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## Aid to Education; Civil Rights; Church-State; Natural Law; Insanity Defense; Sunday Laws

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## IN OTHER PUBLICATIONS

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### **Aid To Education**

Readers of the October 4 issue of *The Commonweal* were treated to an interesting article on federal aid for higher education by Professor Edwin H. Rutkowski of the University of Detroit.

The House of Representatives last year refused to insert into its higher education bill any scholarship aid. Too many representatives felt that working one's way through college is a democratic and character-building opportunity we cannot afford to destroy. The Senate in turn refused in its own bill to include construction grants, as distinguished from loans, for colleges and universities. Feelings ran high that grants, because they would go also to the Church-related higher educational institutions, initiated a new method of assistance that was forbidden under the first amendment.

The conference committee between the legislative chambers might have chosen the easiest way out by dropping both of these features from the joint bill it finally submitted. But the consequences would have been clearly undesirable. The elimination of grants would have disadvantaged public institutions, most of which would run into legal difficulties in attempting to finance repayment of loans. The elimination of scholarships would have disadvantaged private colleges, where tuition is high relative to the public-supported schools. Further, scholar-

ship grants to individual students have the merit of almost unequivocal constitutionality, the mammoth precedent here being the highly successful G.I. Bill of World War II, under which veterans exercised the right of free choice in obtaining the kind of education they wanted, in public, private non-denominational, or private Church-related schools.

But for any program intended realistically to promote advanced study in this country, both public and all types of private colleges and universities must be supported because of the massive area occupied by the private sector of higher education. Private institutions comprise almost 62% of the total number of colleges and universities in this country, enroll 40% of the students in such schools, grant 45% of all degrees, and award 48% of all graduate degrees. And again of all higher educational institutions, 39% are Church-related: 23% Protestant, 16% Catholic.

The results of the conference committee's decision to include both scholarships and grants in its bill are well known. The Senate accepted the compromise over the strong objections of such leaders as Lister Hill, the powerful chairman of his chamber's standing committee dealing with education, who had been one of the opposing conferees. When the House's turn came to consider the conference report, the interjection of

the scholarship program, and the flaring up of previously calmed anxieties over the Church-State problem — suddenly provoked by individual telegrams to each representative from the National Education Association and by Senator Hill's personal intervention with the southern delegation — brought death to the bill on a motion to recommit.

Examining this year's bill from the House, Professor Rutkowski observes that the House has again kept scholarships out, but with a promise to make such direct student aid a part of a revised National Defense Education Act. The Senate's work is still in committee, and scholarships remain a part of an omnibus education bill. But it is too early to draw any conclusions about whether the upper chamber will again directly link up scholarships with its proposals for construction of higher educational facilities, or defer them to other measures. In any case, any realistic expectation of final congressional behavior regarding federal aid to higher education must take scholarship proposals into account as, among other contributions, an answer to the question of how aid may constitutionally be extended to Church-related private colleges and universities.

With respect to the Church-State problem itself, it was a majority of the House, not the Senate, that last year abruptly boggled over the conference committee's allowance of construction grants to Church-related colleges and universities. How did representatives view, and hear viewed, the matter this year in passing a bill with such provisions?

Two principal arguments were put forth in defense of assisting the construction of facilities for Church-related higher education. First of all, had not Congress long ago

settled the question in favor of granting aid to such schools? In support of this contention, Representative Adam Clayton Powell of New York, the chairman of the Education and Labor Committee, entered into the record the details of no less than thirty-two federal programs under which educational institutions with religious affiliation received funds through grants or loans authorized and appropriated by Congress.

The second argument in behalf of the bill's inclusion of Church-related institutions was surely the more difficult one. A legislative practice of many years standing may well indicate what Congress has determined is constitutionally permissible, but under the American system of an ever-possible judicial review the constitutional question is always fair game in hunting grounds outside the legislature. In denying that the first amendment forbids federal aid for the construction of facilities in Church-related institutions of higher education, the second argument stresses the fact of an essential difference between education in the elementary and secondary levels on the one hand, and colleges and universities on the other. In the words of Representative Robert N. Giaimo of Connecticut, we render education in the United States a disservice if we commingle the "two entirely different problems." As Representative Fernand J. St. Germaine of Rhode Island put it, the burden of the first amendment's prohibition is quite clear on the lower school area, but not at all so in respect to the "very fuzzy area" of higher education.

