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TOWARD THE CENTRAL MEANING OF RELIGIOUS LIBERTY: NON-SUNDAY SABBATARIANS AND THE SUNDAY CLOSING CASES REVISITED

by

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SUNDAY closing laws, or "blue laws," are state statutes criminalizing the operation of certain businesses, the performance of certain types of labor, or the selling of certain goods on Sunday. Although

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1. On the history of the Sunday closing laws, see W. Blakely, AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION (1891); G. Harris, SUNDAY LAWS (1892); W. Johns, DATELINE SUNDAY U.S.A. (1967); A. Lewis, SUNDAY LEGISLATION: ITS HISTORY TO THE PRESENT TIME AND ITS RESULTS (1902).


In recent years, state courts have divided on the question of whether Sunday closing statutes are constitutional, although these challenges were based on due process and equal protection claims rather than on religious freedom claims. Cases holding state Sunday closing laws unconstitutional in whole or part include Piggly-Wiggly of Jacksonville, Inc. v. Jacksonville, 336 So. 2d 1078 (Ala. 1976); Calдор's, Inc. v. Bedding Barn, Inc., 177 Conn. 304, 417 A.2d 343 (1979); Rutledge v. Gaylord's, Inc., 233 Ga. 694, 213 S.E.2d 626 (1975); Courtesy Motor Sales v. Ward, 24 Ill. 2d 82, 179 N.E.2d 692 (1962); Boyer v. Ferguson, 192 Kan. 607, 389 P.2d 775 (1964); City of Ashland v. Heck's, Inc., 407 S.W.2d 421 (Ky. 1966); West v. Winnisboro, 252 La. 605, 211 So. 2d 665 (1968); State v. Target Stores, Inc., 279 Minn. 447, 156 N.W.2d 908 (1968); Scag-Way Dep't Stores, Inc. v. City of Omaha, 179 Neb. 707, 140 N.W.2d 28 (1966); People v. Abrahams, 40 N.Y.2d 277, 353 N.E.2d 574, 386 N.Y.S.2d 661 (1976); State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972); Spartan's Indus., Inc. v. Oklahoma City, 498 P.2d 399 (Okla. 1972); Kroger Co. v. O'Hara Township, 481 Pa. 101, 392 A.2d 266 (1978); Scaggs Drug Centers, Inc. v. Ashley, 26 Utah 2d 38, 484 P.2d 723 (1971); County of Spokane v. Vaul-Mart, Inc., 69 Wash. 2d 712, 419 P.2d 993 (1966); Nation v. Giant Drug Co., 396 P.2d 431 (Wyo. 1964). Sunday closing laws have been held constitut-
some states temper their Sunday closing laws with religious exemptions\(^3\) or, in the case of Texas, with an option to remain open for business on either Saturday or Sunday,\(^4\) most of these laws mandate strict restrictions on Sunday business activity. Blanket Sunday closing laws have an invidious effect on people who, for religious reasons, choose to observe some day other than Sunday as a day of rest. These non-Sunday Sabbatarians\(^5\) are forced to choose between working on their observed Sabbath or refraining from work and suffering the economic consequences. In the words of United States Supreme Court Justice Potter Stewart, the non-Sunday Sabbatarian is forced "to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand."\(^6\) Nonetheless, in 1961 a majority of the Supreme Court ruled to the contrary and upheld Sunday closing statutes in *McGowan v. Maryland*\(^7\) and its companion cases.\(^8\)
The problem of accommodating the special concerns of the non-Sunday Sabbatarian sheds light on the fundamental relationship of religion and the state. In disputes concerning religion in the schools, state aid to religious schools, tax exemptions for religious institutions, regulation of religious practices, and autonomy of religious bodies from investigation by the state, the underlying structural question is the balance between the conflicting requirements of the first amendment that mandate the separation of church and state as well as the free exercise of religion. 9

The pervasive debate centers around whether the Constitution demands strict religious neutrality by the state or whether the state may, or indeed must, make some accommodation in its laws for religious minorities to assure their free exercise of religion. The concept of "strict neutrality" is the analogue to "color blindness" under the equal protection clause. A society that observes "strict neutrality" could never permit a "religion-based" classification, be it to disadvantage a religion, aid a church, or accommodate a religious practice. As with problems of racial discrimination, "strict neutrality" treats religion by ignoring it. 10

This Article examines the Sunday closing law cases and demonstrates why they are inconsistent with the first amendment and the constitutional jurisprudence that has evolved in analogous contexts in the two decades since McGowan. The conclusion reached is that "strict neutrality" in religious questions rarely is permissible in a society constitutionally committed to religious freedom. The conceptual analyses employed are applicable directly to the myriad of questions raised under the religion clauses and suggest a resolution of a number of questions heretofore considered intractable. Despite the changes in the law and methodology of constitutional interpretation, the United States Supreme Court may continue to deny a review of the claims of non-Sunday Sabbatarians. This opinion is based on an analogy to the constitutional experience of both judicially recognized and nonrecognized minority groups, particularly racial and non-Christian religious minorities.

9. The first amendment of the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The first clause is referred to as the "establishment clause;" the second clause is the "free exercise clause."

10. For a discussion of the concept of "neutral principles," see Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); and Wright, Professor Bickel, The Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769, 776 (1971). The rather confusing cases and perhaps inherently perplexing interplay between the establishment clause and the free exercise clause suggest that experience and sensitivity rather than logic or neutral principles are the tools necessary for interpretation. Professor Laurence Tribe suggests that religion involves "a realm in which faculties beyond reason, and experience often removed from the public sphere, prove central to most conceptions of the values at stake." L. Tribe, American Constitutional Law 812 (1978).
I. THE SUNDAY CLOSING CASES

In 1961 the United States Supreme Court reviewed and ruled on the constitutional validity of a number of Sunday closing laws. In each case the Court sustained the state restrictions over the constitutional claims of workers, employers, customers, and non-Sunday Sabbatarians.\(^\text{11}\) In *McGowan v. Maryland*\(^\text{12}\) the Court held that so long as a regulation serves a nonreligious state objective, no violation of the first amendment’s establishment clause occurs.\(^\text{13}\) *McGowan* concerned a challenge to Maryland’s Sunday closing laws\(^\text{14}\) by employees of a large department store. The employees argued that the statutes violated the constitutional guarantees of religious freedom and the separation of church and state.\(^\text{15}\) Chief Justice Warren, writing for the majority, dismissed the religious freedom claim on grounds that the plaintiffs had no standing to raise the issue.\(^\text{16}\) The Court reasoned that the litigants did not allege that their own religious freedom was infringed by the statutes, nor did they specifically allege a religious freedom infringement of the store’s non-Sunday Sabbatarian customers.\(^\text{17}\) For the Court to hear such actions, the claims must be ruled personal to those whose religious liberties are affected or coerced by the regulation in question.\(^\text{18}\) Nonetheless, the Court did uphold standing on the employees’ contention that the Sunday closing statutes were, in effect, a law respecting the establishment of religion in violation of the first amendment.\(^\text{19}\) The specific establishment clause complaints of the litigants were that the state chose Sunday to require business closings because Sunday is the Sabbath day observed by most Christian sects, and as such it aided “the conduct of church services and religious observance of the sacred day.”\(^\text{20}\) In rejecting the establishment clause claim, Chief Justice Warren noted the relevancy of the history of the Sunday closing laws and concluded that although such laws originally were motivated by religious reasons,\(^\text{21}\) the emphasis had shifted to secular considerations:

[It is not difficult to discern that as presently written and administered, most [Sunday closing laws] are of a secular rather than of a


\(^{13}\) *Id.* at 451-52. Using a rational, deferential standard of judicial scrutiny, the Court also held that Sunday closing laws are not in violation of the fourteenth amendment’s equal protection clause. In this context, the equal protection issue is devoid of religious overtones.

\(^{14}\) For the current Sunday closing laws in Maryland, see *MD. ANN. CODE* art. 27, §§ 492-534C (1957 & Supp. 1980).

\(^{15}\) 366 U.S. at 429-30.

\(^{16}\) *Id.* at 429.

\(^{17}\) *Id.* at 429-30.

\(^{18}\) *Id.*; accord, Harris v. McRae, 100 S. Ct. 2671, 2689-90, 65 L. Ed. 2d 784, 806-07 (1980).

