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11. ESTABLISHMENT – RELIGION OR RECREATION

A New York local board of education submitted the following prayer to principals for recitation in public schools: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.”

Did this constitute an establishment of religion in violation of the First Amendment of the United States Constitution? The majority of the Supreme Court of the United States said Yes in June, 1962, and a wave of public reaction swept the nation.

Neither Justice Frankfurter nor Justice White participated in the decision, and Justice Stewart registered a strong dissent. Justice Black spoke for the majority that found the act an unconstitutional religious establishment, and Justice Douglas concurred.

The majority opinion reviewed the history of religious establishment. It noted first that the “establishment clause” was designed to avoid a “union of government and religion” – which “tends to destroy government and to degrade religion.” Second, it noted the “historical fact that governmentally established religions and religious persecutions go hand in hand.” **[120]** It pointed to the sixteenth century Book of Common Prayer, created in England by government authority, with its resultant controversies. This, it explained, is what happens when religion is subjected to the whim of politics. “It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.”

The court saw a threat to free individual worship in a government act which put. an “official stamp of approval upon one particular kind of prayer or one particular form of religious services.” The prayers are not exempt from the limitations of the “establishment clause,” the court decided, merely because the prayer is “denominationally neutral nor the fact that its observance on the part of the students is voluntary.” To show “direct governmental compulsion” is not essential, since the “establishment clause”

precludes any laws “which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”

The “prayer” was a mechanical form, not offensive to any religious minority. It was not couched in statutory language but came from administrative governmental authority. Participation in the recitation was voluntary – any student could be excused without undue embarrassment. The procedure did not envelope the population at large, but only schoolchildren under the jurisdiction of the educational agency. Nonparticipants would not be subject to fine or imprisonment for failing to join in the exercise. Apart from any religious implications, the regular morning recitation could point to some secular welfare attributes – respect for family, patriotism for country, and moral training of youth in a society threatened by criminal encroachment. With secular benefits present, conceivably the court could have classed the matter as “civil regulation” within the legitimate “police power,” and therefore not in violation of the Constitution. **[121]** Instead, the court held the prayers to be an establishment of religion. In sharp contrast to the 1962 regents' prayer case in New York, the Massachusetts Lord's Day observance law, tested in 1961, was a statutory enactment of the state legislature which applied to every citizen in the state. It was offensive to doctrinal concepts of religious minorities. Participation in the “observance” was not subject to the voluntary choice of the individual citizen. “Crimes” were created by statute so that fines or imprisonment awaited violators.

James Madison enunciated a philosophic commitment to a church and a state coexisting separately in an atmosphere of mutual respect. Far from suggesting government hostility to religion, Madison favored executive proclamations of fasts and festivals as long as the language was recommendatory and not injunctive.

Government policy cordial to religious practice but short of “any penal sanction enforcing the worship” fitted Madison's frame of dcfinition for church-state separation. Free exercise was protected, establishment prevented.

Scrutinized within the dimension of Madison's “penal sanction test,” the regents' prayer of the Engle case bears constitutional characteristics; whereas the coercive element in legislation enforcing Sunday idleness runs afoul of acceptable government action.

Yet, the Supreme Court of the United States took a position directly opposed to the Madison test. It struck down the nonpenal voluntary prayer of the regents in 1962, while the criminal law sanctions were allowed to stand in four 1961 Sunday-law cases. [2]

In one of the 1961 blue-law cases *(McGowan v. Maryland),* Chief justice Earl Warren remarked: “We do not bold that Sunday legislation may

not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose – evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect-is to use the State's coercive power to aid religion.".[3] **[122]** The Massachusetts Sunday law seemed to fit that description. It was frankly religious, making liberal use of Lord's-day terminology. Its legislative history was religious both in origin and in legislative intent. Its operative effect, like Sunday legislation in other states, showed evidence of discriminatory and arbitrary enforcement against religious minorities.

Since the Supreme Court Sunday-law decisions in 1896 and 1900, the First Amendment guarantees had been ruled applicable to state and local governments via the Fourteenth, opening the door to a religious "establishment" and "free exercise" test of blue-law constitutionality.

As recently as 1923 the highest state tribunal in Massachusetts had described the Sunday law as "religious." The Federal court that decided the issue in 1959, found the Massachusetts blue law "religious." The 1962 United States Supreme Court found religious "establishment" in government sponsorship of the regents' prayer.

Barely thirteen months before the controversial *Engle v. Vitale* decision, the Supreme Court ruled on the Massachusetts Sunday law as relating to the Crown Kosher case. As in the Engle case, the "establishment clause" question was raised. "Was the Massachusetts Sunday law an establishment of religion?" Eight justices said No! One justice said Yes! The decision came in a flurry of action, with opinions released concurrently relative to the four different Sunday-law cases – one from Massachusetts, one from Maryland, and two from Pennsylvania.

