

# Judicial Religious Legislation Exposed

In the regular weekly meeting of the Secular League at Pythian Temple yesterday afternoon, Mr. Alonzo T. Jones gave an address on "Judicial Religious Legislation." The speaker was followed with deep interest by the large audience present, who frequently gave open expression of their hearty approval [*sic.*] of the principles set forth. At the close of Mr. Jones' address there was an animated general discussion by a dozen or more members of the audience. A unanimous vote of thanks was extended to the speaker of the hour for his earnest work in behalf of individual and constitutional religious liberty in the District of Columbia and throughout the nation. The speaker said:

The particular judicial religious legislation to which I invite your attention is that which has been enacted by the courts in establishing Sunday laws in the United States, against the Protestant and Christian principle, and the American and constitutional principle, of the complete separation of religion and the civil power. For, beyond all question, Sunday laws are religious laws, and to sustain them is decidedly to maintain a union of the religious and the civil power.

## The History

Sunday laws originated in that dark intrigue between Constantine and the bishops, when, in the language of Draper, "It was the ambition of Constantine to make theology a branch of politics. It was the hope of every bishop in the empire to make politics a branch of theology." The result was the original union of church and state, with the full-fledged papacy as the consequence; and Sunday legislation was the key to the whole.

Those original Sunday laws were specifically religious, and this to the express exclusion of every other consideration, temporal,

civil, or physical. When these laws were extended to the strict prohibition of "civil transactions of every kind on Sunday," the penalty of "sacrilege"—not crime—that was incurred by violation of the laws is indisputable evidence of the religious nature and intent of the laws.

When, in A. D. 538, a council at Orleans declared that what should be lawful or unlawful on Sunday was a question "exclusively of ecclesiastical jurisdiction," in the nature of things the penalty incurred by disregard of the Sunday laws, as defined by a council at Macon, in Gaul, in A. D. 585, distinguished these laws as exclusively religious and ecclesiastical. That penalty was the double and cumulative one of, first, "the wrath of God," and, second, "the unappeasable anger of the clergy."

In England James I, as head of the church and defender of the faith, by his "Book of Sports," relieved the people from the extreme pressure of the Sunday laws. Indulgence of the "sports" on Sunday became so excessive, that in the reign of Charles I the justices of the peace petitioned the lord chief justice for a restraint of the excesses. But when the lord chief justice and another judge issued an order to that effect they were reprovved by the archbishop, who was sustained by the King, and were required to revoke their order because it was an "invasion of the episcopal jurisdiction."

When those same Sunday laws of England were extended to the English colonies in America and were intensified as in New England by the Puritans, the extreme and exclusively religious nature of these laws was such as to cause them to become forever proverbial. And in the colony of New York the Sunday law declared that the profanation of that day was "the great scandal of the Christian faith."

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These exclusively religious Sunday laws of the colonies were inevitably the Sunday laws of the original States here, by the fact that within an hour (July 4, 1776), those very colonies became these States.

## Decisions of State Supreme Courts

Now the decisions of the supreme courts of those original States sustain those original Sunday laws on their original religious grounds; and then to evade the constitutional prohibition of religious legislation, in defiance of the fundamental maxim that "the intent of the lawmaker is the law," these courts commit the act of judicial religious legislation by declaring that those religious laws are "civil regulations."

This manifest straddling of the issue it is possible to make some allowance for in those cases, from the fact that all those original States except Rhode Island had established religions; and it is too much to expect that those courts, even at the enormous expense of judicial religious legislation, could make a clean break with tradition. But in the cases of the later States it is impossible to make any such allowance. All of these were Territories, and became States, absolutely free from any governmental recognition of things religious; and in the clear light of American and constitutional religious liberty gained and established under the splendid leadership of Jefferson, Madison, and Washington.

Thus the later States arose, having no establishments nor any recognition of religion, and with their constitutions distinctly prohibiting any such thing. Yet by sheer force of traditionalism, the Sunday laws of the States that had established religions have been incorporated in the legislation of all the later States, whose true traditions and whose original constitutions forbade any establishment of religion or recognition of things religious.

Here, then, is the genealogy of all the Sunday laws of all the American States. The Sunday laws of the later States are only the repetition of the Sunday laws of the original States, which were only the identical Sunday laws of the colonies, which were the Sunday laws of England, which were the Sunday laws of papal Rome. And from their original in Rome to their final in these latest States, in every generation they have been nothing else than exclusively religious both in origin and intent.

And yet, in the face of the principle and provision of constitutions prohibiting such laws, and in defiance of the fundamental maxim of law itself, the supreme courts in all these later States have made these Sunday laws to be "constitutional" by giving to them a foreign, false, and unthought-of intent and meaning of said intent and meaning being . . . "sanitary," and even pathological, instead of what by every item of evidence in the case they are—exclusively religious, originally, genealogically, theologically, and logically.

