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A "Judeo-Christian" Myth of Disestablishment

The Legacy of *McGowan v. Maryland*

While "Judeo-Christian" has been used to describe various aspects of American religion, there is scant discussion on how the term has affected the legal definition of religion in the United States. After briefly mapping the ways the term has been used in Supreme Court opinions, I focus on the Court's very first use of the term in *McGowan v. Maryland*, unpacking the working definition of "Judeo-Christian" that is suggested, and tracing how "Judeo-Christian" has influenced the Court's understanding of religious establishment infringement. I argue that in the *McGowan* line of Court opinions, the term "Judeo-Christian," while intended to gesture towards religious inclusivity, works instead to support *de facto* Christian establishment.

While the neologism "Judeo-Christian" has been used to describe various aspects of American religion in the twentieth century, there is scant discussion on how the term "Judeo-Christian" has affected the legal definition of religion in the United States. Thus, I pose the following questions:

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how has the term "Judeo-Christian" been defined and used in United States Supreme Court opinions? What sort of work, if any, does the term "Judeo-Christian" do for America's highest court?[1]

The term "Judeo-Christian"[2] appears in fourteen US Supreme Court decisions, in both majority and dissenting opinions, from 1961 through 2005.[3] While none of these cases hinge on the definition of the term "Judeo-Christian," nor is the term used so prominently in any that there is a paradigmatic "Judeo-Christian" case, tracing the Supreme Court's usage of the term illuminates how the Court understands three particular subject areas: religion, the policing of sexual acts, and the seizure and forfeiture of property. I begin by broadly characterizing how "Judeo-Christian" is used in these three subject areas, and then I explore the Court's first use of the term in *McGowan v. Maryland*, and conclude by examining a subsequent use of the term "Judeo-Christian" in *Edwards v. Aguillard*, which cites *McGowan* as precedent. By developing the working definition of the term "Judeo-Christian" that is suggested in *McGowan*, I explore in particular how the term has influenced the Court's understanding of religious establishment infringement. I argue that in the *McGowan* line of Court opinions, the term "Judeo-Christian," while intended to gesture towards religious inclusivity, works instead to support *de facto* Christian establishment.

[1] I wish to thank Matthew Gabriele and Benjamin Sax for organizing the Virginia Tech symposium "Revisiting the Judeo-Christian Tradition" in October of 2011, and including me in its engaging proceedings. I had the privilege of sharing a draft of this paper with the participants assembled in Blacksburg, Va., each of whom offered valuable insights on this piece. Many thanks to: Matthew Gabriele, K. Healan Gaston, Hannah Johnson, Benjamin Sax, Jeremy Schott, Mark Silk, Tristan Strum, and Jason von Ehrenkrook. In addition, I received valuable feedback from Winnifred Fallers Sullivan, as well as my colleagues at the Institute for Christian & Jewish Studies: Rosann Catalano, Adam Gregerman, Ilyse Kraemer and Christopher Leighton.

[2] Also included in this account are the spelling variations "Judaeo-Christian" and "Judeao-Christian."

[3] McGowan v. Maryland, 366 U.S. 420 (1961); Abington Township v. Schempp, 374 U.S. 203 (1963); United States v. Seeger, 380 U.S. 163 (1965); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1965); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Marsh v. Chambers, 463 U.S. 783 (1983); Goldman v. Weinberger, 475 U.S. 503 (1986); Bowers v. Hardwick, 478 U.S. 186 (1986); Edwards v. Aguillard, 482 U.S. 578 (1987); Robert E. Lee v. Daniel Weisman, 505 U.S. 577 (1992); Richard Lyle Austin v. United States, 509 U.S. 602 (1993); Lawrence v. Texas, 539 U.S. 558 (2003); Van Orden v. Perry, 545 U.S. 677 (2005); and McCreary v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005).

The Court's Various "Judeo-Christians"

Unsurprisingly, the Court uses the term "Judeo-Christian" most often when dealing directly with the topic of religion. There are nine "Judeo-Christian" religion cases that take up the First Amendment legal issues of Free Exercise,[4] Establishment,[5] as well as Freedom of Speech and Freedom of Press.[6] In addition to the First Amendment cases, the Court utilized the term "Judeo-Christian" in *Unites States v. Seeger* when attempting to define the religious exemption guidelines for the Selective Service Act.[7] In these ten religion cases, the term "Judeo-Christian" is often a shorthand substitute for "Jewish and Christian." This hyphenated adjective does not seem to point towards a hybrid "Judeo-Christian" reality which the Court is trying to define, but rather functions in a more pedestrian fashion as an *and*: the Judeo-Christian religions;[8] the Judeo-Christian Bible;[9] the Judeo-Christian God;[10] the Judeo-Christian tradition;[11] Judeo-Christian beliefs.[12]