To reach its decision in the Crown Kosher case the court simply resurrected the nineteenth-century Field doctrine of "police power" and "secular" purpose. But, like the preacher who pounded his pulpit and raised his voice the loudest when his argument was weak, the court took a lot of words to say it – reportedly the aggregate total ranked second in quantity to any decision in Supreme Court history.

[123] The same ecclesiastical authoritarianism that had produced the Book of Common Prayer had established rigid Sunday observance. And while the Massachusetts Lord's Day law of 1961 did not collar the citizen and place him directly in the church pews, it did barricade avenues to most secular activity. The citizen rash enough to go to the park to play a baseball game at 11:30 Sunday morning would have to skirt a statutory roadblock and risk fine and imprisonment.

Said the chief justice, "We agree with the court below that, like the Sunday laws of other States, the Massachusetts statutes have an unmistakably religious origin." But he was able to detect a change that "came about in

1782” where the statutory language declared that “the Observance of the Lord's Day” promotes the “Welfare of a Community” and provides “Seasons for Relaxation from Labor and the Cares of Business.” Hence, Earl Warren observed, “the statute's announced purpose was no longer solely religious.”

In examining the specific laws challenged in the Crown Kosher case, Chief Justice Warren admitted that “the statutes still contain references to the Lord's Day”; but he found that “for the most part, they have been divorced from the religious orientation of their predecessors.” To fortify this contention, the opinion pointed to an expanded scheme of permitted activities which now allows dancing, concerts, and “sports of almost all kinds,” while “church attendance is no longer required.” The court was content to consider “the objectionable language” as “merely a relic.”[4]

Despite the fact that the sharp curtailment of the “worldly amusements” traditionally attacked by Sunday laws remained to confuse and complicate the Sunday “rest,” “relaxation,” “repose,” and “recreation” allegedly available to the citizen, the majority view was that “the present scheme is one to provide an atmosphere of recreation rather than religion,” and that “the 'character' of the day would appear more likely to be intended to be one of repose and recreation” than of a religious nature.

[124] The 1923 Massachusetts case of *Commonwealth v. McCarthy* which had characterized the state Sunday law as “religious” was relegated to footnote status in the Warren opinion. That state court had confirmed that the Massachusetts Sunday law “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.” [5]
[125] In 1961, the chief justice chose instead to quote from the *Commonwealth v. Has* decision of 1877, which, following Field doctrine, describes the Lord's Day statute as “essentially a civil regulation.”[6]

The Supreme Court of the United States considered the Field tradition persuasive and found secular purposes in the nation's Sunday laws.

In sidestepping the use of the specific language of the "several cases, between 1877 and 1923, which gave a religious characterization to the statute," the court argued in the 1961 Crown Kosher case that "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." To bolster the conclusion that "the relevant factors having been most carefully considered, we do not find that the present statute's purpose or effect is religious," the majority referred to a report from the Massachusetts Legislative Research Council relative to legal holidays and their observance. **[126]** That report had talked generally of protection to the public offered by Sunday laws which provided a "period of rest and quiet," the promotion of "health, peace, and good order" and a statutory structure "essentially civil in character." This report bore a date of 1960 – the year *after* the lower Federal court had characterized the statute "religious."

As to arguments that the state could "accomplish its secular purpose by alternative means that would not even remotely or incidentally aid religion, the court announced its rejection based upon reasons stated in the case of *McGowan v. Maryland*, and cited that case as additional authority for its reversal of the 1959 decision of the lower Federal court in the Crown Kosher case.[7]

The "crimes" of the appellants in the McGowan case consisted of Sunday sales of a toy submarine, a stapler and staples, a can of floor wax, and a three-ring loose-leaf binder. The sales occurred in an Anne Arundel County, Maryland, discount store. In that county, permitted sales extended to

foodstuffs, auto and boat accessories, flowers, toilet goods, hospital supplies, and souvenirs.

Although “the taking of oysters and the hunting or killing of game is generally forbidden,” other sports were allowed, providing they had a niche in the statutory list of exceptions and took place in geographically acceptable locations. And, before proceeding with his Sunday “rest” and “recreation” with confidence, the Maryland citizen had to consider the time of day. An act could be illegal one moment of the day and legitimate the next. No wonder the statutory exactions required the skill of a Supreme Court to interpret!

