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12 July, 2018

Constitutional Law, Religion, and Education

 The constitution, religion, and education are among the oldest institutions known to the United States. Historically, these institutions have been popularly viewed as instrumental and essential to the flourishing of American social life. But over the last hundred years, a growing tension can be sensed between religion, education, and the law. A variety of different cases asserting school involvement in inappropriate religious activity have been brought before the Supreme Court. In this paper we will survey notable legal cases related to the practice of religion in public schools, and trace the trajectory of this tension as it has progressively heightened while approaching the twenty-first century.

**Religion and Education in the 1940s**

 While it may be tempting to connote the tension between religion and education with more progressive generations, the 1940s provide us with a variety of interesting cases where schools were challenged for allegedly promoting religion. Starting with *Minersville School District v. Gobitis* (1940), two students—Lillian and William Gobitis were expelled from a Minersville (PA) district school for refusing to salute the American flag (“Minersville” sec 1). The Minersville school district’s policies required a compulsory salute of the flag, a policy not particularly uncommon in the United States extant wartime. Lillian and William (siblings) were Jehovah’s witnesses, and believed that saluting the flag was offensive to their religion. The legal argument advanced by Gobitis’ team was that compelling the children to salute the flag was against their first amendment right to freedom of expression.

 The Supreme Court ruled somewhat resoundingly 8-1 against Gobitis. Delivering the ruling, Justice Frankfurter “relied primarily on the ‘secular regulation’ rule, which weighs the secular purpose of a nonreligious government regulation against the religions practice it makes illegal or otherwise burdens the exercise of religion” (“Minersville”, Sec 2). The court acknowledged the purpose of the mandatory salute as “national cohesion” and even stated that such cohesion was in the interest of national security. Given the secular purpose of the policy and given that its effects fostered a social good (national unity and defense), the court overwhelmingly favored the school district in its ruling.

 But the controversy of the case was not yet over. While it is certainly possible for the Supreme Court to overrule its previous decisions, it is not common, and it is most certainly even *less* common for decisions to be overruled by the same justices who ruled on them initially. Yet this is exactly what happened in 1943, with the ink barely dry on the *Minersville v. Gobitis* decision.

 The one dissenting voice in the decision was justice Harlan Stone. His argument was that “’the very essence of the liberty’ guaranteed by the Constitution ‘is the freedom of the individual from compulsion as to what he shall think and what he shall say’” (“Minersville”, Sec 2). While this argument was evidently not found particularly persuasive by his peers initially, its persuasive power had set in by 1943.

 In 1943 *West Virginia Board of Education v. Barnette* raised a nearly identical set of concerns. The West Virginia Board of Education had instituted a mandatory salute for both teachers and students while saying the pledge of allegiance, and like in Pennsylvania, the penalty per the school’s policies was indefinite expulsion until the policy was complied with. As before, Jehovah’s Witness students refused to say the pledge and were sent home. To make matters worse, local absentee laws were in effect, so not only were the children missing school, but their parents faced the threat of imprisonment, while the children themselves were threatened with being sent to boarding schools for delinquents. As with the Minersville case, the Barnette argument was that the compulsory salute made them put nation before God, in violation of their religious beliefs.

 This time when the courts heard the case they ruled differently, 6-3 against the mandatory salute. The rationale for the ruling can likely be anticipated: mainly, that

the First Amendment cannot countenance efforts to enforce a unanimity of opinion on any topic, and national symbols like the flag should not receive a level of deference that trumps constitutional protections… curtailing or eliminating dissent was not only an improper but also an ineffective way of producing true unity (“West Virginia”, Sec. 2).

Justice Frankfurter, who wrote the majority opinion on the Minersville case, was eager to voice his dissent. In dissenting, he “was skeptical that religious beliefs freed citizens from the obligation to obey rules” and he also argued that in striking down the law (both the school board policy and the Court’s own previous ruling), the court was enlarging its role into the legislature, exceeding the scope of its purpose (which should be to interpret, rather than to agree, disagree, or affect the law).

 As a dissenter, Frankfurter was the only justice who touched on the religiosity of the issue. Not shy, he even argued that as a Jew, his opinion on the limits of religious practice should be taken seriously (“West Virginia”, Commentary Sec. 1). However, the majority did not weigh in on the role that religion played in the case. In fact, the case syllabus stated that “that those who refused compliance did so on religious grounds does not control the decision of this question, and it is unnecessary to inquire into the sincerity of their views” (“West Virginia”, Syllabus §4).

