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Michael Lee Carmin

Indiana University School of Law

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Indiana's Sunday Alcoholic Beverage Sales: Regulation Without Justification

It is axiomatic that the function of a legislature is to create new laws and repeal unnecessary ones. Moreover, a corollary duty of the legislature is to be cognizant of the ramifications of its actions. The history of Indiana's regulation of Sunday activities, both commercial and private, is an excellent example of the problems which may arise when too little attention is given to the relationship between mutually supportive laws which have developed by similar methods.¹ Prior to 1977, Indiana prohibited most commercial and many recreational pursuits on Sundays pursuant to the closing law.² In 1977 the closing law was repealed.³ The repeal of the closing law has produced potential constitutional issues in the regulation of Sunday sales of alcoholic beverages. Historically, the development of Sunday liquor regulations paralleled that of the closing law and was supported by it. The 1977 repeal of the closing law effectively removed this justification for liquor regulations.⁴ The legislative intent in the area of the liquor regulations, following repeal of the

¹ This note focuses on the issues involved in the regulation of Sunday sales of alcoholic beverages. There are similar issues present in other Sunday regulations. For example, a barber may have his license suspended for violating Indiana Code § 35-1-86-1 (1976) (repealed 1977), see IND. CODE § 25-7-1-16(8) (1976), despite the fact that this section was the closing law which was repealed in 1977. See note 2 & accompanying text *infra*. In other words, a barber's license is conditioned on compliance with a non-existent statute. The repeal of the closing law created a legislative gap which has yet to be filled. It is this type of issue and the inaction on the part of the legislature which present potential problems like those discussed in this note. For a discussion of Sunday motor vehicle sales prior to the repeal of the closing law, see *Tinder v. Clarke Auto Co.*, 238 Ind. 302, 149 N.E.2d 808 (1958).

² Whoever being over fourteen (14) years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, quarreling, at common labor, or engaged in his usual vocation, works of charity and necessity only excepted, shall be fined not less than one dollar (\$1.00) nor more than ten dollars (\$10.00); but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travelers, and those engaged in conveying them, families removing, keepers of toll bridges and toll gates, ferrymen acting as such and persons engaged in the publication and distribution of news, or persons engaged in playing the game of baseball or ice hockey after one o'clock P.M. and not less than one thousand (1,000) feet distant from any established house of worship or permanent church structure used for religious services, or any public hospital or private hospital erected prior to the passage of this act.

IND. CODE § 35-1-86-1 (1976) (repealed 1977).

³ An Act to amend IC 4, 8, 14, 15, 16, 17, 22, 24, 25, 33, 34, and 35 as part of a revision of the criminal law, Pub. L. No. 26, § 25, 1977 Ind. Acts 160.

⁴ See notes 79-85 & accompanying text *infra*.

closing law, is problematic. The current situation is subject to constitutional attack because the classification schemes which serve as the basis of the Sunday liquor sales restrictions are irrational and without apparent legislative purpose. Because this situation has gone unnoticed, or if noticed, uncorrected by the legislature, the justification for the Sunday liquor laws must be reexamined and clarified.

This note surveys the origin of the closing laws and traces their development in Indiana. It analyzes the rationale of the Sunday liquor laws, as traditionally related to and dependent upon the closing laws, and demonstrates that the demise of the closing laws left the liquor laws unsupported by any justification, particularly in light of amendments to the Sunday regulations. It argues that the Sunday liquor laws, as they exist today, are subject to constitutional challenges based on Indiana's privileges and immunities clause or the equal protection clause of the fourteenth amendment to the United States Constitution. Therefore, the General Assembly is obligated to act to cure the infirmities of the laws.

DEVELOPMENT OF CLOSING LAWS AND REGULATION OF LIQUOR SALES

Sunday Closing Laws: Historical Sketch

The origin of Sunday closing laws has been traced to the Emperor Justinian in 321 A.D.⁵ A civil edict with religious overtones was issued which created confusion regarding the rationale for the law even at its inception.⁶ During their early development, these laws acquired a blend of "Mesopotamian, Hebrew, Roman, [and] Germanic" elements.⁷ The Hebrew contribution to the closing law, based on biblical commandment, was of a moral flavor.⁸ This influence eventually resulted in a bifurcated rationale for the closing laws. One aspect of the rationale rested on the premise that, apart from any religious considerations, Sunday was a necessary day of rest.⁹ The second aspect explicitly recognized closing laws to be

⁵ See *Rosenbaum v. State*, 131 Ark. 251, 199 S.W. 388 (1917).

⁶ See J. AYER, *SOURCEBOOK FOR ANCIENT CHURCH HISTORY* 284 (1913); A. JOHNSON & F. YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* 219 (1969).

⁷ *Harrison v. McLeod*, 141 Fla. 804, 194 So. 247 (1940).

⁸ "Remember the sabbath day, to keep it holy. Six days you shall labor, and do all your work; but the seventh day . . . you shall not do any work . . .; for . . . the Lord . . . rested the seventh day . . ." *Exodus* 20:8-11 (Revised Standard Version).

⁹ For cases describing the need to prevent excessive labor practices, thus justifying regulation of labor and commercial transactions, see note 57 & accompanying text *infra*.

required by Christian principles.¹⁰

The mid-centuries of English history witnessed significant expansion of the scope of the laws. The purpose of the laws was expressly stated in 1448¹¹ and reemphasized in 1627.¹² Sunday was a day of worship and must be kept holy; certain conduct and activities did injury to God when performed on Sunday. To avoid this sacrilege, restrictions were placed on selected activities.¹³ It was clear that, aside from any governmental desire to protect the people from excessive labor by forcing a day of rest upon them, the laws were based on a religious mandate.

