

# Michigan Law Review

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Volume 50 | Issue 8

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1952

## CONSTITUTIONAL LAW-CHURCH AND STATE-THE NEW YORK RELEASED TIME PROGRAM

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### Recommended Citation

Frank Bowen, Jr. S.Ed., *CONSTITUTIONAL LAW-CHURCH AND STATE-THE NEW YORK RELEASED TIME PROGRAM*, 50 MICH. L. REV. 1359 (1952).

Available at: <https://repository.law.umich.edu/mlr/vol50/iss8/8>

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COMMENTS

CONSTITUTIONAL LAW—CHURCH AND STATE—THE NEW YORK  
RELEASED TIME PROGRAM—The recent decision of the Supreme Court

in the case of *Zorach v. Clauson*<sup>1</sup> affirms the constitutionality of the New York City program for releasing pupils from public schools so that they may attend religious education classes held outside of school property. The pupils are released upon the written request of their parents, and those not released from school remain in their classrooms.<sup>2</sup> Regulations under which the program is conducted prohibit comment by school officials on attendance.<sup>3</sup> Plaintiffs, who were taxpayers and parents of children attending the public schools, unsuccessfully contended that the program was a violation of the First Amendment as

<sup>1</sup> *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679 (1952). The lower courts upheld the program, *Zorach v. Clauson*, 198 Misc. 631, 99 N.Y.S. (2d) 339 (1950), *affid.* 278 App. Div. 573, 102 N.Y.S. (2d) 27 (1951), *affid.* 303 N.Y. 161, 100 N.E. (2d) 463 (1951), *noted*, 61 *YALE L.J.* 405 (1951); 27 *NOTRE DAME LAWYER* 120 (1951); 37 *VA. L. REV.* 1146 (1951). The program had been previously found valid in *Lewis v. Graves*, 245 N.Y. 195, 156 N.E. 663 (1927), but was relitigated in the light of *McCullum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461 (1948).

<sup>2</sup> "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish." 16 N.Y. Consol. Laws (McKinney 1947) §3210, 1(b). The rules so established are:

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school buildings and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools." Regulations of the Commissioner of Education, Art. 17, §154 (1 N.Y. Official Code Comp. 683), quoted in *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E. (2d) 463 at 464 (1951).

<sup>3</sup> "1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

"2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools; A different day may be designated for each borough.

included within the Fourteenth Amendment<sup>4</sup> on the ground that it was a prohibited "establishment of religion" as defined in the *McCullum* case.<sup>5</sup> The Supreme Court through Justice Douglas, in upholding the New York program, distinguished the *McCullum* case upon the ground that the Illinois released time program therein found invalid took place within the school buildings, whereas the New York program was carried on outside of school property.<sup>6</sup> Justices Frankfurter, Black, and Jackson, dissenting, thought the New York program unconstitutional in view of the *McCullum* case.

In the *McCullum* case, the Supreme Court defined "establishment of religion" in terms so sweeping that virtually any religious education program could be included within the definition.<sup>7</sup> In the voluminous comment which followed that case, two extreme positions were evident.<sup>8</sup> Extreme opponents of released time seized upon the expression "wall of separation between Church and State"<sup>9</sup> as being a formula prohibiting any and every type of religious education which might

<sup>5</sup> Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

<sup>6</sup> There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction." Regulations of the Board of Education of the City of New York, reported in *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E. (2d) 463 at 464-465 (1951).

<sup>4</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Constr., Amend. I. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940).

<sup>5</sup> *McCullum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461 (1948).

<sup>6</sup> *Zorach v. Clauson*, 343 U.S. 306 at 309, 315, 72 S.Ct. 679 (1952).

<sup>7</sup> "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 to 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 organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Everson v. Board of Education*, 330 U.S. 1 at 15-16, 67 S.Ct. 504 (1947), quoted in *McCullum v. Board of Education*, 333 U.S. 203 at 210-211, 68 S.Ct. 461 (1948).

<sup>8</sup> "Religious Education and the Public Schools: A Symposium," 43 RELIGIOUS EDUCATION 193 (1948); Symposium, "Religion and the State," 14 LAW AND CONTEMP. PROB. 1 (1949). The controversy has continued to date; see Taylor, "Equal Protection of Religion: Today's Public School Problem," and Moehlman, "The Wall of Separation: The Law and the Facts," 38 A.B.A.J. 277, 281 (April, 1952).

