Missing Link: A Brief History of *Sherbert*

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TABLE OF CONTENTS

Introduction 1

I. Justice Brennan Commissions Equality Framework Against Blue Laws 5

A. ACLU Argues Blue Laws Violate Equality 5

B. Justice Brennan Commissions Equality Framework 10

II. Rational Basis Precedent Impedes Religious Equality Framework in *Braunfeld* 15

A. Chief Justice Warren Chooses Precedent Over Equality 15

B. Justice Brennan and Comrades Push Back 20

III. Justice Brennan Mediates Religious Equality Framework Through *Sherbert* 24

A. Justice Brennan Promotes Counter-Majoritarianism and Court Shifts 24

B. *Sherbert* Gives Justice Brennan a Second Chance 30

C. Justice Brennan Mediates His Equality Framework into Law 36

Conclusion 42

INTRODUCTION

Lawyers, academics, and attentive laypersons are aware of the Religious Freedom Restoration Act (RFRA) because it has become the epicenter of the ongoing battle between religion and equality.[1] Enacted in 1993, RFRA set the statutory standard for adjudicators to use to determine whether a federal law that restricts the free exercise of religion is permissible, generally known as the compelling interest test. Very similar to the compelling interest test applied in race discrimination or disparate impact cases, RFRA's compelling interest test states that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[2] However, most individuals do not know that before the compelling interest test was the statutory standard for the free exercise of religion, it was the constitutional one. And it was originally called the *Sherbert* Test.

What is *Sherbert*? It is the case that the Supreme Court decided in 1963 which set the precedent that the government must have a compelling justification met by narrowly tailored means to burden the exercise of religion by laws that are neutral.[3] It is the case that the Court effectively overruled in 1990 in *Employment Division v. Smith*.[4] And it is the case that Congress deliberately codified in RFRA to overturn the Supreme Court's overruling in *Smith*.[5] More

[1] *E.g.*, Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. OF ILL. L. REV. 839 (2014).
[2] 42 USCS § 2000bb-1(b).
[3] Sherbert v. Verner, 374 US 398 (1963); *see also* 42 USCS § 2000bb(a)(4) ("in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion").
[4] *Id*; Employment Division v. Smith, 494 U.S. 872 (1990) (holding that the government may enact a law that restricts people's ability to exercise their religion so long as it is neutral and generally applicable).
[5] *See* 42 USCS § 2000bb(b)(1) ("The purposes of this Act are-(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its

importantly, *Sherbert* is the cornerstone of religious equality and accommodation jurisprudence, though very few know how it came to be.

There is a historical account of how the Supreme Court developed its equal protection doctrine in race discrimination and disparity cases.[6] However, no comparable account about the Court's application of equal protection to religious discrimination and disparity exists.[7] This paper provides a narrative of where the decision in *Sherbert* came from, and a thorough explanation of how through it Justice William Brennan, Jr. shifted religious freedom jurisprudence from a liberty analysis to an equality analysis. *Sherbert* is a missing link. It is where the Supreme Court embraced its role as gatekeepers to the Constitution by using the equal protection framework of the Fourteenth Amendment as a tool to recognize that free exercise of religion requires religious equality.

The Supreme Court's jurisprudential shift began approximately two years before it decided *Sherbert*. With the aid of the American Civil Liberties Union (ACLU), Abraham Braunfeld, a Jewish owner of a child's clothing store in Philadelphia, made a free exercise claim against Pennsylvania's penal Sunday closing code.[8] The ACLU alleged that the law discriminated religious minorities like Braunfeld because it essentially forced him to choose between either adhering to the Sabbath inherent to Orthodox Judaism or maintaining his

application in all cases where free exercise of religion is substantially burdened"); James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407 (1992).
[6] *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).
[7] *Compare with* 1 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: OVERVIEWS & HISTORY (2010); 2 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE (2011); SARAH BARRINGER GORDON, SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA (2010); Michael W. McConnell, *The Origins and Original Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Michael W. McConnell, *Justice Brennan's Accommodating Approach Toward Religion*, 95 CA. L. REV. 2187 (2007).
[8] Braunfeld v. Brown, 366 U.S. 599 (1961).

livelihood in a competitive retail market.[9] Braunfeld's case was one of four Sunday closing law cases the Supreme Court collectively granted certiorari to review, and it presented the Court with a persuasive religious equality theory of the Free Exercise Clause.[10]

Part one of this paper explores how these cases, and Braunfeld's litigation, in particular, inspired Justice Brennan to bring to the fore his developing theory that the Free Exercise Clause of the First Amendment extends the right to equal protection under the Fourteenth Amendment to religious minorities. In preparation for the Sunday closing law cases, he commissioned his law clerk, Richard S. Arnold, to draft memoranda about the merits of Braunfeld's and the other claimants' religious liberty, due process, and religious equality claims.[11] The memos Arnold produces are the first time that Justice Brennan crystallized his religious equality theory in the Supreme Court. They mirrored Brennan's understanding of the Free Exercise Clause and his intent to make religious equality a part of the Court's counter-majoritarian role.

Part two illuminates the jurisprudential tension between prior precedent and Justice Brennan's equality framework. When the Supreme Court decided *Braunfeld v. Brown* in 1961, a majority rejected the ACLU's religious liberty and religious equality claims despite Justice Brennan's persuasive theory that equal protection doctrine requires the Court to adjudicate free exercise disputes under a compelling interest test analysis.[12] Instead, the Court maintained its

[9] *Id*. In Orthodox Judaism, during the Sabbath the adherent ceases working from sundown on Friday to sundown on Saturday, dedicating the interim to religious study and worship, and rest.
[10] *See* McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Gallagher v. Crown Kosher Super Market of Massachusetts, 366 U.S. 617 (1961).
[11] *See* Memorandum from Law Clerk Richard S. Arnold, Sunday Laws--Applicability of Equal Protection Clause to Associate Justice William Brennan (1960) (on file with the Library of Congress Manuscript Reading Room); Memorandum from Law Clerk Richard S. Arnold, Sunday Laws: Memo on Standing to Raise Constitutional Questions to Associate Justice William Brennan (1960) (on file with the Library of Congress Manuscript Reading Room); Memorandum from Law Clerk Richard S. Arnold, Sunday Laws: Memo on the Merits of the First Amendment Arguments to Associate Justice Brennan (1960) (on file with the Library of Congress Manuscript Reading Room).
[12] *See* Braunfeld v. Brown, 366 U.S. 599, 610 (1961) (Brennan, W., dissenting).

long-held precedent that the government may restrict economic and religious activity through its police power as long as it has a rational reason for doing so.[13] Justice Brennan was not discouraged when he was unable to gather a majority of votes in *Braunfeld* to turn his religious equality framework into law. Instead, he used his time wisely until another opportunity presented itself when the ACLU helped Adell Sherbert, a Seventh Day Adventist, bring a free exercise claim against South Carolina's unemployment compensation structure.[14]

Part three traces the changes in the Court's composition, the socio-legal climate surrounding Sherbert's litigation, and how Justice Brennan mediated these things leading to his majority opinion in *Sherbert*. During the two years between the Court's *Braunfeld* and *Sherbert* opinions, Justice Brennan continued to contour and promote his understanding of the Free Exercise Clause and the Supreme Court's counter-majoritarian role.[15] He also used changes in the Court's composition to his advantage to cultivate a bench that was more receptive to his religious liberty and religious equality theories of the Establishment Clause and Free Exercise Clause, respectively.

Justice Brennan's efforts from *Braunfeld* to *Sherbert* show that the religious accommodation doctrine as it exists today began as a tool to extend equal protection to religious minorities, prohibit religious classification, and protect religious objectors from discrimination. Therefore, modern free exercise jurisprudence, at least as it existed originally, created a right for

[13] Prior to Sherbert v. Verner, the Supreme established in the iconoclastic anti-polygamy case Reynolds v. United States, 98 U.S. 145 (1878), that the freedom to believe is absolute. However, in upholding a federal anti-bigamy statute, over a Mormon's objections that it violated the Free Exercise Clause, the Court recognized that the freedom to act on religious beliefs is qualified by the Legislature's power to protect the public's health, safety, and morals, to which the Court is highly deferential.

[14] Seventh Day Adventists are a minority of Protestants who are required to observe the Sabbath from Friday evening to Saturday evening, like Orthodox Jews.

[15] *See* William J. Brennan, Assoc. Justice, United States Supreme Court, James Madison Lecture at the New York University Law Center: The Bill of Rights and the States, 3 (Feb. 15, 1961) (unpublished manuscript) (on file with the Library of Congress Manuscript Reading Room).

religious persons to protection from discrimination achieved through government-sanctioned majoritarianism.[16] Brennan's objective, moreover, in *Sherbert*'s precedent was to declare the bounds of the Religion Clauses. A liberty analysis governs the Establishment Clause which creates a ceiling that protects the government and secular interests from religious majorities.[17] Whereas, an equal protection analysis is the basis of the Free Exercise Clause which creates a floor that protects religious persons from discrimination by secular and religious majorities.[18]

I. JUSTICE BRENNAN COMMISSIONS EQUALITY FRAMEWORK AGAINST BLUE LAWS

A. ACLU Argues Blue Laws Violate Equality

During the late 1950s and early 1960s, the ACLU heard the outcry of secular and religious minorities who were struggling under the impetus of Sunday closing laws in America. It organized a legal campaign against Sunday legislation which had deep roots in the nation's history and Protestant heritage.[19] The first Sunday/Lord's Day laws in the colonies were enacted by Protestants in the Virginia colony in 1610, and they eventually referred to them as Blue

[16] In United States v. Carolene Products Company, 304 U.S. 144 (1938), the Supreme Court used the rational basis test to defer to Congress' police power and upheld a 1923 act that banned "filled milk" in interstate commerce. In the process the Court also laid the foundation of modern equal protection jurisprudence in footnote four of the majority opinion. There the Court noted that laws which may prejudice "discrete and insular" minorities may require less deference to the Legislature and greater judicial scrutiny. Heightened judicial scrutiny would be required to protect the rights of minority populations that, because of their small numbers and limited access to the political process, could not protect their interests through the political process since it is governed my majority-rule.
[17] *See* School District of Abington Township v. Schempp, 374 U.S. 203 (1963) (Brennan, W., concurring).
[18] *See* Richard Posner & Robert M. O'Neil, Opinions of William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States: October Term, 1962 (n.d.) (unpublished manuscript) (on file with the Library of Congress Manuscript Reading Room).
[19] *See* Sunday Blue Laws: Correspondence. American Civil Liberties Union Papers (1961) (on file with the Mudd Library, Princeton University).

