Chapter 4

The Right to Free Exercise of Religion

"[R]eligion is a matter which lies solely between man and his God. . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."

——Thomas Jefferson, letter to the Danbury Baptist Association, January 1, 1802

For the American revolutionaries, freedom of the soul was the most precious liberty. It was first among rights because it gave meaning to freedom itself. Without it, truth would perish; without truth, men and women could never be fully free. The war for independence was fought for religious liberty as well as for political liberty, and the First Amendment reflects this premier role. Protecting religious liberty was the first right guaranteed to American citizens, heading the list of other necessary rights of a democratic society—freedoms of speech, press, assembly, and petition. "Congress shall make no law," the amendment proclaims, "respecting an establishment of religion or prohibiting the free exercise thereof."

Free exercise means the right to believe in any religion or in no religion at all. History taught the founders the futility of mandating or suppressing religious beliefs, as well as the bloody consequences of trying to do either. Throughout the European past, governments had sought to control what people could believe and routinely persecuted heretics and other individuals who challenged official religious doctrines. Conformity in all things spiritual was prized by church and state alike, and government used its power to torture, imprison, or execute dissenters. The late-fifteenth-century Spanish Inquisition was the most notorious example of such persecution, but in fact all European nations, including England, suppressed religious dissenters.

The English had direct experience with the dangers of religious division. Its bloody sixteenth-century civil war largely stemmed from attempts of government to suppress religious dissent. Even though the conflict led to greater toleration in religious matters, the English government still did not accept the idea of complete religious freedom. The colonies, too, denied its citizens free exercise of religion. Maryland in 1654 withdrew protection from anyone who professed or practiced the "Popish religion," as Roman Catholicism was called; a few years later,Massachusetts hanged four Quakers on the Boston Common; Presbyterian preachers were thrown in jail in eighteenth-century New York; and as late as 1774, itinerant Baptist preachers in Virginia were imprisoned for declaring their beliefs publicly.

The framers rejected this past. James Madison, the primary author of the Bill of Rights, wrote in the 1780s, "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish religious discord. . . Time has revealed the true remedy." The remedy, of course, was freedom of conscience. This right was central to what the founders understood as the great American experiment in liberty. The Virginia Statute for Religious Freedom gave perfect voice to this view. Passed in 1786, after Virginia voters elected a legislature opposed to state interference in religion, the law became the model for the religion clause of the First Amendment. Its architect was Thomas Jeffer-

son, who listed it, along with the Declaration of Independence and the founding of the University of Virginia, as the legacy he wanted the world to remember. The Virginia Statute guaranteed that "all men shall be free to profess, and by argument to maintain, their opinion in matters of religion." This freedom, the act declared, was one of the "natural rights of mankind," and the statute's preamble made plain that the act was necessary because "Almighty God hath created the mind free."

Embracing this right in theory, however, did not always guarantee it in practice. The United States in the eighteenth and nineteenth centuries was overwhelmingly Protestant. Catholics and Jews experienced intolerance, although not legal interference, because their doctrines were different, as did numerous other groups, such as Quakers, Anabaptists, and Mennonites.Two long-lasting religious revivals, or periods of intense preaching and spiritual renewal known as the first and second Great Awakenings, spawned many new sects and denominations. A number of them held doctrines outside the mainstream of what most Americans believed, and they too suffered ostracism, discrimination, and, at times, violence. Mormons especially were persecuted. The sect developed in the 1820s in an area of upstate New York known as the "burned-over district" because of its intense religious fervor. Mormons soon became targets of suspicion and hostility because their beliefs and practices, including polygamy, or plural marriage, set them apart from most nineteenth-century Americans. Pursued relentlessly, they fled from Ohio to Missouri to Illinois, where their leader, Joseph Smith, was murdered and their temple burned. They finally moved to Utah, then part of what Americans considered the Great American Desert, to find a place where they could practice their faith unmolested. Even then, they had to abandon polygamy—and even its advocacy—before the state could be admitted into the Union.

The nineteenth century witnessed few Supreme Court decisions on the religion clauses of the First Amendment, but the twentieth century found the justices deeply engaged in deciding what free exercise meant. The nation had become more diverse as immigrants from Eastern Europe and Asia arrived in large numbers between the 1890s and 1920s, bringing with them a host of religions other than Protestant Christianity. This new pluralism challenged traditional assumptions about the public role of religion and its relationship to the state. It was not long before these issues reached the Supreme Court.

