Rights of the People

INDIVIDUAL FREEDOM AND THE BILL OF RIGHTS

— CHAPTER 2 —

Religious Liberty in the Modern Era

The individual freedom of conscience protected by the First Amendment embraces the right to select any religious belief or none at all. . . . Religious beliefs worthy of respect are the product of free and voluntary choice by the faithful

After the Civil War, the United States underwent significant economic, social, and demographic changes, and with them came new problems of religious freedom. With the passage of the Fourteenth Amendment in 1868, the strictures of the First Amendment gradually came to be applied to the states as well. New questions relating to religious freedom arose, questions that might well have seemed incomprehensible to the Founding Generation. As Alexis de Tocqueville noted long ago, in America, nearly all important issues ultimately become judicial questions. Starting in the latter part of the 19th century, and accelerating in the 20th, the courts had to resolve difficult questions relating to the meaning of the two "religion clauses" in the Fourteenth Amendment.

For most of the first 150 years following the adoption of the Bill of Rights, Congress obeyed the injunctions of the First Amendment; as a result very few cases implicated the Establishment Clause, and those had little value as precedent. Then, in 1947, the Supreme Court ruled that both religion clauses applied to the states. Justice Hugo L. Black, in his majority ruling in *Everson v. Board of Education*, expounded at length on the historical development of religious freedom in the United States.

Justice Hugo L. Black, in *Everson v. Board of Education* (1947)

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa. In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

In this paragraph we find the root rationale for nearly every religion case decided by the Supreme Court in the last fifty years, whether it involves the Establishment Clause (which forbids the government to promote a religious function) or the Free Exercise Clause (which forbids the government to restrict an individual from adhering to some practice). And with the ruling, *Everson* began one of the most contentious public policy debates of our time, namely, What are the limits that the Establishment Clause puts on governmental action, not just in terms of monetary aid for programs, but on religious observances in the public sector?

To take but one example, for many years, a particular ritual marked the beginning of each school day all across America. Teachers in public schools led their students through the Pledge of Allegiance, a short prayer, singing "America" or the "Star-Spangled Banner," and possibly some readings from the Bible. The choice of ritual varied according to state law, local custom, and the preferences of individual teachers or principals. Most Americans saw nothing wrong with this widespread practice; it constituted part of America's historical heritage, an important cultural artifact of, as Justice William O. Douglas once wrote, "a religious people whose institutions presuppose a Supreme Being." In New York, the state had prepared a "non-denominational" prayer for use in the public schools, but a group of parents challenged the edict as "contrary to the beliefs, religions, or religious practices of both themselves and their children." By the 1960s, America's growing cultural as well as religious diversity made many people uncomfortable with the practice of forcing children to recite a prayer regardless of their — or their parents' — religious beliefs.

A group of parents went to court, and eventually the United States Supreme Court ruled in their favor in a case entitled *Engel v. Vitale*. In his opinion, Justice Hugo L. Black (who had taught Sunday school for more than 20 years) held the entire idea of a state-mandated prayer, no matter how religiously neutral, as "wholly inconsistent with the Establishment Clause." A prayer by any definition constituted a religious activity, and the First Amendment "must at least mean that [it] is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government [through the public school system]." Black went on to explain what he saw as the philosophy behind the Establishment Clause:

Justice Hugo L. Black, in *Engel v. Vitale* (1962)

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. [Its] most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion. [Another] purpose [rested upon] an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.

For Black the content of the prayer, its actual words, or the fact that its non-denominational nature allegedly made it religiously neutral, had no relevance to the case. The nature of prayer itself is religious, and by promoting prayer, the state violated the Establishment Clause by fostering a religious activity which it determined and sponsored. The Court did not find evidence of coercion — no child had been forced to pray. Nor did the Court find that the prayer furthered the interests of any one denomination. Rather it was the state's promotion of religious practices in the public school in and of itself that violated the First Amendment.

The *Engel* decision unleashed a firestorm of criticism against the Court which, while it has abated from time to time, has never died out. In the eyes of many, the Court had struck at a traditional practice which served important social purposes, even if it occasionally penalized a few non-conformists or eccentrics. One newspaper headline screamed "COURT OUTLAWS GOD." Protestant evangelist Billy Graham thundered, "God pity our country when we can no longer appeal to God for help," while Francis Cardinal Spellman of New York denounced the ruling as striking "at the very heart of the Godly tradition in which America's children have for so long been raised."

