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Freedom of Religion: Recent Sunday Closing Laws Cases

John E. Donaldson
William & Mary Law School

FREEDOM OF RELIGION AND THE RECENT SUNDAY CLOSING LAWS CASES

JOHN E. DONALDSON

Freedom of religion as a constitutional right has its basis in the First Amendment, which also guarantees the freedoms of speech, press and assembly.[1] These liberties are so fundamental that the prohibitions upon Congress imposed by the First Amendment are held applicable to the States under the due process clause of the Fourteenth Amendment.[2] The unique significance of these liberties as a limitation on governmental activity was well expressed in *West Virginia Board of Education* v. *Barnette*,[3] where the Supreme Court of the United States, in overruling *Minersville* v. *Gobitis* and invalidating a West Virginia law, which in its application required a Jehovah's Witness to salute the flag or risk expulsion from public school, said:

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth Amendment is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the States may lawfully protect.[4]

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[1] The First Amendment is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assembly, and to petition the Government for a redress of grievances."

[2] Cantwell v. Connecticut, 310 U. S. 296 (1940).

[3] 319 U. S. 624 (1943).

[4] *Id.* at 639.

Thus under the reasoning of the Barnette case, First Amendment liberties in terms of due process requirements are unique, and a State may not transgress them merely by virtue of the existence of a "rational basis" for so doing. More is required than this, and the requirement is stated in terms of a "grave and immediate danger" test. In the language of the Court in *Murdock* v. *Pennsylvania*, "Freedom of press, freedom of speech, freedom of religion are in a preferred position."[5]

Freedom of religion as guaranteed under the First Amendment encompasses two specific rights, which are apparent from the express language of the Amendment. First, each person has the right that no religion be preferred by the government over others, that there be no laws "respecting the establishment of a religion." Secondly, each person has the right to the free exercise of religion, for laws forbidding the free exercise of religion are proscribed. Does freedom of religion, encompassing as it does the two specific rights mentioned above, still enjoy the same high regard by the Supreme Court that it did in the *Barnette* case?

In the summer of 1961 the Supreme Court decided the cases of *McGowan* v. *State of Maryland*,[6] *Braunfeld* v. *Brown*,[7] *Gallagher* v. *Crown Kosher Super Market of Massachusetts*,[8] and *Two Guys from Harrison-Allentown* v. *McGinley*.[9] These cases involved the validity of the Sunday closing laws of Maryland, Pennsylvania and Massachusetts, and in sustaining these laws the Court employed reasoning from which it is evident that freedom of religion encompasses less today than it did at the time of the *Barnette* case. Of the four cases decided, *McGowan* and *Braunfeld* are of greater importance because of the lengthy treatment given to the religious issues. *Gallagher* and *Two Guys* follow the reasoning of these cases on the religious issues and reach the same result. In *McGowan* the

[5] 319 U. S. 105, 115 (1943).

[6] 366 U. S. 420 (1961).

[7] 366 U. S. 599 (1961).

[8] 366 U. S. 617 (1961).

[9] 366 U. S. 582 (1961).

appellants, inasmuch as they did not allege an abridgement of the free exercise of *their* religion, did not have the standing to raise that issue.[10] The Court consequently expended most of its efforts on the establishment question. In *Braunfeld* the appellants were Jewish and thus had standing to raise the free exercise issue. Consequently the Court dealt with this issue extensively and adopted the reasoning of the *McGowan* case on the establishment question. In these latter cases the Court decided that the closing laws in question were not laws respecting the establishment of religion and that as applied to a Jew or Sabbatarian they did not prohibit the free exercise of religion.

Purposes of Sunday Closing Laws

Before resolving the constitutional issues presented by the closing laws the Court went into a lengthy study of the history of the closing laws. Although finding that the laws were clearly religious in origin and were manifestly designed to aid Christianity, the Court found that the laws, interpreted in the light of present legislative purposes, are designed to establish

> . . . a day of community tranquility, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week.[11]

The Court thus found a secular purpose in the laws. It then found that the laws were devoid of any religious purposes. It is difficult to reconcile this conclusion with the obvious fact that these laws are well received by the Christians who constitute a majority in most political subdivisions, and to whom the legislatures are principally answerable. The Maryland statute in question is of significance in this regard. By its express provisions certain activities otherwise prohibited, are permitted on Sunday afternoons and late evenings.[12] It seems more than coincidental that Christian church services are held before noon and in the early evening on Sundays.

