

2018

## A True-Blue American Paradox: The Constitutional Tension between Religious Liberty and Sunday Legislation in the United States

Marcus Alden Swearingen Bates  
mbates@gccsda.com

Follow this and additional works at: <https://knowledge.e.southern.edu/jigr>



Part of the [Education Commons](#)

---

### Recommended Citation

Swearingen Bates, Marcus Alden (2018) "A True-Blue American Paradox: The Constitutional Tension between Religious Liberty and Sunday Legislation in the United States," *Journal of Interdisciplinary Graduate Research*: Vol. 4 , Article 1.

Available at: <https://knowledge.e.southern.edu/jigr/vol4/iss1/1>

This Article is brought to you for free and open access by the Peer Reviewed Journals at Knowledge Exchange. It has been accepted for inclusion in Journal of Interdisciplinary Graduate Research by an authorized editor of Knowledge Exchange. For more information, please contact [jspears@southern.edu](mailto:jspears@southern.edu).

# **A True-Blue American Paradox: The Constitutional Tension between Religious Liberty and Sunday Legislation in the United States**

By Pastor Marcus Alden Swearingen Bates

Copyright © September 2018

## **Introduction**

A fundamental legal tension exists between religious liberty and Sunday legislation in the United States. This tension is based upon the fact that the United States Supreme Court has ruled consistently that Sunday rest has developed into a secular principle, and no longer possesses the religious significance that it once had. As such, the Court has claimed that the individual states are within their constitutional authority to regulate the use of Sunday as a common day of rest for the welfare of their citizens. To contest this claim, this paper will present evidence to suggest that Sunday rest is still inherently religious, and that its legal enforcement as a common day of rest circumvents the First and Fourteenth Amendments. This evidence will also show that Sunday legislation poses a significant threat to religious liberty, and thus presents one of the great legal paradoxes of American constitutional history.

## **Rome's Paradox is America's Paradox**

The Seventh-day Adventist eschatological understanding of Rev. 13:1-18 recommends that Protestant America will eventually replicate the historical pattern of ancient Rome and the medieval papacy by repudiating religious liberty through Sunday legislation.<sup>1</sup> Ancient Rome first witnessed the co-existence of religious liberty and a Sunday rest law during the prolific career of Constantine the Great (reign, AD 306-337). After winning a crucial military victory over a rival emperor at the Milvian Bridge (AD 312), Constantine attributed this success to Christ, and

---

<sup>1</sup>Ellen G. White, *Great Controversy* (Mountain View, CA: Pacific Press, 1950), 440-450. For an in-depth discussion of the similarities between ancient Rome and the United States, see Alonzo T. Jones, *The Two Republics* (Battle Creek, MI: Review and Herald, 1891).

experienced a nominal conversion to Christianity. With the cooperation of Valerius Licinius (reign, AD 308-324), Constantine enacted the Edit of Milan (AD 313), which granted religious liberty to all Roman citizens, especially followers of the Christian faith:

As we long since perceived that religious liberty should not be denied, but that it should be granted to the opinion and wishes of each one to perform divine duties according to his own determination, we had given orders, that each one, and the Christians among the rest, have the liberty to observe the religion of his choice, and his peculiar mode of worship.<sup>2</sup>

This legislative act was a key historical development because it placed Christian and pagan citizens of the Roman empire on an equal legal standing in terms of religious liberty. Eight years later (AD 321), Constantine also sponsored the first recorded Sunday law in human history in an effort to further unify Roman society in a religious sense:

On the venerable Day of the Sun let the magistrates and people residing in the cities rest, and let all workshops be closed. In the country, however, persons engaged in agriculture may freely and lawfully continue their pursuits; because it often happens that another day is not so suitable for grain-sowing or for vine-planting; lest by neglecting the proper moment for such operations the bounty of heaven should be lost. (Given the 7<sup>th</sup> day of March, Crispus and Constantine being consuls each of them for the second time [A.D. 321].)<sup>3</sup>

Ancient Rome's original Sunday law reveals an attempt to unify the pagan and Christian elements of Roman society on the basis of a common rest day. Pagan citizens were accustomed to observing Sunday, the "Day of the Sun," as a weekly day of rest. For Christian citizens, the observance of Sunday rest in honor of Christ's resurrection was also a well-established practice by the time of Constantine.<sup>4</sup> This development favored the empire's Sunday-keeping majority at

---

<sup>2</sup>*Eusebius' Ecclesiastical History*, translated by C.F. Cruse (Peabody, MA: Hendrickson, 2006), 372. See also Henry Bettenson and Chris Maunder, *Documents of the Christian Church*, 4<sup>th</sup> edition (Oxford: Oxford University Press, 2011), 17.

<sup>3</sup>Bettenson and Maunder, 20. Philip Schaff, *History of the Christian Church*, vol. 3 (Peabody, MA: Hendrickson, 2006), 380, footnote.

<sup>4</sup>For a discussion on the development of Sunday rest in early Christianity, see Samuele Bacchiocchi, *From Sabbath to Sunday* (Rome: Pontifical Gregorian University Press, 1977).

the expense of a Judeo-Christian minority that still honored the seventh-day Sabbath of Saturday in the face of socio-economic discrimination. Sunday rest was further promoted and practiced by the medieval papacy and the Christian majority during the Middle Ages.<sup>5</sup>

United States history also reveals the co-existence of religious liberty and Sunday legislation, similar to ancient Rome. The original American colonies promoted civil and religious liberty in their legal charters. The majority of these colonies also enforced strict Sunday rest laws (referred to as “Blue Laws”<sup>6</sup>) that were religious in nature. Violating these laws carried severe penalties in some cases. The earliest recorded Sunday law in American history was enacted by the Virginia colony in 1610, and carried the death penalty for a third offense:

Every man or woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day, and in the afternoon to divine service, and catechizing, upon pain for the first fault to lose their provision and allowance for the whole week following; for the second, to lose the said allowance and also be whipt; and for the third to suffer death.<sup>7</sup>

Early colonial Sunday laws in America were also present in Massachusetts (1650), Connecticut (1656), Rhode Island (1679), Maryland (1692-1715), New Jersey (1693), New York (1695), New Hampshire (1700), Pennsylvania (1705), North Carolina (1741), Georgia (1762), and Delaware (1795).<sup>8</sup> An unsuccessful attempt to enact a national Sunday law also occurred in 1888 through the efforts of New Hampshire Senator Henry W. Blair. Labeled the Blair Bill of 1888, the title of this Bill read as follows:

---

<sup>5</sup>White, 49-60.

<sup>6</sup>David N. Laband and Deborah H. Heinbuch, *Blue Laws: The History, Economics, and Politics of Sunday Closing Laws* (Lexington, MA: D.C. Heath and Company, 1987), 8. See also William Addison Blakely, *American State Papers Bearing on Sunday Legislation*, revised and enlarged edition (Washington, DC: Religious Liberty Association, 1911), and Abraham H. Lewis, *A Critical History of Sunday Legislation from 321 to 1888* (New York: D. Appleton and Company, 1888).

<sup>7</sup>Blakely, 33.

<sup>8</sup>Ibid, 36-58.

