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# Never On a Sunday:

## RELIGIOUS AND ECONOMIC LIBERTY IN GOLD RUSH-ERA CALIFORNIA

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SUNDAY CLOSING LAWS were common through most of American history. When the U.S. Supreme Court upheld their constitutionality in 1961 in *McGowan v. Maryland* it noted that every appellate court in American history had done so — except one.<sup>1</sup> That court was the California Supreme Court. Its short-lived decision in *Ex parte Newman*<sup>2</sup> was remarkable, not just for its result but also for its reasoning — and the eventual fates of the justices involved.

In April 1858, the California Legislature passed a law forbidding businesses from operating on Sundays. Morris Newman, a Sacramento tailor who observed the Sabbath on Saturdays according to Jewish tradition, kept his shop open on a Sunday and was convicted and fined.<sup>3</sup> When he refused to pay the fine, he was imprisoned.<sup>4</sup> Newman retained Solomon Heydenfeldt to represent him on his appeal to the Supreme Court. Heydenfeldt had served on the Court earlier in the decade, and, with colleague Henry Lyons, had formed a Jewish majority of justices in 1852.<sup>5</sup>

The case generated three opinions: Chief Justice David Terry's lead opinion for the Court, invalidating the law; Justice (and former Governor) Peter Burnett's concurrence with that result; and Justice Stephen Field's dissent, which would have upheld the law. The two justices who constituted the majority described the issues presented as (1) whether the law discriminated in favor of one religious profession or was a "mere civil rule of conduct"; and (2) whether the Legislature could validly compel a citizen to abstain from his "ordinary lawful and peaceable avocations" one day a week. In addition to these issues of religious and economic liberty, the Court addressed a preliminary question: the degree of scrutiny with which courts should review legislation.

### JUDICIAL SCRUTINY OR DEFERENCE?

Although courts no longer face Sunday closing laws today, the question of how much authority legislatures may wield over people's lives, and how vigorously courts should scrutinize legislative enactments, remains

highly controversial. Chief Justice Terry endorsed the view popularized in 1857, the year before the *Newman* decision, by John Stuart Mill in *On Liberty*: "[M]en have a natural right to do anything which their inclinations may suggest, if it not be evil in itself, and in no ways impairs the rights of others."<sup>6</sup> Terry opposed governmental "usurpations which invade the reserved rights of the citizen."<sup>7</sup> If Congress "perform[ed] an act which involves the decision of a religious controversy . . . it will have passed its legitimate bounds."<sup>8</sup>

Justice Field, by contrast, feared (at least at this stage of his career) judicial usurpation of legislative power. Citing the Legislature's "undoubted right to pass laws for the preservation of health and the promotion of good morals," he opposed judicial interference with the decisions of the Legislature, contending "there is no power, outside of its constituents, which can sit in judgment of its actions."<sup>9</sup> "It is not for the judiciary to . . . exercise a supervision over [legislative] discretion . . . [W]hen it does so, it usurps a power never conferred by the Constitution."<sup>10</sup>

Terry refused to defer to legislative wisdom, asserting that if the Legislature could bar work on *one* day a week, it could bar work on *six* days a week.<sup>11</sup> Justice Field supposed "members of the Legislature will exercise some wisdom in its acts," but if not, "the remedy is with the people. . . . Frequent elections by the people furnish the only protection . . . against the abuse of acknowledged legislative power."<sup>12</sup>

### ARTICLE I, SECTION 4: THE FREE EXERCISE OF RELIGIOUS PROFESSION, WITHOUT PREFERENCE

Notwithstanding this debate, the *Newman* opinions focused mostly on the substantive issues. The first concerned religious liberty, which enjoys protection under Article I, Section 4, of the California Constitution: "[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever be allowed in this State." Terry did not contend, as asserted in a later case, that Sunday closing laws effect a structural discrimination against Jews on the basis that religious Jews could work only five days a week and yet religious Christians could work six days a week.<sup>13</sup> Instead, he characterized the law barring work on Sunday as the enforced observance of a Christian religious practice, as Sunday rest was "one of the modes in which [Chris-

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tianity’s] observance is manifested and required.”<sup>14</sup> Justice Burnett, finding the law transformed a voluntary Christian practice into a compulsory one, concluded the law thereby “violates as much the religious freedom of the Christian as of the Jew.”<sup>15</sup>

Justice Field’s dissent disputed these claims by characterizing the law as imposing a “cessation from labor,” not “religious worship.”<sup>16</sup> “What have the sale of merchandise, the construction of machines, the discount of notes . . . to do with religious profession or worship? . . . It is absurd to say that the sale of clothing, or other goods, on Sunday, is an act of religion or worship . . .”<sup>17</sup>

