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THE SUNDAY CLOSING LAWS DECISIONS — A CRITIQUE

Theodore R. Mann* and Marvin Garfinkel**

Introduction

Abraham Braunfeld is an Orthodox Jew who owns and operates a retail children's clothing store. His store is open from Monday morning until mid-afternoon on Friday, at which time the Fourth Commandment requires that he close. He remains closed until Sunday morning, when he opens his store again and operates a full day.

A state law forbidding him to work on Sunday is enforced against him. The entire week-end is now foreclosed to him. He must either work on Saturday and thus violate his conscience or go out of business and lose his means of earning a living as well as his capital investment. May he be constitutionally confronted with such a choice? The United States Supreme Court has recently answered yes.¹

During the past century and a half many American courts have sustained the constitutionality of Sunday closing laws.² The United States Supreme Court so concluded in 1951 in the case of Friedman v. People of State of New York³ when it ruled that no substantial federal question was presented by a decision of New York's highest court that such a law did not interfere with the religious freedom of a Sabbatarian.⁴ It should have been no surprise, therefore, that in 1961 the United States Supreme Court, after a plenary hearing, again so decided.⁵ What may have been surprising to some was the closeness of the decision, Justices Douglas, Stewart and Brennan having concluded in three separate opinions that such laws interfere with the Orthodox Jew's religious freedom. Before long these laws and the unique problems they create for the Sabbatarian may again be laid alongside the United States Constitution for scrutiny by the highest Court of our land.

1961 witnessed a massive legal assault on Sunday closing laws. The laws of three states, Pennsylvania, Maryland and Massachusetts, were considered by the Court in four cases. Two cases involved Sabbatarian businessmen.⁶ The other two involved discount house operations open seven days a week.⁷ The principal decisions of the Court relating to the first amendment's establishment

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² See notes 98 and 99 of Justice Frankfurter's separate opinion in McGowan v. Maryland, 81 Sup. Ct. 1153, 1179 (1961). One 1858 California decision (Ex parte Newman, 9 Cal. 502) held a Sunday closing law unconstitutional, but the same court overruled that decision three years later in Ex parte Andrews, 18 Cal. 678 (1861). With that exception, such laws have been uniformly upheld.
⁴ McGowan and Two Guys, supra note 5.
⁵ When used in this article, Sabbatarian means one who observes Saturday as a day of rest out of religious conviction.
⁶ Gallagher and Braunfeld, supra note 5.
⁷ McGowan and Two Guys, supra note 5.
and free exercise clauses were McGowan v. State of Maryland, (a discount house case) and Braunfeld v. Brown (a Sabbatarian case). In the McGowan case, only Justice Douglas dissented. In the Braunfeld case, Justices Douglas, Stewart and Brennan dissented.

This article is a critique of the decisions of the Court in the Sabbatarian cases.

In the Braunfeld case, the Court had before it plaintiffs' complaint seeking to enjoin the enforcement of the Pennsylvania Act and a motion to dismissing filed by the defendants (chief of police and district attorney) alleging that the complaint failed to state a claim against the defendants upon which relief could be granted. The principal facts averred by plaintiffs were as follows: Abraham Braunfeld, an Orthodox Jew, owned and operated a retail store in which he sold children's clothing, the Sunday sale of which the Pennsylvania Legislature proscribed. One who does not observe the Sabbath in accordance with the Fourth Commandment cannot be an Orthodox Jew. Such observance of the Sabbath requires a total abstention from business and all manner of work from nightfall Friday until nightfall Saturday and prohibits the hiring of other employees, regardless of the faith of such employees, to work during that same period. Abraham Braunfeld had always closed on Friday night and Saturday and opened on Sunday. If the Sunday closing law were enforced against him he would no longer be able to remain in his business and would lose his capital investment, unless he abandoned Orthodox Judaism and be-

8 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."
9 Supra note 5.
10 Supra note 5.
12 Ibid (Justice Douglas); Braunfeld, supra note 5, at 1149 (Justice Brennan) and 1152 (Justice Stewart).
   Selling certain personal property on Sunday.
   Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100.00), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200.00) or undergo imprisonment not exceeding thirty days in default thereof.
   Each separate sale or offer to sell shall constitute a separate offense.
   Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter.
14 Abraham Braunfeld was one of the five joint plaintiff-appellants. For the sake of simplicity only his case will be referred to.
15 It can be dangerous for a lawyer to comment upon the relative importance of various religious obligations in a given faith. Yet it would seem clear that in balancing the needs of a community against the individual's religious obligations, some such information should be available to the persons doing the balancing. The following information supports the pleaded contention that Sabbath observance is primary and central in the scheme of religious observances of the Orthodox Jew:
   The scriptural source of the Sabbath institution is Exodus 20:8-11, setting forth the Fourth Commandment as follows:
   Remember the sabbath, to keep it holy. Six days shalt thou labor, and
gan operating on Friday night and Saturday.

The Court held that the Pennsylvania law did not violate the establishment clause of the first amendment and that its enforcement against Abraham Braunfeld, despite the consequences, did not interfere with the free exercise of his religion.