In asserting or at least suggesting the existence of the basic distinction, these representatives were in effect repeating what even strong critics of federal aid to parochial schools were willing to acknowledge. During the hearings held on the question earlier in

the year, spokesmen for the National Council of Churches and the notorious — on this issue, at any rate — National Education Association admitted the plausibility of the argument that, in the words of one of them, “the religious coloration of private colleges was sufficiently different from that in parochial schools” to warrant support for some type of aid to Church-related colleges.

### Civil Rights

The public accommodations section of the President’s Civil Rights Bill is discussed at length in the current issue of *Interracial Review* by Robert Drinan, S.J., Dean of Boston College Law School. Observing that even the most optimistic frequently express serious doubt about the possibility of the enactment of this section (Title II) of President Kennedy’s Civil Rights Bill, Father Drinan nevertheless feels very strongly about it. In his opinion, the section, which would desegregate hotels, theatres, restaurants and similar facilities is probably the most important and the most needed of the Administration’s five-point civil rights package. Its enactment in 1963 could change the face of the South; its defeat could open up a new era of massive demonstrations in which the Negroes of the South would, unaided by the law, work for equality of access to privately owned public facilities.

According to Father Drinan the overwhelming urgency of Title II makes it important to discuss several issues involved in this attempt to desegregate the nation’s public accommodations — the thrust and the justification of the Kennedy proposal and the consequences if Congress fails to enact a measure designed to desegregate privately owned but publicly licensed facilities.

It seems fair to say that the basic legal struggle to desegregate publicly owned and

publicly operated facilities has been won. The integration of schools, public parks and other tax-supported institutions may be agonizingly slow, but the law at least is moving in one clear direction.

There is, however, really no law as yet with regard to the vast world of privately owned public accommodations in the South. The United States Supreme Court will probably make clearer in due course its unmistakable feeling that state or municipal trespass laws may not be employed to perpetuate a “white-only” policy followed by hotels, theatres and restaurants. But aside from the Supreme Court opinions on the “sit-ins” there exists no clear-cut legal directives concerning the rights of non-white citizens to enjoy the hospitality of public accommodations that are privately owned.

It is important to note, on the other hand, that no valid legal mandate exists anywhere which gives the right to motel keepers, for example, to refuse all eligible Negro guests. Such a law would be unconstitutional on its face.

The presumption of law is indeed that any merchant who receives a license to conduct a place of public accommodation is bound by the ancient common-law obligation of the innkeeper to extend hospitality to every wayfarer. Into this solid legal tradition, respected for centuries in the Anglo-American world by innkeepers and their associates, the southern mentality has inserted the exception of the Negro. This deviation from the traditional and accepted role of the innkeeper and the restaurateur has been in the South a privately sanctioned arrangement and has never had or could have the blessing of a state or federal law.

Title II of the Kennedy Civil Rights Act seeks, therefore, not to erase any statutory provisions which legally permit southern

owners of public accommodations to serve whites alone. The bill seeks rather to affirm that Negro citizens of the United States have a right to federal protection from a privately invented bias which would preclude them from the accommodations to which by common law they are entitled.

The public accommodations section of the Kennedy Civil Rights Bill is virtually the same as the Civil Rights Act passed by Congress in 1875 and unfortunately invalidated by the Supreme Court a few years thereafter. But the reasons of the Court at that time — or rather its assumptions based on racism — have long since become obsolete.

Father Drinan predicts that if no federal law on this question is enacted it is clear that some of the following consequences will occur:

(1) We can expect ever increasing massive "sit-ins" in hotels, theatres, dining places and in all other similar facilities. The "sit-ins" will perdure until there is "voluntary desegregation." There is every reason to believe that this technique will in the future be just as effective as it has been in the past — probably more so.

(2) It seems likely that the United States Supreme Court will tend, as it has in the past, to fill in the void in declared public policy, by asserting and enforcing the right of Negroes to equality in the enjoyment of privately operated public facilities. The Supreme Court will not thereby be "usurping" any powers reserved to the states or to individuals, but will be simply spelling out and implementing the pre-existing right of every citizen to be treated as an equal with respect to his eligibility for public accommodations.

(3) Legal theories about the "public" nature of "public accommodations" will be developed as Negro groups litigate in south-

ern states. It would seem clear that the management of a licensed facility designed to serve the public as a body cannot select its invitees on the basis of race or color. After all, all citizens, white and colored, pay for the licensing and the health, police and fire protection given to the licensed establishment; on this narrow basis at least the Negro citizen has a right to be treated as an equal.