Laws.[20] And the Blue Laws of early America were severe and unpopular. In the words of Thomas Paine,

> The word Sabbath means rest: that is cessation from labor, but the stupid Blue Laws … make a labor of rest, for they oblige a person to sit still from sunrise to sunset on a Sabbath day, which is hard work. Fanaticism made those laws, and hypocrisy pretends to reverence them for where such laws prevail, hypocrisy will prevail also.[21]

The strictness of Blue Laws even reached then-President George Washington who was given a warning after traveling in an attempt to attend a worship service in New York in violation of Connecticut's Blue Law, which prohibited travel on Sunday.[22]

With the Protestant establishment in place, from the 17th century to the American Revolution a significant objective of Blue Laws was the enforcement of religious practices and principles.[23] Blue Laws primarily functioned to enforce a six-day work week to protect the health of workers from 1844 to 1912.[24] However, commercialism, and its monopoly on Sunday and related laws, would eventually replace the early American religious impetus for Blue Laws.[25] And by the 1960s, it was evident that a general national religion, derived from a particular attitude about religion itself, was displacing Protestantism. Scholars indeed observed that "The competitor [contending with Protestantism] is not chiefly Roman Catholicism nor Judaism nor even secularism. Rather, it is an attitude toward religion. Elevated to ultimacy, this attitude has

[20] DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS, 30 (1987).
[21] Daniel O. Flanagan, *Sunday Blue Laws: A New Hypocrisy*, 54 NOTRE DAME L. REV. 716 (1979).
[22] LABAND & HEINBUCH, *supra* note 20, at 38.
[23] Fred. R. Endsley, Current Status of Sunday Closing Laws in the United States and Their Marketing Implications in Selected Metropolitan Areas, 18 (Jan. 1967) (unpublished Ph.D. dissertation, Louisiana State University) (on file with the University of Virginia Library System).
[24] *Id*. at 20.
[25] LABAND & HEINBUCH, *supra* note 20, at 39.

become a religion itself."[26] This secular "nationalism," moreover, was viewed as independent, and therefore, superior to the "natural" religion of Protestants, Catholics, and Jews[27], and was eventually coined the "Religion of Democracy"—a fervent secular and humanist devotion to the free society and the individual's place in it.[28]

Politically, Blue Laws arose from the economic, social, and religious interests of politicians, their constituents, and members of the community.[29] For instance, many state legislatures enacted Blue Laws to protect the interests of small business owners who would not be able to compete with their competitors if they were allowed to operate on Sunday. And economic interests not only influenced why legislatures enacted Blue Laws but how they determined for whom to create exceptions to the penal codes.[30] Due to weak enforcement, Sunday legislation did not affect Sunday selling, though data shows that by the mid-to-late 1960s, retailers were more likely to open on Sunday in areas that did not have Blue Laws and in the suburbs.[31] Religious citizens, leaders, and politicians fervently supported Blue Laws as a means to protect and honor their religious Sabbath day of worship and rest.[32] And despite a consensus among the state and federal judiciaries that Blue Laws were secular codes of general applicability, their strongest advocates came from Christian churches and organizations.[33]

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[26] WILLIAM HERBERG, PROTESTANT--CATHOLIC--JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY, 67 (2nd ed. 1960).
[27] *Id*. at 70.
[28] ROBERT T. HANDY, A CHRISTIAN AMERICA, 191 (2nd ed. 1984).
[29] LABAND & HEINBUCH, *supra* note 20, at 140.
[30] *Id*. at 723.
[31] Endsley, *supra* note 23, at 169, 176. Moreover, many Blue Laws, like the penal Blue Law at issue in Braunfeld v. Brown, were enacted or reenacted to regulate the burgeoning retail industry; *see*, The Pennsylvania Amendatory Act of August 10, 1959, P.L. 660, 18 Purd. Pa. Stat. Ann. §4699.10 (supp.).
[32] *See* LABAND & HEINBUCH, *supra* note 20, at 146.
[33] Neil J. Dillof, *Never of Sunday: The Blue Laws Controversy*, 39 MD. L. REV. 679, 699 (1979-1980).

It was against this socio-legal backdrop that the ACLU contended against Blue Laws. It believed that the Establishment Clause and Free Exercise Clause of the First Amendment not only complemented one another to ensure complete religious freedom but that they were each a separate, self-sufficient legal standard that ensured protection from different kinds of government action.[34] However, it also acknowledged that a small contingent of the Supreme Court viewed equal protection as a threat that might result in a doctrine that would require the Court to promote religious interests over governmental or secular ones in violation of the Establishment Clause.[35] But the ACLU held a very strong view that equality is inherent in the Free Exercise Clause:

> Man's relation to his God is no concern of the State. Every person has a right to worship as he pleases, and to answer to no one for the verity of his religious views...The Constitution envisions the widest possible toleration of conflicting religious views and the First Amendment is to be accorded a broad meaning and interpretation to that end...The Constitution assures freedom from religion as well as freedom *of* and *for* religion. This freedom is available to believers and non-believers alike. It protects atheists as well as theists, humanists as well as deists.[36]

Moreover, it regarded the free exercise of religion as among the other "preferred freedoms" in the First Amendment. Therefore, it could only be infringed upon, "by showing a clear, grave and present danger to substantial public interests which the State may lawfully protect (such as conduct offending public moral, health or safety)."[37] The ACLU also realized that the Supreme Court often regarded America as a "Christian nation" in its early era and still

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[34] Letter from Kenneth Greenwalt, Assoc., Davies, Hardy & Schenck, to Alan Reitman, Assoc. Dir., American Civil Liberties Union and John de J. Pemberton, Nat'l Exec. Dir., American Civil Liberties Union (Nov. 27, 1962) (on file with the Mudd Library, Princeton University).
[35] *Id*. at 18.
[36] *Id*. at 23-24.
[37] *Id*. at 25.

regarded a much more pluralist America as a "religious people."[38] Still, it stood firmly on its platform that though the mounting religious groups in America had to exercise their religion with a tolerance of one another, the Court had a duty to protect religious minorities by interpreting the Free Exercise Clause liberally, and by judging their religious beliefs and exercises with tolerance and understanding. Therefore, ACLU chapters variously brought litigation against their states' Blue Laws.[39] These laws facially appeared to be civil, social welfare codes for a day of rest, but were fueled by Protestant and Catholic churches and organizations that lobbied stores to close on Sunday to protect the Lord's Day or face moral degradation and the penalty of fines.[40]

Their efforts, furthermore, were to some avail. By 1960 four of their Blue Law cases were granted certiorari and were scheduled to be decided by the Supreme Court in 1961: *McGowan v. Maryland*, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, and *Braunfeld v. Brown*.[41] However, despite its legal acuity and workforce, the ACLU would face an uphill battle before the high court given its precedent that Sunday closing laws were constitutional.[42] Christian majoritarianism was integral in the implementation and justification of Blue Laws though they infringed upon the freedom of religious objectors.[43] In short, the posture of America's judiciary was that,

> the rationale of Sunday closing laws is that man's health and well-being require a day of rest; Sunday was chosen as that day because of the fact of Christianity's role in the history of Western Civilization; and due to these two considerations, those whose religious heritage deny the Sunday observance custom of

[38] *Id*. at 30.
[39] *See* Sunday Blue Laws: Correspondence, *supra* note 19; *see also* Richard Cohen, Sunday Blue Laws: "Sunday in the Sixties," American Civil Liberties Union Papers (1962) (on file with the Mudd Library, Princeton University).
[40] *Id*.
[41] *Id*; Respectively, 366 U.S. 420 (1961), 366 U.S. 420 (1961), 366 U.S. 617 (1961), and 366 U.S. 599 (1961).
[42] *See* Cohen, *supra* note 39.
[43] *See* William J. McCrone, *Constitutional Law-- Religious Liberty--Sunday Closing Laws*, 3 St. Louis U. L.J. 300, 304 (1954–1955).

> Christianity must accept the will of the majority as expressed by a given state's legislature in the exercise of its police powers.[44]

This was certainly the case for the Supreme Court. In 1884, *Soong v. Crowley* was the first Blue Law case it ever considered[45], and by 1889 the Court solidified its jurisprudence that Sunday closing laws were not class legislation—enacted for the benefit of Christians—but a constitutional means by which the State could ensure that employees had a day of rest.[46] And as time pressed forward, the Supreme Court, federal, and state courts found that Sunday closing laws did not violate the equal protection guarantees of the Constitution. In practically all respects, Blue Laws were a legitimate exercise of state police power to create a day of rest so long as they did not target a particular group of people (e.g., Jews) and applied to everyone.[47]

B. Justice Brennan Commissions Equality Framework

An analysis of Justice Brennan's position in freedom of religion cases shows that he was consistently accommodating toward religion and religious persons.[48] Consequently, despite the Court's long-standing precedent that Sunday closing laws are constitutional, Justice Brennan wanted a thorough understanding about the merits of all the legal issues presented in the Blue Law cases and how his framework of the Free Exercise Clause fit in. So, he commissioned one of his law clerks, Harvard Law school graduate, Richard S. Arnold, to draft three memoranda

