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THE DILEMMA OF RELIGIOUS INSTRUCTION AND THE PUBLIC SCHOOLS

RICHARD J. REGAN, S.J.*

LAST JUNE THE UNITED STATES SUPREME COURT struck down the mandatory reading of the Bible and recitation of the Lord's Prayer in the public schools.¹ Mr. Justice Clark, who delivered the opinion of the Court in the case of *School Dist. of Abington Township v. Schempp*, explicitly rested the decision on the principle that "in the relationship between man and religion, the State is firmly committed to a position of neutrality."² Briefly stated, the principle of neutrality, as embodied in the establishment clause of the first amendment, would prohibit both federal and state governments from favoring one religious belief over another, or all religious beliefs over disbelief, or disbelief over religious belief. Mr. Justice Clark explained the test of neutrality in terms of the purpose and primary effect of a legislative enactment:

If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.³

In other words, a governmental accommodation of religion would offend the establishment clause if by a deliberate design or a built-in weighting the accommodation would prefer belief over nonbelief.

The Court's essay at precise definition, which echoed the concurring opinion of Mr. Justice Frankfurter in *McGowan v. Maryland*, wisely transcended the sterile invocation of a metaphoric "wall" of separation or the linguistic strait jacket of an impossibly "absolute" separation of church and state which characterized so much of the discussion in

* A.B., St. Peter's College; LL.B., Harvard Law School; Ph.L., Woodstock College.

¹ *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

² *Id.* at 226.

³ *Id.* at 222.

earlier cases.⁴ The Court's definition recognized by implication that, as a matter of historical record and social imperative, the concerns of religion and government perforce interact. What the Court did in the *Abington* decision was to set up a clear norm to distinguish impermissible from permissible interactions.

Since Pennsylvania had sponsored the unquestionably religious exercises present in the *Abington* case, the Court's decision to strike them was an unassailable conclusion from the principle of neutrality. Many theists, of course, challenge this principle on which the recent decision rested. Yet seven major Supreme Court decisions since 1947, over the dissent or reservation of a small minority, have rightly rejected the challenge.⁵ Religious belief cannot be a criterion of citizenship in a pluralistic democracy. This is the only acceptable meaning of the first amendment which is politically consistent with the fact that many of our citizens profess belief in a nontheistic secular humanism. If all citizens are to enter the democratic political process as equals, they cannot be distinguished at the outset on

⁴ See Mr. Justice Frankfurter's concurring opinion in *McGowan v. Maryland*, 366 U.S. 420, 459 at 461-67 (1961). For earlier discussion, see *Zorach v. Clauson*, 343 U.S. 306, 315 at 317 (1952) (dissenting opinion of Black, J.); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 at 211, 212 at 231 (1948) (opinions of Black, J., and Frankfurter, J., respectively); *Everson v. Board of Educ.*, 330 U.S. 1 at 16, 18 at 26, 28 at 29 (1947) (opinion of Black, J., dissenting opinions of Jackson, J., and Rutledge, J., respectively).

⁵ *School Dist. of Abington Township v. Schempp*, *supra* note 1; *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *McGowan v. Maryland*, *supra* note 4; *Zorach v. Clauson*, *supra* note 4; *Illinois ex rel. McCollum v. Board of Educ.*, *supra* note 4; *Everson v. Board of Educ.*, *supra* note 4. Reservation was expressed by Mr. Justice Reed in *McCollum* and by Mr. Justice Stewart in *Engel*.

the basis of their fundamental value commitments. Harmony among all citizens as equal partners in the democratic process demands that religious disbelief receive the same political status as religious belief. Hence, the same political consideration which requires the equality before the law of Protestant, Catholic, and Jewish beliefs applies as well to nonbelief.

Neutrality is not a philosophical principle which reflects secularist presuppositions but rather a political principle — elevated, of course, to legal and constitutional status by the first amendment — which reflects the exigencies of a pluralistic democracy. American society is a fragile composite of Protestants, Catholics, Jews, and secular humanists, and their subscription to articles of peace is an essential and necessary prerequisite to the fulfillment of civic aspirations. If the believer finds the principle of neutrality unpalatable, it is because he confuses the political and theological orders. The equality before the law of all religious beliefs and disbelief is not an article of religious faith but an article of political peace. The Constitution does not require citizens to profess that all religious belief and disbelief are equal in the eyes of God, but it does require citizens to accept that all religious beliefs and disbelief are equal in the eyes of the state. Such a settlement has proved necessary for even a minimum achievement of political goals in our pluralist and democratic society.

