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12. FREE EXERCISE – CONSCIENCE OR COMMERCE?

In 1961, Sunday-law opponents hoped that the Supreme Court would strike down blue laws either as an "establishment" of religion or as an unconstitutional infringement on the "free exercise" of religion. The court rejected a contention that the legislative classifications and irregular system of Sunday prohibitions constituted a denial of "equal protection" of the law. It also denied that "the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate 'due process.'"

This left the "free exercise" question – the other side of the two-edged constitutional sword for the protection of religious liberty.

The "establishment clause" is a broadly based issue that can be raised by any citizen acting in good faith. In *McGowan v. Maryland* and *Two Guys From Harrison v. McGinley,* where the injury alleged by the parties was economic rather than an infringement of personal religious belief, the parties still could attack Sunday laws as an establishment of religion.

The right of a citizen to raise the "free exercise" issue is more narrowly construed by the majority of the court. **[134]** Thus, in the Crown Kosher case as well as in *Braunfeld v. Brown,* the court extended its consideration to the "free exercise" as well as the "establishment" clause of the First Amendment, since the parties challenging Sunday laws in these two cases were Orthodox Jews alleging infringement of personal religious freedom.

Did applicable Sunday laws "prevent the free exercise of religion" of Mr. Braunfield or the owners of the Crown Kosher market? Six members of the Court said No! Justice Douglas, along with Justices Stewart and Brenan, said Yes!

Where religious establishment could be found, it would logically follow that there was a resultant infringement of free exercise of a religious minority. Prevention of "free exercise" of religion could be found, however, without necessarily finding a corresponding religious establishment, thus, by avoiding impalement on the establishment issue, the majority, was not bound to find free-exercise infringement.

In *Braunfeld v. Brown*[1] the charge of infringement of "free exercise" was based on two arguments: first, that the Sunday laws allegedly, operated to hinder the "Orthodox Jewish faith in gaining new adherents ; and second, that economic pressure on Braunfeld required him either to give up seventh-day Sabbath observance as a tenet of his faith, or to continue to operate at competitive disadvantage economically.

Chief Justice Warren in writing the majority decision conceded that Braunfeld and "all other persons who wish to work on Sunday will be burdened economically by the State's day-of-rest mandate but drew a line of distinction between what he pictured as an "indirect burden" and a law that would make a religious practice unlawful. "The statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets," said the court.

[135] The opinion acknowledged that Sunday law "operates so as to make the practice of their religious beliefs more expensive" and that the religious minority may well face "some financial sacrifice in order to observe their religious beliefs," but maintained that "the option is wholly different than when the legislation attempts to make a religious practice itself unlawful."

The majority implied that before it would find infringement of free exercise, there would have to be evidence of *direct* prohibition rather than mere *indirect* hardship. And "even though the burden may be characterized as being only indirect," infringement could still be found "if the purpose or effect of a law is to impede the observance of one or all religions." Braunfeld believed his case met that test, but the court majority disagreed.

The Warren opinion declared that a statute designed to advance the secular goals of the state "is valid despite its indirect burden on religious observance, unless the state may accomplish its purpose by means which do not impose a burden." It then closed the door on the "one-day-in-seven" as an alternative, by citing the rationale in the McGowan opinion.

The court also rejected the alternative means which offered a statutory exemption for minority religions that worshiped on another day. For backing, Warren talked of the enforcement problems that could be created – as well as the threat to the entire statutory framework which sought to eliminate "the atmosphere of commercial noise and activity." Then there was the threat that Sunday opening by the minority "might well provide these people with an economic advantage over their competitors who must remain closed on that day," paradoxically the same problem confronting the minority before the court, which the opinion had described as an acceptable "indirect burden" under the circumstances.

Here the chief justice toyed with a dangerous bit of contradictory logic. Speaking to the objectionable features of an exemption for those who closed their businesses from sundown Friday evening to sundown Saturday evening, he warned: “With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their business on what had formerly been their least profitable day.”

[136] Here was the irony. In this very case, Orthodox Jews had claimed that the Sunday laws “operate so as to hinder the Orthodox Jewish faith in gaining new adherents” because of the privileged sanctuary extended to first-day observance. The law operated to make Sunday observance more economically attractive than worship on the seventh day of the week, according to Braunfeld. But the court shrugged this off as an “indirect burden” on Braunfeld's faith. Then the court itself, through the Warren statement, utilized the essential heart of this rationale in its effort to show that a Sunday law “exemption” for a minority conscience would not be fair since it might encourage some to join a minority religious cause for a commercial purpose!

If in fact an exemption clause would operate to encourage some to join a minority faith for sheer commercial advantage, why would not the Sunday law itself operate to encourage some to join a majority faith for the same reason? And if it did, would there not be new ammunition that Sunday laws constituted an establishment of religion? After all, the existence of the state enforced Sunday-rest observances gave a competitive edge to religious majorities that were enabled to attract members without fear of any “indirect burden” or penalties accompanying membership. In that sense, the operative effect of the statute would be religious, to say nothing of its purpose. While Braunfeld was denied recognition of the ingredients of this logic in his assault on the Sunday law itself, the court incorporated these ingredients in its own assault on the exemption!

