is that minority religious beliefs are made more expensive than the beliefs of the majority. This disadvantage, perhaps more than any other, has caused the view that restriction of Sunday activity should come about by voluntary agreement between individuals and not by government force to gain considerable support. The


The burden imposed on minority religious beliefs runs throughout the history of this type of law, causing an early writer to remark: "No man can peruse these laws without a chill in every vein, and be ready to disbelieve that so uncharitable a spirit could ever have existed and been exercised in America, in a country whose freedom, civilly and religiously considered, was its boast . . . ." *The Blue Laws of New Haven Colony* at v (1838). That the burdens still exist today—though in less degree—is not denied. Consider the language of Warren: "[T]he statute at bar does not make unlawful any religious practices . . . ."; it simply makes the practice "more expensive." *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). Justice Frankfurter says: "[T]he measure of the burden is not . . . beyond the power of the individual to alter." *McGowan v. Maryland*, 366 U.S. 420, 521 (1961) (separate opinion). Frankfurter adds that the severity of the burden "might be offset by the industry and commercial initiative of the individual merchant." *Ibid.* Might not this line of thought maintain any oppressive statute?


A 1962 resolution by the United Presbyterians' General Assembly said: "The church should not seek nor even appear to seek, the coercive power of the state in order to facilitate the Christian's observance of the Lord's Day." *Newsweek*, June 18, 1962, p. 77. A 1959 report by the National Council of the Churches of Christ in the U.S.A. said: "[T]he general consensus, coming from numerous areas where community-wide efforts against economic encroachments on Sunday have developed, points unquestionably to the greater value and dependability of solutions reached by voluntary agreement rather than by legislative fiat." Quoted in Shaffer, *supra* note 154, at 123-24.
step away from legislation burdened with such difficult problems of constitutionality and policy is commendable.

Brown Hill Boswell

Administrative Law—Judicial Review—Procedural Due Process in Student Disciplinary Proceedings

In the recent case of In re Carter, the petitioner, having been suspended from the University of North Carolina at Chapel Hill on a charge of cheating on a quiz, appealed to the state courts for judicial review. The trial court ruled that the evidence offered against the petitioner failed to rebut the presumption of innocence, that the conviction was therefore not in accordance with due process, and that to deny petitioner readmission on the evidence presented would be arbitrary and capricious. But because additional evidence had been disclosed at the trial, the court remanded the case to the Board of Trustees to refer to the proper administrative authorities for a review taking account of the new evidence. Petitioner took no exception to this order and made no appeal, but moved before a subsequent term of court that an order be issued to the Board of Trustees to show cause why an order should not be issued reversing the suspension and directing correction of University records accordingly. It was held that until the administrative hearing on remand was held, petitioner had not exhausted her administrative remedies; the motion and order to show cause were dismissed.

On appeal, the North Carolina Supreme Court affirmed the dismissal. Delegation of authority by the Board of Trustees in matters of student suspension was upheld as "proper and constitutional." The decision of the Board of Trustees upholding the student honor council and the Chancellor was held to be "the administrative decision of a State board authorized by the Constitution and statutes of the State to make administrative decisions . . . ," and the petitioner was thus held to be entitled to judicial review under the state statutes granting review of administrative decisions. The Carter case thus establishes beyond doubt the jurisdiction of the

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1 262 N.C. 360, 137 S.E.2d 150 (1964).
2 Id. at 372, 137 S.E.2d at 158.
3 Id. at 372, 137 S.E.2d at 159.