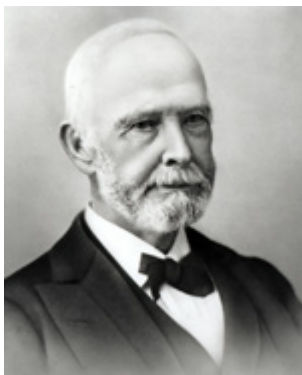
Field’s minority view further refused to base the constitutionality of the law on its classification as exclusively “civil”; he asserted that religious roots did not necessarily invalidate a socially valuable practice. Instead, he argued, just as society may proscribe homicide and perjury, even though these prohibitions appear in the Ten Commandments, so too could a state prescribe a day of rest for its social benefits.<sup>18</sup>

These contrasting opinions echo internal religious debates. One could contend the Sabbath rule is simply a prohibition against working on a seventh day, but its language, “Six days a week you shall work”<sup>19</sup> could also be not merely permissive but directory. If so, forbidding the fulfillment of this religious command would indeed interfere with the exercise of religious freedom, not so much by compelling a Christian practice (Sunday rest) but by forbidding a Jewish one (Sunday work).

Similarly, the Biblical text can support either the interpretation that the Sabbath is a “religious” rule regulating humans’ relationship with God, or a “civil rule of conduct,” regulating humans’ relationship with one another. In Exodus (20:12), the Sabbath derives from the fact God rested on a seventh day, so humans should emulate God. But the cited rationale in Deuteronomy (5:15) is that Pharaoh enslaved the Israelites, and denied them a day of rest, which created an ethical imperative for the now-freed Israelites to treat their own employees with greater humanity.

#### ARTICLE I, SECTION 1: “FREE AND INDEPENDENT” CALIFORNIANS’ RIGHT TO ACQUIRE PROPERTY

The law’s religious source was not the only ground for the Court’s ruling. The majority concluded that even



JUSTICE PETER BURNETT



ATTORNEY AND FORMER JUSTICE SOLOMON HEYDENFELDT

if the rule were not a “preference favorable to one religious profession” but simply, as Justice Field asserted, “a mere civil rule of conduct,” it still violated the state Constitution. Article I, section 1, declared everyone “by nature free and independent,” and recognized Californians’ “inalienable rights,” including “acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.” The majority, shaped by the Gold Rush *zeitgeist*, found the law failed as a secular, economic regulation because it restricted one’s right to work and acquire property.

Ironically, as it upheld Newman’s right to celebrate a day of rest (according to his own calendar), Chief Justice Terry’s lead opinion for the Court questioned the very concept of a Sabbath, wondering how a pursuit that was not only lawful but commendable and praiseworthy six days a week could be “arbitrarily converted into a penal offence” on the seventh.<sup>20</sup> Terry doubted there was a societal problem in “the habit of working too much”: “We have heard . . . reproaches against the vice of indolence,” but no complaint of an “unhealthy or morbid industry.”<sup>21</sup> Terry trusted free and inde-

pendent Californians to judge for themselves when they needed a break from toil, relying on the same interest in self-preservation that led people to seek sleep, food, or pain relief when needed.<sup>22</sup> Because the rest needed by some citizens may be “widely disproportionate to that required by” others, he reasoned, it should be a matter that “each individual must . . . judge for himself, according to his own instincts and necessities.”<sup>23</sup>

Justice Burnett’s concurring opinion echoed this reasoning. Whereas children or slaves might need state intervention to guarantee their needs, Burnett trusted “free agents to regulate their own labor.”<sup>24</sup> If such adults could not be trusted to set their own schedules, they also could not be trusted to make their own contracts.<sup>25</sup> If the state needed to prescribe and enforce their *days* of rest, it could also enforce the *hours* — for working, resting and eating. Just as free adults did not need the state to enforce bedtimes or mealtimes to ensure they enjoyed enough sleep or food, they did not need a paternalistic state to set their work schedule.<sup>26</sup>

Justice Field disputed the article I, section 1 argument on both practical and ideological grounds. As a practical matter, he denied the law restricted individuals from acquiring property, as a weekly respite could improve their productivity during the rest of the week. “With

more truth it may be said, that rest upon one day in seven better enables men to acquire on the other six.”<sup>27</sup>

Field’s ideological argument provided the foundation for future generations to prescribe the hours for working (and now for eating too). He denied Justice Burnett’s premise that laborers were free and independent agents who could choose the hours they worked, rested, and ate. “The relations of superior and subordinate, master and servant, principal and clerk, always have and always will exist. Labor is in a great degree dependent upon capital, and unless the exercise of power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise. . . . It is idle to talk of a man’s freedom to rest when his wife and children are looking to his daily labor for their daily support.”<sup>28</sup>

