

1966

A New Look at Sunday Closing Legislation

Richard A. Spellman

University of Nebraska College of Law, rspellman@unmc.edu

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Richard A. Spellman, *A New Look at Sunday Closing Legislation*, 45 Neb. L. Rev. 775 (1966)

Available at: <https://digitalcommons.unl.edu/nlr/vol45/iss4/10>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

A NEW LOOK AT SUNDAY CLOSING LEGISLATION

I. INTRODUCTION

The Supreme Court of the United States has held that Sunday closing laws do not violate the first amendment, whether or not they contain exemptions for Sabbatarians (those who keep Saturday holy). The Court said that it is within the state police power to provide a day of uniform rest, and that this purpose is secular and not religious even if the chosen day is Sunday. For this reason, in *McGowan v. Maryland*¹ the Court held that such a law did not violate the establishment clause. In *Braunfeld v. Brown*² the Court held that Sunday closing laws do not infringe upon Sabbatarians' free exercise of religion. The reasoning in *Braunfeld* was that Sunday closing laws do not exert direct pressure on the beliefs of Sabbatarians, but only economic pressure which alone is insufficient.³

In *Sherbert v. Verner*⁴ the appellant, a Seventh-Day Adventist, was unable to find employment because her religion forbade her to work on Saturday. She applied for and was refused unemployment compensation from the State of South Carolina, on the ground that her unemployment was without "good cause" as set out in the unemployment act. The Supreme Court held that the refusal under the circumstances abridged the appellant's right to the free exercise of her religion secured by the first amendment. Although *Sherbert* is not a Sunday closing law case, it involves, like *McGowan* and *Braunfeld*, state action causing economic hardship to Sabbatarians. *Braunfeld* was distinguished by the Supreme Court on the basis that the state interest in creating Sunday closing

¹ 366 U.S. 420 (1961). The appellants were employees of a highway department store, and were convicted of selling articles in violation of Md. ANN. CODE art. 27, § 521 (1957), which is a typical Sunday closing law that also exempted certain commodities as well as retail establishments employing not more than one person in addition to the owner. The United States Supreme Court held that the law did not violate (1) the establishment clause of the first amendment or (2) the equal protection or due process clauses of the fourteenth amendment.

² 366 U.S. 599 (1961). The appellants were Orthodox Jews, engaged in the retail sale of clothing which was prohibited from sale on Sunday by a Pennsylvania criminal statute. PA. STAT. ANN. tit. 18, § 4699.10 (1963). The United States Supreme Court held in part that the law as it affected the appellants did not violate their right to the free exercise of religion under the first amendment.

³ The term "direct" as used by the Supreme Court and in this article means a direct burden on belief, as opposed to a burden on economic well-being, which the Supreme Court terms as being "indirect."

⁴ 374 U.S. 398 (1963).

laws is greater and the pressure on Sabbatarians' beliefs is "less direct" than in *Sherbert*.⁵ The Supreme Court did not explain why the state interest in creating a day of uniform rest is so strong, nor did it provide a standard for determining what degree of pressure is sufficient to fall within the ban of the first amendment.

These uncertainties have resulted in two cases, *Terry Carpenter, Inc. v. Wood*⁶ and *Skag-Way Dep't Stores, Inc. v. City of Omaha*⁷ in which the Supreme Court of Nebraska came to the conclusion that Sunday closing legislation is a tool for religious as well as commercial discrimination, and therefore, on the balance, is not so important to the welfare of the state as the statutes upheld by the United States Supreme Court. The purpose of this comment is to attempt to explain how Nebraska reached this position in light of the interpretations of Sunday closing laws in *McGowan*, *Braunfeld* and *Sherbert*.

II. MCGOWAN AND BRAUNFELD

McGowan and *Braunfeld* taken together hold that if the legislative purpose of enacting a Sunday closing law is not to advance a particular religious sect or to adversely effect Sabbatarians, then the law does not violate the first amendment, even though the law has both these effects in economic terms.

