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Constitutional Law-Church and State-Shared Time: Indirect Aid to Parochial Schools

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NOTES

CONSTITUTIONAL LAW—CHURCH AND STATE—Shared Time: Indirect Aid to Parochial Schools

For over forty years, public schools have been participating in shared time programs pursuant to which non-public school children attend public schools for instruction in one or more subjects during the regular school day.[1] Since ninety per cent of the pupils in non-public elementary and secondary schools are in Roman Catholic schools,[2] shared time—or, as it is also known, dual enrollment—raises questions of an establishment of religion in contravention of the provisions of the first amendment to the Constitution. To date, no court has faced this constitutional issue and only three state courts have ruled upon the validity of shared time under *state* constitutions and statutes. Nevertheless, such questions are significant and are becoming increasingly so. A National Education Association survey in 1964 revealed that 280 school systems in 35 states were operating shared time programs;[3] that the use of such programs has grown considerably in recent years is indicated by the twenty-five per cent increase in the use of shared time programs during the two years immediately preceding the survey.[4] Furthermore, Title I of the Elementary and Secondary Education Act of 1965 specifically suggests dual enrollment programs as a means by which local educational agencies can obtain federal assistance for non-public school children.[5]

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1. Wakin, *Experiment in Educational Sharing*, 60 RELIGIOUS EDUCATION 43 (1965).

2. STAFF OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 88TH CONG., 1ST SESS., PROPOSED FEDERAL PROMOTION OF "SHARED-TIME" EDUCATION 1 (Comm. Print 1963).

3. *Hearings Before the Ad Hoc Subcommittee on Study of Shared-Time Education of the House Committee on Education & Labor*, 88th Cong., 2d Sess. 316 (1964). These school systems are primarily concentrated in the midwestern states: Michigan (42), Ohio (36), Illinois (27), Wisconsin (25), Minnesota (13), and Indiana (11).

4. *Hearings on Shared-Time Education, supra* note 3; Powell, *Shared Time, 1964: A Turning Point?*, in RELIGION AND THE PUBLIC ORDER 73 (Giannella ed. 1964).

5. (a) A local educational agency may receive a basic grant or a special incentive grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate state educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)

. . .

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as *dual enrollment*, educational radio and television, and mobile educational services and equipment) in which such children can participate . . . .

79 Stat. 30 (1965), 20 U.S.C. § 241e (Supp. I, 1965). (Emphasis added.) See generally Comment, *The Elementary and Secondary Education Act—The Implications of the Trust-Fund Theory for the Church-State Questions Raised by Title I*, 65 MICH. L. REV. 1184 (1966).

The Nature of Shared Time Programs

The purpose of the shared time programs is to improve the education received by children in non-public schools. This is accomplished by allowing those children to study courses in the public school which the public school may be in a better financial position to offer. At the same time, the parochial school is able to channel the funds which it would otherwise use for providing such instruction into strengthening its parochial school program. The religious emphasis of a parochial school education remains intact since the subjects which the parochial school pupil studies in the public school are generally those which have little ethical value content, such as industrial arts, home economics, science, mathematics, and foreign languages.[6] Subjects which stress values, such as English, social studies, fine arts, and Christian doctrine, are taught in the parochial school.[7] Basically, the shared time programs follow one of two patterns. First, junior high school pupils may study only one or two courses, generally industrial arts or home economics, in the public school.[8] Or, second, parochial school pupils from both the junior and senior high school level may spend approximately one-half of every school day in the public school.[9]

In recent years, the merits of shared time programs have become a subject of controversy. Some critics of shared time believe that it will produce a fragmentation of the public school system through a proliferation of parochial schools.[10] These critics further argue that the divisiveness resulting from the development of such private schools would be destructive of the allegiance to common traditions implanted by a unified public school system. Since shared time programs must be open to all non-public schools on an equal basis, a related fear is that such programs may encourage the formation of private schools whose ideologies would include such rightist or leftist groups as the John Birch Society or the Black Muslims.[11] Although some increase in the number of parochial schools might be anticipated as a result of the Elementary and Secondary Education Act,

6. Wakin, *supra* note 1, at 47. Typically, these courses also require expensive equipment.

7. *Ibid.*

8. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, DUAL ENROLLMENT IN PUBLIC AND NONPUBLIC SCHOOLS 5 (1965) [hereinafter cited as HEW]. Such a program exists in Pittsburgh, Pennsylvania, where 4,831 children enrolled in the seventh and eighth grades of parochial schools studied such courses in public schools in 1964-1965. *Id.* at 21.