(4) Possibly the most serious consequence of the defeat of Title II would be a deepening and an intensification of that feeling of frustration on the part of Negroes which has produced the revolt of 1963. In a year in which as never before Negroes finally secured the attention of the white majority, a defeat of the law that is more needed than any other would be a psychological blow of the most serious nature for the entire Negro community.

(5) If the Civil Rights Act of 1963 provokes a filibuster in the Congress, the result may be not merely a new revolt among the nation's 21 million Negroes but a revolt in Congress itself. The truly intolerable fact that 12 of the Senate's 19 committees and 13 of the House's 21 committees are chaired by southerners could conceivably produce a revolt in the nation's legislative branch against the archaic seniority rule which permits two-thirds of all congressional committees to be headed by southern congressmen, virtually all of whom are the enemies of civil rights legislation.

### Church-State

In wake of the recent reports from Rome that the American bishops are seeking a clarification of the Church-State issue from the Ecumenical Council, an article in the September 1963 issue of *Victorian* makes interesting reading. Entitled "An American Catholic Ponders the Church-State Issue,"

the article by Michael Novak discusses five basic lessons which the American experiment has taught observers.

The first is that the American arrangement has its roots in a lesson learned from the religious strife of Europe. That lesson taught us that State and citizens should not be in conflict over affairs of religious conscience; the State should not demand what the citizens might not conscientiously accept. Where the Prince or the national law had imposed a religion, bitterness and constraints were often the result; many Americans first fled Europe on that account. The American solution, then, has been to detach the State from competence in deciding questions of religious affiliation. This solution does not mean that the body of citizens are irreligious. Rather, it means that the State is not the organ of religion, but that the citizens, alone or in a body, have the guaranteed freedoms of conscience and religious assembly to carry out fully their individual and corporate religious life.

The second principle is a defense of the view that true religion lives in the minds and wills of religious people; it is there that faith and charity take root and from there that they animate external action. No State official, or group, or party, can make a religious decision for a man. Only if his will truly adheres to it is a decision really his. Something similar is true of a man's understanding. Nobody can understand for him. They can give him words to repeat or actions to perform, but only he can really make the act of understanding which converts these words or actions into a part of himself. Both on the side of will and on the side of understanding, moral responsibility is centered in the person, in his own consciousness — and not in the State or party. A man's freedom to maintain this center of consciousness in-

violate is guaranteed in the Bill of Rights. It is this freedom that gives the Catholic Church and Catholics free room to work in their most cherished realm.

The third principle is the recognition of a fact — a fact which holds true in America and in the whole world in general. It is the fact of pluralism. There are many religions. Modern communications have destroyed, or are destroying isolation. Few are the places now where there is only one belief or, at least, where more than one has not been heard of and thought about. The fact is that consciences are divided, and on a world-wide scale. The assumption must be that people everywhere are in good faith, until bad faith is proved. And hence, in conjunction with the first principle, which keeps the State from imposing any particular faith upon its people, this third principle recognizes the mysterious designs of God. Not all people believe; all remain in the freedom of their good faith.

The fourth principle tries to express the different way, then, that the task of the State towards its citizens has come to be conceived. At one time, the State, or rather the Head of State, looked upon himself as a kind of father to his people. His decisions were rather unchecked by a legislature representing the opinions of the people. The people were poorly educated and relatively helpless before ideas and forces that were urged upon them.

Now, citizens are organized and educated. They get their own ideas and pursue their own courses of action. The State has come to be but one apparatus by which they pursue their aims. It is rather an instrument than a personified father and guide. In the old way, the Head of State looked upon the religion of his subjects as the father of a family looks upon that of his children: he

expected his people to follow, he exhorted, and he punished. But now the Head of a democracy is not a father; it is assumed that his subjects have the freedom, education, and means to make their own decisions in religion. The State, instrument rather than father, now tries to emulate the neutrality which God Himself seems to take to human freedom, letting His rain fall on the just and the unjust. And, finally, the conditions for this modern instrumental idea of the State are not met in all lands; the education and organization of the people are not always sufficiently advanced to support a non-paternalism's final aim not to perpetuate itself, but to supplant itself as thoroughly as possible.