The Decisions of the Court

In the McGowan case the Court conceded the religious origin of Sunday closing laws, but said that "beginning before the eighteenth century, non-religious arguments for Sunday closing began to be heard more distinctly and

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do all thy work; but the seventh day is a sabbath unto the Lord thy God, in it thou shalt not do any manner of work, thou, nor thy son, nor thy daughter, nor thy man-servant, nor thy maid-servant, nor thy cattle, nor thy stranger that is within thy gates; for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested on the seventh day; wherefore the Lord blessed the sabbath day, and hallowed it. The Holy Scriptures, (The Jewish Publication Society of America, 1917).

Another version of the same Commandment is found in Deut. 5:12-15. The underlying principles regarding working on the Sabbath will be found in Gen. 2:1-3; Exod. 16:22-30; Exod. 31:12-17; Exod. 20:11-17; Exod. 34:21; see also, Isa. 56:13,14; Amos 8:4-6; Jerem. 17:21,22.

 Authorities differ as to the age of the Sabbath idea, some believing it was sponsored by Moses, and others that it does not predate the Babylonian exile (586 B.C.). See 19 Encyc. Brit., Sabbath, 787-789 (1950). To all, the great antiquity of the Sabbath idea is beyond dispute. To the Orthodox Jew, the Fourth Commandment was revealed by God to Moses at Mount Sinai.

From the days of the Decalogue at least, the Sabbath has been of enormous and diminished importance to Judaism. The reader is referred to 2 George Foot Moore, Judaism in the First Centuries of the Christian Era, 21-39 (Harv. Univ. Press. 1954); 1 The Babylonian Talmud, Seder Mo'ed, Shabbath, Foreword by Dr. J. H. Hertz; xii-xiv Introduction by I. Epstein, xxi-xxvi (The Soncino Press, 1938); Gaster, Festivals of the Jewish Year, 263-290 (Sloane 1932). Encyclopaedia Britannica notes (Id. at 787) that the Fourth Commandment follows immediately upon the commandments which are concerned with God's name, indicating in the words of the contributor, "...how great must have been the importance of the Sabbath...The emphasis...is the more noteworthy in view of the fact that it ignores all the other feasts and rites."

Traditional Jews have by their actions — even by giving up their lives — demonstrated their belief that they "must observe the Sabbath throughout their generations, for a perpetual covenant" (Exod. 21:16). Antiochus Epiphanes sought to abolish the Sabbath, and the Jews at the beginning of the Maccabean revolt allowed themselves to be massacred in cold blood rather than profane the Sabbath — even in self-defense (Moore, op. cit. supra, at 26). Afterwards, defensive warfare was deemed permissible on the Sabbath [Segal, The Sabbath Book, 108, 206, 207 (Thomas Yoseloff 1957)].

One of the great Jewish scholars of recent times said that, "Without the observance of the Sabbath, of the olden Sabbath, of the Sabbath as perfected by the Rabbis, the whole of Jewish life would in time disappear." Dr. J. H. Hertz, the late Chief Rabbi of England, in his Commentaries to the Pentateuch and Haftorahs, 298 (Soncino Press 1952). The following comments point up the generally accepted belief among traditional Jews for the past several millennia that the survival of Judaism is inextricably bound up with the continued virility of the Sabbath institution:

Achad Ha'am, 19th century Jewish writer: "Far more than Israel has kept the Sabbath, it is the Sabbath that has kept Israel." Quoted by Dr. Hertz in his commentaries to The Authorized Daily Prayer Book (Rev. ed.) 341 (Bloch Publ. Co., 1948).

Maimonides: "The institution of the Sabbath and the prohibition against idolatry are each equal in importance to all the other laws of the Torah...The Sabbath is also a sign between the Holy One, blessed be He and us forever." 10 Jewish Encyc., Sabbath 598 (Funk & Wagnalls Co. 1905).

Abram Joshua Heschel, modern Jewish scholar: "There are few ideas in the world of thought which contain so much spiritual power as the idea of the Sabbath. Aeon's hence, when of many of our cherished theories only shreds will remain, that cosmic tapestry will continue to shine. Eternity utters a day."

16 McGowan, supra note 5, at 1108, 1109.
the statutes began to lose some of their totally religious flavor." The purpose of these laws is "to set one day apart from all others as a day of rest, repose, recreation and tranquility — a day which all members of the family and community have the opportunity to spend and enjoy together ..." The Court said that "people of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late-sleeping, for passive and active entertainment, for dining out and the like. *** The cause is irrelevant; the fact exists. ***

In the Court's view, the establishment clause did not ban regulations of conduct "whose reason or effect merely happen to coincide or harmonize with the tenets of some or all religions." The Court felt that most Sunday closing laws as presently written "are of a secular rather than of a religious character" and that "[P]resently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States." In the 

Braunfeld case, the Court recognized that the laws constituted an economic burden upon the appellants and faced the question of whether the Constitution forbids application of the Sunday laws to Sabbatarians. The Court noted that while "The freedom to hold religious beliefs and opinions is absolute, ... the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." The Court cited the polygamy and child labor laws as examples of legislative power that may legitimately affect actions even though these actions are religiously required. The Court noted that in the cases involving laws against polygamy and child labor, the religious practices themselves conflicted with the public interest while in the closing law cases the law does not make unlawful any religious practice of the appellants. In the view of the Court, the Sunday closing laws merely operate "... to make the practice of their religious beliefs more expensive." The Court thus considered the burden on the appellants to be an "indirect" one. Then the Court said, "to strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." The Court considered income tax statutes which limit the amount of charitable deductions to be comparable "indirect" burdens. Likewise the Court considered statutes which require the courts to be closed on Saturday and Sunday as they affect the observance of the religion of a trial lawyer whose religion requires him to rest on a weekday, to be further examples of indirect burdens. The Court concluded that "if the State regulates conduct by enacting a general law with-