BILL TO SECURE TO THE PEOPLE THE ENJOYMENT OF THE FIRST DAY OF THE WEEK, COMMONLY KNOWN AS THE LORD'S DAY, AS A DAY OF REST, AND TO PROMOTE ITS OBSERVANCE AS A DAY OF RELIGIOUS WORSHIP.<sup>9</sup>

The evidence above demonstrates that religious liberty and Sunday legislation have been present in the experiences of ancient Rome and the United States. In both cases, Sunday rest laws were clearly religious in orientation, and existed in a paradoxical relationship with the principle of religious liberty. Further evidence of the religious scope of Sunday rest in the United States is found in the fact that, with the exception of Alaska, every state currently has some variation of Sunday legislation that restricts buying and selling.<sup>10</sup> Sabbath observance prohibits buying and selling (Neh. 10:31; 13:15-22; Jer. 17:19-27), which confirms the religious orientation of Sunday rest. Minnesota, Nebraska, and New York also refer to Sunday as the "Sabbath" in their civil codes, while Massachusetts refers to Sunday as the "Lord's Day."<sup>11</sup> These observations show that Sunday rest is still inherently religious in orientation, and thus refute the claim that Sunday has allegedly morphed into a secular rest day.

### **Legal Foundations of Religious Liberty in the United States**

The American colonies were originally populated by settlers who fled political and religious intolerance in Europe. In their desire to resist the establishment of kingly power and state-sponsored churches, the framers of the U.S. Constitution sought to create a Republican-Protestant nation built upon civil and religious liberty. The Declaration of Independence states that human beings are naturally "endowed by their Creator with certain unalienable Rights," such

---

<sup>9</sup>Ibid, 360. See also Alonzo T. Jones, *The National Sunday Law* (Brushton, NY: Teach Services, 2002), v-vii.

<sup>10</sup>Miriam Cho, "State Sunday Laws," *Liberty Magazine* (November-December 2003), 13. <http://libertymagazine.org/article/state-sunday-laws>. See also Laband and Heinbuch, 47-137.

<sup>11</sup>Cho, 14.

as “Life, Liberty, and the pursuit of Happiness.”<sup>12</sup> The specific principles of civil and religious liberty also find their constitutional expression in the Bill of Rights, which consists of the first ten amendments, ratified by the states on December 15, 1791. The First Amendment expresses the specific principle of religious liberty:

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.<sup>13</sup>

Two clauses in the First Amendment protect religious liberty. The Establishment Clause claims that Congress is not permitted to enact any legislation that constitutes an *establishment* of religion, such as establishing a national religion, for example. The Free Exercise Clause cites that Congress is not permitted to enact any legislation that could potentially prohibit any citizen from the *free exercise* of all non-criminal religious practices.

Religious liberty is also protected on the state level through the Fourteenth Amendment, which applies several amendments in the Bill of Rights to the states through the judicial process of incorporation.<sup>14</sup> This incorporation process is discussed in several U.S. Supreme Court cases, the most notable of which are *Everson v. Board of Education*<sup>15</sup> and *Cantwell v. Connecticut*.<sup>16</sup> The first section of the Fourteenth Amendment states that,

---

<sup>12</sup>*Declaration of Independence* (July 4, 1776). Of course, the practice of slavery in America when this was first produced reveals that the Framers had a limited understanding of this principle, one that was later expanded through the Emancipation Proclamation (1863) and the Civil Rights Act (1964).

<sup>13</sup>*First Amendment to the U.S. Constitution* (December 15, 1791).

<sup>14</sup>Thomas E. Baker and Jerre S. Williams, *Constitutional Analysis*, 2<sup>nd</sup> edition (St. Paul, MN: West, 1999), 367-370; Linda R. Monk, *The Words We Live By* (New York: Hyperion, 2003), 214-216.

<sup>15</sup>*Everson v. Board of Education*, 330 U.S. 1 (1947). Findlaw: <https://caselaw.findlaw.com/us-supreme-court/330/1.html>.

<sup>16</sup>*Cantwell v. Connecticut*, 310 U.S. 296 (1940). Findlaw: <https://caselaw.findlaw.com/us-supreme-court/310/296.html>.

All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and 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.<sup>17</sup>

Three clauses in the Fourteenth Amendment protect religious liberty on the state level.

The Privileges and Immunities Clause cites that no state can pass legislation that restricts any *privilege* (i.e. right) guaranteed to U.S. citizens under the Constitution. The Due Process Clause claims that no state can deprive any citizen of life, liberty, or property without the *due process* of law. The Equal Protection Clause provides *equal protection* under the law for every U.S. citizen, regardless of gender, race, or religious affiliation.

### **Christian Common Law and Secular Sunday Arguments**

The history of American jurisprudence reveals several state-level court cases involving Sunday legislation in the 19<sup>th</sup> century.<sup>18</sup> The Christian Common Law argument is one position that has been cited in favor of the constitutionality of Sunday legislation. This line of reasoning developed in England through the theological claims of a state-sanctioned church and a divinely-ordained monarchy. Church and state were viewed as inseparable under this religio-political system, and thus required that civil regulations reflect Christian principles. Despite their disdain for this arrangement, the framers of the U.S. Constitution were essentially products of the Christian Common Law worldview. They believed that, as a Christian nation, America's legal foundation should reflect a Christian orientation. This orientation was implied by Chief Justice

---

<sup>17</sup>*Fourteenth Amendment to the U.S. Constitution* (July 9, 1868).

<sup>18</sup>Specific case examples include *Sellers v. Dugan* (Ohio, 1849); *Shover v. State of Arkansas* (1850); *Bloom v. Richards* (Ohio, 1853); *State of Missouri v. Ambs* (1854); *Ex Parte Newman* (California, 1858); and *Board of Education v. Minor* (Ohio, 1872), in Blakely, 412-469. This list is not exhaustive.

Johnson in *Shover v. State of Arkansas* (1850), who upheld the constitutionality of Sunday legislation with Christian Common Law reasoning:

Sunday, or the Sabbath, is properly and emphatically called the Lord's day, and is one amongst the first and most sacred institutions of the Christian religion. This system of religion is recognized as constituting a part and parcel of the *common law*, and as such all the institutions growing out of it, or in any way connected with it, in case they shall not be found to interfere with the rights of conscience, are entitled to the most profound respect, and can rightfully claim the protection of the law-making power of the State.<sup>19</sup>

The Christian Common Law orientation of the framers was expressed in another early case by Justice Scott, who upheld Sunday legislation in *State of Missouri v. Ambbs* (1854). Scott observed that because Christianity permeates American society, legal expressions of Christian principles present no conflict, except from a possible non-Christian minority. He observed that the framers reflected Christian values in the Constitution because of a Christian Common Law perspective. For Scott, the framers present the greatest argument in favor of Sunday legislation, because they offered no condemnation of these laws. They lived in a time when Sunday rest laws were common to colonial charters. If these laws were unconstitutional, Scott reasoned that the framers would have stated their illegality in the text of the Constitution:

The framers of the Constitution, then, recognized Sunday as a day to be observed, acting themselves under a law which exacted a compulsive observance of it. If a compulsive observance of the Lord's day, as a day of rest, had been deemed inconsistent with the principles contained in the Constitution, can anything be clearer than, as the matter was so plainly and palpably before the convention, a specific condemnation of the Sunday law would have been ingrafted upon it?<sup>20</sup>

The Secular Sunday argument is most cited legal reason for the justification of Sunday legislation. This argument claims that Sunday has evolved from a religious rest day to a secular rest day common to a majority of citizens. Whereas Sunday allegedly no longer retains religious

---

<sup>19</sup>*Shover v. State of Arkansas* (1850), in Blakely, 415-416, italics mine.

