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Constitutional Law - Separation of Church and State - Released Time Program for Religious Instruction of School Children

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a vehicle proximately causing an accident has entered a thoroughfore from a private driveway rather than from another highway so far as concerns ensuing injuries. From the construction that courts have given statutes which purport to grant regulatory powers to local governing bodies it is apparent that no power for the erection of "stop" signs in private driveways exists in the local authorities of states with provisions patterned after the Uniform Vehicle Code. The heavy toll taken by automotive accidents is an illustration of the need for the more effective traffic regulation which may be secured by allowing a broader margin of discretion to those agencies in closest contact with the hazards of motor vehicle operation.

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CONSTITUTIONAL LAW — SEPARATION OF CHURCH AND STATE — RELEASED TIME PROGRAM FOR RELIGIOUS INSTRUCTION OF SCHOOL CHILDREN. — Plaintiffs brought an action to compel discontinuance of the "released time" program in the New York City schools, under which parents could withdraw their children from the public schools one hour a week to receive religious instruction in the faith of their choice. All religious instruction was carried on outside the school buildings and grounds. There was no supervision or approval of religious teachers, no solicitation of students by school authorities, no distribution of registration cards by school authorities, and no announcements of any kind made in the public schools relative to the program. Students who did not participate in the religious classes remained in school while the religious classes were being held. The contention of the plaintiffs was that this plan violated the constitutional prohibition against laws respecting an establishment of religion contained in the First Amendment [1] to the United States Constitution, and was a breach of the "wall of separation" between church and state enjoined by that amendment. The court *held* that the program as set up was not unconstitutional since it did not involve the use of public property, treated all faiths equally, and was conducted on an entirely voluntary basis. A dissent argued that the plan, in its actual operation, involved the use of "pressure" on the students to attend such classes and was therefore unconstitutional. *Zorach v. Clauson,* 72 Sup. Ct. 679 (1952).

The argument here was similar to that made in the controversial case of *McCollum v. Board of Education,*[2] which involved a suit by the mother of a student in a Champaign, Illinois school to have the program of religious instruction, adopted by the board of education, enjoined as being unconstitutional. The United States Supreme Court there held that the Champaign plan was unconstitutional because it involved the use of tax supported institutions to aid in the propagation of religion.[3] Discussion of the *McCollum* case has brought out the point that the decision was made because of the

1. U.S. Const. Amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

2. 333 U.S. 203 (1948).

3. U.S. Const. Amend. XIV, §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." See Manion, *The Church, the State and Mrs. McCollum,* 23 Notre Dame Law. 456 (1948).

fact that taxpayers' money was involved since the various sectarian groups made use of the school buildings and the teachers' time.[4] Some writers have contended that the result of the *McCollum* decision was to infer that all "released time" programs were unconstitutional, regardless of whether any use was made of school facilities.[5] This uncertainty gave rise to the instant case.

The plaintiffs in the instant case, as in the *McCollum* case, maintained that the clause of the First Amendment against laws "respecting an establishment of religion" erects a "wall of separation between church and state." At the time of its passage, the phrase was generally recognized as merely a legislative prohibition against granting a monopoly of state favors to one particular religion.[6] It has been said that it is difficult to read into it a prohibition against the state either dealing with religion as such, or assisting all religions equally.[7] The Constitution does not demand that every friendly gesture between church and state shall be discountenanced.[8] At the time of the adoption of the First Amendment, the policy of cooperation of the state with religion was universal. In recent cases [9] where it was held that a released time program identical with the one in the instant case was constitutional, it was said that it was a fundamental right of the parent to rear his child in a particular religious faith, or to rear him as a nonbeliever. Denial of this fundamental right, now being exercised through the released time program, should not be made on speculative grounds. The plaintiffs in the instant case argued that the tax supported school system acts as a recruiter of students for classes in religious education; that cooperation between school and church such as is had in New York is a breach of the "wall of separation." Since parents have a constitutional right to choose a school for their children,[10] it would seem logical that they have the right to guide the education of their children in a public school so long as the basic requirements of the state educational system are fulfilled.

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4. Schmidt, *Religious Liberty and the Supreme Court of the United States*, 17 Ford. L. Rev. 173, 184 (1948).

5. *Id.* at 189, 191; Dissenting opinion of Justice Reed in McCollum case, *supra* note 2.