The Court had its champions as well. Many religious groups saw the decision as a significant move to divorce religion from meaningless public ritual, and to protect its sincere practice. The National Council of Churches, a coalition of liberal and orthodox denominations, praised the *Engel* decision for protecting minority rights. President John F. Kennedy, who had been the target of vicious religious bigotry in the 1960 campaign (from many of the groups now attacking the Court), urged support of the decision, and told a news conference:

> We have, in this case, a very easy remedy. And that is, to pray ourselves. And I would think that it would be a welcome reminder to every American family that we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important in the lives of all of our children.

The President's commonsense approach captured the Court's intent in *Engel*. The majority did not oppose either prayer or religion, but did believe that the Framers had gone to great lengths to protect individual freedoms in the Bill of Rights. To protect the individual's freedom of religion, the state could not impose any sort of religious requirement, even in an allegedly "neutral" prayer. As soon as the power and prestige of the government is placed behind any religious belief or practice, according to Justice Black, "the inherently coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

The following year the Court handed down its decision in *Abington v. Schempp*. A Pennsylvania law required that "at least 10 verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." In addition, the students were to recite the Lord's Prayer in unison. This time Justice Tom Clark, normally considered a conservative, spoke for the majority in striking down the required Bible reading. The neutrality commanded by the Constitution, he explained, stemmed from the bitter lessons of history, which recognized that a fusion of church and state inevitably led to persecution of all but those who adhered to the official orthodoxy.

In the United States, rights are proclaimed in the Constitution, but they are defined by the Supreme Court, which the Constitution has established to provide a reliable and definitive interpretation of the law. The fact that a majority of citizens — even perhaps a large majority — may not be affronted by prayer in the school or Bible reading is, to a large extent, irrelevant in constitutional adjudication. The purpose of the Bill of Rights is not to protect the majority, but the minority. As Justice Oliver Wendell Holmes, Jr., once said of freedom of speech, it is not for the speech we agree with, but for the speech we detest. Freedom of religion, like freedom of speech, does of course protect the majority. However, the protection of the First Amendment's Establishment Clause is invoked in a meaningful way when the majority, attempting to use the power of the state, tries to enforce conformity in religious practice. Very often, to protect one dissident, one disbeliever, the majority may be discomfited; it is the price the Founding Fathers declared themselves willing to pay for religious freedom.

It is a view that many Americans still share, along with the belief that this protection of individual conscience is good for religion as well. Justice John Paul Stevens wrote in a modern case that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious belief or none at all. . . . Religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."

While this view is not accepted by all Americans, a majority recognizes that in such a heterogeneous society as the United States is at the beginning of the 21st century, those who do not accept the norms of the majority, as Justice Sandra Day O'Connor wrote, may be characterized as "outsiders, not full members of the political community." That is a situation that the Framers of the First Amendment, members of the Court, and most Americans are determined to avoid. Religious dissenters in a free society are not to be merely tolerated and made to feel as inferior members of the society; their differences are to be valued as part of the tapestry of cultures that make the United States so unique.

While some religious groups have continued to oppose the decisions in *Engel* and *Schempp*, many of the mainstream religious bodies have come to see that the Court had actually promoted religion rather than subverted it. James Madison, in the "Memorial and Remonstrance," written over 200 years ago, believed that not only the state's antagonism, but its efforts at assistance, could damage religion and religious liberty. Their intellectual descendants have argued along similar lines, and believe that the state can never help religion, but only hinder it. To establish any form of state-sanctioned religious activity in the schools threatens to introduce denominational hostility. Moreover, the sincere believer does not need the state to do anything for him except leave him alone; those with confidence in their faith do

not need Caesar's assistance to render what is due to God.

There are also sincere believers who, while agreeing that belief is an individual matter, nonetheless see religion as an integral aspect of America's civic life. They do not seek to establish a religion, but rather want there to be an accommodation, in which state aid may be given to religiously affiliated organizations provided it is done fairly, with no preference given to any single group. The Supreme Court has wrestled with this problem of some state aid to charitable organizations for more than 50 years, and its decisions have been far from consistent. While it is settled that money may not be given for religious proselytizing, most churches and synagogues run a variety of social service and educational programs, whose loss would place great strain on the public systems. The Court has carved out exceptions to the general rule of no state aid in order to assist some of these programs, and in June 2002, took what many considered a major step toward the accommodationist position.

