



**GALLAGHER**

**v.**

**CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC.  
SUPREME COURT OF THE UNITED STATES**

**366 U.S. 617**

**May 29, 1961**

**[6 - 3]**

**OPINION:** WARREN/BLACK/CLARK/WHITTAKER...The principal issues presented in this case are whether the Massachusetts **Sunday Closing Laws** violate equal protection, are statutes respecting the establishment of religion or prohibit the free exercise thereof.

Appellees are Crown Kosher Super Market, a corporation whose four stockholders, officers and directors are members of the Orthodox Jewish faith, which operates in Springfield, Massachusetts, and sells kosher meat and other food products that are almost exclusively kosher and which has many orthodox Jewish customers; three of Crown's customers of the Orthodox Jewish faith, whose religion forbids them to shop on the Sabbath and requires them to eat kosher food, as representatives of that class of patrons; and the chief orthodox rabbi of Springfield, as representative of a class of orthodox rabbis whose duties include the inspecting of kosher food markets to insure compliance with Orthodox Jewish dietary laws.

Crown had previously been open for business on Sunday, on which day it had conducted about one-third of its weekly business. No other supermarket in the Springfield area had kept open on

---

Sunday. Since the Orthodox Jewish religion requires its members to refrain from any commercial activity on the Sabbath—from sundown on Friday until sundown on Saturday—Crown was not open during those hours. Although there is a statutory provision which permits Sabbatarians to keep their shops open until 10 a.m. on Sunday for the sale of kosher meat, Crown did not do so because it was economically impractical; for the same reason, Crown did not open after sundown on Saturday.

**Those provisions of the law immediately under attack are in a chapter entitled 'Observance of the Lord's Day.'** They forbid, under penalty of a fine of up to fifty dollars, the keeping open of shops and the doing of any labor, business or work on Sunday. Works of necessity and charity are excepted as is the operation of certain public utilities. There are also exemptions for the retail sale of drugs, the retail sale of tobacco by certain vendors, the retail sale and making of bread at given hours by certain dealers, and the retail sale of frozen desserts, confectioneries and fruits by various listed sellers. The statutes under attack further permit the Sunday sale of live bait for noncommercial fishing; the sale of meals to be consumed off the premises; the operation and letting of motor vehicles and the sale of items and emergency services necessary thereto; the letting of horses, carriages, boats and bicycles; unpaid work on pleasure boats and about private gardens and grounds if it does not cause unreasonable noise; the running of trains and boats; the printing, sale and delivery of newspapers; the operation of bootblacks before 11 a.m., unless locally prohibited; the wholesale and retail sale of milk, ice and fuel; the wholesale handling and delivery of fish and perishable foodstuffs; the sale at wholesale of dressed poultry; the making of butter and cheese; general interstate truck transportation before 8 a.m. and after 8 p.m. and at all times in cases of emergency; intrastate truck transportation of petroleum products before 6 a.m. and after 10 p.m.; the transportation of livestock and farm items for participation in fairs and sporting events; the sale of fruits and vegetables on the grower's premises; the keeping open of public bathhouses; the digging of claims; the icing and dressing of fish; the sale of works of art at exhibitions; the conducting of private trade expositions between 1 p.m. and 10 p.m.

These statutes do not prohibit Sunday business and labor by Sabbatarian observers so long as it disturbs no other person. However, this has been construed to forbid the keeping open of shops for the sale of merchandise. Permission is granted by local option for the Sunday operation after 1 p.m. of amusement parks and beach resorts, including participation in bowling and games of amusement for which prizes are awarded. Special licenses for emergency Sunday work may be obtained from local officials.

Other provisions of the Massachusetts Sunday legislation make generally unlawful Sunday attendance or participation in any public entertainments except for those which are duly licensed locally, conducted after 1 p.m., and are in keeping with the character of the day servance.

