**[108]**

# 10. FIRST DAY VERSUS FIRST AMENDMENT

Volleys of hot lead shredded the natural beauty of the Pennsylvania countryside in July, 1863.

The place was Gettysburg, a pivot point in United States history. General Lee had organized an invasion from northern Virginia in an effort to slice up the Union heartland. General Meade and his Federal forces were just as determined to repel the invasion and break the back of the Confederacy. Of the 150,000 Americans committed to the conflict, nearlv one third would be dead or wounded when the battle was over. It began on July 1 and raged throughout July 2 and July 3. By July 4 1863, the course of history had been irrevocably altered.

As the ranks formed for battle, the Union Army entrenched itself along Cemetery Ridge, its left flank guarded by a craggy knoll called Little Round Top. Strewn with rocks, scrubby brush, and trees, Little Round Top provided a commanding view of the Federal line.

Little Round Top was also the key to the Battle of Gettysburg. General Meade had posted two divisions along the southern portion of Cemetery Ridge and the Little and Big Round Tops; but General Sickles, the corps commander, sensed the approach of a Confederate attack on July 2 and determined to improve this position – without benefit of orders from Meade.

**[109]** When Sickles moved his men forward to what he believed to be strategic advantage, Little Round Top was up for grabs.

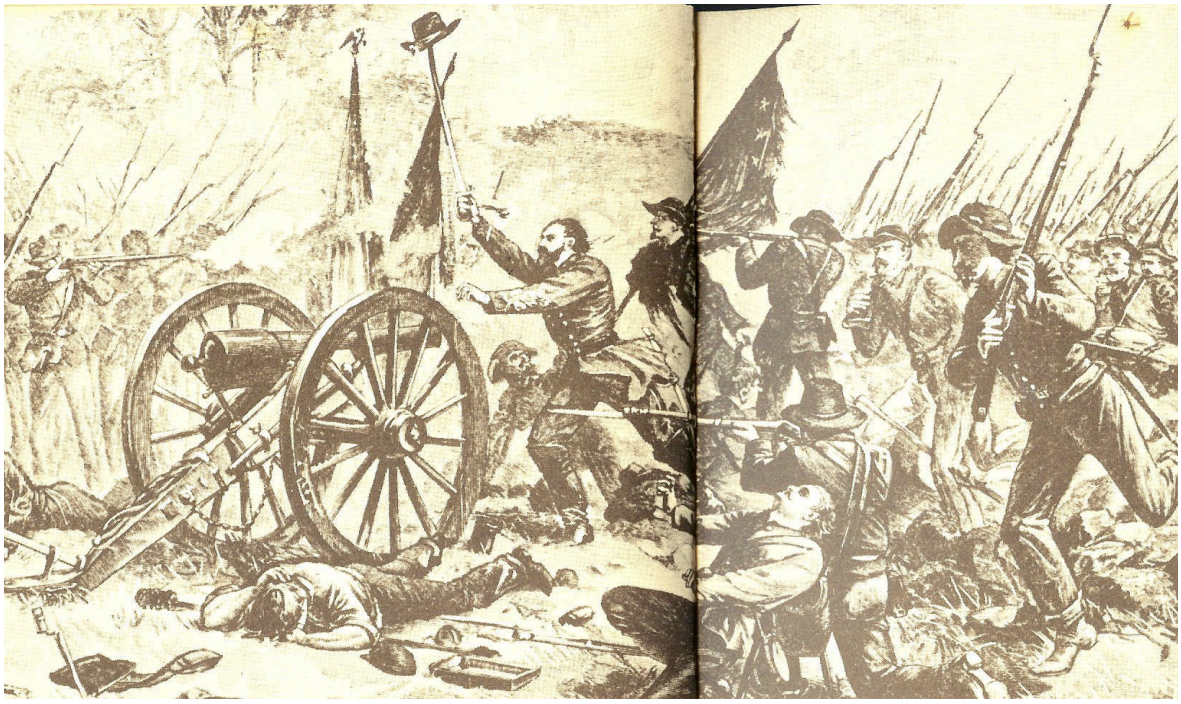
Shrewd Confederate generals did not wait for an invitation. They assaulted the exposed Union left flank. The two Federal divisions could no longer return to the Round Tops and Cemetery Ridge if they wanted. Blue uniformed infantrymen struggled valiantly in the exposed positions of a peach orchard and a wheat field. The aggressive gray line simply overpowered them.