9. *Id.* at 5. A shared time program of this nature was begun in 1963 in the Cherry Hills School District in Michigan when 180 pupils enrolled at a parochial secondary school attended a public school for three hours each day. *Id.* at 38.

10. Pfeffer, *Second Thoughts on Shared-Time*, 79 CHRISTIAN CENTURY 779 (1962).

11. *Hearings on S. 370 Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess. 2898 (1965) (Elementary and Secondary Education Act of 1965).

the increase should be marginal since the parochial school would still have to finance the construction and operation of its educational facilities and comply with minimum state educational standards. It has also been suggested that shared time might encourage the establishment of racially segregated private schools,[12] but such segregation could be only partially achieved since the dually enrolled students would still be taking some courses in the integrated public school.

More significant is the fear voiced by the American Jewish Congress that public school officials in shared time programs may make decisions which serve parochial school rather than public school objectives.[13] The most common example of such a situation would be a decision to locate a new public school near a parochial school so as to facilitate public school attendance by parochial school pupils, although the needs of the public school district dictate a different location.[14] Such dangers can be avoided by requiring that the frame of reference for such decisions be the promotion of primarily public, rather than sectarian, purposes. The opposition of the American Jewish Congress is also based on the fact that, in some shared time programs, parochial school students are segregated while studying in the public school, thus emphasizing rather than mitigating religious differences.[15] Although such segregation may facilitate administration and scheduling, it is not essential to the successful operation of shared time and is a defect which can easily be remedied. Indeed, the House and Senate debates on the Elementary and Secondary Education Act clearly indicate that shared time programs under the act must avoid religious segregation.[16]

The American Civil Liberties Union has also opposed shared time, warning that such programs may involve participation by sectarian officials in decisions regarding such public school matters as curriculum, textbooks, or the selection of teachers.[17] However,

12. *Id.* at 2895.

13. *Id.* at 2557-60.

14. Such a situation arose when a parochial school proposed that the West Allis-Milwaukee School Board locate a new public school across the street from the parish school. The school board rejected this proposal since, in effect, the public school would have served as a secular annex to the parochial school. Powell, *supra* note 4, at 76.

15. *Hearings on S. 370, supra* note 11, at 2557-60.

16. 111 CONG. REC. 5912-13 (1965); S. REP. No. 146, 89th Cong., 1st Sess. 11 (1965). See also Kelly & La Noue, *The Church-State Settlement in the Federal Aid to Education Act*, in RELIGION AND THE PUBLIC ORDER 147-48 (Giannella ed. 1965).

17. American Civil Liberties Union, Position on Shared Time, April 4, 1965. The ACLU's present opposition is also based on the contention that tax money is used to support academic programs for children receiving their basic education in church schools and, therefore, shared time violates the first amendment. Originally, the Church-State committee of the ACLU had recommended that the ACLU not consider shared time unconstitutional provided that: (1) shared time is offered on a nondiscriminatory basis to students of all church-related schools; (2) control of the program is vested in public authorities; and (3) such programs serve public rather than religious objectives. American Civil Liberties Union, Proposed Policy Recommendations on the Issue of Shared Time, May 29, 1964.

the danger, if any, arising from such integral involvement of sectarian officials in public school matters could be avoided by requiring that all decisions regarding these matters be made by public officials. Other critics suggest that shared time programs impose an undue administrative burden on the public school, but while there is undoubtedly some additional burden, public school administrators who have participated in these programs have generally supported them[18] and administrative difficulties were not among the disadvantages cited by public school officials in the 1964 Health, Education and Welfare Department (HEW) study on shared time.[19]

