

12-1-1961

## Constitutional Law -- Establishment of Religion -- Sunday Closing Laws

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### Recommended Citation

Henry M. Schmerer, *Constitutional Law -- Establishment of Religion -- Sunday Closing Laws*, 16 U. Miami L. Rev. 337 (1961)

Available at: <https://repository.law.miami.edu/umlr/vol16/iss2/11>

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forum after all these advances and retreats, these reconnaissances and skirmishes, would be a postponement of justice equivalent to a denial. If anything is due him, he should get it in the forum whose aid he has invoked."<sup>36</sup>

STANTON S. KAPLAN

## CONSTITUTIONAL LAW — ESTABLISHMENT OF RELIGION — SUNDAY CLOSING LAWS

Four cases testing the constitutionality of Sunday closing laws<sup>1</sup> of Maryland, Pennsylvania, and Massachusetts, as being violative of the establishment of religion clause of the first amendment,<sup>2</sup> were decided as corollary cases by the United States Supreme Court. A divided Court<sup>3</sup> held: it is not a violation of the establishment clause of the first amendment<sup>5</sup> for a state to set aside Sunday as a uniform day of rest for all citizens, even though these Sunday laws were originally enacted to aid the predominant Christian sects. A state is not prevented from achieving its secular goals because a law coincides or harmonizes with the tenets of certain religions.<sup>6</sup> *McGowan v. Maryland*, 81 Sup. Ct. 1101, 1153, 1218 (1961);<sup>7</sup> *Gallagher v.*

36. *Id.* at 72, 161 N.E. at 423.

1. Also known as "blue laws," a name given to colonial statutes of New Haven, Connecticut regulating the religious and personal conduct of citizens. The laws were bound in blue books. It is used today to describe statutes applying strict Mosaic principles. BLACK, LAW DICTIONARY 218 (4th ed. 1951); 1 BOUVIER, LAW DICTIONARY 373 (3d rev. 1914); WEBSTER, NEW INTERNATIONAL DICTIONARY 296 (2d ed. unabridged 1951). This term was used in the opinions of the courts below. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944 (E.D. Pa. 1959); *Crown Kasher Super Market, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959); *McGowan v. State*, 220 Md. 117, 151 A.2d 156 (1959). For a view that "blue laws" never existed see MARTIN, *THE DAY* 28-30 (1933).

2. Other major issues discussed and found not to be violative of the Constitution were: the free exercise of religion clause of the first amendment as applied to members of the Orthodox Jewish faith who closed their stores on Saturday, their Sabbath; the equal protection clause of the fourteenth amendment as applied to the classifications of exemptions itemized in the statutes; and the due process clause of the fourteenth amendment as applied to the vagueness and restrictiveness of these statutes. For a discussion of these issues prior to the present decisions, see Comment, 59 COLUM. L. REV. 1192 (1959).

3. Chief Justice Warren wrote the four majority opinions. Justice Frankfurter joined by Justice Harlan wrote a single concurring opinion for all four cases. Justice Douglas wrote a single dissenting opinion covering all four cases. Justices Black, Brennan, Stewart, and Frankfurter concurred and dissented on some of the other issues.

4. Only Justice Douglas dissented to this holding.

5. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." (Italics indicate the "establishment clause.")

6. [Since the remainder of the text will handle only the establishment of religion issue which is interwoven through all the opinions, subsequent citations to the instant cases will be by citing *McGowan v. Maryland*, 81 Sup. Ct. and the applicable page.]

