McGOWAN v. MARYLAND
SUPREME COURT OF THE UNITED STATES
366 U.S. 420
May 29, 1961
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This is an easy read. Lots of history about Sunday. Justice Douglas's dissent is noted for its crystal clear conclusions. Enjoy!

Abattoir - " a slaughter house."

OPINION: Chief Justice Warren...The issues in this case concern the constitutional validity of Maryland criminal statutes, commonly known as Sunday Closing Laws or Sunday Blue Laws...

Seven employees of a large discount department store...in Anne Arundel County, Maryland... were indicted for the Sunday sale of a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine in violation of *Md. Ann. Code, Art. 27, §521*. Generally, this section prohibited, throughout the State, the Sunday sale of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals. Recently amended, this section also now excepts...the retail sale in Anne Arundel County of all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs. It now further provides that any retail establishment in Anne Arundel County which does not employ more than one person other than the owner may operate on Sunday...

§492...forbids all persons from doing any work or bodily labor on Sunday and forbids permitting

children or servants to work on that day or to engage in fishing, hunting and unlawful pastimes or recreations. The section excepts all works of necessity and charity. §522...disallows the opening or use of any dancing saloon, opera house, bowling alley or barber shop on Sunday. However, in addition to the exceptions noted above, *§509* exempts, for Anne Arundel County, the Sunday operation of any bathing beach, bathhouse, dancing saloon and amusement park, and activities incident thereto and retail sales of merchandise customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses. §90... makes generally unlawful the sale of alcoholic beverages on Sunday. However, this section, and immediately succeeding ones, provide various immunities for the Sunday sale of different kinds of alcoholic beverages, at different hours during the day, by vendors holding different types of licenses, in different political divisions of the State -- particularly in Anne Arundel County.

The remaining statutory sections concern a myriad of exceptions for various counties, districts of counties, cities and towns throughout the State. Among the activities allowed in certain areas on Sunday are such sports as football, baseball, golf, tennis, bowling, croquet, basketball, lacrosse, soccer, hockey, swimming, softball, boating, fishing, skating, horseback riding, stock car racing and pool or billiards. Other immunized activities permitted in some regions of the State include group singing or playing of musical instruments; the exhibition of motion pictures; dancing; the operation of recreation centers, picnic grounds, swimming pools, skating rinks and miniature golf courses. The taking of oysters and the hunting or killing of game is generally forbidden, but shooting conducted by organized rod and gun clubs is permitted in one county. In some of the subdivisions within the State, the exempted Sunday activities are sanctioned throughout the day; in others, they may not commence until early afternoon or evening; in many, the activities may only be conducted during the afternoon and late in the evening. Certain localities do not permit the allowed Sunday activity to be carried on within one hundred yards of any church where religious services are being held. Local ordinances and regulations concerning certain limited activities supplement the State's statutory scheme. In Anne Arundel County, for example, slot machines, pinball machines and bingo may be played on Sunday...

[These employees] were convicted and each was fined <u>five dollars</u> and costs. The Maryland Court of Appeals affirmed...

First, appellants contend here that the statutes applicable to Anne Arundel County violate the constitutional guarantee of freedom of religion in that the statutes' effect is to prohibit the free exercise of religion in contravention of the 1st Amendment, made applicable to the States by the 14th Amendment. <u>But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are</u>. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," we hold that appellants have no standing to raise this contention...

Secondly, appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the 1st

Amendment, made applicable to the States by the 14th Amendment. If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion, then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true here. However, the writings of Madison, who was the 1st Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority. Thus, in *Everson v. Board of Education*[1], the Court permitted a district taxpayer to challenge, on "establishment" grounds, a state statute which authorized district boards of education to reimburse parents for fares paid for the transportation of their children to both public and Catholic schools. Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the **Christian** religion. We find that, in these circumstances, these appellants have standing to complain that the statutes are laws respecting an **establishment of religion**.