An earlier Supreme Court had thrown out a license tax for the distribution of religious literature as an unconstitutional tax on religion.[2] **[137]** Now the 1961 majority frankly acknowledged “financial sacrifice” and religious beliefs that were “more expensive,” but did not admit that this “indirect burden” was a tax on religion or religious belief or an infringement of religious free exercise.

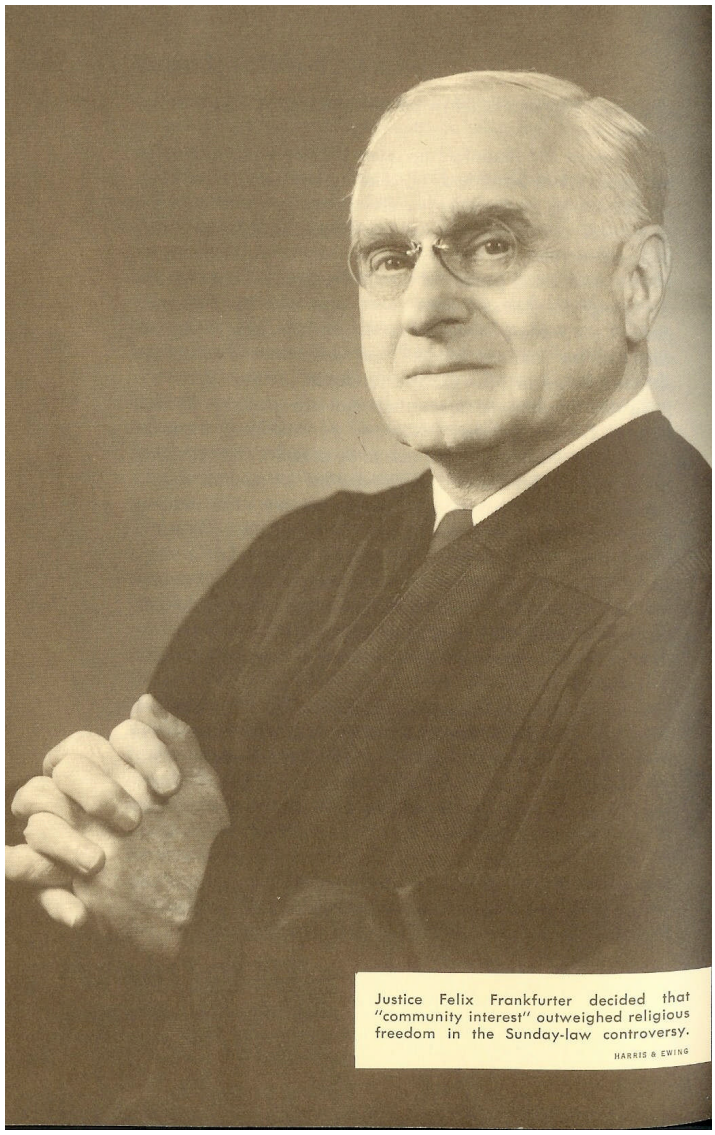
The court left Braunfeld no other alternatve but to give up his conscientious belief and sell clothing and home furnishings in Philadelphia on Saturday, or else to continue to close down on Saturday by conscience and on Sunday by coercion, with “financial sacrifice.”

The owners and patrons of the Crown Kosher Super Market in Springfield, Massachusetts, were also told by the court, through the holding

in the Braunfeld decision, that being saddled with an "indirect burden" and competitive disadvantage did not infringe their free exercise of religion.

Justice Frankfurter, concurring with the majority in both *Braunfeld v. Brown* and *McGowan v. Maryland*, wrote an opinion[2] attached to the latter case to cover both. He introduced his remarks with an attack on Sunday-law exemptions for the benefit of citizens that worship on another day. His thinking overlapped with the Warren opinion by citing the problems of maintaining "the atmosphere of general repose" for a single day; problems of policing; the possible competitive disadvantage to a Sunday keeper if the Orthodox Jew could open for business on the first day of the week; and the danger "that administration of such a provision may require judicial inquiry into religious belief."

Like Warren, Frankfurter recognized that blue laws "do create an undeniable financial burden upon the observers of one of the fundamental tenets of certain religious creeds, a burden which does not fall equally upon other forms of observance." But he rejected the comparison to the cases where previous courts had found an unconstitutional tax on religion, because "the burden which the Sunday statutes impose is an incident of the only feasible means of achievement of their particular goal" and "the measure of the burden is not fixed by legislative decree."


