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## Constitutional Law - "Released Time" Program Held Constitutional

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The decided weight of authority supports the *Schmidt* case. Prior to the instant case, those cases denying removal, on grounds of public policy, seem to have been restricted to Illinois.<sup>19</sup>

### CONSTITUTIONAL LAW—"RELEASED TIME" PROGRAM HELD CONSTITUTIONAL

Petitioner seeks to test the constitutionality of the action of the Board of Education of the City of New York, whereby defendants established a "released time" program to enable public school children to obtain religious instruction during hours otherwise demanded for secular studies by the New York Compulsory Education Law.<sup>1</sup> The United States Supreme Court, in affirming the decision of the Court of Appeals of New York,<sup>2</sup> held that the statute, providing for the release of public school children from classes, was constitutional. *Zorach v. Clauson*, 343 U.S. 306 (1952).

Prior to the *Clauson* case, the Supreme Court had reviewed only one "released time" program, that of the City of Champaign, Illinois,<sup>3</sup> in the case of *McCullum v. Board of Education*.<sup>4</sup> The Champaign program was held unconstitutional. Now, after "released time" systems of one form or another have existed in this country for nearly thirty years<sup>5</sup> without the benefit of a Supreme Court ruling on their constitutionality, one such program has been struck down and another sustained on the basis of differences which have been called "trivial"<sup>6</sup> and of "no significance."<sup>7</sup>

The problem in the *Clauson* case is, of course, basically the same as that presented in the *McCullum* case, i.e., "Whether this system has prohibited the 'free exercise' of religion or is a law 'respecting an establishment of religion' within the meaning of the First Amendment."<sup>8</sup> The factual situations presented by the two cases, however, disclose several seemingly fundamental differences.

The most apparent of these lies in the fact that in Champaign, the classes in religious instruction were conducted in the public school build-

<sup>19</sup> *Miner v. Miner*, 11 Ill. 43 (1849); *Seaton v. Seaton*, 337 Ill. App. 651, 86 N.E. 2d 435 (1949); *Chase v. Chase*, 70 Ill. App. 572 (1897).

<sup>1</sup> 16 McKinney's Consolidated Laws of New York (1940) Part 1, Art. 65, § 3202.

<sup>2</sup> *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E. 2d 463 (1951).

<sup>3</sup> There was no underlying state enabling act involved.

<sup>4</sup> 333 U.S. 203 (1948).

<sup>5</sup> An informative outline of the history and development of "released time" programs is given by Frankfurter, J., in his separate concurring opinion in *McCullum v. Board of Education*, 333 U.S. 203, 225 (1948).

<sup>6</sup> Jackson, J., dissenting in *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>7</sup> Black, J., dissenting in *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>8</sup> *Zorach v. Clauson*, 343 U.S. 306, 310 (1952).

ings and on school property. In New York, the religious classes can only be held wholly "outside the [public] school grounds."<sup>9</sup>

Secondly, the public school officials of Champaign had power and authority to approve or reject any course of instruction offered by a religious group desiring to participate in the program; they had also the power to reject any individual instructor who was proposed to teach one of the classes. This power is clearly a means by which any religious group or groups could be effectively prevented from participating in the program—a latent possibility which could develop into discrimination by government officials. Still another discriminatory possibility lies in the fact that the only sects which were allowed to participate in the program were the member groups of "The Champaign Council of Religious Education."<sup>10</sup>

Under the New York system, however, the potentialities of such discrimination are substantially reduced, if not eliminated, because the religious courses must be maintained and operated by or under the control of the religious bodies.<sup>11</sup> Furthermore, a program for religious instruction may be initiated by any religious organization, in co-operation with the parents of pupils concerned.<sup>12</sup>

Also, as was pointed out in the *McCullum* case, school officials and teachers actively participated in enrolling pupils for religious instruction. This situation gives a very solid basis for Mr. Justice Frankfurter's contention that there was an "obvious pressure [by the schools] upon children to attend" the religious classes.<sup>13</sup>

Under the New York program, on the other hand, there can be no announcement of any kind in the public schools relative to the program;<sup>14</sup> religious organizations, in co-operation with parents, will assume full responsibility for attendance,<sup>15</sup> and there shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil for religious instruction.<sup>16</sup>

With regard to the use or non-use of public school buildings, the Illinois Supreme Court, in upholding the Champaign plan,<sup>17</sup> said it was "apparent" that the plan was "to all intents and purposes exactly the same" as the system in the case of *Latimer v. Board of Education of the City of*

<sup>9</sup> 1 N.Y. Official Code Comp. 683, Regulations of the Commissioner of Education of the State of New York, Art. 17, § 154(1).

<sup>10</sup> Brief for Appellant at 31, *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>11</sup> 1 N.Y. Official Code Comp. 683, Regulations of the Commissioner of Education of the State of New York, Art. 17, § 154(2).

<sup>12</sup> *Ibid.*

<sup>13</sup> *McCullum v. Board of Education*, 333 U.S. 203, 227 (1948).