In *McGowan* the appellant's arguments against Sunday closing laws under the establishment clause are found in the majority opinion as follows:

Sunday is the Sabbath day of the predominant Christian sects; . . . the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; . . . the purpose of setting Sunday as a day of universal rest is to induce people with no religion . . . to join the predominant Christian sects; . . . the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day.⁸

The appellant in addition demonstrated the Christian origin of the laws, as well as language to that effect in the statute.⁹ The Supreme Court did not agree that the purpose of Sunday closing

⁵ See note 20 *infra*.

⁶ 177 Neb. 515, 129 N.W.2d 475 (1964). See text accompanying notes 23-30 *infra*.

⁷ 179 Neb. 707, 140 N.W.2d 28 (1966). See text accompanying notes 48-58 *infra*.

⁸ *McGowan v. Maryland*, 366 U.S. 420, 431 (1961).

⁹ *Id.* at 431-34.

laws was religious:

[T]he State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.¹⁰

The Court recognized that the appellant in *McGowan* suffered an immediate economic loss as a result of Sunday closing laws.¹¹ Nevertheless, the Court held that regardless of economic injury, the purpose in contemporary society of Sunday closing laws is secular, and if a state chooses Sunday as the day of uniform rest, the coincidence with the religious tenets of the Christian faith does not result in the violation of the establishment clause.

In *Braunfeld*, a member of the Jewish faith suffered an economic loss. But in the opinion of the Court, the resulting coercion to work on Saturday in order to compete economically with non-Sabbatarians was only an "indirect" pressure on a Sabbatarian's free exercise of religion.¹² There must be a "direct" pressure on religious beliefs and exercise before a violation of the first amendment occurs.¹³

¹⁰ *Id.* at 450. (Footnote omitted.)

¹¹ *Id.* at 453. It is interesting to compare the holding in *McGowan* with the following language taken from *Engel v. Vitale*, 370 U.S. 421 (1961): "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of *direct governmental compulsion* and is violated by the enactment of laws which establish an official religion *whether those laws operate directly to coerce nonobservant individuals or not.* *Id.* at 430. (Emphasis added.)

Canada, which does not have a law comparable to the establishment clause in the Constitution of the United States, has also entertained litigation over Sunday closing laws. It is interesting to note that the Canadian courts concede that the Sunday laws are religious laws, contrary to the result reached in *McGowan*. For an interesting discussion on the Canadian position, see Barron, *Sunday in North America*, 79 HARV. L. REV. 42 (1965).

¹² "The distinction between the two clauses in apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

¹³ "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. . . . But if the State regulates conduct by enacting a general law . . . 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

The rationale laid down by the Supreme Court in *McGowan* and *Braunfeld* has not proved to be workable. This is made clear, for example, by an attempt of the Florida legislature under the holdings of *Braunfeld* and *McGowan* to provide for mandatory Bible reading in public schools. The statute stated that its purpose was *purely secular*—the instillation of a higher sense of morality among school children. The statute was initially upheld by the state supreme court in *Chamberlain v. Dade County Bd. of Pub. Instruction*.¹⁴ The court said that guidelines were completely lacking since *McGowan* and *Braunfeld*.¹⁵ The Supreme Court of the United States reversed without opinion.¹⁶

Another case which illustrates the lack of definitive guidelines in *McGowan* and *Braunfeld* is *State ex rel. Hecks, Inc. v. Gates*.¹⁷ In this case, a Sunday closing law contained a Sabbatarian exemption. It was attacked by a Moslem whose day of worship was Friday, on the grounds that the law violated the first amendment. The state court upheld the statute, citing *McGowan*

which do not impose such a burden." *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