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[44] *Id*.
[45] LABAND & HEINBUCH, *supra* note 20, at 39.
[46] McCrone, *supra* note 43, at 300.
[47] *Id*. at 301–302.
[48] *See* Michael W. McConnell, *Justice Brennan's Accommodating Approach Toward Religion*, 95 CA. L. REV. 2187 (2007) for a thorough exposition on Justice Brennan's stance on freedom of religion while he was on the bench ("In striking contrast to the partisans of today, Justice Brennan did not view a vigorous and publicly active religious sector as a threat to democratic values. His interpretation of the separation of church and state did not pit the religious against the secular nor favor secular ideologies over their religious counterparts. Instead, Justice Brennan sought to protect the freedom of both, and ultimately the freedom of the American people to make their own decisions about what worldviews are most persuasive. Indeed…Justice Brennan's jurisprudence was highly protective of religious freedom and hence, in many applications, of religion"), at 1.

and provide tentative conclusions based on his analysis of existing case law.[49] The first memorandum examined whether the state Blue Law at issue in each of the Sunday closing cases violated the Equal Protection Clause of the Fourteenth Amendment.[50] The second memorandum analyzed whether the claimants in each case had standing to seek judicial relief.[51] Moreover, the final, and most important memorandum for Justice Brennan's purposes determined whether the state Sunday closing schemes in each of the cases violated the Establishment or Free Exercise Clauses of the First Amendment.[52] In addition to confirming the validity of Braunfeld's free exercise claim, Arnold's last memo helped Justice Brennan shape his equal protection theory of the Free Exercise Clause as juxtaposed to the Establishment Clause.[53]

Arnold dedicated his third and last memorandum to help Justice Brennan have a clear understanding of "the religious issues under the first amendment…because *Braunfeld* raises them inescapably. The appellants there have standing, and the Pa. statute seems invulnerable to equal-protection attack."[54] To start, Arnold advised that the Court's prior precedents on the validity of Blue Laws did not mean that it should dismiss Braunfeld's case for lack of a federal question like it did to six previous Blue Law cases.[55] The Supreme Court had not decided the validity of Blue Laws since 1940 when it held that the Fourteenth Amendment incorporates the religious clauses in the First Amendment. Arnold commented,

[49] Richard Sheppard Arnold would later become a renowned judge in the U.S. District Court and then U.S. Court of Appeals for the Eighth Circuit.
[50] Memorandum from Law Clerk Richard S. Arnold, Sunday Laws--Applicability of Equal Protection Clause to Associate Justice William Brennan (1960) (on file with the Library of Congress Manuscript Reading Room).
[51] Memorandum from Law Clerk Richard S. Arnold, Sunday Laws: Memo on Standing to Raise Constitutional Questions to Associate Justice William Brennan (1960) (on file with the Library of Congress Manuscript Reading Room).
[52] Memorandum from Law Clerk Richard S. Arnold, Sunday Laws: Memo on the Merits of the First Amendment Arguments to Associate Justice Brennan (1960) (on file with the Library of Congress Manuscript Reading Room).
[53] *Id.*
[54] Arnold, Memo on Standing to Raise Constitutional Questions *supra* note 51 at 12.
[55] Arnold, Memo on the Merits of the First Amendment Arguments, *supra* note 52 at 1–2.

> But when we reflect that it is only since *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), that it has been clear that [the] 14th amendment incorporates as against the states the religious provisions of the 1st amendment, and that this Court has not since that time written an opinion on Sunday laws, it becomes clear that it is high time this Court gave more guidance to the states than mute dismissals. In such an important matter of constitutional law, I should think that precedent, while persuasive, should not foreclose the Court from considering the case on its merits.[56]

Then Arnold turned to the merits of Braunfeld's Establishment Clause claim. He relied on the Court's precedent to presume that the Sunday closing statutes were not per se invalid for benefitting Christianity.

> On the merits, I shall begin by assuming that the Sunday laws are not automatically invalid because to some extent they tend to advance Christianity (except for the Seventh-Day Adventists who are Sabbatarians) and hurt Judaism. The Court has made it clear, at least as far as the Establishment Clause is concerned, that some minimal accommodation of state to church is permissible.[57]

As First Amendment rights, Arnold continued, the Court should analyze Establishment Clause and Free Exercise Clause under heightened scrutiny. The Establishment Clause, he concluded, protects the government from religion while both clauses protect religious minorities from the government. Citing *United States v. Carolene Products, Co.*, footnote four[58] and *West Virginia Board of Education v. Barnette*[59], Arnold stated,

> 1) the Establishment Clause, like the protection for freedom of speech and the press is a fundamental safeguard of the free functioning of government, one of the considerations uppermost in

[56] *Id*. at 3.
[57] *Id*. at 6; *see also* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding New York's released-time program for religious education for public-school children upheld where instruction takes place outside of school buildings); Everson v. Board of Education, 330 U.S. 1 (1946) (upholding New Jersey's reimbursement of cost of transportation to school to parents of parochial-school children as well as those of public-school children).
[58] 304 U.S. 144, 152–53, n.4 (1936) (recognizing that courts need to use heightened scrutiny to protect the individual rights of racial, gender, and religious minority groups that cannot advocate for their interest through the political process because they are discrete and insular).
[59] 319 U.S. 624, 639 (1943).

> the minds of those who drafted the bill of rights; 2) both the establishment and free-exercise clauses are designed to protect religious minorities (in 1791, non-conformists; now, Jews) who because they are small in number and different from the rest of the population, cannot always look to the political processes to protect themselves against discrimination.[60]

And after conceding that states have the power to enact Sunday closing laws to protect their interest to have citizens that were rested, healthy, and efficient, Arnold called whether that interest was sufficiently compelling to abridge religious freedom into question. He informed Justice Brennan that Blue Laws might violate the Establishment Clause because they represent a state's endorsement of Christianity.[61] Effectively, when a state enacts and endorses a Sunday closing law,

> Christians are made to feel that the state favors their customs, and Sabbatarians are made to feel foreign and inferior. We do not have here the traditional establishment elements of religious taxation or forced affirmation, but we do have a discriminatory preference of one religion over another.[62]

In addition to being discriminatory, Arnold continued, Blue Laws restricted religious minorities like Braunfeld's ability to exercise their religion freely by economically penalizing them for not being Christian.

> [T]he laws substantially impede the free exercise of religion because they make it financially more advantageous to be Christian. Persons observing Sunday as their day of rest are allowed to be open for business 6 days a week, while persons observing Saturday may do business only on five: on Saturday their religion forces them to close, and on Sunday their government does the same. Thus, the state offers a material inducement to change from a Saturday-observer to a Sunday-observer. It will not do to say that the disadvantage is not caused

[60] Arnold, Memo on the Merits of the First Amendment Arguments, *supra* note 52 at 8.
[61] *Id*. at 9.
[62] *Id*. at 9–10.

> by the state but by the individual free choice to become a Jew, not that the state is simply imposing a nondiscriminatory civil regulation. By making it financially better to be a Christian, the state conditions the free choice of religion…[63]

Then Arnold informed Justice Brennan that the real issue for the Court to decide was whether Blue Laws passed the compelling interest test.[64] According to the Court's application of the Equal Protection Clause of the Fourteenth Amendment in other cases involving discrimination, Arnold advised Justice Brennan that the Amendment should be read liberally to incorporate its compelling interest test into the Free Exercise Clause.

> I do not think that the 14th amendment should be limited to the correction of those abuses with which it framers were familiar and which they specifically had in mind. Rather it should be regarded as a broad charter of liberty general enough to keep the states from indulging in forms of discrimination not specifically alluded to by the framers. Such has been the interpretation accorded to the amendment by this Court in other contexts, and such, I believe, is not contradicted by any specific statements [by] the amendment's author. [65]

And under this Free Exercise paradigm, Arnold concluded that Blue Laws are unconstitutional because they are not narrowly tailored since they lacked exemptions for religious minorities.

> I lean strongly to the view that the state's interest in peace and quiet is not great enough to justify this infringement of religious liberty, at least when we know that the state could reasonably adopt an exemption for Orthodox Jews. I think the free-exercise clause would be a better vehicle for such a holding than the establishment clause, since the impediment to Judaism seems more marked tha[n] the state's endorsement of Christianity.[66]

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[63] *Id*. at 10.
[64] *Id*. at 12.
[65] *Id*. at 13.
[66] Arnold, Memo on the Merits of the First Amendment Arguments, *supra* note 52 at 15.

Arnold's analysis coalesced with Justice Brennan's religious equality sentiments and illuminated that the compelling interest test, through the Free Exercise Clause, was the most effective constitutional vehicle for his framework.

II. RATIONAL BASIS PRECEDENT IMPEDES RELIGIOUS EQUALITY FRAMEWORK IN *BRAUNFELD*

A. Chief Justice Warren Chooses Precedent Over Equality

In the ACLU's first Blue Law case, *McGowan v. Maryland*, the Supreme Court recognized a rational basis test for Blue Laws. Writing for the majority, Chief Justice Earl Warren upheld the Court's long-standing precedent that the State had the power to promote and protect public health, safety, and morals through Blue Laws.[67] Moreover, in its second Blue Law case, *Two Guys from Harrison-Allentown v. McGinley*, the Supreme Court held that individuals not injured in their religious practices did not have standing to argue that Blue Laws violated the Establishment Clause in the First Amendment.[68] However, the unique free exercise claim present in Abraham Braunfeld's circumstances gave the ACLU and similarly situated religious minorities[69] hope that it could triumph over the legal arguments presented by Pennsylvania, the Pennsylvania Retailers' Association, and the Retail Clerks International Association.[70]

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[67] 366 U.S. 420 (1961); *see also* LABAND & HEINBUCH, *supra* note 20, at 40.
[68] LABAND & HEINBUCH, *supra* note 20, at 40.
[69] *See* Brief of Synagogue Council of America and Nat'l Community Relations Advisory Council, Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617 (1961) (No. 11).; Brief of American Jewish Comm. and Anti-Defamation League of B'nai B'rith, Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617 (1961) (No. 11); Brief for American Civil Liberties Union and Civil Liberties Union of Massachusetts, Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617 (1961) (No. 11); Brief for the General Conference of Seventh-Day Adventists, Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617 (1961) (No. 11).
[70] *See* Brief of Amicus Curiae Retail Clerks Int'l Assoc., AFL-CIO, Braunfeld v. Brown, 366 U.S. 599 (1961) (No. 67); Brief for Pennsylvania Retailers' Assoc., Intervening Defendant, Braunfeld v. Brown, 366 U.S. 599 (1961) (No. 67); Brief of Amicus Curiae, Nat'l Retail Merchants Assoc., Braunfeld v. Brown, 366 U.S. 599 (1961) (No. 67).