The fifth principle of the American arrangement attempts to express the basic outlook, the point of view, from which the other principles and their practical working out have grown. It maintains that political principles derive validity not from a world of ideas or of abstractions, not from an ideology, but from intelligibility verified in facts. This means that neither beautiful ideals nor brute facts can guide political judgment, but rather, whatever possibilities and rational courses of action there are within the facts. Thus, for example, it would be well if Church and State got along smoothly, if there were never any conflicts or quarrels about jurisdiction, if religious truth automatically impressed itself on all consciences and unified all men immediately, and freely in one body. But in fact not all men do receive the truth, not all hear it correctly, and not all even hear it; furthermore, countries where the union of Church and State has swayed in one way or another do not have a very good record of peace or freedom — even for the Church. Hence, the designers of the American arrangement de-

siring neither to create an ideal unity nor to set Church and State wrestling over the cold facts of power, tried to create a way of checks and balances in which the best possible reasonability in the circumstances might come to be. They detached the competence of the State from religious matters; they detached the use of the State from the hands of any Church. The fifth principle tries to point out the critical approach to politics: neither the idealism of Plato's *Republic* nor the *Realpolitik* of Bismarck, Napoleon, and the rest but the study both of facts and of the greatest possible meaning that can be obtained from them.

Mr. Novak observes further that Pope John's *Pacem in Terris* has given Americans hope that their experience of liberty of conscience has been assimilated by the Church as a new lesson from the centuries, a new glory to the working out of the Gospels in human history, a new contribution from the New World to the Old. A great deal of thinking must yet be done as the Church enters an uncertain and changing future, a great deal of theological-political thinking, and especially on the movement towards a world as distinct from a national order. For the Pope has set mankind a new goal. Having reached a solution favoring freedom in the relation of persons, nation, and Church, man must now ask: What is the relation of persons, nations, world, and Church? If much of this thinking is not done by Americans, from the vantage point of their unique and rich experience, a great loss will be felt to the Church Universal. American Catholics must awaken at one and the same time, to a consciousness of themselves as unique, and to a consciousness of their place in a universal view of history and space.

#### **Natural Law**

Not often are our American writers fea-

tured in European publications. Particularly is this true in the area of legal philosophy. One exception, of course, is Miriam Theresa Rooney, former Dean of Seton Hall Law School, and presently Professor of Law, whose very excellent article on the nature of the general principles of law was recently featured in the March 1963 issue of *World Justice*, (published under the auspices of the Louvain University).

Professor Rooney's article is written in an attempt to explain the import of Article 38 (C) of the Statute establishing the International Court of Justice. According to the article, the law to be applied by the judges includes "the general principles of law recognized by civilized nations."

According to Professor Rooney the pervading error in modern thinking about law is the unwarranted identification of law with force. It is not new but more widely accepted now. Machiavelli had once described so accurately the way some strong men gained power that his own name became synonymous with the ruthlessness and double-dealing he had observed in practice. Thomas Hobbes, born within earshot of the gunfire off England during the battle with the Spanish Armada, never got over his sense of terror at the display of might possible to sovereign powers. His description of *Leviathan*, so influential upon Bentham, Austin, and Holmes, among others, in the common-law system, was matched by the work of the intellectuals who wrote in justification of the reign of terror in France, and of *Macht-politik* for the Germans. With the reliance on military forces to support theories of communism among the Soviets and the dependence on armed troops to make socialism prevail with the Nazis, especially when called forth by apparently constitutional means, millions of people have come to

dread the screaming siren, the knock on the door, and ration cards as the voice of the law. Instead of turning with confidence to the courts on the local as well as international levels for the peaceful settlement of claims, the rational order has become inverted until force comes first to mind instead of last, as it did with Bracton, Aquinas and More.

False philosophical principles, which seem so obvious when they are eventually pointed out, often go undetected for centuries until a shocking effect becomes widespread, and millions cry out in one voice to question how they were led so far astray. That is the situation now. All over the world people are asking in increasing volume for justice, for recognition of their right to assent or dissent, for participation in what Professor Myres McDougal calls a universal order of human dignity. Equality of opportunity, equality of representation, and equality of bargaining power, are different ways of expressing these wants. All find place, not in materialism nor conceptualism, not in positivism nor subjectivism, not in nominalism nor solidarism, nor any similarly fallacious theory, no matter how well expressed, but rather in the balanced philosophy of modern realism which is perennially acclaimed and which provides the basic principles implicit in the common-law system. The dignity of the human being, his distinctively spiritual quality of power to reason, and his capacity to make responsible choices, still conform to all our scientific observations of the laws of nature. The sooner our philosophical system is rewritten in modern language to make these existent relationships clear, the sooner the juridical order will be able to resume its proper function of ensuring justice and re-establishing peace.