Against this backdrop of religious laws the New World was colonized. Predominate among the people settling in New England were victims of religious intolerance in the "old country."¹⁴ They came seeking new land and new freedom. Yet the closing laws enacted in New England were far more extensive than those of England.¹⁵

The closing laws were continually carried westward by migrating settlers. During the eighteenth century the Northwest Territory was carved out of the wilderness as the United States expanded its borders westward. The territory was governed by the Ordinance of 1787.¹⁶ The general closing law enacted under the Ordinance reasserted the religious rationale: "The christian world have set apart the first day of the week, as a day of rest from common labors and pursuits; it is therefore enjoined that all servile labor, works of necessity and charity excepted, be wholly abstained on said day."¹⁷ Not surprisingly, each subsequent stage in Indiana history saw the reenactment of a general closing law. In 1800 the Indiana Territory was severed from the Northwest Territory. The new government quickly passed a closing law, ostensibly to prevent vice and immo-

¹⁰ See A. JOHNSON & F. YOST, *supra* note 6, at 222-27; W. JOHNS, DATELINE SUNDAY, U.S.A. 95-102 (1967).

¹¹ Certain days wherein fairs and markets ought not to be kept, 1448, 27 Hen. 6, c. 5.

¹² An act for punishing diverse abuses committed on the Lord's day, called Sunday, 1625, 1 Car. 1, c. 1.

¹³ An act for the better observation of the Lord's day, commonly called Sunday, 1676, 29 Car. 2, c. 7 (the forerunner of Indiana's closing law); Upon which days wool may be shown in the staple, and in which not, 1359, 28 Edw. 3, c. 14 (prohibiting the showing of wool on Sunday). The closing law earned its name by forcing the closing of businesses and commercial enterprises on Sunday.

¹⁴ W. JOHNS, *supra* note 10, at 12-14.

¹⁵ *Id.* at 1-7. An excellent example of the irrational nature of the laws was the penalty for kissing one's wife in public on Sunday—a whipping. *Id.* at 6.

¹⁶ For a history of the government of the territory see NORTHWEST TERRITORY CELEBRATION COMMITTEE, HISTORY OF ORDINANCE OF 1787 AND OLD NORTHWEST TERRITORY 16 (1937).

¹⁷ Laws of Governor and Judges under the Ordinance of 1787, from July 25th, 1788 to July 2d, 1791, A law respecting crimes and punishments, ch. 6, § 22, 1787-1802 Northwest Territory Laws 92 (1788).

rality.¹⁸ When statehood was conferred upon the territory in 1816, Indiana responded by establishing its own closing law, which was also designed to prevent certain "immoral practices."¹⁹ By 1905 the Indiana General Assembly had formulated a closing law²⁰ which, except for minor amendments in 1909²¹ and 1941,²² remained in effect until 1977.²³

Sunday Liquor Sales Restrictions

The government of the Northwest Territory addressed liquor licensing as well as Sunday closing laws. The licensing law, in contrast to later restrictive measures, required a tavernkeeper to *provide* "liquors of good and salutary quality" or risk revocation of his license.²⁴ In the 1816 closing law, Sunday sales of intoxicating liquors were restricted,²⁵ but sales to travelers were excepted from the prohibition.²⁶ However, acceptance of such laws was not unanimous nor without controversy.

In the early 1800's the proponents of liquor sales viewed whiskey as a necessity possessing wonderful medicinal and curative powers.²⁷ Further, religious leaders did not uniformly oppose whiskey and many were associated with its use;²⁸ a church-oriented newspaper publicly opposed abstinence in 1841 as contrary to the teachings of the Bible.²⁹ Temperance movements gradually gained influence, however, and the use of intoxicating liquors fell out of vogue.³⁰ In 1855 the temperance forces gained control of the General Assembly³¹

¹⁸ An Act for the prevention of Vice and Immorality, ch. 37, § 1, 1807 Ind. Acts 199. This closing law remained virtually intact in the closing law established by the First General Assembly of Indiana.

¹⁹ An Act to prevent certain immoral practices, ch. 32, §§ 1, 2, 1816-17 Ind. Acts 165 (1817) (repealed 1905). The state's first closing law set the tone for the versions which would follow in later years; substantial portions of it appeared in the 1905 version, the basic closing law which survived until 1977.

²⁰ An act concerning public offenses, ch. 169, § 467, 1905 Ind. Acts 584 (repealed 1977).

²¹ Act of March 8, 1909, ch. 175, § 1, 1909 Ind. Acts 436 (repealed 1977).

²² Act of March 3, 1941, ch. 75, § 1, 1941 Ind. Acts 191 (repealed 1977).

²³ See note 2 & accompanying text *supra*.

²⁴ An Act granting licenses to merchants, traders and tavern-keepers, Laws of 1792, ch. 24, § 9, 1787-1802 Northwest Territory Laws 114 (1792).

²⁵ An Act to prevent certain immoral practices, ch. 32, § 1, 1816-17 Ind. Acts 165 (1817) (repealed 1905).

²⁶ *Id.* § 2.

²⁷ T. GOODWIN, LIQUOR LAWS AND DECISIONS 4 (1883).

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 6.

³⁰ *Id.* at 5-9.

³¹ *Id.* at 13.

and passed a state prohibition law.³² The force of the law was quickly limited by the courts,³³ and it was repealed in 1858.³⁴

The General Assembly nonetheless continued its attempts to regulate issuance of licenses for retail sales of liquor. Nearly every General Assembly from 1816 through 1979 made some modification of the regulation of liquor permits and licenses.³⁵ The Sunday exception for travelers was eliminated in 1853,³⁶ and closing hours for permissible sale days were instituted in the late 1880's.³⁷ In 1917 Indiana enacted a second prohibition³⁸ which was followed by a nationwide prohibition.³⁹ After nearly fifteen years these efforts were deemed a failure and repealed.⁴⁰ The legislature turned again to license regulation, and by 1971 the current closing hours were established.⁴¹

The mid-1970's saw major revisions in Indiana's Sunday closing and liquor laws. With the repeal of the exception for Sunday travelers in 1853, Indiana made it unlawful to sell intoxicating liquors on Sunday.⁴² Then, on February 13, 1973, Public Law 55⁴³ was enacted as a new title of the Indiana Code compiling all laws and regulations

³² An Act to prohibit the manufacture and sale of spirituous and intoxicating liquors, except in the cases therein named, and to repeal all former acts inconsistent therewith, and for the suppression of Intemperance, ch. 105, § 1, 1855 Ind. Acts 209 (repealed 1858).