\(^{19}\) 366 U.S. at 430. The Court conferred standing because plaintiffs suffered a “direct economic injury.” *Id.* at 430-31.

\(^{20}\) *Id.* at 431.

\(^{21}\) *Id.*
religious character, and that presently they bear no relationship to establish-ment of religion as those words are used in the Constitution of the United States.22

The secular justification cited by the Court in support of the closing laws was the state’s interest in providing a universal day of rest for all citizens.23 Using Sunday as the particular day is not impermissible under the establish-ment clause according to the Court, even though it happens to coincide with the Sabbath observed by a majority of Christians, because:

"[I]t is common knowledge that the first day of the week has come to have special significance as a rest day in this country. 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 entertainments, for dining out, and the like."24

In reaching this result, the Court followed a purpose and effect test for determining whether a statute violates the establishment clause. This test was first hinted at in Everson v. Board of Education,25 in which a taxpayer challenged a state statute authorizing local school districts to reimburse parents for the cost of transporting their children to and from private schools on public buses.26 A portion of this reimbursement money was paid to Catholic parents who sent their children to Catholic parochial schools.27 The taxpayer argued, inter alia, that the statute was a law respecting the establishment of religion in violation of the first amendment’s establishment clause.28 In rejecting this challenge the Court provided an extensive discussion of the meaning of the establishment clause, stating:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”29

Although the establishment clause does not require the state to be an adversary of religion,30 the Everson Court concluded that it does require neutrality between the state and religious and nonreligious groups.31 So long as the primary purpose of a state law or regulation and its effects were secular, the incidental benefits or burdens placed upon religious entities were constitutionally tolerable.32 Thus, while any aid or assistance advances the religious mission, that effect is overshadowed by any secular

22. Id. at 444. The Court also noted that Sunday closing laws are no longer supported exclusively by religious groups. Id. at 435. See Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv. L. Rev. 730-31 (1960).
23. 366 U.S. at 445.
24. Id. at 451-52.
26. Id. at 3.
27. Id.
28. Id. at 8.
29. Id. at 15-16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).
30. 330 U.S. at 18.
31. Id.
32. Id. at 17. See also L. Tribe, supra note 10, at 835-46.
objectives of education, health, and safety. The Court has since proffered an additional test: the program or practice should not create an excessive entanglement between church and state.33

On the same day McGowan was decided, the Court also rejected the constitutional claims of a department store owner in Two Guys from Harrison-Allentown, Inc. v. McGinley,34 the operators of a Kosher market in Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.,35 and orthodox Jewish merchants in Braunfeld v. Brown.36 In Two Guys from Harrison-Allentown, Inc. a large discount department store brought suit to enjoin enforcement of Pennsylvania's Sunday closing laws, which forbade the selling of certain items and the performance of "worldly employment" or business on Sunday.37 Chief Justice Warren, in writing for the majority, dismissed the plaintiff's constitutional claims on grounds identical to those in McGowan after finding various state legislative and judicial disavowments of the religious character of the statutes.38 The Court, however, did comment on the religious wording of the statutes, which referred to Sunday as "the Lord's day," used the term "Sabbath Day," and recognized days other than Sunday as "secular days."39 According to the Court, these words remained in the statute only because of legislative oversight in failing to remove them40 and not because of any attempt to aid a religion.

Unlike McGowan and Two-Guys from Harrison-Allentown, Inc., the Court reached the free exercise of religion claims in Braunfeld v. Brown41 and Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.42 In these cases orthodox Jewish merchants, who observed their Sabbath on Saturday, challenged respectively the constitutionality of Pennsylvania's and Massachusetts' Sunday closing laws.43 The Court in Gallagher deferred its analysis of this issue to Braunfeld, where the merchants com-

34. 366 U.S. 582 (1961).
38. 366 U.S. at 584-85.
39. Id. at 594.
40. Id.
42. 366 U.S. 617 (1961).
plained that Pennsylvania's Sunday closing law impaired their ability to earn a livelihood. Their faith required abstention from all work on their Sabbath, which extended from sundown Friday to sundown Saturday. It also prohibited adherents from shopping on the Jewish Sabbath. The Court rejected these arguments and concluded that the statute did not embrace any religion or force anyone to accept a particular religion; the burden imposed on non-Sunday Sabbatarians was only an indirect burden on the exercise of religion. Thus, the statute did not violate the free exercise clause. In its dismissal of the free exercise claim, the Court pronounced:

If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But 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 may accomplish its purpose by means which do not impose such a burden.

In Braunfeld the Court also rejected judicially imposed exemptions for non-Sunday Sabbatarians because of the administrative problems it feared would result. The reluctance to inquire into the validity of claimed religiosity, the need to police on two days in order to assure compliance with a closing law, and the problem of determining when violations occur, prompted the denial of this alternative.

The most troubling problem for the Court in handling these cases was that if it allowed non-Sunday Sabbatarians to operate businesses on Sunday, they would enjoy a monopoly and an unfair advantage over the members of majority sects forced to take Sunday off. These free exercise claims are closely linked to the Court's analysis of the establishment clause claims as noted in McGowan. The finding that Sunday closing laws were not maintained for the purpose of aiding a religion or all religion was critical to their validity. Although the Court conceded in an exhaustive study of the history of the closing laws that Sunday was recognized as having been a religiously motivated choice for a day away from labor at the time of origin of these laws, it concluded that over the centuries, this religious connotation had been lost.

45. Id. at 603.
46. Id. at 606.
47. Id. at 607.
48. Id. at 608-09.
50. 366 U.S. at 608-09.
52. For the Court's discussion of the history of Sunday closing laws, see McGowan v.
II. **McGowan and Braunfeld Reconsidered**

The Supreme Court has not reviewed the Sunday closing cases in the past two decades although it had an opportunity to do so recently in *Supermarkets General Corp. v. Maryland*. In that case the Court summarily dismissed another challenge to the same Maryland Sunday closing law sustained in *McGowan* although *Supermarkets General Corp.* and several other cases taken to the Court in the last few years arose primarily from claims of economic liberty rather than free exercise of religion. Nevertheless, one can conclude that despite the denial of the appeal in *Supermarkets General Corp.*, the Court simply is avoiding another difficult issue, not indicating its approval of the Maryland Supreme Court’s ruling. Ample support exists for the rejection in the near future of the result and the underlying principles of *McGowan v. Maryland*.

A. **Standing and Overbreadth Under Free Exercise**

The challenges to Sunday closing laws mounted in recent years have not been brought by non-Sunday Sabbatarians. *McGowan* emphasized that free exercise of religion challenges could not be raised by those whose religious scruples were not directly coerced by the challenged measure. This rule is grounded in the standing requirement of article III of the Constitution that requires the complainant to possess a personal stake in the controversy. The rule is also found in the standing requirement of article III of the Constitution that requires the complainant to possess a personal stake in the controversy. Sunday worshippers and nonreligious litigants, nevertheless, are injured by the Sunday closing laws, suffer as a result of them, and, accordingly, would have their claim vindicated by a Court holding the

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54. The Maryland Supreme Court dismissed the plaintiffs religious freedom claims by following the holding and rationale of *McGowan*. 409 A.2d at 254-57.
56. See note 53 supra.
57. 366 U.S. at 429-30.
60. For cases supporting the proposition that standing may be found only when the plaintiff suffers injury not generally experienced by all in society, see Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59 (1978) (residents in immediate area of nuclear power plant have standing); United States v. SCRAP, 412 U.S. 669 (1973) (environmentalists have standing to challenge freight rates that discourage recycling of resources); Baker v. Carr, 369 U.S. 186 (1962) (plaintiff has standing to challenge political redistricting on grounds that redistricting dilutes his vote).
laws to be constitutionally invalid. In light of recent liberalized rulings on standing, Sunday worshippers and nonreligious individuals now should qualify to raise the interests of non-Sunday Sabbatarians.62 The claims of religious minorities ought to be permitted to be litigated under the doctrine of constitutional jus tertii, the doctrine allowing surrogate litigants to raise the rights of third parties because of the difficulty for such third parties to assert their own rights.63 The doctrine also explains the recent judicial expansion of standing rights. The costs and difficulty of constitutional litigation imposes a substantial impediment to religious minorities who attempt to assert rights in the free exercise arena.64

Closely related to the question of standing is the first amendment speech doctrine of overbreadth, which operates to invalidate statutes purporting to outlaw protected as well as unprotected first amendment free expression activity.65 If a statute prohibits protected expression, it is overbroad and is susceptible to judicial invalidation. The Court allows a litigant whose activity is capable of regulation under a narrowly drawn statute to raise the

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64. The Burger Court adhered to a liberal view of standing to assert the rights of others in Craig v. Boren, 429 U.S. 190 (1976) (licensed female beer vendor may raise a constitutional challenge to statute based on age-sex differential on behalf of objections of males 18-20 years old). But see Harris v. McRea, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980) (standing denied to plaintiff who was challenging restrictions on government funding of abortions on a free exercise claim). In Harris the Court emphasized that only allegations of personal coercion satisfied the standing requirement. Id. at 2689-90 (citing Warth v. Seldin, 422 U.S. 490 (1975)). Nonetheless, the Court's summary rejection of standing probably was based on the belief that the substantive argument was frivolous, not on a studied analysis of the standing issue.