<sup>9</sup> *Supra* note 7.

utilize public school funds or time.<sup>10</sup> Extreme proponents of released time, on the other hand, equated "secularist" with "socialist"<sup>11</sup> and "atheist,"<sup>12</sup> even to the extent of suggesting that the Supreme Court itself violated the Constitution by establishing a "religion without a church."<sup>13</sup> The Supreme Court, however, seems to have decided the *Zorach* case by a process of balancing the interests involved in public and sectarian education.<sup>14</sup> The scope of this comment is limited to showing the nature and propriety of this relative measure of an "establishment of religion."

## I

It is believed that the controversy over released time can be most easily seen as the resultant of three major historical forces: (1) the political concept of freedom of religion from state control, and of the state from religious control;<sup>15</sup> (2) the growth of public education, not only in quantitative terms, but in importance as a factor in perpetuating democracy;<sup>16</sup> (3) the increasing complexity of industrial society which forces parents to rely upon schools to furnish knowledge previously either unnecessary or imparted in the home.<sup>17</sup> Error is inherent in oversimplification; and likewise, there is no simple method of correctly tracing the evolution of even these oversimplified factors in a brief manner. It is hoped, however, that the following attempt to do so will clarify the problem of released time as one of degree and not one of absolutes.

The first compulsory education law was enacted in Massachusetts in 1647,<sup>18</sup> and had the avowed purpose of furthering the religious tenets of the theocracy then in existence.<sup>19</sup> Although there is doubtless some

<sup>10</sup> BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION* (1950); THAYER, *THE ATTACK UPON THE AMERICAN SECULAR SCHOOL* (1951); MOEHLMAN, *THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (1951).

<sup>11</sup> Quigley, "The Relationship between Government and Church Sponsored Education," 43 *RELIGIOUS EDUCATION* 217 at 218 (1948).

<sup>12</sup> O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 44, 45 (1949).

<sup>13</sup> Murray, "Law or Prepossessions?" 14 *LAW AND CONTEMP. PROB.* 23 at 30 (1949).

<sup>14</sup> Meiklejohn, "Educational Cooperation Between Church and State," 14 *LAW AND CONTEMP. PROB.* 61 (1949); Kauper, "The First Ten Amendments," 37 *A.B.A.J.* 717 at 784 (1951).

<sup>15</sup> TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 1-28 (1948).

<sup>16</sup> MORISON AND COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 511 (1942).

<sup>17</sup> BOWER, *CHURCH AND STATE IN EDUCATION* 28 (1944); cf. ELIOT, *NOTES TOWARDS THE DEFINITION OF CULTURE* 107 (1949).

<sup>18</sup> MOEHLMAN, *THE CHURCH AS EDUCATOR* 87 (1947).

<sup>19</sup> The enactment began, "It being one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures. . . ." *Supra* note 18.

parallel between the Puritan emphasis upon education, and democratic ideals of equality,<sup>20</sup> neither religious tolerance nor any concept of "separation of church and state" was present in this first school system.<sup>21</sup> The colonists felt that education was a function of the church,<sup>22</sup> and free schools were for paupers.<sup>23</sup> It was not until the early part of the nineteenth century that free schools under civil control were accepted in the north, and the southern states seem to have been without a comparable school system until after the Civil War.<sup>24</sup>

The concept of political separation of church and state is manifest not only in the First Amendment, but is epitomized in the disestablishment of the various state religions. The most famous disestablishment was that of the Anglican Church in Virginia in 1786 which was made possible by the variety of organized religions<sup>25</sup> as well as by the noted leadership of Madison and Jefferson with their ideas of political morality and secular bases for conscience.<sup>26</sup> Massachusetts, in 1833, was the last state to disestablish its church.<sup>27</sup> That this universal abandonment of established churches is relevant to the present question of released time seems self evident, but that it should be determinative of the question is most doubtful.<sup>28</sup>

Conflict between the concept of political separation of church and state and the growing public school systems came with the Catholic immigration.<sup>29</sup> Religious education seems to have been separated from secular education by about 1875 as recognition was given to Catholic objections to use of the King James Bible in public schools.<sup>30</sup> By this date, the schools had become, through school districts, political units of the state, and were no longer an integral part of relatively homogeneous Protestant communities.<sup>31</sup> When this separation of sectarian

<sup>20</sup> PERRY, *PURITANISM AND DEMOCRACY* 192 (1944).

<sup>21</sup> MORHELMAN, *SCHOOL AND CHURCH* 7 (1944).

<sup>22</sup> Meiklejohn, "From Church to State," *RELIGION AND EDUCATION* 5 (1945). (This book is Volume 4 of a series on Religion in the post-war world edited by Dean Sperry).

<sup>23</sup> 1 MORISON AND COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 512 (1942).

<sup>24</sup> *Ibid.*

<sup>25</sup> O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 34 (1949).