Justice Field abandoned his opposition to both economic autonomy and judicial review when he joined the United States Supreme Court, where he served from May 1863 until December 1897, a tenure second in Supreme Court history only to Justice William O. Douglas’ 35 years, 7 months. When the high Court in *Munn v. Illinois*<sup>29</sup> permitted a state to impose a cap on what a business could charge, Field found it “subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference.”<sup>30</sup>

The *Newman* holding was short-lived: the Court disapproved it three years later in *Ex parte Andrews*.<sup>31</sup> Why? The court’s composition had changed, and the two justices who replaced Terry and Burnett, Joseph Baldwin and Warner W. Cope, analyzed the issues differently. And why did Terry leave the Court? Because U.S. Senator David Broderick had offended Terry, who then challenged Broderick to a duel. Terry resigned from the Court in order to face off against the senator. When the dust had settled, Terry had lost his position, Broderick had lost his life, and Morris Newman had lost his precedent.

It would not be Terry’s last act of violence involving a United States senator, nor would *Newman* be the last act in the Terry–Field rivalry.

#### AFTERMATH — 1880S

The Supreme Court, having expanded to its current size of seven justices, reviewed the issue again in March 1882.<sup>32</sup> The 4–3 decision cited *Andrews* in upholding a newer Sunday closing law. But its *constitutionality* did not guarantee its *popularity*. As prosecutions clogged the San Francisco courts, the issue became a major focus of the 1882 elections.<sup>33</sup> The Republican platform favored the restrictions, whereas Sunday laws were opposed by the Democratic Party, whose platform deemed “anti-democratic” “all laws intended to restrain or direct a free and full exercise by any citizen of his own religious and political opinion.”<sup>34</sup> The platform committee’s chair

was David Terry, and the Democrats swept to victory in November.<sup>35</sup>

Justice Field had a countermove. San Francisco enacted a measure regulating laundries to ensure general standards of sanitation and cleanliness.<sup>36</sup> One provision barred work at night or on Sunday. Police arrested one Soon Hing for working at night, not Sunday, but Field used the opportunity to include dicta in the U.S. Supreme Court’s unanimous opinion: “Laws setting aside Sunday as a day of rest are upheld . . . from [the government’s] right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.”<sup>37</sup> The high Court would cite this language in *McGowan*, right after noting the outlier *Newman* holding and its disapproval in *Andrews*.

The two justices — Terry and Field — also collided in a more personal context. Sarah Hill had been the putative wife of mining magnate and U.S. Senator William Sharon. The validity of the marriage was disputed after his death, and by 1888 Hill had married her lawyer in that litigation — Terry. Although the California Supreme Court had found the marriage valid (with Hill due to collect a tidy sum) a federal panel rejected this analysis, and found Hill and Sharon had never been married. When a judge from the panel announced the decision, it generated an altercation in the courtroom; David Terry was arrested for assault and Sarah Terry for contempt of court, with the citation issued by the judge — Stephen Field.

Terry’s subsequent threats led to Field’s protection by U.S. Marshal David Neagle. In 1889, Field and Neagle were riding on a Los Angeles–San Francisco train that the Terrys boarded in Fresno. When the train stopped in Lathrop for breakfast, Terry confronted Field, and Neagle shot Terry to death. The shooting also generated a United States Supreme Court case, with a 6–2 majority (Field recused himself) finding Neagle acted within his federal duties and therefore could not be prosecuted in state court.<sup>38</sup>

#### AFTERMATH — 2017

Eroding public support for requiring *businesses* to close once a week did not extinguish public interest in protecting *employees* from working without rest, as urged by Justice Field’s *Newman* dissent. Labor Code section 552 implemented this imperative by providing “No employer shall cause his employees to work more than six days in seven.” By the twenty-first century, many companies operate 7 days a week (even 24 hours a day) but may not require employees to work this entire schedule.

Just two years ago, the California Supreme Court in *Mendoza v. Nordstrom, Inc.*<sup>39</sup> construed section 552. First, the Court needed to define the “seven” day period. Did it apply to each calendar week, or on a “rolling” basis to the preceding seven days? In other words, if an employee was off on Monday in one week, Tuesday the next week, and Wednesday on the third, did that violate

the statute? The Court concluded the law required a day off in each calendar week, not after every sixth day, and so such a schedule would be lawful.

More significantly, the Court's interpretation of the verb "cause" synthesized the opinions of Justice Burnett and Justice Field in *Newman*. Burnett insisted "Free agents must be left free" to make their own arrangements, and work as much as they chose, whereas Field doubted that employees, subject to employers' command, could really exercise free choice. The Nordstrom employees, echoing Field's view, contended employers "caused" employees to work simply by *permitting* that labor, as if free choice by employees to work was impossible.<sup>40</sup> Nordstrom countered with Burnett's position that free people exercised free choice, so seven-day labor was freely chosen (and lawful) unless the employer "requires" or "forces" it.