Regarding religious liberty, they argued that Pennsylvania's closing law for retail stores violated the First and Fourteenth Amendments[71] because it interfered with the ability of Jewish retailers to exercise the practices of Orthodox Judaism and the religion's ability to retain and attract followers.[72] Because observing a Friday evening to Saturday evening Sabbath is central to adhering to Orthodox Judaism, the statute, counsel for Braunfeld argued, was unconstitutional.[73] It essentially coerced adherents of Orthodox Judaism and other Sabbatarians (i.e., Seventh Day Adventists) to violate worshipping and resting on the specific day prescribed by their religion, which is central to their religion, as distinct from mainstream Christianity which the statute effectively preferred.[74] The economic disadvantage arising from only being able to work four-and-a-half days a week (Monday through Friday evening) while their competitors in the retail industry were able to work six days a week was the source of coercion identified by Braunfeld and his associates.

As Richard Arnold's memoranda for Justice Brennan predicted[75], a majority of Justices upheld the state Blue Laws in the other Sunday closing cases because they did not violate the Equal Protection, Due Process, or Establishment Clauses.[76] However, the Court gave special attention to Braunfeld's case to reinforce its precedent that Sunday closing laws were

[71] In Cantwell v. Connecticut, 310 U.S. 296 (1940) the Supreme Court held that the Fourteenth Amendment incorporates the Free Exercise Clause of the First Amendment as against the States.
[72] Appellant's Brief, at 10, Braunfeld v. Brown, 366 U.S. 599 (1961) (No. 67).
[73] *Id*.
[74] *Id*. at 12; *see also, id*. at 14. They noted that as far back as 1682, Pennsylvania was motivated to use blue laws for the primary religious purpose of advancing the canons of Christianity in which Sunday is the day designated for rest and the enjoyment of religious worship and teaching. Pennsylvania's Supreme Court, moreover, had from 1853, "…acknowledged—indeed insisted—that the Sunday blue laws were based upon the fact that Sunday is a day which occupies special position in the Christian religion."
[75] *See* Arnold, Sunday Laws--Applicability of Equal Protection Clause, *supra* note 50; Arnold, Memo on Standing to Raise Constitutional Questions *supra* note 51.
[76] *See* McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 420 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961).

constitutional despite the unique free exercise claim it presented. For the majority, history and precedent were greater than religious minorities' right to equality.

Writing for the majority, Chief Justice Earl Warren was very careful to carve out a unique holding for the peculiar free exercise quandary that Braunfeld's case presented by narrowing the holding from a broad general burden imposed by the State to a minor economic burden occasioned by a person's religious status. The early drafts of his opinion made it appear that the State had broad power to impose any burden on religious minorities for any reason. At first, Warren wrote,

> Concedely, appellants will be burdened if the state's recognized interest is to be satisfied; and appellant's burden is imposed because of their religious beliefs. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments, as interpreted by the decisions of this Court, forbid this.[77]

However, Chief Justice Warren reconsidered how broad the premise of his holding should be. And, for prudential reasons, he narrowed its scope to the economic impact the laws had on religious minorities incidental to their religious status. The draft of his opinion written on March 20, 1961, read,

> Concedely, appellants will be burdened <economically> if the State's recognized interest is to be satisfied; and appellants' burden is <occasioned> because of their religious beliefs. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments, as interpreted by the decisions of this Court, forbid this.[78]

[77] Earl Warren, Braunfeld (No. 67): Draft Majority Opinion 4–5 (Feb. 15, 1961) (on file with the Library of Congress Manuscript Reading Room).
[78] Earl Warren, Braunfeld (No. 67): Draft Majority Opinion 4 (Feb. 20, 1961) (on file with the Library of Congress Manuscript Reading Room).

To narrow his premise further, Chief Justice Warren then moved his analysis from any "recognized interest" a State may have, to the State's specific and historical interest in a uniform day of rest. He effectively minimalized the State's active role in imposing an economic penalty on a minority of individuals for their religious orientation. On March 9, 1961, he revised his draft opinion to read,

> Concedely, appellants will be burdened economically ~~if the State's recognized interest is to be satisfied~~ <by the State's day of rest mandate;> and appellants' burden is occasioned because of their religious beliefs. Our primary inquiry then is whether, in these circumstances the First and Fourteenth Amendment~~, as interpreted by the decisions of this Court,~~ forbid this.[79]

And after minimalizing the State's role, Chief Justice Warren then trivialized the unique circumstances non-Sunday worshippers endured under a Sunday closing regime. He did so by amassing them with other persons who simply wanted to work on Sunday for non-religious reasons. On May 24, 1961, he revised his opinion as follows,

> Concededly, appellants <and all other persons who wish to work on Sunday> will be burdened economically by the State's day of rest mandate; and appellants~~' burden is occasioned because of their religious beliefs,~~ <point out that their religion requires them to refrain from work on Saturday as well>. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments forbid ~~this~~ <application of the Sunday Closing Law to appellants>.[80]

By the time Chief Justice Warren finished the final draft of his majority opinion on May 29, 1961, Braunfeld and similarly situated religious minorities were mere commercial

[79] Earl Warren, Braunfeld (No. 67): Draft Majority Opinion 4 (Mar. 09, 1961) (on file with the Library of Congress Manuscript Reading Room).
[80] Earl Warren, Braunfeld (No. 67): Draft Majority Opinion 4 (May 24, 1961) (on file with the Library of Congress Manuscript Reading Room).

opportunists rather than victims of religious discrimination.[81] The State was an innocent actor, and the Hobbesian choice Sunday Closing Laws imposed on religious minorities burdened their wallets rather than their constitutional right to exercise their religion freely. Moreover, their religion—not the State—was to blame.

> It is to be noted that, in the cases just mentioned[82], the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task…because resolution in favor of the State results in the choice of the individual of either abandoning his religious principle or facing criminal prosecution. But again, this is not the case before us because the 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.[83]

So, the majority led by Chief Justice Warren rejected Braunfeld's free exercise claim and the claim that Pennsylvania's law respected a Christian establishment. Warren instead found that Pennsylvania passed the act within its legislature's power to protect the health and safety of retail employers and employees by creating a uniform day of repose and recreation.[84] Under the toothless rational basis test, any burden upon religion was permissible because it was incidental to achieving a generally applicable secular purpose.[85] And in the end, stating "…our concern is not with the wisdom of legislation but with constitutional limitations," the majority led by Chief

[81] Earl Warren, Braunfeld (No. 67): Draft Majority Opinion 5 (May 29, 1961) (on file with the Library of Congress Manuscript Reading Room).
[82] Here Chief Justice Warren was referring to Reynolds v. United States, 98 U.S. 145 (1879) (holding that the First Amendment protects an absolute right to religious belief but not an absolute right to religious action), and Prince v. Massachusetts, 321 U.S. 158 (holding that a state's interest in protecting children through child labor law supersedes parents' constitutional right to raise their children and children's constitutional right to practice religion as they choose).
[83] Earl Warren, Braunfeld (No. 67): Draft Majority Opinion 6 (May 29, 1961) (on file with the Library of Congress Manuscript Reading Room).
[84] *See* McGowan v. Maryland, 366 U.S. 420, 607 (1961) (Douglas, W., dissenting); David W. Louisell, *The Man and the Mountain: Douglas on Religious Freedom*, 73 Y.L.J. 6, 985–86 (1964).
[85] *Id*.

Justice Earl Warren deferred to the discretion of Pennsylvania's legislature not to provide an exemption to maximize the enforceability of the Sunday closing statute.[86] Unfortunately, for Braunfeld and like religious minorities, a majority of the Court chose precedent over equality.

B. Justice Brennan and Comrades Push Back

Unlike Chief Justice Warren, Justice William Brennan thought his equal protection theory of the Free Exercise Clause was the appropriate standard to decide Braunfeld's dispute. In his dissenting opinion, Brennan argued that instead of examining whose freedom was not affected, the Court should have examined the constitutionality of Pennsylvania's Sunday closing law through the perspective of the individuals whose liberty was significantly truncated—Orthodox Jews—as a religious minority group. He remarked,

> Abraham Braunfeld is a devout and faithful practitioner of the Orthodox Jewish faith. For him, and this Court concedes, one who does not observe the Jewish Sabbath by refraining from labor cannot be an Orthodox Jew…Because he is faithful to the tenets of his faith, Abraham Braunfeld will have to discontinue his business [ ] The effects of the laws sustained today 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.[87]

Because of the liberty at stake—the freedom of worship—was a First Amendment liberty in the ranks of the freedom of speech and the press, Brennan argued that as a matter of precedent, the state statute was not subject to a rational basis review.

> Religious freedom, the freedom to believe and to practice strange and, it may be foreign, creeds has classically been one of the

[86] McGowan v. Maryland, 366 U.S. 420, 608 (1961) (Douglas, W., dissenting).
[87] William J. Brennan, Braunfeld File: Dissent Draft Two, 1–2, (on file with the Library of Congress Manuscript Reading Room) (n.d.); *see also* Braunfeld v. Brown, 366 U.S. 599, 610 (1961) (Brennan, W., dissenting).