To Roman Catholics, shared time offers some benefits to offset the burden of taxation for the support of public schools that their children might not otherwise attend, a possibility of lower parochial school tuition, and improved education for their children.[20] However, the reaction of the Catholic community has been ambivalent since shared time requires several departures from the Catholic concept of education.[21] First, the Catholic objective of having religion permeate the entire curriculum[22] may be frustrated when the Catholic student takes courses in the public school. However, since the subjects which the parochial school student studies in the public school are typically those which lack ethical value content, the interference with religious emphasis will most likely be minimal. Second, shared time conflicts with the traditional Catholic view that boys and girls should be taught separately during adolescence.[23] However, the disadvantage of departing from this tradition is surely insignificant when compared with the greater educational opportunities afforded Catholic children through shared time programs.[24]

From the perspective of the public schools, shared time programs may reduce Catholic opposition to public school budgets and bond issues by giving Catholics an interest in the public school system.[25] Moreover, study in a pluralistic environment, which contributes toward understanding and a reduction of prejudices among Protestants, Catholics, and Jews, will be beneficial to both dually enrolled and public school children.[26] With few exceptions, dually enrolled students and their parents were found by the HEW study to support such programs.[27]

Finally, shared time programs may provide a viable compromise

18. Wakin, *supra* note 1, at 46.
19. See HEW at 7.
20. *Ibid.*
21. Wakin, *supra* note 1, at 44.
22. *Symposium—Shared-Time*, 57 RELIGIOUS EDUCATION 5, 30 (1962).
23. *Id.* at 19.
24. See Wakin, *supra* note 1, at 44.
25. *Symposium*, *supra* note 22, at 6.
26. *Id.* at 12.
27. See generally HEW.

to the controversy regarding public support of non-public schools.[28] Historically, public support of sectarian instruction has been prohibited in the several states[29] and it is unlikely that direct aid to parochial schools will ever be held constitutional.[30] Assuming that, in light of their educational function, some aid to parochial schools is desirable, it is submitted that shared time is one vehicle for the rendering of such aid, which, because the public funds are restricted to the public schools, is not inconsistent with our historical policy.

Constitutionality of Shared Time Under the First Amendment

The first amendment to the Constitution provides that "Congress shall make no law respecting the establishment of religion nor prohibiting the free exercise thereof." Since the first amendment has been incorporated into the due process clause of the fourteenth amendment and is therefore binding upon the states,[31] it is necessary to determine whether shared time programs constitute an establishment of religion within the meaning of the first amendment. For this purpose, the program should be analyzed in light of the three interrelated approaches which the Supreme Court has articulated in its interpretation of the establishment clause.

1. The "Child Benefit" Theory

In *Everson v. Board of Education*,[32] the Supreme Court's first extensive consideration of the establishment clause, the Court upheld a state statute providing for the reimbursement of expenses incurred by parents in transporting their children by bus to parochial as well as public schools. In interpreting the establishment clause, the Court articulated what appeared to be a strict separationist test:

> 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. . . . 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.[33]

28. *Symposium*, *supra* note 22, at 30.

29. KAUPER, RELIGION AND THE CONSTITUTION 111 (1964).

30. DEP'T OF HEALTH, EDUCATION AND WELFARE, MEMORANDUM ON THE IMPACT OF THE FIRST AMENDMENT TO THE CONSTITUTION UPON FEDERAL AID TO EDUCATION, reprinted in 50 GEO. L.J. 351 (1961).

31. Cantwell v. Connecticut, 310 U.S. 296 (1940).

32. 330 U.S. 1 (1946). Some commentators question whether *Everson* is still good law since Mr. Justice Douglas, who was one of the five man majority in *Everson*, appears to have repudiated the *Everson* holding in his concurring opinion in Engel v. Vitale, 370 U.S. 421, 437 (1962). See Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302, 307 (1966).

33. 330 U.S. at 15-16.