Although there is a general bar of games and sports on Sunday, professional sports may be played between 1:30 p.m. and 6:30 p.m., and indoor hockey and basketball any time after 1:30 p.m.; amateur sports may be played between 2 p.m. and 6 p.m.; this is all subject to local option and no game may be conducted within one thousand feet of any regular place of worship except in a public playground or park. There are specific bans on auto racing, horse racing, boxing and hunting with firearms. And there are a number of additional exemptions from the general proscription. Golf, tennis, dancing at weddings, concerts of sacred music and the celebration of religious customs or rituals are all allowed on Sunday as are the operation of miniature golf

---

courses and golf driving ranges after 1 p.m. Motion pictures may be exhibited after this hour if a local license is obtained. Parades with music for certain commemorative purposes may be held on Sunday by veterans', civic, fraternal, policemen's and firemen's organizations providing that they are suspended while passing within two hundred feet of public worship services.

Persons who keep places of public entertainment or refreshment lose their licenses if they entertain, on Sunday, people other than travelers, strangers or lodgers. With limited exceptions, discharging firearms for sport except on one's own land, fishing for commercial purposes, and fishing with nets or spears are prohibited on Sunday. The use of gaming devices is not allowed. Outdoor exercise without the element of contest is generally permitted as is the taking of mammals by means of traps. Heavier penalties are imposed for the willful cutting and destruction of timber, shrubs, fruits or vegetables on Sunday than on other days of the week.

Still other statutory sections make it a crime for most employers to require their employees to engage in ordinary occupation on Sunday unless the employee is allowed twenty-four consecutive hours off during the following six days. The sale of alcoholic beverages by certain licensees is permitted on Sunday after 1 p.m. by local option. However, patrons consuming the beverages on the premises must be seated at tables.

Appellees sought permanently to enjoin the enforcement of the statute against them, alleging that appellant, Springfield's chief of police, had previously arrested and prosecuted Crown's manager for keeping open on Sunday; that, unless restrained, appellant would continue to enforce the statute against Crown; that the statute was unconstitutional for the reasons stated above. The three-judge Federal District Court, one judge dissenting, agreed with appellees...

## I

The **equal protection** arguments advanced by appellees are much the same as those made by appellants in *McGowan v. Maryland*.<sup>1</sup> They contend that the exceptions to the statute are so numerous and arbitrary as to be found to have no rational basis; that the law permits the sale of certain food items sold by Crown but limits this permission to selected types of stores; that the employees in the exempted activities are just as much in need of a day of rest as are Crown's employees. The three-judge District Court described the present statutory system as an 'unbelievable hodgepodge' and sustained appellees' allegations.

The answers to these arguments are likewise similar to those given in *McGowan* when the contentions are examined under the standards set forth in that opinion. Many of the exceptions in the Massachusetts Sunday Laws are reasonably explainable on their face. Such items as tobaccos, confectioneries, fruits and frozen desserts could have been found by the legislature to be useful in adding to Sunday's enjoyment; such items as newspapers, milk and bread could have been found to be required to be sold fresh daily. It is conceivable that the legislature believed that the sale of fish and perishable foodstuffs at wholesale would not detract from the atmosphere of the day, while the retail sale of these items would inject the distinctly commercial element that exists during the other six days of the week. It is fair to believe that the allowance of professional and amateur sports on Sunday would add to the day's special character rather than detract from it.

---

<sup>1</sup> Case 1A-R-028 on this website.

---

And the legislature could find that the circumstances attendant to the conduct of professional sports are sufficiently different from those of amateur sports to justify different treatment as to the hours during which they may be played. Furthermore, the legislature could determine that, although many retailers, including Crown, sell frozen desserts, to permit only a limited number of innholders, druggists and common victuallers to sell them on Sunday would serve the public purpose of providing these items on Sunday and, at the same time, limit the commercial activities ordinarily attendant to their sale. And, if such determination requires this limited number of stores to be open to serve the public interest, the employees of most of the stores are still protected by the statutory provision giving the employees another day of rest. To permit all stores which sell the exempted products to remain open on Sunday but to limit them to the sale of the exempted items might well be believed to impose near insuperable enforcement problems.

The fact is that the irrationality of these and the many other apparently reasonable distinctions has not been shown. The presumption of validity upon which the other classifications stand has not been dispelled. 'A classification having some reasonable basis does not offend against (the equal protection) clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality', thus, we hold that the Massachusetts Sunday Laws do not violate equal protection of the laws.