The Federal left was crumbling, and Confederate skirmishers were preparing to attack the Round Tops when Brigadier General Gouverneur K. Warren rode up and diverted an artillery battery and a couple of infantry brigades to defensive positions on Little Round Top. The ranks were woefully thin, and there was little time to dig in. Already snipers behind the rocks of Devil's Den were zeroing in on the officers with deadly accuracy. A pall of acrid smoke hung heavy. The crack of rifles, the metallic whine of packaged death cutting through the air, the massive explosives, the screams

of the dying, and the gutteral cries from onrushing men pitted against one another in a game of death – this raging spectacle engulfed Little Round Top.

In the last analysis, it was a story of men. At the extreme left end of this Federal left flank were some troops from Maine brought to the scene by the desperate command of General Warren. To their left was no more Union Army. Coming at them from the front were gray-clad soldiers from Alabama. South and North, Alabama and Maine – strangers meeting for the first and last time on a Pennsylvania hillside in frantic and agonizing combat. Enemies, not from personal animosities but because history made them so.

Bullets are no respecters of persons. They tore out the hearts of the youth from Maine and Alabama alike, as ugly red blotches marked grotesque monuments on the rocks of Little Round Top. **[110]** With the enemy so close, there was no time to reload; the bayonet, the knife, the sword, and the crunch of a gun butt on a human skull – tbese were the weapons.



Then it was over! The men from Maine, the living, the dead, and the dying, still clung to the gouged-out crevices of Little Round Top. The men from Alabama, those who could, withdrew to regroup. But General Lee was never to have his guns mounted on Little Round Top, and without Little Round Top, Pickett's charge the next day did not succeed. Gettysburg was lost to the South.

Without Gettysburg, the South could not win the war. And without victory, the Confederacy would die.

**[111]** With the passing of the Confederacy in 1865, the United States emerged into a new era. What had been a Federal Government with strong state loyalties and rivalries became a national government with strong central

leadership. States rights declined while the scope of individual rights expanded.

The rights and dignities of individual citizens of the United States were protected by law, irrespective of any "prior condition of servitude." Out of the national torture and tumult of Gettysburg came a rebirth, a rebuilding, and the Fourteenth Amendment to the United States Constitution.

This amendment said in part:

> **[112]** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ten years after the close of the war, James G. Blaine urged Congress to adopt a constitutional amendment which would remove religious establishment from the reach of state governments just as certainly as the First Amendment had created a wall of separation between church and state for the Federal Government. The Blaine proposal touched on specifics in addition to general guarantees.

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised, or lands so devoted, be divided between religious sects or denominations.[1]

With slight modification, the House overwhelmed opposition to the amendment by a vote of 180 to 7 in favor of Blaine's proposal. On August 14, 1876, ten days after the House vote, a majority of the Senate voted for the measure – 28 to 16. (At that time Senators were still chosen by state legislatures rather than by direct vote of the people.)

Since proposed constitutional amendments require a two-thirds vote in Congress before being sent to the states for ratification, the Senate majority was inadequate by the narrowest of margins. The Blaine amendment died in Congress. If it had cleared Congress and been adopted by the states, it is conceivable that state Sunday laws could have been wiped from the books before 1900.

**[113]** Nevertheless, the Fourteenth Amendment was law. The repercussions from its impact cut a wide swath in judicial history. By 1925

the United State Supreme Court had decreed that First Amendment guarantees were applicable to state and local government through the provisions of the Fourteenth Amendment.[2] By 1943 the court confirmed that the freedom of religion guaranteed by the First Amendment applied to the states through the Fourteenth Amendment.[3]

But while this legal evolution in human rights was in metamorphosis, state Sunday laws were still being used as tools of religious intolerance. In Pennsylvania, where the high court introduced the "civil regulation" doctrine in 1848, the Pittsburgh Sabbath Association arranged for the arrest of members of the Pittsburgh Symphony Society for "furnishing music to the public on Sunday" in 1929. Two years later in a Philadelphia suburb "a policeman arrested a boy for kicking a football on Sunday. When the father protested, the . . . policeman shot and killed the father."[4]

"A deputy sheriff of Washington County arrested two Seventh-day Adventists for Sunday work, one – a crippled mother who walks on crutches – for washing clothes on her own premises, and the other a man who donated and hauled a load of wood to a church to heat it for religious services."[5] The place was Virginia, the year, 1932.