 There is an old axiom which suggests that one should not speak about religion with others. The idea being that it is a contentious thing and might often lead otherwise cordial and professional people into barbaric controversy and dispute, challenging one another’s values—so, it is better left alone. The Supreme Court seemed to tacitly agree when considering the role of religion in education during the 1940s. While initially simply denying that there was any religious content in the mandatory salute (and therefore, that the salute couldn’t possibly be contrary to religious belief), once it acknowledged that the salute did have some currency as a form of communication, it still preferred to treat the issue from the comfort of the first amendment rather than grapple with whether or not religious liberty was violated.

**Engel v. Vitale (1962): The Establishment Clause**

 Jumping forward almost twenty years, the next highly influential case in the history of religion and education is *Engel v. Vitale* (1962). Perhaps emboldened by the Supreme Court’s preferred reticence over religious matters in schools, the New York State Board of Regents had set into policy a non-denominational prayer to be said alongside the pledge of allegiance. The prayer was voluntary, but the parents of nearly a dozen students found that the use of the prayer was in contradiction to their own religious beliefs, and was therefore a violation of the first amendment’s establishment clause.

 The establishment clause plays a major role in analyzing cases where there is a proposed conflict between state and religion. It

prohibits the government from making any law ‘respecting an establishment of religion’ [and] not only forbids the government from establishing an official religion, but also prohibits government actions that unduly favor one religion over another [while] it also prohibits the government from unduly preferring religion over non-religion, or non-religion over religion (“Establishment Clause”, §1).

The argument in the Engel v. Vitale case was that the school, by implementing a prayer, was favoring a particular set of religious beliefs.

 There were interesting arguments offered in defense of the prayer, arguments which were elucidated by the lone dissenter, Justice Stewart (“Engel”, Commentary Sec 2). Stewart believed that the establishment clause’s object was primarily concerned with state sanctioned religions, and of course the school was not *founding* a religion, so the applicability of the establishment clause was somewhat questionable. But even besides that, the prayer was non-denomination so it, *by definition*, did not favor any particular religion and any impression that the prayer’s contents were unique to a particular religion were merely inadvertent and incidental. Moreover, given that the prayer was completely *voluntary*, there was no question of coercion or of students facing any sort of penalty for not participating in it (“Engel”, Sec 2).

 As intimated, the courts ruled in favor of Engel. And they did so resoundingly, with an 8-1 ruling. Justice Black, who had initially supported the Minersville ruling but then enthusiastically supported the reversal of that ruling in the West Virginia ruling, represented the majority’s view of the establishment clause, and they viewed the clause more according to its spirit than Justice Stewart did. The majority saw the purpose of the establishment clause as being concerned primarily with governmental interference with religion. This being the case, the fact that the prayer was non-denominational, and voluntary did not factor into the relevancy of the issues at hand. The very existence of the prayer was considered an endorsement of a religious system, and the fact that the prayer didn’t commit to any *particular* religious system was irrelevant to that fact. And while the students were allowed to leave the room or simply not participate, the majority “recognized that children are unlikely to choose not to engage in a teacher-led activity” (“Engel”, Sec. 2). Unlike before, the courts were very much focused on the pragmatics of the case by allowing what might be called “ordinary student behavior” to influence their decision. As such, the “voluntary” nature of the prayer wasn’t viewed as being *really* voluntary given that students probably wouldn’t see it that way, despite whatever they were told by the school administration.

 Before moving on to the next case, it is worth pausing to appreciate the dramatic swing in the Supreme Court’s sentiments regarding religion and school over only twenty years. Starting with the Minersville decision, the Supreme Court had few scruples about maintaining the constitutionality of compelled acts of devotion to national symbols, regarding religious objections to such policies as simply insignificant. But no sooner had it decided so that it quickly pivoted and found the idea offensive, but on secular freedom-of-speech grounds rather than on the grounds of religious liberty. By the time of the Engel case, the Supreme Court’s sentiments were squarely in support of religion being very clearly and carefully withheld from schools, even if their explanations still focused more on the state’s duty to refrain from approving of any particular religion rather than an individual’s civil right to *practice* (or not practice) any particular religion. What remains the same in these twenty years is that the courts are generally reticent to weigh in on the role that a particular person’s religion actually plays in the constitutionality of the case, but on the state’s burden to “stay out of it.” But what is noticeably different is the court’s disposition and sensitivity toward such issues. Unlike the Minersville ruling, the subsequent rulings considered here emblemize a heightened vigilance against religion in schools, even if the explanations offered by the courts do not tend toward acknowledging individual liberties.