³³ *Beebe v. State*, 6 Ind. 501 (1855). The court found major portions of the law to be unconstitutional since it permitted a state-held monopoly in the liquor industry.

³⁴ An Act to repeal an act entitled "An Act to prohibit the manufacture and sale of spirituous and intoxicating liquors, except in the cases therein named, and to repeal all former acts inconsistent therewith, and for the suppression of Intemperance," ch. 15, § 1, 1858 Ind. Acts 40.

³⁵ Modifications of requirements to obtain a retailer's permit were typical of legislative efforts. *E.g.*, An Act to amend an act, entitled an act to license and regulate taverns, ch. 36, § 2, 1820-21 Ind. Acts 92 (1821); An act to authorize persons to retail spirituous liquors without the requisition of a tavern keeper, ch. 63, § 2, 1827-28 Ind. Acts 79 (1828).

³⁶ An Act to regulate the retailing of Spirituous Liquors, and for the suppression of evils arising therefrom, ch. 66, § 6, 1853 Ind. Acts 87.

³⁷ Act of March 17, 1875, ch. 13, §§ 3, 9, 1875 Ind. Acts, 49th Spec. Sess. 55. The precise closing hours were frequently modified.

³⁸ An Act prohibiting the manufacture, sale, gift, advertisement or transportation of intoxicating liquor except for certain purpose and under certain conditions, ch. 4, § 4, 1917 Ind. Acts 15. In 1919, Indiana resolved to adopt the eighteenth amendment to the Constitution which established National Prohibition. S.J. Res. 2, ch. 236, 1919 Ind. Acts 846.

³⁹ U.S. CONST. amend. XVIII.

⁴⁰ U.S. CONST. amend. XXI. Indiana adopted a new licensing law. An Act concerning alcoholic beverages, and declaring an emergency, ch. 80, 1933 Ind. Acts 492.

⁴¹ IND. CODE § 7.1-5-10-1 (Cum. Supp. 1979).

⁴² Sunday liquor sales were proscribed, but express exceptions were provided for sales for "sacramental, mechanical, chemical, medicinal, or culinary purposes." An act to regulate the retailing of Spirituous Liquors, and for the suppression of evils arising therefrom, ch. 66, § 1, 1853 Ind. Acts 87.

⁴³ IND. CODE tit. 7.1 (1976 & Cum. Supp. 1979).

concerning alcoholic beverages. On May 1, 1973, Public Law 60⁴⁴ amended the new title. The amendment allows restaurants to serve intoxicating liquors by the drink on Sunday if for consumption on the premises, provided certain criteria are satisfied.⁴⁵ This restriction on Sunday sales, with the recent amendment liberalizing the regulations, has been retained despite the repeal of the closing law in 1977.

It was this 1977 repeal which first necessitated focusing attention on the justification for the Sunday sales restrictions. Prior to that time, regulation of Sunday activities was in keeping with preserving its status as a "day of rest";⁴⁶ however, this status was lost in 1977.⁴⁷ The General Assembly emphasized this change in attitude during the 1979 session. The law regulating boxing and wrestling exhibitions⁴⁸ was amended to remove the "antique" restriction on Sunday exhibitions.⁴⁹ Today, for reasons other than a day of rest rationale, a few activities continue to be prohibited on Sunday;⁵⁰ yet, Sunday liquor sales are restricted without benefit of any justification independent of the repealed closing law, and as such, are subject to constitutional challenges.

RESTRICTIONS ON SUNDAY LIQUOR SALES: IN SEARCH OF A RATIONALE

Development of the Police Power Rationale

The religious rationale used to support the Sunday restrictions was express.⁵¹ A police power rationale only became necessary after

⁴⁴ IND. CODE §§ 7.1-3-16.5-1 to -6 (1976).

⁴⁵ To qualify for the supplemental retailers' permit the restaurant must demonstrate that it has annual gross sales of \$100,000.00, 50% of which are food sales. *Id.* § 7.1-3-16.5-2.

⁴⁶ See cases cited notes 55-57 *infra*.

⁴⁷ In addition to the repeal of the closing law, Public Law 26 repealed the prohibition against Sunday hunting. Act of April 11, 1977, Pub. L. No. 26, § 25, 1977 Ind. Acts 160. Other Sunday prohibitions were retained for reasons other than a day of rest rationale. See note 50 & accompanying text *infra*.

⁴⁸ IND. CODE §§ 25-9-1-5, -16, -17 (1976) (amended 1979).

⁴⁹ In 1979, when preparing to schedule a boxing exhibition to be held on a Sunday, the Administrative Director of the Indiana Athletic Commission discovered what he termed an "antique" law, which prohibited such Sunday exhibitions. *Indpls. News*, Jan. 6, 1979, at 13, col. 3.

⁵⁰ See, e.g., IND. CODE § 34-1-34-12 (1976) (civil judgment execution may not be issued on Sunday unless plaintiff shows a compelling need); *id.* § 33-15-1-2 (office of the state supreme court clerk is closed on Sunday). These provisions are sustainable due to the legislature's control of state offices without concern for any police power justification.

⁵¹ *E.g.*, the very title of the 1855 closing law reveals its religious orientation: An Act for

the states ratified the first amendment,⁵² which, under the establishment clause, required the separation of church and state.⁵³ A constitutional challenge to a state closing law based on first amendment reasoning did not become possible until the Supreme Court incorporated its guarantees into the fourteenth amendment.⁵⁴ This extension of first amendment principles to the states necessitated a secular response to uphold their closing laws.