The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day. In substantiating their "establishment" argument, appellants rely on the wording of the present Maryland statutes, on earlier versions of the current Sunday laws and on prior judicial characterizations of these laws by the Maryland Court of Appeals...**There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.**

Sunday Closing Laws go far back into American history, having been brought to the colonies with a background of English legislation dating to the thirteenth century. In 1237, Henry III forbade the frequenting of markets on Sunday; the Sunday showing of wools at the staple was banned by Edward III in 1354; in 1409, Henry IV prohibited the playing of unlawful games on Sunday; Henry VI proscribed Sunday fairs in churchyards in 1444 and, four years later, made unlawful all fairs and markets and all showings of any goods or merchandise; Edward VI disallowed Sunday bodily labor by several injunctions in the mid-sixteenth century; various Sunday sports and amusements were restricted in 1625 by Charles I. The law of the colonies to the time of the Revolution and the basis of the Sunday laws in the States was 29 Charles II, c. 7 (1677). It provided, in part:

> "For the better observation and keeping holy the Lord's day, commonly called Sunday: be it enacted...that all the laws enacted and in force concerning the observation of the day, *and repairing to the church thereon*, be carefully put in execution; and that all and every person and persons whatsoever shall upon every Lord's day apply themselves to the observation of the same, by exercising themselves

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[1]Case 1A-R-022 on this website.

> thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, laborer, or other person whatsoever, *shall do or exercise any worldly labor or business or work* of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted);...and that no person or persons whatsoever shall publicly cry, show forth, or expose for sale any wares, merchandise, fruit, herbs, goods, or chattels, whatsoever, upon the Lord's day, or any part thereof..."

[Clearly,]...the English Sunday legislation was in aid of the established church.

The American colonial Sunday restrictions arose soon after settlement. Starting in 1650, the Plymouth Colony proscribed servile work, unnecessary traveling, sports, and the sale of alcoholic beverages on the Lord's day and enacted laws concerning church attendance. The Massachusetts Bay Colony and the Connecticut and New Haven Colonies enacted similar prohibitions...The religious orientation of the colonial statutes was equally apparent. For example, a 1629 Massachusetts Bay instruction began, "And to the end the Sabbath may be celebrated in a religious manner..." A 1653 enactment spoke of Sunday activities "which things tend much to the dishonor of God, the reproach of religion, and the profanation of his holy Sabbath, the sanctification whereof is sometimes put for all duties immediately respecting the service of God..." **These laws persevered after the Revolution and, at about the time of the 1st Amendment's adoption, <u>each of the colonies had laws of some sort restricting Sunday labor</u>.**

But...nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor. In the middle 1700's, Blackstone wrote, "The keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness."...The preamble to a 1679 Rhode Island enactment stated that the reason for the ban on Sunday employment was that "persons being evill minded, have presumed to employ in servile labor, more than necessity requireth, their servants ..." The New York law of 1788 omitted the term "Lord's day" and substituted "the first day of the week commonly called Sunday." Similar changes marked the Maryland statutes...With the advent of the 1st Amendment, the colonial provisions requiring church attendance were soon repealed.

More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come. In England, during the First World War, a committee investigating the health conditions of munitions workers reported that "if the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed...On economic and social grounds alike this weekly period of rest is best provided on Sunday."

The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests. Recent New Jersey Sunday legislation was supported by labor groups and trade associations*;* modern English Sunday legislation was promoted by the National Federation of Grocers and supported by the National Chamber of Trade, the Drapers' Chamber of Trade, and the National Union of Shop Assistants...