7. This case affirmed a Maryland Court of Appeals decision upholding the conviction of seven employees of a discount department store for selling on Sunday a three

*Crown Kosher Super Market, Inc.*, 81 Sup. Ct. 1122, 1153, 1218 (1961);<sup>8</sup> *Two Guys From Harrison - Allentown, Inc. v. McGinley*, 81 Sup. Ct. 1135, 1153, 1218 (1961);<sup>9</sup> *Braunfeld v. Brown*, 81 Sup. Ct. 1144, 1153, 1218 (1961).<sup>10</sup>

Sunday closing laws have a long history.<sup>11</sup> In 1858, Justice Field, then a member of the California Supreme Court, dissented in the only state

ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine in violation of Maryland's "Sabbath Breaking" statute. MD. ANN. CODE art. 27, § 521 (1957). The Maryland court held that the "basic purpose" of Sunday closing laws "is the civil establishment and regulation of a day of rest from work, not a law respecting the establishment of religion . . ." *McGowan v. State*, 220 Md. 117, 123, 151 A.2d 156, 159 (1959).

8. This case reversed a three judge federal district court decision enjoining the chief of police of Springfield, Massachusetts from enforcing the state's "Lord's Day" statute, MASS. ANN. LAWS ch. 136, §§ 5-6 (1958), against a kosher food store owned and operated by members of the Orthodox Jewish faith who had closed their store on Saturday in observance of their religion. Several Orthodox Jewish customers and the Chief Orthodox Rabbi of Springfield, representing their respective classes, were also plaintiffs in the original action. The district court in finding the law in violation of the establishment clause stated: "The characterization [by the Massachusetts court] 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 . . . if the religious motivation of the statute were more explicitly avowed." *Crown Kosher Super Market, Inc. v. Gallagher*, 176 F. Supp. 466, 473 (D. Mass. 1959). One judge dissented to the holding.

9. This case affirmed a three judge federal district court decision refusing to restrain the district attorney for Lehigh County, Pennsylvania from enforcing against a highway discount department store the state law against "selling certain personal property on Sunday." PA. STAT. ANN. tit. 18, § 4699.10 (Supp. 1960). The district court held that while Sunday closing laws were derived from laws preventing the "profanation of the Christian Sabbath," the Supreme Court has implied that they are not an establishment of religion. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944, 948-51 (E.D. Pa. 1959). One judge concurred as to legislation passed by Pennsylvania prior to 1959, but would have found the 1959 law unconstitutional as being an arbitrary and unreasonable use of the state's police power.

10. This decision affirmed a three judge federal district court dismissal of a complaint seeking an injunction to restrain the commissioner of police for Philadelphia, Pennsylvania from enforcing the state's Sunday closing law. PA. STAT. ANN. tit. 18, § 4699.10 (Supp. 1960). The complaint was brought by merchants of a retail clothing and furniture store who were members of the Orthodox Jewish faith and who kept their store closed on Saturday in observance of their religion. The district court dismissed the complaint in a per curiam decision on the authority of *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944 (E.D. Pa. 1959). *Braunfeld v. Gibbons*, 184 F. Supp. 352 (E.D. Pa. 1959).

11. Sunday laws are older than either the common or civil law. *Harrison v. McLeod*, 141 Fla. 804, 194 So. 247 (1940). Their origin may be traced to the fourth commandment. *Exodus* 20:8-11 (rationale is religious); *Deuteronomy* 5:13-15 (rationale is secular). While the Jews had celebrated the seventh day of the week as the Sabbath, the Christians began celebrating the first day of the week to commemorate the resurrection of Jesus. PFEFFER, CHURCH, STATE, AND FREEDOM 228 (1953). The first Sunday law was issued in 321 A.D. by Constantine as part of his program of empire unification. *Ibid.* At common law, Sunday business except judicial proceedings could be transacted. *Eden v. People*, 161 Ill. 296, 43 N.E. 1108 (1896); *Ward v. Ward*, 75 Minn. 269, 77 N.W. 965 (1899); 83 C.J.S. *Sunday* § 4 (1953). England and the American colonies passed many Sunday laws, most of which were motivated by religious forces. *McGowan v. Maryland*, 81 Sup. Ct. 1108. Today almost all the states have some form of Sunday legislation. *Id.* at 1201-17. Even the federal constitution in art. 1, § 7 makes a reference to Sunday by excepting it from the ten days the President has to veto a bill. For a detailed history of the development of Sunday closing laws see generally Johnson, *Sunday Legislation*, 23 Ky. L.J. 131 (1934); JOHNSON & YOST, SEPARATION OF CHURCH

case to hold Sunday closing laws violative of religious freedom.<sup>12</sup> Three years later Justice Field's dissent became the majority opinion of the California Supreme Court.<sup>13</sup> In 1885, Justice Field as a member of the United States Supreme Court wrote the majority opinion upholding a city ordinance prohibiting the operations of laundries at night. Although Sunday closing laws were not at issue, Justice Field stated:

