

Note: Constitutional Aspects of Sunday Closing Laws

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NOTES AND COMMENTS

NOTE: CONSTITUTIONAL ASPECTS OF SUNDAY CLOSING LAWS

The development of Sunday Closing Laws may be traced through the institutions of the Roman empire,¹ England² and the American colonies.³ At present, they constitute a highly complex and controversial element of our statutory law.⁴ In America, after the adoption of our constitutional system, these laws gradually gave rise to a number of serious problems and their reconciliation with the individual freedoms secured in the Bill of Rights and similar guarantees of the state constitutions has been a fruitful source of litigation for more than a century.⁵

This note will attempt to draw a comparison between the traditional position of the courts on the constitutional issues created by the enforcement of the Sunday Laws, and the current judicial attitude, as expressed by the Supreme Court in four cases⁶ recently before it. An effort will also be made to evaluate the impact of these

cases on the particular area of constitutional law with which they are concerned.

From the earliest times to the present, Sunday Laws have been subjected to attack along three principal lines:⁷

- (1) That they are laws directly promoting the establishment of Christianity,
- (2) That they impair the right of free exercise of religion, and,
- (3) That they are discriminatory, class legislation, and constitute a denial of equal protection of the law.

Originally these objections were raised on the state level.⁸ However, they eventually

¹ See JOHNSON & YOST, SEPARATION OF CHURCH AND STATE 219 (2d ed. 1948).

² *Id.* at 223.

³ *Id.* at 224-26.

⁴ For an indication of the complexity of these laws see the table contained in Appendix II of the separate opinion of Mr. Justice Frankfurter in *McGowan v. Maryland*, 366 U.S. 420, 551 (1961). See also Comment, 59 COLUM. L. REV. 1192 n.6 (1959).

⁵ *McGowan v. Maryland*, 366 U.S. 420, 435 (1961).

⁶ *McGowan v. Maryland*, *supra* note 5; *Gallagher*

v. Crown Kasher Super Mkt., Inc., 366 U.S. 617 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

⁷ They have at times been challenged on other grounds. For example it has been asserted that their terminology, especially in connection with the designation of exempted products and business activities is vague and misleading; that they constitute an unwarranted interference with the personal habits of citizens; that they deprive individuals of liberty and property without due process of law; and, in an early case, that they violated the "privileges and immunities" clause of the fourteenth amendment. *Broad-Grace Arcade Corp. v. Bright*, 48 F.2d 348 (E.D. Va.), *aff'd*, 284 U.S. 588 (1931) (per curiam); *Justesen's Food Stores, Inc. v. City of Tulare*, 12 Cal. 2d 324, 84 P.2d 140 (1938); *Ex parte Newman*, 9 Cal. 502 (1858); *State ex rel. Walker v. Judge of Section A*, 39 La. Ann. 132, 1 So. 437 (1887). Nevertheless, the categories enumerated in the text seem to cover the most basic areas of litigation.

⁸ *Cantwell v. Connecticut*, 310 U.S. 296 (1940),

found their way into the federal courts where they have become a vital and controversial aspect of current law.

*Sunday Laws as an Establishment
of Religion*

During the colonial period and afterwards, until approximately the end of the eighteenth century, the primary scope of the Sunday Laws in this country remained a basically religious one.⁹ Although this orientation became much less marked in the 1800's,¹⁰ decisions reaffirming the religious purposes of these laws continued to appear.¹¹ Yet, during the nineteenth century, the early approach which gave recognition to the religious foundation of Sunday closing legislation but sustained it nevertheless, gave way to the secular outlook which has pervaded the thinking of the courts in this century.¹² This shift was the result of repeated attacks against the blue laws based on the anti-establishment provisions incorporated into many of the state

made the religious guaranties of the first amendment applicable to the states. Before this, the "establishment" and "free exercise" issues could generally be raised only in the state courts. See Comment, 59 COLUM. L. REV. 1192, 1196 (1959).

⁹ See Note, 73 HARV. L. REV. 729, 730 (1960).

¹⁰ See, e.g., *Ex parte Andrews*, 18 Cal. 679, 684-85 (1861); *Bloom v. Richards*, 2 Ohio St. 387, 392 (1853).