17 Id. at 1109.
18 Id. at 1118.
19 Id. at 1118, 1119.
20 Id. at 1113.
21 Id. at 1115.
22 Braunfeld, supra note 5, at 1145, 1146.
23 Id. at 1146.
25 Braunfeld, supra note 5, at 1147.
26 Ibid.
27 Id. at 1148.
in its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the state may accomplish its purpose by means which do not impose such a burden. 28

Establishment and Free Exercise

The analytical method employed by the Court was to consider whether the Sunday closing laws violate the establishment clause in the abstract, i.e., separate and apart from and without reference to the effect that they may have upon the Sabbatarian; and to consider whether the laws violate the Sabbatarians' free exercise of religion separate and apart from and without reference to the historical relationship such laws have with Christianity and the benefits Christianity derives from them. Such an analysis is incomplete in a case involving an allegation of a type of preferential treatment which by its very nature includes aspects of establishment and aspects of interference with free exercise in combination.

Justice Frankfurter in his separate opinion said,

Within the discriminating phraseology of the First Amendment, distinction has been drawn between cases raising "establishment" and "free exercise" questions. Any attempt to formulate a bright-line distinction is bound to founder. In view of the competition among religious creeds, whatever "establishes" one sect disadvantages another, and vice versa. 29

Anyone who has considered carefully the first amendment as it relates to Sunday closing laws must agree with Justice Frankfurter. Nevertheless he, and apparently the Chief Justice too, felt that it would help analytically "to isolate in general terms the two largely overlapping areas of concern reflected in the two constitutional phrases, 'establishment' and 'free exercise' . . . . " 30 The result of such isolated consideration was that the Court never reached the crux of the unique problem posed by Sunday closing laws, i.e., the radical change wrought by these laws in the interrelationship between Sunday and Saturday-observing faiths.

It may be that present-day Sunday closing laws are not religious laws, but having said that much it should not follow that like any other secular regulation — like the limitations on charitable deductions under the Internal Revenue Code 31 — they are valid despite their "indirect burden on the exercise of religion." 32 In considering whether such laws may constitutionally be applied to a Sabbath observer it is not enough to decide that they are no longer reli-

28 Ibid.
29 McGowan v. Maryland, 81 Sup. Ct. 1153, 1155 (1961) (Separate opinion of Justice Frankfurter.)
30 Ibid.
31 If there is any logic whatever in acclaim that such limitations interfere with the free exercise of religion, then would it not follow that a tax on a clergyman's income is likewise invalid? There is of course no logic in such a claim. Unlike tax laws, which are truly secular, Sunday laws accommodate — and intentionally accommodate — the great Christian majority. That is why Sunday is selected. Having accommodated one-fifth, the others deserve equal accommodation.
32 Braunfeld, supra note 5, at 1147.
hensive laws; their connection with Christianity, even if not amounting to an establishment, is nonetheless enormously relevant to the determination of the free exercise question. Conversely their continuing adverse effect upon competing faiths — no less now that they have “evolved” into secular regulations than when they were admittedly religious laws — is pertinent in deciding the establishment question.

Almost seventeen hundred years ago Emperor Constantine promulgated the first Sunday law as part of his program of empire unification by means of the establishment of Christianity. From that day until fairly recently, Sunday legislation has been religious in origin and purpose. Thus Sunday legislation in 321 A.D. was among the first progeny of the marriage of the Christian Church and the state and was viewed in the same light during most of the ensuing sixteen centuries. It may well be, as both the Chief Justice and Justice Frankfurter point out at great length, that the rationale for present-day Sunday closing laws is primarily secular; that “beginning before the 18th century, non-religious arguments for Sunday closing began to be heard more distinctly and statutes began to lose some of their totally religious flavor.” It may well be that the state by enacting Sunday closing laws today “seeks to set one day apart from all other as . . . a day in which there exists relative quiet and disassociation from the every day intensity of commercial activities, a day in which people may visit friends and relatives who are not available during working days.” But it is equally important not to lose sight of the fact that the Sunday closing law of today was made possible by sixteen centuries of state-imposed religious observance of Sunday as a day of rest; that Sunday rather than Tuesday or Saturday is selected today in order to accommodate the vast Christian majority of citizens; that Christianity benefits very substantially from this selection by having obtained the help of the state in preserving Sunday as a day of rest. Even if, in the view of the Supreme Court, such laws do not necessarily violate the establishment clause, any complete anlysis of the constitutionality of these laws as applied to Sabbatarians must take proper account of the substantial aid which such laws have been and still are, intentionally or incidentally, to Christianity.

The first amendment had many objectives. It was meant to protect citizens from the political tyranny which combinations of church and state had produced in the past; it was meant to protect the individual in his right to believe or disbelieve. It was most certainly meant to protect the right of any religious group to “flourish according to the zeal of its adherents and the appeal

34 McGowan, supra note 5, at 1109-1112.
35 McGowan, supra note 29, at 1161-1166 and 1169-1178.
36 Although the rationale may be secular, it cannot be denied that the recent wave of Sunday closing laws is attributable to the active cooperation of religious elements, particularly Sunday observing groups, and urban commercial interests.
37 McGowan, supra note 5, at 1109.
38 Id. at 1118.
39 Id. at 1107.
of its dogma,” and to keep the government “neutral when it comes to competition between sects.”