## II

**Appellees make several contentions that the statutes violate the constitutional guarantees of religious freedom. First, they allege that the statutes are laws respecting an establishment of religion in that both their original and current purposes are to enforce the observance of Sunday as the Sabbath.**

We agree with the court below that, like the Sunday laws of other States, the Massachusetts statutes have an unmistakably religious origin. The first enactment of the Plymouth Colony in 1650 stated simply that 'whosoever shall prophane the Lords day by doeing any servill worke or any such like abusses' shall either be fined or whipped. Eight years later, a ban on Sunday traveling was enacted with the following preamble:

'Whereas complaint is made of great abuses in sundry places of this Government of prophaning the Lords day by travellers both horse and foot by bearing of burdens carrying of packes &c. upon **the Lords day** to the great offence of the Godly welafected among us.'

And, in 1671, the religious purpose was made clear beyond doubt:

'9. This Court taking notice of great abuse, and many misdemeanours, committed by divers persons in these many wayes, Profaneing the Sabbath or Lord's-day, to the great dishonour of God, Reproach of Religion, and Grief of the Spirits of God's People

'Do therefore Order, That whosoever shall Prophane the Lord's-day, by doing unnecessary servile Work, by unnecessary travailing, or by sports and recreations, he or they that so transgress, shall forfeit for every such default forty shillings, or be publicly whipt: But if it clearly appear that the sin was proudly, Presumptuously and with a high hand committed, against the known Command and Authority of the blessed God, such a

---

person therein Despising and Reproaching the Lord, shall be put to death or grievously punished at the Judgment of the Court.

'10. And whosoever shall frequently neglect the public Worship of God on the Lords day, that is approved by this Government, shall forfeit for every such default convicted of, ten shillings, especially where it appears to arise from negligence, Idleness or Prophaness of Spirit.'

The Sunday regulations of the Massachusetts Colony were no different. The 1653 version spoke of the abuses of the Dishonor of God and the Reproach of Religion which were Grieving the Souls of God's Servants. Among other things, the statute forbade Drinking and Sporting on Sunday. In 1665, Neglect of God's Public Worship was made a crime. Every person was required to apply himself to Duties of Religion and Piety on Sunday according to the 1692 statute which continued the ban on Sunday sports. The preamble to the new statute in 1761 retained the Religion and Piety language and added that Profanation of the Lord's Day is highly offensive to Almighty God. This statute retained and strengthened the former prohibitions.

A change came about in 1782. The preamble added the following:

'Whereas the Observance of the Lord's Day is highly promotive of the Welfare of a Community, by affording necessary Seasons for Relaxation from Labor and the Cares of Business; for moral Reflections and Conversation on the Duties of Life, and the frequent Errors of human Conduct;...'

Thus, the statute's announced purpose was no longer solely religious. But this statute proscribed the Sunday attendance at any Concert of Music and Dancing in addition to the previously mentioned activities. This law was re-enacted in 1792.

However, when we examine the statutes now before the Court, we find that, for the most part, they have been divorced from the religious orientation of their predecessors. The preambles' statements, in certain terms, of religious purpose exist no longer. Sports of almost all kinds are now generally allowed on Sunday. The absolute prohibition against alcoholic beverages has disappeared. Concerts and dancing are permitted. Church attendance is no longer required.

Admittedly, the statutes still contain references to the Lord's Day and some provisions speak of weekdays as being secular days. Although § 2 of c. 136 excepts concerts of sacred music, the next clause of the section permits free open air concerts. It would seem that the objectionable language is merely a relic. The fact that certain Sunday activities are permitted only if they are 'in keeping with the character of the day and not inconsistent with its due observance,' does not necessarily mean that the day is intended to be religious; the 'character' of the day would appear more likely to be intended to be one of repose and recreation. We are told that those provisions forbidding certain activities to be conducted within a set distance from a place of public worship are especially devoted to maintaining Sunday as the Sabbath. But because the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all. Although many of the more recently allowed Sunday activities may not commence prior to 1 p.m., others may be undertaken at any time during the day. And the contention that evening church services are being protected cannot be maintained since most of those activities that begin after 1 p.m. may continue throughout the day.