Laws setting aside Sunday as a day of rest, are upheld not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which come from uninterrupted labor.<sup>14</sup>

That dictum,<sup>15</sup> as well as Justice Field's California dissent, has been the basis for other states upholding Sunday closing laws against religious attack.<sup>16</sup> However, there have been several state courts that have invalidated Sunday closing laws on the ground that their classifications were arbitrary.<sup>17</sup>

Until recently the federal courts had not permitted the religious freedoms of the first amendment to be raised against state Sunday closing laws.<sup>18</sup>

AND STATE IN THE UNITED STATES 219-31 (1948); PFEFFER, CHURCH, STATE, AND FREEDOM 227-41 (1953); 3 STOKES, CHURCH AND STATE IN THE UNITED STATES 143-76 (1950).

12. *Ex parte* Newman, 9 Cal. 502 (1858).

13. *Ex parte* Andrews, 18 Cal. 678 (1861).

14. *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885). For a discussion of Supreme Court cases involving Sunday laws preceding 1885 see "Never on Sunday" in Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 83-85 (1961).

15. Justice Douglas in his dissent calls it obiter dictum. *McGowan v. Maryland*, 81 Sup. Ct. 1222.

16. Annot., 12 Am. & Eng. Ann. Cas. 1096, 1097 (1909). See cases collected in *McGowan v. Maryland*, 81 Sup. Ct. 1180 n.99. For a discussion of some of these cases see JOHNSON & YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 232-55 (1948).

17. Classifications of which businesses could stay open and which businesses must close on Sunday are considered arbitrary classifications when they are unreasonable. E.g., *Moore v. Thompson*, 126 So.2d 543 (Fla. 1960); *Pacesetter Homes, Inc. v. Village of South Holland*, 18 Ill. 2d 247, 163 N.E.2d 464 (1960). There has also been frequent litigation over the interpretation of what is or is not permitted to be sold on Sunday. It was erroneously held by Christ, J. that pigeon "feed" was not within the statutory exception for "food." *People v. Shifrin*, 198 Misc. 348, 101 N.Y.S.2d 613 (Nassau County Ct.), *rev'd*, 301 N.Y. 445, 94 N.E.2d 724 (1950).

18. See *Brunswick-Balke-Collender Co. v. Evans*, 228 Fed. 991 (D. Ore. 1916), *appeal dismissed*, 248 U.S. 587 (1919); *In re King*, 46 Fed. 905 (W.D. Tenn. 1891). The first amendment was originally interpreted as not being applicable to the states. *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 588 (1845). Cf. *Barron v. Mayor and City Council*, 32 U.S. (7 Pet.) 242 (1833). The first amendment was first applied to the states through the due process clause of the fourteenth amendment in *Gitlow v. New York*, 268 U.S. 652 (1925). The free exercise of religion clause was explicitly applied to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The establishment of religion clause was applied to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947). *Crown Kosher Super Market, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), which on appeal is one of the instant cases, is the only federal court decision to

The Supreme Court did uphold Sunday closing laws in two cases during the nineteenth century and in dictum said the laws did not infringe on religious freedom.<sup>19</sup> Subsequent cases were dismissed on appeal.<sup>20</sup> In 1908, a District of Columbia court invalidated a Maryland law as being violative of the first amendment because it enforced the observance of Sunday as a religious, rather than as a civil regulation.<sup>21</sup>

The establishment of religion clause of the first amendment is still a relatively new concept;<sup>22</sup> the first case dealing with it,<sup>23</sup> *Everson v. Board of Education*,<sup>24</sup> was decided by the Supreme Court in 1947. While the Court split in *Everson*, in upholding state aid for parents who sent their children by public carrier to Catholic schools, the Court was in agreement on the basic principle that the "establishment clause" erected "a wall of separation between Church and State."<sup>25</sup>

hold a state Sunday closing law violative of religious freedom. *But see*, District of Columbia v. Robinson, 30 App. D.C. 283, 12 Am. & Eng. Ann. Cas. 1094 (D.C. Cir. 1908).