The “establishment clause” issue was raised in *McGowan v Maryland,* appellants contending “that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance, . . . to induce people with no religion or people with marginal religious belief to join the predominant **“**Christian sects,” and “to aid the conduct of church services and religious observance of the sacred day.”

[127] Speaking for the majority decision, Chief justice Warren acknowledged that “there is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces.” And he recited evidence that many years ago “nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor.” Then the chief justice embraced the “police power” philosophy of the Californian, Justice Stephen J. Field. Warren quoted from Field's dissent in *Ex Parte Newman;* Field's words in the Soon Hing decision of 1885; the “civil regulation” language enunciated by Harlan in the Hennington case; and the full acceptance of this dogma in *Petit v. Minnesota* at the turn of the century.

These decisions were in each case written in an era before First Amendment guarantees had been held applicable to state and local government and placed upon a judicial pedestal of protection. These decisions came from an era that was also the scene of religious agitation for Federal Sunday legislation and of arbitrary enforcement of Sunday laws against religious minorities.

Nevertheless, in the McGowan case the Supreme Court found the Field tradition persuasive, and the majority rejected the lower Federal court ruling in favor of “the state supreme court's determination that the statute's present purpose and effect is not to aid religion but to set aside a day of rest and recreation.”

The court saw no problem in the coexistence of “secular” and religious” purposes in civil regulations. It ignored Roger Williams's distinction between the first four and the last six of the Ten Commandments and compared blue laws to laws prohibiting theft, murder, and adultery.

[128] As to alternative means for the achievement of "secular" purpose, the chief justice wrote that a "one-day-in-seven" rest law requiring rest from labor for an unspecified twenty-four-hour period during each consecutive seven days was inadequate to meet the state's secular goal to set aside "a day of rest, repose, recreation, and tranquillity." He used the "family day" argument in justifying the state's quest for "a special atmosphere of tranquillity, a day which all members of the family or friends and relatives might spend together."

Determined to preserve the Sunday institution irrespective of religious overtones, the court concluded, "Sunday is a day apart from all others. The cause is irrelevant; the fact exists."[8]

The Pennsylvania blue law attacked in the *Two Guys From Harrison v. McGinley* case also received the blessing of the Supreme Court. Looking to the "relevant judicial characterizations and, particularly, the legislative history leading to the passage of the 1959 Act immediately before us, we hold that neither the statute's purpose nor its effect is religious."[9]

Justice Felix Frankfurter wrote an opinion concurring with the majority decision on both the McGowan and the Two Guys cases, in which he was joined by Justice John M. Harlan, namesake of the Justice Harlan who wrote for the court in the Hennington case.

Frankfurter launched into a detailed analysis of the history and development of Sunday legislation. His views were supplemented by a charted outline of state Sunday-law classifications as extant in 1961.

Frankfurter also acknowledged that "the earlier among the colonial Sunday statutes were unquestionably religious in purpose. . . . But even the seventeenth century legislation does not show an exclusively religious preoccupation." He pointed to a 1792 Massachusetts Sunday law preamble as early evidence that such legislation began to "display a duplicity of purpose."

The "seventeenth century" language in the laws before the court, Frankfurter argued, "does not of itself prove the continuation of the purposes for which the colonial governments enacted "these laws, or that these are the purposes for which their successors of the twentieth [century] have retained them and modified them." **[129]** He rejected "one-day-a-week laws" as inadequate substitutes because they "do not accomplish all that is accomplished by Sunday laws. They provided only a periodic physical rest, not that atmosphere of entire community repose which Sunday has traditionally brought." Like the Warren statement, Frankfurter's concluded that "the statutes of Maryland, Massachusetts, and Pennsylvania which we here examine are not constitutionally forbidden fusions of church and state."[10]

Thus the majority of the court found a legitimate secular purpose in Sunday legislation which justified its existence under the "police power" of

the state. Classed as a “civil regulation,” the court said, it was not an establishment of religion.

Thirteen months later, in the board of regents' prayer case, it was essentially the same court that declared: “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”[11]

Justice William O. Douglas in the 1961 cases took issue with the majority and in a dissenting opinion characterized the Sunday laws before the court as an establishment of religion.

The landmark decisions of the court were greeted with mixed reactions. The Lord's Day Alliance and other religious proponents of Sunday laws breathed a sigh of relief that the blue laws could remain on the books, regardless of the rationale employed by the court. Religious minorities who observe the seventh day had hoped for a continuation of the trend of the decade of the forties, during which court majorities spoke through the pens of Justices Douglas, Black, and Frank Murphy for complete religious liberty. These religious groups were disappointed in 1961.

[130] Citizens without religious preferences, and with no bias toward Sunday observance, still preferred to create their own “atmosphere of recreation” without the threat of fine for playing baseball at the wrong hour of the day on Sunday.