¹¹ See, e.g., *Kilgour v. Miles*, 6 G. & J. 268 (Md. 1834); *Commonwealth v. Wolf*, 3 S. & R. 48 (Pa. 1817).

¹² This secular outlook, although it dominated the thinking of the state courts in the nineteenth century, was not universally accepted. Some courts clung to the old approach. See *Brimhall v. Van Campen*, 8 Minn. 1 (1862). "This Sunday act can have no other object than the enforcement of the fourth of God's commandments, which are a recognized and excellent standard of both public and private morals." *Id.* at 5. See also *Ex parte*

constitutions.¹³ The state courts came to rely almost exclusively upon the rationale that the Sunday Laws, apart from what may have been their former religious orientation, could be effectively sustained as exercises of the police power.¹⁴ It was reasoned that the progressing industrialization of society had created the danger of degradation and degeneration among the working classes through the vitiating effects of incessant labor in factories, mines and the like. To protect its citizens from these dangers, the state might well exercise its general police power to prohibit labor and the carrying on of business for one day in the week.¹⁵ The fact that the day chosen by the legislature, in its discretion, might coincide with the religious Sabbath of the Christian sects could not detract from the prohibition as a legislative exercise of an acknowledged power.¹⁶

Koser, 60 Cal. 177, 194 (1882).

¹³ See, e.g., *Frolickstein v. Mayor of Mobile*, 40 Ala. 725, 727-28 (1867); *Bloom v. Richards*, 2 Ohio St. 387, 390 (1853).

¹⁴ *State ex rel. Walker v. Judge of Section A*, 39 La. Ann. 132, 1 So. 437 (1887): "There exists a remarkable *consensus* of authority that the establishment of a compulsory day of rest in each week is a legitimate exercise of the police power." *Id.* at —, 1 So. at 443.

¹⁵ *Swann v. Swann*, 21 Fed. 299 (C.C.E.D. Ark. 1884). "Experience has shown the wisdom and necessity of having, at stated intervals, a day of rest from customary toil and labor for man and beast. It renews flagging energies, prevents premature decay, promotes the social virtues, tends to repress vice, aids and encourages religious teachings and practice, and affords an opportunity for innocent and healthful amusement and recreation." *Id.* at 303. See also *Lindenmuller v. People*, 33 Barb. 548 (N.Y. Sup. Ct. 1861); *Ex parte Hodges*, 65 Okla. Crim. 69, 83 P.2d 201 (1938).

¹⁶ *Ex parte Andrews*, 18 Cal. 679 (1861). "[T]hat the closing of shops on that day might be more convenient to Christians, or might advance their religious aims or views, is no reason for holding the law unconstitutional." *Id.* at 684.

With the application of the first amendment to the states through the due process clause of the fourteenth amendment,¹⁷ the same objection raised against the blue laws in the state courts (*i.e.*, that they were establishments of religion) was leveled against them in the federal courts.¹⁸ But the efforts to topple the Closing Laws on this ground failed completely.¹⁹ The same approach adopted by the state courts was also followed in the federal jurisdiction. As far as the first amendment's prohibition against the establishment of religion was concerned, the cases took the view that the Sunday Laws had long since ceased to be religious establishments; that they constituted valid police regulations, discretionary with the state legislatures, and that, however unsound they might be as policy measures, they fell well within the constitutional bounds of the first amendment.²⁰

Pronouncements by the Supreme Court as to the validity of the Sunday Laws, especially in regard to their ability to withstand attack based on the establishment concept, had, up until the present, been both infrequent and inconclusive.²¹ The Court did, however, in *Soon Hing v. Crowley*,²² *Hennington v. Georgia*²³ and *Petit v. Minnesota*,²⁴ speak with approval of the police power theory of the Sunday Laws, despite the fact that none of these cases squarely presented the issue of establish-