<sup>14</sup> Regulations of Board of Education of the City of New York, Rule 1.

<sup>15</sup> *Ibid.*, Rule 3.

<sup>16</sup> *Ibid.*, Rule 6.

<sup>17</sup> *McCullum v. Board of Education*, 396 Ill. 14, 71 N.E. 2d 161 (1947).

*Chicago*,<sup>18</sup> and the fact that in one the classes were held in the schoolrooms while in the other at places outside the school property was of no significance. The New York Court of Appeals, in the *Clauson* case, however, pointed out that difference as being of no little importance.<sup>19</sup> Likewise, the basis of the Supreme Court's decision in the *McCullum* case seemed to be the "use of tax supported property for religious instruction."<sup>20</sup> In fact, the sole relief sought in the *McCullum* case was to prohibit all instruction in, and teaching of, religious education in the public schools.

Notwithstanding Mr. Justice Reed's dissent in that case, wherein he concludes from the principal opinions that they ban "any use of a pupil's school time whether that use is on or off the school grounds,"<sup>21</sup> what was actually held in the case must be considered with reference to what was petitioned. Recognizing this, Mr. Justice Douglas, speaking for the Court in the *Clauson* case, said, with reference to the *McCullum* case, "In that case the classrooms were turned over to religious instructors. We accordingly held that the programs violated the First Amendment."<sup>22</sup>

The hypothesis that released time programs *per se* constitute an unconstitutional aid to religious groups has been vigorously propounded and attacked in both the *McCullum* and the *Clauson* cases. The negative side of the argument is well put by Mr. Justice Douglas, speaking for the Court in *Zorach v. Clauson*.<sup>23</sup>

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . When the state encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. . . . The government must be neutral when it comes to competition between sects.<sup>24</sup>

The affirmative view is well summed up by Mr. Justice Black, speaking for the Court in the *McCullum* case. He there says, and repeats in his dissent in the instant case, that "the state . . . affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery."<sup>25</sup>

<sup>18</sup> 394 Ill. 228, 68 N.E. 2d 305 (1946).

<sup>19</sup> *Zorach v. Clauson*, 303 N.Y. 161, 168, 100 N.E. 2d 463, 470 (1951).

<sup>20</sup> *McCullum v. Board of Education*, 333 U.S. 203, 209 (1948).

<sup>21</sup> *Ibid.*, at 240.

<sup>22</sup> *Zorach v. Clauson*, 343 U.S. 306, 309 (1952).

<sup>23</sup> 343 U.S. 306 (1952).

<sup>24</sup> *Ibid.*, at 331.

<sup>25</sup> *Zorach v. Clauson*, 343 U.S. 306, 316 (1952); *McCullum v. Board of Education*, 333 U.S. 203, 212 (1948).

That the state did "help" sectarian groups under the Champaign program cannot be seriously questioned; the threat of the truant officer if the released pupil did not attend his religious instruction, and the solicitation of pupils by secular teachers in the public schools are examples of that "help."

But how does the state "help" religious groups in New York? The verb signifies some type of affirmative action which, though admittedly present under the Champaign system, does not evidence itself in the New York case. There the regulations set out specifically that the classes may not be held within the public schools,<sup>26</sup> that the classes were never to be mentioned by teachers or principals,<sup>27</sup> and that the public school system declined any responsibility for the released students' attendance in classes of religious instruction.<sup>28</sup> The only "help" which can be said to have been rendered by the New York City Board of Education is a purely passive and negative allowance of the program to operate if and how it can.

The Supreme Court expresses this same view of the "help" rendered in the instant case, and goes on to conclude the opinion with:

We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.<sup>29</sup>

#### TORTS—RIGHT OF UNEMANCIPATED CHILD TO SUE HIS PARENT FOR PERSONAL TORT

Plaintiff, a minor seven years of age, instituted an action by his next friend against his father and another. Defendants were partners in a business which required the maintenance of a gasoline pump on the premises of the family home where plaintiff resided. Although the father knew that plaintiff and other children often played near the pump, he was negligent in its operation. As a result, a fire originated near the pump and severely burned plaintiff. The Supreme Court of Ohio held that an unemancipated child has the right to sue his parent for negligence in the latter's business or vocational capacity. *Signs v. Signs*, 156 Ohio St. 566, 103 N.E. 2d 743 (1952).

From the early common law, the law has recognized the right of an unemancipated minor child to bring a tort action against the parent in matters affecting property.<sup>1</sup> It has also been held that actions for per-

<sup>26</sup> Note 9 supra.

<sup>27</sup> Note 16 supra.

<sup>28</sup> Note 15 supra.

<sup>29</sup> *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

<sup>1</sup> *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932); *Preston v. Preston*, 102 Conn. 96, 128 Atl. 292 (1925); *Lamb v. Lamb*, 146 N.Y. 317, 41 N.E. 26 (1895); *Alston v. Alston*, 34 Ala. 15 (1859); *Prosser, Torts* § 99 (1941).