<sup>26</sup> SCHNEIDER, *A HISTORY OF AMERICAN PHILOSOPHY* 56-59 (1946).

<sup>27</sup> 1 MORISON AND COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 242 (1942).

<sup>28</sup> After the disestablishment in Massachusetts, for example, Horace Mann believed that some form of non-sectarian instruction should continue in the public schools. THAYER, *THE ATTACK UPON THE AMERICAN SECULAR SCHOOL* 11 (1951).

<sup>29</sup> 2 STOKES, *CHURCH AND STATE IN THE UNITED STATES* 549 (1950).

<sup>30</sup> BOWER, *CHURCH AND STATE IN EDUCATION* 28 (1944).

<sup>31</sup> *Id.* at 26.

and secular education took place, the family and church were more capable of imparting religious instruction than they are at present. Industrial society has not only tended to disintegrate family unity and discipline but it has also necessarily increased the demands which the school makes upon the pupils' time.<sup>32</sup> Thus, that which the parents and churches find themselves less capable of doing individually today, they are attempting to do by acting in their political capacity to call upon the assistance of the public school system. The constitutional limits upon such attempts must be found in the cases.

## II

In the *McCullum* case, three elements seemed to support the finding of unconstitutionality of the Illinois released time plan. (1) The religious instruction was carried on within the public school building, thus utilizing tax funds. (2) There was close cooperation between the religious groups and the school authorities. (3) Absence from the legally required duty of school attendance was conditioned upon attendance at sectarian instruction.<sup>33</sup> The New York program litigated in the *Zorach* case differs in respect to the first two of these elements but seems identical regarding the third.<sup>34</sup> (1) There was no use of tax funds in the New York program.<sup>35</sup> (2) There was only enough cooperation between the school officials and the religious groups to insure efficient operation of the New York program.<sup>36</sup> (3) There was, however, in the New York program, the same conditionally authorized absence and consequent segregation of participants in the program from non-participants.<sup>37</sup> Even in this latter point of identity between the two programs, the New York program might be distinguished because the segregation was not by particular sects within the school building.<sup>38</sup> It should be noted that in upholding the constitutionality

<sup>32</sup> *Supra* note 17; cf. International Council of Religious Education, "Statement of Policy" (1949).

<sup>33</sup> *McCullum v. Board of Education*, 333 U.S. 203 at 209, 68 S.Ct. 461 (1948); Remmler, "The Legal Situation Resulting from the Recent Supreme Court Decision," 43 RELIGIOUS EDUCATION 211 at 212 (1948); Note, 19 GEO. WASH. L. REV. 716 at 718 (1951).

<sup>34</sup> The numerous factual distinctions listed in the opinion of the trial court seem subordinate to these two differences. *Zorach v. Clauson*, 198 Misc. 631 at 638, 99 N.Y.S. (2d) 339 (1950); same, *Lewis v. Spaulding*, 193 Misc. 66 at 72, 85 N.Y.S. (2d) 682 (1948), appeal withdrawn, 299 N.Y. 564, 85 N.E. (2d) 791 (1949).

<sup>35</sup> *Zorach v. Clauson*, 343 U.S. 306 at 308-309, 72 S.Ct. 679 (1952).

<sup>36</sup> *Id.* at 313.

<sup>37</sup> *Id.* at 321. Opinion of Frankfurter, J., dissenting.

<sup>38</sup> Segregation within the school building seems to have been one of the main objections to the Illinois released time plan. Pfeffer, "Religion, Education, and the Constitution," 8 LAWYERS' GUILD REV. 387 at 397 (1948).

of the New York program, the Court expressly reserved any question of coercion of the pupils to attend the religious instruction.<sup>39</sup>

Justification for the majority's finding of a constitutional difference between the two programs must be found by an examination of the competing interests. One possible analysis is that the released time legislation is an exercise of religious liberty by a majority of the people of New York. The decision of the *Zorach* case is then justified by saying that the amount of aid to religion is not sufficient to warrant restraint upon the free exercise of religion of those who support the legislation.<sup>40</sup> A better analysis seems to be to characterize the released time legislation as an exercise of political power, and balance that power against the rights of those who oppose the legislation as an infringement on the free exercise of religion.<sup>41</sup> This latter analysis seems to give meaning to the statement of the majority in the *Zorach* case that the First Amendment "studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency . . ." of Church and State.<sup>42</sup>

Education is beyond doubt a major public interest.<sup>43</sup> And in the context of religious education, this interest has been recognized by allowing the state to furnish textbooks<sup>44</sup> and transportation<sup>45</sup> to pupils attending parochial schools, and to permit the reading of the Bible in public schools.<sup>46</sup> However, the rights of the individuals who oppose state power prevent the abolition of private schools<sup>47</sup> or the unreasonable regulation of the curriculum of all schools.<sup>48</sup> And, as was decided

<sup>39</sup> The question of actual coercion was not properly raised in the state courts. *Zorach v. Clauson*, 343 U.S. 306 at 311-312, 72 S.Ct. 679 (1952). Frankfurter, J., dissenting, believed that the facts as to actual coercion were necessary to decide the issue. *Id.* at 322. It has been suggested that the New York program is constitutional in theory but not in fact. Note, 49 *COL. L. REV.* 836 (1949).