> highest values of our society. It has not until today been important whether a law challenged on that ground is rationally justifiable. Yet the Court says today, without so much as a deferential nod toward that high place which we have accorded religious freedom in the past, that any substantial State interest will justify encroachment on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose.[88]

On the contrary, he believed that state action had to pass the compelling interest test: The State had to have a compelling governmental interest which justified the substantial burden it placed on Braunfeld's and like minorities free exercise of religion. He contended that,

> Our cases before this have applied an exacting standard to legislation of which it truly may be said, as may be said of these statutes, collides with the guarantee of free exercise of one's religion.[89]

Furthermore, presuming Pennsylvania had a justified compelling governmental interest, Justice Brennan saw that the law was unconstitutional because it did not provide an exemption for Orthodox Jews, and like religious objectors, like the statutes in twenty-one states with Sunday closing laws did. He wrote,

> It is, of course, encouraging that 21 of the 34 States which have general Sunday regulations provide statutory exemptions in one form or another in favor of those who close their businesses on Friday night and Saturday from conscientious belief. *But I think those exemptions are compelled by the First Amendment.* The Court holds otherwise in the interest of the mere convenience of having everyone rest on the same day.[90]

[88] William J. Brennan, Braunfeld File: Dissent Draft One, 2, (one file with the Library of Congress Manuscript Reading Room) (n.d.).
[89] William J. Brennan, *supra* note 87, at 2; *see also* Braunfeld v. Brown, *supra* note 87 at 611-12.
[90] William J. Brennan, *supra* note 87, at 3 (emphasis added); *see also* Braunfeld v. Brown, *supra* note 87, at 613-14.

And overall, Justice Brennan was disappointed that a majority of his colleagues refused to be gatekeepers to the justice and equality that the Constitution requires but chose judicial deference for administrative ease. He lamented,

> The Court, in my view, I say respectfully, has fallen into error in exalting administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect. The Court forgets I think a warning uttered during the congressional discussion of the First Amendment itself. Daniel Carrol of Maryland said, "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand."[91]

Justices Potter Stewart and William Douglas agreed with Justice Brennan and his religious equality paradigm. To Justice Stewart, the Sunday closing law posed a gross violation of free exercise of religion. He believed it was not within the state's power to place someone in a cruel Hobbesian choice scenario where he was forced to choose between his faith and "economic survival."[92] Justice William O. Douglas, moreover, was unpersuaded by the states' secular claims and viewed Blue Laws created a Protestant establishment.[93] He declared that the Sunday closing law was an explicit violation of the Free Exercise Clause because it took advantage of religious minorities' inability to protect their interests through the political process, thereby enabling largely Protestant state legislatures to pass laws to the disadvantage of religious minorities.[94] In

[91] William J. Brennan, *supra* note 87, at 3.
[92] Potter Stuart, Braunfeld File: Dissent Draft (on file with the Library of Congress Manuscript Reading Room) (Apr. 27, 1961).
[93] Dillof, *supra* note 33, at 698.
[94] McGowan v. Maryland, *supra* note 86, at 565; *see also*, George Rossman & Richard B. Allen, *Review of Recent Supreme Court Decisions*, 47 A.B.A. J. 12, 1210 (1961).

fact, Douglas asserted that if the facts were in reverse, and the law at issue prohibited merchants from being open on Saturday, the Court's opinion would likely have been completely different.[95]

Legal minds outside of the Supreme Court acknowledged that America's significant Christian heritage was the crucible of the controversy over Sunday closing laws because of the way that they discriminated against Saturday Sabbath observers. However, the consensus was that one strong contention nevertheless justified the laws: "... it is the Sabbatarians' religion and not the law which requires them to observe some other day rather than Sunday."[96] Blue Laws were so ubiquitous, so normalized in American culture that they remained in place and caused Jewish Americans to question their place in America.[97] However, the rational basis test the Court applied in the Sunday closing law cases, and in *Braunfeld* in particular, was a marked departure from the "grave and immediate danger" test it recognized in prior freedom of religion cases like *West Virginia Board of Education v. Barnette*.[98] By requiring states to have significantly less than an imminent danger to be able to infringe upon the free exercise of religion, the Court's decisions in the Sunday closing law cases unintentionally but effectively demoted the freedom of religion from the "preferred position" it usually shared with the freedom of the press and speech.[99] Moreover, some scholars observed that "the freedom of religion encompasses less today than it did [before]."[100]

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[95] McGowan v. Maryland, supra note 86, at 565; *see also* David W. Louisell, *The Man and the Mountain: Douglas on Religious Freedom*, 73 Y.L.J. 6, 985–86 (1964).
[96] McCrone, *supra* note 43, at 303.
[97] *See, e.g.*, Meyer Kramer, *Is America a Christian Country?: Sunday Closing Laws vs. Sabbath Observing Jews*, 4 TRADITION: A J. OF ORTHODOX JEWISH THOUGHT 5, 8, 16 (1961).
[98] John E. Donaldson, *Freedom of Religion and the Recent Sunday Closing Law Cases*, 3 Wm. & Mary 384, 385 (1961–1962); *see also* Flanagan, *supra* note 21, at 718 ("The rational basis test requires that the Sunday Closing law be rationally related to the statute's lawful purpose--a common day of rest.").
[99] Donaldson, *supra* note 98, at 384–385.
[100] *Id.* at 384.

III. JUSTICE BRENNAN MEDIATES RELIGIOUS EQUALITY FRAMEWORK THROUGH *SHERBERT*

A. Justice Brennan Promotes Counter-Majoritarianism and Court Shifts

Religion was a pressing social and political issue during the early 1960s. The election of John F. Kennedy during the 1960 presidential election, despite his Catholic faith, demonstrates the tension between America and religious pluralism as his administration colored not only the social and political spheres of American society but would have a significant impact on its climate for legal change. During the first year of Kennedy's presidency, the Supreme Court decided *Braunfeld*.[101] Though the Court did not find in favor of Braunfeld in its five-four decision of his appeal, Justice Brennan was able to muster together a couple of his colleagues that advocated for religious equality through the Free Exercise Clause: Justices Stewart and Douglas.

However, having written the controlling opinion in *Braunfeld*, it was clear that Chief Justice Warren was not of the same mind as Justices Brennan, Stewart, and Douglas were about religious equality. What is more, in an opinion separate from the *Braunfeld* decision, Justice Felix Frankfurter specifically rejected expanding the free exercise of religion to encompass substantial burdens placed on religious persons in the absence of a statute narrowly tailored to achieve a compelling government interest.[102] Justice Harlan, additionally, joined him in his opinion.[103] This Frankfurter-Harlan coalition was not uncommon. But opposition from his

[101] *See* Rossman & Allen, *supra* note 94, at 1207–11.
[102] *Id*. at 1210.
[103] *Id.*

colleagues did not stop Justice Brennan from promoting his understanding of the Court's role as the guardian of individual rights against majoritarian intrusion.

For instance, during a 1961 lecture in front of an audience at NYU Law School, Brennan expressed that, in essence, the Bill of Rights was created to safeguard individual liberties from encroachment by government action.[104] Justice Brennan believed the Civil War heightened a national outcry for protection against abuses of state power on individual rights, and the states ratified the Fourteenth Amendment in 1868 as a safeguard against such manipulations of state power.[105] However, after its ratification, the Supreme Court was fearful of a backlash from the nation's predominantly Anglo citizenry. So, it initially construed the Fourteenth Amendment, and particularly, its Equal Protection Clause, in a manner that reduced the extent of restraint of state power that it was intended to do.[106] Justice Brennan declared that James Madison, as the iconic Father of the Constitution, intended for the federal courts and the Supreme Court to be guardians of the Bill of Rights, and especially the liberties recognized by the First Amendment.[107] And at the foundation of the Court's role as guardian of the Constitution was its duty to prohibit the majority's will from abusing the minority and the individual.[108]

For Justice Brennan, the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment worked together to invoke the needs and interests of the minority who is powerless when facing the nation's majoritarian political process.[109] He advocated parallelism between the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the

[104] William J. Brennan, Assoc. Justice, United States Supreme Court, James Madison Lecture at the New York University Law Center: The Bill of Rights and the States, 3 (Feb. 15, 1961) (unpublished manuscript) (on file with the Library of Congress Manuscript Reading Room).
[105] *Id*. at 6–7.
[106] *Id*. at 8.
[107] *Id*. at 14.
[108] *Id*. at 15.
[109] Brennan, Assoc. Justice, *supra* note 104, at 18.

Establishment and Free Exercise Clauses of the First Amendment. Though the religion clauses are separate, the Establishment Clause implicates the interests of religious minorities who are threatened by the potential of the government to create a religious establishment that reflects the majority's whim. The Free Exercise Clause protects religious individuals' needs, interests, and rights which reflected the memorandum Justice Brennan commissioned his law clerk to draft, and in his dissenting opinion in *Braunfeld*.[110] Justice Brennan foresaw that the socio-political conditions of the nation would create more conflict between the individual and state action advanced through majority will. Therefore, he exhorted courts to heighten their vigilance against government erosion of individual rights as a means to defend the Constitution and freedom themselves.[111] For him, such vigilance was not a matter of judicial intervention, but a dire matter of the Supreme Court asserting its place as the guardian of the Constitution and individual liberty.[112] And his insistent arguments seemed to begin to influence his fellow Justices.

For instance, in 1961, in *Torcaso v. Watkins* the Court unanimously struck down a Maryland provision requiring individuals to declare their belief in God before assuming a public position as a violation of the Establishment Clause's prohibition against requiring any religious test for public office.[113] However, some Justices were still chary of explicitly extending equal protection to religious minorities. Justice Clark merely concurred with the result in the majority opinion written by Justice Hugo Black because he was unsure if he agreed that *Everson*[114], which applied the Establishment Clause against the states through the Fourteenth Amendment, was

[110] *Id*.
[111] *Id*. at 22.
[112] *Id*. at 24.
[113] 367 U.S. 488 (1961); *see also* George Rossman & Richard B. Allen, *Review of Recent Supreme Court Decisions*, 48 A.B.A. J. 1, 80–82 (1962).
[114] 330 U.S. 1 (1947).

decided correctly.[115] Similarly, Justice Frankfurter concurred with the majority opinion because he had qualms with some of its reasoning regarding equality and individual religious liberty.[116] Additionally, Justice Harlan did the same as his colleagues, Frankfurter and Clark, sharing their differences with the opinion's rationale.[117]

The judicial blocks for and against the expansion of equal protection through the Free Exercise Clause appeared unwavering at the close of 1961. However, unforeseeable changes in the composition of the Supreme Court would occur in 1962 that would provide enough clout Justice Brennan and his religious equality comrades needed to extend equal protection to religious minorities. In the spring of 1962 Justice Charles E. Whittaker, who voted with the controlling opinion in *Braunfeld*, unexpectedly retired.[118] After five years on the Court, he acceded to the pressures of the position and retired as a result of a nervous breakdown.[119] In response to the sudden vacancy, President Kennedy nominated Byron White in Whittaker's stead.