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[10] 366 U. S. 420, 429 (1961).

[11] 366 U. S. 599, 602 (1961).

[12] 366 U. S. 420, 445 (1961).

Justice Douglas, in his dissenting opinion, had this to say of the conclusion reached by the majority:

> The Court picks and chooses language from various decisions to bolster its conclusion that these Sunday laws in the modern setting are "civil regulations." No matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities. After all, the labels a State places on its laws are not binding on us when we are confronted with a constitutional decision. We reach our own conclusion as to character, effect, and practical operation of the regulation in determining its constitutionality.[13]

Although the latest decisions from Maryland and Pennsylvania find no religious purpose to the closing laws, language used by the high courts in these States in fairly recent years indicate that Douglas' analysis may well be correct. The following is the language of an earlier Maryland decision:

> It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion, of all sects and denominations that observe that day, as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, except works of necessity and charity, and thereby promotes the cause of Christianity. If the Christian religion is, incidentally or otherwise, benefited or fostered by having this day of rest (as it undoubtedly is), there is all the more reason for the enforcement of laws that help to preserve it.[14]

The language of a fairly recent decision of the Pennsylvania Supreme Court in a closing law case is as follows:

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[13] McGowan v. Maryland, 366 U. S. 420, 572 (1961).

[14] Judefind v. State, 78 Md. 510, 515-6, 28 Atl. 405-7 (1894).

> Christianity is a part of the common law of Pennsylvania . . . and its people are Christian people. Sunday is the holy day among Christians.[15]

It is significant that the latest case[16] on the closing laws decided by the Supreme Court of Maryland specifically relied upon and quoted the passage from the above Maryland case.[17] Whether or not the Sunday closing laws are completely devoid of religious purposes is a matter of fact. It is difficult to understand how the Court resolved the question as it did. The Court makes clear the point that the laws in question were sustained only because they had no religious purpose.[18] It seems implicit in the Court's treatment of the cases that the slightest degree of religious purpose to a Sunday closing law would be sufficient to invalidate it.

Establishment of Religion

With respect to the establishment of religion, appellants in the four cases contended that the laws were unconstitutional because they clearly gave encouragement to Christianity by promoting the attendance of marginal church-goers, and that as a consequence of this Christianity was preferred over other religions which observed a different day of rest. Furthermore, the enforcement of the laws would be directly prejudicial to Jews and Sabbatarians in seeking new followers because of the economic burden that would be imposed upon their potential adherents by virtue of their having to forego a day of employment each week.[19] Having found no religious purposes in the laws in question and having found a valid secular purpose present, the Court resolved the establishment issue in the following words:

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

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15 Commonwealth ex rel. v. American Baseball Club, 290 Pa. 136, 143, 138 Atl. 497, 499 (1927).

16 McGowan v. State, 220 Md. 117, 151 A.2d 156 (1959).

17 Judefind v. State, 78 Md. 510, 28 Atl. 405 (1894).

18 McGowan v. Maryland, 366 U. S. 420, 449, 453 (1961).

19 *Id.* at 431.

happens to harmonize with the tenets of some or all religions.[20]

The Court points out that the mere fact that murder is forbidden by all religions does not prevent the State from illegalizing it, and the mere fact that most religions forbid polygamy does not prohibit the State from illegalizing that practice.[21] Consequently, the Court reasons, the mere fact that the predominant religions in this country admonish their adherents to observe Sunday as a day of rest should not prevent a State in promoting its secular purposes from proscribing unnecessary commercial activity on Sundays.