65. See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970); Note, Overbreadth Review and the Burger Court, 49 N.Y.U.L. Rev. 532 (1974). For an example of the continued vitality of the doctrine, see Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). The doctrine was criticized by some members of the Court in Gooding v. Wilson, 405 U.S. 518 (1972), and denied in Broadrick v. Oklahoma, 413 U.S. 601 (1973). Broadrick involved a challenge to the state act prohibiting partisan political activities by government employees. Although the overbreadth doctrine was not applied, the Court found a special state interest in the statute and concluded that the statute's intrusion on protected activity was minimal. Id. at 615-18. The requirement that the overbreadth be substantial means that there must be numerous realistic applications of the statute to protected first amendment activity, rather than a mere hypothetical application to protected activity. Thus, the Broadrick standard remains applicable after Schaumburg to areas of conduct where the state possesses a special interest in regulation, but not in other cases involving substantial first amendment protected activities.
potential impact of the statute on hypothetical third parties. The rationale for the doctrine is that the regulation may inhibit the exercise of protected speech activity, invite prosecutions by law enforcement, or be used as a pretext for local officials to single out unpopular views for "special attention" under the statute. Free exercise of religion is as fundamental to liberty as freedom of expression. Indeed, it is a vital aspect of both personal autonomy and expression. Unquestionably, laws that interfere with the free exercise of religious beliefs and practices chill both the freedom to exercise religion and, in many cases, the willingness to pursue conscientious beliefs or to join a nontraditional religious order. Accordingly, the overbreadth doctrine should be applied in the free exercise area to allow those not personally coerced to raise the rights of religious minorities. The relief orders in all such cases would not necessarily require the wholesale invalidation of the overbroad regulation. For instance, a truant from public school could not have a court strike down compulsory education laws because of the failure of the laws to exempt the Amish or other conscientious objectors. Rather, the courts could establish an exemption from the challenged statute for religious minorities where such a construction would leave in place a regulation that would not chill free exercise. The problem with free speech and expression is the near impossibility of listing all of the protected activities that might be immune from a defectively overbroad rule, while a blanket exemption for religious objectors, as is often included in statutes, would prove effective. As a result, the practical effect of such a doctrine in the free exercise of religion area should be that legislatures will become more sensitive to religious practices and include religious exemptions in their Sunday closing statutes and ordinances where appropriate. Regardless of which technique is adopted, the rights of non-Sunday Sabbatarians should be permitted to be raised by Sunday worshipers and nonreligious individuals or groups.

B. Changing Standards of Judicial Review

*McGowan v. Maryland* is remembered less as a case of religious freedom or the lack thereof than it is for setting forth the basic standard of reviewing the exercise of legislative discretion when challenged under the equal protection clause. *McGowan* is and remains the basic standard rule that a "mere rational basis" is all that is needed to sustain an act of the legislature regulating economic activities. This deference may be explained in

68. See New Orleans v. Dukes, 427 U.S. 297 (1976) (push cart vendor law held to be an economic regulation subject to deferential review); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (minimal rationality scrutiny of land use controls under the due process clause); see also L. TRIBE, supra note 10, at 994-96. In light of the environmental conditions existing in today's urban America, the Court should reconsider the underlying rationality of Sunday closing laws. One could argue that Sunday closing is irrational when the goal of the legislature is an improvement in the environment and the health and safety of the public.
part by the historical evolution of Congress and the Court from the days of the Depression. As late as 1961 the Court was predominantly a "New Deal" Court. The center of judicial controversy was that the conservative Court, under Chief Justice Charles Evans Hughes, had second-guessed the decisions of Congress aimed at protecting society from the effects of the Depression. The liberal model of judicial review was one of deference to the legislature, an institution that in 1936 represented liberal values when compared to the relatively laissez faire philosophies of a majority of the Court. After World War II, the focus of the legislature shifted from issues of economic democracy. The dominant view of legislative autonomy continued, however, despite the increasing legislative intolerance of the 1950s. The experience of the "McCarthy era" and its preoccupation with loyalty, along with the "cold war," demonstrated that judicial deference for the popular will could threaten civil liberties. This philosoph-

Today grave concern exists over both air quality and the excessive consumption of energy. Critical needs for peak hour energy have caused utility companies to plead with customers to cease using appliances during peak afternoon hours. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). The sensible approach and one consistent with current goals of energy independence would be to have business and industry alter their schedules so as not to compete at peak energy consumption periods. Legislatures soon may be forced to require certain industries to remain open on Saturdays and Sundays and take weekdays off to conserve energy and avoid system overloads. The alternative is the importation of more fuel and construction of more power generating plants. Moreover, automobile pollution and the problems with our once clean air are exacerbated by the decrease in fuel efficiency occasioned by congested freeways. Work schedules staggered to avoid congestion are crucial. The alternatives of more highway construction or a shift to alternate modes of transportation appear irrational in light of the current policies of governmental austerity. This type of environmentally sensitive planning is actually mandated under the federal Clean Air Act, which requires each state to establish land use and transportation plans to permit the maintenance of certain minimum standards of air quality. 42 U.S.C. §§ 7401-7626 (Supp. 1979). See generally W. Rodgers, Environmental Law (1977).

In addition to the problems of pollution and energy consumption, the recreational capacity of the nation is being tested. Access to beaches, campgrounds, and parks will become even more difficult. As housing costs escalate along with the cost of transportation, the once-relevant Sunday closing laws may confine much of America to overcrowded and overpriced ghettos, unable to gain access to freeway ramps, places of recreation, or even decent shelter with which to enjoy the state-mandated day of family leisure. One approach to relieving this problem would be to shift work and recreation schedules to permit more extended use of public recreational facilities.

69. While only Justices Black, Frankfurter, and Douglas were appointed by President Roosevelt, the appointees of Presidents Truman and Eisenhower shared the experience of the Depression years and generally adopted a stance of legislative deference derived in part from the image of the legislature as a popular institution for progressive reform.


ically based standard of judicial review, resting on New Deal expediency, posed problems for the dismantlement of racial segregation and threatened the protection of the rights of unpopular political, religious, cultural, and racial minorities from the new intolerance of the legislatures.

Since *McGowan*, the Court has retreated substantially from the deferential treatment of legislative will in the context of equal protection. In more recent cases, the Court has altered its levels of scrutiny, rejecting the rational basis test when reviewing discrimination against judicially recognized suspect classes, such as racial minorities,72 and interference with fundamental rights.73 This two-tiered equal protection analysis was advocated as early as 1938 by Justice Harlan Stone in his famous footnote 4 in *United States v. Carolene Products Co.*,74 but his concept of "discrete and insular minorities" still was incubating when the Sunday closing cases were decided and has never been applied in a religious freedom context.75


73. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel held a fundamental right); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting held a fundamental right). The Court may be on the verge of identifying the right to pursue a livelihood as a fundamental right. In this regard, note the recent judicial innovations in the area of commercial free speech, in which the Burger Court has elevated the notion of commercial speech to a protected status under the Constitution. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); Bates v. State Bar, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Buckley v. Valeo, 424 U.S. 1 (1976). These cases used a much different standard of judicial scrutiny than that stated in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which the Court pronounced its legislative deference stance in the commercial speech area in upholding a legislative ban on handbill circulation. The rights of non-Sunday Sabbatarians to pursue their livelihood and quest for economic survival are important principles; a powerful policy argument can be made that the commercial speech cases should be applied to the free exercise cases to assure economic opportunity for those disadvantaged by restrictive laws and religious conscience. Otherwise, the scheme of laws forces an unfair choice between religion and livelihood. Certainly, the cavalier discussion of the economic impacts of Sunday closing laws in *McGowan* v. Maryland, 316 U.S. 420, 516 (1961), and *Braunfeld* v. *Brown*, 366 U.S. 599, 608-09 (1961), are out of step with the heightened sensitivity for economic freedom exhibited by the Burger Court. *See also* *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (heightened scrutiny under the interstate privileges and immunities clause when regulations that disparately affect non-residents touch on fundamental rights such as means to a livelihood); *Sailer Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (invalidating state statutory prohibition against female bartenders).