Indeed, one of the few noncontroversial interpretations of the first amendment is that it prohibits preference of one religion over another. Perhaps Sunday closing laws, despite the obvious aid that they give to Christianity, are not preferential when they are not enforced against Sabbatarians; perhaps such aid can be rationalized legitimately as the accidental or incidental by-product of valid secular legislation, even though Sabbatarian faiths have not been so benefited and must rely on traditional methods of moral suasion to protect the holiness of their day. Perhaps Christianity has just been lucky. Justice Frankfurter in his separate opinion said that it is reasonable to expect a state to select Sunday because any other day “would not be seconded, as is Sunday legislation, by the community’s moral temper.” It is possible then to say that just as the secular aspects of Sunday laws are seconded by the “moral temper” of the Christian community, religious aspects of Sunday as the day of rest are quite coincidentally seconded by the state’s selection of Sunday. Both parties have been fortunate in this coincidence, but their aims are deemed to be entirely separate aims, one secular and the other religious. But let there be no mistake about it — even those Sunday laws which exempt Sabbatarians are of great benefit to Christianity, and “in view of the competition among religious creeds” to the extent that one sect is benefited, the other is disadvantaged. Sunday is protected; Saturday is not. The seeds of an establishment are there. But when such a law is applied to Sabbatarians as well and they too must rest on Sunday and are denied the productive use of the entire week-end, then the combination of incidental help to one party and hindrance to the other is preferential far beyond the disadvantage one party would naturally sustain by virtue of an advantage granted to his competitor.

In other words establishment cannot be isolated from free exercise in the analysis of a case which involves an allegation of preferential treatment, because preferential treatment by its very nature involves a combination of both the establishment and free exercise clauses. The determination of whether there has been a preference demands consideration of the sum total effect of a law — from the point of view of both how much it aids one faith and how much

41 McGowan, supra note 29, at 1178, 1179.
42 The Sabbath observer whose trade brings him within the proscription of the Pennsylvania Act is able to conduct his retail business only from Monday morning until mid-afternoon on Friday. A retail businessman cannot realistically be expected to operate profitably on a four and one-half day week, when the other two and one-half days happen to be the entire week-end. Appellants in *Braunfeld* did not go to their customers. They had to wait — for customers to come to them. And to customers in our society, week-ends have become prime shopping time.

The competitive disadvantage to Sabbath observers inherent in the statute is especially great — probably fatal — for the appellants in *Braunfeld*. They were not in trades catering exclusively to Jewish customers, such as were the kosher butchers in *Friedman v. New York*, 341 U.S. 907 (1951), whose competitors likewise closed on the Jewish Sabbath. *Braunfeld* sold children’s clothing, shoes, draperies and slip covers, in open and immediate competition with others who operated on Friday night and Saturday. It is fair to assume that if the appellants were closed on Sunday, most of their Sunday customers would have bought elsewhere on Friday night or Saturday.
it hinders the others. It was this combination which the United States Supreme Court failed to consider.

The majority of sects in the United States observe Sunday; others, in direct competition with them for adherents, observe Saturday. Even assuming that the purpose of the legislation is not to protect Christianity, the end result is the same — the competition is no longer free or fair. One faith is helped and the other faith is not only denied that help, but is prosecuted for not respecting a day which it does not consider holy. When Sabbatarians are compelled to observe separate secular and religious days of rest, and all others have the political strength to make the two coincide, the Sabbatarian faiths are not being permitted to flourish in accordance with “the zeal of their adherents and the appeal of their dogma.” Obviously, such laws hamper Sabbatarian faiths in their efforts to win new adherents and to retain old ones.

Thus we have the unique result that both the aid to Christianity and the burden on Sabbatarians were justified by the Court by the fact that they are incidental to the primary purpose of the law. The writers suggest that the United States Supreme Court has permitted the ultimate purpose of the constitutional guarantee — to let each religion flourish or decay, and to compete with other religions, on its own merits — to be dashed upon the slippery shoals of “motive” and “intent.”

The Court Balanced Inapplicable Interests

The majority opinion in the *Braunfeld* case did not come to grips with the problem of what standard ought to be applied in judging the constitutionality of this kind of law. Clearly the Court did not use any particularly exacting standard. Justice Brennan in his dissenting opinion in the *Braunfeld* case quite accurately complained that the majority failed to give even a “deferential nod towards that high place which we have accorded religious freedom in the past.” Perhaps that is not so important. We learn more about the real value of religious freedom in our society by examining the types of cases in which the Court has permitted legislative incursions into that freedom than we do from the various articulations of applicable standards.