19. *Petit v. Minnesota*, 177 U.S. 164 (1900) (not a violation of the equal protection clause for a state to prohibit the opening of a barber shop on Sunday); *Hennington v. Georgia*, 163 U.S. 299 (1896) (not a violation of the interstate commerce clause for a state to prohibit the running of freight trains on Sunday).

20. *Ullner v. Ohio*, 358 U.S. 131, *Kidd v. Ohio*, 358 U.S. 132, *dismissing appeal from* 167 Ohio St. 521, 150 N.E.2d 413 (1958); *Grochowiak v. Pennsylvania*, 358 U.S. 47 (1958), *dismissing appeal from* 184 Pa. Super. 522, 136 A.2d 145 (1957); *Gundaker Central Motors, Inc. v. Cassert*, 354 U.S. 933 (1957), *dismissing appeal from* 23 N.J. 71, 127 A.2d 566 (1956); *Towery v. North Carolina*, 347 U.S. 925, *dismissing appeal from* 239 N.C. 274, 79 S.E.2d 513 (1954); *McCee v. North Carolina*, 346 U.S. 802, *dismissing appeal from* 237 N.C. 633, 75 S.E.2d 783 (1953); *Friedman v. New York*, 341 U.S. 907 (1951), *dismissing appeal from* 302 N.Y. 75, 96 N.E.2d 184 (1950); *Brunswick-Balke-Collender Co. v. Evans*, 248 U.S. 587 (1918), *dismissing appeal from* 228 Fed. 991 (D. Ore. 1916). One case was a per curiam affirmance. *Broad-Grace Arcade Corp. v. Bright*, 284 U.S. 588, *affirming* 48 F.2d 348 (E.D. Va. 1931).

21. District of Columbia v. Robinson, 30 App. D.C. 283, 12 Am. & Eng. Ann. Cas. 1094 (D.C. Cir. 1908). The law, dating from 1723, was also held to be obsolete since it had not been enforced in the District of Columbia for over 100 years. See also *O'Hanlon v. Myers*, 18 S.C. (10 Rich.) 128 (1856). Sunday regulations for the District of Columbia were upheld in *Siddons v. Edmonston*, 42 App. D.C. 459 (D.C. Cir. 1914).

22. Its history could be traced to the statement: "Render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's." *Luke* 20:25. In fact, only the colony of Rhode Island had no established church up to the time of the Declaration of Independence. KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE* 19 (1957). Massachusetts did not disestablish the church until 1833. *Id.* at 34. It was not until 1877 that New Hampshire permitted non-Protestants to run for Congress. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 25 (1949). Even today no other major country has our concept of separation of church and state. For a detailed account of the development of the establishment clause see generally PFEFFER, *CHURCH, STATE, AND FREEDOM* (1953); 1-3 STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950). For a less detailed account see generally GREENE, *RELIGION AND THE STATE IN AMERICA* (1941); KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE* 1-39 (1957).

23. Earlier cases had discussed the establishment clause in dictum. *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871).

24. 330 U.S. 1 (1947).