74. 304 U.S. 144, 152 n.4 (1938). The philosophy is that certain "discrete and insular minorities," including religious groups, are entitled to closer judicial scrutiny of discriminatory legislation due to their incapacity to participate effectively in the legislative process.75

75. The Burger Court has continued to adhere to this tiered approach to judicial scrutiny and actually has moved further from the standard of mere rationality applied by the more deferential Warren Court. While the Court continues to apply a rational basis test to business and economic regulation, it has adopted a middle tier of scrutiny in sex discrimination cases. Now, rather than approving any measure in which the legislative means arguably bear some rational relationship to a legitimate legislative end, the measure actually must serve an important governmental purpose. In the sex discrimination area, see *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976). *See also* *Ambach v. Norwich*, 441 U.S. 68 (1979) (alienage); *Lalli v. Lalli*, 439 U.S. 259 (1978) (illegitimacy); *Foley v. Connelie*, 435 U.S. 291 (1978) (alienage).
Two terms after *McGowan* and *Braunfeld* the Court in *Sherbert v. Ver-ner* did refuse to apply the rational basis test to economic legislation that had the effect of disadvantaging a religious minority. The Court invalidated the refusal of South Carolina to find eligible for unemployment compensation a Seventh Day Adventist who refused Saturday work. The disqualification of benefits, the Court held, restricted the plaintiff's free exercise of religion. Justice Brennan's majority opinion used language strikingly similar to Justice Stewart's dissent in *Braunfeld* to declare the disqualification invalid:

The [State] ruling forces [plaintiff] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

To condition the availability of benefits upon this [plaintiff's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

The Court continued by ruling that the state's interest in enforcing the benefit disqualification was not compelling enough to uphold the statute's constitutionality in the face of this religious infringement. By using a standard of judicial review somewhat higher than the rational relationship test, the Court found the state's interest in preventing fraudulent claims by people feigning religious objections to Saturday work "wholly dissimilar" to the compelling state interests upheld in the Sunday closing law cases. Less restrictive alternative means of achieving South Carolina's objectives were available. Moreover, the Court distinguished *Sherbert* from *Braunfeld* by noting that the Sunday closing laws upheld in *Braunfeld* imposed a "less direct burden" on religious freedom than the infringement imposed by South Carolina's unemployment benefits statute.

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77. *Id.* at 404. The Court employed an intense scrutiny under the equal protection clause in the *Sherbert* decision, a level of review that appears to be more demanding than that applied in *Braunfeld*. This compelling state interest examination previously was employed in *NAACP v. Alabama*, 357 U.S. 449 (1958) (protecting membership lists from broad disclosure demands). Ironically, Justice Harlan, the author of *NAACP v. Alabama*, wrote the dissent in *Sherbert*, arguing for a more deferential stance. *Sherbert* recently was approved in *Thomas v. Review Bd.*, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981).
78. 374 U.S. at 404, 406.
79. *Id.* at 406-07.
80. *Id.* at 407-08.
81. *Id.* at 407.
82. *Id.* at 408. The Sunday closing requirement may put some marginal non-Sunday Sabbatarian entrepreneurs out of business; others may be unaffected. Still others, preferring not to be open on weekends, will applaud the suppression of competition from those who otherwise might operate all seven days. Thus, the Court could conclude that the economic impact of the Sunday closing law is speculative, whereas the denial of benefits in *Sherbert* was a certainty. Historically, the Court has been more sensitive to the character of an act than to its practical consequences. While the losses from Sunday closing were seen in *Braunfeld* as an indirect result, the loss of benefits in *Sherbert* was direct and nonspeculative. If the Court, by use of the label "indirect" meant that businesses fail by poor management or the natural processes of the market, the relevant economic test should look to the similarly situated entrepreneur who is not a non-Sunday Sabbatarian. In a market composed of mar-
Justice Stewart’s concurring opinion in Sherbert emphasized quantitative impacts in comparing the unemployment statute with Sunday closing laws. Stewart believed the infringement on the plaintiff’s religious freedom in Sherbert to be “considerably less onerous” than the infringement imposed on non-Sunday Sabbatarians and upheld by the Court in the Sunday closing cases. Thus, he concluded that Braunfeld should be overruled explicitly because of the Court’s inconsistent reading of the free exercise clause. Justice Harlan, in his dissenting opinion, stated unequivocally that Sherbert overruled Braunfeld, reasoning that the secular purpose of South Carolina’s statute was even clearer than the Sunday closing law upheld in Braunfeld because it aimed to promote fiscal integrity.

The success of the “less restrictive alternatives” strategy in Sherbert suggests that Sunday closing laws have been allotted undue deference. They, too, are susceptible to such alternatives as a “one day in seven” closing law that would allow the non-Sunday Sabbatarian or anyone to decide which day to close. This analytical tool, the less restrictive alternative, has been applied in the first amendment free exercise context for at least twenty years and, in fact, was considered in McGowan. The problem with McGowan is not so much that the Court failed to investigate less restrictive alternatives to Maryland’s closing law, or to apply strict scrutiny, but, rather, that it accepted as compelling the secular justification for the law offered by the state. Maryland’s environmental and administrative justifications, by subsequent standards, would be judged rational, yet not compelling. Further, the argument of more difficult enforcement for a religious exemption is not compelling by even subsequent Warren Court decisions. The proper inquiry is whether the state’s important goal of having a quiet day when the entire family can assemble is compelling and whether an exemption for non-Sunday Sabbatarians or a “one day in seven” type of measure would preclude the state from achieving its objective. Such alternatives probably would not alter the basic character of Sundays or the employment practices of industry and commerce. The traditional Christian practice of Sunday Sabbath will remain pervasive, as

83. Id.
84. Id. at 417.
85. Id. at 421.
86. Id.
88. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940) (religious solicitation); Schneider v. Irvington, 308 U.S. 147 (1939) (religious solicitation).
proven by the experiences of jurisdictions that have avoided or abandoned Sunday closing laws. The practice of exempting non-Sunday Sabbatarians from a Sunday closing requirement cannot be demonstrated to destroy or even affect significantly the aims of a day of rest.

The Court's analysis of compulsory education and the problems of religious accommodation reveals a different degree of deference. In Wisconsin v. Yoder\(^9\) the Court held that the salutary state objective of universal compulsory education was not superior to the sincerely held beliefs of Amish parents that secondary education conflicted with their religious scruples.\(^2\) A rational or even a compelling interest simply is not enough to override religious freedom unless the state's objective is critical to health and safety and a no less restrictive alternative is available. Yet, the state's desire that families have a day together has been deemed more compelling than the societal goal of universal minimal educational standards. Granted, there may be cases where the state's health or safety concerns are compelling, as in compulsory vaccination, for example.\(^3\) Arguably, the refusal of religious minorities to be vaccinated against infectious diseases poses a different problem, as the general population might be exposed to harm. That an exception for non-Sunday Sabbatarians from the Sunday closing laws would cause a similar societal threat, a break in consistency, is a specious argument. All closing laws already contain extensive exceptions. The extent of exceptions in the Pennsylvania and Connecticut closing laws has prompted courts in those states to invalidate their Sunday closing statutes.\(^4\)

A final analogy to this problem is the Court's decision in Pruneyard Shopping Center v. Robbins,\(^5\) upholding the California Supreme Court's ruling that the state's constitution guaranteed the right to circulate petitions on the premises of a privately owned shopping center. In this case a group of high school students filed suit to enjoin the owners of a private shopping center from prohibiting access to the center for the purpose of circulating political petitions.\(^6\) In response to the students' first amendment free speech argument,\(^7\) the owners claimed that the California Supreme Court's decision amounted to an unlawful taking of their property under the fifth amendment, as applied to the states under the fourteenth.\(^8\)

The Court rejected the owners' claim, noting that only a few persons would be circulating in a place open to the public where thousands passed

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92. Id. at 234-35.
95. 447 U.S. 74 (1980).
96. Id. at 77.
97. Id. at 80.
98. Id. at 82.
on an hourly basis.\textsuperscript{99} While the character of the state's interference with
an owner's right to exclude might appear to constitute an unlawful taking,
the Court held that impact was so slight and the purpose of the permission
so important that no taking had occurred.\textsuperscript{100} In the same way, to excuse
that de minimis class of non-Sunday Sabbatarians from the Sunday clos-
ing laws would in no way threaten the goal of a common day of rest, only
the goal of symmetry.\textsuperscript{101} Their labors would blend easily with the much
larger class of exempted activities.