Until the Sunday closing law cases, it was indeed an extreme case that would limit religious freedom. For example, to many Mormons accepted doctrine required male members to practice polygamy. This duty was enjoined by different books — including the Holy Bible — which those Mormons believed to be of divine origin, and they believed also that polygamy was required by the direct request of Almighty God in a revelation to Joseph Smith, their founder and prophet. The Supreme Court, not doubting the bona fides of that belief, nevertheless sustained a conviction for bigamy because the real danger of permitting the practice to continue was quite evident. The Court said,

43 *Supra* note 40.
44 *Braunfeld*, *supra* note 5, at 1151.
46 Reynolds v. United States, 98 U.S. 145 (1878).
According as monogamous or polygamous marriages are allowed, do we find the principles in which the Government of the People to a greater or less extent rests. *** (Polygamy leads to the patriarchal principle, and which, when applied to large communities fetters the people in stationary despotism, while the principle cannot long exist in connection with monogamy. 47

Indeed, in Cleveland et al. v. United States, 48 the Court considered the practice of polygamy to be a "return to barbarism," saying that "The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community." 49

In Davis v. Beason, 50 the fallacy of granting absolute religious freedom to such sects was exposed when the Court said,

There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passion of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kind ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. 51

In Jacobson v. Commonwealth of Massachusetts, 52 prosecution followed the refusal and neglect to comply with the statutory requirement of vaccination against smallpox. While Jacobson did not raise religious infringement as a defense, he argued that the statute interfered with his liberty. The Court held that it was within the police power of local government to protect its citizens against contagious diseases. The result could hardly have been otherwise even if a religious scruple had been involved. The law cannot permit an entire community to be endangered by the refusal of certain persons to be immunized against contagious diseases. The case is a perfect example of a danger both clear and present — of a tragic clash between the desperate needs of a community and the convictions of a man.

Other examples quickly come to mind.

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government in which he lived could not interfere to prevent the sacrifice? Or if a wife religiously believed in burning herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? 53

A closer case was presented in Prince v. Massachusetts, 54 the religious practice involved was the distribution of Watch Tower magazines on the streets by young children, members of the Jehovah's Witnesses sect, in conformity with

47 Id. at 165, 166.
49 Id. at 19.
50 133 U.S. 33 (1890).
51 Id. at 343. See also Murphy v. Ramsey, 114 U.S. 15 (1885).
52 197 U.S. 11 (1905).
53 Reynolds v. United States, 98 U.S. 145, 166 (1878).
54 321 U.S. 158 (1944).
the scripture, "A little child shall lead them." The laws of Massachusetts forbade girls under the age of 18 to sell magazines or periodicals on the street. The importance of laws protecting young children from being forced by their custodians to labor is obvious and the case presented a difficult question of balancing the religious freedom of the custodian and of the child against the interest of society in protecting various other interests of the child. The United States Supreme Court, while suggesting that if an adult rather than a child were involved the result would be different, held that the statute was constitutional as applied to a child, Justice Murphy dissenting.

But in the Braunfeld case the Court was not dealing with "a return to barbarism" as polygamy has been described, or the refusal to become immunized against a highly contagious disease, or attempts at human sacrifice or with the religious compulsions of women who burn themselves on the pile of their dead husbands. It was rather dealing with an institution — the Sabbath — as ancient as Judaism, and which Orthodox Jews believe to be at the core of their religion which is so much a part of Western civilization. It is an institution out of which grew Sunday observance among Christians as well as the very statutes which Pennsylvania, Massachusetts and Maryland enacted and which were challenged before the United States Supreme Court. All that was under consideration was the right of five traditional Jews profitably to operate modest and orderly businesses and to continue in the faith of their fathers, without having to make a state-imposed choice between the two.

Although all of the foregoing cases illustrate that religious freedom is not absolute and can be impaired, they also illustrate better than any shorthand phrase such as "clear and present danger" could, the extreme circumstances required before the Supreme Court would, in the past, permit any incursion into religious liberty. Until the 1961 decisions, the social needs which have justified an impairment of religious liberty have been enormously compelling. This reflected the high estate which religious freedom enjoyed as one of the basic, fundamental and underlying values in America, distinguishing our way of life from that in many other lands. What is most disturbing about the decisions of 1961 is that the Court permitted an infringement of religious liberty for virtually no societal need at all.

The question is, what would it have cost society to permit the Sabbatarian to continue operating on Sunday? Arguably, it might be proper to permit the burden — the clog, as Justice Brennan called it — upon the Sabbatarian's religious freedom if the alternative were a society without a community day of rest, and without the attendant social benefits noted by the Court. That is

55 See supra, note 15.
56 Yet the Jewish Sabbath and the Christian Sunday are not the same either in conception or in manner of observance. "Paul from the first days of Gentile Christianity, laid it down definitely that the Jewish Sabbath was not binding on Christians." 19 Encyc. Brit., Sabbath, 787-789 (1950). Sunday became the Lord's Day in Christianity, a day set apart for worship in memory of the Resurrection. See 21 Encyc. Brit., Sunday, 565 (1950).
57 Braunfeld, supra note 5 at 1151.
how the Court balanced the competing interests presented to it. But obviously these were not the interests confronting one another. It is not necessary to preserve the Sabbatarian's first amendment freedoms at the expense of the community at large, and the case should not have been decided as though this were the choice.

If the Court had held that the Sunday closing law while not unconstitutional on its face, could not be applied to Sabbatarians, there would still have been a community day of rest with all of the attendant social benefits noted by the Court diminished to some very small extent by the fact that the law could not constitutionally be applied to Sabbatarians. It is this diminution of the social consequences arising out of the community Sunday, and not a deprivation of all those consequences, which should have been weighed against the infringement of religious liberty. The writers submit that the change in the nature of Sunday and in its social significance to the great majority, if the law were not applied to Sabbatarians, would be virtually imperceptible. And to permit an infringement of religious liberty for such slender needs is at variance with the high estate that freedom has been given in every relevant decision of the United States Supreme Court and indeed with the language used by the Court in exalting religious freedom in these very cases.