25. "The 'establishment of religion' clause of the First 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 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

The *Everson* principle was repeated by the Court in holding that a state public school *could not* teach religious doctrine during school time<sup>26</sup> and in holding a state *could* release from school those children who desired religious instruction.<sup>27</sup> The Court declined to hear other "establishment clause" issues arising from state actions involving bible reading in the public schools,<sup>28</sup> distribution of bibles in the public schools,<sup>29</sup> and Sunday closing laws.<sup>30</sup>

The instant cases are the first in which the Supreme Court gave a plenary hearing to Sunday closing laws. The previous "establishment clause" cases<sup>31</sup> are of little assistance in determining what state actions are an establishment of religion.<sup>32</sup> The Justices in the instant cases were unanimous, as were the Justices in the previous "establishment clause" cases, in adhering to the *Everson* principle, but were divided eight to one in applying that principle to Sunday closing laws.<sup>33</sup>

Chief Justice Warren, speaking for the majority, found that a state could have valid economic<sup>34</sup> and social-welfare<sup>35</sup> reasons for desiring Sunday

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.' " *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). [The above quotation is hereinafter referred to as the *Everson* principle.] The "wall" phrase was first used by Thomas Jefferson in a letter to the Danbury Baptist Association, January 1, 1802. It was cited in *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

26. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

27. *Zorach v. Clauson*, 343 U.S. 306 (1952).

28. *Doremus v. Board of Education*, 342 U.S. 429 (1952).

29. *Gideons International v. Tudor*, 348 U.S. 816 (1954), *denying cert. in* 14 N.J. 31, 100 A.2d 857 (1953). The New Jersey Supreme Court invalidated the bible distribution.

30. *Friedman v. New York*, 341 U.S. 907 (1951), *dismissing appeal from* 302 N.Y. 75, 96 N.E.2d 184 (1950).

31. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Everson v. Board of Education*, 330 U.S. 1 (1947).

32. See Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U.L. REV. 1274 (1961). In all three prior "establishment clause" cases the Justices were unanimous on the *Everson* principle, but two cases, including *Everson*, upheld the state actions. Justice Jackson dissenting in *Everson* pointed out: "The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent," — consented.'" *Everson v. Board of Education*, 330 U.S. 1, 19 (1947). As to determining what is secular and what is sectarian Justice Jackson said, "it is a matter on which we can find no law but our own prepossessions." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 238 (1948) (concurring opinion). For a similar view see PFEFFER, *THE LIBERTIES OF AN AMERICAN* 29 (1956). For an opposing view see 34 A.B.A.J. 482 (1948).

33. See *McGowan v. Maryland*, 81 Sup. Ct. 1114, 1154, 1226.

34. The following organizations filed as *amicus curiae* seeking to uphold Sunday closing laws: Pennsylvania Retailers Ass'n; National Retail Merchants Ass'n; and Retail Clerks Int'l Ass'n. Labor unions have been active in promoting Sunday closing laws. KIRSTEIN, *STORES AND UNIONS* 20 (1950); Editorial Note, 12 *RUTGERS L. REV.* 505, 508 (1958).

35. For the social advantages of a uniform day of rest see generally Brief for the Retail Clerks Int'l Ass'n, AFL-CIO as *Amicus Curiae*, *Braunfeld v. Brown*, 81 Sup. Ct.

closing laws. This result was reached by considering the commercial entertainment and recreational facilities permitted to remain open on Sunday,<sup>36</sup> and the popular use of Sunday as a day of rest.<sup>37</sup> The Court in a footnote stated that to offset "the wave of materialism which is sweeping the country" might be another reason why a state might want a uniform rest day with certain hours of that day in which little or no activities prevail.<sup>38</sup> A state cannot be frustrated in its legislation because certain religions advocate the same law.<sup>39</sup>

A state may not use its police power in a manner that offends religious freedom, if there is another alternative to accomplish the same goal.<sup>40</sup> The Court rejected a rest-one-day-in-seven statute as a reasonable alternative to a state's goal of a uniform day of rest.<sup>41</sup>

Justice Frankfurter, concurring, formulated a test to be used in "establishment clause" cases: "[An] 'establishment' contention can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear."<sup>42</sup> It is submitted that this test might remove the first amendment freedoms from their preferred position in constitutional law.<sup>43</sup>

Justice Douglas, the lone dissenter, rejected any type of test or balancing of religious freedom.<sup>44</sup> "There is an 'establishment' of religion in the constitutional sense if any practice of any religious group has the sanction

1144, 1153, 1218 (1961). While some of the state court decisions from Maryland, Massachusetts, and Pennsylvania have recognized Sunday closing laws as welfare legislation, other decisions have had religious overtones. See *McGowan v. Maryland*, 81 Sup. Ct. 1222-25 (dissenting opinion).