By a narrow margin, the justices approved the issuance of state vouchers to the families of school children, which could then be used to pay tuition in private schools, even if these schools were religiously affiliated. The decision removed a major legal hurdle facing proponents of vouchers, but the ultimate decision on whether to adopt a full voucher plan will rest on the legislatures of the 50 states. The debate will no longer be over the constitutionality of the plan, but instead will be over the political wishes of the citizenry, a majority of whom, according to the polls, oppose vouchers. How this issue plays out in the next decade will have a great deal to say about the nature of church and state relations in the United States.

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There are two religion clauses in the First Amendment. The Establishment Clause prohibits government, even when acting on behalf of a majority, from attempting to impose a uniform religious practice. The Free Exercise Clause was specifically designed to protect dissident sects from government under the control of the mainstream religions. The value of protecting minorities will become ever more apparent as the United States, at the beginning of the 21st century, becomes the most pluralistic democratic country in history.

The Framers wanted not only to protect government from religion, but also to protect religion from government. James Madison not only fought to prevent the establishment of one dominant religion, he also intended for the government to stay out of all religious controversies. The Framers had both experience and knowledge of how potent a weapon government could be in the hands of religion, and they wanted nothing to do with it. Here again, one runs into the problem of how to reconcile keeping government totally neutral in religious matters with the strong role religion has played in American civic life. Religion is very important to many Americans as part of civic culture, and to pretend that government is completely uninvolved is quite unrealistic.

The Free Exercise Clause is a way to protect different sources of religious meaning and assure full and equal citizenship for believers — and non-believers — of all stripes. In other words, it helps to foster pluralism and thus allow each person and each group full play of their ideas and faiths. Although we tend to think of the colonies as having been settled primarily from the British Isles, in fact by 1776 immigrants had arrived from Scandinavia, western and central Europe, and, of course, from Africa through the slave trade. Although the new country was nowhere near as pluralistic as the United States would later become, compared to England and other European nations of the time, it was already a hodge-podge of nationalities and religions. Many

scholars continue to believe that the intellectual cross-fertilization needed to remain a vibrant and democratic society is only possible if one of the most important aspects of each person's life — religious belief — is left untouched by government's hand.

Sometimes religious groups have been unpopular, and yet they persisted, and eventually the majority learned that religious freedom meant allowing even despised groups latitude in which they could worship God according to the dictates of *their* consciences. Sometimes the demands of the majority could not be swayed on moral grounds; opposition to polygamy, for example, led to one of the most significant early decisions on the meaning of free exercise.

The Mormons, or the Church of the Latter Day Saints, arose in the early 19th century in the United States, and offended many Christian groups by their enthusiasm for multiple marriage. Forced to migrate west to the frontier, the Mormons established a prosperous settlement in what is now the State of Utah. Eventually the colony grew to the point where it met the requirements to be admitted as a state into the Union, but this could not happen so long as Mormons continued to cling to polygamy. Federal law criminalized the practice, and the Mormons turned to the Supreme Court, claiming that the free exercise of their religion demanded that the government tolerate polygamy.

The Court clearly was unwilling to put the stamp of constitutional approval on a practice condemned by more than 95 percent of the country. On the other hand, the Constitution did seem to give unequivocal protection to religious exercise. Chief Justice Morison Waite finessed the problem in a way that still affects all free exercise cases; he drew a sharp distinction between religious belief and practice. Waite quoted Thomas Jefferson that "religion is a matter which lies solely between man and his God; . . . the legislative powers of the government reach actions only, and not opinion." Following this reasoning, the Court held that "Congress was deprived of all legislative power over mere opinions, but was left free to reach actions which were in violation of social duties or subversive of good order." Polygamy, according to the Court, clearly was subversive of good order and Congress could thus make the practice a crime.

Chief Justice Morrison R. Waite, in *Reynolds v. United States* (1879)

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition. . . .

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall

not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Interestingly, this is one of the few cases where the Supreme Court ruled against the Free Exercise claims of a distinct and separate group, and it did so because the practice involved — polygamy — was seen as a threat to civil society. The distinction between action and faith, however, created an important constitutional principle, that faith in and of itself could not be attacked or outlawed.

Undoubtedly the most famous of the free exercise cases involved the Jehovah's Witnesses and their refusal to salute the American flag. Although only one of many small religious sects in the United States, the Witnesses understood the basic meaning of the Free Exercise Clause, and in their repeated visits to the Supreme Court, helped to turn that ideal into a reality.