Eight Lincoln, Nebraska, boys were fined $5 each in 1921 for playing horseshoes in a vacant lot on Sunday. A 1930 Sunday football game in New Jersey was stopped, and in 1924 a New Jersey court invoked a 1798 blue law and found it illegal to play a phonograph or listen to the radio on Sunday because this was "music for the sake of merriment."

When a Sunday-law "spy" peered into the privacy of a Baltimore home in 1926 and saw a man pressing his pants on Sunday, the act was reported, and a fine resulted. In Georgia, in 1930, the state where the "police power" doctrine had been aired in the Hennington case, there was arbitrary use of the Sunday law. **[114]** "The police of Clayton County protected and helped a traveling circus to land in town and put on a show; they also cooperated with airplanes which took people for rides and made much money; yet they arrested a Bible colporteur for delivering a book explaining the Bible, on Sunday, since the person who ordered the book requested that the book be delivered then because it was the only day he was at home."[6]

But the ultimate testing ground for blue laws under the enlightenment of the First Amendment was Massachusetts. This was fitting, for here was a land saturated with the lore of freedom and its conflicts. Here the Pilgrims landed. Here was the residence of Anne Hutchinson and the earlier home of Roger Williams. This was where the tea was unceremoniously dumped into the harbor during a unique Boston party. "The shot heard round the world" was fired at the green in Lexington, and the Sons of Liberty saw the whites of British eyes at Bunker Hill. Massachusetts sons were in the thick of the

Gettysburg conflict – as well as every other serious challenge to the national liberty. Garrison held his anti-Sunday-law convention here in 1848.

Home of the deeply religious, Massachusetts was the last of the original thirteen colonies to remove vestigial evidences of original church-state union. And like its sister colonies, colonial blue laws remained on the books in one form or another even after the formal but incomplete disestablishment. The Massachusetts Lord's Day law was amended more than seventy times since its inception.

Here, perhaps, was the best possible laboratory in which to test the dynamics of democratic development and determine the vulnerability of ancient blue laws under the scrutiny of First Amendment guarantees.

**[115]** In 1877 the Massachusetts court apparently tried to tie into the "police power" justification of Sunday laws by describing its blue law as "essentially a civil regulation," even though the complaint in the case of *Commonwealth v. Has* charged the defendant with opening his shop on Sunday "to the great scandal of religion, against good morals and manners, and against the peace of said Commonwealth."[7]

But even in the face of the civil regulation language introduced into the Has opinion, subsequent statements of the state court admitted for the record that the Sunday law "was originally inserted to secure the observance of the Lord's Day in accordance with the views of our ancestors, and it ever since has stood and still stands for the same purpose," and acknowledged that the law was "enacted to secure the proper observance of the Lord's Day as understood by our forefathers."[8]

In 1923 the same court ruled against Sunday bread deliveries and explained that the statute which prohibited the performance of labor, business, or work on Sunday "was enacted to secure respect and reverence for the Lord's Day," and "that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements."

That same year in Massachusetts "three Seventh-day Adventists were arrested and fined for painting the interior of a house on Sunday," despite the fact "they had kept Saturday, and there was an exemption clause in the law that covered their cases." In 1924, two Worcester men were fined for Sunday violations – one for shining shoes and the other for transporting a hog.[10]

Then came the decisions of the United States Supreme Court extending First Amendment guarantees to individual states. Could the Massachusetts statute entitled "Observance of the Lord's Day" survive? Was it either an "establishment of religion" or a means of preventing "free exercise of religion"? This question was asked in Springfield, and it traveled all the way to the United States Supreme Court for an answer.

The Crown Kosher Super Market of Massachusetts was a corporation, with a controlling interest owned by an Orthodox Jew. **[116]** Specializing in kosher food products, the market catered primarily to Jewish patronage and closed weekly from sundown Friday evening through sundown Saturday evening.

On Sundays the market traditionally opened its doors from eight in the morning until six in the evening. One third of the week's business was done on this one day, since Orthodox Jewish patrons would not shop on Saturday even if the store had remained open.

The Massachusetts blue law had by this time acquired a crazyquilt pattern of amendments and exceptions. Some businesses exempt by statute were allowed to operate, thus enabling an enterprising citizen to engage in one business on six days of the week and another all day Sunday. The law said Yes to the sale of tobacco on Sunday but No to the sale of food. Candy was permissible, but not meat. A barber must close down completely on Sunday, but a bootblack could work until 11 a.m. The wholesale disposition of fish was acceptable, but not retail sale of the identical fish. Professional football could be played on Sunday, during stipulated afternoon hours only.