36. "[T]he air of the day is one of relaxation rather than one of religion." *McGowan v. Maryland*, 81 Sup. Ct. 1117. "This is not consistent with aiding church attendance; in fact, it might be deemed inconsistent." *Id.* at 1142.

37. "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." *Id.* at 1118-19.

38. *Id.* at 1128 n.4. See also Justice Frankfurter's concurring opinion at 1177.

39. *Accord*, *United States v. Ballard*, 322 U.S. 78 (1944); *Reynolds v. United States*, 98 U.S. 145 (1878). The Chief Justice pointed out that the Ten Commandments also prohibit murder, theft, fraud, adultery, etc. Prohibiting polygamy also has religious roots. *McGowan v. Maryland*, 81 Sup. Ct. 1114. On the other hand, Justice Douglas dissenting asked whether the government could require a universal and symbolic circumcision, only give tax exemptions to those children who were baptized, require a fast throughout the Moslem month of Ramadan, or make it criminal for a nonbeliever to sell pork or run an abattoir. *Id.* at 1220, 1225.

40. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *Cf.* *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (dissenting opinion). See *McGowan v. Maryland*, 81 Sup. Ct. 1118.

41. *McGowan v. Maryland*, 81 Sup. Ct. 1118. A statute exempting those who religiously observe another day was also rejected by the Court as a reasonable alternative in connection with the "free exercise clause." *Id.* at 1148-49.

42. *Id.* at 1158. See *Id.* at 1157.

43. See *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

44. *McGowan v. Maryland*, 81 Sup. Ct. 1226.

of law behind it."<sup>45</sup> Sunday and religion have become synonymous.<sup>46</sup> The issue is not whether Sunday can be retained as a day of rest, but whether a state can impose criminal sanctions on those whose religious convictions do not call for them to worship on a Sunday.<sup>47</sup>

The detail and scope of all the opinions would make it appear that Sunday closing laws will not be given a hearing again before the Supreme Court in the near future.<sup>48</sup> This will enable the states to apply these laws broadly. Apparently, these laws even can be enforced against the non-present owner of a self-service coin-operated automatic laundry machine.<sup>49</sup> One major area not discussed by the Court was whether a state could prohibit commercial and noncommercial sports and dances on Sunday.<sup>50</sup> It is questionable whether the Court meant to imply that a state could prohibit these activities by its dictum on materialism.<sup>51</sup>

The next "establishment" issue the Court probably will decide is whether a prayer may be given in public schools.<sup>52</sup> While the instant

45. *Ibid.*

46. "Sunday is a word heavily overlaid with connotations and traditions deriving from the Christian roots of our civilization that color all judgments concerning it. This is what the philosophers call 'word magic.'" *Id.* at 1220. Since most Americans talk in terms of at least one rest day every seven days instead of one rest day every nine or ten days, it shows how the religion and customs of a people become intertwined. Note, 73 HARV. L. REV. 729, 738 (1960). "Sunday laws were among the early attempts to impregnate the law with a moral flavor." *Harrison v. McLeod*, 141 Fla. 804, 806, 194 So. 247, 248 (1940). "The moral element is the Hebrew contribution to the law." *Id.* at 806, 194 So. at 247. See 3 STOKES, CHURCH AND STATE IN THE UNITED STATES 581 (1950). On the other hand, it has been held that it does not violate religious freedom to require trains to operate seven days a week. *State v. Chicago, B. & Q.R.R.*, 239 Mo. 196, 143 S.W. 785 (1912).