ment or of free exercise of religion, which will be discussed below.²⁵ On the other hand, *McGowan v. Maryland*,²⁶ *Two Guys From Harrison-Allentown, Inc. v. McGinley*,²⁷ *Braunfeld v. Brown*²⁸ and *Gallagher v. Crown Kosher Super Mkt., Inc.*,²⁹ have been the occasion for a direct and unequivocal rejection by the Court of the position that Sunday Laws are unconstitutional establishments of religion. In these cases, the Court has closely identified itself with the traditional view of the state courts which rest their sustentation of the Sunday Laws on the recognition of a basic turn about in their historical evolution from the avowed promotion and preservation of the Christian Sabbath to the insurance of the secular well-being of workers through mandatory periodical rest from labor.³⁰ These holdings have reconciled state Sunday legislation with the federal establishment doctrine as set forth in *Everson v. Board of Educ.*,³¹ *McCullum v. Board of Educ.*³² and *Zorach v. Clauson*³³ and seem to have determined conclusively that the existence of blue laws is compatible with

²⁵ The cases mentioned in the text involved (1) an attempt to have a San Francisco fire control regulation struck down, (2) an attack against a Georgia closing law as an unconstitutional regulation of interstate commerce and (3) an effort to have a Minnesota Sunday Law regarding barber shops declared unconstitutional as violative of equal protection.

²⁶ 366 U.S. 420 (1961).

²⁷ 366 U.S. 582 (1961).

²⁸ 366 U.S. 599 (1961).

²⁹ 366 U.S. 617 (1961).

³⁰ *McGowan v. Maryland*, 366 U.S. 420, 431-45 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592-98 (1961); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961); *Gallagher v. Crown Kosher Super Mkt., Inc.*, 366 U.S. 617, 624-30 (1961).

³¹ 330 U.S. 1 (1947).

³² 333 U.S. 203 (1948).

³³ 343 U.S. 306 (1952).

¹⁷ See note 8 *supra*.

¹⁸ See *Crown Kosher Super Mkt., Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *rev'd*, 366 U.S. 617 (1961).

¹⁹ See *McGowan v. Maryland*, 220 Md. 117, 151 A.2d 156 (1959), *aff'd*, 366 U.S. 420 (1961).

²⁰ *Ibid.*

²¹ See Comment, 59 COLUM. L. REV. 1192, 1198-99 (1959).

²² 113 U.S. 703 (1885).

²³ 163 U.S. 299 (1896).

²⁴ 177 U.S. 164 (1900).

the maintenance of " 'a wall of separation between church and State.' " ³⁴

Free Exercise of Religion

Even assuming that the state in the exercise of its general police power may enact legislation prohibiting labor and the carrying on of business on Sunday, a further problem arises where the exercise of governmental power actually or apparently conflicts with the constitutional right of individuals to free exercise of religion. A consideration of the incipient religious scope of the Sunday Laws re-emphasizes the problem. Objections of this type have been strenuously pressed by religious minorities, such as Jews and Seventh Day Adventists, who observe religious Sabbaths other than Sunday.³⁵ A Jewish businessman, for example, who is required by his religious convictions to close down his business on Saturday and in addition is compelled by the state to do the same on Sunday, finds that for all practical purposes his work week is reduced to five days. On the other hand his Christian competitor, who already observes Sunday as his religious Sabbath, is free to do business for six days a week and finds himself the beneficiary of a considerable economic advantage over the religiously conscientious Jew. As a result, those of the Jewish faith feel that the state is placing a penalty on the exercise of their religion by forcing

them into a situation where they must sacrifice their religious convictions in order to compete effectively with their Christian counterparts.³⁶

The historical development of this issue parallels that of the establishment controversy in that it was originally raised in the state courts and became prominent in the federal courts only with the application of the first amendment to the state governments.³⁷ Again, as in the case of the establishment controversy, the state courts almost without exception sustained the blue laws as not impairing the right of free exercise.³⁸ Having discarded the old notion that these laws could be justified as religious legislation³⁹ and having laid a more satisfactory foundation in the state's police power,⁴⁰ the courts reasoned that the choice of a particular day or period to implement the policy of mandatory rest from labor was a matter of discretion with the legislature.⁴¹ If the choice made happened to work hardship upon certain reli-

³⁶ See Note, 73 HARV. L. REV. 729, 733-35 (1960).

³⁷ See Comment, 59 COLUM. L. REV. 1192, 1196 (1959).