Beginning in the 1940s the justices defined religious liberty as part of the liberty protected under the due process clause of the Fourteenth Amendment, which meant that the First Amendment now applied to state and federal governments equally. This shift required the Court to consider how far the constitutional protection of free exercise extended. Did it protect, for example, groups who refused to follow a law because it interfered with their right to practice their religion?

Religious minorities were most in danger of having their free exercise lim ited or denied, and few groups was more persecuted than Jehovah's Witnesses, a pacifist sect that sought to restore Christianity to its primitive beginnings. Their vigorous evangelizing activities offended many Americans, who wanted to use ordinances and other government measures to regulate their door-to-door solicitations or use of public places as pulpits. This issue became especially urgent during the heightened tensions of the depression and World War II because Jehovah's Witnesses would not pledge allegiance to the flag or swear loyalty to any form of national authority. Their beliefs described these acts as worshiping

an authority other than God, a practice they rejected. Did the First Amendment protect their right to refuse to do something that the people's elected representatives had decided was clearly in the national interest?

In 1935, the leader of the Jehovah's Witnesses, Joseph Rutherford, went on the radio to praise young Carleton Nichols, a third grader in Lynn, Massachusetts, for refusing to recite the Pledge of Allegiance to the U.S. flag as required by state law. Rutherford told his audience of fellow believers that saluting the flag amounted to worshiping a false idol, which violated God's law and would bring eternal damnation. He held up Witnesses in Nazi Germany as examples of faithfulness. They had refused to salute Adolf Hitler in face of extreme pressure, and now he implored American disciples to show the same courage, which young Carleton had done by keeping his seat.

Listening to the broadcast at their kitchen table were Lillian Gobitas, a twelve-year-old girl, and her ten-year-old brother, William. Lillian was class president and a good student. She knew her classmates would not understand if she, too, refused to salute the flag, but, she recalled later, "I did a lot of reading and checking in the Bible and I really took my own stand." Her brother and two other young Witnesses joined her. The school board voted to expel them. In the process, they rejected the argument of Lillian and William's parents that they loved their country but they could not salute the flag without violating their religious convictions. Every citizen and every child must show proper regard for the flag, the board president declared, or soon the nation would suffer from disrespect and a lack of patriotism. The Gobitas family sued the board, claiming a violation of their First Amendment right to exercise their beliefs freely.

The idea of a pledge had existed only since 1892, when the editors of a children's magazine proposed one for the 400th anniversary of Columbus's voyage to the New World. The pledge—the same one we recite now, except that the words "under God" were added in 1952—quickly became popular. In 1907, Kansas was the first state to make its recitation compulsory for schoolchildren; by 1935, forty of the forty-eight states had similar laws.Many people undoubtedly believed these laws were in accord with the founding generation's wishes, but not if George Washington serves as a guide.When some members of the Continental Congress in 1778 suggested a pledge of loyalty be required for sol diers, he wrote in response: "I would not wish in any instance that there should be the least degree of compulsion exercised."

The lower federal courts ruled in favor of the Gobitases, but the Supreme Court did not agree by an 8-to-1 vote. The majority framed the issue as one of nationalism, not religious rights. It was 1940 and the nation was on the verge of war. The justices were uneasy about doing anything that might decrease respect for the flag or interfere with a school board's ability to foster patriotism in its students. "National unity," Justice Felix Frankfurter wrote in the majority opinion, "increases national security." The proper remedy for Lillian and William Gobitas and their parents was to elect a legislature sympathetic to their views.

The lone dissenting member of the Court disagreed sharply with this view. In an unrelated case two years earlier, Justice Harlan Fiske Stone had written a footnote in which he claimed special protection for First Amendment rights. "The Constitution," he argued, "expressed more than the conviction of the people that democratic processes must be preserved at all costs. It also is an expression of faith and a command that freedom of the mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and morality without which no free government can exist." In his dissent in *Minersville*

School District v. Gobitis (the Court misspelled Gobitas), Stone resurrected this theme and gave it special emphasis by taking the unusual step of reading his dissent aloud before the Court. The role of the Constitution, he said, was to protect individuals, not government: "The very essence of the liberty which [the Bill of Rights] guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion." Asking an unpopular group to lobby the legislature for a change in the law, as the majority had suggested, was no remedy.