The Witnesses were and are a proselytizing sect, and their efforts to gain converts and distribute their literature have often brought them into conflict with local authorities. They gained enormous notoriety just before World War II when, in obedience to their belief that saluting a flag violated the biblical command against bowing down to graven images, they instructed their children not to join in the morning ritual of saluting the American flag. For this adherence to their beliefs as war approached, many Witness children were expelled from school, and their parents were subjected to fines and criminal hearings. Listen to the words of Lillian Gobitas:

Lillian Gobitas

I loved school, and I was with a nice group. I was actually kind of popular. I was class president in the seventh grade, and I had good grades. And I felt that, Oh, if I stop saluting the flag, I will blow all this! And I did. It sure worked out that way. I really was so fearful that, when the teacher would look my way, I would quick put out my hand and move my lips.

My brother William was in the fifth grade at that time, the fall of 1935. The next day Bill came home and said, I stopped saluting the flag. So I knew this was the moment! That wasn't something my parents forced on us. They were very firm about that, that what you do is your decision, and you should understand what you're doing. I did a lot of reading and checking in the Bible and I really took my own stand.

I went first to my teacher, Miss Anna Shofstal, so I couldn't chicken out of it. She listened to my explanation and surprisingly, she just hugged me and said she thought it was very nice, to have courage like that. But the students were awful. I really should have explained to the whole class but I was fearful. I didn't know whether it was right to stand up or sit down. These days, we realize that the salute itself is the motions and the words. So I sat down and the whole room was aghast. After that, when I'd come to school, they would throw a hail of pebbles and yell things like, Here comes Jehovah! They were just jeering at me. . . .

It has been more than fifty years since I took a stand on the flag

salute, but I would do it again in a second. Without reservations! Jehovah's Witnesses do feel that we're trying to follow the Scriptures, and Jesus said, They persecuted me, and they will persecute you also. . . . The case affected our lives so much, and we have passed its lessons on to our children.

The Supreme Court agreed to hear the case in 1939, and at a time when nearly everyone expected the United States would have to enter World War II, the value of promoting patriotism seemed a very important function of the public schools. Justice Felix Frankfurter, himself a Jew, found himself torn between his attachment to religious freedom for all groups and his belief that constitutionally the schools had a right to require students to salute the flag. To a colleague on the Court he wrote, "Nothing has weighed as much on my conscience, since I have come on this Court, as has this case. All my bias and pre-disposition are in favor of giving the fullest elbow room to every variety of religious, political, and economic view . . . but the issue enters a domain where constitutional power is on one side and my private notions of liberty and toleration and good sense are on the other." Eight of the nine members of the Court voted to uphold the school district.

How helpless the Witnesses were soon became apparent. In the wake of the adverse decision, there were hundreds of attacks on Witnesses, especially in small towns and rural areas. By the end of 1940, more than 1,500 Witnesses had been attacked, and many beaten brutally in over 350 incidents, and this pattern continued for at least two years. It was not one of the nation's finest moments, but it was a learning experience. At the same time that Americans learned about the attacks on the Witnesses, they also learned about Hitler's mass murders of helpless minorities in Europe and of his "final solution" that would liquidate six million men, women, and children for no other reason than their religious beliefs. The Supreme Court agreed to hear another case on the flag salute, and this time, a new member of the Court, Justice Robert H. Jackson, later to be American prosecutor at the Nuremberg trials, upheld the right of the Witnesses to be different and the limits that the Constitution put on government action.

Justice Robert H. Jackson, in *West Virginia Board of Education v. Barnette* (1943)

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a

compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

There have been many other cases since the flag salute decisions, but all of them have built upon Justice Jackson's eloquent idea of a "fixed star," that no government official can prescribe what is orthodox. Not all decisions have gone in favor of the dissenting sects, but the notion that government cannot penalize thought remains as true today as it did a half century ago and at the time of the nation's founding.

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Religion continues to play an important role in the civic and individual lives of American citizens. Some believe that it should play a greater role in the nation's public affairs, while others believe just the opposite. Laymen, scholars, legislators and jurists continue to debate where the line should be drawn between the activities of church and state, and how far dissenting groups may go in carrying out their religious beliefs. This debate is at the very heart of the democratic process. It does not always lead to consensus, and clearly not everyone can win every debate. But the sincerity and enthusiasm that Americans bring to this debate, as they do in dealing with the limits of free speech, is what makes the constitutional liberty stronger. Religious freedom is not an abstract ideal to Americans; it is a vibrant liberty whose challenges they confront every day of their lives.

For further reading:

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Chapter 3: Freedom of Speech »

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