**C. Historical Basis for the Sunday Closing Statutes**

In \textit{McGowan v. Maryland} the Court emphasized the relevancy of the
historical basis of Sunday closing laws in determining whether such stat-
utes infringed the first amendment's establishment clause.\textsuperscript{102} Attempts at
structuring constitutional norms upon the historical record, however, have
proved to be problematic at best.\textsuperscript{103} As historian Edward Hallett Carr has
written:

Our examination of the relation of the historian to the facts of history
finds us . . . in an apparently precarious situation, navigating deli-
cately between the Scylla of an untenable theory of history as an ob-
jective compilation of facts, of the unqualified primacy of fact over
interpretation, and the Charybdis of an equally untenable theory of
history as the subjective product of the mind of the historian who es-
tablished the facts of history and masters them through the process of
interpretation, between a view of history having the centre of gravity
in the past and the view having the centre of gravity in the present.\textsuperscript{104}

Carr indicates that the problems relate to the presence or absence of a
comprehensive historical record. While both religion clauses of the first
amendment are historically based, that base is not tied to an easily deci-
pherable record. Ample room exists for the current Court to eschew the
historical record and identify a religious motive in the maintenance of
Sunday closing laws.\textsuperscript{105} Realistically, as in the race area, the Court proba-

\textsuperscript{99} \textit{Id.} at 83-84.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} The justification for the government's action in \textit{Pruneyard} is insubstantial. Other
cases may be overdue for reversal. \textit{See e.g.}, Reynolds v. United States, 98 U.S. 145 (1878)
(polygamy conviction of Mormon). Sunday closing exemptions seem much closer to the
exemption of Jehovah's Witnesses from an obligatory flag salute. West Virginia State Bd. of

\textsuperscript{102} \textit{See} text accompanying note 21 \textit{supra}.

\textsuperscript{103} \textit{See} L. Tribe, \textit{supra} note 10, at 816-18.


\textsuperscript{105} While enactment of the Sunday closing laws was unquestionably the work of reli-
gious zealots, the Sunday closing cases can lead to the conclusion that even the maintenance
of current restrictions is substantially motivated by a similar religious fervor on the part of
legislatures and the public. The philosophy of legislative deference, symbolized by \\textit{Mc-
gowan}, precludes the Court from closely scrutinizing the motives of state legislatures so
long as any set of facts could justify the measure. \textit{McGowan v. Maryland}, 366 U.S. 420,
468-70 (1961) (Frankfurter, J., concurring). The Warren Court also refused to question the
underlying motives of a draft card burning statute in \textit{United States v. O'Brien}, 391 U.S. 367,
bly will be respectful of the historical work of earlier Justices; other commentators, however, have questioned the history of Sunday closing laws as announced by the Court in *McGowan* and its companion cases.\(^{106}\) As Professor Tribe has indicated, "[t]he historical record is ambiguous."\(^{107}\) The meaning of arguments made over the centuries that a day of rest serves secular health needs in addition to spiritual needs is not clear. Does the fact that reformers of social conditions would use religion to seek their ends affect how we should view the arguments for Sunday closing laws? Might a Christian zealot use a secular public welfare argument to mask the true purpose of Sunday closings? The history of these laws is not dissimilar to the morass of history surrounding the Civil War constitutional amendments, a record found to be inconclusive in *Brown v. Board of Education*\(^ {108}\) and demonstrated to be conflicting in *Jones v. Alfred H. Mayer Co.*\(^ {109}\) In *Brown* the Court stated no specific historical basis under the fourteenth amendment's equal protection clause for its ruling that racial segregation in the public schools is unconstitutional.\(^ {110}\) The Court in *Jones* considered the history of the Civil Rights Act of 1866 in an attempt to justify its conclusion that Congress had the power to prohibit private discrimination in housing.\(^ {111}\) The propriety of extending reconstruction civil rights legislation to private discrimination was, at best, clouded by the voluminous and often contradictory record.\(^ {112}\) Eschewing the historical arguments, the Court ruled that private discrimination in housing was prohibited.

This discussion should not lead to the conclusion that historical data should be ignored. Often history is not so murky and can guide interpretation. Historical traditions may well provide insight to those attempting to interpret open-ended edicts such as the due process and equal protection clauses. The record may contain valuable information about the ideals of society and its expectations of fairness. While it may not be dispositive,

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In a different context, but applicable by analogy, the Burger Court, in its interpretation of the fourteenth amendment's equal protection clause, has moved away from the effects analysis of the Warren Court and now requires a finding of intentional or purposeful discrimination in government practices challenged under both the equal protection clause and the fifteenth amendment. For equal protection cases, see Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). For a case decided under the fifteenth amendment, see City of Mobile v. Bolden, 446 U.S. 55 (1980) (racial effect of at-large elections insufficient to establish constitutional violation).


110. 347 U.S. at 489-95.

111. 392 U.S. at 431-37.

112. *Id.* at 435-37.
history may help identify the goals of the framers and our civilization. History cannot aid decision making, however, when it offers only unverified recollections. This is all that is available in the matter of Sunday closing laws; thus, the Court should base its conclusions on other types of information.

When the Court established in *Runyon v. McCrary*\(^{113}\) that discrimination in admissions to private schools on the basis of race was properly proscribed by a congressional enactment,\(^{114}\) Justice Stevens indicated that he had substantial doubts about the historical truths and the result in *Jones*.\(^{115}\) Nevertheless, he joined the Court in endorsing the *Jones* history because the result of legitimizing private racial discrimination would be contrary to his understanding of today's mores.\(^{116}\) Ironically, retention of an assumed inaccurate historical record resulted in protection of minorities from majority tyranny, while the retention of the historical image established by the Sunday closing cases carries quite the opposite result. Despite disparate interpretations of the historical origin of Sunday closing laws, upholding a restriction of religious liberty on the basis of unverifiable historical recollections is troubling, particularly so because religious tolerance has little historical precedent.\(^{117}\)

**D. Clash Between Free Exercise and Establishment Clauses**

Throughout these religion cases a tension exists when the Court attempts to discuss establishment clause issues in a vacuum removed from the problems of the free exercise clause.\(^{118}\) This difficulty arises, in part, from the confusion over the meaning of the establishment clause. Most of the problems, however, stem from the Court's insensitivity toward diversity in religious practices and a gnawing desire to identify a simplistic "neutral principle." Arguably, two underlying premises of *McGowan* and *Braunfeld* are a concern that exempting the non-Sunday Sabbatarian from a Sunday closing law would create a monopoly or governmental favoritism for one or more religious sects and the belief that the establishment clause requires strict neutrality.\(^{119}\) Such neutrality prohibits statutory reli-

\(^{113}\) 427 U.S. 160 (1976).

\(^{114}\) Id. at 172-73 (racial exclusion practiced by schools was classic violation of 42 U.S.C. § 1981 (1976)).