The Supreme Court forewarned the states of its view of the first amendment as early as 1884. In *Soon Hing v. Crowley*,⁵⁵ the Court held that “[l]aws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.”⁵⁶ Despite this lucid declaration of a police power rationale, attacks on the laws continued until 1961 when the Court fully delineated the criteria for legitimacy of such laws by explicitly requiring the states to demonstrate a police power rationale.⁵⁷

Determining Indiana's historical justification for the closing laws is not easy. They have acquired an almost chameleon nature. The legislative justification for the laws seldom has been articulated fully. Courts generally seek to propound a rationale from the opera-

the protection of the Sabbath, and providing penalties for the desecration thereof, ch. 84, 1855 Ind. Acts 159 (repealed 1909).

⁵² The first amendment was ratified in 1791; however, it was more than 150 years before its guarantees were fully incorporated into the fourteenth amendment and thereby made applicable to the states. See note 54 & accompanying text *infra*.

⁵³ “Congress shall make no law respecting an establishment of religion” U.S. CONST. amend. I. For a discussion of this clause in respect to closing laws, see cases cited note 57 *infra*.

⁵⁴ *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). For earlier treatments of incorporation of first amendment guarantees, see *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

⁵⁵ 113 U.S. 703 (1885).

⁵⁶ *Id.* at 710.

⁵⁷ In 1961 the Supreme Court heard four cases from different states challenging state closing laws. The Court held that a religious rationale was improper, but that the laws were sustainable pursuant to a police power rationale, regardless of the rationale once used to support the laws. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two-Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Mkt.*, 366 U.S. 617 (1961).

The religious origin of the closing laws were recognized in *McGowan*, but the Court also found that “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 or all religions.” *McGowan v. Maryland*, 366 U.S. at 442.

The purpose of the closing law was significant as it was found permissible for the state to seek “to set one day apart from all others as a day of rest.” *Id.* at 450. For a discussion of Indiana closing law and the impact of these cases, see Note, *The Constitutional Status of the Indiana Closing Law*, 37 IND. L.J. 397 (1962).

tion of the law and from its historical development. However, Indiana case law concerning closing laws is of little help. In *Voglesong v. State*⁵⁸ the closing law was challenged when it was used to convict a defendant for engaging in his usual vocation, selling liquors, on Sunday. The court summarily upheld the law, asserting that "[t]he question [of the constitutionality of the closing laws] can hardly be considered an open one. The grounds upon which such acts are sustained have been thoroughly examined and are generally admitted to be substantial."⁵⁹ As authority for this view, the court cited only two cases, neither of which involved constitutional challenges to the law.⁶⁰

A constitutional challenge was again before the court in *Foltz v. State*.⁶¹ The court failed to consider the constitutional challenge adequately, and cited *Voglesong* as controlling.⁶² In yet another constitutional challenge, the court faced, for the first time in Indiana, a challenge to the closing law based on the privileges and immunities clause of the Indiana Constitution⁶³ and the equal protection clause of the fourteenth amendment.⁶⁴ The court refused to consider the issue, claiming that "[t]hat sentiment is too widely spread and profound, and that policy is too firmly embedded in the laws and in the decisions of the courts, to be overthrown."⁶⁵ In effect, the issue of the proper rationale was ignored and the closing laws were bootstrapped into precedent: the laws existed, therefore they were accepted; ergo, they should continue to exist. The only unequivocal statement of purpose for the laws was made with the enactment of the closing law under the Ordinance of 1787.⁶⁶

⁵⁸ 9 Ind. 112 (1857). This case was decided under the 1855 closing law, which was enacted for the "protection of the Sabbath." See note 51 *supra*.

⁵⁹ 9 Ind. at 114. The constitutional challenge was raised under IND. CONST. art. 1, § 4, which is the state provision comparable to the establishment clause. The challenge was unsuccessful and the provision remains intact today. The forerunner to the 1851 constitution was drafted in 1816 and contained a similar clause. IND. CONST. art. 1, § 3 (1816).

⁶⁰ The court cited one Indiana case as authority, *Reynolds v. Stevenson*, 4 Ind. 619 (1853), which challenged a closing law as inapplicable to a particular activity, the execution of a note, and one Pennsylvania case, *Commonwealth v. Johnson*, 22 Pa. 102 (1853), which involved the exception for acts of charity.

⁶¹ 33 Ind. 215 (1870).

⁶² "It is urged that the law under which the prosecution was had is obnoxious to the Constitution of the State." *Id.* at 216. Despite this acknowledgment of plaintiff's contention, the court failed to elaborate on the nature of the constitutional challenge and sustained the validity of the law.

⁶³ "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. 1, § 23.

⁶⁴ "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

⁶⁵ *State v. Hogriever*, 152 Ind. 652, 661, 53 N.E. 921, 924 (1899).

⁶⁶ See note 17 & accompanying text *supra*.

The 1905 closing law was challenged, in *Carr v. State*,⁶⁷ on specific allegations that a 1909 amendment to the law had created exceptions to the general provisions of the law which were violations of privileges and immunities and equal protection considerations.⁶⁸ The court held that the closing law was constitutional, then proceeded to an examination of the treatment granted such challenges in Indiana and in other jurisdictions. The conclusion was inevitable: extreme deference is granted the legislature when reviewing the constitutionality of a statute. If there is any reasonable purpose for the law, it withstands the attack.⁶⁹ The dissent took an opposite view, arguing that the classification created by the 1909 amendment was a specific violation of the privileges and immunities clause.⁷⁰ The case is significant because the court impliedly stated that the closing law could not be sustained by a religious rationale.⁷¹ Thereafter, case law developed the police power rationale to thwart various attempts to invoke the privileges and immunities clause.⁷² By 1958 the supreme court had forgotten that a religious rationale once existed when it claimed that "Sunday closing laws have uniformly been justified solely upon the need of man's body for a *day of rest*."⁷³ Any residual doubt as to the constitutionality of the laws as regards equal protection challenges was answered by the United States Supreme Court in 1961.⁷⁴

During the early developmental stage of Indiana's closing law, Sunday restrictions on liquor sales were subject to similar changes. As has been mentioned, such sales were proscribed on Sunday with an exception made for travelers,⁷⁵ similar in scope and effect to other exceptions to the law for various commercial transactions conducted on Sundays.⁷⁶ This exception for travelers was eliminated in 1853.