In addition to the topic of religion, the Court also uses the term "Judeo-Christian" in four due process cases that take up either the legality of sodomy or the governmental seizure of private property. In the sodomy cases of *Bowers v. Hardwick* and *Lawrence v. Texas*, the Court makes reference to "traditional Judeo-Christian values"[13] and "Judeo-Christian moral and ethical standards."[14] In these two cases, "Judeo-Christian" operates as a shorthand replacement for "Biblical" and/or "Jewish and Christian" as the Court suggests that there is a biblically based moral heritage shared by American Jews and Christians. In two cases dealing with the constitutionality of seizure and forfeiture, the Court utilizes the term "Judeo-Christian" when asserting a long historical precedent for the governmental confiscation of property utilized in a crime. The Court references the custom of *deodand* in "Bib-

[4] *Abington Township v. Schempp and Goldman v. Weinberger.*

[5] *McGowan v. Maryland, Abington Township v. Schempp, Marsh v. Chambers, Edwards v. Aguillard, Lee v. Weisman, Van Orden v. Perry, and McCreary v. ACLU.*

[6] *Memoirs v. Massachusetts.*

[7] *United States v. Seeger.*

[8] *McGowan v. Maryland*, 366 U.S. at 442; *Edwards v. Aguillard*, 482 U.S. at 615.

[9] *Abington v. Schempp*, 374 U.S. at 283.

[10] *Van Orden v. Perry*, 545 U.S. at 707, 719, and 722.

[11] *Marsh v. Chambers*, 463 U.S. at 793; *Goldman v. Weinberger*, 475 U.S. at 510; *Lee v. Weisman*, 505 U.S. at 589; *McCreary v. ACLU*, 545 U.S. at 894.

[12] *McCreary v. ACLU*, 545 U.S. at 904.

[13] *Bowers v. Hardwick*, 478 U.S. at 211.

[14] *Lawrence v. Texas*, 539 U.S. at 571.

lical and pre-Judeo-Christian practices."[15] In these cases, the term "Judeo-Christian" functions principally in a historical sense, standing in for the term "pre-biblical."

While each of these three strands of usage deserves detailed scholarly attention, both individually and in conversation with each other, that larger project is forthcoming.[16] In this article, I have chosen to bracket entirely the latter two trajectories, namely the areas of sexual acts and the *deodand*, in favor of focusing on the ten "Judeo-Christian" religion cases. Indeed, even that scope proved too ambitious for my small study. Thus, I have limited my exploration even further, focusing attention on how the term "Judeo-Christian" was used by the Court to understand issues of religious establishment.

McGowan v. Maryland and the Legality of Sunday Closing Laws

The term "Judeo-Christian" makes its first appearance in America's highest court in a most unlikely 1961 Supreme Court opinion. In *McGowan v. Maryland*, the issue under consideration is the legality of Maryland's Sunday closing laws. While observing the Sabbath is something Jews and Christians may share in principle, determining when the Sabbath occurs is not a point of "Judeo-Christian" agreement. Not to worry—Justice Warren, writing for the majority, was not so obtuse as to suggest outright that Maryland's Sunday observance was a Judeo-Christian practice. Instead, Warren makes a more subtle argument when introducing the term "Judeo-Christian" into the Court's lexicon.

In *McGowan* the appellants, employees of a department store convicted and fined for selling prohibited items on a Sunday, argued that they were suffering economic injury due to Maryland's Sunday closing laws. The appellants asserted that "Sunday is the Sabbath day for the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance."[17] It is important to note that they did not argue that the Blue Laws infringed on, or in any way implicated, their personal religious beliefs or practices. Rather the appellants contend that the Sunday closing laws were an illegal establishment of Christianity by the state

[15] *Calero-Toledo v. Pearson*, 416 U.S. at 681; *Austin v. United States*, 509 U.S. at 611.

[16] I am currently working to expand this paper by putting the Court's various usages of the term "Judeo-Christian" in conversation, as well as placing the Court's use of the term in a broader historical and scholarly context.

[17] *McGowan*, 366 U.S. at 431.

of Maryland and were designed to promote Christian practices. The fact that the appellants did not bring their own religious identities or practices into the argument means the *McGowan* case is not principally concerned with issues of religious freedom, but rather part of the cadre of Court opinions focused on violations of religious establishment.