Justice Felix Frankfurter decided that "community interest" outweighed religious freedom in the Sunday-law controversy.
HARRIS & EWING

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[139] The associate justice gave the legislature credit for reasoning that the competitive disadvantage of the Orthodox Jew might be offset "by the industry and commercial initiative of the individual merchant," and that

after all, if there were no Sunday law at all, he would still be at a disadvantage from the nonobserving merchant that opened seven days a week as compared with his six. Indirect comfort for an “indirect burden”!

Frankfurter was a scholar known for balancing competing interests. Here he chose to balance religious freedom versus what he chose to describe as “community interest.” Was the need for an “atmosphere of general repose” of sufficient importance to the public in order “to outweigh the restraint upon the religious exercise of Orthodox Jewish practicants?” Yes, said the associate justice. And “in view of the importance of the community interests which must be weighed in the balance, is the disadvantage wrought by the nonexempting Sunday statutes an impermissible imposition upon the Sabbatarian's religious freedom?” To this, his response was No.

Speaking only for himself and not for Justice Harlan, who had joined in his concurring opinion, Frankfurter did favor remanding the Braunfeld case to the district court, but only because he felt there had been “too summary a disposition” of the case.

Potter Stewart, newest and youngest member of the court, agreed with the dissent of justice Brennan in the Braunfeld case and added some remarks of his own. In a concurring dissent as marked for its brevity as justice Frankfurter's concurrence with the majority had been for its comprehensive detail, Justice Stewart expressed his conviction that “Pennsylvania has passed the law which compels an Orthodox Jew 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. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. **[140]** I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.”[4]

Both Justice Stewart and Justice William J. Brennan agreed with the majority on the “establishment clause” and “equal protection clause” issues, but were convinced, like Justice William O. Douglas, that Braunfeld's free exercise of religion had been infringed.

The Brennan dissent,[5] rejected the exposure of First Amendment guarantees to any balancing act. In his view, “personal liberty” was enshrined on a pedestal which reached above mere social convenience. In words reminiscent of the religious freedom cases of the 1940's, Brennan stated that “the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.”

Brennan summarized the issue as “whether a State may put an individual to a choice between his business and his religion.” In his view, a law requiring such a choice prohibited “the free exercise of religion.”

He cited, as a precedent, a 1943 decision on *West Virginia State Board of Education v. Barnette*, written by Justice Jackson, indicating that the mere existence of a state interest which is "substantial and important, as well as rationally justifiable" was not sufficient in itself to trample individual conscience. He quoted Jackson as saying: "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 State may lawfully protect." Brennan could find no such "grave and immediate danger" to the interests of the state that could justify the blue law encroachment on Braunfeld.

[141] He interpreted the majority opinion as repudiation of the Jackson language because, "without so much as a deferential nod towards the high place which we have accorded religious freedom in the past," the court now seemed to say "that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose." It appeared to Brennan that "this clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature," which the Supreme Court had previously forbidden as unconstitutional.

He eyed the constitutional scale in a vain search for the weighty "overbalancing need" and "compelling state interest" that led the majority to allocate a subordinate role to conscience. It was not the interest of seeing that "everyone rest one day a week," since the appellant rested as a matter of religious conviction. It was "not the desire to stamp out a practice deeply abhorred by society, such as polygamy," as in a nineteenth century case that had come before the court. Nor was "it the state's traditional protection of children." Rather, "it is the mere convenience of having everyone rest on the same day."

The associate justice disputed the majority argument that "mere convenience" could constitutionally justify the denial of "an exemption for those who in good faith observe a day of rest other than Sunday." The difficulties that the "Court conjures" in the granting of such an exemption Brennan viewed as "more fanciful than real." As a result, "administrative convenience" had been exalted to a level so as to "justify making one religion economically disadvantageous." This result he did not accept.

Neither did he accept the court's claim that a substantial burden on religion could be justified by its being only indirect. He concluded by reminding his associates of the words of Maryland Representative Daniel Carroll, spoken August 15, 1789, during Congressional debates on the First Amendment, that – the rights of conscience are, in their nature, of peculiar delicacy, **[**and will little bear the gentlest touch of government.'"

142] The year 1961 became a landmark in Sunday-law history. A traditional religious symbolism emerged relatively unscathed from a massive legal confrontation, despite persuasive arguments presented by a minority of the court. Unmoved by evidence of at least concurrent religious purpose present in blue laws, the United States Supreme Court chose to emphasize "atmosphere of recreation." The court resurrected the "police power" and "civil regulation" rationale that Stephen Field had pioneered and refined.

Associate Justice William O. Douglas, a member of the court since 1939, also made legal history in a resounding dissent which protested the majority findings on both issues.

REFERENCES

1. *Braunfeld v. Brown,* 366 U.S. 599 (1961).
2. See *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105 (1943). Also *Follett v. Town of McCormick,* 321 U.S. 573 (1944).
3. *McGowan v. Maryland,* 366 U.S. 459 (1961).
4. See Stewart Dissent, *Braunfeld v. Brown,* 366 U.S. 616 (1961).
5. See Brennan Dissent, Ibid., 610.