\(^{115}\) 427 U.S. at 189-92 (Stevens, J., concurring); see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

\(^{116}\) Id.


gious classifications, whether they burden or benefit specific religions, as well as any exemption based upon religious status that would violate an equal protection neutrality principle. This result would be logical if the first amendment contained only an establishment clause; there is, however, also a free exercise clause. In each case both of these important clauses must be accommodated. Government must not allow its so-called religion-blind laws to interfere with religious practice; the free exercise clause should be superior.

Few would argue that the need for decorum in a courtroom requires an orthodox Jew to remove his hat, although others may be made to do so. Creating an exception to the neutral rule, however, would violate literal notions of strict neutrality. What should be the result if election day falls upon a high holiday of a minority faith? Strict neutrality would force a decision between religion and state, precisely the decision that the establishment clause was intended to prevent. This notion of strict neutrality was certainly rejected in \textit{Sherbert v. Verner}, in which the state was required to make an exception on behalf of non-Sunday Sabbatarians from the neutral rules of the state unemployment compensation law. Any remnant of the simplistic quest for neutral principles in a religion-blind, no-exemptions rule was put to rest in \textit{Wisconsin v. Yoder}, in which an exemption from compulsory education was mandated under the requirements of the free exercise clause.

Professor Tribe has identified three major interpretations of the framers' intent in creating the establishment clause. First, Roger Williams advocated a system whereby state aid to religion without control would provide the ideal balance. Secondly, Thomas Jefferson's view was the "wall of separation," or strict neutrality view, in advocating government avoidance of any involvement in religious affairs. Finally, James Madison's position precluded governmental interference with religion, but emphasized that government should not place any direct or indirect burdens on individuals because of their religion or beliefs.

While Professor Tribe suggests that the real purpose of the establish-

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120. Zorach v. Clauson, 343 U.S. 306, 312-14 (1952); P. KURLAND, RELIGION AND THE LAW 18 (1962); Kurland, Of Church and State and the Supreme Court, 29 U. CHI. L. REV. 1 (1961); see P. KAUPER, RELIGION AND THE CONSTITUTION 45-79 (1964); Louisell, Does the Constitution Require A Purely Secular Society?, 26 CATH. U.L. REV. 20 (1976). There is also the close analogy of the need to guarantee both equality and liberty. Equality is achieved when everyone's liberty is curtailed. Liberty may be abridged only at the point that fair and equal treatment of others is seriously endangered.

121. See note 9 supra.


125. See notes 76-86 supra and accompanying text.

126. 406 U.S. 205 (1972); see notes 91-92 supra and accompanying text.

127. 406 U.S. at 234-35.

128. See L. TRIBE, supra note 10, at 817. Tribe refers to this as the "evangelical view."

\textit{Id.} at 816.

129. \textit{Id.} at 816-19.

130. \textit{Id.}
ment clause was to keep the federal government out of state religion,131 we are left with the Court's history: a blend of Jefferson's and Madison's views that seek a church-state separation and uninhibited free exercise of religion, potentially incompatible goals that require sensitive accommodation. The problem raised by the government's providing chaplains in the military is illustrative. Hiring chaplains and financing their missions could be said to be beyond the power of a nation with an establishment clause; however, to deprive the conscript or the patriotic religious adherent of access to spiritual guidance and the sacraments of his or her faith can be seen to represent an invasion of the soldier's right to exercise his religious liberty freely. Such an unfair choice, serving one's country or one's conscientious beliefs, is not the type that a nation with a free exercise clause should impose upon its citizens, yet this is precisely the type of choice that was imposed on non-Sunday Sabbatarians in McGowan v. Maryland. This overlap of the two clauses was observed recently by the Court in McDaniel v. Paty,132 wherein the Tennessee Constitution barred ministers from serving in the legislature. While the Court was split over the precise rationale for its holding, the opinions agreed that a person should not be endowed arbitrarily with disabilities based on religious or philosophical beliefs. The status of minister is simply an indication of the depth of sincerity of one's religious beliefs. Neither McGowan nor Braunfeld engaged in such a sensitive balancing; thus McDaniel, as well as Sherbert and Yoder, suggest a reconsideration of the Sunday closing law cases.133

131. Id. at 819.
133. In Thomas v. Review Bd., 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981), Indiana denied unemployment compensation to a Jehovah's Witness who voluntarily left work for religious reasons upon discovering that he was constructing the contemporary equivalent of the Sherman tank. The Supreme Court of the United States reversed the decision of the Indiana Supreme Court and held that the denial of benefits violated the petitioner's free exercise right. The Court noted that the fact that other members of the church did not object to working on tanks did not preclude the petitioner from basing his opposition on religious beliefs. The infringement of his liberty was not less just because others of the same sect disagreed. In so deciding, the Court underscored both the validity and duty of states' accommodation of reasonable religious practices. Sensitive accommodation may loosen further the doctrinal foundation of Braunfeld and McGowan.

The alternative to religious accommodation is the creation of a neutrality that may be hostile to religion. Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970); see L. Tribe, supra note 10, at 821. The first amendment certainly was not intended as a preference for atheism. Zorach v. Clauson, 343 U.S. 306, 314 (1952). Professor Tribe argues that what is compelled by the free exercise clause should not be forbidden by the establishment clause. L. Tribe, supra note 10, at 827-28, 839-40.

The cases holding that conscientious objectors are exempt from military duty lend credence to this approach, although they were decided on statutory grounds. See Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970). While Justice Harlan's opinion in Welsh suggested that one has no constitutional right to conscientious objector status, that view may be based primarily upon the assessment of a compelling government interest in self-preservation. Id. at 360 n.12 (Harlan, J., concurring). Sherbert suggests that such dicta are flawed if based on the establishment clause and are troublesome under the free exercise clause for failing to discuss less restrictive alternatives. Some have argued that neutrality is not violated when a measure contains a secularly relevant factor. See L. Tribe, supra note 10, at 821-22; Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle, 81 Harv. L. Rev. 513, 519
III. ACCOMMODATION OF RELIGIOUS FREEDOM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The religious freedom issues that surround the Sunday closing law cases are related tangentially to the accommodation of religious freedom under federal statutory law. The Civil Rights Act of 1964 proscribes employer discrimination in the workplace on the basis of an employee's religion. Although cases arising under this section are voluminous, of particular interest is the Court's handling of religious freedom claims under the Sunday closing laws compared with its handling of claims under title VII relating to the issue of to what extent an employer must accommodate an employee's religion when the employee cannot for religious reasons work on a scheduled workday that happens to fall on his or her Sabbath. The Court considered this precise issue in 1977 in Trans World Airlines, Inc. v. Hardison.

In Hardison the Court upheld an employer's discharge of a member of the Worldwide Church of God for his religion-based refusal to work on Saturday. Speaking for the Court, Justice White noted the statutory definition of religion in title VII under the 1972 amendments "includes all aspects of religious observance and practice, as well as belief" but observed that some discrimination may be allowed if "an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Although he found little statutory or administrative guidance as to the extent of the employer's accommodation obligation, Justice White ruled that the employer's discharge of Hardison did not violate title VII because the employer's efforts to accommodate Hardison's religion were reasonable in light of the employer's adherence to a collectively bargained seniority system. The Court defined "undue hardship" as something greater than any de minimis cost necessary to accommodate Hardison's religious justification for refusing to work on Saturday. These additional costs were present in this

(1968). The avoidance of discrimination based upon religion could be regarded as such a secular goal. See generally Note, Establishment Clause Neutrality and the Reasonable Accommodation Requirement, 4 Hastings Const. L.Q. 901, 931-34 (1977).

   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to
discriminate against any individual with respect to his compensation, terms,
conditions, or privileges of employment, because of such individual's race,
color, religion, sex, or national origin.


138. 432 U.S. at 75.

139. Id. at 77.

140. Id. at 84.
case, according to the Court, because to require TWA to pay Hardison for his Saturday off would create "unequal treatment of employees on the basis of their religion" in contravention to the literal wording of title VII.\textsuperscript{4}

Arguably, the employer's act was neutral, and if the employer had been the state, no finding of unconstitutional religious discrimination would have been made. Title VII, however, contemplates the potential discriminatory effects of neutral employment practices on religious groups and requires more than the employer's not hiring, firing, or making promotion decisions because of the applicant's or employee's religion. The statute demands that the employer accommodate the free exercise practices of an employee except when the result would constitute an "undue hardship."\textsuperscript{142} Such an "undue hardship" seemingly was presented by the Hardison facts. The Court found that the existence of a collectively bargained seniority system, whereby no employee had to forego a Saturday off for Hardison, and a neutral work rule prohibiting more than one job transfer within a six-month period constituted more than a de minimis burden.\textsuperscript{143} Justice Marshall, in his dissent, aptly characterized the majority opinion as presenting "the cruel choice of surrendering . . . religion or . . . job."\textsuperscript{144}

\textsuperscript{4} Id. at 84-85.