³⁸ See, e.g., *Lindenmuller v. People*, 33 Barb. 548 (N.Y. Sup. Ct. 1861); *Ex parte Koser*, 60 Cal. 177 (1882); *Judefind v. State*, 78 Md. 510, 28 Atl. 405 (1894); *Specht v. Commonwealth*, 8 Pa. 312 (1848); *State v. Grabinski*, 33 Wash. 2d 603, 206 P.2d 1022 (1949). The only case in state courts striking down a Sunday Law on religious grounds seems to have been *Ex parte Newman*, 9 Cal. 502 (1858). But that case was overruled shortly after by *Ex parte Andrews*, 18 Cal. 679 (1861). See Comment, 59 COLUM. L. REV. 1192, 1196 (1959).

³⁹ *Ex parte Hodges*, 65 Okla. Crim. 69, 83 P.2d 201 (1938). "It is beyond the power of the legislature to impose the observance of Sunday as a religious duty." *Id.* at —, 83 P.2d at 203.

⁴⁰ See JOHNSON & YOST, SEPARATION OF CHURCH AND STATE 231 (2d ed. 1948).

⁴¹ *Lane v. McFadyen*, 259 Ala. 205, 66 So. 2d 83 (1953); *Ex parte Newman*, 9 Cal. 502 (1858)

³⁴ *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

³⁵ A number of jurisdictions give exemptions to Jews and others who observe a day other than Sunday as their Sabbath. CONN. GEN. STAT. ANN. § 53-303 (1960); IND. ANN. STAT. § 10-4301 (1956); KY. REV. STAT. ANN. § 436.160 (1955); ME. REV. STAT. ANN. ch. 134 § 44 (1954); MICH. STAT. ANN. § 18.855 (1957); OHIO REV. CODE ANN. § 3773.24 (Baldwin 1960); VA. CODE ANN. § 18.1-359 (1960).

gious minorities; that fact could not militate against the laws since any conflict which might exist would be the result not of the state's prohibition but of the religious convictions of the minorities themselves.⁴² It was emphasized that the Sunday Laws were wholly negative in character; that is, they merely *prohibited* certain acts wholly *secular* in nature.⁴³ In no instance did they prohibit the performance of religious duties⁴⁴ or compel adherence to the tenets of any religious sect.⁴⁵

In interpreting provisions of the state constitutions guaranteeing the right to free exercise of religion, the state courts found a convenient source of support in the provisions' history. At the time of their adoption, it was reasoned, Sunday Laws had long been in effect, thus their existence could not have been considered inconsistent with the right to free exercise of religion.⁴⁶

(dissenting opinion); *State v. Diamond*, 56 N.D. 854, 219 N.W. 831 (1928).

⁴² See *Corporation of Minden v. Silverstein & Dittmer*, 36 La. Ann. 912 (1884). "He [the Jewish businessman] is left the absolute and unrestrained freedom of disposing of Saturday, his Sabbath, as he may deem proper, or to worship God according to the dictates of his own conscience. He is not . . . required to observe the Christian Sabbath, and he is not checked in his right to pursue other avocations. . . ." *Id.* at 914-15.

⁴³ *Ex parte Andrews*, 18 Cal. 679, 684-85 (1861).

⁴⁴ *State v. Grabinski*, 33 Wash. 2d 603, 206 P.2d 1022 (1949). "No one is restricted in his religious beliefs or practices. . . ." *Id.* at —, 206 P.2d at 1025.

⁴⁵ *People v. Friedman*, 302 N.Y. 75, 96 N.E.2d 184 (1950), *appeal dismissed*, 341 U.S. 907 (1951) (want of a substantial federal question). "It does not set up a church, make attendance upon religious worship compulsory . . . provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion." *Id.* at —, 96 N.E.2d at 186.

⁴⁶ See *Judefind v. State*, 78 Md. 510, 28 Atl. 405 (1894); *cf. McGowan v. Maryland*, 366 U.S.