In her last year on the California Supreme Court before retiring, Justice Kathryn Mickle Werdegar authored a unanimous opinion that endorsed neither extreme. She denied that *permitting* work qualified as *causing* it. After all, the Legislature could have barred employers from permitting an employee to work six days a week, as it had done in prohibiting employers from permitting such seven-day-a-week labor by minors, but it had not imposed so rigid a requirement for adults.<sup>41</sup> On the other hand, the Court's opinion recognized an "employer can, short of requiring or forcing employees to go without rest, still implicitly make clear that doing so will redound to their benefit, or spare them sanction, and thereby motivate or induce employees to work every day."<sup>42</sup> Rather than condone such "implied pressure," the Court held employers needed to inform employees about their right to rest, and then maintain "absolute neutrality" as to their decision.<sup>43</sup> Employees thus could work seven days each week if they chose, but employers could do nothing to induce ("cause") that choice.

Nearly sixteen decades after Morris Newman opened his shop on a Sunday, the California Supreme Court had finally produced a no opinion that implemented all the priorities expressed in *Newman*. It protected employees from working beyond their desired workweek, as Justice Field wished to do, but also allowed them to set their own schedule, as the *Newman* two-justice majority had urged. But rather than simply *assume* employees exercised free choice, Justice Werdegar's opinion for the Court *ensured* they would. And no one got shot in the process.

## ENDNOTES

1. *McGowan v. Maryland* (1961) 366 U.S. 420, 435.
2. *Ex Parte Newman* (1858) 9 Cal. 502 (hereafter *Newman*).
3. Jeremy Zeitlin, *What's Sunday All About? The Rise and Fall of California's Sunday Closing Law* (2012) 7 Cal. Legal Hist. 355–356, citing William M. Kramer (1990) *Jewish-Activist Lawyers of Pioneer California* 5.

4. *Newman*, 9 Cal. at p. 504.
5. Heydenfeldt penned one of the most memorable lines in California Supreme Court history in permitting recovery by a plaintiff who fell into an uncovered hole in the sidewalk while intoxicated: "A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it." (*Robinson v. Pioche, Bayerque & Co.* (1855) 5 Cal. 460, 461.)
6. *Newman*, 9 Cal. at p. 507.
7. *Newman*, 9 Cal. at p. 508 (lead opn. of Terry, C.J.).
8. *Id.*, at p. 507.
9. *Id.*, at p. 520.
10. *Id.*, at p. at 520.
11. *Id.*, at p. 509.
12. *Id.*, at p. 527.
13. *Ex parte Koser* (1882) 60 Cal. 177, 208 (dis. opn. of Sharpstein, J.).
14. *Newman*, 9 Cal. at p. 506 (lead opn. of Terry, C.J.).
15. *Newman*, 9 Cal. at p. 513 (conc. opn. of Burnett, J.).
16. *Newman*, 9 Cal. at p. 523 (dis. opn. of Field, J.).
17. *Id.*, at p. 519.
18. *Id.*, at p. 522.
19. Exodus 20:8; Deuteronomy 5:12.
20. *Newman*, 9 Cal. at p. 507 (lead opn. of Terry, C.J.).
21. *Id.*, at p. 508.
22. *Ibid.*
23. *Id.*, at p. 508.
24. *Newman*, 9 Cal. at p. 518 (conc. opn. of Burnett, J.).
25. *Ibid.*
26. California law now prescribes meal breaks for employees. See e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1018.
27. *Newman*, 9 Cal. at p. 528 (dis. opn. of Field, J.).
28. *Id.*, at p. 520.
29. (1876) 94 U.S. 113, 135.
30. *Id.*, at p. 136 (dis. opn. of Field, J.).
31. (1861) 18 Cal. 678.
32. *Ex parte Koser* (1882) 60 Cal. 177.
33. Zeitlin, *supra*, 7 Cal. Legal Hist. at pp. 369–371.
34. *Id.*, at p. 374.
35. *Id.*, at p. 372.
36. *Soon Hing v. Crowley* (1885) 113 U.S. 703, 708.
37. *Id.*, at p. 710.
38. *In re Neagle* (1890) 135 U.S. 1.
39. *Mendoza v. Nordstrom Inc.* (2017) 2 Cal.5th 1074.
40. *Mendoza*, 2 Cal.5th at p. 1090.
41. *Mendoza*, 2 Cal.5th at p. 1092, fn. 8.
42. *Id.*, at p. 1091.
43. *Ibid.*