47. *McGowan v. Maryland*, 81 Sup. Ct. 1218. There is a distinction between Sunday as a day of rest with a penalty for violation and a holiday like Independence Day with no penalty. JOHNSON & YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 245 (1948). Sunday is a holy day and not a holiday. MARTIN, SIX STUDIES ON THE DAY 36 (1938); MARTIN, THE DAY 123-33 (1933). A state may not make it compulsory to observe a religious holiday. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (dictum).

48. The Court has already dismissed an appeal on the authority of the instant cases, *Bargaintown, U.S.A., Inc. v. Whitman*, 81 Sup. Ct. 1913 (1961). However, Chief Justice Warren does point out that only the specific statutes before the Court were upheld. "We do not hold 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." *McGowan v. Maryland*, 81 Sup. Ct. 1119.

49. The Supreme Judicial Court of Massachusetts upheld such an enforcement on the authority of the instant cases. *Commonwealth v. Chamberlain*, 175 N.E.2d 486 (Mass. 1961). At a first glance, a lay person might find this ruling inconsistent with: "[H]e shall wash his clothes, and be clean." *Leviticus* 13:34.

50. Massachusetts has extended its Sunday laws, which prohibit public dancing, to cover several holidays. A traditional Harvard University dance which fell on Veterans Day last year was ruled by the Mayor of Cambridge to be a "family ritual" so the students would not be breaking the law. *Wall Street Journal*, Nov. 10, 1961, p. 1, col. 4. Compare Annot. 24 A.L.R.2d 813, 819 (1952); Note, 61 YALE L.J. 427, 430-31 (1952).

51. See note 39 *supra* and accompanying text.

52. See *Engel v. Vitale*, 10 N.Y.2d 174, 176 N.E.2d 579, cert. granted, 30 U.S.L. WEEK 3180 (U.S. Dec. 4, 1961) (No. 468).



cases did not alter the interpretation of the "establishment clause,"<sup>53</sup> the upholding of state action would appear to enhance the chances of the Supreme Court validating prayers in the public schools. On the other hand, if the Court retains the same criteria that a tradition once religious must now have a secular basis as well, then the invalidation of prayers in the public schools should result.

In the opinion of this writer the Court circumvented the spirit of the *Everson* principle in the instant cases. Although the majority of the Court found the statutes in question to coincide with the major church attendance times, because the exempted activities permitted on Sunday could not begin until after one o'clock in the afternoon and they were suspended during the early evening hours, the Court did not believe that this was enough aid to religion to bring it within the *Everson* principle.<sup>54</sup> But this is certainly an aid to some religions.

The Massachusetts statutes in question refer to a "Lord's Day." There is no mention of Sunday or the first day of the week.<sup>55</sup> The Pennsylvania and Maryland statutes in question make several references to the "Lord's Day" or the "Sabbath."<sup>56</sup> The Court calls the "objectionable language" "merely a relic" of the seventeenth century.<sup>57</sup> It is submitted that since the words of a statute ordinarily are interpreted in the sense in which they were understood at the time the statute was enacted,<sup>58</sup> these words alone should have been enough to find a violation of the "establishment clause."<sup>59</sup>

Critics who claim the dominant Protestant sects are preferred under the religious clauses will utilize the instant cases to substantiate their point.<sup>60</sup>

53. The *Everson* principle is still as strong as before the instant cases. See Cahn, *The "Establishment of Religion" Puzzle*, N.Y.U.L. REV. 1274 (1961).

54. *McGowan v. Maryland*, 81 Sup. Ct. 1115, 1127, 1142. Permitting activities only in the afternoon on Sunday rather than during the entire day was a compromise with religious groups. MARTIN, *SIX STUDIES ON THE DAY* 60-63 (1938).

55. See MASS. ANN. LAWS ch. 136 (1958).

56. E.g., MD. ANN. CODE art. 27, § 521 (1957); PA. STAT. ANN. tit. 18, § 4699.4 (Supp. 1960).

57. *McGowan v. Maryland*, 81 Sup. Ct. 1127, 1173-75.

58. *United States v. N. E. Rosenblum Truck Lines*, 315 U.S. 50 (1942) (by implication); 82 C.I.S. *Statutes* § 329 (1953); 50 AM. JUR. *Statutes* § 236 (1944). See generally Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957 (1940); Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886 (1930).