<sup>20</sup>*State of Missouri v. Ambbs* (1854), in Blakely, 429. See also Blakely, 425-433.

significance, the states are operating within their scope of legislative authority to enforce Sunday rest laws for the secular purpose of promoting the well-being of their citizens. In *Hennington v. Georgia* (1896), a case that will be discussed below, Justice Harlan quoted this line of reasoning as presented by Justice Thurman in *Bloom v. Richards* (1853):

‘We are . . . to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest.’<sup>21</sup>

*Ex Parte Newman* (1858) was one early court case where the majority opinion ruled against the constitutionality of Sunday legislation.<sup>22</sup> Mr. Newman, a Jewish merchant, violated a California statute prohibiting the sale of goods on Sunday. He claimed that the law (1) obstructed his right to acquire property, and (2) constituted an establishment of religion. Chief Justice Terry wrote the majority opinion of the court in favor of Newman. He reasoned that time is a tool for acquiring property, and citizens are “free agents” to regulate the use of their time. Statutes that dictate the use of time are acting beyond the scope of government power. Sunday is also an important religious rest day for the Christian majority. This rest day retains a secular label in name only, and should not be legally honored. Terry concluded that Sunday rest “infringes upon the liberty of the citizen, by restraining his right to acquire property.”<sup>23</sup>

---

<sup>21</sup>*Bloom v. Richards* (Ohio, 1853), in *Hennington v. Georgia*. U.S. Sup. Ct. 163 U.S. 299 (1885), 305. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/163/299.html>.

<sup>22</sup>*Ex Parte Newman*, 9 California 502 (1858). LexisNexis: <https://lexisnexis.com>. The second case is *Thomasson v. State* (Indiana, 1860). See “The Constitutional Status of the Indiana Sunday Law,” *Indiana Law Journal*, Vol. 37 (Spring 1962): 397-416.

<sup>23</sup>*Newman*, 510. See also *Newman*, 504-518. See also Warren L. Johns, *Dateline Sunday, U.S.A.: The Story of Three and a Half Centuries of Sunday-law Battles in America* (Mountain View, CA: Pacific Press, 1967), 85-94; James T. Ringgold, *Sunday: Legal Aspects of the First Day of the Week* (Clark, NJ: Lawbook Exchange, 2003), 4-7.

Justice Field, the lone dissenter in *Newman*, was a fierce archrival of Terry whose bodyguard later killed Terry in 1889 after a physical confrontation between the two judges.<sup>24</sup> Field dissented on the basis of the Secular Sunday argument, citing that a regular weekly rest day is beneficial for society. Since people have the tendency to overwork themselves, the legislature has the prerogative to enact and enforce rest laws to restrict this tendency. He rejected the “right to acquire property” and “free agent” reasons from Terry, and held that Sunday legislation does not constitute an establishment of religion. For Field, the state simply mandates a common rest day for its citizens to recover from the strain of regular labor.<sup>25</sup>

Chief Justice Terry resigned from the court the year after *Newman* and was replaced by Justice Field (1859). Field subsequently encouraged the application of his Secular Sunday argument to overturn the decision of *Newman* in *Ex Parte Andrews* (1861).<sup>26</sup> With support from Field, Justice Baldwin cited this Secular Sunday position by alleging that Sunday rest laws are secular in nature and do not require any religious response from citizens:

The operation of the act [the Sunday rest law] is secular, just as much as the business on which the act bears is secular; it enjoins nothing that is not secular, and it commands nothing that is religious; it is purely a civil regulation, and spends its whole force upon matters of civil economy. The mere fact that this regulation takes effect upon a day which has been appropriated as a day of rest by the sanctions of a particular church, no more destroys the power of the Legislature to command abstinence from labor on that day, than the fact that if the Legislature appointed certain public business to be done on Saturday or Sunday – this would have been ‘discriminating’ *against* the sects, according religious sanctity to those days.<sup>27</sup>

Baldwin concluded that the court saw no need to expound any further on the secular orientation of Sunday rest: “We do not deem it necessary to pursue the discussion. The opinion

---

<sup>24</sup>Johns, 82-84.

<sup>25</sup>Ibid, 518-529. See also Johns, 84-85.

<sup>26</sup>*Ex Parte Andrews*, 18 California 678 (1861). LexisNexis: <https://lexisnexis.com>.

<sup>27</sup>*Andrews*, 685.

of Mr. Justice Field in *Ex parte Newman*, 9 Cal. 518, discusses the main questions involved, and more fully expresses our views.”<sup>28</sup>

The *Andrews* decision is important because it cited Field’s position of the Secular Sunday argument as justification for Sunday legislation. Moreover, Field became an associate justice of the Supreme Court in 1863, and his position was later cited by the Court in *Soon Hing v. Crowley*, 113 U.S. 703 (1885). While this case did not directly address the issue of Sunday rest laws, it did reference Field’s viewpoint as justification for regulating business hours. Mr. Hing was arrested for violating a city ordinance that designated specific hours of operation for wash houses. He claimed that this ordinance violated the Equal Protection Clause because it discriminated against Chinese laundry workers. Hing also claimed that it undermined his right to work the hours that he deemed as necessary to earn a livelihood.

Field penned the majority opinion of the Court in this case. He ruled against Hing, citing that citizens have the general right to employ their time as they see fit. However, this right “must be exercised subject to the general rules . . . adopted by society for the common welfare.”<sup>29</sup> He claimed that the states are within their jurisdiction to supervise liberty with reasonable laws that govern the health and well-being of their citizens. He cited Sunday rest laws as examples of this principle, and referenced his own position from *Newman* and *Andrews*:

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 comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws . . . and their validity has been sustained by the highest courts of the states.<sup>30</sup>

---

<sup>28</sup>Ibid.

<sup>29</sup>*Soon Hing v. Crowley*, 113 U.S. 703 (1885), 709. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/113/703.html>.

<sup>30</sup>Ibid, 710.

The *Soon Hing* case is significant because it was the first U.S. Supreme Court case to cite Field's position as a legal justification for Sunday legislation. Moreover, this position was also cited or implied in every subsequent case involving the constitutionality of Sunday rest laws. Field's position, therefore, formed the basis for a national legal precedent that would justify the existence and enforcement of state-level Sunday legislation.<sup>31</sup>

### **U.S. Supreme Court Sunday Law Cases**

Six state-level Sunday law cases have been addressed by the U.S. Supreme Court. These six cases include *Hennington v. Georgia*, 163 U.S. 299 (1896), *Petit v. Minnesota*, 177 U.S. 164 (1900), *McGowan v. Maryland*, 366 U.S. 420 (1961), *Two Guys v. McGinley*, 366 U.S. 582 (1961), *Braunfeld v. Brown*, 366 U.S. 599 (1961), and *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961). This section will survey each of these six cases, and demonstrate that Field's position was either cited or implied as justification for Sunday legislation.

#### *Hennington v. Georgia*, 163 U.S. 299 (1896)

Mr. Hennington was the transportation superintendent for an interstate train company, and was cited for violating a Georgia statute prohibiting the operation of trains on Sunday. Since his company was an interstate railroad, he argued that the Georgia statute violated the Commerce Clause of the U.S. Constitution.<sup>32</sup> Upon examination, however, the Court ruled that the Commerce Clause was secondary to the primary issue of the right of states to mandate a common day of rest for the benefit of their citizens. The Court determined that the statute was "not directed against interstate commerce," but "simply declared that, on and during the day fixed by

---

<sup>31</sup>Johns, 94.

<sup>32</sup>Article I, Section 8, Clause 3. Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

law as a day of rest for all the people within the limits of the state from toil and labor incident to their callings, the transportation of freight shall be suspended.”<sup>33</sup>

Chief Justice Harlan wrote the majority opinion of the Court, and referred to the “same view . . . expressed by Justice Field in *Ex Parte Newman*.”<sup>34</sup> He stated that “there is nothing in the legislation . . . which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the state.”<sup>35</sup> The Georgia State Legislature possessed the “power to enact laws to promote the order and to secure the comfort, happiness, and health of the people,” and thus acted “within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, should cease.”<sup>36</sup> While citing Field’s position of Secular Sunday in support of Sunday rest, Harlan used the term “Sabbath day,” which is a religious phrase.