\textsuperscript{142} See 42 U.S.C. § 2000e(j) (1976). Professor Tribe suggests that the phrase is equivalent to the rule of\textsuperscript{141} Sherbert that the state must accommodate if such requires "no significant sacrifice." L. Tribe, supra note 10, at 853. The provision was established in the 1972 amendments to title VII. Its antecedent was a regulation issued by the Equal Employment Opportunity Commission (EEOC), the entity charged with enforcement of title VII. In 1966 the EEOC initially issued a rule requiring accommodation "where such accommodation can be made without serious inconvenience to the conduct of the business." 31 Fed. Reg. 8370 (1966). The rule was amended in 1967 to require accommodation "where such accommodation can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(b) (1980). In light of the evolution of the rules, the statute appears to require more than inconvenience on the part of the employer, yet the Hardison interpretation appears to be a relaxation, equating undue hardship with mere inconvenience or anything more than a de minimis burden.

An alternative formulation might be to require accommodation unless the refusal is "reasonably necessary in support of an important or substantial interest." Moskowitz v. Wilkinson, 432 F. Supp. 947, 949-50 (D. Conn. 1977) (religious beliefs outweigh prison requirement that inmates shave their beards). The standard in any case seems to require something closer to "compelling" or "necessary" rather than merely "rational."

\textsuperscript{143} 432 U.S. at 68.

\textsuperscript{144} Id. at 87 (1977) (Marshall, J., dissenting): "As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." Id. Hardison may represent a greater concern for nonreligious employees than the problems of accommodation and the intent of the statute. Note, Accommodation of Employee's Religious Practices: Trans World Airlines, Inc. v. Hardison, 15 UWB. L. ANN. 311, 321-23 (1978). Justice Marshall did not attack the collectively bargained seniority system challenged in Hardison, probably because title VII specifically recognizes and immunizes facially valid seniority plans from scrutiny under title VII. See 42 U.S.C. § 2000e-2(h) (1976). The Court also had validated a seniority plan under the provision three weeks before the Hardison decision so as to bar relief to a class of blacks previously discriminated against. See Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). This protection of seniority rights over those who have been discriminated against in the past creates hardships and unfairness. With a recession-plagued economy, the last hired, first fired practice tends to burden inordinately both the recently hired black and the non-Sunday Sabbatarian. Only minimal interference with seniority and other collectively bargained agreements is necessary to accommodate religion or compensate for injuries resulting from religious or
The rationale for not bending a work rule or even a seniority agreement to assure accommodation is difficult to perceive because Hardison would have worked a different shift and on popular holidays. He even was willing to work overtime at regular pay to compensate TWA for having to pay overtime compensation to another employee until he acquired sufficient seniority to opt out of a Saturday requirement.

Fortunately, the lower court decisions under title VII since Hardison have not been so unsupportive of the needs of religious minorities and non-Sunday Sabbatarians. While federal and state courts have been anything but uniform in their treatment of problems of accommodation, some trends are emerging. An employer must accommodate reasonable employee requests to be absent on their Sabbath or other religious holidays where no collectively bargained seniority agreement to the contrary exists. Additionally, conscientious religious objections to joining or supporting a union must be honored. Nonetheless, arguments that specific job assignments violate religious scruples and create special burdens racial discrimination. Such compensation is a significant goal, one that is compelling and necessary if the equality, liberty, and tolerance upon which the Constitution is based are to prevail.

Administrative costs necessary to provide accommodation are presumed to be de minimis.


Administrative costs necessary to provide accommodation are presumed to be de minimis.


Plaintiffs have been unsuccessful in seeking an exception from military uniform requirements. Prisons accommodate reasonable requests for special diets, at least those prisons in the federal system. The right of a religious group to be recognized and obtain access to the prison chapel is unsettled. Those whose religion dictates the assumption of a new name cannot be penalized. As title VII and the emerging constitutional requirement of accommodation converge with the civil rights revolution of recent decades and its concomitant freedom to participate in nontraditional faiths, the courts may expect to be the focal point for resolving the accommodation question.

Jehovah's Witness to teach patriotic curriculum including the pledge of allegiance; Chapman v. Pickett, 491 F. Supp. 967 (C.D. Ill. 1980) (Black Muslim prisoner excused from handling pork while on kitchen duty); Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979) (mere inconvenience to allow Roman Catholic Internal Revenue Service employee to disqualify himself from processing exemption application of abortion advocacy group).


5. Compare Cruz v. Beto, 405 U.S. 319 (1972) (prison officials must accommodate religious needs of Buddhist), with Jones v. Bradley, 590 F.2d 294 (9th Cir. 1979) (self-proclaimed pastor of the Universal Life Church denied access to chapel and right to perform prisoner marriages; however, prisoner failed to request alternative room with less security problems and to present an outside sponsor for church). The underlying problem in Jones was that the prison officials believed that there was no intent to use the chapel for religious purposes. 590 F.2d at 296. This raises the spectre of groups that claim religious status in the face of traditional suspicion of new religions. No attempt will be made here to resolve the problem of defining religion except to warn of the dangers. The focus should be upon the sincerity of the adherent and the centrality of questioned practice in light of compelling state interests. For the problem of one group, the Church of the New Song, compare Church of the New Song v. Establishment of Religion on Taxpayers Money in the Fed. Bureau of Prisons, 620 F.2d 648 (7th Cir. 1980) (res judicata that church is not legitimate), with Loney v. Scurr, 474 F. Supp. 1186 (S.D. Iowa 1979) (sincerity of Church of the New Song identified).


7. In Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782 (S.D. Cal. 1980), the court held that the accommodation requirement of title VII of the 1964 Civil Rights Act was unconstitutional. The underlying rationale for judicial insensitivity toward the plight of the nonconforming minority is captured in Judge Learned Hand's opinion in Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953):

The First Amendment protects one against action by the government ... but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. ... We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the...
IV. ANALOGY TO RACIAL DISCRIMINATION

The problems of the racial minority group member in obtaining equal opportunity bear a certain resemblance to the treatment of religious minorities.\textsuperscript{158} Initially, there is the similarity of exemption from work rules

sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

(quoted in \textit{Anderson}, 489 F. Supp. at 791). The popular sentiment of the "melting pot" theory whereby all in a democracy should engage in assimilation of majority values, practices, and beliefs is, in fact, an anathema to the concept of a free society.

The court in \textit{Anderson} used the theory of entanglement, as the Civil Rights Act invited inquiries into the sincerity of religious beliefs, but such an inquiry is not a violation of the establishment clause. See \textit{United States v. Ballard}, 322 U.S. 78 (1944); L. Tribe, \textit{supra} note 10, at 859-80. The concern of the court in \textit{Anderson} seems to be purely administrative, precisely the concern of Justice Frankfurter with the making of exceptions for non-Sunday Sabbatarians. \textit{McGowan v. Maryland}, 366 U.S. 420, 516 (1961) (Frankfurter, J., concurring).

The constitutionality of the accommodation provision of title VII, however, was implicitly validated in \textit{Trans World Airlines, Inc. v. Hardison}, 432 U.S. 63 (1977). See also \textit{Gavin v. Peoples Natural Gas Co.}, 613 F.2d 482 (3d Cir. 1980).

