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How God becomes god in the U.S. Public Schools: A Short History of Legal Interpretation

Abstract

As the public school system in the United States grew to what it is today, “God” as the unique reality who spoke to the students through the Christian bible gradually became a god among other gods portrayed in the world’s religions. A key ingredient in this change were the decisions by the U.S. Supreme Court. They gradually demanded that the freedom’s found in the Constitution’s First Amendment be applicable to all the students and that the state be prevented from establishing any religion.

Introduction

As we age we encounter “religion” in many ways. The foundational encounter is with the religion, or non-religion, of our parent(s) or parenting community.¹ Gradually we become acquainted with the religions of others that are or are not similar to that of our parent(s). Thus, through socialization, we come to know what “my” religion, “our” religion and “their” religion is.

Religious socialization, as with all socialization, is both an affective and ideational process. The process of recognizing “my” religion, “our” religion, and “their” religion is also both affective and ideational. Our religion and their religion usually take institutional form. In the not too distant past and in many parts of the globe today “their” religion brought feelings of fear, distain, and hate along with affirmations that these were false ideologies and ways of life.

“Don’t talk about politics or religion if you want a peaceful gathering” is not an idle warning. When we request that people come out religiously in our educational systems we should heed this warning as we begin to talk. Religious wars in the past and the present have destroyed civilizations. Advocating the entry of all religions into the public square may be as destructive of that square as well as an enhancement to the individual lives and institutions of those who enter it.

Law and politics² play the role of ordering the lives and temper the speech of those who enter this common, public, square. But law not only orders the present lives of those who enter into

¹ There are 10.3 million single mothers in the United States. The socialization process of their

² Politics here is understood in its more ancient sense as how people go about living together to achieve a common good. See David Miller, *Political Philosophy: A Very Short Introduction* (Oxford: Oxford U. Press, 2003), 4.

our public schools but also gives form to the language, ideas, and feelings of those so ordered for the future.³ What we examine in what follows is the development of laws dealing with religion in U.S. public schools – especially the teaching of religion. In doing so, however, we cannot neglect the self-evident fact that those participating in the schooling process are influenced not only by teachers but also administrators, bus drivers, maintenance personnel, and everything and everyone that provides the environment of the teaching-learning experience found in these schools.

It is politics that provides the well spring of communal life as individuals in the community bring their hopes, ideas, and experiences into the public school to provide an environment to further their children's maturation process. For law to bring about a secure, creative, healthy, and ordered community politics is essential. In this paper we will look at how the laws develop. We leave it to others to discuss the politics.⁴

We begin with a statement of the laws that have been implemented to deal with religion and the schools. We then look at several contexts which lead to the interpretation of these laws. A conclusion brings our discussion to an end by offering a necessary reminder of the consequences of the legal development we have reviewed.

The Laws

The laws regulating religion in U.S. public schools are local. For national laws, such as the Constitution, there has to be specific reasons for their application to the local level. Usually the reason is that the local law is contrary to constitutional law. The school board's manual is where one finds those policies implementing the laws for the local school. These policies should reflect the coherence between local and federal law. We deal here with the development of federal law dealing with religion in the schools. Those policies that apply these laws are in the local school board manuals.⁵

The most significant laws are the following. Bold has been added to highlight words of central concern.

³ For how paradigms are used in the social sciences and how they shift within an educational context see Larry Laudan, *Progress and Its Problems: Towards a Theory of Scientific Growth* (Berkeley, CA: University of California Press, 1977).

⁴ See Nathan R. Kollar, *Defending Religious Diversity in Public Schools: A Practical Guide for Building our Democracy and Deepening Our Education* (Santa Barbara, CA: Praeger, 2009) for the practical and theoretical necessities to bring a healthy politics into our public schools.