The decision exposed Jehovah's Witnesses to public attack, and they became victims of violence in a country worried about Hitler's advance across Europe and its own security. The U.S. Department of Justice counted more than three hundred attacks on Witnesses during the months afterward. A meeting hall was burned in Maine; a Maryland mob, aided by police, broke up a Witnesses' meeting; in Illinois, a Witness was beaten until he kissed the flag; an Indiana crowd drove Witnesses from town, as did a group in Mississippi. In West Virginia, nine Witnesses were forced to swallow large amounts of castor oil, causing severe cramps and bleeding, before a sheriff tied them together, paraded them in front of an angry crowd, painted them with swastikas, and drove them out of town. "It was open season on Jehovah's Witnesses," Lillian Gobitas recalled later.

Two years later, another case came before the Supreme Court. This time West Virginia had passed a law requiring the Pledge of Allegiance in public schools, which Marie Barnette, a Witness, refused to do. The Court reversed itsearlier decision, voting 6 to 3, thanks to a change of mind on the part of three justices and the retirement of two other justices. In *West Virginia State Board of Education v. Barnette* (1943), Justice Robert Jackson made a powerful defense of personal liberty: if there was any "fixed star in our constitution, 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." Other justices supported him in separate opinions. The rights guaranteed by the First Amendment protect unpopular minorities, Justice Hugo Black wrote, because "freedom to speak and write about public questions is as important to government as is the heart to the human body. In fact, this privilege is the heart of our government."While it was necessary and proper to teach patriotism, forcing unity was no different than what Nazi Germany did, Justice Jackson admonished. Those who seek to force an end to dissent, he noted, "soon find them exterminating dissenters." Above all, the Bill of Rights protected the right to individual opinions and beliefs, no matter how unpopular.

The right to believe freely is an absolute right under the First Amendment: government cannot force citizens to accept or reject any religious idea or belief. Taking action on the belief, however, is not an absolute right. Societies in the past believed in human sacrifice as a religious act, yet no one today may claim constitutional protection for this extreme practice. Clearly, the right to free exercise must be balanced with society's need for order, safety, and public welfare. The important question is how we identify what is protected and what is not.

The Supreme Court has addressed this issue by defining religion broadly and by expanding the activities protected by the free exercise language of the First Amendment. Certain religious views might even seem preposterous to most people, but anyone has a right to beliefs that traditional faiths would consider to be lies: "Men may believe what they cannot prove," the Court concluded in a 1944 case. The justices also have restricted governments from limiting the ability of individuals to practice their religion. Laws that require stores to close on

Sunday, for example, are unconstitutional if they discriminate against groups, such as Jews or Seventh-Day Adventists, whose sacred times are on other days of the week. More recently, in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), the Court upheld the right of believers in a folk religion to practice animal sacrifice, even though public health laws forbade it. In an Oregon case in 1990 (Employment Division v. Smith), however, the government's interest in controlling narcotics outweighed American Indians' right to use peyote, a hallucinatory drug, in their religious ceremonies. Free exercise of religion does not excuse anyone from obeying laws that are neutral and apply to everyone, the Court ruled, but otherwise government must prove a strong need to regulate a religious practice, no matter how slightly.

The peyote decision alarmed religious groups from across a broad spectrum of belief, and they lobbied successfully for the Religious Freedom Restoration Act of 1993, which sought to set a stricter test for government to meet before it could interfere with free exercise. Although the Court later ruled much of the act unconstitutional, the popular response was noteworthy. Protestants, Catholics, Muslims, and Jews, among others, agreed that their separate beliefs were best protected by a common commitment to the right of free exercise.

Today, America is home to the world in all its religious variety. By some estimates, the United States has more than 1,500 organized religious groups, representing all the world's religions.We truly are a pluralistic society, and we value our diversity even as we struggle with the problem of maintaining national unity in the face of so many different beliefs. The issue seems new to us, but in fact the founders understood how attractive freedom of religion would be to the world's people. They recognized their greatest challenge would be to live up to the promise represented by the Latin phrase they chose for the Great Seal of the United States—E Pluribus Unum (Out of Many, One). In an era when governments elsewhere enforced conformity, could this new nation allow men and women to live according to their own beliefs? History taught that religion had been a bloody battleground. How could they prevent it from disuniting America?