However, for the purpose of determining the validity of the Sunday closing laws it is difficult to draw assistance from analogies with murder and polygamy. Both of these proscribed activities are manifestly contrary to the social and moral order upon which our society is based, and a failure to enact and enforce laws against such evils would jeopardize the stability of our civilization. Such would not be the consequence of a failure to proscribe unnecessary work on Sundays. Also, forbidding of murder has no effect on the strength or growth of religions, nor does it favor one over another. Laws against polygamy, while they may operate adversely against some groups with respect to dogma, do not appear to have any substantial effect on the quest for new adherents by these groups. Regardless of considerations of purpose or intent, the Sunday closing laws in their operation and effect give encouragement to those religions that observe Sunday as a day of rest and because of the economic burden imposed, adversely affect Jews and Sabbatarians in their attempts to keep their present memberships and gain new adherents. Laws against murder and polygamy are clearly allowable under the "grave and immediate danger" test set forth in *West Virginia Board of Education* v. *Barnette*.[22] The sustaining of Sunday closing laws designed to provide the conveniences of a common day of rest seem to be a clear departure from that test. The *McGowan* case seems to say that freedom of religion

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[20] *Id.* at 442.

[21] *Ibid.*, relying on Reynolds v. United States, 98 U. S. 145 (1878).

[22] *Supra*, note 4.

with respect to the establishment clause of the First Amendment means only that a legislature may not *intentionally* prefer one religion over another. Was it the intent of the framers of the First Amendment to insure that no religion be given a preferred status by governmental activity, or was it their intent that government should not intentionally prefer one religion over another? The Court, as to the establishment clause, discounts the effect of legislation on religions and looks only to intent. It is little consolation to religions receiving discriminatory treatment that they are being injured unintentionally. They are injured just the same.

Free Exercise of Religion

In *Braunfeld* v. *Brown*[23] the appellants were members of the Orthodox Jewish faith, who by the tenets of their religion, were required to forego commercial activity from nightfall Friday to nightfall Saturday. Braunfeld was a retail merchant who sold clothing and home furnishings, and under the Pennsylvania closing law the sale of such goods on Sundays was illegal.[24] In a criminal proceeding for violating the statute he challenged its constitutionality on the ground that, among other things, it prohibited the free exercise of his religion as guaranteed under the First and Fourteenth Amendments. Braunfeld argued that because the statute required him to refrain from business activity on Sundays, and because his religion required him to refrain from business activity on Saturdays, the enforcement of the statute against him would impose a severe economic burden and would in effect compel him to choose between adhering to a basic requirement of his faith and enduring financial loss.[25] In effect, he argued that the closing law, imposing as it did an economic burden upon him if he should remain strong in his faith, was a law forbidding the free exercise of religion.

The Court's manner of overcoming this argument is interesting. The Court first says

> . . . the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates

[23] 366 U. S. 599 (1961).

[24] *Ibid.*

[25] *Id.* at 601.

> a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday . . .[26]

Arguing that the statute in question merely proscribes activities permitted but not required by the religion of appellants, the Court concludes that although the closing laws adversely affect appellants in the free exercise of their religion, the effect is merely indirect. The rationale of the Court's finding in this regard is contained in the following language:

> 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.[27]

Having established that the statute has only an indirect effect on the free exercise of appellants' religion, the Court proceeds to show that on occasion laws having a direct effect on religion have been sustained. Examples are laws prohibiting polygamy[28] and laws forbidding minors to sell publications on the streets,[29] the latter being applied to Jehovah's Witnesses. It should be noted that religious practices involved in these examples affect areas where the State has a vital concern. The protection of the home and the safeguarding of minors from the evils of labor have long been recognized as important concerns of legislatures. No valid analogy can be drawn between the evils of polygamy and child labor and the evils of permitting a Sabbatarian to work on Sundays. There is nothing inherently evil in working on Sundays.

Two earlier cases decided by the Supreme Court have a direct bearing on the question of how far a State may go in enacting laws whose effect it is to impose economic

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[26] *Id. at* 605.

[27] *Id.* at 606.

[28] Reynolds v. United States, 98 U. S. 145 (1878).