However, as with most First Amendment religion cases, establishment issues and free exercise issues are never far apart. Before we examine *McGowan* in detail, it is important to note the larger legal context of this establishment-focused opinion. On the same day that the *McGowan* decision was issued, the Supreme Court also decided three companion cases that were intended, *in toto*, to fully examine the legality of Sunday closing laws under both religion clauses.[18] While the *McGowan* decision was the principal opinion to address the legal issues attendant to Sunday closing laws, an overview of the four cases provides additional insight on the Court's position. In each of the four opinions, Justice Warren, writing for the majority, upheld the legality of Sunday closing laws, making two distinctive, yet related arguments with regards to the religion clauses of the First Amendment.[19]

In *McGowan v. Maryland* and *Two Guys v. McGinley*, Warren addressed the legal challenge that Sunday closing laws were a government establishment of religion. Warren summarized the appellants' arguments in *Mc-*

[18] The companion cases to *McGowan* were: Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961).

[19] In addition to the first amendment religion arguments, the appellants also argued that the Sunday Closing Laws violated the Equal Protection Clause of the Fourteenth Amendment. The appellants questioned "whether the classifications within the statutes bring about a denial of equal protection under the law, whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process … they contend that the classifications contained in the statutes concerning which commodities may or may not be sold on Sunday are without rational and substantial relation to the object of the legislation" (*McGowan*, 366 U.S. at 422). For example, on Sundays in Maryland, you could purchase tobacco, candies, milk, bread, gasoline, medicines, newspapers, car and boat accessories, and souvenirs. But you could not purchase a three-ring loose-leaf binder, floor wax, a stapler with staples, and a toy submarine, as the appellants in *McGowan* found out when they were indicted for the sale of these items. The Court finds that the Fourteenth Amendment allows government to "enact laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rest on grounds wholly irrelevant to the achievement of the State's objective … It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day" (*McGowan*, 366 U.S. at 425).

Gowan which asserted that "Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day."[20] In short, the appellants argued that Sunday closings are meant to promote Christian observance and reflected the state endorsement of a Christian worldview.

In agreement with the state of Maryland, the Court granted that the origin of the state's Sunday closing laws was undoubtedly religious, and that the original practice was an exercise in Christian establishment. However, in the Court's view, the historical origin of the law was insufficient as an argument that it was an unconstitutional establishment of religion. Rather, the Court emphasized Maryland's claim that Sunday closing laws had evolved from their religious beginnings to now address secular concerns with which the State had legitimate interests, namely the cessation of labor and the protection of the physical and mental health of Maryland's work force. In the Court's view, neither the purpose nor the effect of the Sunday closing laws, as understood and enforced in 1961, was religious. Thus, there was no unconstitutional religious establishment.

In *Braunfeld v. Brown* and *Gallagher v. Crown Kosher Market*, Warren addressed religious free exercise challenges to Sunday closing laws by taking up two cases brought by Orthodox Jewish merchants. *Braunfeld* is the principal opinion addressing this particular First Amendment issue. Warren summarized the arguments of the Jewish appellants as follows, "Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath."[21] In

[20] *McGowan*, 366 U.S. at 431.
[21] *Braunfeld*, 366 U.S. at 601.

sum, these Jewish merchants would be forced to accept what they perceived as state-imposed financial harm as a consequence of practicing their faith.

In agreement with the state of Pennsylvania, Warren affirmed the judgment of the lower court finding that no violation of religious free exercise had occurred since the Jewish appellants were not coerced into holding a religious belief or opinion in opposition to their Judaism, nor did it make criminal any Jewish belief or practice. Rather, "the Sunday law simply regulates a secular activity, and as applied to the appellants, operates so as to make the practice of their religious beliefs more expensive."[22] While Warren recognized that Sunday Closing Laws imposed an indirect fiscal burden on Jewish merchants, the law did not restrict Jewish practice or belief, and thus in the Court's view, did not violate the religious free exercise clause.[23]

The "Judeo-Christian" Debut at Court

It is within the context of writing *McGowan v. Maryland*, the principal opinion in the four cases deciding the legality of Sunday closing laws, that the term "Judeo-Christian" first takes the stage in Supreme Court jurisprudence.