6. For a discussion of the historical background of the First Amendment, see Parsons, The First Freedom (1948).

7. Burke, *Busses, Released Time and the Political Process*, 32 Marq. L. Rev. 179 (1948); Schmidt, *Religious Liberty and the Supreme Court of the United States*, 17 Ford. L. Rev. 173, (1948), at 180, states, "Whereas the Champaign Council on Religious Education was only interested in the voluntary cooperation of parents who wished their children to be religiously educated (as a result of which only *some* children were to be exposed to religious education), Mrs. McCollum by her legal technique of mandamus, sought to coerce all parents (and, therefore, all children affected negatively or positively by the program) into the pattern of her particular atheistic indifference or belief respecting schooling and curriculum . . . the pretense at neutrality which was involved in the invocation of the First Amendment masked an intolerant anti-religionism. Actually it was . . . Council . . . which manifested neutrality and Mrs. McCollum who manifested hostility . . . apparently, neither the Supreme Court nor Mrs. McCollum was able to see that such a position of alleged "neutrality" respecting religion is really more at variance with the First Amendment historically and logically than the program of the Champaign Council on Religious Education."

8. Nichols v. School Directors, 93 Ill. 61 (1879); Chance v. Mississippi State Textbook R. & P. Board, 190 Miss. 453, 200 So. 706 (1941); Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950).

9. Gordon v. Board of Education of Los Angeles, 78 Cal.App.2d 464, 178 P.2d 488 (1947); People v. Board of Education, 394 Ill. 228, 68 N.E. 2d 305 (1946); Lewis v. Spaulding, 193 Misc. 66, 85 N.Y.S.2d 682, *aff'd*, 299 N.Y. 564, 85 N.E.2d, 791 (1949); People v. Graves, 245 N.Y. 195, 156 N.E. 663 (1927).

10. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Decisions with respect to released time programs have left unanswered several questions: first, are there any constitutional limitations as to the amount of time which may be devoted to religious training in place of secular education? [11] It would appear that the answer to this question is left entirely with the individual states. A second question is whether there is an indirect pressure placed on the student to attend religious instruction. It has been said that "religious instruction can compete more successfully with arithmetic than with recreation." [12] If this is so, it may be argued that the released program involves at least an indirect use of governmental facilities, since the regular educational program is thereby used as a coercive instrument to induce students to attend religious instruction classes.[13] If a student applies for release from regular classes to attend a religious class and then plays truant regularly, can school discipline constitutionally be applied to him? To allow the student to be punished by school authorities for failure to attend a religious class is to place the coercive power of the compulsory attendance laws behind the religious instruction program. To say that he cannot be punished may easily present a vexatious problem of administration, since an easy way of escaping class work would thereby be opened up.[14]

An alternative program used both in this country and in France is the dismissed time program under which the entire student body is dismissed at a certain hour each week, enabling students to attend religious instruction of their choice. The desirable results possible under this system could be diminished by scheduling other extra-curricular activities during the dismissed time. Another difficulty may be encountered in the form of statutory requirements that the school day must extend to a definite time.[16] This type of statute presents problems in regard to released time programs as well.

North Dakota has not yet judicially determined the issue presented in the principal case. A survey in 1948 reported that only 11.1 per cent of the schools in this state dismiss students for regular religious instruction each week, and this appears to be on a dismissed, rather than a released time basis.[16]

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11. N.D. Rev. Code: §15-3407 (1948): "Parents, guardians, or other persons having control of a child of compulsory school age may have such child excused from school attendance for the purpose of sending him to any parochial school to prepare such child for religious duties, for a total period of not exceeding six months in the aggregate, and such period may extend over one or more years."

12. Zorach v. Clauson, 303 N.Y. 161, 100 N.E.2d 463, 477 (1951) (dissenting opinion).

13. Mr. Justice Reed, dissenting in the McCollum case, argued that the effect of that case was to bar "any use of a pupil's school time whether that use is on or off the school grounds." An intriguing question is whether the McCollum decision actually resulted in favoritism being extended toward Atheism, which is considered a "religious faith."

14. Cases dealing with this problem have not come to the attention of the researcher. The New York City plan meets the dilemma by placing full responsibility for attendance on the churches involved.

15. See note 11 *supra*.

16. Aarthum, Religious Education in the Public Schools of North Dakota, 34 U. of N. Dak. School of Education Record 241 (May 1949) (excerpts from master's thesis, unpublished, University of North Dakota library).