---

Furthermore, the long list of exemptions that have been recently granted evidences that the present scheme is one to provide an atmosphere of recreation rather than religion. The court below pointed out that, since 1858, the statutes have been amended more than seventy times. It would not seem that the Sunday sales of tobacco, soda water, fruit, et cetera, are in aid of religion. It would seem that the operation of amusement parks and beach resorts is in aid of recreation.

An examination of recent Massachusetts legislative history bolsters the State's position that these statutes are not religious. In 1960, a report of the Legislative Research Council stated:

'In general, Sunday laws protect the public by guaranteeing one day in seven to provide a period of rest and quiet. Health, peace and good order of society are thereby promoted. Such provision is essentially civil in character and the statutes are not regarded as religious ordinances.'

The earliest pronouncements of the Supreme Judicial Court of Massachusetts are further indication of the religious origin of the Sunday Laws. In *Pearce v. Atwood*, it was stated that the statute's sole object was 'ensuring reverence and respect for one day of the week, in order that religious exercises should be performed without interruption from common and secular employments.' In *Bennett v. Brooks*, the day was characterized as one 'set apart for religious services and observances.'

In 1877, a case arose in which a charge of violation of religious freedom was made. The Supreme Judicial Court relied on the Pennsylvania case of *Specht v. Commonwealth* and stated clearly:

'It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community.' *Commonwealth v. Has.*

The court below characterized this decision as an ad hoc improvisation by the Massachusetts court. Of course, the court below was correct in deciding that it was not bound by the Massachusetts characterization of the statutes. But ten years later, in *Commonwealth v. Starr*, another religious charge against the statute was made; it was rejected on the authority of *Has.*

As the court below pointed out, there have been several cases, between 1877 and 1923, which gave a religious characterization to the statute. But in none of these cases was there a contention

---

regarding religious freedom, and none of the cases stated the statute's purpose to be exclusively religious. Finally, in the only recent case passing on the Massachusetts Sunday Closing Laws, Commonwealth v. Chernock, the court summarily dismissed the complainant's religious contention, relying on Has.

**The relevant factors having been most carefully considered, we do not find that the present statutes' purpose or effect is religious.** Although the three-judge court found that Massachusetts had no legitimate secular interest in maintaining Sunday closing, we have held differently in McGowan v. Maryland. And, for the reasons stated in that case, we reject appellees' request to hold these statutes invalid on the ground that the State may accomplish its secular purpose by alternative means that would not even remotely or incidentally aid religion.

**Secondly, appellees contend that the application to them of the Sunday Closing Laws prohibits the free exercise of their religion.** Crown alleges that if it is required by law to abstain from business on Sunday, then, because its owners' religion demands closing from sundown Friday to sundown Saturday, Crown will be open only four and one-half days a week, thereby suffering extreme economic disadvantage. Crown's Orthodox Jewish customers allege that because their religious beliefs forbid their shopping on the Jewish Sabbath, the statutes' effect is to deprive them, from Friday afternoon until Monday of each week, of the opportunity to purchase the kosher food sanctioned by their faith. The orthodox rabbis allege that the statutes' effect greatly complicates their task of supervising the condition of kosher meat because the meat delivered on Friday would have to be kept until Monday. Furthermore, appellees contend that, because of all this, the statutes discriminate against their religion.

These allegations are similar, although not as grave, as those made by appellants in Braunfeld v. Brown.<sup>2</sup> Since the decision in that case rejects the contentions presented by these appellees on the merits, we need not decide whether appellees have standing to raise these questions.

Accordingly, the decision below is reversed.

**CONCURRENCE:** FRANKFURTHER/HARLAN...[Not Provided.]

**DISSENT:** DOUGLAS...[Not Provided.]

**DISSENT:** BRENNAN/STEWART...[Not Provided.]

---

<sup>2</sup> Case 1A-R-030 on this website.