As mentioned above, the Court acknowledged in *McGowan* that while Maryland's Sunday closing laws had religious origins, the laws presently advanced legitimate secular goals, namely the promotion of the health and well being of society through a common day of rest. In examining the historical development of Sunday closing legislation, the Court found that while both religious and non-religious reasoning supported the continuing enforcement of the law, by 1961 the statute's purpose was secular. While the Court determined that in this case the current laws primarily had a secular justification (public day of rest) that replaced the original religious reasoning behind the law (keeping the Christian Sabbath), more general questions still remained: What is the proper relationship between religious and nonreligious aspects of legal regulation? What is the Court to do when a particular law is more in comport with one religious tradition than another? It is in this discussion that Justice Warren first used the term "Judeo-Christian":

> the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to

[22] *Braunfeld*, 366 U.S. at 605.

[23] In *Gallagher v. Crown Kosher Market*, the lower court had ruled in favor of the Jewish merchants, and the Court reversed the finding, citing *Braunfeld*.

> coincide or harmonize with the tenets of *some or all religions*. 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 the Judeo-Christian religions* while it may disagree with others does not invalidate the regulation. So too with the question of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in *the Decalogue*.[24]

To be clear, Warren's argument runs as such—sometimes government regulation of conduct may compliment or coincide with the regulation of conduct espoused by a particular religion, and disagree with the regulation of conduct espoused by another religion. Indeed, an examination of the historical origins of a particular law may even reveal that the law was crafted to advance a particular religion historically. According to Warren neither of these reasons (i.e., simple alignment between a religious law and secular law; demonstration that a secular law has a religious, or religiously motivated, historical origin) were sufficient to strike down a law on establishment grounds. Instead, the Court must focus its attention on the reasons for the current law, and whether or not the State has legitimate secular reasons undergirding it. The alignment of government regulation with one religion's regulations, and not another religion's, is not by itself a violation of the Establishment Clause.

So what exactly is the term "Judeo-Christian" doing in *McGowan* for the Court? How does it aid Warren's very specific argument? In the context of the quoted paragraph, "Judeo-Christian" has two important referents that are picked up by the Court in later opinions citing *McGowan* as precedent: "some or all religions" and "the Decalogue." Here, I focus only on the first parallelism: "some or all religions" / "the Judeo-Christian religions."[25]

[24] *McGowan*, 366 U.S. at 442, emphasis added.

[25] The term "Judeo-Christian" also serves as a bridge to Warren's introduction of the Decalogue into the logic of the argument, making the allusion to the "dictates of the Judeo-Christian religions" have some purchase. In bringing in the Decalogue, Warren attempted to further clarify the logic of the Court's decision through concrete example. Murder, theft and fraud are offenses proscribed by both the state and the Decalogue. Certainly, Warren implied, government regulations in these arenas would not be an establishment of religion as prohibited by the founding fathers. In the two dueling 2005 Ten Commandment cases (*Van Orden v. Perry* and *McCreary v. ACLU*) "Judeo-Christianity" and its relationship with the

In bringing "the Judeo-Christian religions" into his discussion, Justice Warren aimed to illustrate his more abstract claim that a perceived harmony between particular religious and secular laws need not be a violation of establishment. "The Judeo-Christian religions" are his example set of "some or all religions" at the paragraph's opening. Even though this case involved Sunday closing laws and the establishment of a governmental preference for Christianity, the logic of the argument undergirding this decision demands a more inclusive posture. Indeed, the phrase "some or all" requires more than one religious tradition be included in this discussion, lest the case look like an endorsement of Christian establishment. If he only referenced Christianity, Warren's broader argument would be weakened rhetorically and substantively. Having a singular religious community map onto government regulation looks dangerously like establishment. However, "Judeo-Christianity" sounds like Warren is referencing religion more generally, which appears less like an establishment of a particular religion. The irony of course, is that this logic is used to defend Sunday closing laws, regulations that could never fall under Warren's proffered Judeo-Christian umbrella. Indeed, the use of the term "Judeo-Christian" by Justice Warren in this context is even more striking when you consider that the two companion cases decided in conjunction with *McGowan* were brought by Jewish appellants.

Where does McGowan lead? "Some or all religions" & Edwards v. Aguillard

Warren's inaugural use of "Judeo-Christian" in McGowan defined one particular way the term would be used by the Court going forward.[26] In 1987, the Supreme Court took up a case that dealt with religious establishment issues as they played out in the schoolroom.[27] Justice Scalia, citing *McGowan v. Maryland* in a dissenting opinion, demonstrates where the logic of Justice Warren's particular "Judeo-Christian" understanding takes the Court. As

Decalogue is parsed, none too cleanly, by the Court, and *McGowan* factors into these two decisions. While space does not permit us to consider that line of cases here, I wanted to highlight that *McGowan's* "Judeo-Christian" legacy has an important part to play in how the Court understands protections and objections to presentations of the Ten Commandments on government property.