The general principles of law recognized by civilized nations which are needed on the world level to facilitate communication and trade, can be spelled out in various ways. Professor Rooney states that among them may be included:

Men are reasonable beings having limited intellectual power and freedom to choose.

Men live in the society of other men.

Minimum standards of conduct are required to live in society successfully.

No man should be judge in his own cause. (Submission to third party judgment.)

Opportunity to be heard (including the day in court) is required.

There must be jurisdiction to hear and decide.

Hearing pleas from both sides is essential.

Evidence must be properly admissible.

There must be an impartial judge (with no conflict of interests of his own).

And an independent and courageous judiciary (free from outside pressures).

There is presumption of good faith (clean hands).

Fairness and consistency are expected.

Reasoned argument is the means of persuasion.

Reliance on force is the last resort, not the first.

Respect for legal order must be maintained for the common good.

Professor Rooney concludes that there are many others, perhaps too numerous ever to list completely, but the effort helps to concentrate attention by making the implicit a bit more explicit. They call for universal respect to the extent that they recognize the universal consciousness of a need for self-determination, responsibility, and dignity. To make them effective is the function of the legal profession. Comparison of specific procedures is helpful, but of greater importance is the development of a sound method of confronting common juridical problems. The greatest need of all is the re-establishment in everyone's mind that

law is concerned with justice, not uncontrollable power. Then it will be possible to see that peace is the work of justice and that world peace is possible only through law. Who is there to lead in making this clear except those who know the law and serve it.

### Insanity Defense

Readers of the symposium on "Mental Disease and Criminal Responsibility" which was featured in *The Catholic Lawyer* issues of Autumn 1958 and Spring 1959 will recall the heated controversy between the opponents and proponents of the M'Naghten Rule.

The October 1963 issue of the *American Bar Association Journal* features an article by Professor Jerome Hall dealing with the Rule. Responding to overt and implied criticism of the M'Naghten Rule for determining legal insanity to excuse criminal responsibility, Professor Hall proposes a national seminar or study by judges of the diverse and perplexing problems they must face in deciding issues in this field. He thinks that M'Naghten needs repair rather than replacement and that a rough consensus might be attainable.

The Professor suggests the following program of a seminar group to permit such a study. No preference is implied as to the order of studying the various problems and their formulation is not wholly neutral since the purpose is, also, to raise questions regarding current criticism of the M'Naghten Rule.

1. What are the principal meanings of "disease?" Is mental illness like physical illness, or is it so different from it that even a very wide analogy is misleading?

2. What is "science?" Is there an intermediate type of knowledge between science,

rigorously defined, and common sense? Where should psychiatry be placed, *e.g.*, what of statements by leading psychiatrists to the effect that psychiatry is an art? What evidence is there that psychiatrists (a) cure mental illness, (b) diagnose it correctly, (c) can recognize that persons who have not committed any harm are socially dangerous, and (d) can accurately predict that certain individuals will commit crimes if they are released from hospitals or penal institutions?

3. What is an expert, *e.g.*, does that term imply that there is a body of knowledge with reference to which all or most "experts" agree? What is the basis of the position taken by some social scientists that psychiatry has not yet developed to the point where psychiatrists should be permitted to testify in court as experts? What are the principal types or schools of psychiatry, and what is the significance of divergent diagnoses? What does this imply regarding the common assumption that psychiatrists are expert in classifying certain persons as "psychotic" or "insane?" If these terms mean extreme and irrational deviation from social norms, for instance, being a social nuisance, is such labeling by a psychiatrist more or less sound than that by an intelligent jury?

4. Does psychiatry include expert skill in elucidating such terms as "right," "freedom," "justice," "punishment" and "responsibility?" What is the special competence of psychiatrists? What is the significance of a deterministic premise when employed (a) in physical science, (b) in psychiatric research, (c) in therapy, and (d) in deciding whether a person should be held criminally responsible for a harm he committed?

5. The history of legal tests of insanity should be explored to ascertain their rela-

tionship to the contemporaneous medical and psychiatric knowledge, moral ideas and views of "human nature" and, also, to evaluate certain recent statements, *e.g.*, that the M'Naghten Rule was merely the product of political pressure, that a "wild beast" test was never actually a rule of law in England in the implied literal sense, and that lawyers have usually impeded the march of scientific progress while doctors have facilitated it.