- ¹⁴ 160 So. 2d 97 (Fla. 1964), *rev'd and remanded*, 377 U.S. 402 (1964), *rev'd*, 171 So. 2d 535 (Fla. 1965).
- ¹⁵ "It is our conclusion that the statute was founded upon secular rather than sectarian considerations and is to be construed as was the Sunday Closing Law in the *McGowan* case. . . . The accommodation of religious beliefs is secondary to the intent of the Legislators. . . . [W]e do not feel that the privilege, or duty, is ours to speculate the extent to which the Supreme Court of the United States intended to expand its philosophy. We have, without avail, endeavored to find, in the diverse views expressed by the several Justices of the United States Supreme Court who participated in these decisions, a clear course for us to follow." *Id.* at 99. (Footnote omitted.)
- ¹⁶ *Chamberlain v. Dade County Bd. of Pub. Instruction*, 377 U.S. 402 (1964).
- ¹⁷ 149 W. Va. 421, 141 S.E.2d 369 (1965). "[T]his Court holds that the failure of the statute to provide an exemption for persons of the Druse or Moslem faith or any other faith, whose members conscientiously observe Friday as the Sabbath, even though it provides such exemption for members of a faith which observes Saturday as a Sabbath, does not violate the provisions of the First Amendment to the Constitution of the United States or prohibit the free exercise of religion of any of the petitioners. . . ." *Id.* at 445, 141 S.E.2d at 385. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Id.* at 448, 141 S.E.2d at 386. The court held that none of the classifications violated the "invidious discrimination" test. *Id.* at 448, 141 S.E.2d at 387. See note 18, *infra*, for a brief discussion of "invidious discrimination" as the current equal protection standard.

and *Williamson v. Lee Optical Co.*¹⁸ as authority. The *Gates* case in effect allows the state to discriminate among religions. Unfortunately the Constitution has not been used to protect minority religions with the same intensity under the equal protection clause as it has protected minority racial groups. If a state once chooses to make class distinctions among various religions for the purposes of regulation, then its classifications are discriminatory when they confer a benefit on some religions and not on others. One would think this explicit in the equal protection clause, and the fact that the discrimination occurs with religious classifications, ought to be sufficient to make the discrimination invidious within the meaning of the current equal protection test. The first amendment as interpreted in *Braunfeld* falls far short of realizing the substantial interdependency between economics and the exercise of religion, and the effect that one bears on the other. This is indicated by the very nature of the direct-indirect test laid down in *Braunfeld*. But as it stood after *Braunfeld*, neither the first amendment nor the equal protection clause of the fourteenth amendment provide protection against the situation in *Gates*.

III. SHERBERT V. VERNER

Sherbert v. Verner,¹⁹ contrary to *Braunfeld*, recognizes that there is a cause and effect relationship between economic deprivation and the exercise of religion so as to produce a violation of the free exercise clause. The majority in *Sherbert* attempted to distinguish *Braunfeld* as follows:

[T]he state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the *less direct* burden upon religious practices in *Braunfeld*. . . . The Court recognized that the Sunday closing law which that decision sustained undoubtedly served 'to make the practice of [the Orthodox Jewish merchants'] . . . religious beliefs more expensive,' 366 US, at 605. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a *strong state interest* in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a

¹⁸ 348 U.S. 483 (1955). "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the *invidious discrimination*." *Id.* at 489. (Emphasis added.)

¹⁹ 374 U.S. 398 (1963). See note 4 *supra*, for a discussion of the facts.

requirement would have rendered the entire statutory scheme unworkable.²⁰

This language presents several important factors which merit further discussion.

First, the Court finds no difficulty in abandoning the direct-indirect test used in *Braunfeld*, and adopting a test based on the degrees of directness, as balanced against the strength of underlying state interests. The Court for the first time recognized that economic pressure as a result of not being able to find a job could exert enough pressure on a Sabbatarian to disregard that part of her faith which asks her not to work on Saturday. Furthermore, the Court recognized that the particular day of worship is an integral part of any religion, and is protected by the free exercise clause from economic pressure. The Court also admitted that the appellant in *Braunfeld* is made to have a more expensive religion as an immediate consequence of Sunday closing laws. Then why does the Court refuse to require Sabbatarian exemptions?

According to the Supreme Court, it is partly because the "strong state interest" in providing Sunday as a day of rest would be destroyed by allowing Sabbatarian exemptions, because of administrative difficulties and because of the great competitive advantage which would result to Sabbatarians. To require a Sabbatarian exemption would render the Sunday closing law "unworkable."