In perfect illustration of this is the statement of the Supreme Court of Ohio to the effect that the Sunday law "could not stand for a moment" in that State in the presence of the principle of separation [*sic.*] of church and state and the constitutional prohibition "if its sole foundation" were religious.

By the unanimous evidence of history, law, and fact, "the sole foundation" of Sunday laws has always been religious. The very statute which the Ohio court was in this case construing stood in the code under the title of "Offenses Against Religion and Morality." Never in the world was there enacted a Sunday law with any other than religious intent. And "the intent of the lawmaker is the law." A law "can have no meaning beyond the intent of those who made it." "The law must be construed according to the intention of the lawmaker." Therefore, in truth, in fact, and in law, the Sunday law of Ohio is unconstitutional; and this, according to the very word of the court, that the Sunday law "could not stand for a moment" in the presence of the constitution, "if the sole ground" were exactly what it is—religious.

But in spite of truth, fact, the law, and the maxims of law, the court proceeded to legislate the Sunday law into "constitutionality" by the declaration that it is "a mere municipal or police regulation," and then immediately proceeded to recognize religion as its sole foundation by the statement that, "in accordance with the feelings of a majority of the people, the Christian Sabbath was very properly selected." And then, having thus fixed it as undoubtedly religious, the court sagely observed that "the legislative power in Ohio has never extended to the enforcement of

religious duties, merely because they are religious." Oh, no; of course not! That would be unconstitutional. But just call these religious duties "civil," and enforce them as "civil," and that will be entirely constitutional!

### **The National Supreme Court**

And this falsely "civil" cover for the truly religious Sunday laws—this judicial religious legislation—the national Supreme Court has confirmed for all the States. The story of it is curious as well as valuable.

The constitution of California guarantees the free exercise of religious profession and worship "without discrimination or preference." A law was enacted there that "no person shall, on the Chris-

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tian Sabbath, or Sunday, keep open any store," &c. In 1858 a case under this statute reached the Supreme Court of that State. In the finest and best reasoned decisions ever rendered on the subject the court decided the law to be unconstitutional; Justice Stephen J. Field dissenting.

In his dissenting opinion Justice Field first gave a "civil," "physical," and "general health" cover to the religious statute designating "the Christian Sabbath, or Sunday;" and then confirmed and sustained the religious basis of the law by declaring that "Christianity" being "the prevailing faith of our people" and "the basis of our civilization," "that its spirit should infuse itself into our laws, is natural."

The constitutional prohibition of any "discrimination or preference" in "religious profession or worship" he circumvented thus: "In what manner it conflicts with the fourth section I am unable to perceive. . . . It makes no discrimination or preference between the Hebrew and Gentile, the Mussulman and pagan, the Christian and infidel."

Of course, we must give to the judge full credit for telling the truth where he said that he was "unable to perceive" that a statute

plainly designating "the Christian Sabbath" was any discrimination or preference over Jew, Mussulman, pagan, or infidel. But when a man in his position is confessedly "unable to perceive" such a plain thing as that, he gives cause for very serious question as to whether and how he could be able really "to perceive" all that he described as the "civil," "secular," "physical," and hygienic basis of the religious Sunday law.

And when a man in such a position as that was "unable to perceive" so upon as palpable a thing, as that the positive designation of "the Christian Sabbath" in the law is a discrimination and preference in favor of the "Christian" religion, then how can any of us be fairly considered culpable in being equally unable to perceive that Justice Field's "civil," "secular," "physical," and hygienic basis of Sunday laws is anything else than inept, foreign, and false? And is it the American principle that the defective perception of the judge shall be the final test of the supreme law?

The next year after that decision of the California court, and Justice Field's dissenting opinion, Justice Field himself became chief justice of the California court. In 1861 another Sunday law case came before that court. In the decision upon this case, the former decision of the court was supported with Justice Field's dissenting opinion in that case, which stood as the law of the subject in that State until the people of California, as the supreme expounders of their own will, expressed in their own constitution, by the decision of popular vote, overwhelmingly swept out of existence all Sunday laws in the State.

Chief Justice Field, of the California court, became Associate Justice Field, of the national Supreme Court. And when a case came before the national Supreme Court as to the constitutionality of Sunday laws in the States, the court sustained those Sunday laws, and cited Justice Field's dissenting opinion as the ground of the decision. And so by national decision, the religious Sunday laws, upon the foreign and false basis furnished by Justice Field's judicial legislation, have been fastened upon all the States. And this is a plain indication of just what the national Supreme Court will

do with Sunday laws by the national government whenever there shall come to that court an opportunity. This is further indicated by the fact that in its decision that "this is a Christian nation," the national Supreme Court mentioned "the laws respecting the observance of the Sabbath," as one of the proofs of it.