⁵ This is reflected in such matters as days off for religious holidays by teachers as well as students. What is happening in the East Ramapo School district is a good example of this. See http://www.nytimes.com/2012/07/28/nyregion/parents-in-east-ramapo-school-district-ask-state-to-oust-orthodox-jews-on-board.html?pagewanted=all&_r=0 . If the pluralism present in the nation is not found within a certain area of the United States it is very difficult to change their views of others religions. Many just do not pay attention to the laws they disagree with and are enabled in such action by the law enforcement and judiciary that agree with the lawbreakers.

Article Six, third paragraph, of the United States Constitution (1789) reads:

*The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and Judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but **no religious Test** shall ever be required as a Qualification to any Office or Public Trust under the United States.*

The First Amendment to the U.S. Constitution (1791)

*Congress shall make no law respecting an **establishment** of religion, or prohibiting **the free exercise** thereof; or abridging the **freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

Fourteenth Amendment to the U.S. Constitution(1864)

*Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.***

The Equal Access Act (1984)

*It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum **to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.***

Shifting Contexts and Interpretations of the Laws

Time brings changes in ideas and social environment. Immigration brings new religious communities. Both time and immigration challenge the ways the laws order the community. The result is a new understanding of the laws' applicability to U.S. citizens. What follows is the current state of understanding about the above quoted laws as they apply to religion in U.S. public schools. We begin with the affirmation that God and religion are linked together and the rejection of belief in God as necessary to hold public office.

You do not have to believe in God to hold public office anywhere in the United States.

This would apply to school board members. This interpretation of article six in the Constitution depends upon the interpretation of the fourteenth amendment as meaning that equal protection must be provided to every citizen in the United States. No state is privileged to formulate laws that are contrary to those of the Constitution.

The Maryland state constitution read as follows: *[No] religious test ought to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God.* Maryland had ratified the U.S. Constitution in 1788 yet retained this as a law in its constitution.

This law was declared unconstitutional by the Supreme Court in *Torcaso v. Watkins* (1961) because it contradicted Article Six of the Constitution.

All school personnel and students enjoy freedom of speech, freedom to exercise their religion, and freedom from having a religion forced on them by the state (established religion).

The changing historical contexts are significant in understanding how the First Amendment came to be understood in relationship to religion because new contexts resulted in changes in school policy. Understanding of First Amendment rights is a result of the changing historical contexts and the paradigms of interpretation evolving from these understandings.

An example of how historical context and legal argument result in differing policy changes in the school is the response to the question: “What should be done when children refuse to salute the flag for religious reasons?” In 1940, the U.S. Supreme Court ruled that it was illegal for children to refuse to salute the flag. In 1942, the U.S. Supreme Court ruled that it was legal and the school had no right to punish the children. Contexts made all the difference.

The first refusal was to what happened in Minersville, Pennsylvania. Two children, 10 and 12, were expelled for refusing to salute the flag and reciting the Pledge of Allegiance. These were new practices that had been mandated after World War I. The Gobitis children were Jehovah’s Witnesses who considered salutes and pledges blasphemy. Their attorneys used the Fourteenth Amendment’s due process clause to argue their case. They lost. *Minersville School District V. Gobitis* (1940)

The same thing happened in West Virginia in 1942. Parents were prosecuted for not allowing their children to salute the flag or recite the pledge. The children were disciplined by the school. The federal district court placed an injunction restraining the state from enforcing the school board’s resolution. It went directly to the U.S. Supreme Court as *Barnette v. West Virginia State Board of Education* (1942). This time the same act of refusal was argued as an exercise of free speech and freedom of religion. The parents won. The school board lost. Same action in both cases was illegal in one context; legal in another.

Once the First Amendment was seen as equally applicable to everyone in the United States, *Gitlow v. New York* (1925), everyday issues of people’s religion entering into the public square could be considered by the Supreme Court: Should my tax dollars be used to support the religious education of those not of my religion? Should the religion of the majority be taught to everyone in the school? Must my children pray the prayers of the majority? Should religion, an important dimension of a person’s personality, be honored and discussed in the classroom? In club meetings? Over the public address system? The answers to these and other questions are most easily seen in the following paradigms that have been used to answer them. They are in historical sequence with the paradigm in bold print and the court case that best exemplifies the paradigm in italics. The court cases that illustrate the paradigm were foundational to subsequent cases dealing with religion in the schools.