⁶⁷ 175 Ind. 241, 93 N.E. 1071 (1911).

⁶⁸ The case concerned a challenge to an exception in the closing law on a theory that it granted privileges to one class of citizens. *Id.* at 244-45, 93 N.E. at 1072.

⁶⁹ *Id.* at 247, 93 N.E. at 1073. See also *Parks v. State*, 159 Ind. 211, 64 N.E. 862 (1902).

⁷⁰ *Carr v. State*, 175 Ind. 241, 264-68, 93 N.E. 1071, 1079-80 (1911) (Myers, J., dissenting).

⁷¹ *Id.* at 251, 93 N.E. at 1074 (discussing the basis of a closing law but not expressly stating that a religious rationale would be improper).

⁷² For recent attacks upon state regulations which invoke claims based on a privileges and immunities clause challenge, see *Taxpayers Lobby, Inc. v. Orr*, 262 Ind. 92, 311 N.E.2d 814 (1974); *City of Ft. Wayne v. Maplewood Park Util., Inc.*, 143 Ind. App. 507, 241 N.E.2d 805 (1968).

⁷³ *Tinder v. Clarke Auto Co.*, 238 Ind. 313, 149 N.E.2d 808, 813 (1958). The court made the statement after recognizing the importance of the religious origin of the closing law. Thus, regardless of the origin, the Indiana Supreme Court viewed the closing law from a purely secular, police power perspective.

⁷⁴ See cases cited note 57 *supra*.

⁷⁵ See notes 24-26 & accompanying text *supra*.

⁷⁶ The 1817 closing law contained exceptions to the Sunday prohibition of labor for the

Thereafter, liquor regulations acquired more specific focus. In 1881 the state supreme court found that the public interest required a limitation on the privilege to retail liquors.⁷⁷ The court reached this conclusion without citing precedent or authority, believing it to be so well accepted that it did not require substantiation. The apparent justification for the Sunday liquor law had become intertwined with that of the closing law: the police power rationale supported both.⁷⁸

Indiana's Rationale for the Sunday Liquor Laws

In order to evaluate a state's reasons for enacting liquor sale restrictions, one must first ascertain their nature. Since the Indiana General Assembly compiles very little legislative history, it is difficult to discern the purpose of a law or an amendment. Alternative methods to gain insight into the General Assembly's purpose are either an investigation of the general purpose clause of the law, if drafted into the statute, or a survey of the historical context and trends reflected in the law.

The history of Indiana's Sunday closing and liquor laws reveals only one permissible purpose for the laws as they existed in 1973; *i.e.*, a police power rationale.⁷⁹ Title 7.1 of the Indiana Code contains such a rationale in its purpose clause.⁸⁰

operation of ferries and other necessary services. An Act to prevent certain immoral practices, ch. 32, § 1, 1816-17 Ind. Acts 165 (1817) (repealed 1905). The closing law of 1905 was amended to permit the playing of baseball and the publishing of newspapers. IND. CODE § 35-1-86-1 (1976) (repealed 1977).

⁷⁷ "The enactment of a law regulating the liquor traffic is an exercise of the police power of the State." *McKinney v. Town of Salem*, 77 Ind. 213, 214 (1881). The liquor traffic regulation at issue in the case was not purely a Sunday regulation; consequently, the discussion of the applicable police power rationale was not conclusive on the issue of its use in the area of the closing laws. However, the existence of a closing law provided collateral support for the Sunday restrictions. Thus, only after 1977 could the Sunday restrictions be critically examined. For other early discussions of state power to regulate liquor traffic, see *South Carolina v. United States*, 199 U.S. 437 (1905) (regulation fully justified under the police power); *Mugler v. Kansas*, 123 U.S. 623 (1887) (liquor traffic admittedly dangerous to the health, safety and morals).

⁷⁸ An attack on a Sunday liquor sales scheme had to surmount the heavy sentiment permitting liquor traffic regulation as part of the state's protection of the public well-being, and faced the difficult task of overcoming tradition-rich closing law, which validated Sunday liquor sales prohibitions apart from any other justification for liquor traffic regulation.

⁷⁹ After 1961, the police power view was self-sustaining, regardless of the earlier religious connotation of the closing laws. See note 57 & accompanying text *supra*.

⁸⁰ "The general purposes of the title are: (a) To protect the economic welfare, health, peace and morals of the people of this state . . ." IND. CODE § 7.1-1-1-1 (1976). This statement is consistent with the case law defining the police power. See note 57 & accompanying text *supra*.

Traditionally, the police power rationale for these regulations has taken two approaches. First, as mentioned above, Sunday has been considered to be a mandatory day of rest, and thus, the legislature is empowered to force the closing of businesses and to restrict the general activities of the people.⁸¹ Second, as the Supreme Court has noted, the intoxicating qualities of liquor and the dangers that accompany its consumption subject liquor sales to comprehensive government regulation.⁸² Arguably, Sunday sale restrictions are designed to limit these dangers and are sustainable as a legitimate exercise of the police power. The concerns of both approaches were satisfied prior to the 1973 amendment to Title 7.1.⁸³

REPEAL OF THE CLOSING LAW: ELIMINATION OF THE POLICE POWER RATIONALE

The 1973 amendment permitting sales of intoxicating liquors for on-premise consumption presented new issues. In keeping with the view, expressed in *Carr v. State*, that exceptions to the closing laws are possible as society's needs change, and that the police power must be flexible to meet these needs,⁸⁴ the amendments could still be justified. However, the 1977 repeal of the closing law compels reexamination of the rationale for the 1973 amendment, which created a legislative distinction between sales for on-premise consumption and sales for off-premise consumption.⁸⁵ The issue now is whether this distinction is premised on irrational classifications and thus violative of constitutional concerns or is a valid legislative attempt to regulate liquor sales.⁸⁶

⁸¹ The repeal of the closing law was not based on judicial voiding of its force or its basis, thus the constitutionality of such a law remains unquestioned.