Further confusion resulted from an exemption which allowed Sunday activity for an observer of the seventh-day Sabbath. The exemption covered those who "believe that the seventh day of the week ought to be observed as the Sabbath and actually refrain from secular business and labor on that day if (they) disturb no other person thereby."[11] The problem here was in the interpretation of the phrase "disturb no other person thereby."

Thus, when the Crown Kosher Super Market was accused of violating the Massachusetts law, the Jewish merchant found no help in the state courts. But with the First Amendment guarantees available through the Fourteenth Amendment, Orthodox Jews took the issue to the Federal court. Here they charged that the Massachusetts "Lord's Day" law established religion and prevented the free exercise of the Jewish faith. **117]** Appellants also alleged denial of equal protection of the laws and an invalid exercise **[**of the police power of a state because of capricious classifications and arbitrary exceptions.

Over the vigorous dissent of District Judge William T. McCarthy of Boston, in 1959 Federal Circuit Judges Calvert Magruder and Peter Woodbury made judicial history by granting appellants the injunctive relief sought.

The court noted that the first Massachusetts Sunday law and the modified colonial versions "had the religious purpose to compel a seemly observance of that day of the week celebrated as the Sabbath (Sunday) by the dominant Christian sect."[12] Referring to the massive amendments that created "an almost unbelievable hodgepodge" on the statute books, it rejected any

analysis which would show the Sunday law had abandoned its religious character.

The court criticized the finding in the 1877 Has case, charging that "the characterization of the Sunday law as being merely a civil regulation providing for a 'day of rest' seems to have been an *ad hoc* improvisation . . . because of the realization that the Sunday law would be more vulnerable to constitutional attack, under the state constitution, if the religious motivation of the statute were more explicitly avowed." Other Massachusetts state court decisions such as *Bennett v. Brooks* in 1864, and *Commonwealth v. White* in 1906, were cited as evidence substantiating the religious rather than secular character of the establishment.

Coupled with this was the fact that the appellants were of a minority religious persuasion. Friend-of-the-court briefs supporting the appellants' position were filed by the International Religious Liberty Association and the Southern New England Conference of Seventh-day Adventists.

The Archdiocesan Council of Catholic Men and the Lord's Day League of New England joined in offering an opposing friend-of-the-court opinion. The latter brief referred to the common "purpose of preventing the further secularization and commercialization of the Lord's Day."

**[118]** The Federal court majority also commented that the Hennington holding of 1896 was obsolete because the United States Supreme Court of that day had given its decision "*before the modern development of limitations upon the powers of the state implicit in the Fourteenth Amendment.*"

Accordingly, the Federal court found in the Crown Kosher case that the Massachusetts Sunday law had furnished special protection to dominant Christian sects which celebrate Sunday as the Lord's Day, without furnishing comparable protection to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as a day of rest. The Federal court unmasked the "police power" sham and found the Massachusetts first-day law to be in conflict with the First Amendment guarantees of the United States Constitution.

It was a blow to blue-law advocates that they would not take lying down. They appealed to the United States Supreme Court. To make it easier for that court to return to the "police power" rationale of the Field era, the Sunday-law protagonists this time refrained from disclosing a common "purpose of preventing the further secularization and commercialization of the Lord's Day."

The stratagem worked.

## REFERENCES


1. *Congressional Record,* 44th Congress, Ist Session, December 14, 1875, page 205
2. See *Gitlow v. New York,* 268 U.S. 652 (1925).
3. See *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Douglas v. Jeannette,* 319 U.S. 157 (1943); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943).
4. *American State Papers* (Washington, D.C.: Review and Herald Publishing Association, 1943), pages 566, 567.
5. Ibid., p. 567.
6. Ibid., p. 563.
7. *Commonwealth v. Has,* 122 Massachusetts 42 (1877).
8. *Commonwealth v. White,* 190 Massachusetts 578 (1906).
9. *Commonwealth v. McCarthy*, 244 Massachusetts 484 (1923).
10. *American State Papers,* page 564.
11. *General Laws of Massachusetts,* Chapter 136, Section 6. In *American State Papers,* page 470.
12. *Crown Kosher Super Market v. Gallagher*, 176 U.S. 466 (1959).