1. Schools should be **nondenominational**: not encouraging a denominational or sectarian position in the schools. As states began to abandon the tradition of the clergy teaching poor children for the centralized common or public school system of Massachusetts (1837) they also mandated children’s attendance at these schools. An essential part of

these new centralized schools with their legally bound students was the teaching of religion. But what religion? As time passed since the country's founding the local populations became more pluralistic. Initially the pluralism was different protestant denominations, then Jews and Christians, and, today every religion in the world is found in the United States.

The political solution to the initial diversity was to adopt a common curriculum and school day reflecting what was common to the denominations in their locale. The public schools in these states taught religion in a nondenominational manner. They accepted the fact that "my religion" was impossible to mandate in public schools but "our religion" was acceptable. As in so many such situations "our religion" was simply referred to as religion. Central to that religion was the faith reality of God as a supreme, all powerful, all knowing, creator-God who revealed his will through the bible. The bible was the King James's translation, the prayers were from that translation, and the moral teachings were based on the Ten Commandments as found in that translation. The history of that religion had strong opinions of those who did not adhere to its way of life such as Roman Catholics and Jews.⁶ Nondenominational religious education was the default mode of teaching in the U.S. public schools.

2. Schools should sustain a **Wall of Separation** between religion and the school. Although this paradigm was first used in the *Reynolds v. United States* (1878) case, it gained notoriety in the *Everson v. Board of Education* (1947). Everson felt that using his tax monies to provide busing for Catholic school children was a way of establishing a religion. The court said no it wasn't establishing a religion but central to the court's decision was the use of Thomas Jefferson's "wall of separation" paradigm. In other words, when applied to religion in the public schools, the state cannot do anything to advocate for one religion over any other. The Catholic schools in particular were the center of a great deal of litigation as Catholics entered into American society (19th-20th centuries). They shared with the protestant majority a belief in God but not the culturally accepted means of what and how God revealed God's self to Christians. The Wall paradigm was used to prevent Catholic schools from using tax monies while the nondenominational paradigm was still used in teaching in the schools.
3. Schools should be **neutral** toward religion. *Engel v. Vitale* (1962) concluded that any prayer to God in public schools was an establishment of religion. The prayers were for the most part neutral said the court but they were still prayers and still advocated one family of religions that believed in an "almighty God" who was promoted in these prayers. Drop the prayers to God. But schools should still teach about religion (i.e. neutrally). The *Abington v Schempp* (1963) decision clearly states, "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment," Justice Clark wrote for the majority. Schools now may not affirm the

⁶ For a more extensive discussion concerning the nature of denominations as well as the origins of religion in the public schools see Kollar. op. cit, pp. 30-33.

existence of God but they could teach about God as portrayed among the gods of all religions.

4. Schools should sustain a **minimum entanglement** between religions and public schools. *Lemon v. Kurtzman* (1971). This was a challenge to a Pennsylvania law allowing tax funds to be used to pay those teaching secular subjects in Catholic schools. The court said these funds could not be used because any government action must fulfill the following requirements:
 - The government's action must have a secular legislative purpose;
 - The government's action must not have the primary effect of either advancing or inhibiting religion;
 - The government's action must not result in an "excessive government entanglement" with religion.

This came to be known as the Lemon Test and, with the Equal Access law, is still used today among the majority of the Justices. The conservative justices do not, however, place confidence in this test's ability to meet current legal demands.

5. Schools must allow **Free Speech and Equal Access**. *Board of Education of Westside Community School District v. Mergens* (1990). This was a challenge to a schools refusal to allow a group of students to form a Christian bible study club that would meet on school grounds. The Supreme Court, using the Lemon Test to interpret the *Equal Access Law* (1984) and said that the school could be used for the club's meetings while no state funds could be used to pay anyone. Notice that the arguments are beginning, once again, to employ freedom of speech to argue for their client's desires rather than freedom of religion.⁷

The move of plaintiffs to argue their religious clients manner of entrance into the public square under freedom of speech provides us with an opportunity to mention a few other significant cases of how religion enters into the square outside of public schools: conscientious objection and suing religious organizations for misrepresentation.