Because of the timing of his arrival on the Supreme Court, Justice White did not participate in the six-to-one decision in *Engel v. Vitale*.[120] In the majority opinion, the Court struck down a state law requiring prayer at the beginning of each day in public schools as a

[115] Letter from Thomas C. Clark, Assoc. Justice, United States Supreme Court, to Hugo Black, Assoc. Justice, United States Supreme Court, No. 373 Torcaso v. Watkins (June 15, 1961) (on file with the Library of Congress Manuscript Reading Room).
[116] Letter from Felix Frankfurter, Assoc. Justice, United States Supreme Court, to Hugo Black, Assoc. Justice, United States Supreme Court (June 13, 1961) (on file with the Library of Congress Manuscript Reading Room); *see also* Felix Gilman, The Famous Footnote Four: A History of the Carolene Products Footnote, 46 S. TEX. L. REV. 163, 185, 189–191 (2004).
[117] Letter from John M. Harlan, Assoc. Justice, United States Supreme Court, to Hugo Black, Assoc. Justice, United States Supreme Court, Re: No. 373 - Torcaso (June 13, 1961) (on file with the Library of Congress Manuscript Reading Room).
[118] *Charles E. Whittaker*, Oyez, https://www.oyez.org/justices/charles_e_whittaker (last visited Dec 17, 2016).
[119] *Id*.
[120] 370 U.S. 421 (1962).

violation of the Establishment Clause which prohibited government entities (i.e., public schools) and officials (i.e., public school teachers) from facilitating and supervising religious practices, like prayer.[121] After reading the first draft of Justice Black's majority opinion in *Engel*, Justice Douglas shared his concern that banning prayer in public schools would necessarily create a constitutional prohibition against other government engagement in religious conduct like the manner in which the Court opened each session with a declaratory prayer asking for God's help and blessing.[122]

Furthermore, his fear of an overbroad reading of the majority's central holding co-existed with the Justices' general wariness about the backlash from Anglo-Protestant Americans they anticipated receiving after it affirmed the invalidation of school prayer as a violation of the Establishment Clause. Nevertheless, though the decision was widely unpopular across America's Anglo-Protestant populations, the Court was ready to stand its ground as a counter-majoritarian tool to protect vulnerable populations, like religious and ideological minority public school students, from the power of the majority. Being the staunch supporter of free exercise that he was, Justice Stewart was the only one to dissent from the majority opinion because he thought that the school prayer provision was constitutionally enacted through the legislative process and was a permissible extension of the free exercise rights of a Protestant majority.[123] Notably, Justice Black wrote the majority opinion in *Torcaso* and *Engel*, indicating his growing support of religious liberty since the *Braunfeld* decision in 1961.

[121] *Id*; *see also* Rossman & Allen, *supra* note 113, at 80–82.
[122] Letter from William O. Douglas, Assoc. Justice, United States Supreme Court, to Hugo Black, Assoc. Justice, United States Supreme Court (June 11, 1962) (on file with the Library of Congress Manuscript Reading Room).
[123] *See* Engel v. Vitale, 370 U.S. 421 (1962) (Stewart, P., dissenting).

In addition to Justice White, another Justice was not involved in the *Engel* decision. To the shock and alarm of his colleagues, before the Court could decide *Engel*, Justice Frankfurter had a stroke which rendered him unable to participate and forced him to resign from the Court.[124] Facing another unexpected vacancy on the Court, President Kennedy appointed Arthur J. Goldberg to take the ailing Justice's seat. Known to be a liberal who supported broad constitutional and civil rights[125], Justice Goldberg would be an asset to Justice Brennan's religious equality coalition on the Court. His support for the Court's counter-majoritarian role was evinced by his concurrence in one of the most counter-majoritarian decisions in the Court's history at that time.

On June 17, 1963, the Court decided another pivotal school prayer case called *School District of Abington Township v. Schempp*.[126] The challenged provision, in this case, required a state's public schools to begin each morning by reading ten verses from the Bible over the intercom, followed by a recitation of the Lord's Prayer.[127] Writing for the eight-to-one majority, Justice Tom Clark declared the ordinance unconstitutional because it violated the Establishment Clause like the provision in *Engel* did.[128] Moreover, like in *Engel*, Justice Stewart was the only one to dissent because he believed that invalidating the ordinance infringe on the freedom of religious majorities to exercise religion.[129] Remarkably, Chief Justice Warren did not object to any of the Court's religious liberty opinions since his opinion in *Braunfeld*. His acquiescence indicates a change of heart regarding religion and the Court's counter-majoritarian role since

[124] *Felix Frankfurter*, Oyez, https://www.oyez.org/justices/felix_frankfurter (last visited Dec 17, 2016).
[125] *Arthur J. Goldberg*, Oyez, https://www.oyez.org/justices/arthur_j_goldberg (last visited Apr 6, 2018).
[126] 374 U.S. 203 (1963); *see also* George Rossman & Rowland L. Young, *Review of Recent Supreme Court Decisions*, 50 A.B.A. J. 1, 80–84 (1964).
[127] *Id*.
[128] *Id*.
[129] *See* School District of Abington Township v. Schempp, 374 U.S. 203 (1963) (Stewart, P., dissenting).

rejecting Justice Brennan's religious equality theory in 1961. And Justice Brennan was ready to seize the next opportunity to turn his theory into law when the Court received a state supreme court appeal from a Seventh Day Adventist in South Carolina.

B. *Sherbert* Gives Justice Brennan a Second Chance

The Beaumont plant of Spartan Mills in upcountry South Carolina was not always on a six-day work-week, and Adell Sherbert was not always a Seventh Day Adventist. She became one on August 5, 1957, and joined the small population of about 150 Seventh Day Adventists in the Spartanburg area.[130] She was a dedicated worker, having been employed as a spool-tender in the same Beaumont mill since 1938.[131] Before the plant went from a voluntary Saturday work schedule to a mandatory six-day work-week on June 6, 1959, Sherbert had always worked from seven in the morning to three o'clock in the evening, Monday through Friday.[132] Though she explained to her supervisor that she could not work on Saturday due to her sincere religious convictions, she was scheduled to work six successive Saturdays, and her previously accommodating supervisor discharged her on July 27, 1959, for failing to work as she was scheduled.[133]

Failing to find employment at other textile mills in the area, because none would accommodate her inability to work on Saturday for religious reasons[134], she filed for unemployment benefits under the South Carolina Unemployment Compensation Law. An eligible applicant for unemployment benefits under the statute had to be available to work any

[130] Appellant's Opposition to Motion to Dismiss, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526).
[131] Motion to Dismiss, at 4–5, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526).
[132] *Id*.
[133] *Id*.
[134] Joseph Hearst, *High Tribunal Rejects Blue Law Attack: Adventist's Appeal to Be Heard, Tho*, CHICAGO DAILY TRIBUNE, Dec. 18, 1962, at pg. 5; *see also,* Motion to Dismiss, *supra* note 131, at 4–5.

and all days of the week except Sunday; could not have been discharged for misconduct; and, had to be willing to accept any available employment opportunity offered to her through an employment office or employer.[135] However, the state's Employment and Security Commission found her ineligible because she was "unavailable" for work since she would not work on Saturdays.[136] Moreover, because her employer fired Sherbert for missing work, which constituted "misconduct," she was disqualified from receiving benefits for five weeks.[137]

On appeal from the South Carolina Supreme Court, Sherbert's counsel worked together to defeat a swift motion to dismiss from Sherbert's opponents based on Sunday closing law precedent.[138] In Sherbert's brief, they mounted an attack arguing that the law, as the state applied it to Adell's circumstance, was invalid because it effectively violated her freedom of conscience and her ability to exercise her faith as a Seventh Day Adventist.[139] Sherbert's counsel, Frank Lyles, James Cobb, and William Donnelly also had the support of the American Jewish Committee (AJC) and the ACLU which, in light of their efforts in *Braunfeld*, were eager to support Sherbert's free exercise claims. At the time, the Supreme Court had a rule mandating review of state supreme court decisions that ruled on questions of federal constitutional law. And given Justice Brennan's support of its religious equality arguments in *Braunfeld*, the ACLU saw *Sherbert* as another chance for Justice Brennan to make his theory the new precedent for the Free Exercise Clause. So, the ACLU accepted an invitation to join the American Jewish Committee's brief in *Sherbert* during a large dinner at the New York Waldorf Astoria between its national

[135] Brief for Appellant, at 3–4, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526).
[136] *Id.* at 5.
[137] *Id*.
[138] *See generally*, Appellant's Opposition to Motion to Dismiss, *supra* note 130; Motion to Dismiss, *supra* note 131.
[139] Brief for Appellant, at 13, 21, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526).

legal director, Melvin Wulf, and the Committee's legal director, Theodore Leske.[140] Unlike in *Braunfeld*, the ACLU was not the catalysts behind the appellant briefs in *Sherbert*.[141] Rather as the sponsor of the Anti-Defamation League and AJC's joint brief, the ACLU's presence was more for its financial support and endorsement its name possessed than for its legal resources or workforce.[142]

Because most, if not all, available employment would have required Sherbert to work on her Sabbath, to be eligible to receive unemployment compensation she would have had to express an availability and willingness to work on Saturday to satisfy the statute's "able and willingness" requirement. However, she could not do so: she, in fact, was neither available nor willing due to her religious beliefs. Therefore, her counsel argued that the statute, in effect, economically sanctioned Sherbert for failing, "…to do acts or engage in conduct that [violated] her conscientiously held views as to her duty to God."[143] Counsel also noted that this kind of economic coercion—the kind that threatened a person's absolute freedom of conscience—was unconstitutional because it was greater than the coercion at work in *Braunfeld*.[144] Economic coercion was especially present in this case, they argued, because by denying Sherbert benefits made available to the general public due to her religious convictions, the statute became, "…nothing more than the assertion of [the] right to impose an unconstitutional condition on [the] enjoyment of…" public benefits.[145] As with Abraham Braunfeld, as a Sabbatarian there was a