Their solution was a radical experiment in liberty that remains our practice. They embraced diversity in the conviction that it would lead to truth and freedom. In the *Federalist Papers*, essays written to persuade voters to ratify the Constitution, James Madison argued that we as a nation should encourage people to follow their own interests. In Federalist No. 10, he claimed that we are more secure in our liberty when a large number of interest groups exist. In such circumstances, no group will ever have enough members to form a permanent majority that can threaten the rights of people who hold unpopular beliefs.

Madison was writing about all sorts of beliefs, political as well as religious, but religion was his model for encouraging such unparalleled diversity. He believed truth would emerge from a vigorous exchange of ideas—but he also understood that, ultimately, every man and woman would have to decide the moral and spiritual truths he or she would live by. For the founding generation, the right to believe and act according to individual conscience was the essence of liberty. It is why the First Amendment lists freedom of religion first among the individual rights that must be protected from government interference. Our unity, they trusted, would come from our common commitment to this first principle of freedom.

The idea of free exercise of religion is, perhaps, even more important today. Violent religious disagreements are as much a part of the twenty-first century as

they were of the distant past. Numerous societies throughout the world still do not accept the right of individuals to believe or not to believe as they choose. In the United States, certain groups, fearing that we have become a secular or unreligious society, want to declare America officially to be a Christian nation. Yet our entire history reveals a strong link between the free and unrestrained exercise of religion and religious vitality.With the exception of Ireland, we are the most overtly religious society in the Western world, with more than 90 percent of Americans identifying themselves as believers of one sort or another. Our commitment to the peaceful coexistence of many different beliefs is rare in world history. We do not have citizens taking arms against each other in the name of faith, despite our sharp disagreements over matters of theology and practice. A commitment to the free exercise of belief is what has led to this unusual religious tradition. We have learned from our history, even if imperfectly, that religious freedom is central to freedom itself. The key question now is whether and how we will maintain this commitment.

Religious Tolerance in the Colonies

Free exercise of religion meant different things to seventeenth- and eighteenth-century Americans than it does to us, and that meaning differed among the various colonies. Rhode Island, under the leadership of Roger Williams, was the only colony to embrace completely free exercise of religion. In The Bloody Tenent (1644), written while Williams was in England to secure a charter for his colony, he argued for tolerance.

It is the will and command of God that, since the coming of His Son, the Lord Jesus, a permission of the most Paganish, Jewish, Turkish or anti-Christian consciences and worship be granted to all men, in all nations and countries; and they are only to be fought against with that sword which is only, in Soul matters able to conquer, to wit; the sword of the Spirit—the Word of God.

Most colonies adopted a policy of toleration, with the Pennsylvania Charter of Liberties (1682) among the most liberal, but such tolerance extended only to people who believed in one God as an eternal, supreme Creator.

That all persons living in this province, who confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world; and that hold themselves obliged in conscience to ive peaceably and justly in civil society, shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship, nor shall they be compelled, at any time, to frequent or maintain any religious worship, place or ministry whatever.

In Common Sense *(1776), a tract that argued for separation from Great Britain, Thomas Paine also advocated free exercise of religion as "the will of the Almighty."He argued that government had an obligation to protect the right of belief.*

As to religion, I hold it to be the indispensable duty of every government, to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith. . . . For myself, I fully and conscientiously believe, that it is the will of the Almighty, that there should be a diversity of religious opinions among us: it affords a larger field for our Christian kindness. Were we all of one way of thinking, our religious dispositions would want matter for probation; and on this liberal principle, I look on the various denominations among us, to be like children of the same family, differing only, in what is called, their Christian names.

"The Diversity We Profess to Admire"

In Wisconsin v. Yoder *(1972), a unanimous Supreme Court held that Wisconsin's compulsory high school attendance law violated the rights of Amish parents to free exercise of their religious beliefs. The Amish, a conservative Christian group, came from Germany originally and settled first in Pennsylvania and later in the Midwest. Since the sixteenth century, they have believed in maintaining a strict separation between themselves and the modern world. In the twentieth century, their religious beliefs led them to maintain their rural traditions and to reject automobiles and electricity. They also refused to marry outside their community. Amish parents permitted their children to attend public schools only through the eighth grade because of concern that attendance at high school would lead to outside marriages. Wisconsin law, however, required school attendance until age sixteen. Writing for the Court, Chief Justice Warren Burger concluded that the Amish right to free exercise of religion trumped the interest of the state in educating its youth.*

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief. When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yeoman" who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.