However, in disposing of the case, the Court implicitly departed from this absolute standard of "no aid" and rested its decision on the fact that, although benefit accrued incidentally to parochial schools, the statute could be construed as public welfare legislation designed to protect school children from the hazards of traffic.[34] The Court thus relied on the "child benefit" theory, previously enunciated in *Cochran v. Board of Education*,[35] which in effect permits the state to extend certain welfare aids to students attending church-related schools without violating the establishment clause so long as the benefit is given directly to the child and the benefits, if any, received by the church-related school are wholly incidental to the child's. "Child benefits" typically will include such services as school bus transportation, secular textbooks, and medical care.[36] Since shared time promotes public welfare—education—and since the benefit—opportunity to attend public school classes—accrues directly to the child with the parochial school benefiting only indirectly, it would appear that shared time programs could be sustained under the "child benefit" approach of *Everson*.

On the other hand, it could be argued that shared time does directly aid religion since it releases funds which would otherwise be used by the parochial school to provide the instruction offered in the public schools and such funds can be used by the church for other activities, including the expansion of the parochial school system. This benefit, however, may not be sufficiently direct to render shared time programs unconstitutional, since, in *Everson*, the Court specifically recognized that some of the children might not be sent to the parochial schools if the parents were not reimbursed for their childrens' bus fare.[37] In effect, therefore, the Court regarded the *tendency* of the statute to increase the enrollment in parochial schools as insufficient to render the statute unconstitutional.

2. Released Time Analogy

The Supreme Court's second approach to the establishment clause may be found in *Zorach v. Clauson*.[38] In *Zorach*, the Court upheld a released time program pursuant to which public schools released their pupils during the school day for religious instruction in

34. *Id.* at 17-18.

35. 281 U.S. 370 (1930). In *Cochran*, the Court upheld a statute which provided for the furnishing of free textbooks to children attending both parochial and public schools. However, plaintiffs did not argue that the statute violated the first amendment; instead, they contended that the statute constituted a taking of private property for a non-public purpose in violation of the fourteenth amendment.

36. See La Noue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. PUB. L. 76 (1964).

37. 330 U.S. at 17.

38. 343 U.S. 306 (1952).

religious centers outside the public school.[39] Despite the fact that released time has a wholly religious purpose, the Court did not find it violative of the establishment clause. If shared time were regarded as an expanded released time program, it would clearly be constitutional under *Zorach*.[40] Admittedly, there is a difference between the two programs: released time permits public school children to receive religious instruction in religious centers; shared time allows parochial school children to receive secular instruction in the public schools.[41] Nonetheless, this distinction seems to support the constitutionality of shared time, since if the public schools can accommodate religion when the purpose is religious instruction in religious centers, surely they should be able to accommodate religion when the end is secular instruction in the public schools.[42]

3. Accommodated Neutrality

In *Abington School District v. Schempp*,[43] the Supreme Court's most recent consideration of the establishment clause, state statutes requiring Bible readings at the beginning of the public school day were declared unconstitutional. Reaffirming the principle that the state must be neutral in its relations with groups of religious believers and non-believers,[44] the Court declared that, if legislation is to withstand the test of the establishment clause, "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[45] Indeed, the Court implied that this is the "neutrality" which the Constitution demands. The Supreme Court thus articulated the criteria which have been applied in previous establishment clause cases: where the Court has found such compelling secular purposes as the protection of school children from traffic hazards,[46] the establishment of a uniform day of rest,[47] or the operation of a hospital,[48] statutes which might have been suspect under the establishment clause were deemed constitutional; however, where no legitimate secular purpose was to be served by the

39. *Id.* at 308. Previously, the Supreme Court, in Illinois *ex rel.* McCollom v. Board of Educ., 333 U.S. 203 (1948), had held unconstitutional a program permitting *sectarian* teachers to hold weekly classes in the public schools.

40. See Comment, 57 Nw. U.L. Rev. 578, 594 (1962).

41. Stokes & Pfeffer, Church and State in the United States 390 (1964).

42. In upholding the released time program, the Supreme Court emphasized that when the state cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it accommodates the public service to the spiritual needs of the community and thus follows the best of our traditions. 343 U.S. at 313-14.

43. 374 U.S. 203 (1963).

44. *Id.* at 218.

45. *Id.* at 222.