⁸² *Crane v. Campbell*, 245 U.S. 304, 307 (1917). See also *Midwest Beverage Co. v. Gates*, 61 F. Supp. 688 (N.D. Ind. 1945); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966).

⁸³ The 1973 amendment to Title 7.1 did not in itself raise the issue of the constitutionality of the Sunday liquor regulations. The existence of the closing law forced an examination of the scheme to begin with the state's general and well-established power to regulate Sunday activities. The supplemental retailers' permit, IND. CODE § 7.1-3-16.5-1 (1976), was a valid exception to the regulation. The repeal of the closing law removed this police power-exception perspective, and focused attention on liquor regulation as requiring justification independent of the closing law.

⁸⁴ 178 Ind. 241, 260-61, 93 N.E. 1071, 1077-78 (1911).

⁸⁵ IND. CODE §§ 7.1-3-16.5-1 to -6 (1976). The amendment enables an examination of the regulation scheme based solely on the state's desire to regulate the liquor traffic; any measures which the state employs in furtherance of its regulations must operate to achieve its goal of liquor regulation. This is the exact problem in examining the regulation scheme—without legislative pronouncement of a purpose, it is difficult to evaluate the propriety of the regulations.

⁸⁶ It is well recognized that a license to retail liquor is not a property right. See, e.g., *Indiana*

In distinguishing between the two types of sales, the legislature has favored one type of retailer over another.⁸⁷ Such legislation is proper only if the classifications are premised upon rational distinctions.⁸⁸ In testing the distinction under the privileges and immunities clause of the Indiana Constitution it must be determined whether the differences created are pertinent to the classification.⁸⁹ If the differences are rational and further a permissible goal of the legislature, then granting the benefit to a class of retailers by excepting some sales from the general Sunday prohibition of liquor sales is a legitimate exercise of the police power.⁹⁰

A challenge based on the equal protection clause of the fourteenth amendment is tested similarly. The Supreme Court has held that absent the creation of a "suspect classification" or infringement upon a "fundamental interest," the state need only show a rational relationship between the classification and the legislative purpose to justify the discrimination among classes.⁹¹

The General Assembly failed to supply an explanation for the 1973 amendment to Title 7.1 which would satisfy the standards imposed by the federal and state constitutions.⁹² It is not difficult to find a reasonably articulable legislative purpose based on the criteria included in the amendment qualifying a permit holder for on-premise sales. A restaurant becomes eligible to sell intoxicating liquors on Sunday provided it satisfies a yearly gross sales require-

Alcoholic Beverage Comm. v. Superior Ct., 233 Ind. 563, 122 N.E.2d 9 (1954); Moore v. City of Indianapolis, 120 Ind. 483, 22 N.E. 424 (1889); Dagley v. Incorporated Town of Fairview Park, ___ Ind. App. ___, 371 N.E.2d 1338 (1978). Cf. Note, *Liquor License—Privilege or Property?*, 40 NOTRE DAME LAW. 203 (1965) (concluding a license is property for some purposes). But it has also been said that the power to regulate the liquor traffic is subject to constitutional limitations. In its regulation, the state cannot discriminate against the rights of citizens. See, e.g., Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898).

⁸⁷ The two classifications generally distinguish retailers who sell drinks for on-premise consumption from all other liquor retailers; however, in operation, the classification scheme separates restaurants and clubs qualifying for the supplemental retailer's permit from packaged retailers, taverns, restaurants and clubs not qualifying for the special permit.

⁸⁸ Forks v. City of Warsaw, 257 Ind. 237, 273 N.E.2d 856 (1971); *In re Pisello*, 155 Ind. App. 484, 293 N.E.2d 228 (1973).

⁸⁹ Heninger v. Police Comm'r, 161 Ind. App. 72, 314 N.E.2d 827 (1974).

⁹⁰ See *id.*; American Coal Mining Co. v. Special Coal & Food Comm'r, 268 F. 563 (D.C. Ind. 1920).

⁹¹ Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 813 (1976); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955). See also Skinner v. Oklahoma, 316 U.S. 535 (1942) (fundamental right issue; strict scrutiny standard). But see Morey v. Doud, 354 U.S. 457 (1957) (state regulatory statute not required to apply to all persons engaged in the same business).

⁹² A statutory amendment is subject to the purpose clause drafted for the subject area; however, it behooves a legislature to clarify its intention when enacting a major change in the scheme of the regulations. The General Assembly did not provide any such clarification for the 1973 amendment.

ment and that fifty percent of those transactions are in retail sales of food.⁹³ The latter requirement indicates that the legislature intended establishments qualifying for permits to be restaurants serving cocktails with meals and not taverns that only served a nominal amount of food. The Sunday sale of liquors is thus a "food service." Under this view, the classification of types of sales before 1977 was arguably rational: the General Assembly continued to regulate the liquor traffic through a general prohibition of Sunday retail sales, compatible with the "day of rest" approach of the closing law, and, excepted certain sales from the prohibition as a service to Sunday diners.⁹⁴

In the six years since the Sunday liquor laws were amended to permit the Sunday sales there has not been a challenge to the regulations. This is not surprising. The power of the General Assembly to regulate the liquor traffic has been a fact of life in Indiana since the origin of the territory.⁹⁵ Similarly, closing laws have long been accepted, surviving as a legislative concept for over 1600 years. In Indiana, the closing law was not repealed until after the change in the Sunday liquor laws. A serious challenge to the classification could not have been made until after the repeal in 1977.⁹⁶

Now after this repeal, and with it the removal of the "Sunday is a day of rest" rationale, the distinction between on-premise sales and off-premise sales could be sustained only if rationally related to the remaining police power for regulating the liquor traffic, *i.e.*, the special characteristics of liquor.⁹⁷ An examination of the actual effects of the classification, however, indicates a lack of such rational relationship.