Analogously, in Minersville School District v. Gobitis, the Court balanced the right of a state to pass legislation "of general scope not directed against doctrinal loyalties of particular sects" against the right of one child, on religious grounds, to refuse to salute the flag. But inapplicable competing interests were weighed. Against that child's rights should have been weighed only "the inconveniences which may attend some sensible adjustment of school discipline." Three years later, in the Barnette case, the Minersville decision was overruled.

The remaining question is whether the importance to the public of those ends is sufficient to outweigh the restraint upon the religious exercise of Orthodox Jewish practice which the restriction entails. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; Cox v. State of New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049. The nature of the legislative purpose is the preservation of a traditional institution which assures to the community a time during which the mind and body are released from the demands and distractions of an increasingly mechanized and competition-driven society. The right to this release has been claimed by workers and by small enterprisers, especially by retail merchandisers, over centuries, and finds contemporary expression in legislation in three-quarters of the States. The nature of the injury which must be balanced against it is the economic disadvantage to the enterpriser, and the inconvenience to the consumer, which Sunday regulations impose upon those who choose to adhere to the Sabbatarian tenets of their faith.

58 Indeed the Chief Justice's opinion in Braunfeld goes further. He holds that because the burden on Braunfeld's religious freedom is "indirect" rather than "direct" (i.e., the law does not directly compel him to work on Saturday but only indirectly may achieve that result by stopping him from working on Sunday), the law is valid so long as its "purpose and effect" is "to advance the State's secular goals." Braunfeld, supra note 5 at 1148. Justice Frankfurter however explicitly weighs the completing interest in McGowan, supra note 29, at 1186, as follows:

The nature of the legislative purpose is the preservation of a traditional institution which assures to the community a time during which the mind and body are released from the demands and distractions of an increasingly mechanized and competition-driven society. The right to this release has been claimed by workers and by small enterprisers, especially by retail merchandisers, over centuries, and finds contemporary expression in legislation in three-quarters of the States. The nature of the injury which must be balanced against it is the economic disadvantage to the enterpriser, and the inconvenience to the consumer, which Sunday regulations impose upon those who choose to adhere to the Sabbatarian tenets of their faith.

59 310 U.S. 586 (1940).
60 Id. at 594.
61 Id. at 606 (dissent of Justice Stone).
In justifying a state’s decision not to exempt Sabbatarians, the Court accepted rationalizations which do not have even tissue substance. The possibilities that the least profitable day of the week might become the “religious” day of rest for some and that a “state-conducted inquiry” would be required, simply do not realistically exist. The Court was asked to declare the law unconstitutional as applied to specific Sabbatarians who could establish the bona fides of their adherence to a faith whose history spans four millenia. Should a “Wednesditarian” also wish to be exempt, he would have to stand before the bar of a court and prove by sworn testimony that his convictions are sincerely held and not merely a transient adjustment for purposes of economic advantage. The burden would be his, not the State’s. Surely a first amendment freedom should not be infringed because of such a “possibility.”

The Court in the Braunfeld case developed a principle new to the first might have to require Sabbatarian employers “to hire employees who themselves qualified for exemption because of their own religious beliefs.” But why shouldn’t employees who would otherwise be able to work to support themselves only from Monday to Friday afternoon have such an opportunity to be relieved from economic pressure to violate their Sabbath? The Sabbatarian’s week-day employees would not have to be selected on that basis.

Lastly, the Court expressed concern over the economic advantage Sunday retailers might have over their competitors, citing the Parliamentary Debates in England although there exists a long history here in the United States of a dozen States with Sabbatarian exemptions in their Sunday closing laws. This long history gives no support whatever to the theory that a Sunday retailer would be at a competitive advantage. Unlike the fraudulent “Wednesditarian” the Sabbatarian does not give up the least profitable day of the week — he gives up the most profitable day and evening. A first amendment case requires an inquiry by the Court into the substantiality of the reasons advanced for the infringement. Substance is here lacking not only because the history in the twelve States gives it no support, but also because the very small number of Sabbatarians who open on Sunday have always opened on Sunday, frequently in business areas where the other stores close and have always been at a serious economic disadvantage despite their Sunday operation, as could have been amply demonstrated at trial.

First amendment freedoms are not absolute and religious liberty may be curtailed if the countervailing needs of society are legitimate and are weighty and compelling enough. But surely religious freedom cannot be one of the great values which distinguishes our way of life from others if it can be set aside for virtually no social needs at all.

63 Braunfeld, supra note 5, at 1149.
64 Ibid.
65 Ibid.
Direct v. Indirect Interference

The Court in the *Braunfeld* case developed a principle new to the first amendment by drawing a distinction between what it called "direct" and "indirect" burdens on religious observance. The Court said that a law which makes unlawful a religious practice would directly interfere with religious liberty whereas a law which "does not make unlawful any religious practices" but which "operates so as to make the practice of . . . religious beliefs more expensive" is merely an indirect burden on religious observance. The result of this distinction was made clear in the Chief Justice's opinion. In the case of indirect burdens, no special standards will be applied by the Court nor will there even be a balancing of the interest of society and the individual's liberty. The Court said, "If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State many accomplish its purpose by means which do not impose such a burden."