**Wisconsin v. Yoder (1972)**

 With that said, the curious case of Wisconsin v. Yoder (1972) should be discussed, since it breaks from the mold established in the preceding decades. Several Amish families (Yoder) were prosecuted by the state of Wisconsin for pulling their children from public schools. Wisconsin law required public school attendance until the age of sixteen, but these families had pulled their children after eight grade. Their argument was that their children’s salvation would be at risk with continued school attendance, and as such, that Wisconsin’s law violated their civil right to religious liberty.

 The challenge with this case was that there was no question of “secularizing” the decision. The question was not over any particular compelled activity that might be considered remotely religious—but simply “being in school.” So, the Supreme Court was more or less forced to address the religious liberty of these individual families and weigh it against the laws of the state of Wisconsin.

 Interestingly, the court unanimously ruled in favor of Yoder. The syllabus for this case is longer than any of the other cases discussed, and evidences the Supreme Court wanting to explain its decision very carefully. First of all, in weighing the State’s interest in universal education, the Court asserted that it “is not totally free from a balancing process when it impinges on other fundamental rights… and the traditional interest of parents with respect to the religious upbringing of their children” (“Yoder”, Syllabus §1). In other words, unlike the Minersville ruling, there was no arguing that the compelled attendance at school proved to be some universal benefit transcendent of the individual and traditional rights of the parties involved.

 But probably even more interestingly, this case actually includes a “vetting” of the religious beliefs in question. The Court’s syllabus asserts that Yoder “amply supported their claim that enforcement of the compulsory formal education requirements after the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs” and also added that the *history* of the Amish as a “self-sufficient segment of American society” demonstrates “the sincerity of their religious beliefs” (“Yoder”, Syllabus §§2-3). The syllabus actually goes into unusual detail praising the Amish’s industry and long-standing heritage in the United States, all in the interest of legitimizing the Yoder case.

 This is the first case examined where the sincerity of the religious belief in question, along with the relative legitimacy of it, is examined in any detail. No doubt it is a sensitive matter even for the highest court of the land to examine the veracity of a respondent’s religious belief, yet in this case the Supreme Court had little choice—and when they *did* so examine, they were brought to a unanimous decision.

 What are we to make of the Yoder decision which, at face value, appears to subjugate the state to religion at least since it allowed recusal from mandatory state practices due to religious belief? It is one thing—one might argue—to strike down a mandatory act of devotion in a public school, it is another thing to allow someone to completely disassociate with the state’s educational services on the grounds of religion. Had the previous decisions initiated a “slippery slope” of sorts, the inevitable conclusion of which would be a precedent for not going to school at all?

 Not really—after all, the Supreme Court’s ruling was that Yoder didn’t have to keep going to school—the Supreme Court did *not* rule that Wisconsin’s laws were unconstitutional, nor did it rule (or even suggest) that the state had no interest in mandating education for its citizens. On the contrary, the ruling acknowledged the legitimacy of that interest, but merely sought to balance it *with this particular instance*.

 So, in sum, the Yoder case really has nothing *to do* with the establishment clause. But it is highly instructive because it illustrates how there can be stark material similarity between respondent claims, while legally having completely different ramifications for the educational system and the ongoing interpretation of law. The Yoder case goes to show that a school’s responsibility to be non-partisan in religious matters can *itself* fail to meet the individual religious needs of a given person, and that at least in principle, such failure can be enough to legally exempt that person.

**The Establishment Clause Continued: Board of Education v. Mergens (1990) & Elk Grove Unified School District v. Newdown (2004)**

 The resolution of the Yoder case, though favorable for Yoder, certainly highlights the growing tension between schools and religion. While the legal nuances and distinctions are important, the impact of such rulings from a social perspective don’t typically take them into account. From a popular perspective, it may easily look like Yoder just “got out of school” because of religious beliefs; there was no compulsory salute, there was no mandated prayer—it was the education institute *as such* that violated Yoder’s religious beliefs. How exactly can schools design themselves in a way that (legally) facilitates learning without alienating those whom it serves?