46. Everson v. Board of Educ., 330 U.S. 1 (1946).

47. Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

48. Bradfield v. Roberts, 175 U.S. 291 (1899).

statute, the Court generally found the statute to be violative of the clause and hence unconstitutional.[49] Analyzing shared time programs in light of the *Schempp* approach, it is clear that such programs satisfy the requisite two criteria: a secular legislative purpose and a primary effect which neither advances nor inhibits religion.[50] As to the first, the purpose of shared time is to extend public school instruction to students in church-related schools, clearly a secular objective. Second, in order to satisfy the primary effect test, the state may not employ essentially religious means in advancing its secular ends,[51] but, since the means employed in shared time programs are the public schools, no difficulty is encountered here.

The tenor of the *Schempp* opinion indicates that the neutrality of which the Court speaks is not a strict neutrality but rather one of accommodation. This conclusion is dictated in part by the Court's emphasis on the compulsion which exists when the state requires children to attend school and then subjects them to Bible readings supervised by the teacher—a state employee; under a strict neutrality test an examination of these coercive factors would not be necessary since the mere fact that the Bible readings were directed at religious rather than secular ends would be a sufficient basis for finding a violation of the establishment clause.[52] Additional support for this conclusion may be drawn from Mr. Justice Brennan's concurring opinion in *Schempp*, wherein he enumerates six types of permissible programs in which the activity in question constitutes what may be deemed an establishment of religion, thus making it clear that not every connection between religion and the state is unconstitutional.[53] Admittedly, several of these activities involve situations in which the establishment clause conflicts with the "free exercise of religion" clause and, therefore, it is arguable that the courts have merely reconciled two seemingly conflicting constitutional provisions in favor of the free exercise clause. However, even assuming the validity of this

49. *E.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (prayer prescribed by state Board of Regents recited at beginning of each school day); Torcaso v. Watkins, 367 U.S. 488 (1961) (affirmation of faith in God required as condition of holding public office); Illinois *ex rel.* McCollom v. Board of Educ., 333 U.S. 203 (1948) (religious instruction on public school premises). *But see* Zorach v. Clauson, 343 U.S. 306 (1952), where the Court upheld the constitutionality of a released time program which had a wholly religious purpose. See note 38 *supra* and accompanying text. See generally Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEXAS L. REV. 142 (1963).

50. 374 U.S. at 222.

51. See Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation*, in RELIGION AND THE PUBLIC ORDER 1, 13 (Giannella ed. 1963).

52. See KAUPER, RELIGION AND THE CONSTITUTION 71-79 (1964).

53. 374 U.S. at 294-304. These six categories are: military chaplains, invocational prayers in legislatures, the study of the Bible in public schools, tax exemption for churches, religious considerations in public welfare programs, and activities, such as the Sunday closing laws, which although religious in origin, have ceased to have religious meaning.

argument, it is obvious that shared time also involves issues which relate to the free exercise of religion, particularly the educating of one's child in the religious beliefs of the parents.[54] The Supreme Court recognized in *Sherbert v. Verner*[55] that enabling an individual to enjoy welfare benefits without requiring him to violate his religious convictions is an accommodation which does not constitute an establishment of religion. *Sherbert* is particularly applicable to an analysis of shared time programs since the educational benefits of shared time accrue to the individual rather than to the religious institution, just as did the unemployment compensation benefits in *Sherbert*.

Furthermore, a public school education is a benefit which the state makes available to the entire community and the benefits which the church receives by the attendance of Catholic children in public schools under shared time programs are no different than the benefits it receives from such services as sanitation, police, and fire protection, which are also provided to the general public without regard to religious beliefs. As the *Everson* Court emphasized, the state cannot exclude anyone from receiving public welfare benefits because of his faith.[56] Since a parent has a right to educate his child in a parochial rather than a public school,[57] and since the state has an obligation to provide a public school education to all children in a community, it should not be an establishment of religion within the meaning of first amendment for the state to provide education to parochial school students on a part time basis under a shared time program.[58] Similarly, since it is not unconstitutional for a child to attend a parochial school full time, it should not be unconstitutional for him to attend both a parochial and a public school.