While this Article identifies the accommodation clause of title VII to be at least constitutional, and arguably mandatory, despite decisions such as \textit{Anderson}, the troubling problems of applicability of title VII to churches and their related activities will not be discussed extensively. Although National Labor Relations Bd. v. Catholic Bishop, 440 U.S. 490 (1979), ruling that the National Labor Relations Act was inapplicable to parochial school teachers on statutory grounds, suggests that the establishment clause prohibition of excessive entanglement constitutionally might preclude such regulation, this should not mean blanket immunity from government regulation, including the Civil Rights Act. Such immunity might mean that religious entities would be free to discriminate against other minorities. Even if room for debate exists as to whether some oversight of charitable tax exemptions is compatible with free exercise and establishment, there can be little doubt that churches must comply with fire codes, trash dumping, and other environmental and safety laws. Nevertheless, difficult conceptual problems arise when sex and race discrimination laws are applied to religious entities. Can a sect refuse to appoint women priests? Can a church refuse to hire a janitor not of the faith? What if the refusal is for the same position but at the church school? What if the company that makes the books for the school is owned by the church: can it refuse to hire the nonmember janitor? What if the diversified church that owns the lumber mill or timber operation that supplies the paper for the school books and hymnals? Common sense dictates that this "House that Jack Built" scenario requires some sensitive balancing. The starting point could be the concept developed by the Court in \textit{National League of Cities v. Usery}, 426 U.S. 833 (1976), in which the problem of federal regulation of state government activities was resolved by the standard of autonomy for essential state functions. Religious autonomy should be determined by reasonable standards of sincerity and centrality so that essential religious functions would be immune from nonessential state regulation. Admittedly, this response is not perfect. It probably would satisfy the problem of ministerial appointments or even religious school teacher appointments, but the situations of janitors and others are less clear. Churches could well argue that the role models exposed to children should be the faithful. While the arguments as applied to the book publisher or lumber mill become tenuous, they are more persuasive when applied to a religious commune. I would urge autonomy for the latter, if sincere. Like all areas of religious freedom, the questions raised here cannot be resolved by simplistic neutral principles; there must be an accommodation. \textit{Hardison} implies the validity of the accommodation provisions of title VII: the Court, however, may be avoiding the constitutional question. \textit{Pfeffer, Freedom and or Separation}, 64 MINN. L. REV. 561, 577 (1980).

\textsuperscript{158} The systematic abuse of the black in America is in no way equated with the insensitivity visited upon minority religious sects. See generally \textit{J. Kushner, supra} note 62. A parallel exists, however, in the philosophical and practical nuances of the developed constitutional jurisprudence wherein unpopular minorities consistently are denied the full measure of fairness that our nation ought to provide.
or Sunday closing laws, arguably a special preference, to the problem of affirmative action that arose in University of California Regents v. Bakke. In Bakke the university set aside seats in its medical school for qualified minority applicants to correct for underrepresentation in the profession and past societal discrimination. Both the religious and racial discrimination questions raise the issue of preference. A majority of a very divided Court in Bakke held that affirmative action, not restricted to narrow areas of remedial relief for victims of acts of discrimination, constitutes special treatment not envisioned by the Constitution or the civil rights laws. Nevertheless, a differently constituted majority endorsed the concept of affirmative action and the principle that race requires the government to accommodate programs devised to remedy a discriminatory record. Thus, the Court approved the use of preferences, although not quotas, to fill a specific number of places in the class.

The Constitution on its face speaks of rights such as equality; it does not speak of remedies. This omission has caused the Court considerable difficulty in distinguishing the two. Where egregious violations of the Constitution have occurred, as has been the case with blacks, achievement of equality requires special remedies that might amount to temporary preferences. The comparison that can be drawn to the religious context is that in a nation dominated by practices that emanate from traditional Christian religious values, the achievement of true religious liberty as well as equality may require preferences or exceptions from strict neutrality such as those approved in affirmative action legislation and racial remedial

159. See, e.g., Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961). Religious preferences are discussed in Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782 (S.D. Cal. 1980). In California Teachers Ass'n v. Board of Trustees, 70 Cal. App. 3d 431, 138 Cal. Rptr. 817 (1977), the court refused to allow a Jewish teacher to use sick pay allotted to "personal necessity" for the religious observance of Rosh Hashanah, ruling the requested treatment to be a windfall for religious adherents who would receive six days of paid holiday. Another way to look at the result is that those with religious scruples receive a lower pay than those who shun observance. Six days allotted to emergencies and necessities would seem appropriate to religious observance and a proper accommodation. All employees would lose pay when absences, due to religious scruples or personal hardship, exceed the allotment. While this does not begin to satisfy the orthodox Jew who must observe as many as 112 holy days, such an accommodation might not be an "undue burden" as the nation moves towards the four-day work week. Even as sensitive a scholar in this field as Justice William Brennan has expressed reservations about substantial accommodation. Sherbert v. Verner, 374 U.S. 398, 410 (1963). The California Teachers case was decided on purely statutory grounds, although county counsel had argued that any special exemption would violate the establishment clause. See also Brown v. Stone, 378 So. 2d 218 (Miss. 1979) (invalidation of state statutory exemption from vaccinations under the establishment clause), cert. denied, 101 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).


162. Id. at 272. Justices Brennan, White, Marshall, and Blackmun, in separate opinions, concurred with Justice Powell.

163. J. Kushner, supra note 62, at 116-19. While the thirteenth and fourteenth amendments arguably permit rather than require affirmative action, the free exercise clause mandates accommodation.

164. Fullilove v. Klutznick, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) (sustaining the 10%
agreements.165

Another common thread between the free exercise cases and the racial
discrimination cases is the difficult requirement of proving discrimination.
The establishment clause inquiry into purpose and effect, under 
\textit{McGowan}, is a deferential rational basis test. Free exercise, under 
\textit{Braunfeld} and \textit{Sherbert}, is judged by the same standard as racial discrimination, that
is, strict scrutiny; the operation of that standard in the racial context, how-
ever, requires a clear showing of purpose or intent, not simply discrimina-
tory effect. Thus, proof of a violation becomes a formidable task.166 This
evidentiary problem is what makes litigation of housing and school segre-
gation cases arduous.167 The intent requirement allows discriminatory ef-
facts to be ignored. Religious exemptions, on the other hand, are judged
by an effects test or a test that recognizes that a practice will, with substan-
tial certainty, impose a discriminatory burden. Application of the religious
liberty model to the race area would result in a significant benefit for
plaintiffs. Its use would help ensure that discrimination and its effects are
not the result of insensitive realities of "color blindness."

Moreover, the proof problem also arises in employment discrimination
claims brought by racial and religious minorities. The motive for discrimi-
natory action or inaction rarely is evident. Thus, a sophisticated employer,
one capable of masking business motives, may make intent extremely diffi-
cult to establish. As a result, in order to prevail a plaintiff often will be
required to present dramatic evidence of discriminatory results that could
be explained by nothing other than racism or religious bigotry.

V. CONCLUSION

The 1961 Sunday closing cases have outlived their limited rationality.
Subsequent doctrinal evolution expanding citizens' standing and heighten-
ing the scrutiny of judicial review make a strong case for reconsideration,
as do current environmental conditions. While the Court may be cautious
in overturning established precedent, legislators should be vigilant in de-
termining the constitutionality of their acts. Religious fervor and business
protectionism probably will cause the retention of many Sunday closing
laws; enlightened legislators, however, should strive to deregulate religious
liberty.

A reconsideration of the Sunday closing cases and the problem of the
unaccommodated non-Sunday Sabbatarian casts light on the fundamental
conflict between the dictates of nonestablishment and free exercise of reli-
gion. To facilitate free exercise and to assure that the law acknowledges
diversity and freedom, the Sunday closing cases illustrate why the free ex-

\footnotesize{165. United Steel Workers of America v. Weber, 443 U.S. 193 (1979) (upholding affirma-
tive action hiring preferences contained in a collective bargaining agreement).
166. See J. Kushner, supra note 62, at 98-110, for a discussion of the problems of proof.
requirements), with Hills v. Gautreaux, 425 U.S. 284 (1976) (housing desegregation).}
exercise clause should be accorded superior status when claims of violation of church/state separation arise.

The conflicts over religious liberty are not resolved by simple principles. Sensitive balancing of the concerns of religious adherents and the value of separation will continue to be required, just as they are required in interpreting other first amendment rights. The United States Supreme Court has been increasingly vigilant in protecting the rights of religious minorities. Recent developments of the Burger Court suggest an evolution toward increasing that protection to its most advanced status yet. Democracy and the first amendment require that dissenting religious views be afforded the same rights enjoyed by the majority. These principles should compel the Court to reevaluate religious liberty questions, including accommodation and the Sunday closing laws, as it moves toward articulating the central meaning of religious liberty.