In the aftermath of the *Abington* case, a critical re-examination of released-time programs for voluntary religious instruction is, in my opinion, imperative. The principle of neutrality which the Court in the *Abington* case authoritatively sanctioned, fully articulated, and logically followed, raises the question whether the public schools may permit

voluntary religious instruction during school hours where at least one equally attractive alternative is available to nonparticipants. According to the common interpretation, the decision in the case of *Illinois ex rel. McCollum v. Board of Educ.* prohibited all such instruction at least when conducted on the public school premises, although the decision in the case of *Zorach v. Clauson* modified the previous case to the extent of permitting the classes provided they are conducted off the public school premises.⁶

In the *Abington* case, all five opinions expressed or implied agreement with the *McCollum* decision. Mr. Justice Clark assigned religion to the home, the church, and the individual; his obvious silence on the place of religion in the school appeared to imply a broad acceptance of *McCollum*.⁷ Mr. Justice Douglas repeated his contention, first broached in the case of *Engel v. Vitale*,⁸ that the establishment clause prohibited all use of public funds for religious purposes; presumably he would consider any religious instruction on public property to fall under that prohibition.⁹ Mr. Justice Brennan expressly defended the *McCollum* decision on the ground that the released-time program there involved "placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects. . . ."¹⁰ Mr. Justice Goldberg implied concurrence with the *McCollum* decision by acknowledging "the propriety . . . of the

teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools."¹¹ Even Mr. Justice Stewart, who dissented, incongruously endorsed *McCollum* "because of the coercive effect which the use by religious sects of a compulsory school system would necessarily have upon the children involved" and because of the "government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets."¹²

Despite this imposing array of judicial authority, I suggest that the constitutional exclusion of voluntary sectarian religious instruction from the public schools where an equally attractive alternative is available to nonparticipants does not follow logically from the principle of neutrality. Indeed, in my opinion, such an exclusion would rather prefer disbelief over belief. Here we must recall the central principle of the case of *Pierce v. Society of Sisters*, that the child is not "the mere creature of the state" and that parents enjoy the primary right, duty, and responsibility to educate the child.¹³ The state's role in public education, therefore, is secondary and subordinate to that of the parents; its task is to support rather than supplant parental choice. This is not to say that the state may not act where parents default or may not specify the minimum secular education required to fulfill civic aims. But the state may not treat the child, inside or outside the public school, as its own autonomous and impersonal handiwork. To invert the roles of parent and state would establish the educational Leviathan of political absolutism.

⁶ *Zorach v. Clauson*, *supra* note 4; *Illinois ex rel. McCollum v. Board of Educ.*, *supra* note 4.

⁷ *School Dist. of Abington Township v. Schempp*, *supra* note 1, at 226.

⁸ *Supra* note 5.

⁹ *School Dist. of Abington Township v. Schempp*, *supra* note 1, at 229-30.

¹⁰ *Id.* at 262.

¹¹ *Id.* at 306.

¹² *Id.* at 314.

¹³ 268 U.S. 510, 535 (1925).

Failure to understand clearly the respective educational roles of the parent and the state necessarily blurs the distinction between state *sponsorship* and state *permission* of religious instruction in public education which, in my view, is constitutionally critical. As a result, every phrase of the public schools is conceived simply as a state activity and every released-time program a constitutionally forbidden religious activity of the state. This reasoning may explain why *McCullum* and subsequent decisions have failed to make a straight-forward distinction between state-sponsored and state-accommodated religious instruction.¹⁴ If the public school offers pupils the opportunity of voluntary religious instruction at the request of their parents, then the public authority is simply executing its substitutional relationship to the parents. The public authority is not endorsing religious education; rather, it is permitting pupils to obtain the education which their parents have chosen for them insofar as this is administratively feasible within the general civic aims of public education.