Almost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system. Some of our States now enforce their Sunday legislation through Departments of Labor. **Thus have Sunday laws evolved from the wholly religious sanctions that originally were enacted...**

This Court has considered the happenings surrounding the Virginia General Assembly's enactment of "An act for establishing religious freedom," written by Thomas Jefferson and sponsored by James Madison, as best reflecting the long and intensive struggle for religious freedom in America, as particularly relevant in the search for the 1st Amendment's meaning. In 1776, nine years before the bill's passage, Madison co-authored Virginia's Declaration of Rights which provided that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience..." Virginia had had Sunday legislation since early in the seventeenth century; in 1776, the laws penalizing "maintaining any opinions in matters of religion, *forbearing to repair to church*, or the exercising any mode of worship whatsoever" were repealed, and all dissenters were freed from the taxes levied for the support of the established church. **The Sunday labor prohibitions remained; apparently, they were not believed to be inconsistent with the newly enacted Declaration of Rights. Madison had sought also to have the Declaration expressly condemn the existing Virginia establishment. This hope was finally realized when "A Bill for Establishing Religious Freedom" was passed in 1785. In this same year, Madison presented to Virginia legislators "A Bill for Punishing...Sabbath Breakers"** which provided, in part:

> "If any person on **Sunday** shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence."

This became law the following year and remained during the time that Madison fought for the 1st Amendment in the Congress. It was the law of Virginia, and similar laws were in force in other States, when Madison stated at the Virginia ratification convention:

> "Happily for the states, they enjoy the utmost freedom of religion...Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment. I believe it to be so in the other states...I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom."

In 1799, Virginia pronounced "An act for establishing religious freedom" as "a true exposition of the principles of the bill of rights and constitution," and repealed all subsequently enacted legislation deemed inconsistent with it. **Virginia's statute banning Sunday labor stood**...

In the case at bar, we find the place of Sunday Closing Laws in the 1st Amendment's history both enlightening and persuasive.

But in order to dispose of the case before us, we must consider the standards by which the Maryland statutes are to be measured. Here, a brief review of the 1st Amendment's background proves helpful. The 1st Amendment states that "Congress shall make no law respecting an establishment of religion..." The Amendment was proposed by James Madison on June 8, 1789, in the House of Representatives. It then read, in part:

> "The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

We are told that Madison added the word "national" to meet the scruples of States which then had an established church...In its report to the House, the committee...recommended the insertion of the language, "no religion shall be established by law." Mr. Gerry said "it would read better if it was, that no religious doctrine shall be established by law." Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience ...He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.

The Amendment, as it passed the House of Representatives nine days later, read, in part:

"Congress shall make no law establishing religion..."

It passed the Senate on September 9, 1789, reading, in part:

"Congress shall make no law establishing articles of faith, or a mode of worship..."

An early commentator opined that the "real object of the amendment was...to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government." **But, the 1st Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a "broad interpretation...in the light of its history and the evils it was designed forever to suppress..." *Everson v. Board of Education.* It has found that the 1st and 14th Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church. Thus, in *McCollum v. Board of***

***Education*[2]*,* the Court held that the action of a board of education, permitting religious instruction during school hours in public school buildings and requiring those children who chose not to attend to remain in their classrooms, to be contrary to the "Establishment" Clause.**

However, 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. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. *Reynolds v. United States.*[3] The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

Thus, these broad principles have been set forth by this Court. Those cases dealing with the specific problems arising under the "Establishment" Clause which have reached this Court are few in number. The most extensive discussion of the "Establishment" Clause's latitude is to be found in *Everson v. Board of Education:*

> "The 'establishment of religion' clause of the 1st Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

Under challenge was a statute authorizing repayment to parents of their children's transportation expenses to public and Catholic schools. The Court...recognized that "it is undoubtedly true that children are helped to get to church schools," and "there is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for

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[2]Case 1A-R-023 on this website.

[3]Case 1A-R-001 on this website.

by the State." But the Court found that the purpose and effect of the statute in question was general "public welfare legislation"*;* that it was to protect all school children from the "very real hazards of traffic"*;* that the expenditure of public funds for school transportation, to religious schools or to any others, was like the expenditure of public funds to provide policemen to safeguard these same children or to provide "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.

Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens...Sunday Closing Laws...have become part and parcel of this great governmental concern wholly apart from their original purposes...The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. **To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.**

We now reach the Maryland statutes under review. The title of the major series of sections of the Maryland Code dealing with Sunday closing...is "Sabbath Breaking"; §492 proscribes work or bodily labor on the "Lord's day," and forbids persons to "profane the Lord's day" by gaming, fishing et cetera; §522 refers to Sunday as the "Sabbath day." As has been mentioned above, many of the exempted Sunday activities in the various localities of the State may only be conducted during the afternoon and late evening; most Christian church services, of course, are held on Sunday morning and early Sunday evening. Finally, as previously noted, certain localities do not permit the allowed Sunday activities to be carried on within one hundred yards of any church where religious services are being held. This is the totality of the evidence of religious purpose which may be gleaned from the face of the present statute and from its operative effect.

The predecessors of the existing Maryland Sunday laws are undeniably religious in origin...There are judicial statements in early Maryland decisions which tend to support appellants' position. In an 1834 case involving a contract calling for delivery on Sunday, the Maryland Court of Appeals remarked that "Ours is a Christian community, and a day set apart as the day of rest, is the day consecrated by the resurrection of our Saviour, and embraces the twenty-four hours next ensuing the midnight of Saturday." *Kilgour* v. *Miles*. This language was cited with approval in *Judefind v. State.* It was also stated there:

> "It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion -- of all sects and denominations that observe that day -- as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a Court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, (except works of necessity and charity,) and *thereby* promotes the cause of Christianity. If the Christian religion is, incidentally or otherwise, benefitted or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it. Whilst Courts have generally sustained Sunday laws as 'civil regulations,' their decisions will have no less weight if they are shown to be in accordance with divine law as well as human."

But it should be noted that...the Maryland court specifically rejected the contention that the laws interfered with religious liberty and stated that the laws' purpose was to provide the "advantages of having a weekly day of rest, 'from a mere physical and political standpoint.'"

Considering the language and operative effect of the current statutes, we no longer find the blanket prohibition against Sunday work or bodily labor. To the contrary, we find that [the statute]...permits the Sunday sale of tobaccos and sweets and a long list of sundry articles which we have enumerated above; [another section] permits the Sunday operation of bathing beaches, amusement parks and similar facilities; [and another] permits the Sunday sale of alcoholic beverages, products strictly forbidden by predecessor statutes; we are told that Anne Arundel County allows Sunday bingo and the Sunday playing of pinball machines and slot machines, activities generally condemned by prior Maryland Sunday legislation. Certainly, these are not works of charity or necessity. [The] current stipulation that shops with only one employee may remain open on Sunday does not coincide with a religious purpose. These provisions, along with those which permit various sports and entertainments on Sunday, seem clearly to be fashioned for the purpose of providing a Sunday <u>atmosphere of recreation, cheerfulness, repose and enjoyment</u>....[W]e believe that the air of the day is one of relaxation rather than one of religion.

The existing Maryland Sunday laws are not simply verbatim re-enactments of their religiously oriented antecedents. Only §492 retains the appellation of "Lord's day" and even that section no longer makes recitation of religious purpose. It does talk in terms of "profaning the Lord's day," but other sections permit the activities previously thought to be profane. Prior denunciation of Sunday drunkenness is now gone. Contemporary concern with these statutes is evidenced by the dozen changes made in 1959 and by the recent enactment of a majority of the exceptions...

The Maryland court declared in its decision in the instant case: "The legislative plan is plain. It is to compel a day of rest from work, permitting only activities which are necessary or recreational." After engaging in the close scrutiny demanded of us when 1st Amendment liberties are at issue, **we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation.** But this does not answer all

of appellants' contentions. We are told that the State has other means at its disposal to accomplish its secular purpose...that would not even remotely or incidentally give state aid to religion. On this basis, we are asked to hold these statutes invalid on the ground that the State's power to regulate conduct in the public interest may only be executed in a way that does not unduly or unnecessarily infringe upon the religious provisions of the 1st Amendment. *Cantwell v. Connecticut.*[4] However relevant this argument may be, we believe that the factual basis on which it rests is not supportable. It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice.