 Board of Education v. Mergens (1990) helps answer that question. Mergens hoped to start a Christian extra-curricular club at Westside High school in Nebraska. On the grounds of the establishment clause, the school refused, stating that it could not give approval of any particular religion. Shrewdly, Mergens argued that this refusal was in violation of the Equal Access Act which does not allow public schools to deny equal access to students who wish to meet on the basis of “religious, political, philosophical, or other content of the speech at such meetings” (“Board” Syllabus §1).

 The courts ruled that the club formation should be allowed, and their reasoning is illuminative for understanding the limits placed on schools viz. “approving” of religion. While the students of the club would be discussing religion, and while the club itself had a patently religious purpose, the school’s curriculum was left undisturbed and unaffected by the formation and maintenance of the club. So, the establishment clause was simply not applicable, and while the school had to “approve” the club, the sort of approval that the club would be receiving was not at all the sort of approval the state is denied permission to grant. It would merely be the approval to exist as a non-curricular group—it would *not* be the school’s approval that this group was good, bad, or anything else.

 As with the Yoder case, religion is “favored” in this ruling because it simply does not affect the state (i.e., the school). This is essentially the crucial difference between the Minersville, West Virginia, and Engel cases—each of which included, as a matter of *inter-curricular* activity, some threat or another to the school’s religious non-partisanship.

 While that line may seem fairly clear, it became blurry fifteen years later with the somewhat notorious Elk Grove Unified School District v. Newdow (2004). In this case, Michael Newdow brought a complaint against the district asserting that the Pledge of Allegiance’s expression “under God” was unconstitutional per the establishment clause. His daughter, a student of the school, was being subjected to state-sponsored indoctrination (he argued).

 With the Newdow case, the Supreme Court slid back into familiar ground. They refused to hear the case, because Newdow was a non-custodial parent, and therefore had no standing for his case (“Elk Grove”, Sec 1). As such, they never addressed the constitutionality of “Under God.”

**Discussion**

 Given the principles identified by the previous cases, mainly, that a violation of the establishment cause must not only be “approval” of some religion but an approval which in some way or another *affects* the school’s primary deliverable: curriculum. There is certainly precedent to regard a prefatory activity—like the pledge of allegiance—as having such an affect (West Virginia and Engel both prove as much). With that in mind, one might argue that the expression “under God” certainly favors *theism*. Further, that while “theism” is broad, the establishment clause does not insist that such favoring be given toward a *particular* religion. In fact, it even forbids favoring *religion*, period.

 But the establishment clause also forbids favoring *irreligion*. What would removing “under God” from the pledge be, except a favoring of irreligion? Would it be just to compensate for fifty years of favoring “under God” by removing it? It is difficult to see how the pendulum does not swing back around, and hard, creating the exact problem that it’s trying to solve.

 Perhaps a key distinction is that the establishment clause is that what is forbidden is *unduly* favoring religion or non-religion. As legal commentators have long observed, “some government action implicating religion is permissible, and indeed unavoidable” including religious invocations at legislative sessions, public funding for private religious transportation, university funding of religious publications, etc. (“Establishment Clause”, §2). Just what exactly constitutes *unduly*?

 Although the Supreme Court never ruled, several of the justices at the time—including Scalia and Thomas—had previously argued that one must be careful not to over-extend the meaning of “coercion.” Indirect and latent forms of coercion, Scalia had argued previously, are not legal precedents (“Lee v. Weisman”, Commentary sec 2). One could certainly argue that saying the U.S. is “under God” is, at very best, indirect and latent coercion (if coercion at all).

 Legally, the question is unresolved. Practically, schools might take notice of these rulings as a way of gauging the sort of latitude they have in the establishment clause. There is a fairly noticeable tension between religion and the state, one which is testified to by ongoing legal cases over the past century. This has been far from an exhaustive discussion of them, but a selective one to help illustrate that *if nothing else*, one of the benchmarks for inappropriate and illegal inclusion of religion in schools is if the inclusion has some direct effect on the school’s curricular activity. As such, cases like Yoder and Mergens simply fall outside the scope of it; the school is left unaffected by the actions of those parties. On the other hand, when the school is devising *policy* it must be ever vigilant of these legal restrictions.

 In practice, we find that the pledge of allegiance is something that’s just easier for schools to abandon. The law is very powerful, whether as an ally or an enemy. In this case, unresolved tensions over exactly “where the line is drawn” when it comes to bare religious utterances in schools have led decision makers to simply opt for the legally safer course. Policy makers are simply uncertain whether or not the law is their friend or their foe in this case. Erring on the side of caution and pragmatics, they’ve resolved to stay as far away from it as possible.

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