It is difficult to agree with the Court that "so great a competitive advantage" is a meritorious defense against Sabbatarian exemptions. The other half of the argument is that Sunday worshippers now enjoy a great advantage over Sabbatarians who close on Saturday for religious reasons. To allow Sabbatarians to open their stores on Sunday while all others are closed admittedly gives them an advantage of a monopoly on Sunday trade. But this objection has little meaning to a Sabbatarian who now is deprived completely of week-end trade because of his firmly held religious beliefs.

The other argument given by the Court is that a Sabbatarian exemption would pose administrative problems "since there would be two or more days to police rather than one and it would be more difficult to observe"²¹ when violations occur. This does not square

²⁰ *Id.* at 408-09. (Emphasis added.) (Footnote omitted.) The only case to apply *Sherbert* to a Sunday closing law is *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965), and the court in *Solomon* quoted at length from this language in distinguishing *Braunfeld* from the Sunday closing case before it. The United States Supreme Court dismissed the appeal. *Solomon v. South Carolina*, 382 U.S. 204 (1965).

²¹ *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961). See note 23, *infra*.

with Justice Brennan's dissent in *Braunfeld* where he observed that twenty-one out of thirty-four Sunday closing law states have exemptions, and

We are not told that those States are significantly noisier, or that their police are significantly more burdened. . . . Even England, not under the compulsion of a written constitution, but simply influenced by considerations of fairness, has such an exemption for some activities.²²

Another administrative difficulty that the Court suggests is that a Sabbatarian exemption would require an undesired inquiry into the sincerity of religious beliefs.²³ What Justice Brennan said applies here also. This argument was rejected by the Supreme Court in *Sherbert*. Furthermore, in *In re Jenison*²⁴ the court held, in accordance with *Sherbert*, that prospective jurors who refuse duty because of a conflict with religious scruples cannot be prosecuted. All that is necessary, said the court, is an inquiry into the sincerity of religious belief.²⁵

The Supreme Court distinguished *Braunfeld* from *Sherbert* on the grounds that in *Braunfeld* a Sabbatarian exemption would destroy the valid state interest in creating a uniform day of rest. The reasons given to substantiate this are weak: 1) great competitive advantage to Sabbatarians, 2) policing difficulties, and 3) problems in obtaining convictions of violators. Aside from these, all that remains in the balance is the strength of the state interest as opposed by the effect that Sunday closing laws have on the free exercise of religion by Sabbatarians. At this point, the need for standards and clarity become crucial, but here the Court is least illuminating.

The Court said there was a less direct burden on religious practices in *Braunfeld* than in *Sherbert*. Applying this test necessarily involves a determination of the degree of coercion which is forbid-

²² *Id.* at 614-15. Israel, incidentally, has an exemption for Christians, as well as one for Moslems. Gilbert, *Tenth Judicial Circuit Conference*, 34 F.R.D. 29, 53 (1964).

²³ Commercial noise, enforcement difficulties, economic advantages and inquiry into religious convictions are given as reasons why a state may prefer not to exempt Sabbatarians. *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961).

²⁴ 267 Minn. 136, 125 N.W.2d 588 (1963), *reversing* 265 Minn. 96, 120 N.W. 2d 515 (1963) after the United States Supreme Court *vacated and remanded per curiam* in light of *Sherbert*. 375 U.S. 14 (1963).

²⁵ Regarding procedures relating to inquiries into the sincerity of religious beliefs, see *United States v. Seeger*, 380 U.S. 163 (1965) involving exemptions from military service because of religious training and belief.

den by the free exercise clause. In the past, however, this has not proved workable. The two school release time cases reached opposite results only because in *McCullum v. Board of Educ.*,²⁶ proof of coercion was before the Court, and in *Zorach v. Clauson*,²⁷ the proof was not admitted into evidence in the lower court.²⁸ In *Sherbert* a third alternative was reached—the pressure on the appellant to forego a religious practice is “unmistakable.”²⁹ The problem of proof of coercion, then, has not been smoothly handled by the Supreme Court. Can it fairly be said as a matter of constitutional law that the pressure in *Braunfeld* is unmistakably less than in *Sherbert*? If there is a standard on which the free exercise of religion is made to turn, it should be one involving actual proof, and which interjects an element of predictability. The Supreme Court has not developed the standard as yet, nor did it attempt to do so in *Sherbert*.