Thus understood, neither the purpose nor the primary effect of a released-time program is religious. Of course, there is an incidental benefit to religious activity, but this is not prohibited by the principle of neutrality. The purpose and primary effect are rather to honor the primacy of parental rights in the education of children. The public authority, which operates and controls the educational framework of the public schools as the surrogate of the parents,

¹⁴ *Engel* adverted specifically to the state composition and imposition of the Regents' Prayer, but gave no indication that state-accommodated religious instruction under proper circumstances would be constitutionally acceptable. *Engel v. Vitale*, *supra* note 4, at 425.

simply accommodates the reasonable wish of parents to specify religious instruction for their own children.

To deny that public schools may allow parents to choose an elective of religious instruction would in fact establish secularism as the religion of our public schools. The public authority would then act to prevent parents from selecting a feasible amount of religious instruction as part of the formal education of their children. In other words, the public schools would be required to exclude religious instruction from the education even of those who desire it. The product of such a policy would not be the neutrality of the government between belief and disbelief; the government would rather place the heavy weight of its authority in public education solely on the side of the secular humanist creed.

Mr. Justice Black in both *McCullum* and *Zorach* insisted that released-time for voluntary religious instruction invoked the state's compulsory education laws to assist religious sects. "Pupils compelled by law to go to school for secular education," he explained, were "released in part from their legal duty upon the condition that they attend the religious classes."¹⁵ In his view, the state thus made religious sects the beneficiaries of its education laws. Mr. Justice Jackson in his dissent in *Zorach* voiced a similar complaint, that the state first compelled each student "to yield a large part of his time for public secular education," and then released some of it to him "on condition that he devote it to sectarian religious purposes."¹⁶ Thus, the truant officer would dog the youngster who failed to attend his religious instruction classes.

¹⁵ *Illinois ex rel. McCullum v. Board of Educ.*, *supra* note 4, at 209-10.

¹⁶ *Zorach v. Clauson*, *supra* note 4, at 323-24.

But I submit that Mr. Justice Black and Mr. Justice Jackson have misread the compulsory education laws, and that the misreading conflicts with the primacy of parental rights recognized in the *Pierce* decision. Compulsory education laws require only that a child secure formal schooling which includes the secular education specified as necessary to fulfill the duties of citizenship. The laws do not require that a child's formal schooling be exclusively secular. The state does not ask that parents exclude religious instruction from their child's formal education. A child can fulfill the state's requirement of secular instructions by attendance at a church-related school without any implication that the state thus acts to make beneficiaries of the churches. Surely the compulsory education laws would not operate any more to favor the churches if a child fulfilled the state's requirement of secular instruction by attendance at a public school where religious instruction was available. Indeed, the *Pierce* decision established the general right of parents to obtain for their child the education of their choice on the view that those who nurture the child and direct his destiny "have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹⁷ In the light of that decision and its philosophy of parental primacy, I do not see how the state's compulsory education laws could constitutionally insist on the exclusion of voluntary religious instruction as part of a child's formal schooling.

Of course, religious instruction at home and at church remains freely and fully available to children attending public schools. This availability obviously limits the hostile

effect of excluding voluntary religious instruction from the public schools. But it does not serve to refute, as Mr. Justice Clark implied for the Court in the *Abington* case, the charge that such an exclusion would establish the "religion of secularism" within the public schools.¹⁸ The believer is equal to the nonbeliever inside as well as outside the public school, and the believing parent retains the primary right to the formal as well as the informal schooling of his child as far as administratively feasible within the general civic aims of public education. Hence, the Constitution cannot be interpreted consistently with the principle of neutrality to prohibit the child, whose parents so wish, from receiving religious instruction within the framework of his formal education in the public school where an equally attractive alternative is available to nonparticipants.

The actual effect of excluding voluntary religious instruction from the public schools is far more serious than Mr. Justice Clark has recognized. Today the family and the church are not generally well adapted to shoulder alone the burden of religious education. The complexity and mobility of modern society with its resulting dislocations render the family and the church less adequate than in the past to transmit religious values within their own self-contained structures. Few parents today are themselves prepared to give religious instruction, and few families are organized in a way to sustain the instruction once undertaken. Nor is the place and framework of the church in our society much better suited to pierce the child's absorption in the modern world of accelerated activity. But the school appears

¹⁷ *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

¹⁸ *School Dist. of Abington Township v. Schempp*, *supra* note 1, at 225.

to offer an institution structured to accomplish what neither the home nor the church can now do by themselves. This is why parents of religious conviction are anxious to find a place for religious instruction within the formal education which their children receive in the public schools.