[26] It is important to note that I think the term "Judeo-Christian" takes on different nuances in other lines of cases, as will be developed in the larger project. Warren's use of the term did not preclude other Justices from using "Judeo-Christian" in different ways.

[27] Edwards v. Aguillard, 482 U.S. 578.

discussed above, Justice Warren's use of the term "Judeo-Christian" was an empty gesture towards religious inclusivism. I contend that in Justice Scalia's dissent in *Edwards v. Aguillard*, he expands upon Warren's troublesome initial usage of the term to make a similar argumentative move.

In 1982, the Louisiana state legislature passed the Louisiana Creationism Act, which "forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.' No school is required to teach evolution or creation science. If either is taught, however the other must also be taught."[28] The stated purpose of the statute was to protect academic freedom for Louisiana's teachers, which the state declared to be the legitimate secular interest it aimed to promote.

The Supreme Court affirmed the decision of two lower courts, finding that the Louisiana Creationism Act violated the Establishment Clause because the "Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety."[29] The majority used only the first part of the three-pronged test put forward in *Lemon v. Kurtzman* to find that the Louisiana law was a religious establishment, asserting that the law in fact, had no secular purpose.[30] Rather, the Court argued, the only purpose of the legislation was to require the teaching of a particular religious doctrine, namely *creatio ex nihilo*,[31] in the public school classroom, when the topic of evolution was covered in science classes. In essence, the Court argued that the Louisiana legislature did not actually intend to promote the "academic freedoms" of elementary and high school teachers to secular or scientific materials, but rather required them to present a religious belief as a scientific theory. As such, the majority concluded that the legislature's stated secular intent for the legislation was a sham.[32]

[28] *Edwards*, 482 U.S. at 581.

[29] *Edwards*, 482 U.S. at 596.

[30] In 1971, the Supreme Court set up a three-pronged test to determine Establishment Clause violations in Lemon v. Kurtzman, 403 U.S. 602 (1971). In brief, according to the Lemon test a law must (1) have a secular purpose (2) have a primary effect that neither advances nor inhibits religion and (3) must not foster an excessive entanglement between government and religion.

[31] *Edwards*, 482 U.S. at 591: "The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term 'creation science' was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act."

[32] *Edwards*, 482 U.S. at 587.

To reach this determination about the intent of the legislation, Justice Brennan, writing for the majority, examines the legislative history of the Act, as well as considers whether the substance of the Act comports with the stated purpose of promoting academic freedom. When examining the legislative history, the majority finds that "the purpose of the legislative sponsor Senator Bill Keith was to narrow scientific curriculum. During the legislative hearings, Senator Keith stated: 'My preference would be that neither [creationism nor evolution] be taught.' Such a ban on teaching does not promote—indeed it undermines—the provision of a comprehensive scientific education."[33] In addition to determining that legislative history suggested the actual intent of the legislation was to narrow academic freedom rather than expand it, Brennan agreed with the lower court's findings that the Act also did not substantively expand or guarantee any freedoms to teachers that they did not already possess but rather had "the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism.'"[34]

In addition the majority needed to determine whether creation science was a religious doctrine. Justice Brennan examined both the "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution"[35] as well as the definition of the term in the context of the legislation, the legislative history, and the expert testimonies gathered at previous trials. In sum, the Court found that "the term 'creation science,' as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind."[36] Additionally, in a concurring opinion, Justice Powell cited the definition of the "doctrine or theory of creation" in Webster's Third New International Dictionary as "holding that matter, the various forms of life, and the world were created by a transcendent God out of nothing."[37] Thus, the Court determined that "creation science" was in fact a religious belief.

In sum, the Court held that the law advanced no legitimate secular purpose and that creation science, which the law self-evidently promoted, was a religious doctrine. Recall that in *McGowan*, simply because a law harmonizes

[33] *Edwards*, 482 U.S. at 587.
[34] *Edwards*, 482 U.S. at 589.
[35] *Edwards*, 482 U.S. at 591.
[36] *Edwards*, 482 U.S. at 592.
[37] *Edwards*, 482 U.S. at 598.

or coincides with a particular religious belief does make the law automatically invalid. Indeed, as *McGowan* affirmed, if the law principally advances a legitimate secular purpose, the secondary effect of promoting of a religious belief or practice is permissible. In *Edwards*, the majority concluded that since the Creationism Act did not advance a secular purpose, and indeed only advanced a religious belief, the Act, unlike the laws at issue in *McGowan*, was an unconstitutional establishment of religion.