More important, perhaps, the Supreme Court has not spelled out why the state interest in creating a day of uniform rest is so strong as to allow a state to exert any pressure on Sabbatarians' beliefs, regardless of how direct or indirect that pressure might be. The purposes of Sunday closing legislation³⁰ apply equally to other days of the week which would avoid a conflict of religious-economic interests. Why Sunday? The Supreme Court obviously feels that there is a particular advantage in Sunday; otherwise the “reason-

²⁶ 333 U.S. 203 (1948). A public school was opened to Catholic, Protestant and Jewish instructors who would teach their religions in the classrooms of the school once a week. “Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.” *Id.* at 212.

²⁷ 343 U.S. 306 (1952). This case is similar on its facts to *McCullum*, except that the children were taught religion off school property. This program was held not to violate the first amendment. “There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion.” *Id.* at 311. (Footnote omitted.)

²⁸ “And though the courts below cited the concurring opinion in *McCullum* . . . to ‘emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied,’ they denied that opportunity on the ground that such proof was irrelevant to the issue of constitutionality.” *Id.* at 321-22 (Frankfurter, J., dissenting).

²⁹ 374 U.S. 398, 404 (1963).

³⁰ See note 10 *supra*.

able alternative" test suggested in *Braunfeld*³¹ would have been applied. The distinct advantages, no doubt, are tradition and uniformity. But when these "secular" interests alone are permitted to overcome the spirit of the first amendment merely because only "indirect" injury arises from them, then the plight of religious minorities in this country is grave indeed.³²

IV. SUNDAY CLOSING LAWS IN NEBRASKA

These unresolved questions have partially contributed to two recent Nebraska Supreme Court decisions which held Sunday closing laws invalid as a violation of the equal protection clause. The two cases represent somewhat of an evolution, even though decided only a year apart. In the *Wood*³³ case, as will be seen, the court was struggling for an understanding of Sunday closing laws which would properly account for their inherent air of discrimination. In *Skag-Way*,³⁴ the court totally reappraised Sunday legislation in a modern commercial context. It concluded that Sunday closing laws are a guise in the name of traditional state police power to protect business interests, and therefore are subject to close scrutiny under the equal protection clause. As such, Sunday

³¹ See note 13 *supra*.

³² In *Sherbert*, the Supreme Court announced a somewhat different approach to the establishment clause than it had taken in *McGowan*. *Sherbert* held that it is not "fostering the establishment" of the appellant's religion to require a state to pay her unemployment because her religion made her refuse to accept work on Saturday. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). In the words of the Court: "[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences. . . ." *Ibid.* (Emphasis added.) If a state has an "obligation of neutrality in the face of religious differences," and such an obligation results in recognizing and making a religious exception for Sabbatarians, then the establishment clause has taken on an additional factor since the *McGowan* case. The additional factor was commented upon by Justice Stewart, concurring in the result in the *Sherbert* case, when he said: "Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite result" than that which is reached in the *Sherbert* case. *Id.* at 414. Formerly, strict neutrality imposed no such duty to accommodate the various factions within the religious community. Sunday closing laws obviously do not take into account the disposition of the religious community, unless they contain Sabbatarian exemptions, and as discussed in connection with the free exercise clause, the Supreme Court has not explained why Sunday closing is of such compelling state interest.

³³ *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 129 N.W.2d 475 (1964).

³⁴ *Skag-Way Dep't Stores, Inc. v. City of Omaha*, 179 Neb. 707, 140 N.W. 2d 28 (1966).

closing laws no longer occupy a favored position, contrary to the conclusion reached in *Sherbert*.

