"[I]f 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."—Chief Justice WARREN

"If the 'free exercise' of religion were subject to reasonable regulations ... rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with anyone's free exercise of religion."—Justice DOUGLAS

"The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end."—Justice BRENNAN

Braunfeld v. Brown

366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961).

This case presented one of a series of challenges to state laws requiring certain businesses to be closed on Sundays. A special three-judge federal district court had dismissed a suit brought by Jewish merchants, and they appealed to the Supreme Court.

Mr. Chief Justice **WARREN** announced the judgment of the Court and an opinion in which Mr. Justice **BLACK,** Mr. Justice **CLARK,** and Mr. Justice **WHITTAKER** concur. ...

Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath. Appellants also assert that the statute will operate so as to hinder the Orthodox Jewish faith in gaining new adherents. ...

In McGowan v. Maryland [1961] we noted the significance that this Court has attributed to the development of religious freedom in Virginia in determining the scope of the First Amendment's protection. We observed that when Virginia passed its Declaration of Rights in 1776, providing that "all men are equally entitled to the free exercise of religion," Virginia repealed its laws which in any way penalized "maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever." But Virginia retained its laws prohibiting Sunday labor. We also took cognizance, in *McGowan,* of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquility, respite and recreation. ...

Concededly, appellants ... will be burdened economically by the State's day of rest mandate; and appellants point out that their religion requires them to refrain from work on Saturday as well. Our inquiry then is whether ... the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.

Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. Cantwell v. Connecticut [1940]; Reynolds v. United States [1878]. Thus, in West Va. v. Barnette [1945], this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; 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.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell*. ... [L]egislative power may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion. ... Thus, in *Reynolds*, this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. And, in Prince v. Massachusetts [1944], this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work. ...

... [T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates 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. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated ... may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion ... would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. ... Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. 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. ...

As we pointed out in *McGowan*, we cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest ... a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days. ... Also, in *McGowan*, we examined several suggested alternative means by which ... the State might accomplish its secular goals without even remotely or incidentally affecting religious freedom. We found there that a State might well find that those alternatives would not accomplish bringing about a general day of rest. ...

However, appellants advance yet another means at the State's disposal which they would find unobjectionable. They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. ... A number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring. ... For all of these reasons, we cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied.

Mr. Justice **HARLAN** concurs in the judgment. Mr. Justice **BRENNAN** and Mr. Justice **STEWART** concur in our disposition of appellants' claims under the Establishment Clause and the Equal Protection Clause. Mr. Justice **FRANKFURTER** and Mr. Justice **HARLAN** have rejected appellants' claim under the Free Exercise Clause in a separate

opinion.[1] ...

Mr. Justice **DOUGLAS,** dissenting.

The question is not whether one day out of seven can be imposed by a State as a day of rest. The question is not whether Sunday can by force of custom and habit be retained as a day of rest. The question is whether a State can impose criminal sanctions on those who ... worship on a different day or do not share the religious scruples of the majority. If the "free exercise" of religion were subject to reasonable regulations, as it is under some constitutions, or if all laws "respecting the establishment of religion" were not proscribed, I could understand how rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with anyone's free exercise of religion. ...

But that is not the premise from which we start. ... The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish—whether the result is to produce Catholics, Jews, or Protestants, or turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral. ... Certainly the "free exercise" clause does not require that everyone embrace the theology of some church or of some faith, or observe the religious practices of any majority or minority sect. ...

Mr. Justice **BRENNAN,** concurring and dissenting. ...

The Court has demonstrated that public need for a weekly surcease from worldly labor. ... I would approach this case differently, from the point of view of the individuals whose liberty is—concededly—curtailed by these enactments. For 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. ...

The first question to be resolved ... concerns the appropriate standard of constitutional adjudication in cases in which a statute is assertedly in conflict with the First Amendment. ... The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end. Nor is the case decided by a finding that the State's interest is substantial and important, as well as rationally justifiable. This canon of adjudication was clearly stated by Mr. Justice Jackson, speaking for the Court in *Barnette*:

> ... 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 is involved. ... The right of a State to regulate, for example, a public utility may well include ... power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But

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[1] In a companion case, McGowan v. Maryland (1961).—**Eds.**

> 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. ...

This exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment. ... For religious freedom ... has classically been one of the highest values of our society. ... The honored place of religious freedom in our constitutional hierarchy, ... foreshadowed by a prescient footnote in *Carolene Products*, must now be taken to be settled. Or at least so it appeared until today. For in this case the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, 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.

Admittedly, these laws do not compel overt affirmation of a repugnant belief, as in *Barnette*, nor do they prohibit outright any of appellants' religious practices, as did the federal law upheld in *Reynolds*. But their effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage. Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. 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. And yet, such a tax, when applied in the form of an excise or license fee, was held invalid in Follett v. McCormick [1944]. ...

What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds*, for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State's traditional protection of children, as in Prince v. Massachusetts, for appellants are reasoning and fully autonomous adults. It is not even the interest in seeking that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. ...

It is true, I suppose, that the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's. ...

In fine, the Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. ... The Court forgets, I think, a warning uttered during the congressional discussion of the First Amendment itself: "... the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand. ..."

Mr. Justice **STEWART**, dissenting. ...

Editors' Notes

(1) **Query:** Did Warren use an approach of *protecting fundamental rights?* Did he use a version of the "strict scrutiny test"? Did he regard freedom of religion as a "fundamental right" What about Douglas? Brennan? Where would *reinforcing representative democracy* lead an interpreter in this case?

(2) Sherbert v. Verner (1963) to some extent undercut the substantive holding in *Braunfeld*. In an opinion written by Brennan, the Court held, with Warren joining the majority, that a denial of unemployment benefits to a Seventh Day Adventist who refused to take any job that required her to work on Saturdays violated free exercise. Despite the vote of 7–2, Brennan had difficulty in mustering a majority behind his opinion. See Bernard Schwartz, *Super Chief* (New York: New York University Press, 1983), pp. 468–470. Stewart concurred separately, expressing concern about the Court's creating a conflict between the establishment and free exercise clauses. For further analysis of this problem, see Rehnquist's dis. op. in Thomas v. Review Bd. (1981; reprinted below, p. 1193).

(3) For the background and aftermath of *Braunfeld* and its companion cases, see Candida Lund, "Religion and Commerce," in C. Herman Pritchett and Alan F. Westin, eds., *The Third Branch of Government* (New York: Harcourt, Brace & World, 1963); for a comparative study of Sunday Closing laws in Canada and the United States, see Jerome A. Barron, "Sunday in North America," 79 *Harv.L.Rev.* 42 (1965). Ireland, 97 per cent Catholic, has an exemption for Jews in its Sunday closing law. Christian merchants challenged the exemption as a denial of equal protection, but the Supreme Court sustained the statute after rejecting Warren's reasoning in *Braunfeld* and agreeing with that of Brennan in *Sherbert*. Quinn's Supermarket v. Attorney General (1972).