*Petit v. Minnesota*, 177 U.S. 164 (1900)

Mr. Petite was a barbershop owner who violated a Minnesota statute by conducting business on Sunday. Most Sunday rest laws generally make exceptions for legitimate works of necessity. In this case, the Court determined that cutting hair and trimming beards are not works of necessity. Chief Justice Fuller presented the majority opinion of the Court, and confirmed that Sunday law enforcement falls within the legal jurisdiction of the states. Each state has the right to exercise its police power for the welfare of its citizens: “We have uniformly recognized state laws relating to the observance of Sunday as enacted in the legitimate exercise of the police

---

<sup>33</sup>*Hennington*, 318.

<sup>34</sup>*Ibid*, 304.

<sup>35</sup>*Ibid*.

<sup>36</sup>*Ibid*.

power of the state.”<sup>37</sup> Stating that “innumerable decisions of the state courts have sustained the validity of such laws,” the Court supported the Minnesota statute with the same reasoning used by “Mr. Justice Field, then a member of the Supreme Court of California, in *Ex parte Newman*, 9 Cal. 502, whose opinion was approved in *Ex parte Andrews*, 18 Cal. 678.”<sup>38</sup>

### McGowan v. Maryland, 366 U.S. 420 (1961)

The year 1961 was significant in the history of U.S. Supreme Court Sunday law cases. The Warren Court ruled on four cases involving the Sunday rest issue on May 29, 1961. The first case was the famous landmark case, *McGowan v. Maryland*. The appellants were employees of a large department store, and they had violated a state statute prohibiting the sale of certain goods on Sunday. They claimed that (1) the statute violated the Equal Protection Clause, because retailers in other locations were allowed to sell the same goods on Sunday, and (2) the statute violated the Establishment Clause, because Sunday is the Sabbath for most Christian groups, and its legal enforcement encourages people to join these groups and attend church.<sup>39</sup>

The Court did concur that the statute was somewhat arbitrary in making location a specific requirement to sell certain commodities on Sunday. However, Chief Justice Warren, who wrote the majority opinion of the Court, ultimately concluded that geographic restrictions on Sunday sales in Maryland were still consistent with the state legislature’s desire to achieve the secular goal of securing weekly rest for its citizens:

Here again, it would seem that a legislature could reasonably find that these commodities, necessary for the health and recreation of its citizens, should only be sold on Sunday by those vendors at the locations where the commodities are

---

<sup>37</sup>*Petit v. Minnesota*, 177 U.S. 164 (1900), 165. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/177/164.html>.

<sup>38</sup>*Ibid.*

<sup>39</sup>*McGowan v. Maryland*, 366 U.S. 420 (1961), 420-431. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/366/420.html>.

most likely to be put to immediate use. Such a determination would seem to serve the consuming public and at the same time secure Sunday rest for those employees, like the appellants, of all other retail establishments.<sup>40</sup>

Warren admitted that Sunday laws originally had a religious motivation. However, “non-religious arguments for Sunday closing began to be heard more distinctly” over time, and these “statutes began to lose their totally religious flavor.”<sup>41</sup> The “language used in some of these cases further evidences the evolution of Sunday laws as temporal statutes.”<sup>42</sup> He referenced Field’s position, observing that “Religious objections have been raised . . . on numerous occasions but sustained only once, in *Ex Parte Newman*, 9 Cal. 502 (1858); and that decision was overruled three years later, in *Ex Parte Andrews*, 18 Cal. 678.”<sup>43</sup>

Warren also noted that Field’s original comments from his *Newman* dissent (as also cited in *Soon Hing*) were referenced by both Justice Harlan in *Hennington* and Chief Justice Fuller in *Petit*. The following quotation summarizes Field’s reasoning on this point:

Its requirement is a cessation from labor. In its enactment, the Legislature has given the sanction of the law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience, and sustained by science . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted.<sup>44</sup>

Warren expounded further by stating that,

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. Numerous laws . . . now point the way toward the good of life for all. Sunday Closing Laws, like those before

---

<sup>40</sup>*Ibid*, 427-428.

<sup>41</sup>*Ibid*, 433-434.

<sup>42</sup>*Ibid*, 436.

<sup>43</sup>*Ibid*, 435.

<sup>44</sup>*McGowan*, 436-437.

us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. 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 religious 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.<sup>45</sup>

Warren thus concluded that,

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.<sup>46</sup>

Overall, *McGowan* constituted a third Supreme Court case involving Sunday legislation, and followed suit with *Hennington* and *Petit* by citing Field's position of Secular Sunday as a definitive legal precedent in defense of state-level Sunday laws. This case also serves as the most expansive legal commentary on the Secular Sunday argument.

*Two Guys v. McGinley*, 366 U.S. 582 (1961)

A corporation called *Two Guys* violated two Pennsylvania closing laws by conducting business on Sunday. Similar to *McGowan*, the appellants claimed that these statutes violated the Equal Protection and Establishment Clauses. The Court acknowledged that the statutes were originally passed for religious purposes, and had "some traces of the early religious influence."<sup>47</sup>

---

<sup>45</sup>Ibid, 444-445.

<sup>46</sup>Ibid, 451-452.

<sup>47</sup>*Two Guys v. McGinley*, 366 U.S. 582 (1961), 594. Findlaw: <https://caselaw.findlaw>.

However, because these statutes were listed under the title, “Offenses against Public Policy, Economy, and Health,” they should be viewed as being non-religious and secular in nature, because they had the express motivation of preserving the general welfare of the people.<sup>48</sup> The use of the “Lord’s Day” and “Sabbath Day” in the legal wording was simply the “result of legislative oversight in failing to remove them.”<sup>49</sup> As can be expected, the Sunday rest statute was upheld by the Warren Court “for the same reasons stated in *McGowan v. Maryland*,” on the basis of Field’s position.<sup>50</sup>

*Braunfeld v. Brown*, 366 U.S. 599 (1961)

Mr. Braunfeld, an orthodox Jewish business owner who kept the seventh-day Sabbath (Saturday), violated a Pennsylvania Sunday closing law by opening his business on Sunday to remain competitive in the marketplace. He argued that this statute violated the Equal Protection, Establishment, and Free Exercise Clauses on the basis of economic hardship, because a shorter work week potentially forces Orthodox Jews to set aside their faith in order to earn a livelihood. He also suggested that the statute discourages other potential business owners from embracing the Jewish faith because of the economic disadvantage of a reduced work week. Their Sunday-keeping competitors have the economic advantage of closing only one day per week. Churches who observe Sunday can also attract new converts because of a convenient rest day.<sup>51</sup>

The Court responded to Braunfeld’s claims by stating that, while some religious practices should not be restricted by legislation, the freedom to act in religious matters is not entirely free

---

com/us-supreme-court/366/582.html.

<sup>48</sup>Ibid.

<sup>49</sup>Ibid, 594-595.

<sup>50</sup>Ibid, 597.