The *Wood* case illustrates a typical Sunday closing law violation. The plaintiff corporation sold a can of paint, a toy, two cans of vegetables, one pair of hose and one can opener³⁵ in violation of section 3 of the act,³⁶ which enumerated items not to be sold on Sunday. Section 4 did not exempt the plaintiff who employed more than two persons.³⁷ The plaintiff sought to enjoin enforcement of the act, basing its contentions on article 1, sections 1³⁸ and 3³⁹ of the Constitution of Nebraska, and the fourteenth amendment to the Constitution of the United States. The plaintiff did not contend that the act violated the first amendment,⁴⁰ and so the Nebraska court was concerned only with the validity, under due process, of the various classifications embraced in the act.

The court found that the state objective of promoting health, peace and good order of society is not served by allowing retailers with less than three employees to remain open on Sunday while all others are made to close, allowing commercial recreational activities on Sunday and prohibiting the sale of other commodities, allowing hamburger buns to be sold and not hamburgers, and exempting Sabbatarians who close on Saturday but forbidding them from selling on Saturday the commodities exempted on Sunday.⁴¹ The court found the law "discriminatory, arbitrary and unreasonable."⁴²

The equal protection clause was interpreted in *McGowan and Lee Optical Co.*⁴³ to allow the state legislature great leeway in

³⁵ *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 519, 129 N.W.2d 475, 478 (1964).

³⁶ Neb. Laws c. 392, § 3 (1963).

³⁷ Neb. Laws c. 392, § 4 (1963).

³⁸ "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." NEB. CONST. art. I, § 1.

³⁹ "No person shall be deprived of life, liberty, or property, without due process of law." NEB. CONST. art. I, § 3.

⁴⁰ *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 521, 129 N.W.2d 475, 479 (1964).

⁴¹ *Id.* at 523-25, 129 N.W.2d at 480-81.

⁴² *Id.* at 526, 129 N.W.2d at 481.

⁴³ See note 18 *supra*. "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. 420,

setting up classifications, by giving a presumption of validity to what the legislature might feel are classifications suitable to the purpose of the law.

In a Sunday closing law, certain commodity exemptions are required by human consumptive needs. The majority view which follows *McGowan* is to allow the legislature to determine what commodities are needed, and to provide for their sale so long as the method bears a reasonable relationship to these commodities and to the purpose of the legislation. For example, it is reasonable to exempt small retail stores from general closing on the theory that the goods they carry are generally those the public needs on Sunday. A legislature might further feel that the small retail business does not substantially abrogate the policy of eliminating a commercial atmosphere on Sunday. It was so held in *McGowan*.⁴⁴

Similarly, a legislature might feel that it is necessary to forbid meat from being sold on Sunday, on the theory that meat handling and packaging invites an undesirable industrial atmosphere much more than allowing restaurants and drive-ins to stay open. On the same theory, bread is not a commodity generally sold in restaurants, so it may be sold.

The Nebraska court held that both of these classifications violate the equal protection clause, giving no weight to legislative determination.

Whether the purpose of the ordinance in question be conformable to the original purpose of such acts, to protect religious observance of the Sabbath or that of the protection of society by establishing a compulsory day of rest, it is not clear why the prohibition of the sale of commodities is in furtherance of such purpose or object and the prohibition of various permitted commercial activities is not.⁴⁵

This was pointed out by Justice Carter in his concurring opinion:

The impracticability of classifying by the business or commodity approach is almost insurmountable. . . . While I agree with the majority opinion, it does not leave the impression, approved by this court, that Sunday closing laws are proper subjects of legislation but, at the same time it strikes down the act on the basis of discriminating classifications, when proper classifications appear to border on the impossible.⁴⁶

The apparent harsh use of the equal protection test in the

425 (1961). The Nebraska test is similar. See *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 522, 129 N.W.2d 475, 479 (1964).

⁴⁴ See note 1 *supra*.

⁴⁵ *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 524, 129 N.W.2d 475, 480 (1964).

⁴⁶ *Id.* at 529-30, 129 N.W.2d at 483.

Wood case may be attributed to two possible reasons: 1) a narrow interpretation of the legislative purpose behind the Sunday closing laws; and 2) failure of the United States Supreme Court to eliminate or satisfactorily explain away discriminatory religious-economic overtones in Sunday closing laws, and further, its failure to define the nature of the state interest in creating them to convincingly eliminate the air of discrimination.