However, **the State's purpose is not merely to provide a one-day-in-seven work stoppage**. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility -- a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.

Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.

Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like...Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, **we hold that the Maryland statutes are not laws respecting an establishment of religion.**

The distinctions between the statutes in the case before us and the state action in *McCollum v. Board of Education,* the only case in this Court finding a violation of the "Establishment" Clause, lend further substantiation to our conclusion. In *McCollum*, state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation at bar. In *McCollum*, the only alternative available to the nonattending students was to remain in their classrooms; the alternatives open to nonlaboring persons in the instant case are far more diverse. In *McCollum*, there was direct cooperation between state officials

[4]Case 1A-R-011 on this website.

and religious ministers; no such direct participation exists under the Maryland laws. In *McCollum*, tax-supported buildings were used to aid religion; in the instant case, no tax monies are being used in aid of religion...

DISSENT: Justice Douglas...**The question is not whether one day out of seven can be imposed by a State as a day of rest. The question is not whether Sunday can by force of custom and habit be retained as a day of rest. The question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority**...**I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors.**

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. The Declaration of Independence stated the now familiar theme:

> "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their **Creator** with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."

...For these reasons we stated in *Zorach v. Clauson*[5], **"We are a religious people whose institutions presuppose a Supreme Being."**

But those who fashioned the 1st Amendment decided that if and when God is to be served, His service will not be motivated by coercive measures of government. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" -- such is the command of the 1st Amendment made applicable to the State by reason of the Due Process Clause of the 14th. This means, as I understand it, that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, *first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; *second*, that no one shall be interfered with by government for practicing the religion of his choice; *third*, that the State may not require anyone to practice a religion or even any religion; and *fourth*, that the State cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters, not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

The 1st Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish -- whether the result is to

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[5]Case 1A-R-025 on this website.

produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral. This freedom plainly includes freedom *from* religion with the right to believe, speak, write, publish and advocate anti-religious programs. Certainly the "free exercise" clause does not require that everyone embrace the theology of some church or of some faith, or observe the religious practices of any majority or minority sect. The 1st Amendment by its "establishment" clause prevents, of course, the selection by government of an "official" church. Yet the ban plainly extends farther than that. We said in *Everson v. Board of Education* that it would be an "establishment" of a religion if the Government financed one church or several churches. For what better way to "establish" an institution than to find the fund that will support it? The "establishment" clause protects citizens also against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it. The Government plainly could not join forces with one religious group and decree a universal and symbolic circumcision. Nor could it require all children to be baptized or give tax exemptions only to those whose children were baptized.

Could it require a fast from sunrise to sunset throughout the Moslem month of Ramadan? I should think not. Yet why then can it make criminal the doing of other acts, as innocent as eating, during the day that Christians revere?

...**The issue of these cases would...be in better focus if we imagined that a state legislature, controlled by orthodox Jews and Seventh-Day Adventists, passed a law making it a crime to keep a shop open on Saturdays. Would a Baptist, Catholic, Methodist, or Presbyterian be compelled to obey that law or go to jail or pay a fine? Or suppose Moslems grew in political strength here and got a law through a state legislature making it a crime to keep a shop open on Fridays. Would the rest of us have to submit under the fear of criminal sanctions?**

...We have then...Sunday laws that find their source in Exodus, that were brought here by the Virginians and by the Puritans, and that are today maintained, construed, and justified because they respect the views of our dominant religious groups and provide a needed day of rest.

The history was accurately summarized a century ago by Chief Justice Terry of the Supreme Court of California in *Ex parte Newman:*

> "The truth is, however much it may be disguised, that this one day of rest is a purely religious idea. Derived from the Sabbatical institutions of the ancient Hebrew, it has been adopted into all the creeds of succeeding religious sects throughout the civilized world; and whether it be the Friday of the Mohammedan, the Saturday of the Israelite, or the Sunday of the Christian, it is alike fixed in the affections of its followers, beyond the power of eradication, and in most of the States of our Confederacy, the aid of the law to enforce its observance has been given under the pretence of a civil, municipal, or police regulation."