CONSTITUTIONAL INFIRMITIES IN THE CURRENT SUNDAY SALES LAW

The standards used to gauge legislation against Indiana's privileges and immunities clause and against the fourteenth amendment are extremely liberal. A court will avoid "legislating" and will seek to uphold a challenged statute as long as a mere rational relationship exists between the exercise of the police power and the goal or

⁹³ IND. CODE § 7.1-3-16.5-2 (1976).

⁹⁴ This view is well within keeping of the other amendments to the closing law. *See* IND. CODE § 35-1-86-1 (1976) (repealed 1977).

⁹⁵ *See* notes 24-35 & accompanying text *supra*.

⁹⁶ *See* notes 83, 85 & accompanying text *supra*.

⁹⁷ To sustain the present regulatory scheme, a justification must be found which focuses upon the nature of intoxicating liquors; otherwise, there is no possible justification for the legislature to permit certain sales and consumption of liquor on Sundays while prohibiting other forms of retail.

purpose of the statute.⁹⁸ Thus it becomes necessary to examine the restrictions on the Sunday sales of liquor and the result produced.

The actual consumption of alcoholic beverages on Sunday is not unlawful, either in the privacy of one's home or in any public area where consumption is legal on other days. The prohibition of packaged liquor sales does not address itself to *consumption* of packaged liquors, only sales. Thus, the consumer is merely forced to purchase on another day that liquor which he desires to drink on Sunday. Therefore, the Sunday law is not designed to regulate the behavior of the consumer, as it relates to consumption,⁹⁹ but regulates that of the retailer as it relates to the act of selling.

Similarly, if it is the act of selling liquor which is the subject of legislative concern, as was the case with the general closing law,¹⁰⁰ excepting sales by the drink for consumption on the premises is not a proper exception to the general prohibition of Sunday liquor sales;¹⁰¹ there is nothing inherently harmful in packaged liquor sales which is not also present in single drink sales. This is not to say that the legislature could not, or even that it has not, found some recognizable harmful aspect in sales of liquor on Sunday, but it is suggested that whatever hypothetical danger exists in one type of sale must also exist in the other.

Further, as far as the purchaser of liquor is concerned, on-premise sales are not necessarily "supplemental" to a restaurant's serving food on Sunday, because there is no requirement that the customer also buy food at the restaurant as a prerequisite to obtaining alcoholic beverages.¹⁰² Even more troublesome are the criteria to be satisfied prior to qualifying for the supplemental retailers' permit. This statutory standard computes the gross sales requirement on a yearly basis and a restaurant is not required to sell any minimum amount of food on Sunday in order to qualify.¹⁰³ In other words, the restaurant could enjoy a purely liquor traffic on Sunday while con-

⁹⁸ The issue of whether or not a court will "legislate" or defer to the wisdom of the people's body politic is a much discussed topic. For the purposes of this note, the statement that a court will strive to uphold a constitutionally challenged statute, *Carr v. State*, 175 Ind. 241, 247, 93 N.E. 1071, 1073 (1911), is accepted as the probable view of a court hearing a challenge to the liquor regulations.

⁹⁹ The retail regulations address the act of retailing, not of consuming.

¹⁰⁰ The closing law addressed in broad terms all commercial activities, then established exceptions. See notes 24-26, 74-76 & accompanying text *supra*.

¹⁰¹ The alcoholic beverage title is written with a general Sunday sales prohibition, but includes a particular exception from that restriction; therefore, the burden is on the state to demonstrate a rational relation between the exception and the apparent purpose of the general regulatory scheme.

¹⁰² See IND. CODE § 7.1-3-16.5-1 (1976).

¹⁰³ *Id.* § 7.1-3-16.5-2.

tinuing to qualify for the permit. In addition, the legislature effectively discounted a food service rationale by statute in 1975. Public Law 60 did not address liquor sales by clubs. Subsequently, in 1975 Public Law 72 authorized a club holding a liquor sales permit to sell alcoholic beverages for on-premise consumption on one Sunday in each calendar quarter.¹⁰⁴ This statute was amended in 1977 to permit such sales one Sunday each month.¹⁰⁵ Significantly, there is not a minimum food sale prerequisite for a club to qualify for the Sunday permit, as there is for a restaurant.¹⁰⁶

Finally, the prohibition of off-premise sales is not a logical effort to reduce the number of Sunday drivers who might have been drinking. On the contrary, persons not foresighted enough to purchase their liquor on another day, to drink at home on Sunday, must do their drinking in public and then make their way home, which is likely to increase the number of drunk drivers on the road.

The above examination of the result of the 1973 amendment focuses primarily on what the purchaser would view as its effect. The seller has a wholly different concern. A tavern owner depends upon the very traffic affected by this amendment for his livelihood.¹⁰⁷ He is hard-pressed to see the rationale of the distinction between his sales by the drink and those permitted by a holder of the supplemental retailers' permit.¹⁰⁸ In 1881 the Indiana Supreme Court addressed a challenge to the closing law when a motel owner sold cigars on Sunday, which was contrary to the law, because the sale did not qualify as an act of necessity for the purpose of the statutory exception.¹⁰⁹ A tavern owner today finds the court's view very similar to his own: permitting the motel owner to sell cigars to his patrons would permit him to achieve an "odious and intolerable monopoly" because other such businesses are closed by law.¹¹⁰ The

¹⁰⁴ An Act to amend IC 1971, 7.1-3-20 concerning alcoholic beverages, Pub. L. No. 72, 1975 Ind. Acts 563 (current version at IND. CODE § 7.1-3-20-2 (1976)).

¹⁰⁵ IND. CODE § 7.1-3-20-2 (1976).

¹⁰⁶ The sections defining a club do not contain references to a minimum volume of food sales required to obtain a permit. See IND. CODE §§ 7.1-3-20-1 to -8 (1976 & Cum. Supp. 1979).

¹⁰⁷ The legitimate concern of the tavern-owner is the loss of his steady clientele to the restaurant "down the street" because the opportunity to purchase liquor on Sundays operates to alter the "habits" of the individuals.