59. *District of Columbia v. Robinson*, 30 App. D.C. 283, 12 Am. & Eng. Ann. Cas. 1094 (D.C. Cir. 1908). One of the reasons the lower court invalidated the Massachusetts law was that "the joint brief filed by the Lord's Day League of New England and the Archdiocesan Council of Catholic Men 'lets the cat out of the bag,' so to speak in the following statement: 'Each organization has various aims and purposes, but have, in common, the purpose of preventing the further secularization and commercialization of the Lord's Day.'" *Crown Kosher Super Market, Inc. v. Gallagher*, 176 F. Supp. 466, 474 (D. Mass. 1959).

60. See CORWIN, *A CONSTITUTION OF POWER IN A SECULAR STATE* (1951); CUNNINGHAM, *Freedom to Believe*, in *FREE MAN VERSUS HIS GOVERNMENT I* (Harding ed. 1958); PFEFFER, *CHURCH, STATE, AND FREEDOM* (1953). For a contrary view see O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 22-42 (1949). Catholics are not as interested in Sunday laws as are Protestants since Catholics may use the time

It is hoped that in future "establishment clause" cases the Court will not be as willing to uphold laws that directly benefit religious groups. If religion is to remain free from governmental interference, religious groups might well consider rejection of secular aid, because it is likely to be followed by secular control.<sup>61</sup>

HENRY M. SCHMERER

### **BANKRUPTCY — TITLE TO LOSS CARRY-BACK TAX REFUNDS**

In March 1957, the trustee in bankruptcy filed a successful claim for refund of federal income taxes on behalf of the bankrupt. The trustee carried back a net operating loss sustained during 1956. The bankrupt reported income on a calendar year basis. He contended that he, not the trustee, was entitled to the refund because section 70(a) of the Bankruptcy Act<sup>1</sup> vests title in the trustee only to property vested in the bankrupt at the time of the filing of the petition in bankruptcy. Since the petition in bankruptcy was filed in June of 1956 and because the right to the refund did not arise until December 31, 1956, he argued that the trustee was not entitled to the funds. *Held*: the expectation before the end of a taxable year of a refund for a loss carry-back is not a "right of action" or "property" which by statute vests in the trustee in bankruptcy, and the bankrupt taxpayer is entitled to the refund. *In re Sussman*, 289 F.2d 76 (3d Cir. 1961).

The taxpayer's right to a loss carry-back refund does not vest in him until the end of the taxable year in which the loss occurs. The Internal Revenue Code, which authorizes loss carry-backs, does so on the basis of a taxable year.<sup>2</sup>

Section 70(a) of the Bankruptcy Act provides that the trustee in bankruptcy takes title to such "property" as the bankrupt could have transferred by any means at the time of the filing of the petition in bankruptcy.<sup>3</sup>

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they are not in church to do other activities. 3 STOKES, *CHURCH AND STATE IN THE UNITED STATES* 158 (1950). *But see*, Brief for the Archdiocesan Council of Catholic Men as Amicus Curiae, *Crown Kosher Super Market v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959) (by implication).

61. The Court subsequently held as unconstitutional a section of the Maryland Constitution requiring a belief in God in order to hold public office as violative of the establishment and free exercise of religion clauses. "[W]e have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Torcaso v. Watkins*, 81 Sup. Ct. 1680, 1683 (1961). See Cahn, *How To Destroy the Churches*, Harper's, Nov. 1961, p. 33.

1. 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a) (1958).

2. INT. REV. CODE OF 1954, § 172(c). It is evident that one who sustains a net operating loss for a portion of his taxable year may earn enough income during the balance of the year to offset or reduce the loss.

3. This interpretation has been adopted in *Fairbanks Steam Shovel Co. v. Wills*, 240 U.S. 642 (1916); *Fish v. East*, 114 F.2d 177 (10th Cir. 1940); *Dannel v. Wilson*