That case involved the validity of a Sunday law under a provision of the California Constitution guaranteeing the "free exercise" of religion. Justice Burnett stated why he concluded that the Sunday law, there sought to be enforced against a man selling clothing on Sunday, infringed California's constitution:

> "Had the act made Monday, instead of Sunday, a day of compulsory rest, the constitutional question would have been the same. The fact that the Christian *voluntarily* keeps holy the first day of the week, does not authorize the Legislature to make that observance *compulsory*. The Legislature can not compel the citizen to do that which the Constitution leaves him free to do or omit, at his election. The act violates as much the religious freedom of the Christian as of the Jew. Because the conscientious views of the Christian compel him to keep Sunday as a Sabbath, he has the right to object, when the Legislature invades his freedom of religious worship, and assumes the power to compel him to do that which he has the right to omit if he pleases. The principle is the same, whether the act of the Legislature *compels* us to do that which we wish to do, or not to do. . . .
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> "Under the Constitution of this State, the Legislature can not pass any act, the legitimate effect of which is *forcibly* to establish any merely religious truth, or enforce any merely religious observances. The Legislature has no power over such a subject. When, therefore, the citizen is sought to be compelled by the Legislature to do any affirmative religious act, or to refrain from doing anything, because it violates simply a religious principle or observance, the act is unconstitutional."

...**No matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment**; and they serve and satisfy the religious predispositions of our Christian communities. After all, the labels a State places on its laws are not binding on us when we are confronted with a constitutional decision. We reach our own conclusion as to the character, effect, and practical operation of the regulation in determining its constitutionality.

It seems to me plain that by these laws the States compel one, under sanction of law, to refrain from work or recreation on Sunday because of the majority's religious views about that day. The State by law makes Sunday a symbol of respect or adherence. Refraining from work or recreation in deference to the majority's religious feelings about Sunday is within every person's choice. **By what authority can government compel it?**

...The conduct held constitutionally criminal today embraces the selling of pure, not impure, food; wholesome, not noxious, articles. Adults, not minors, are involved. The innocent acts, now constitutionally classified as criminal, emphasize the drastic break we make with tradition.

These laws are sustained because, it is said, the 1st Amendment is concerned with religious convictions or opinion, not with conduct. But it is a strange Bill of Rights that makes it possible for

the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs. **Some have religious scruples against eating pork. Those scruples, no matter how bizarre they might seem to some, are within the ambit of the 1st Amendment. Is it possible that a majority of a state legislature having those religious scruples could make it criminal for the nonbeliever to sell pork? Some have religious scruples against slaughtering cattle. Could a state legislature, dominated by that group, make it criminal to run an abattoir?**

The Court balances the need of the people for rest, recreation, late sleeping, family visiting and the like against the command of the 1st Amendment that no one need bow to the religious beliefs of another. There is in this realm no room for balancing. I see no place for it in the constitutional scheme. **A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus.** The religious regime of every group must be respected -- unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause.

...The State can, of course, require one day of rest a week: one day when every shop or factory is closed...Then the "day of rest" becomes purely and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the "weaker brethren," to those who are indifferent to the claims of a Sabbath through apathy or scruple. **Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?**

There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the "free exercise" of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of those laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as its Sabbath a day other than Sunday.