<sup>40</sup> Opinion of Desmond, J., concurring, *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E. (2d) 463 at 469 (1951); Murray, "Law or Prepossessions?" 14 *LAW AND CONTEMP. PROB.* 23 at 36 (1949); note, 61 *YALE L.J.* 405 at 410 (1951). This analysis seems to leave unanswered the problem as to the criteria for measuring allowable state aid to religion.

<sup>41</sup> *Supra* note 14.

<sup>42</sup> *Zorach v. Clauson*, 343 U.S. 306 at 312, 72 S.Ct. 679 (1952).

<sup>43</sup> Meiklejohn, "Educational Cooperation between Church and State," 14 *LAW AND CONTEMP. PROB.* 61 at 71 (1949).

<sup>44</sup> *Cochran v. Louisiana Board of Education*, 281 U.S. 370, 50 S.Ct. 335 (1930).

<sup>45</sup> *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504 (1947).

<sup>46</sup> *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394 (1952). The taxpayers who were complaining were found to have insufficient interest to present a "case or controversy." It was indicated that had they been parents of children currently attending the school, then they might have had standing to challenge the alleged "establishment of religion."

<sup>47</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925).

<sup>48</sup> *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923).

in the *McCullum* case, the right of the individual prevents operation of one type of released time program which infringes upon religious freedom.<sup>49</sup> The line between allowable state power and the individual's right is not one which can be defined with certainty, and the opinion of the *McCullum* case seems to have drawn the line more in accord with the opinion of the dissenting Justices of the *Zorach* case than with that of the majority. The *Zorach* case is a retreat from the position taken in the *McCullum* case, for it abandons the absolute "wall of separation between Church and State" formula.<sup>50</sup> In a broader sense, however, that formula was abandoned at its inception in the *Everson* case, in which the Court allowed incidental aid to a parochial school because of the paramount public interest in safely transporting children to school.<sup>51</sup> The principle of the *Zorach* case seems to be that, absent expenditure of tax funds, cooperation of a public school system with religious education groups will be permitted so long as the religious liberty of pupils and parents is respected. However much one may feel that the dissenting opinions of the *Zorach* case are correct as to the merits of the particular question decided, the majority seems to have adopted a more rational principle of interpreting the First Amendment guarantees in a situation so complex that it is not susceptible of absolute measures.

### III

Although the *Zorach* case properly enunciates a rational basis for interpretation of the First Amendment, the prime danger of released time programs should be remembered. A released time program uses the public schools as a focal point for religious differences.<sup>52</sup> Abuse of such a program is easy, and many abuses may be beyond the reach of legal remedy.<sup>53</sup> The Supreme Court is no longer a "National School

<sup>49</sup> *McCullum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461 (1948).

<sup>50</sup> "The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." Douglas, J., for the Court, *Zorach v. Clauson*, 343 U.S. 306 at 312, 72 S.Ct. 679 (1952).

<sup>51</sup> *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504 (1947); Prior to the *Zorach* case, however, the distinction between aid to the pupil and aid to religion seems to have been accepted. 2 STOKES, CHURCH AND STATE IN THE UNITED STATES 754 (1950).

<sup>52</sup> TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 329 (1948).

<sup>53</sup> Kuebler, "To Reduce Tensions between Government and Church-Sponsored Education," 43 RELIGIOUS EDUCATION 223 at 225 (1948). For example, a teacher may give burdensome work to those children who remain behind. Note, 61 YALE L.J. 405 at 413 (1951).

Board”;<sup>54</sup> its recognition of the interest of the community and state in allowing public schools to cooperate with religious groups places the burden directly upon those who sponsor such cooperation to protect the rights of minority groups.<sup>55</sup>

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<sup>54</sup> Corwin, "The Supreme Court as National School Board," 14 *LAW AND CONTEMP. PROB.* 3 (1949).

<sup>55</sup> Smaller communities would probably attain more satisfactory religious education without the danger of released time by coordinated planning by church groups. Edmonson, "Religious Education in Smith City," 43 *RELIGIOUS EDUCATION* 229 (1948).