[140] Letter from Melvin L. Wulf, Legal Dir., American Civil Liberties Union, to Theodore Leskes, Legal Dir., American Jewish Committee (Feb. 20, 1963) (on file with the Mudd Library, Princeton University).
[141] *See* Letter from Melvin L. Wulf, Legal Dir., American Civil Liberties Union, to Sol Rabkin, Legal Dir., Anti-Defamation League (Feb. 20, 1963) (on file with the Mudd Library, Princeton University).
[142] Letter from Sol Rabkin, Legal Dir., Anti-Defamation League, to Melvin L. Wulf, Legal Dir., American Civil Liberties Union (Feb. 15, 1963) (on file with the Mudd Library, Princeton University).
[143] Brief for Appellant, *supra* note 139, at 14.
[144] *Id.* at 17–18.
[145] *Id.* at 19.

direct nexus between Sherbert's religious belief and her religious practice of abstaining from work from Friday evening to Saturday evening: as with an Orthodox Judaism, adhering to the Sabbath was integral to Seventh Day Adventism. Counsel, therefore, argued that South Carolina's unemployment statute effectively eliminated her ability to exercise her religion.[146]

Then Sherbert's counsel advanced the proposition that was stated in Arnold's memo to Justice Brennan and argued by Braunfeld's counsel: the compelling interest test. Coherently, they declared,

> a general law to advance legitimate secular goals of the State, where it touches, even tangentially, on First Amendment freedoms of the individual, must be highly selective and narrowly drawn to prevent the supposed evil; any deterrent to exercise of religious freedom, even if incidental or indirect, must have appropriate relation to purpose of the law and be essential to its accomplishment.[147]

Accordingly, though South Carolina had a compelling interest to construe the "able and available" requirement in such a way as to ensure that it could protect its unemployment compensation fund from being depleted by fraudulent claimants, it was invalid because willingness to work on Saturday was not narrowly tailored to meet the stated end.[148] Instead of requiring absolute availability, the statute could alternatively be construed to require the Commission to inquire whether the claimant was, in fact, a part of the market to which she could provide service or on a case-by-case basis whether the employment available was suitable for the claimant.[149]

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[146] *Id.* at 22.
[147] *Id*. at 22–23.
[148] Brief for Appellant, *supra* note 139, at 27.
[149] Tangentially, counsel for Sherbert also argued that the availability requirement of the challenged unemployment law when combined with the state's Sunday closing law discriminated against Saturday Sabbatarians while favoring Sunday-observers. *Id*. at 31.

In their reply brief, Sherbert's counsel also emphasized that Sherbert's unemployed status was not her personal choice. The decision, in fact, was made by her employer because she became a Seventh Day Adventist before her employer changed the mill to a mandatory six-day a week work schedule. It was her employer's personal decision to stop accommodating her inability to work on Saturday as he had done for the entirety of her employment.[150] Furthermore, as someone willing and seeking decent employment Sherbert met the act's requirement of being attached to the local labor market; however, respondents' conjecture that permitting an exemption in the act for Sherbert and like religious objectors would undermine the compelling secular purpose of the act was simply false.[151] Almost all of the other states with laws practically identical to South Carolina's unemployment compensation statute had exemptions for those who objected to working on Saturday and were in no way rendered administratively ineffective due to unemployment compensation fraud.[152] So, in addition to feasible alternatives to achieving a substantial public interest that did not impinge religious freedom, the act discriminated against religious minorities like Sherbert because, in tandem with South Carolina's Sunday closing statute, it presumptively exempted those who objected to working on Sunday.[153]

Counsel for the appellees used *Braunfeld* as a model to counter Sherbert's claims.[154] Coherently, counsel urged that the denial of unemployment compensation benefits imposed upon Sherbert was a mere lack of economic benefit but certainly was not a tax upon her religious

[150] Reply Brief for Appellant, at 4–5, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526) (quotations omitted).
[151] *Id*. at 7.
[152] *Id.* at 7, 11–25. In their reply brief counsel included the pertinent parts of thirty state/territory unemployment compensation statutes which provided that applicants were not ineligible for refusing to work on Saturday due to a religious objection. The states cited were Arizona, Alabama, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, Washington, and Wisconsin.
[153] *Id.* at 8.
[154] *See* Brief for Respondents, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526).

beliefs.[155] Counsel argued that by voluntarily restricting her availability to work, she rendered herself ineligible for unemployment compensation[156], and though her finding work suitable under her restrictions became an indirect burden on her free exercise of religion, such burden was not unconstitutional.[157] As a result, though the law indirectly burdened Sherbert's freedom of religion, because it did not prohibit any religious belief or opinion, South Carolina constitutionally enacted the statute within its police power to achieve the important public interest of safeguarding individuals from involuntary, short-term economic misfortune.[158] And the incidental economic burden, which Sherbert was experiencing for failing to meet the "available for work" eligibility standard, was a valid regulation needed to meet the state's compelling goal of maintaining stable employment. Indeed, they pressed, the public's interest outweighed the economic burden the act place on the practice of her religion.[159]

Going further, respondents asserted that it was Sherbert—not the State—who was responsible for bearing the risks and potential costs of entering into a particular workforce while adhering to a specific set of religious restrictions.[160] According to their logic, by becoming a Seventh Day Adventist, Sherbert essentially made the personal choice to become unemployed and, the statute was not meant to compensate individuals who limited their availability to work for personal reasons, religious or otherwise.[161] Respondents asserted that it would be untenable for the Court to force the state to construe and apply the eligibility requirements in such a way as to permit Sherbert to receive unemployment compensation benefits for refusing available work

[155] *Id.* at 10.
[156] *Id.* at 16.
[157] *Id.* at 11.
[158] *Id.* at 12.
[159] Brief for Respondents, *supra* note 154, at 16.
[160] *Id.* at 17.
[161] *Id.* at 18, 20.

due to her religious objections. It would be to permit the religious, irreligious, sincere, and insincere alike to refuse to work to the detriment of their employers and receive benefits due to their personal circumstances.[162] The Court, therefore, could not find in her favor because to do so would be to undo South Carolina's Unemployment Compensation Law itself to the detriment of the public it was enacted to benefit. Moreover, it would be judicial encroachment onto the state's police power governing a law which was neither enacted nor construed with invidious intent against religious populations but was generally applicable to religious and nonreligious individuals alike.[163]

And, all of these arguments set the stage for Justice Brennan to turn his religious equality framework into a new area of free exercise jurisprudence.

C. Justice Brennan Mediates His Equality Framework into Law

By June 17, 1963—the day which the Supreme Court published Justice Brennan's majority opinion in *Sherbert*—Justice Brennan had made the most of opportunities to mediate his religious equality theory into an unprecedented area of jurisprudence. In 1962, the Justices were intent to outline the guarantees of the religion clauses of the First Amendment. The Court struck a sharp blow to majoritarianism in America when it invalidated organized prayer and Bible reading in public schools in its decision in *Engel v. Vitale*. Subsequently, the Court was forced to consider the proper constitutional and historical functions the Establishment Clause and

[162] *Id.* at 22.
[163] *Id.* at 27–28. Respondents argued this to counter Sherbert's claim that the statute, as in was interpreted and applied by South Carolina's Employment Security Commission, deprived her of due process and equal protection of the laws in violation of the Fourteenth Amendment because it invidiously discriminated against her religion to the benefit of Sunday Sabbath observers (i.e., mainstream Christians).

the Free Exercise Clause in the consolidated school prayer case, *Abington School District v. Schempp.*[164] Additionally, it was a case that it decided on the same day that it decided *Sherbert*.

The Court was determined to use *Schempp* to reinforce its holding that prayer and Bible reading in public schools created a Christian establishment of religion in violation of the Establishment Clause. However, Justice Brennan would go a step further by providing a detailed expository of the historical development and jurisprudential evolution of the Establishment Clause to support its rationale and mediate his religious equality precedent in *Sherbert*.[165] Chief Justice Warren desired to assign the majority opinion to Justice Brennan; however, Justice Brennan insisted on writing an exclusive concurring opinion reconciling the history of the Establishment Clause and the Court's modern application of it. Consequently, Chief Justice Warren assigned the majority opinion for *Schempp* to Justice Clark. But, it was Justice Brennan who contoured the bounds of the Establishment Clause to highlight the role of the Free Exercise Clause.[166] Therefore, it was of no surprise that Warren assigned the next religious liberty majority opinion, *Sherbert v. Verner*, to Justice Brennan after a conference vote indicated a seven-to-two disposition to overturn South Carolina Supreme Court's ruling. However, Justice Brennan delayed his majority opinion for *Sherbert* because he was preoccupied with writing the lengthy Establishment Clause manifesto for *Schempp*.[167]

On May 22, 1963, Justice Brennan wrote Justice Clark about his majority opinion in *Schempp* saying, "Dear Tom: I like your opinion in the above cases [*Schempp*] and join without

[164] *See* Richard Posner & Robert M. O'Neil, Opinions of William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States: October Term, 1962, 1 (n.d.) (unpublished manuscript) (on file with the Library of Congress Manuscript Reading Room).
[165] *Id*. at 3.
[166] *Id*.
[167] *Id*.

change or elaboration."[168] And as Justice Brennan was mediating a final draft of his majority opinion for *Sherbert,* he realized that it would be better for the Court to publish its decisions to *Schempp* and *Sherbert* on the same day. They were companion opinions because they were in conversation with each other since they each shaped the Establishment Clause and the Free Exercise Clause, respectively. So, three weeks after his letter to Justice Clark, Justice Brennan wrote Chief Justice Warren to request that the Court do exactly that.