In *United States v. Seeger*, 380 U.S. 163 (1965) the Supreme Court ruled that the exemption from the military draft for conscientious objectors could not be reserved only for those professing conformity with the moral directives of a supreme being, but also for those whose views on war derived from a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those "... who had routinely gotten the exemption."⁸

In dealing with the beliefs of the "I Am Movement," *United States v. Ballard* (1944) Justice Douglas writing for the majority wrote

The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any

⁷ See also *Rosenberger v U of Virginia* (1995) and *Widmar v Vincent* (1984).

⁸ See also *Welsh v. United States* (1970).

sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

Conclusion

To come out religiously one should be aware of the multiplicity of religions that are also coming out. To educate in a pluralistic society such as the United States without attending to ALL the religions in the public square is a disservice to all those who claim to be religious and rings false to students who are aware that my religion and our religion are not the only religions as evidenced by the Supreme Court decisions and their socialization process in the Public Schools.⁹

⁹ Although this conclusion is a true reflection of the past, the future is uncertain for three reasons: with the concerted effort to defund them they may not be able to sustain a rounded curriculum or even their institutional existence; the current Supreme Court's turn to the right will make the previous minority decisions into majority ones; the presupposition that Charter schools are better than Public Schools will lead to schools, for the most part, reflecting the "my religion" of its constituents rather than the pluralism of the global community.

Resources

- **Federal Law:** The Library of Congress THOMAS site is the source for federal legislative information. THOMAS provides several options for finding bills and resolutions: thomas.loc.gov.
- **State Law:** For state laws it is best to go to the state's legislative homepage and most will have a link to research options where a person can search for state laws and rules.

A helpful book for the social context of all laws and their interpretation is:

- Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge, MA: Harvard University Press, 1990).

Books dealing with law and teaching about religion in the schools:

- Joan DelFattore, *The Fourth R: Conflicts Over Religion in America's Public Schools*. (New Haven: Yale University Press, 2004).
- Kent Greenawalt *Does God Belong in Public Schools?* (Princeton, NJ: Princeton University Press, 2005) provides an explanation of why some things may and may not be done.

Religion and the interpretative history of laws:

- See www.religiousfreedom.com/articles/caino.htm for Bruce J. Casino, *Defining Religion in American Law* (May 15, 1999).
- <http://www.aclu.org/religion/schools/16146leg19950412.html>.
- http://www.law.cornell.edu/uscode/html/uscode20/usc_sec_20_00004071----000-.html

Laws and materials dealing with First Amendment issues, religion in particular are:

- The Southern Poverty Law Center at: <http://www.tolerance.org/teach/?source=redirect&url=teachingtolerance>
- Freedom Forum, a nonpartisan foundation at: <http://www.freedomforum.org/>.
- First Amendment Center's Web site, features comprehensive research coverage of First Amendment issues and topics, at: <http://www.firstamendmentcenter.org/>.
- Both Jewish and Muslim sites are helpful in looking at the legal interpretations. See Jewish perspective at: http://www.adl.org/main_Religious_Freedom/default.htm.
- The Muslim perspective at: www.soundvision.com/Info/education/pubschool/pub.free.asp.

Schools, religion, employees

- Freedom of religion in the workplace from the U.S. government at: www.dol.gov/dol/topic/discrimination/ethnicdis.html.
- <http://www.eeoc.gov/laws/types/religion.cfm>.
- Civil Rights Division of the U.S. government is helpful for its many references at: www.america.gov/st/washfile-english/2007/November/20071128173019xlrennef0.1781427.html
- Employment law information network at: <http://www.elinfont.com/fedarticles/18/6>.