It is unclear from the opinion just exactly what the purpose of the Sunday closing law is. The court's treatment of the retail exemption would indicate that it regards the law essentially as an absolute prohibition of work on Sunday, and not as an attempt to create a day of tranquility. Although both are causally related, and the court has recognized the validity of the latter purpose, it might have helped to specify in the statute that its purpose is to create tranquility, and that exceptions are designed to provide commodities to the public in a way least offensive to that purpose.⁴⁷

The second reason for the court's rigid interpretation of the equal protection test is suggested by the court's treatment of the Sabbatarian exemption. To have been consistent with the ruling regarding the small retail exemption, any class exemption regardless of its reasonable relation to the purposes of the law is violative of equal protection. However, in dealing with the Sabbatarian exemption, the court did not say that the exemption was discriminatory per se, as would have been consistent. The court instead accepted the exemption as being proper, but held that the discrimination was in prohibiting Sabbatarians from selling on Saturday the exempt goods permitted to be sold on Sunday. There is absolutely no reasonable commercial connection between Sabbatarians working on Sunday and the commodities needed by the public, as there was in the other unconstitutional classifications. Sabbatarian exempted businesses might very well disrupt community tranquility and provide employment for thousands of workers.

After the *Wood* case, the Supreme Court of Nebraska had reached the indefensible position of attempting to save the Sabbatarian exemption for reasons which reflect the religious overtones of Sunday legislation, while at the same time holding that a commodity approach inherently discriminates because it differently affects people similarly situated. The two attitudes could not coexist.

⁴⁷ This uncertainty as to what the purpose of the legislature was has been cleared up considerably by *Skag-Way Dep't Stores, Inc. v. City of Omaha*, 179 Neb. 707, 140 N.W.2d 28 (1966).

The problems in the *Wood* case were resolved in *Skag-Way Dep't Stores, Inc. v. City of Omaha*.⁴⁸ The majority opinion was written by Justice Carter who had concurred in the result of the *Wood* case, but who had pointed out that the *Wood* case left the validity of Sunday legislation largely in doubt. In *Skag-Way*, two Omaha city ordinances were challenged by the plaintiff. They were far more discriminatory than the statute in the *Wood* case, because they required that only two classes of businesses close on Sunday: 1) those that had as their main purpose the selling of clothing, shoes, jewelry, ready to wear items and hardware, and 2) those that sold groceries, fruits, vegetables and meat.⁴⁹ All other business and occupations were not covered by the ordinances, including Sabbatarians who were exempted whether they otherwise fell within the prohibition or not.⁵⁰ Thus, no matter whether the purpose of Sunday legislation is to require complete work-stoppage or to provide a day of rest and tranquility, the classifications covered by the statute bore no reasonable relationship to either purpose.

The court held that the ordinances were not related to the ". . . health, safety, peace and good order of society and, even if they did so relate themselves, they are discriminatory as to those in the same class."⁵¹

In the *Skag-Way* case, the approach taken to the ordinances forecasts the approach that will be taken to Sunday laws in the future, and indicates a marked departure from the traditional understanding of Sunday legislation enunciated in *McGowan*.

The classification of stores in accordance with commodities sold no longer provides a proper method of classification because the department store, chain store, and supermarket generally include all of the goods formerly sold only in the 'community stores.' . . . [T]he meaningful economic changes and their effect on the reasonableness of classification require a fresh look at an old question affected by these modern conditions.⁵²

The court reaffirmed its position that Sunday legislation was within the purview of state legislation,⁵³ provided that the legislation itself does not proceed on a commodity approach, which re-

⁴⁸ *Ibid.*

⁴⁹ OMAHA, NEB., MUNICIPAL CODE §§ 19.12.010 and 19.24.010 (1959).

⁵⁰ *Skag-Way Dep't Stores, Inc. v. City of Omaha*, 179 Neb. 707, 710-11, 140 N.W.2d 28, 31 (1966).