<sup>51</sup>*Braunfeld v. Brown*, 366 U.S. 599 (1961), 599-603. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/366/599.html>.

from legislative restrictions across the board. Some religious behaviors are subject to legislative scrutiny if they conflict with the general welfare of society.<sup>52</sup> Moreover, not all Jewish believers are burdened by Sunday closing laws. Only those who own businesses or otherwise feel the need to work on Sunday are affected, and can potentially choose another type of livelihood that avoids Sunday labor. Warren also observed that if the statute was nullified, the “operating latitude” of the Pennsylvania legislature would be restricted. It is not realistic for all legislative enactments of a governing body to avoid offending every citizen group. Therefore, the Court reserves the right to validate any reasonable statute designed to advance a state’s secular goals, even if it might burden the religious practices of a particular faith group.<sup>53</sup>

*Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961)

The orthodox Jewish owners of the Crown Kosher Market in the city of Springfield were cited for violating a Massachusetts Sunday closing law in this case. Similar to *Braunfeld*, the owners claimed that the statute violated the Equal Protection, Establishment, and Free Exercise Clauses.<sup>54</sup> Once again, the Court agreed that Massachusetts Sunday laws had religious origins. However, these laws had gradually abandoned their spiritual origins over time and had adopted a recreational character, despite the presence of religious phrases such as the “Lord’s day,” which implies the reasoning of the Field doctrine. Although the state might have originally enacted the

---

<sup>52</sup>*Reynolds v. United States*, 98 U.S. 145 (1878), 161-167. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/98/145.html>. In this particular case, the Court addressed polygamy, and ruled that the government has the right to legislate and regulate this specific practice. *Prince v. Massachusetts*, 321 U.S. 158 (1944), 164-171. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/321/158.html>. In this case, the Court addressed the issue of underage children selling religious materials. Both of these cases addressed the issue of how the government might regulate religious practices that it deems as working against the general well-being of its citizens.

<sup>53</sup>*Braunfeld*, 603-609.

<sup>54</sup>*Gallagher v. Crown Kosher Market*. 366 U.S. 617 (1961), 617-622. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/366/617.html>.

statute to protect Sunday-keeping Christians, the statute itself did not compel church attendance. The Court also suggested that the presence of state exemptions for religious groups that observed a different rest day is further evidence of the secular motive for this statute. For these reasons, the Court upheld the legitimacy of this Sunday law based on secular grounds.<sup>55</sup>

### **The Dissenting Voice against Sunday Legislation**

The evidence presented thus far demonstrates that Sunday legislation has been consistently upheld on the state and national levels through the Christian Common Law and Secular Sunday arguments. Field's position is fundamentally based upon the Secular Sunday argument, and has been specifically cited by the U.S. Supreme Court as justification for Sunday closing laws. Even so, strong dissenting arguments have been raised against the constitutionality of Sunday legislation. This particular section will survey these dissenting arguments.

#### **Sunday Laws Encourage Religious Bigotry**

Justice Caldwell of the Ohio Supreme Court dissented against Sunday legislation in *Sellers v. Dugan* (1849). Two men contracted for the sale of 400 bushels of corn on Sunday in violation of an Ohio statute prohibiting business contracts on this day. One party paid for the corn, did not receive it, and sued the other party for a breach of contract. However, because the contract was written on Sunday, the Court rendered the contract void and did not require any financial remuneration. Caldwell dissented against this ruling, citing that if a Sunday contract is voided, it should be based on immoral contents, not because it is signed on a particular day. Otherwise, the state legislature's scope of power would have no apparent limit.<sup>56</sup> Caldwell

---

<sup>55</sup>Ibid, 622-631.

<sup>56</sup>*Sellers*, in Blakely, 412-413.

concluded that Sunday rest laws encourage religious bigotry and replace heart-felt religious convictions with a mere external, civil obligation:

Indeed, if I were to attempt to present the error into which . . . the court has fallen in this decision, in its strongest light, I would do it by a reference to the action of the courts and legislative bodies . . . in attempting to enforce the observance of the Sabbath by law. It always has and always will produce a pharisaical and hypocritical observance of a religious duty, and creates a spirit of censorious bigotry, and tends powerfully to destroy every religious feeling of the heart.<sup>57</sup>

### Sunday Laws are Religious in Orientation

The most significant dissent against Sunday legislation was presented by U.S Supreme Court Justice William O. Douglas in *McGowan*. He observed that the religious orientation of Sunday has been recognized by various courts through the years. Despite having an apparent civil and secular label, Sunday rest laws ultimately have a religious foundation because of their basis on the Sabbath commandment. These laws are also motivated by the fact that Sunday is held sacred by the Christian majority, not because of any alleged secular significance. Citing Terry in *Newman*, Douglas claimed that the Secular Sunday argument is an attempt to conceal the fact that this day still retains a strong religious overtone:

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.<sup>58</sup>

Douglas argued that the spiritual origin of Sunday rest has not lost its significance because of a secular label, a court ruling, or a legal precedent. Requiring this day of rest by law

---

<sup>57</sup>Ibid, 413.

<sup>58</sup>*Newman*, 509, in *McGowan*, 571.

clearly favors the Sunday-keeping Christian majority in the United States. No government has any rational basis for the legal enforcement of a religious institution like Sunday rest, which possesses such a deep spiritual heritage. He concluded that,

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?<sup>59</sup>

### Sunday Laws Violate the First Amendment

Religious groups should practice their faith principles only as they invoke their First Amendment right to peaceably assemble and promote these principles, and should not be aided by the legislative power of government outside of a general protection of the freedom to worship. No civil authority should impose criminal sanctions on individuals who do not share the same doctrinal view on Sunday rest as the Christian majority. Sunday laws violate the Establishment Clause of the First Amendment because (1) Sunday rest has a religious origin, and (2) these laws prefer one religion (the Sunday-keeping Christian majority) above another. Justice Black noted that any law that prefers one religion above another constitutes an establishment of religion in *Everson v. Board of Education* (1947):

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 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 . . . 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.'<sup>60</sup>

---

<sup>59</sup>*McGowan*, 573.

<sup>60</sup>*Everson*, 15-16.

In the reference above, Justice Black also observed that the Establishment Clause is violated when laws are enacted that “aid one religion.”<sup>61</sup> Douglas viewed Sunday legislation as a breach of Black’s interpretation of what constitutes an establishment of religion: “There is an ‘establishment’ of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it.”<sup>62</sup> He cited that, “When . . . the State uses its coercive powers . . . 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.”<sup>63</sup> Therefore, since Sunday legislation favors the Christian majority in America, it qualifies as an establishment of religion, and thus violates the Establishment Clause.<sup>64</sup>

Sunday legislation also violates the Free Exercise Clause. In *McGowan*, Douglas noted that 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.”<sup>65</sup> In *Braunfeld*, Stewart observed that forcing someone to choose between their religion and their livelihood is a prohibition of the “constitutional right to the free exercise of religion” because Sunday laws force non-Sunday adherents to choose between faith and “economic survival.”<sup>66</sup> Chief Justice Warren noted in ironic fashion that Sunday-keeping business owners might claim discrimination if Sabbath-keeping business owners are granted a Sunday exemption:

To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide the people with an economic advantage over their competitors who must remain closed on that day; this might

---

<sup>61</sup>Ibid, 15.

<sup>62</sup>*McGowan*, 576.

<sup>63</sup>Ibid, 577.

<sup>64</sup>Ibid, 560-562.

<sup>65</sup>Ibid, 576-577.

<sup>66</sup>*Braunfeld*, 616.

cause the Sunday-observers to complain that their religions are being discriminated against.<sup>67</sup>

In reality, however, Sunday exemptions level the economic playing field to where both non-Sunday keepers and Sunday-keepers are able to choose a six-day work week. Moreover, even if an exemption for business on Sunday were granted, the non-Sunday keeper is still at an economic disadvantage, because Sunday is generally the least profitable day for business when compared to other days of the week. Even so, civil authorities should avoid enacting any type of legislation that prohibits non-criminal actions on a particular day, or that might force all citizens to observe religious principles against their will. Doing business on the rest day of a particular religious sect should be viewed as a non-criminal act. Therefore, Sunday observance should not be legally required for citizens who desire to earn their living on this day. Otherwise, non-Sunday adherents could experience an economic disadvantage, especially if they are business owners who could potentially operate under a reduced work week as a result:

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.<sup>68</sup>

Justice Stewart also made this very same observation in *Braunfeld*:

Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me, this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the *free exercise* of their religion.<sup>69</sup>

Justice Brennan also concurred with this line of reasoning in *Braunfeld*:

---

<sup>67</sup>Ibid, 608-609.