Justice Holmes once said, "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." It is to be hoped that this unfortunate distinction between direct and indirect burdens on religious freedom will be quickly re-examined and discarded.

Concerning religious freedom, Justice Murphy said, "Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches." The distinction the Court drew between direct and indirect limitations on religious freedom has neither the clarity nor the general applicability of a lasting constitutional principle. Applied across the board, it would permit of all kinds of burdens — laws taxing religious observance, for example — which do not make unlawful the religious practice itself.

Ultimately, a statute's consonance with religious freedom can be measured only one way: By the degree of voluntarism, of freedom, in religious choice before and after the statute. Is it not the statutory compulsion to rest on Sunday which makes it more likely that Sabbatarian businessmen will begin to work on Saturday, thus abandoning their Sabbath observance and their faith?

In *Follett v. Town of McCormick*, the Court struck down an ordinance requiring a $15.00 per annum license fee of agents selling books, as applied to a Jehovah's Witness. In that case, the community imposed a tax upon all businesses and professions and, once paid, there was absolutely no discretion in any governmental agency or personnel to withhold the license. Thus, there was no attempt to single out any religious group, nor did the legislation leave open the door to administrative abuse. And it must be noted that the burden was "indirect," i.e., it did not make unlawful the religious practice.

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67 *Braunfeld*, supra note 5, at 1147.
68 Id. at 1148.
71 321 U.S. 573 (1944).
Which of the two statutes, the *Follett* case statute or the instant one, more effectively limits religious choice or voluntarism? Indeed, ordinances like those in the *Follett* case are struck down not because they tend to compel anyone to give up his faith — they clearly do not — but because even though a $15.00 tax may contain no such compulsion, $1,000.00 tax does, and the difference is only in degree. But Sunday closing laws do not merely contain the seed of future possible compulsion; rather they will effect an immediate compulsion. The choice of going out of business or giving up their faith faces Sabbatarian businessmen immediately upon the enforcement of these laws.

**The Effect of the Decisions**

The Sunday closing law decisions will have the effect of radically restricting the ability of Jewish and Christian Sabbatarians to observe the seventh day as a day of rest in accordance with the biblical commandment and to convince their children to do likewise. Aside from this obvious restriction of religious liberty, the decisions were a victory for those who view America as a vast melting pot, as against those who see positive values in our continuing to be a culturally pluralistic or diverse people. It may seriously be questioned, for example, whether the emerging cultural patterns of suburbanites, patterns cutting clear across ethnic, religious and class lines, ought to be the subject matter of legislative power. The habit of "whole family" shopping on Sunday for family purchases at massive shopping centers and discount houses certainly cannot be deemed inherently bad from a purely secular point of view, and one has the feeling that in the legislative battle involving on the one hand supporters of the suburban discount operations and on the other hand supporters of the established downtown economic interests, the interests and desires of the families who choose to shop on Sunday are singularly unrepresented. Likewise, the Sabbatarian is not and does not want to become a part of the larger economic struggle between emerging and established economic interests. What has caused him and his forebears for generations before him to live a lifetime of "business as usual" Sundays has nothing to do with the new cultural trends of mid-twentieth century. Sunday business has become a way of life for him; a cultural manifestation of his efforts to support his family without sacrificing sacred beliefs. Sunday work in his weekday trade is not a religious duty, but it is a way of life that developed because of his religion. "The essential characteristic of these [first amendment] liberties is that under their shield, many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this

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72 To freeze by law a rapidly changing cultural pattern not heading in dangerous directions is unwise if not unconstitutional. This thought was expressed by contemporary philosopher Horace Kallen, *Cultural Pluralism and the American Idea* (Univ. of Pa. Press, 1956) when he said (p. 55):

> ... whatever stays truly always and everywhere the same stays null and dead. What exists and lives, struggles to go on doing so, and its struggle is its change. A living culture is a changing culture ...  


74 For descriptions of the unique way of life developed by Orthodox Jews as a result of their interpretation of the Fourth commandment, see Dr. Hertz' Foreward to the Shabbath tractate of the Babylonian Talmud, *op. cit. supra*, note 15, at p. xv; Moore *op. cit. supra*, note 15, at pp. 34-39; Silver, *Where Judaism Differed*, 92 (Jewish Publ. Soc. 1957).
shield more necessary than in our own country for a people composed of many races and of many creeds. Should the "type of life" thereby developed by Orthodox Jews, harming no one, be outlawed by a state legislature, and should the State be permitted to do away with these diverse cultural patterns in the interest of "enforced Sunday togetherness?"

Religious and ethnic differences have become obliterated in this vast land with amazing rapidity (to the great satisfaction of some and the consternation of others) without the aid of legal compulsion. The fondest hopes of some historians and philosophers of forty years ago, that the democratic atmosphere on these shores would permit of the fullest flowering of many diverse ethnic cultures, have been shattered with the mobility of our people and fluidity of social change — without the force that is law. For better or for worse, our people, our religions and our cultures are becoming in more and more ways indistinguishable. Those few who wish to retain their distinctive way of life should be permitted to try without legal hindrance, and to try to influence others, including their children and later generations that their ways are best.

It can be argued that not only religious pluralism, but cultural differences too come under the protective wings of the Constitution. No other rationale suggests itself for the unanimous opinions of the United States Supreme Court in *Meyer v. State of Nebraska,* in which a statute prohibiting the teaching of foreign languages to students who had not completed eight grades, was declared unconstitutional; and in *Pierce v. Society of Sisters,* in which it was held that a state could not compel all children to go to public school. Justice McReynolds said in the *Pierce* case, "The fundamental theory of liberty upon which all government in this union reposes excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers."