For generations, Sunday-law boosters had preached of “family day,” “health and welfare,” “rest from labor,” “recreation,” and “community benefit.” Now the majority of the court adopted this line of argument.

The court majority made it clear that the “secular” purpose it looked to in Sunday legislation was, in addition to physical “rest,” the creation of an “atmosphere of recreation.” Admittedly the religious purpose of blue laws requires the observance of a specific day in a specific manner. Did the secular purpose of an “atmosphere of recreation” lend itself to any other statutory possibility, such as “one-day-in-seven” legislation? No, said the court.

“One-day-in-seven” laws require that an individual be given twenty-four hours of rest in each consecutive seven-day period – without designating the day but guaranteeing rest from uninterrupted labor for the individual. If the “one-dav-in-seven” statute also gave the individual the free choice as to which day he would rest, presumably all members of the family would select the same day to create an “atmosphere of recreation.” They would also be good judges of the recreation they personally enjoyed, be it baseball on the front lawn, hunting in the woods, or even the reading of blue laws on the front porch.

The Fourth of July and Labor Day are annual holidays that create an “atmosphere of recreation.” There are no criminal penalties attached to the

observances. Participation is voluntary. Each family seems to know how to use the time without looking to a law book for information as to what is or is not legal. If a legislature objectively sought a secular objective of “rest, relaxation, repose, and recreation” for all its constituents, it is conceivable that the holiday atmosphere could be created without exposure to charges of “religious establishment,” and without the coercion that characterizes blue laws with their threats of fines and prison penalties.

[131] It is questionable whether legislatures had “secular” purposes in mind as they amended blue laws. The prevailing theology of Sunday observance had undergone major metamorphosis since colonial days. What had once been considered “worldly” had evolved into accepted Sunday conduct in twentieth-century America. Legislative amendments added to colonial-era blue laws reflected that theological evolution. It is conceivable that legislatures unwittingly endeavored to keep pace with theological change rather than presenting a planned statutory scheme designed to achieve “secular” ends.

And if there ever was a legitimate “secular” legislative intent, when did it materialize? The 1923 Massachusetts state court could see only “religious” purpose thirty-eight years before the United States Supreme Court said “recreation.” And was the “secular” purpose pointed to by the court in 1961 *exclusive; dominant; equal;* or was it merely *incidental* to the “religious” purpose in the blue laws

Little more than a year later, the Supreme Court read “establisbment” into the regents' prayer. Here was a relatively innocuous school exercise that suggested some “secular” benefits to the family, the community, and the nation. Admittedly concurrent with a “religious” purpose, was the “secular” ingredient in the prayer exercise of lesser significance than in the weekly Sunday observance that had been a symbol of religious allegiance for centuries, and had carried criminal sanctions to prove it.

Under the Field doctrine of “civil regulation,” could there be any religious holy day, ceremony, practice, or educational function that would not have at least some concurrent incidental “secular” benefit to the “welfare of the community”? Now that the 1961 interpretation has the force of law, is the state or the citizen left with any standard to determine when if ever blue laws can be construed as religious establishments.

[132] Roger Williams had talked of two tables of the Decalogue. The last six commands, he said, dealt with man's duty to man, whereas the first four dealt exclusively with man's duty to God. Williams saw valid “secular” purpose in the last six, but not in the first four.

In addition to the fourth commandment, “Remember the Sabbath,” duty to God included abstention from idol worship and reverence in the use

of the name of God. Observance of a day has been interpreted as a symbol of allegiance to a religious cause. Could the other commands of the first table of the Decalogue carry sufficient secular benefit to remove them also from the prohibitions of the First Amendment?

The answers are left for another day. Meanwhile, the 1961 Supreme Court had something to say on the subject of the "free exercise clause" of the First Amendment.

REFERENCES

1. *Engle v. Vitale*, 370 U.S. 421 (1962).
2. See *McGowan v. Maryland*, 366 U.S. 420 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys From Harrison v. McGinley*, 366 U.S. 582 (1961).
3. *McGowan v. Maryland*, Op cit.
4. *Gallagher v. Crown Kosher Super Market*, Op. cit.
5. *Commonwealth v. McCarthy*, 244 Massachusetts 484 (1923).
6. *Commonwealth v. Has*, 122 Massachusetts 40 (1877).
7. *Gallagher v. Crown Kosher Super Market*, Op. cit.
8. *McGowan v. Maryland*, Op. cit.
9. *Two Guys From Harrison v. McGinley*, Op. cit.
10. *McGowan v. Maryland*, Op. cit.
11. *Engle v. Vitale*, Op. cit.