<sup>68</sup>McGowan, 578.

<sup>69</sup>*Braunfeld*, 616, *italics mine*.

[The] laws do not say that appellants must work on Saturday. But their effect is that appellants may not simultaneously practice their religion and their trade without being hampered by a substantial competitive disadvantage. Their effect is that no one may, at one and the same time, be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen.<sup>70</sup>

The central issue of Sunday rest laws regarding the Free Exercise Clause is that they promote economic inequality for citizens who choose to rest on a different day for reasons of faith, and thus could potentially inhibit the free exercise of religion. If a non-Sunday keeping business owner closes his or her store on Saturday for religious purposes, and is also compelled by law to close on Sunday, then he or she is at an economic disadvantage to a Sunday-keeping competitor. He or she is essentially reduced to a five-day work week, while a competitor can potentially take advantage of a six-day work week. This scenario might also force non-Sunday keeping business owners to violate their faith principles by opening on their personal Sabbath because of economic pressure, which clearly prohibits the free exercise of religion.

#### Sunday Laws Violate the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment guarantees that no state can enact legislation that discriminates against any individual or group. In addition to promoting economic inequality against non-Sunday business owners in areas where they are enforced, Sunday rest laws are arbitrary and inconsistent due to the wide variety of commerce restrictions among the states.<sup>71</sup> Therefore, the discriminatory and inconsistent nature of Sunday legislation poses a threat against equal protection under the law for non-Sunday faith adherents.

Furthermore, Sunday legislation also conflicts with the Privileges and Immunities Clause of the Fourteenth Amendment. The specific rights to exercise religious liberty, acquire property,

---

<sup>70</sup>Ibid, 613.

<sup>71</sup>Laband, 146.

and choose how to use personal time in non-criminal enterprises are guaranteed constitutional privileges. Any legislation that obstructs or restricts these privileges qualifies as a violation of this clause, which would include Sunday closing laws.

Finally, Sunday legislation also breaches the Due Process Clause of the Fourteenth Amendment. Black observed in *Everson* that the “Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom.”<sup>72</sup> Douglas confirmed in *McGowan* that the First Amendment is applied to the states “by reason of the Due Process Clause of the Fourteenth.”<sup>73</sup> Therefore, given that, (1) any violation of the First Amendment constitutes a breach of the Due Process Clause, and (2) Sunday laws violate the Establishment and Free Exercise Clauses of the First Amendment, it can be concluded that Sunday closing laws constitute a violation of this particular clause.

#### The Scenario of a Non-Sunday Majority

Douglas presented a thought-provoking scenario in his *McGowan* dissent: how would a Sunday-keeping Christians react if a non-Sunday religious majority were elected and legislated rest on another day other than Sunday? Would Sunday-keepers comply or protest against such a law? He encouraged the Court to consider this viewpoint:

The issue of these cases would therefore 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 that 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?<sup>74</sup>

In *Arlan's Department Store v. Kentucky* (1962), Douglas presented the same scenario:

---

<sup>72</sup>*Everson*, 15.

<sup>73</sup>*McGowan*, 563. See also *McGowan*, 562, 568.

<sup>74</sup>*Ibid*, 565.

By what authority can government compel one person not to work on Sunday because the majority of the populace deems Sunday to be a holy day? Moslems may someday control a state legislature. Could they make criminal the opening of a shop on Friday? Would not we Christians fervently believe, if that came to pass, that government had no authority to make us bow to the scruples of the Moslem majority?<sup>75</sup>

Concluding his dissent in *McGowan*, Justice Douglas cited a powerful commentary from Allan C. Parker, Jr., who, at that particular time, served as pastor at the South Park Presbyterian Church in Seattle, Washington. He quoted Pastor Parker as saying that, “we [the Sunday-keeping majority] do not have the right to force our practice upon the minority.”<sup>76</sup> In the two quotations below, Pastor Parker continued by saying that,

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.<sup>77</sup>

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.<sup>78</sup>

The above quotations encourage a consideration of the vantage point of a non-Sunday minority with respect to Sunday closing laws. These laws clearly favor the Sunday-keeping Christian majority in the United States. The fact that the U.S. Supreme Court has consistently

---

<sup>75</sup>*Arlan’s Department Store v. Kentucky*, 371 U.S. 218 (1962), 219. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/371/218.html>. Because of the four landmark cases involving Sunday laws in 1961, this case was dismissed for lack of a federal question.

<sup>76</sup>*McGowan*, 580.

<sup>77</sup>*Ibid.*

<sup>78</sup>*Ibid*, 580-581.

ruled that these laws do not violate either the First or Fourteenth Amendments is an alarming trend. Douglas concluded his dissent against Sunday legislation with these closing words from Pastor Parker: “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?”<sup>79</sup> These concluding thoughts should evoke a careful reflection as to the overall danger of Sunday closing laws.

### The Dissenting Voice: Conclusions

Despite the U.S. Supreme Court’s claim that Sunday has evolved into a secular rest day, this paper has suggested that Sunday rest still retains a strong religious significance for the majority of Christians in America, and its legislative enforcement violates the First and Fourteenth Amendments. The weekly rest day finds its origin in the Fourth Commandment of the Decalogue, and the presence of terms like “Sabbath” and “Lord’s Day” within the legal codes of various states confirms the religious orientation of Sunday. Levy observes that, “Sunday remains for many Americans the church-going day and continues to have a religious character unlike any other days of the week.”<sup>80</sup> McCrossen even suggests both a secular and religious significance for Sunday: “In making and remaking Sunday, Americans have invoked holy day and holiday not as antithesis but as part of a continuum . . . Domestic, didactic, and commercial meanings for Sunday joined rather than replaced religious meanings. In doing so they bridged the gap between rest and leisure.”<sup>81</sup> Murakami notes that “Sunday has . . . a religious connotation,” and because

---

<sup>79</sup>Ibid, 581.

<sup>80</sup>Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: MacMillan, 1986), 159, in Yoshio Murakami, “Religion and State: Implications of Sunday Closing Laws,” *Bulletin of Hokuriku University*, Volume 27 (2003), 109.

<sup>81</sup>Alexis McCrossen, *Holy Day, Holiday: The American Sunday* (Ithaca, NY: Cornell, 2000), 16.

this “connotation cannot be erased easily,” the States should “not make such a questionable day the rest day by enforcement.”<sup>82</sup> Therefore, because Sunday is still revered as a rest day for the vast majority of Christians in America, Sunday closing laws should be repealed, if for no other reason than to avoid the appearance of partiality.

### **Sunday Rest and Other Christian Laws**

The U.S. Supreme Court has claimed that the states have the right to promote a rest day for the general welfare of citizens. Despite this claim, some businesses still remain open on this day, even in areas where Sunday closing laws are enforced. Employees that work on this day are not able to rest in these cases. If health and well-being are the goals of Sunday rest, then alcohol, tobacco, and other harmful things should also be outlawed, as these elements are more harmful to people than the lack of weekly rest from labor.

Warren also argued in *McGowan* that the religious origin of Sunday rest should not prevent its legal enforcement because other laws have also been legislated that have religious origins, such as murder, adultery, and polygamy:

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 Judeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy.<sup>83</sup>

Warren’s logic on this point is questionable. Murder, adultery, and polygamy are much more damaging to society when compared to refusing to rest from work on a weekly basis. A refusal to rest every seventh day from labor does not directly affect one’s ability to pursue life,

---

<sup>82</sup>Murakami, 110.