6. Important, also, is a comparative study of American, English and Continental law, especially with reference to the "irresistible impulse" test as a complete alternative to the cognitive (M'Naghten) test. On what grounds has the Report of the Royal Commission, 1949-1953, so highly praised in this country by critics of M'Naghten, been criticized by English judges, for instance, Justice Devlin? In the study of the Continental codes, the meaning of the word "or" needs to be scrutinized to determine whether its significance is disjunctive or conjunctive. Continental cases should be studied to determine whether the position so vigorously urged here by very articulate psychiatrists — that a person's cognitive faculties may be quite normal or even superior but, nonetheless, he may be unable to keep from committing the most serious harms — is actually accepted in European law. If it is found to be recognized to some extent, is this the effect of the early nineteenth-century psychology of separate faculties, which has been everywhere discarded, or is it currently supported by able European psychiatrists?

7. In the study of such social problems, the most difficult question often is: What is the question or the proposal that is made? This requires logical analysis of various arguments. For example, is it consistent with the psychology of integrated personality (that man functions as a unit) to argue

that M'Naghten should be abandoned? Is it consistent with that theory of psychology to argue that the volitional function can be seriously disordered, but, at the same time, the cognitive functions remain normal? Is it consistent to assert that psychiatry does not deal with human freedom, right and wrong, responsibility, and justice, and to assert also that the right-and-wrong test is a vestige of superstition and that psychotic persons understand the difference between right and wrong? Logical inquiry can also disclose the areas where no assured answer can be given to certain questions, e.g., whether punishment deters, whether psychiatrists can rehabilitate criminals, and so on. If "experts" in behavioral disciplines and psychiatrists do not have all the desired answers, what is the role of intelligent laymen in dealing with such problems, and what of the legal and ethical standards developed by thoughtful persons in the course of many centuries?

8. The characteristics and requirements of a democratic legal order should be studied especially in relation to the role of unfettered officials, unfettered experts and unfettered juries. Are the prevailing conceptions of human nature, individual responsibility, freedom, right and wrong, as traditionally expressed in the rules of law which guide judges and juries, to be subordinated to the theories of psychiatrists and, if so, to which ones — Freudian, neo-Freudian, anti-Freudian, Jungian, Adlerite, existentialist, organicist, neurologist, Reikian, Frommian, or eclectic? Should the selected experts be permitted to present any theories or opinions to juries who receive no guidance from judges or laws?

9. There are still unsettled questions about "punishments" to be studied; they involve questions of public policy, ethics

and free discussion. There are distinctions to be drawn between reforms, utopias and the relation of punishment to freedom and social responsibility. There are issues which concern hospitalization and punishment, e.g., when is a "hospital" a penitentiary? And again, if we cannot determine whether punishment deters or whether experts can rehabilitate offenders, what is the status of so-called "retributive" punishment?

10. Finally, efforts might be made to formulate conclusions reached at the end of the inquiry, which, presumably, would correctly and precisely reflect the various positions held at that time. Evidently, also, some of the topics and some of the methods of analysis indicated above would be dealt with or employed at several meetings.

### Sunday Laws

The constitutionality of Sabbatarian exemptions to Sunday Closing Laws is discussed at length in a scholarly note in the Summer 1963 issue of *The Boston University Law Review*.

At first glance, there would not appear to be any doubt as to the validity of Sabbatarian exemptions, since Mr. Chief Justice Warren, in *Braunfeld v. Brown*,<sup>1</sup> said in regard to them: "A number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation."

Can legislation, seemingly sanctioned by the Court one day, be declared unconstitutional the next? This would not be impossible, for in *Braunfeld*, the validity of a Sabbatarian clause was not in issue. Hence, the Chief Justice's statement was obiter dictum, rather than an evaluation of con-

<sup>1</sup> 366 U. S. 599 (1961).

stitutional considerations for or against Sabbatarian clauses. Possible constitutional objections to a Sabbatarian clause include arguments that it constitutes an "establishment" of religion, and that it unreasonably prohibits the "free exercise" of religion, and denies equal protection.

The primary constitutional problems are: (1) the statute classifies according to religion, *i.e.*, it does not permit one to work Sunday who has closed on Saturday for secular reasons; and (2) the exemption does not include all religions that celebrate their Sabbath on a day other than Sunday.

The note points out that the apparently conflicting precedents in this area make one feel as though he is being tossed between extremes of judicial thought, rather than led through an orderly system of precedent. Perhaps the reason for this inconsistency is, as Professor Kurland suggests, that advocates are doing a better job of destroying their opponents' cases than they are in building their own. But whatever the reason, it is clear that the answers to the perplexing constitutional problems of the Sabbatarian exemptions do not lie in a consistent pattern of Supreme Court decisions.

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