[29] Prince v. Commonwealth of Massachusetts, 321 U. S. 158 (1943).

burdens on the free exercise of religion. In *Follette* v. *Town of McCormick*[30] and *Murdock* v. *Pennsylvania*[31] the validity of ordinances requiring the payment of license taxes by door to door sellers of tracts, booklets and other publications was drawn in question, and as applied to Jehovah's Witnesses, the Court held them unconstitutional as tending to prohibit the free exercise of religion. In the 1961 cases the Court took cognizance of these license cases, but held them inapplicable to the Sunday closing laws in question. The Court distinguished the license cases by finding that the purpose of the taxes was to raise revenue, and revenue could be reasonably raised by other alternatives.[32] The Court also found that with respect to the purposes behind the closing laws, no other alternatives were reasonable. However in neither *Follette* v. *Town of McCormick* nor *Murdock* v. *Pennsylvania* did the Court state that the license taxes were invalid because other means of raising revenue were available. Instead, the rationale of the decision was that the taxes imposed a burden that prohibited the free exercise of religion.

The disposition of the license tax cases as precedents by the Court is less than satisfactory. The license tax in the *Follette* case was fifteen dollars annually.[33] If the burden of such a tax tends to prohibit the free exercise of religion, it would seem that a law requiring a person to forego a full day's employment each week so that he may observe his religion on a day other than Sunday prohibits the free exercise of religion.

Having proceeded thus far, the Court then lays down the following test for determining when a law prohibits the free exercise of religion:

> . . . If the purpose or effect of a law is to impede the observance of one or all religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct

[30] 321 U. S. 573 (1944).

[31] 319 U. S. 105 (1943).

[32] Braunfeld v. Brown, 366 U. S. 599, 607 (1961).

[33] 321 U. S. 573, 574 (1944).

> by enacting a general law within its power, the purpose or 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.[34]

Applying this test, the Court held that the Sunday closing law of Pennsylvania did not prohibit the free exercise of religion in a constitutional sense, for the purpose and effect of the law tended to advance the State's secular goals, and no alternative method was available to achieve these goals. Appellants in the *Braunfeld* case argued that a reasonable alternative was available in that exceptions could be made for those whose religious beliefs called for the observance of a day of rest other than Sunday. They pointed out that most states having closing laws excepted from the operation of the laws those persons who observe a day of rest other than Sunday.[35] The Court dismissed this reasoning on the grounds that a state could find that such an exception would hinder the achievement of the desired purpose, a universal day of rest, and that it would make enforcement more difficult.[36]

In examining the test laid down by the Court it should be noted that it is stated in terms of general laws aimed at secular goals. The Court in stating the test does not say that the goals must be important or that the evils at which the legislation is aimed must be grave and imminent. It does not say that a balance must be drawn between the value of the state's goals and the value of preserving inviolate the free exercise of religion. It imposes no clear and present danger test. It says instead that if a state has a secular goal and has only one reasonable method of achieving it, a law designed to accomplish that goal will be sustained even though it imposes an indirect burden on the free exercise of religion.

Conclusion

From the above discussion it can be seen that there has been a distinct and significant departure from the "grave and

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[34] Braunfeld v. Brown, 366 U. S. 599, 607 (1961).

[35] *Id.* at 608.

[36] *Ibid.*

imminent danger" test set forth in the Barnette case. This departure has resulted from an emphasis on intent as the criteria for determining when the establishment clause has been violated, and the finding that where there is no intent to prefer one religion over another, the mere fact that the operation and effect of a statute puts a religion in a preferred position is not sufficient to invalidate it. As to the free exercise clause, the departure has resulted from a classification of burdens on religion into direct and indirect, a discounting of the significance of indirect burdens where there is no intent to burden and a finding that if the law is aimed at a valid secular goal and no other reasonable alternative is available to achieve the goal, the law will be sustained.

It is significant that the Court, in determining the validity of state regulations that are alleged to burden interstate commerce, do not ask if the burden is direct or indirect, or even if there is an intent to burden interstate commerce or to prefer intrastate commerce.[37] The court asks only if interstate commerce is burdened. Why should the protection afforded interstate commerce be greater than the protection afforded freedom of religion under the First Amendment? It would seem that the proper test for determining whether the First Amendment guarantees of religious liberty have been violated would be to determine solely if a burden is imposed or a religion preferred, and if such a burden or preference is found, to balance the evil of the burden or preference with the need to eliminate the evils at which the legislation is directed. If religious freedom is to be sacrificed, it should be only when necessitated by public exigencies. There is no such exigency calling for closing laws that tend to prohibit the free exercise of religion and to give certain religions preferred treatment.

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[37] Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520 (1959).