<sup>83</sup>*McGowan*, 442.

liberty, and property. Conversely, murder, adultery, and polygamy have a direct effect on other human beings in a negative sense, and can prohibit the ability to pursue life, liberty, and property. For this reason, prohibitions on these three vices are necessary for the well-being of society. Christians, Jews, and non-militant Muslims might all agree that murder, adultery, and polygamy are sins against God. Yet, these three groups generally promote a different day of rest. Therefore, legislation enforcing a specific day of rest should be avoided because of the disparity of opinion between these groups as to which day should be kept as the weekly Sabbath.

### **Modern National Sunday Law Movements**

Most Sunday laws restricting retail sales have been either repealed, relaxed, or are not currently enforced.<sup>84</sup> This apparent lax in Sunday law enforcement should not be taken lightly or underestimated. Cho observes that,

In conclusion, Sunday laws remain ubiquitous in America. They do not generally create a major day-to-day burden on non-Sunday worshipers as they are currently enforced. Nevertheless, their continued existence along with case law upholding their constitutionality, establishes the principle that the majority can impose its day of worship on religious minorities. Such a principle is antithetical to religious freedom. While public sentiment may not currently support the enforcement or expansion of Sunday laws, it is clear that such sentiment can change rapidly. In the face of such a change, the legal stage is set for the enforcement and expansion of Sunday laws. These laws therefore, are not merely historical oddities, but rather dangerous precedents that pose a threat to our future religious liberty.<sup>85</sup>

Catholicism and Protestantism both promote the institution of Sunday rest, and encourage the civil government to pursue legislation to protect this institution. Shea observed that Catholic Church authority is respected when Sunday rest is enforced by civil authorities:

For all ages Christian nations looked to the Catholic Church, and, as we have seen, the various states enforced by law her ordinances as to worship and cessation of labor on Sunday . . . Strange as it may seem, the state, in passing laws

---

<sup>84</sup>Laband, 162-163, 47-52; Cho, 4-5.

<sup>85</sup>Cho, 15.

for the due sanctification of Sunday, is unwittingly acknowledging the authority of the Catholic Church.<sup>86</sup>

Moreover, Leo XIII stated that “Sunday rest” is a “worker’s right which the state must guarantee.”<sup>87</sup> John Paul II observed that, “Christians will naturally strive to ensure that civil legislation respects their duty to keep Sunday holy.”<sup>88</sup> Lanaro cited that, “All Americans would do well to petition the President and the Congress to make a Federal law – an amendment to the Constitution if need be – to re-establish the Sabbath [i.e. Sunday] as a national Day of Rest.”<sup>89</sup> Lindsell, the former editor of *Christianity Today*, also observed that,

The proper use of the Lord’s Day [Sunday], wholly apart from any religious implications, can come about by free choice or it can be legislated. It is highly unlikely that it will be accomplished by voluntary action by the citizenry generally. Therefore the only way to accomplish the objective is by force of legislative fiat through the duly elected officials of the people.<sup>90</sup>

The Sunday rest agenda might seem innocuous on the surface. However, controversial issues such as same-sex marriage, abortion, prayer in school, and displaying the Decalogue on government property have generated conservative reactions from influential Christian leaders who have taken a public stand on traditional Christian principles. These conservative reactions could awaken a collective Christian desire for America to return to the religious foundation it once had in its early stages, which includes the legacy of Sunday legislation. Given that the Supreme Court has sanctioned state-level Sunday rest laws in its case history, these indicators suggest that a future national Sunday law is inevitable.

---

<sup>86</sup>John G. Shea, “The Observance of Sunday and Civil Laws for Its Enforcement,” *American Catholic Quarterly Review*, Vol. 8 (Philadelphia, PA: Hardy & Mahony, 1883), 139.

<sup>87</sup>Pope Leo XIII, *Rerum Novarum*, Encyclical Letter (May 15, 1891): 127-128.

<sup>88</sup>Pope John Paul II, *Dies Domini*, Apostolic Letter (May 31, 1998): 112.

<sup>89</sup>Jon Lanaro, “Sacking Sunday,” *Catholic Twin Circle* (August 25, 1985): 12.

<sup>90</sup>Harold Lindsell, “The Lord’s Day and Natural Resources,” *Christianity Today* (7 May 1976): 12.

## Liberty for All or Liberty for None

Constitutional liberties extend to every American citizen, not just to a majority of citizens. Baldwin claimed that “religious liberty either applies to us all or it applies to none of us at all.”<sup>91</sup> Madison made the same observation regarding religious liberty: “The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”<sup>92</sup> He also stated that, “Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.”<sup>93</sup> Justice Burnett confirmed this point in *Newman* regarding the rights of non-Sunday adherents and Sunday closing laws:

The protection of the Constitution extends to *every* individual, or to none. It is the individual that is intended to be protected. The principle is the same, whether the many or the few are concerned. The Constitution did not mean to inquire how many or how few would profess or not profess this or that particular religion. If there be but a single individual in the State who professes a particular faith, he is as much within the sacred protection of the Constitution as if he agreed with the great majority of his fellow-citizens.<sup>94</sup>

Madison also warned that if a “majority be united by a common interest, the rights of the minority will be insecure.”<sup>95</sup> He observed that “Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect

---

<sup>91</sup>Chuck Baldwin, “Religious Right Needs to Defend All Saints Episcopal” (19 September 2006). <http://www.newswithviews.com/baldwin/baldwin321.htm>.

<sup>92</sup>James Madison, “Memorial and Remonstrance” (20 June 1785). The Founders’ Constitution: [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html).

<sup>93</sup>*Ibid.*

<sup>94</sup>*Newman*, 514.

<sup>95</sup>James Madison, “Federalist #51.” Yale Law School: [http://avalon.law.yale.edu/18th\\_century/fed51.asp](http://avalon.law.yale.edu/18th_century/fed51.asp).

to invade those of another.”<sup>96</sup> These thoughts suggest that if Sunday closing laws infringe on the liberty of any citizen, they should immediately be repealed. Sunday rest is a religious principle that favors the Sunday-keeping Christian majority in America, and mandates rest on this day for non-religious and non-Sunday keeping religious citizens.

Sunday legislation also potentially infringes on the religious and economic freedom of non-Sunday keeping citizens who observe a different day of rest. Religious liberty involves the freedom to worship God in a non-criminal manner fashion without interference from government power. The conscientious choice to obey religious principles is the highest form of worship. The legal enforcement of Sunday rest ultimately imposes a forced religious legalism on society. The joy of free-will obedience to God is supplanted by the burden of civil obligation, which destroys religious freedom. This is the ultimate tragedy of Sunday legislation.<sup>97</sup>

### **Concluding Thoughts**

A legal paradox involving the co-existence of religious liberty and Sunday legislation began in ancient Rome under Constantine and has developed in the United States. This paradox has been justified by the U.S. Supreme Court through Field’s position, which suggests that the religious principle of Sunday rest has evolved into a secular day of rest that has been accepted by American society. The Court also claims through its case history that this principle does not violate the First or the Fourteenth Amendments. This historical development also has prophetic implications, as Seventh-day Adventist eschatology predicts the last-day enactment of national and international Sunday laws as fulfillments of the enforcement of the mark of the beast, which is described in Rev. 13:1-18.

---

<sup>96</sup>Ibid.

<sup>97</sup>Laband, 160; *McGowan*, 563.