Justice Scalia felt otherwise. In his dissent, Scalia challenged both the majority's finding that the Louisiana law advanced no secular purpose, and also disputed the Court's move to invalidate the Act because creation science coincided with certain religious views. To augment the latter point, Justice Scalia cites *McGowan v. Maryland* [emphasis added]:

> We have, for example, turned back Establishment Clause challenges to restrictions on abortion funding, Harris v. McRae, supra, and to Sunday closing laws, McGowan v. Maryland, supra, *despite the fact that both "agre[e] with the dictates of [some] Judaeo-Christian religions," id.*, at 442. "In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation." *Ibid.* … Thus, the fact that creation science coincides with the beliefs of certain religions, a fact upon which the majority relies heavily, does not itself justify invalidation of the Act.[38]

Scalia uses "Judaeo-Christian" here to extend Court protections to state-supported creationism education against establishment challenges, analogizing creationism laws to Sunday closing laws. He argues that the Court has a history of rejecting establishment clause challenges that rest heavily on the perceived overlap between "some Judeo-Christian" law and secular law. He writes that the Court upheld restrictions on abortion funding and the validity of Sunday closing laws "despite the fact that *both* 'agre[e] with the dictates of [*some*] Judaeo-Christian religions'" [emphasis added]. The questions quickly arise: are "both" cases good examples of "[some] Judaeo-Christian" dictates? Is this "[some]" that Justice Scalia inserts a nod to *McGowan's* "some or all religions," or recognition on his part that the sentence is absurd without it?

[38] *Edwards*, 482 U.S. at 615.

I contend that Scalia is utilizing a subtle, but false argumentative move made possible by Justice Warren in *McGowan*. In *McGowan* the Court argued that while states' regulations of behavior may coincide with the religious laws of "some or all religions," such a coincidence did not automatically invalidate the laws. This first part is the general rule or precedent that Justice Warren meant for the Court to adopt. He fleshed out this position with some particular "Judaeo-Christian" examples to demonstrate his broader point. Namely, laws regulating murder, adultery, and polygamy were not invalidated because they aligned with "the dictates of Judaeo-Christian religions."

Justice Scalia conflates the principle set forward in *McGowan* with the example set, and in the process seemingly affords special protections from establishment challenges to those "Judeo-Christian" dictates enacted into law. He emphasizes those moments when the Court has, in particular, extended protections to laws that conform to "the dictates of [some] Judeo-Christian religions" rather than focusing on the more general notion that Warren put forward in *McGowan*. Justice Scalia cites the Court protection of Sunday closing laws and laws restricting abortion funding as part of this protected body of laws complimentary to the "Judeo-Christian" tradition. He infers that such protections should be extended to teaching creationism, presumably as another "Judeo-Christian" dictate.

Moving with Justice Scalia into the realm of the particular, I ask: are Sunday closing laws, abortion regulations, and creationism correctly classified as "Judeo-Christian" dictates? While the status of abortion and abortion funding in Jewish circles is not settled, abortion regulation is not generally a Jewish issue. Nor is teaching creationism generally understood as a Jewish issue, and certainly the observance of Sunday as a day of rest is not a Jewish position. These are all essentially Christian positions seeking, and occasionally finding, protection in the language of Judeo-Christianity. Scalia's usage of the term "Judeo-Christian" is thus, like Warren's in *McGowan*, illusory.

Conclusion

Beginning with *McGowan*, the United States Supreme Court has used the term "Judeo-Christian" in one line of cases to defend against accusations of Christian establishment. As Warren correctly intuited in his 1961 opinion, making the claim that simply because a secular law coincided with "some or all religions" did not necessarily imply a violation of establishment principles was a weak position in a Sunday closing case, where Christian establishment

was clearly a central issue. Adding the term "Judeo-Christian" into his formulation suggested that this idea applied to more than just Christianity, even if that implication was not true in the *McGowan* context.

However, with Warren's choice of terms, a pattern was set. As Justice Scalia's invocation of *McGowan* has shown, the Court has the option to utilize the term "Judeo-Christian" to describe essentially Christian positions, and to defend those positions against accusations of establishment violations. Thus, Court watchers should be wary if and when the Court utilizes the *McGowan* case and its "Judeo-Christian" terminology: arguments for Christian establishment may be lurking.