> Dear Chief: My opinion for the Court in No. 526, *Sherbert v. Verner* and the concurring and dissenting opinions cite the Prayer case, *School District of Abington v. Schempp*. John Harlan and I agree that it is therefore necessary to announce *Sherbert* after Tom Clark has announced *Schempp*. Since my turn to announce Court opinion comes before Tom's, with your approval, I'll…hold announcement of *Sherbert* until [shortly] after Tom has announced…*Schempp*, Nos. 119 & 142. Sincerely, Bill.[169]

And Chief Justice Warren granted his request.

When Justice Brennan circulated the first draft of his majority opinion for *Sherbert,* it asserted that South Carolina's unemployment compensation statute, in tandem with the state' Blue Law, penalized Sabbatarians like Adell Sherbert as a religious class. Such discriminatory penalization was unconstitutional because it violated equal protection as construed through the Free Exercise Clause.[170] However, to preserve the essence of his equality rationale and fragile majority vote, Justice Brennan prudentially had to make nonintegral compromises. So, at the request of Justices Goldberg and Black, Brennan modified the opinion to acknowledge that the South Carolina Supreme Court did not aim the penalty at religious minorities intentionally.

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[168] Letter from William J. Brennan, Jr., Assoc. Justice, United States Supreme Court, to Thomas C. Clark, Assoc. Justice, United States Supreme Court (May 22, 1963) (on file with the Library of Congress Manuscript Reading Room).
[169] Letter from William J. Brennan, Jr., Assoc. Justice, United States Supreme Court, to Earl Warren, Chief Justice, United States Supreme Court (June 15, 1963) (on file with the Library of Congress Manuscript Reading Room).
[170] Posner & O'Neil, *supra* note 164, at 4.

Rather the manner in which the South Carolina Supreme Court construed the "personal reasons" provision disparately impacted religious minorities due to their religious convictions in violation of the Free Exercise Clause.[171]

Moreover, Justice Stewart responded to the first circulation by announcing that he would only concur in the result because the majority opinion failed, and Brennan refused, to explicitly overrule the holding in *Braunfeld*.[172] Given that Chief Justice Warren wrote the majority opinion in *Braunfeld* and was a part of the majority in *Sherbert*, it was likely a matter of political strategy that Brennan restrained himself from overruling *Braunfeld* in letter but reserved himself to truncate it in substance. For Brennan to do otherwise would place Warren in a poor light and risk losing the application of the compelling interest test to free exercise claims by tampering with Sunday as an American institution. Justice Brennan decisively had to compromise on overruling *Braunfeld* to achieve the religious equality precedent in *Sherbert*.

After Justices Stewart and Douglas announced that they would each write separate concurring opinions, and Justice Harlan announced that he would write a dissenting opinion that Justice White would join, Brennan made multiple additional changes to his opinion. In response to Stewart's concern that Brennan's interpretation of the Free Exercise Clause would conflict with the Establishment Clause, Brennan added a paragraph to part five of his concurring opinion in *Schempp*.[173] The paragraph clarified that, while public welfare benefits allocated directly to churches was impermissible under the Establishment Clause because it would exceed the ceiling that the Establishment Clause creates for collective religious liberty. Yet, such allocation to religious objectors as individuals was permissible per the Free Exercise Clause because it creates

[171] *Id*.
[172] *Id*.
[173] *Id*. at 5.

a floor of protection for a religious person based on equality.[174] And to address Douglas' worry that Justice Brennan's majority opinion for *Sherbert* permitted an establishment of Seventh Day Adventism, Brennan included another paragraph in his majority opinion. This paragraph emphasized that South Carolina was not being forced to grant benefits to a particular religion but was required to grant the same public benefits to individuals with no regard to certain classifications like religion. Such a requirement was necessary to prevent religious discrimination, and the Free Exercise Clause, therefore, prescribed it.[175]

Lastly, in reply to Harlan's assertion that the state supreme court did not err in its construction of South Carolina's unemployment statute, Brennan inserted a footnote into his opinion. That footnote stated that South Carolina's state courts construed the statute in a way that penalized Sabbatarians as a religious class to a harsher degree that even those who were unable to work for explicitly non-religious "personal reasons."[176] Most importantly, under the state's construction of the statute, Sunday worshippers could be exempted from work in cases of "emergency" while non-Sunday worshippers could not.[177]

As a mark of his insight regarding intra-judicial politics, Justice Brennan was careful throughout his opinion not to explicitly invoke the Fourteenth Amendment's Equal Protection Clause to keep a stable majority vote, while still utilizing equal protection principles through the vehicle of religious discrimination. Justice Brennan purposed to

> demonstrate that the state courts had indeed singled out the Sabbatarians for harsher treatment even than persons unable to work for much more clearly "personal" reasons. Second, the opinion of the Court added still another section, designed to

[174] *Id*.
[175] *Id*.
[176] Posner & O'Neil, *supra* note 164, at 5.
[177] *Id*.

> demonstrate that a further constitutional vice of the statute was built-in discrimination between the Saturday and Sunday worshipper…While the argument was couched in terms of religious discrimination rather than equal protection, it contained more than a trace of the latter.[178]

Consequently, Justice Brennan wrote an opinion that lacked the text of the Equal Protection Clause but intentionally had equal protection underpinnings throughout: a presumptive rule that made the Free Exercise Clause the minimum threshold against individual religious classification, and as a corollary, religious discrimination.[179]

Then almost as to solidify a new age of religious equality through free exercise jurisprudence, Justice Brennan declared,

> This holding but reaffirms a principle that we announced a decade and a half ago, namely that the State may not exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.[180]

At last, Justice Brennan achieved equality for religious individuals through the Free Exercise Clause.

[178] *Id*.
[179] *Id*.
[180] Sherbert v. Verner, 374 U.S. 398, 410 (1963).

CONCLUSION

The average reader of today would be inundated with media inspired by the religious liberty framework that RFRA created, and its corollarial consequences. As of this writing an advanced search of historical periodical databases for RFRA-related media published from 1990 to 2018 yields over 300 results.[181] And a broader search of all contemporary media about RFRA and related cases or controversies reveals over 16,000 recent results and counting.[182] And yet, on December 18, 1962, a hurried reader of the *Chicago Tribune* would likely have missed the seemingly obscure story of Adell H. Sherbert, a Seventh Day Adventist from Spartanburg, South Carolina who managed to get her appeal before the highest court in the United States.[183] If the reader did manage to find the minute section in this single newspaper article about her case, she would have learned that Sherbert claimed that South Carolina violated her First Amendment right to exercise her religion freely.[184]

Seven months later that reader may have stumbled across the only two articles that briefly commented about the Court's ruling in *Sherbert*.[185] However, that reader would have never read a newspaper article about how Justice Brennan created a ground-breaking religious equality framework when the Supreme Court decided her case because at the time of this writing such an

[181] Based on advanced search of "Religious Freedom Restoration Act" conducted in *ProQuest Historical Newspapers* on Apr. 10, 2018.
[182] Based on advanced search of "Religious Freedom Restoration Act" conducted in *Google* on Apr. 10, 2018.
[183] Joseph Hearst, *High Tribunal Rejects Blue Law Attack: Adventist's Appeal to Be Heard, Tho*, CHICAGO DAILY TRIBUNE, Dec. 18, 1962, at pg. 5; *see also*, ____, *Supreme Court Upholds Law on Sunday Closing: Justice Douglas Dissents from Opinion That Legislation Does Not Aid Religion*, L.A. TIMES, Dec. 18, 1962, at pg. 5
[184] *Id.*
[185] *See*____, *Proceedings in the U.S. Supreme Court Yesterday*, N.Y. TIMES, June 18, 1963, at pg. 59; _____, *Saturday Work Ban By a Church Upheld: ADVENTIST WINS ON JOBLESS PAY*, N.Y. TIMES, June 18, 1963, at pg. 1.

article was never published.[186] The public overlooked *Sherbert* as an inconsequential employment compensation case.[187]*Sherbert* was as obscure and misunderstood then as it is now.

Justice Brennan's opinion in *Sherbert* laid the foundation of contemporary understanding of the religion clauses. In the decades following the decisions, the religion clauses were understood not to function as merely constitutional mechanisms meant to prevent the State from governing religious affairs and vice versa. Rather, the Free Exercise Clause functions as a "floor" for individual religious equality, while the Establishment Clause functions as a "ceiling" for collective religious liberty.[188] Moreover, the Free Exercise Clause is not subsumed into the Establishment Clause but is a separate constitutional mechanism that affords religious objectors protection from government encroachment.[189]

When Congress passed RFRA in 1993, it preserved *Sherbert*'s text, but it lost its rich history and wisdom.[190] Justice Brennan worked diligently to shape contemporary free exercise jurisprudence which created a right for religious objectors to claim protection from discrimination. In doing so, he also inspired a framework for a future where equal protection and religion share a cooperative rather than antagonistic relationship. Today, battles over equal protection and religion, in which secular and religious values contend with each other, seem to

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[186] Based on an advanced search conducted in *ProQuest Historical Newspapers* of "Adell Sherbert" or "Sherbert v. Verner" from 1963

[187] *See* newspaper articles cited *supra* note 185.

[188] Laurence H. Tribe, Professor of Law, Harv. Univ., Address at the Conference on Government Intervention in Religious Affairs, 2–3 (Feb. 11, 1981) (transcript available in the ACLU Papers at the Mudd Library, Princeton University).

[189] *Id*; *see also* Thomas v. Review Board, 450 U.S. 707 (1981) (holding that the Free Exercise Clause requires a state to provide unemployment compensation benefits to an employee who quit because of a belief that his religion prohibited him from engaging in the employer's line of work); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding that the Free Exercise Clause prohibits denying employment benefits to an employee who was dismissed for objecting to work certain shifts due to her religious convictions); Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989) (holding that it violates the Free Exercise Clause to require a person who refuses to work on Sunday due to his sincere religious conviction to prove that his belief is a tenet of an established religious sect in order to claim protection).

[190] *See, e.g.*, Ryan *supra* note 5.

have torn an irreconcilable gap within this framework.[191] But a look at the past gives hope for the future. *Sherbert* is the missing link.

[191] *See, e.g.*, Laycock *supra* note 1.