The Supreme Court has adopted this view of the free exercise conflict *in toto*.⁴⁷ As far as the choice of Sunday by the state legislatures in the implementation of their policies is concerned, the Court begins its evaluation with the proposition that such a choice, based on the police power, does not violate the right to free exercise of religion⁴⁸ and cannot be set aside unless it may be characterized as unreasonable.⁴⁹ In sustaining the choice the Court pointed out that the state may legitimately seek to set apart a day which all the members of the family and community at large may enjoy *together*,⁵⁰ amid quiet and disassociation from the everyday intensity of commercial activities.⁵¹ Furthermore, in the opinion of

420, 437-40 (1961).

⁴⁷ *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Mkt., Inc.*, 366 U.S. 617 (1961).

⁴⁸ *Braunfeld v. Brown*, *supra* note 47. In *Braunfeld* the Court indicates that statutory exemptions such as are given to Jews and Seventh Day Adventists in some jurisdictions are not required to sustain the statutes' constitutionality. Such exemptions, the Court points out, may well provide religious minorities with undesirable economic advantages. See *Kislingbury v. Treasurer of City of Plainfield*, 10 N.J. Misc. 798, 160 Atl. 654 (C.P. 1932). The Court also emphasizes the traditional distinction made in the area of religious liberty between the absolute right *to believe*, which is not subject to restriction and the qualified right *to act* upon one's convictions, which is subject to regulation. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Davis v. Beason*, 133 U.S. 333 (1890); *United States v. Kissinger*, 250 F.2d 940 (3d Cir.), *cert. denied*, 356 U.S. 958 (1958); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954).

⁴⁹ *Braunfeld v. Brown*, *supra* note 47, at 607-09. The Court lists a number of considerations which tended to point up the reasonableness of the particular Sunday legislation under consideration there.

⁵⁰ *McGowan v. Maryland*, 366 U.S. 420, 450-53 (1961).

⁵¹ *Ibid.*

the Court, any attempt by the states to apply the legislative theory of the Closing Laws by allowing a choice to each individual on a "rest one day in seven" basis would result in serious enforcement problems, which state legislatures do well to avoid.⁵² As a result, we may fairly conclude that on the free exercise issue as well as on the establishment issue, the Supreme Court has squarely aligned itself with the traditional view of the state courts.

Equal Protection of Law

Despite the fact that Sunday Laws have been sustained overwhelmingly against the contentions that they are establishments of religion and that they violate the right to free exercise of religion, they have been subjected to further attack based on the concept of equal protection of law. In this respect, the laws have not fared nearly as well as in the other areas and have, not infrequently, been struck down as discriminatory and arbitrary.⁵³ Unlike the religious issues discussed above, the equal protection controversy found its way into the federal courts at an early date through the explicit provisions of the fourteenth amendment.⁵⁴

Both because of general policy considerations and the pressures brought to bear by various economic groups,⁵⁵ the Sunday Laws have developed, from the early simple and categorical prohibitions of labor and business transactions, into a highly

complex system of exemptions and exceptions.⁵⁶ Characteristically, a modern Sunday Law, after reciting its general ban against labor and business not qualifying as either necessary or charitable, will list certain articles of merchandise or businesses which are not subject to the statute's provisions.⁵⁷

As a result of this system of exemptions, situations frequently arise in which a particular dealer (such as a grocer) who does not qualify for a statutory exemption will be prohibited from selling some specific item (such as confectionary) which another dealer qualifying for an exemption (a druggist, for example) will be permitted to sell without restriction.⁵⁸ It has been objected that statutory provisions which make possible such a set of circumstances are discriminatory and violate the right to equal protection of law.

In dealing with this problem, the state courts and the Supreme Court have adopted the same basic approach.⁵⁹ A crucial element in this regard has been the concept of judicial restraint. The courts apparently have proceeded on a presumption of constitutionality in their consideration of the statutory classifications commonly incorporated into the Closing Laws.⁶⁰ Generally,

⁵⁶ *Crown Kosher Super Mkt., Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *rev'd*, 366 U.S. 617 (1961). "The result . . . is that the Sunday law, as it now exists on the books, is an almost unbelievable hodgepodge." *Id.* at 472.

⁵⁷ See Note, *supra* note 55, at 506 n.9.

⁵⁸ See *Elliott v. State*, 29 Ariz. 389, 242 Pac. 340 (1926).