And all of this is strictly pertinent and up to date, by the fact that the Sunday Rest Committee of the District of Columbia, through its attorney, has issued to Congress a printed brief on "The Legal and Constitutional Aspects" of Sunday legislation; pleading that it "be regarded as civil," yet presenting no single item of any other ground than religious.

### **In the District of Columbia**

And just let Congress enact a Sunday law for the District of Columbia, and the above-mentioned and dangerous "opportunity" will come to the national Supreme Court. Then let the court still hold the ground taken in its decisions here cited, and there you will have the same old religious Sunday laws made of national force and authority here. In that there will be restored and established here the old and original union of religion and the state. And in that there will be put into the hands of the church combine here the key to the union of church and state in this nation. And that church combine will promptly see to it that this key shall be diligently used to open in this land all the doors of the religious despotisms of the old order of things. And the creaking of the old and rusty hinges of these opening doors will sound the knell of constitutional religious liberty in this nation and for the world.

And this will have been all brought about solely by judicial religious legisla-

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tion; that is, by the courts, State and national, having made exclusively religious laws constitutional against the positive inhibitions of the constitutions, State and national, and against the fundamental maxims of law itself, by giving to these laws a

meaning false in fact, and foreign both to the nature of those laws and to the intent of the makers of the laws.

The principle that must ever, in justice, guide in the construction of statutes as well as constitutions, is authoritatively stated as follows:

"A court which should allow a change of public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty [*sic.*]."—Cooley, "Constitutional Limitations," page 67.

The principle applies with equal force to the construction of a statute, as to the construction of a constitution. And whether the change of sentiment which a court should allow thus to influence it be public and general or only the private and personal sentiment and bias of the court itself, the principle is the same and such court is equally "chargeable with reckless disregard of official oath and public duty." Yet this is precisely what has been done by the courts when, by setting up an utterly new and foreign meaning, they give to Sunday legislation a construction not in any sense warranted by the intention of its founders or its framers anywhere in human history or experience.

### **Not Recall, but Instruction**

Now, upon all this, some may be ready to say, "Recall such judges." But I do not say recall the judges. I say, Instruct the courts.

You recall the judges, and you will fill their places only with other judges as ill-informed on the principles and as precedent-bound as those whom you recall. But instruct the courts, and you can have an intelligent construction of the law and the constitution; and so an intelligent expression of the will of the people.

In the government of the people in this American republic it is ever the inalienable right and undeniable prerogative of the people to instruct the judicial, as truly as it is their prerogative to instruct the legislative and the executive branches of their government.

In this government of the people the Supreme Court is not the supreme tribunal upon constitutional questions. In the ringing words of Abraham Lincoln, "The people, the people, of these United States are the rightful masters of both Congresses and courts." And further, in his first inaugural: "I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court. \* \* \* At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, as in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers—having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is this view any assault upon the court or the judges." And this upon the principle as stated by Lincoln in another place: "I insist that if there is anything which it is the duty of the whole people to never intrust to any hands but their own, that thing is the preservation and perpetuity of their own liberties and institutions."

The ways and means of instructing the courts are several: but I touch only the primary and the fundamental one. That is: By open, free, and full discussion of the principles involved, to create intelligent public opinion. As perfectly stated by Abraham Lincoln: "Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently, he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed."

It is true this is a much slower and more laborious process than is the recall. Yet, it has the merit of being perfectly safe and also of being strictly according to the fundamental principles of this republic as a government of the people. It is easier to arouse political passion than it is to create intelligent and wholesome public opinion by calm, patient, and studious discussion of fundamental principles. And the crowd is ever more ready to

indulge natural and political passion than it is to study the Constitution.

### **Conclusion**

The sum of the whole matter, then, is this:

Sunday legislation in any form or to any extent is only religious; and in itself means a union of religion and the State.

The American constitutional principle of government is the total separation of religion and the state.

To sustain such laws is to establish the union of religious and the state, and to open the doors to the religious meddlings, despotisms, and persecutions of the old order of things from which the American people had freed themselves.

By judicial religious legislation, State and national, against the positive inhibitions of the constitutions, State and national, and against the fundamental maxims of law itself, contrary to truth and fact, the courts, State and national, have sustained such laws.

In this the courts have set the American people face to face with the imminent and final denial of the inestimable boon of religious liberty, which, by their constitutions, State and national, they had expressly secured to themselves.

Will the people of these United States, as "the rightful masters of both Congresses and courts," allow themselves thus to be filched of their own rights and liberties proclaimed and fixed by themselves upon divine principles and in their own supreme laws?

This leaflet can be had in any quantity. Will you join in the good work of circulating it? Address: ALONZO T. JONES, Flynn's College, 8th and K Sts., N. W., Washington, D. C.