Considerations at the State Level

Even if shared time programs do not violate the first amendment, they must still overcome three obstacles at the state level: the constitutionality of such programs under state constitutions, the statu-

54. See Katz, *Note on the Constitutionality of Shared Time*, in RELIGION AND THE PUBLIC ORDER 85, 89 (Giannella ed. 1964).

55. 374 U.S. 398 (1963). In *Sherbert*, the Court held unconstitutional a state's denial of unemployment compensation benefits to a Seventh Day Adventist who, because of religious conviction, refused employment requiring work on Saturdays. The Court emphasized that in so holding it was not fostering the establishment of the Seventh Day Adventist church, but rather was merely reflecting neutrality. See generally KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963); Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation*, in RELIGION AND THE PUBLIC ORDER 1 (Giannella ed. 1963); Moore, *supra* note 49.

56. 330 U.S. at 16.

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

58. See Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1453 (1966); Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302, 311 (1966).

tory power of local school boards to create such programs, and the relationship of shared time to state compulsory education laws.

First, state constitutions are often more specific than the federal constitution in prohibiting the expenditure of public funds for the support of sectarian schools.[59] For example, the Constitution of New York provides:

> Neither the state nor any subdivision thereof shall use . . . any public money, . . . directly or indirectly, in aid or maintenance . . . of any school . . . under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . . .[60]

Although statutes authorizing bus transportation or free textbooks to parochial school students have generally been held unconstitutional under such state constitutional provisions,[61] shared time programs need not suffer the same fate. A distinction between the two types of programs may lie in the fact that the former aids the student in receiving instruction in a parochial school whereas the latter brings parochial school children into the public schools and therefore fulfills a proper state function by providing a public school education for all children in the community. Since the public schools are open to all children, it cannot be violative of the state constitutions to allow parochial school pupils to attend the public schools. Moreover, as the only court to face this question reasoned, shared time

59. See Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302, 326 (1966). See generally ANTIEAU, CARROLL & BURKE, RELIGION UNDER THE STATE CONSTITUTIONS (1965); KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1964). There are some exceptions, such as ORE. CONST. art. 1, §§ 2-3, which has been held to be identical to the provisions of the United States Constitution. City of Portland v. Thornton, 174 Ore. 508, 149 P.2d 972, *cert. denied*, 323 U.S. 770 (1944).

60. N.Y. CONST. art. 11, § 4. The Attorney General of New York has ruled that shared time would violate this constitutional provision. OP. N.Y. ATT'Y GEN., July 15, 1965.

61. School bus statutes held unconstitutional: Matthews v. Quinton, 362 P.2d 932 (Alaska 1961); Opinion of the Justices, 216 A.2d 668 (Del. 1966); McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953); Board of Educ. v. Antone, 384 P.2d 911 (Okla. 1963); Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962). Bus statutes held constitutional: Bowker v. Baker, 73 Cal. App. 653, 167 P.2d 256 (1946); Snyder v. Town of Newton, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed*, 365 U.S. 299 (1961); Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956); Squires v. Inhabitants of City of Augusta, 155 Me. 151, 153 A.2d 80 (1959); Board of Educ. v. Wheat, 174 Md. 314, 199 Atl. 628 (1938). Although a bussing statute was originally held unconstitutional in Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938), the statute is now valid in New York under an amendment to N.Y. CONST. art. 11, § 4.

Free textbook statutes held unconstitutional: Board of Educ. v. Allan, 51 Misc. 2d 297, 273 N.Y.S.2d 239 (Sup. Ct. 1966); Dickman v. School Dist., 232 Ore. 238, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962). Free textbook statutes held constitutional: Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929); Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941). See generally Note, 32 BROOKLYN L. REV. 362 (1966).

does not contribute to the support of sectarian schools any more than does allowing sectarian students to enroll in a public high school upon graduation from a sectarian elementary or junior high school.[62]

A second obstacle presented at the state level is whether the state statutes have delegated to the school boards the power to create shared time programs. For example, shared time is specifically authorized by statute in Iowa,[63] but it is probably prohibited in Louisiana.[64] Most state statutes, however, do not deal specifically with shared time, but rather contain provisions granting broad discretionary powers to the school boards in the operation of the public school system.[65] In construing such a statute in *Morton v. Board of Education*,[66] the Illinois Appellate Court found that the Chicago School Board had sufficient statutory authority to sustain its creation of shared time programs—a result that could be reached under most state statutory schemes.