Mr. Justice Brennan admitted in the *Abington* case that “parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated.”¹⁹ But that choice, in his view, was simply between a public secular and a private sectarian education. The state could not “inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures.”²⁰ Hence, the parent who sends his child to the public school willingly accepts “an atmosphere free of parochial, divisive, or separatist influences” and cannot fairly complain of the exclusion of religious instruction. Thus did Mr. Justice Brennan seek to avoid the charge that the exclusion of religious influences from public education violated the parental rights of believers and preferred disbelief over religious belief.

Mr. Justice Brennan was certainly correct to insist on the free exercise of parental choice in the education of children. His own explanation would have sounded more plausible if the parents of children attending church-related schools received recompense from the state for their contribution to the educational requirements of citizenship. But, as the situation now stands, parents are not

confronted with the equally attractive alternatives of public and private schools; they may choose a religiously oriented education for their children only if they or their fellow religionists can afford it. Even if the state did support parents’ choice of a religiously oriented school to fulfill secular educational goals, by what right should the child of the believer be forced to leave the public school in order to obtain religious instruction as part of his formal education? The believer is equal to the nonbeliever inside as well as outside the public school, and the believing parent retains the primary right to the reasonable specification of religious instruction within as well as without the formal education of his child in the public school. By the same logic, of course, an equally attractive alternative to religious instruction must be available to those who may wish not to participate.

What lay behind Mr. Justice Brennan’s sharp dichotomy between public and private schools was the philosophy “that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.”²¹ But the implication that religion is a “parochial, divisive, or separatist” influence against which it is the unique public function of the school to protect the child is a thinly veiled profession of secularist philosophy hardly consistent with the principle of neutrality. Unwittingly but no less certainly, Mr. Justice Brennan assumed the secularist argument that the sectarian religious instruction of children is somehow dangerous to the cause of civic virtue. The

¹⁹ *Id.* at 242.

²⁰ *Ibid.*

²¹ *Id.* at 241-42.

demands of pluralism embodied in the principle of neutrality do indeed forbid the democratic state to sponsor religious exercises or instruction designed as a common program for all students in the public schools. That was the decision in the Regents' Prayer and Bible-reading cases. But the demands of pluralism and the principle of neutrality also forbid the democratic state to claim a unique public function for the exclusion of religious influences in the training of citizens. The only influences prohibited by the principle of neutrality are those sponsored by the state herself. For the state to assert the exclusion of religious instruction from the public schools as her own proper and indeed unique function would brand sectarian religion an enemy of the state and, of course, thus violate the principle of neutrality.

The proposition that the public school is committed exclusively to secular education was not novel to Mr. Justice Brennan. Mr. Justice Jackson had declared as early as *Everson* that the public school was "organized on the premise that secular education can be isolated from all religious teaching,"²² and Mr. Justice Clark cited that passage with apparent approval in the *Abington* case.²³ Similarly, Mr. Justice Brennan's concept of the public school's "uniquely public function" reflected the opinion of Mr. Justice Frankfurter in *McCullum* that:

The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to

keep out divisive forces than in its school . . .²⁴

From this view of the public school, Mr. Justice Frankfurter could only conclude that released-time for religious instruction inculcated in nonparticipants "a feeling of separatism when the school should be the training ground for habits of community . . ."²⁵

Unfortunately, the philosophy of education which regards the public school as the unique vehicle of natural unity is altogether too dominant. In the name of democracy this philosophy would make the public school the community's agency of conformity rather than the parents' representative and thus establish the public school as a secular temple to initiate the young in communal worship. It would supplant rather than support parental choice in the religious instruction of children and prefer collective uniformity to individual freedom. In short, this philosophy of education would promote state absolutism rather than liberal humanism.

Political unity and community harmony are, of course, values to be cherished, but they should not be purchased at the price of parents' freedom of educational choice in matters of religious belief. Any real attempt to achieve political harmony and cohesive unity in a pluralistic society like the American must respect this primacy of parental rights. There are surely other ways in which our civic communion of mind, heart, and action can be fostered without sacrificing so fundamental a principle. In this respect, the success of the present ecumenical movement is instructive. No attempt is made there to

²² *Everson v. Board of Educ.*, *supra* note 4, at 23-24.