⁵⁹ See, *e.g.*, *Gundaker Central Motors, Inc. v. Gassert*, 23 N.J. 71, 127 A.2d 566 (1956), *appeal dismissed*, 354 U.S. 933 (1957) (want of a substantial federal question); *McGowan v. Maryland*, 220 Md. 117, 151 A.2d 156 (1959), *aff'd*, 366 U.S. 420 (1961).

⁶⁰ *McGowan v. Maryland*, *supra* note 59, at —, 151 A.2d at 159.

⁵² *Ibid.*

⁵³ See *State v. Hurliman*, 143 Conn. 502, 123 A.2d 767, 770 (1956), in which the court mentions several cases holding invalid various Closing Laws on this ground.

⁵⁴ See *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

⁵⁵ See Note, 12 RUTGERS L. REV. 505, 508-09 (1958).

the determinations of the state legislatures in this connection will not be questioned regarding their advisability as policy measures and will be set aside only because of gross, unjustifiable discrimination or arbitrariness.⁶¹ In coping with the problem of just how far legislative discrimination can be carried without constituting an abuse of discretion, the courts have evolved a number of subsidiary concepts. For example, some courts have stated flatly that legislative discrimination between classes is permissible and that the right to equal protection is violated only where the legislature begins to discriminate between *individual members* of a given class.⁶² Some courts, on the other hand, have approached the problem from the point of view of a "stores-product" distinction,⁶³ reasoning that it is permissible for the legislature to impose a blanket prohibition upon the sale of a given product, whereas it would be violative of equal protection to prohibit certain designated stores from selling that product without restricting all other stores in the same manner.⁶⁴

Despite what may be described as the general reluctance of the courts to strike down Sunday Laws as discriminatory class legislation,⁶⁵ they have not hesitated to do

so where they felt such action was called for. Thus, in *Elliott v. State*,⁶⁶ the court declared unconstitutional a Sunday Closing Law which prohibited the opening of grocery, shoe and hardware stores on Sunday while exempting jewelers, dealers in second-hand goods, and tailoring establishments.⁶⁷ Similarly, in *Arrigo v. City of Lincoln*,⁶⁸ the court held invalid a statute which forbade the opening of grocery and meat stores but excepted cigar stores, fruit stores and others.⁶⁹

As already pointed out, the Supreme Court has adopted fundamentally the same attitude as the state courts in this area. In *Petit v. Minnesota*,⁷⁰ the Court upheld a state Sunday Law which contained the traditional exemption for labor or business activity qualifying as "necessities," but explicitly designated the operation of barber shops as being beyond the contemplation of the statutory exemption.⁷¹ The Court perceived a sufficient basis for singling out barber shops in the considerable difficulty which might be attendant upon any effort to classify their operation as necessary or unnecessary. Basically, the case reaffirmed the "wide discretion" possessed by the state legislatures in these matters and redefined the palpable arbitrariness required to set aside legislative classifications contained in the blue laws.⁷² In *McGowan*,⁷³ the Court pointed out that a statutory classification in

⁶¹ *Lane v. McFadyen*, 259 Ala. 205, 66 So. 2d 83 (1953); *Komen v. City of St. Louis*, 316 Mo. 9, 289 S.W. 838 (1926); *State v. Weddington*, 188 N.C. 643, 125 S.E. 257 (1924); *State v. Diamond*, 56 N.D. 854, 219 N.W. 831 (1928).

⁶² See, e.g., *State v. Towery*, 239 N.C. 274, 79 S.E.2d 513, appeal dismissed, 347 U.S. 925 (1954) (want of a substantial federal question).

⁶³ *State v. Grabinski*, 33 Wash. 2d 603, 206 P.2d 1022 (1949). "As long as the legislature limits its exceptions to specific commodities, such enactments are almost universally upheld." *Id.* at —, 206 P.2d at 1024.

⁶⁴ See *State v. Hurliman*, 143 Conn. 502, 123 A.2d 767 (1956).

⁶⁵ *Supra* note 61.

⁶⁶ 29 Ariz. 389, 242 Pac. 340 (1926).

⁶⁷ *Id.* at 342.