Finally, a problem may be posed by state compulsory education laws, as interpreted by the courts. In *Special District for the Education & Training of Handicapped Children v. Wheeler*,[67] the Supreme Court of Missouri declared that a child attending both a public and a private school in one day would violate the Missouri compulsory education law which required children "to attend regularly some day *school*, public, private, or parish."[68] The court reasoned that its decision was dictated by the use of the singular "school," for only if the statute read "some day schools" would attendance at two schools be permitted.[69] However, as the dissent vigorously argued, the purpose of such legislation is to insure that children receive a

62. Commonwealth *ex rel.* Wehrle v. Plummer, 21 Pa. Dist. 182, 186 (1911), *aff'd sub nom.* Commonwealth v. School Dist. of Altoona, 241 Pa. 224 (1913). *But cf.* text accompanying notes 36-37.

63. IOWA CODE § 257.26 (1962).

64. LA. REV. STAT. § 17-153 (1963) prohibits the operation of any public school in connection or combination with any private school.

65. See, *e.g.*, MICH. COMP. LAWS § 340.583 (1948) ("Every board shall establish and carry on such grades, schools and departments as it shall deem necessary or desirable"). *But see* 65 OP. OHIO ATT'Y GEN. 10 (1965), in which the Attorney General ruled that local school boards lack statutory authority for the creation of shared time programs; such part-time attendance would require that an exception be made to the statutorily-prescribed requirement of five hours of class each day and there was no authority for such an exception.

66. 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966). The statute involved in this case was ILL. REV. STAT. ch. 122, § 34-18 (1963).

67. 408 S.W.2d 60 (Mo. 1966). The program at issue was not shared-time but rather a program under which parochial school children were released from part of their regular school day to go to buildings maintained by the school district to receive speech therapy. The holding, however, equally precludes the operation of shared-time programs.

68. MO. REV. STAT. § 164.010 (1959). (Emphasis added.) This statute has since been amended specifically to include parochial schools. MO. REV. STAT. § 167.031 (1965).

69. 408 S.W.2d at 63-64.

certain minimum level of education and it should be immaterial whether this education is received at more than one school.[70] The *Morton* court adopted this approach in construing the Illinois School Code, which requires every child "to attend some public school . . . the entire time it is in session."[71] The Illinois Appellate court noted:

> Since the object of the compulsory attendance law is that all children be educated and not that they be educated in any particular manner or place, part-time enrollment in a public school and part-time enrollment in a non-public school is permitted by section 26-1 [the compulsory attendance law], so long as the child receives a complete education.[72]

Such a construction is surely more enlightened and persuasive than the approach of the Missouri courts and it avoids the anomalous result of holding a parent who seeks to improve his child's education guilty of violating the state's compulsory education laws.[73]

Conclusion

To the children who attend non-public elementary and secondary schools, shared time offers an opportunity for improved education through expanded facilities. To the children enrolled in public schools, shared time offers the same advantages by engendering Roman Catholic support for public school expenditures. Since shared time is effectuated within the framework of the public school, it is not only consistent with our basic tradition of providing a public education for all, but it also enables non-public school children to share in this heritage. In addition, shared time furthers another basic tradition—allowing the free exercise of one's religious beliefs through the education of one's children in accordance with those beliefs.

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70. *Id.* at 66-67.

71. 69 Ill. App. 2d at 43-44, 216 N.E.2d at 307.

72. *Id.* at 45, 216 N.E.2d at 308.

73. The dissent in *Wheeler* also pointed out that, under the majority's holding, a parent who transfers his child to another school after moving to a different community or a parent who allows his gifted high school-age child to attend junior college classes would also be guilty of violating the Missouri compulsory education law. 408 S.W.2d at 66. Furthermore, the dissent noted that violation of the compulsory education laws is deemed a misdemeanor and, therefore, penal in nature. *Ibid.*