Several reasons have been presented to prove the constitutional illegality of Sunday closing laws: (1) Sunday rest favors the Christian majority, and thus violates the Establishment Clause; (2) Sunday rest presents economic and religious challenges for a non-Sunday religious minority, and thus violates the Free Exercise Clause; and (3) Sunday rest can possibly deprive non-Sunday religious adherents of the right to (a) acquire property, (b) practice their religion with no economic challenges, and (c) practice their religion without discrimination from civil government, and thus violates the Due Process, Equal Protection, and Privileges and Immunities Clauses. These reasons demonstrate that Sunday laws cannot peacefully co-exist with religious liberty without constitutional consequences for a non-Sunday religious minority.

The Court also shows no sign of reversing its position on Sunday rest laws. In *Employment Division v. Smith* (1990), Justice Scalia confirmed that the Supreme Court has “upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days.”<sup>98</sup> He also stated that the Court has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>99</sup>

Sunday legislation in any form should be resisted and repealed. Unfortunately, lessons from history and eschatology reveal that Sunday rest laws in the United States will remain and be elevated to the national and international levels. Regardless, proponents of religious liberty should do all in their power to oppose such developments. A.T. Jones, a Seventh-day Adventist educator and theologian, opposed the 1888 Blair Bill during senate deliberations. When Senator Blair asked Jones if a seventh-day rest law would be satisfactory, he responded by saying that,

---

<sup>98</sup>*Employment Division v. Smith*, 494 U.S. 872 (1990), 880. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/494/872.html>.

<sup>99</sup>*Ibid*, 878-879.

“if this bill were in favor of enforcing the observance of the seventh day as the Lord’s Day, we would oppose it just as much as we oppose it as it is now.”<sup>100</sup> After being asked if he were against all rest laws, Jones claimed that, “We are against every Sunday law that was ever made in this world, from the first enacted by Constantine to this one now proposed; and we would be equally against a Sabbath law if it were proposed, for that would be antichristian, too.”<sup>101</sup> These same sentiments should be echoed by those who oppose Sunday legislation.

### Bibliography

- Arlan’s Department Store v. Kentucky*, 371 U.S. 218 (1962), 219. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/371/218.html>.
- Bacchiocchi, Samuele. *From Sabbath to Sunday*. Rome: Pontifical Gregorian University Press, 1977.
- Baker, Thomas E. and Jerre S. Williams. *Constitutional Analysis*. 2<sup>nd</sup> edition. St. Paul, MN: West, 1999.
- Baldwin, Chuck. “Religious Right Needs to Defend All Saints Episcopal” (19 September 2006). <http://www.newswithviews.com/baldwin/baldwin321.htm>.
- Bettenson, Henry and Chris Maunder. *Documents of the Christian Church*. 4<sup>th</sup> edition. Oxford: Oxford University Press, 2011.
- Blakely, William Addison. *American State Papers Bearing on Sunday Legislation*. Revised and enlarged edition. Washington, DC: Religious Liberty Association, 1911.
- Braunfeld v. Brown*, 366 U.S. 599 (1961), 599-603. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/366/599.html>.
- Cantwell v. Connecticut*, 310 U.S. 296 (1940). Findlaw: <https://caselaw.findlaw.com/us-supreme-court/310/296.html>.
- Cho, Miriam. “State Sunday Laws.” *Liberty Magazine* (November-December 2003), 13. <http://libertymagazine.org/article/state-sunday-laws>.
- “The Constitutional Status of the Indiana Sunday Law.” *Indiana Law Journal*, Vol. 37 (Spring 1962): 397-416.

---

<sup>100</sup>Jones, *National Sunday Law*, 20.

<sup>101</sup>Ibid, 23.

*Declaration of Independence*. July 4, 1776.

*Employment Division v. Smith*, 494 U.S. 872 (1990). Findlaw: <https://caselaw.findlaw.com/us-supreme-court/494/872.html>.

*Eusebius' Ecclesiastical History*. Translated by C.F. Cruse. Peabody, MA: Hendrickson, 2006.

*Everson v. Board of Education*, 330 U.S. 1 (1947). Findlaw: <https://caselaw.findlaw.com/us-supreme-court/330/1.html>.

*Ex Parte Andrews*. 18 California 678 (1861). LexisNexis: <https://lexisnexis.com>.

*Ex Parte Newman*. 9 California 502 (1858). LexisNexis: <https://lexisnexis.com>.

*First Amendment to the U.S. Constitution*. December 15, 1791.

*Fourteenth Amendment to the U.S. Constitution*. July 9, 1868.

*Gallagher v. Crown Kosher Market*. 366 U.S. 617 (1961), 617-622. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/366/617.html>.

*Hennington v. Georgia*. U.S. Sup. Ct. 163 U.S. 299 (1885), 305. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/163/299.html>.

Johns, Warren L. *Dateline Sunday, U.S.A.: The Story of Three and a Half Centuries of Sunday-law Battles in America*. Mountain View, CA: Pacific Press, 1967.

Jones, Alonzo T. *The National Sunday Law*. Brushton, NY: Teach Services, 2002.

\_\_\_\_\_. *The Two Republics*. Battle Creek, MI: Review and Herald, 1891.

Laband, David N. and Deborah H. Heinbuch. *Blue Laws: The History, Economics, and Politics of Sunday Closing Laws*. Lexington, MA: D.C. Heath and Company, 1987.

Lanaro, Jon. "Sacking Sunday." *Catholic Twin Circle* (August 25, 1985): 12.

Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment*. New York: MacMillan, 1986.

Lewis, Abraham H. *A Critical History of Sunday Legislation from 321 to 1888*. New York: D. Appleton and Company, 1888.

Lindsell, Harold. "The Lord's Day and Natural Resources," *Christianity Today* (May 7, 1976): 12.

- Madison, James. "Federalist #51." Yale Law School: [http://avalon.law.yale.edu/18th\\_century/fed51.asp](http://avalon.law.yale.edu/18th_century/fed51.asp).
- \_\_\_\_\_. "Memorial and Remonstrance" (20 June 1785). Founders Online: <https://founders.archives.gov/documents/Madison/01-08-02-0163>.
- McCrossen, Alexis. *Holy Day, Holiday: The American Sunday*. Ithaca, NY: Cornell, 2000.
- McGowan v. Maryland*, 366 U.S. 420 (1961), 420-431. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/366/420.html>.
- Monk, Linda R. *The Words We Live By*. New York: Hyperion, 2003.
- Murakami, Yoshio. "Religion and State: Implications of Sunday Closing Laws." *Bulletin of Hokuriku University*, Volume 27 (2003): 99-113.
- Petit v. Minnesota*, 177 U.S. 164 (1900), 165. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/177/164.html>.
- Pope John Paul II. *Dies Domini*. Apostolic Letter. May 31, 1998.
- Pope Leo XIII. *Rerum Novarum*. Encyclical Letter. May 15, 1891.
- Prince v. Massachusetts*, 321 U.S. 158 (1944), 164-171. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/321/158.html>.
- Reynolds v. United States*, 98 U.S. 145 (1878), 161-167. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/98/145.html>.
- Ringgold, James T. *Sunday: Legal Aspects of the First Day of the Week*. Clark, NJ: Lawbook Exchange, 2003.
- Schaff, Philip. *History of the Christian Church*. Vol. 3. Peabody, MA: Hendrickson, 2006.
- Shea, John G. "The Observance of Sunday and Civil Laws for Its Enforcement." *American Catholic Quarterly Review*, Vol. 8. Philadelphia, PA: Hardy & Mahony, 1883, 139-152.
- Soon Hing v. Crowley*, 113 U.S. 703 (1885), 709. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/113/703.html>.
- Two Guys v. McGinley*, 366 U.S. 582 (1961), 594. Findlaw: <https://caselaw.findlaw.com/us-supreme-court/366/582.html>.
- White, Ellen G. *Great Controversy*. Mountain View, CA: Pacific Press, 1950.