⁶⁸ 154 Neb. 537, 48 N.W.2d 643 (1951).

⁶⁹ *Id.* at 647. See also *Justesen's Food Stores v. City of Tulare*, 12 Cal. 2d 324, 84 P.2d 140 (1938); *Allen v. City of Colorado Springs*, 101 Colo. 498, 75 P.2d 141 (1937); *McKaig v. Kansas City*, 363 Mo. 1033, 256 S.W.2d 815 (1953).

⁷⁰ 177 U.S. 164 (1900).

⁷¹ *Id.* at 168.

⁷² *Id.* at 165-68.

⁷³ 366 U.S. 420 (1961).

this area will be nullified only if it "rests on grounds wholly irrelevant to the achievement of the State's objective."⁷⁴ The equal protection concept is described there as not necessarily making mandatory territorial uniformity but only implying "equality between persons as such."⁷⁵

Conclusion

Clearly, Sunday closing legislation has received the overwhelming endorsement of both state and federal courts.⁷⁶ In its recent re-evaluation of these laws, the Supreme Court has undoubtedly been influenced to a large extent by the marked concurrence of authority in this area.⁷⁷ At any rate, the majority of the Court has appropriated in its entirety the traditional police power theory of the Sunday Laws developed by the state courts during the last century. Despite the vigorous position of the dissenters on the free exercise issue,⁷⁸ both that issue and the establishment issue seem to have been settled definitively. Although the Court declares that Sunday Laws may yet constitute a violation of the establishment clause if they can be demonstrated to incorporate a use of the state's coercive power in aid of religion,⁷⁹

it remains highly doubtful that such a demonstration can be realistically attempted in light of the Court's liberal interpretation of those Sunday Laws presently in force.⁸⁰ And so long as this is true, there seems to be little possibility of having blue laws struck down as unconstitutional infringements of the right to free exercise of religion.

On the other hand, both the traditional approach⁸¹ and the Court's present attitude regarding the Closing Laws as violative of equal protection may be characterized as largely *ad hoc* determinations. Perhaps, in light of the Court's sympathetic interpretation of the Maryland and Massachusetts statutes in *McGowan v. Maryland*⁸² and *Gallagher v. Crown Kosher Super Mkt., Inc.*,⁸³ this *ad hoc* characterization may prove more apparent than real in the federal jurisdiction since successful assaults against the Sunday Laws have been restricted to the equal protection area.⁸⁴ Any change in this pattern seems highly remote, if not impossible, at this time. With regard to the status of the Closing Laws as implements of public policy operating within the framework of our modern social and economic structures, the question of modification or abolition seems to have been withdrawn emphatically from the area of

⁷⁴ *Id.* at 425.

⁷⁵ *Id.* at 427. See also *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Mkt., Inc.*, 366 U.S. 617 (1961).

⁷⁶ See cases cited note 75 *supra*. See also Comment, 50 COLUM. L. REV. 1192, 1196 (1959).

⁷⁷ *McGowan v. Maryland*, 366 U.S. 420, 436 (1961). The Court here refers explicitly to the wide authority sustaining Sunday Closing Legislation.

⁷⁸ *McGowan v. Maryland*, *supra* note 77, at 561 (dissenting opinion of Douglas, J.); *Braunfeld v. Brown*, *supra* note 75, at 616 (dissenting opinion of Stewart, J.).

⁷⁹ *McGowan v. Maryland*, *supra* note 77, at 453.

⁸⁰ For a summary of Sunday Laws currently operative throughout the United States, see Appendix II of the separate opinion of Mr. Justice Frankfurter in *McGowan v. Maryland* *supra* note 77, at 551.

⁸¹ *Lane v. McFadyen*, 259 Ala. 205, 66 So. 2d 83 (1953). "The decisions have been as varied as the statutes or ordinances on which the actions arose. . . ." *Id.* at —, 66 So. 2d at 87.

⁸² 366 U.S. 420 (1961).

⁸³ 366 U.S. 617 (1961).

⁸⁴ See discussion and cases collected in note 38, *supra*.

judicial determination.⁸⁵ If Sunday closing legislation is a dying relic of the past, it now appears that it will have to die where it was born — in the state legislatures.