When these laws are applied to Orthodox Jews...or to Sabbatarians their vice is accentuated. If the Sunday laws are constitutional, kosher markets are on a five-day week. Thus those laws put an economic penalty on those who observe Saturday rather than Sunday as the Sabbath. For the economic pressures on these minorities, created by the fact that our communities are predominantly Sunday-minded, there is no recourse. When, however, the State uses its coercive powers -- here the criminal law -- to compel minorities to observe a second Sabbath, not their own, the State undertakes to aid and "prefer one religion over another" -- contrary to the command of the Constitution. *Everson v. Board of Education.*

In large measure the history of the religious clause of the 1st Amendment was a struggle to be free

of economic sanctions for adherence to one's religion. A small tax was imposed in Virginia for religious education. Jefferson and Madison led the fight against the tax, Madison writing his famous Memorial and Remonstrance against that law. As a result, the tax measure was defeated and instead Virginia's famous "Bill for Religious Liberty," written by Jefferson, was enacted. That Act provided:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief..."

The reverse side of an "establishment" is a burden on the "free exercise" of religion. Receipt of funds from the State benefits the established church directly; laying an extra tax on nonmembers benefits the established church indirectly. Certainly the present Sunday laws place Orthodox Jews and Sabbatarians under extra burdens because of their religious opinions or beliefs. Requiring them to abstain from their trade or business on Sunday reduces their work-week to five days, unless they violate their religious scruples. This places them at a competitive disadvantage and penalizes them for adhering to their religious beliefs.

"The sanction imposed by the state for observing a day other than Sunday as holy time is certainly more serious economically than the imposition of a license tax for preaching," which we struck down in *Murdock v. Pennsylvania*[6]. The special protection which Sunday laws give the dominant religious groups and the penalty they place on minorities whose holy day is Saturday constitute, in my view, state interference with the "free exercise" of religion.

I dissent from applying criminal sanctions against any of these complainants since to do so implicates the States in religious matters contrary to the constitutional mandate. Reverend Allan C. Parker, Jr., Pastor of the South Park Presbyterian Church, Seattle, Washington, has stated my views:

> "We forget that, though Sunday-worshiping Christians are in the majority in this country among religious people, we do not have the right to force our practice upon the minority. Only a Church which deems itself without error and intolerant of error can justify its intolerance of the minority.
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> "A Jewish friend of mine runs a small business establishment. Because my friend is a Jew his business is closed each Saturday. He respects my right to worship on Sunday and I respect his right to worship on Saturday. But there is a difference. As a Jew he closes his store voluntarily so that he will be able to worship his God in his fashion. Fine! But, as a Jew living under Christian inspired Sunday closing laws, he is required to close his store on Sunday so that I will be able to worship my God in my fashion.

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[6]Case 1A-R-017 on this website.

> "Around the corner from my church there is a small Seventh Day Baptist church. I disagree with the Seventh Day Baptists on many points of doctrine. Among the tenets of their faith with which I disagree is the 'seventh day worship.' But they are good neighbors and fellow Christians, and while we disagree we respect one another. The good people of my congregation set aside their jobs on the first of the week and gather in God's house for worship. Of course, it is easy for them to set aside their jobs since Sunday closing laws -- inspired by the Church -- keep them from their work. At the Seventh Day Baptist church the people set aside their jobs on Saturday to worship God. This takes real sacrifice because Saturday is a good day for business. But that is not all -- they are required by law to set aside their jobs on Sunday while more orthodox Christians worship.
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> "... I do not believe that because I have set aside Sunday as a holy day I have the right to force all men to set aside that day also. Why should my faith be favored by the State over any other man's faith?"

With all deference, none of the opinions filed today in support of the Sunday laws has answered that question.

Justice Douglas likely "got this one right" in dissent. The effect of the majority decision is that Jews can only compete 5 days per week in comparison to 6 days for Christians. And, it seems the secular argument for Sundays off is not intellectually honest. Is this a case where the Court just could not "undo" what had been the "long standing tradition"? On the really tough questions, on occasion it seems the Court has to stretch beyond reason to justify a result than cannot be justified. Fortunately, in the grand scheme of things, this is rare. It is somewhat surprising this is an 8 to 1 decision. My, the "8" really left poor Justice Douglas hanging out there on a limb all by himself, didn't they?