¹⁰⁸ The restaurant qualifies for the permit based upon its gross food sales; however, since the computation of the required gross sales is not limited to Sunday sales, IND. CODE § 7.1-3-16.5-2 (1976), the Sunday sales by the restaurant to the non-food purchasing consumer are indistinguishable from the tavern's weekday sales.

¹⁰⁹ *Mueller v. State*, 76 Ind. 311 (1881). See also *Carver v. State*, 69 Ind. 61 (1879) (hotel owner selling cigars on Sunday violated the closing law because patrons were not travelers, and thus not within the exception).

¹¹⁰ 76 Ind. at 314.

tavern owner could reasonably ask what is the danger in his sales by the drink severe enough to warrant the legislative classification which is not present in the sales by a restaurant or, more perplexingly, in the sales by a club.

AVOIDING THE CONSTITUTIONAL DILEMMA

The General Assembly has several alternative solutions to the current problem of a lack of a rational relation between purpose and effect. First, a repeal of the 1973 amendment which created the classification would eliminate the issue. This solution is unlikely considering the lobbying strength of various interest groups which supported the amendment.¹¹¹ Second, the Sunday restriction for off-premise sales could be eliminated. This solution is logical since there has not been demonstrated a cogent reason for continuing to prohibit these sales. Such a change is unlikely due to the pervasive history of liquor regulation in Indiana and the restrictions on Sunday sales which have been an integral part of that denouement. Furthermore, the legislature arguably fears the effect of such uninhibited sales upon the packaged liquor retailer, consistent with the concern expressed for retailers of motor vehicles.¹¹² Third, the legislature could reexamine the reasons used to justify the classification of types of sales and develop an articulable purpose for the regulations which is consistent with the effect, if any exists.

The preferable option would be to amend the current regulations to eliminate the problems. The food service rationale is a valid concern. There is nothing inherently wrong with serving alcoholic beverages in conjunction with serving food. It is difficult to measure the effect of Sunday liquor sales as an inducement for conference and exposition business within the state, but presumably, out-of-state groups considering Indiana as a situs for weekend conferences are influenced by the opportunity to imbibe on Sundays; obviously, the attracting of additional revenue to the state is a valid legislative

¹¹¹ The Indiana Restaurant Association lobbied for passage of the 1973 amendment; due to the paucity of the legislative history concerning the amendment, it is not possible to document the extent of the Association's influence.

¹¹² In *Tinder v. Clarke Auto Co.*, 238 Ind. 302, 149 N.E.2d 808 (1958), the court recognized the legislature's concern for the retailer of motor vehicles and acknowledged the fear that permitting Sunday retail sales would permit the smaller retailer to be forced into Sunday hours in order to compete with the larger retailers. Further, the court exhibited an awareness of the buying habits of consumers and the heavy concentration of Sunday sales. It concluded that the small retailer could not realistically choose to be closed on Sunday. These concerns have never been expressed as regards the liquor traffic; such explanation would go a long way in providing an indication of the legislative purpose for the restrictions.

concern. However, if the gross sales requirement is to be of any real significance, then the computations must be based upon Sunday sales alone. This is the time of concern, therefore, it must be the time during which the restaurant qualifies. Administratively, it requires little added effort to segregate the sales figures for Sundays from those of the balance of the week.¹¹³ In this same vein, the sales by a club are clearly not intended to satisfy any food service rationale and must be eliminated. The criteria which must be met in order to be a club and to obtain a liquor permit do not address the same concerns as the prohibition of Sunday liquor sales or any exceptions therein.

If the exception for clubs is retained it is subject to abuse. In only two years the permissible Sunday sale days were tripled.¹¹⁴ There is nothing in the current law to prevent these sale days from being expanded to include every Sunday. If the club authorized to engage in such sales is one of limited membership, than an attack is possible, based on the granting of a privilege to a class of citizens;¹¹⁵ if the membership is open and not selective, then the distinction between the club and the local tavern is near impossible to make, with only the intangible club "atmosphere" absent from the tavern. If it is the special "atmosphere" of a club which lends itself to Sunday liquor sales, separate from any food sales, then there is no limit in terms of members, nature of the patronage or type of atmosphere which will characterize a tavern.¹¹⁶ Thus, the local bar becomes the local club and the Sunday sales restriction operates only to exclude packaged sales. Without legislative delineation of the purpose for the Sunday restriction and the corresponding exceptions, the limitations will eventually become inoperable.

CONCLUSION

It is conceivable that the lack of a proper rationale for the current Sunday liquor laws will not be considered a problem of sufficient

¹¹³ A similar possibility would be to require that the consumer of the alcoholic beverage also consume some quantity of food. Such a provision, however, would be administratively unfeasible, though appropriate in a pure "food service" rationale.

¹¹⁴ See notes 104-06 & accompanying text *supra*.

¹¹⁵ In such a club, the granting of the privilege to purchase alcoholic beverages on Sunday would be an inherent right of anyone satisfying the membership requirements; however, such "right" would be subject to the minimum drinking age established by law, which is *not* a requirement for club membership.

¹¹⁶ Similar to the need for a legislative statement as to the purpose of the 1973 amendment, there should be a statement of the intention of the legislature when it enacted the club amendments. Both explanations would aid in resolving the issue of improper regulation.

magnitude to warrant any changes. Such a view would not be unusual: the evolution of liquor regulation has been a slow and ponderous process throughout Indiana's history; and, the current system has been unchallenged to date. However, such a view would also be grossly in error. The failure of the General Assembly to act prospectively to cure the ills of the current law, prior to an equal protection challenge or one based on the privileges and immunities clause, might possibly result in a judicial voiding of the 1973 amendment. At best, it would be a senseless waste of time and money to force such a battle to the courts. Legislative foresight can bring about some needed changes now and with little effort. Whether a court would simply void the 1973 amendment or go on to address the entire classification scheme of liquor regulations ought to be a real subject of concern to the legislature. Public sentiment runs hot in issues of liquor regulation and it is the public's representatives who are not only empowered but also obligated to determine the course of such regulations.

Michael Lee Carmin