The legislative action complained of in the above cited cases and in *Farrington v. Tokushige* and *Bartels v. State of Iowa* have one thing in common — they are all attempts at cultural unification. Horace Kallen, an eminent contemporary philosopher, has said,

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76 Dissenting opinion of Justice Stewart in *Braunfeld,* supra note 5 at 1153.
77 See, for example, Kallen, *Culture and Democracy in the United States; Studies in the Group Psychology of the American Peoples* (Boni and Liveright 1924), particularly pp. 115, 118-121.
78 Compare the hopes of Kallen, ibid, with the facts actually emerging, as described by historian Oscar Handlin, *The American People In The Twentieth Century,* Ch. VIII, p. 186, et seq. (Harv. Univ. Press 1954).
79 For a study of the impact of the majority culture on several small, insular Jewish communities, see Ben Kaplan, *The Eternal Stranger: A Sociological Study of Jewish Life in the Small Community* (1957).
80 262 U.S. 390 (1923).
81 268 U.S. 510 (1925).
82 It should be noted that the State legislature did not outlaw religious school attendance at times not conflicting with public school attendance.
83 *Pierce v. Society of Sisters,* supra note 81, at 535. Cahn, *The Sense of Injustice* 6, note 3 (N.Y. Univ. Press 1949) appears to take another view of this case. He characterizes it as a vestige of a time, before 1937, when the Supreme Court promoted its economic and social prejudices to the rank of immutable natural laws.
84 273 U.S. 284 (1927).
85 262 U.S. 404 (1923).
Fundamentally, . . . [cultural unification] would require complete nationalization of education, the abolition of every form of parochial and private school, the abolition of instruction in other tongues than English and the concentration of the teaching of history and literature upon the English tradition. The other institutions of society would require treatment analogous to that administered by Germany to her European acquisitions.\textsuperscript{86}

Most of these have been attempted. Consistently, until the 1961 Sunday closing laws cases, the United States Supreme Court has struck down such attempts at cultural unification.

A constitutional basis for especially exacting judicial scrutiny of attempts to legislate away cultural differences, is suggested in the now famous Footnote 4 of United States \textit{v.} Carolene Products Company.\textsuperscript{87} There, Justice Stone enunciated the "rational basis" standard of constitutionality and then qualified it by saying:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. *** Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious \ldots national \ldots or racial minorities. \textsuperscript{****88}

As a practical matter it can fairly be said that if Jewish and Christian Sabbatarians together amounted to really substantial numbers, their accumulated weight could make itself felt and such Sunday closing laws might well not pass. If a common day of rest could not on that account be attained, the legislature would find some other way of attacking the problems presumably existing. It might, for example, require businesses to close on one day or the other and provide exemptions for those very few here in the United States whose religion requires that they rest on some other weekday. By doing so, no one would be prejudiced and everyone would have adequate rest and time to withdraw from the hurry-burry of worldly cares. It is true that if this were the law and if there were very substantial numbers of Sabbatarians, there would still be lacking something which the proponents of this type of legislation insist is important — the sense of community repose of which the Court spoke. But this is the price we would have to pay for living in a pluralistic society. And there is no real question but that if half our citizens were Sabbatarians, the legislature would be prepared to pay that price, and we would have no Sunday closing laws of the type that exist today. The difference then is in numbers — Sabbath observers are few enough to be at the mercy of an overwhelming majority, acting through its legislature.

\textsuperscript{86} \textsc{Kallen, Culture and Democracy in the United States} 119 (Boni and Liveright, 1924).

\textsuperscript{87} 304 U.S. 144 (1938).

\textsuperscript{88} \textit{Id.} at 152. And see Minersville School District \textit{v.} Gobitis, 310 U.S. 586, at 605 and 606 (1940) ("And until now we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities, although no political process was affected \ldots ").
Postscript

Having now completed this article on a complex subject, the writers wish to add — as a postscript — their conviction that articles on this and related subjects, popularized perhaps, would be of far greater value in a lay periodical than in a law journal. There are so many current unresolved problems involving the first amendment’s establishment and free exercise clauses: Blue Laws, Bible reading, prayers and carols in public schools; federal aid to education; birth control laws; religious oaths for public office — the list is almost endless. And these problems, while of course they are of great concern to lawyers, are of no greater concern to them than to every citizen. Moreover, since legislators and judges are human and subject to one degree or another to the force of public opinion — at the very least living, working and breathing in the same atmosphere affected by that public sentiment — the outcome of all these issues depends in some measure on the opinions of the general public. And we tend to forget that while the first amendment is supposed to protect the basic freedoms of even the smallest minority, it is an amendment which can be repealed or amended when enough people wish it. Somehow, one can’t help feeling that the analysis of these great problems has become the private domain of judges, theologians and lawyers — and at that only a small group of lawyers.

We are foolish — those of us on both sides of these vitally important questions — if we fail to bring the discussion into the public domain, to the very people who will, after all is said and done, decide.

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89 Professor Edmond Cahn made a real contribution to public discussion of the very subject matter of this article by his highly interesting and popularized How To Destroy The Churches, Harpers, Nov. 1961, pp. 33-39.