⁵¹ *Id.* at 713-14, 140 N.W.2d at 32.

⁵² *Id.* at 710-11, 140 N.W.2d at 31.

⁵³ *Id.* at 713, 140 N.W.2d at 32.

flects an attempt to discriminate among businesses.⁵⁴ To one reading *Skag-Way* in conjunction with the *Wood* case, which held business and commodity classifications invalid even though they were somewhat related to the purpose of reducing the commercial atmosphere, the future of Sunday legislation in Nebraska seems dim, unless it closes the door to classification problems by providing for total closing.

The method with which the court treated the Sabbatarian exemption in *Skag-Way* eliminated the problem reached at this point in the *Wood* case. "The ordinances before us indicate an intent to promote religious considerations inherent in the provision permitting closing on Saturday by those who conscientiously observe Saturday as their Sabbath. But we do not place this decision on that ground."⁵⁵ Presumably they could. But in light of the near impossibility of meeting the Supreme Court's requirements of equal classification outside of, perhaps, total-closing, the inclusion of a Sabbatarian exemption has little singular importance to the present position of the court taken under the equal protection clause.

Thus, the Supreme Court of Nebraska has avoided the religious issues under the first amendment by re-appraising Sunday legislation.

The difficulties of classification under modern conditions lead us more in the direction of individual persuasion and private conscience as the proper solution of this complex problem. And it might well be said that it is not the province of the state . . . in the exercise of its police power to invade the realm of private conscience except where it is incidental to the proper exercise of the police power.⁵⁶

The court inferred that if a Sunday closing law contained a Sabbatarian exemption, it might be struck down on the ground that it carries religious considerations (which is clearly contrary to the position taken in *Braunfeld*),⁵⁷ but the court has not faced the

⁵⁴ Another difficulty which will face legislative drafters attempting to frame a Sunday closing law within the confines of the *Wood* and *Skag-Way* cases is the proposition laid down that "harmless" merchandise cannot be prohibited from sale, while other merchandise in the same class ("harmless") is allowed to be sold. *Skag-Way Dep't Stores, Inc. v. City of Omaha*, 179 Neb. 707, 711, 713, 140 N.W.2d 28, 31, 32 (1966). Since most merchandise falls within this class, it is seemingly impossible to prohibit one item from sale without prohibiting all items from sale to avoid the discrimination announced in *Skag-Way*.

⁵⁵ *Id.* at 713, 140 N.W.2d at 32.

⁵⁶ *Id.* at 712, 140 N.W.2d at 31-32.

⁵⁷ *Braunfeld* left the matter of whether a state might include a Sabbatarian exemption up to the states. *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961).

question of whether Sunday legislation without a Sabbatarian exemption violates the first amendment, and it is doubtful that it soon will.

V. CONCLUSION

The Supreme Court of Nebraska indicated in *Skag-Way* that the history of Sunday legislation has moved through three phases: 1) where closing laws were held valid on the theory that merely promoting religious considerations alone advanced the state welfare within the scope of the state police power, 2) where they would be invalidated if the sole purpose were to advance religious interests (*McGowan*), and 3) where they are invalid as a discriminatory tool to protect certain business interests.⁵⁸ If the closing laws are to be considered economic regulations aimed at protecting down-town stores, it is doubtful that the United States Supreme Court will interfere with the state's interpretations under the present constitutional test of "invidious discrimination," but it remains for the Supreme Court to answer the questions raised under the first amendment, aside from any given state-held position regarding the purpose of the law. The position taken by the Nebraska court clearly indicates that other considerations ought to be taken into account aside from those enumerated by the Supreme Court in arriving at the conclusion that Sunday legislation is of great state interest. It is submitted that the susceptibility of Sunday legislation to commercial misuse and discrimination to protect certain business interests detracts greatly from the importance of Sunday legislation, and this ought to move the balance toward greater protection of religious minorities.

Richard A. Spellman '67

⁵⁸ *Skag-Way Dep't Stores, Inc. v. City of Omaha*, 179 Neb. 707, 710, 140 N.W.2d 28, 31 (1966).