²³ *School Dist. of Abington Township v. Schempp*, *supra* note 1, at 218. We should note, however, that the citation of Mr. Justice Jackson in *Abington* looks chiefly to support the general principle of governmental neutrality in matters of religion.

²⁴ *Illinois ex rel. McCullum v. Board of Educ.*, *supra* note 4, at 231.

²⁵ *Id.* at 227.

hide genuine differences of belief but only to overcome religious separation through charity. The open presence of religious differences in the public schools may likewise help, more than an "ostrich posture," to move students out of isolation into communication, out of estrangement into understanding, and out of hostility into cooperation.

Similar to the claim that home, church, and private school remain available for the religious instruction of children whose parents so wish is the concession that objective courses about religion are constitutionally permissible in public education. Presuming that a fruitful distinction can be drawn between instruction about religion and religious instruction, why may not believers choose the latter for their children? The principle that parents have the primary right to educate their children remains fundamental to any liberal philosophy of education. Parents should be free, therefore, to specify strictly religious instruction for their children as far as administratively feasible within the general civic aims of public education.

Mr. Justice Brennan also argued in the *Abington* case that religious instruction in the public school classroom would place the religious teacher "in precisely the position of authority held by regular teachers of secular subjects," lend "to the support of sectarian instruction all the authority of the governmentally operated public school system," and thus unconstitutionally augment the "prestige and capacity" of the religious teacher for influence.²⁶ This argument, of course, implies that *all* authority in the public school, whether of the secular or the reli-

gious teacher, derives primarily from the state and not from the parent. But such an implication is completely at odds with the fundamental philosophy of a free society that the authority to educate the child rests primarily with his parents. Once the primacy of parental rights is recognized, then Mr. Justice Brennan's argument falls. For the mantle of authority which the religious teacher, or indeed the secular teacher, assumes in the public school classroom is primarily parental and only secondarily involves the state as the parents' surrogate. As a matter of fact, if no academic credit is given for the religious instruction, no pay to the religious instructor, and recreation is available to the student as an alternative, the authority of the religious teacher in the public schools is by no means equal to that of the secular teacher.

Although the language of Mr. Justice Black's opinion in *McCullum* pinned that decision in part on the use of the state's tax-supported public school buildings for the dissemination of religious doctrines,²⁷ in the *Abington* decision only Mr. Justice Douglas thought the single fact of financial aid to religious activity to be decisive.²⁸ Indeed, four members of the Court in the recent case disavowed that test. Mr. Justice Brennan expressly admitted that the public expenditures involved in the use of public school classrooms, light, and heating for religious instruction would not necessarily violate the establishment clause.²⁹ Mr. Justice Goldberg and Mr. Justice Harlan defended the constitutionality of military chaplains and so im-

²⁶ *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 262-63 (1963).

²⁷ *Illinois ex rel. McCollum v. Board of Educ.*, *supra* note 4, at 209, 212.

²⁸ *School Dist. of Abington Township v. Schempp*, *supra* note 26, at 229-30.

²⁹ *Id.* at 261-62.

PLICITLY accepted the validity of at least one form of incidental financial aid to religious activity.³⁰ Mr. Justice Stewart, in dissenting, recalled the principle that the state could not constitutionally discriminate against religious groups in the use of public property.³¹ Even Mr. Justice Clark made it clear that he did not base the Court's decision on the use of public property for religious purposes and reserved judgment on the constitutionality of military chapels.³²

In my opinion, the justices rightly rejected the position that any financial aid to religious activity by the state would constitute an establishment of religion. As the state may not discriminate in favor of one or all religions, neither may it discriminate against them. Thus, the state not only may but even must permit religious organizations to make an orderly use of public parks where these are generally open to other civic groups.³³ So too the state should permit religious groups to use public school property where parents so request. The state in a free society should recognize the primary right of parents to specify religious instruction for their child as far as administratively feasible within the general civic aims of public education. For the state to demand as a matter of constitutional principle the exclusion of such religious instruction would imply both state absolutism in education and state hostility to religion. Nor does the expenditure of public funds for light, heat, and application forms appear as anything other than an appropriation incidental to the accommodation of parental wishes. Similarly, the in-

volvement of the public school in the administration of the released-time program is subordinate to the exercise of parental choice. The essential issue is whether the public authority may provide a place for voluntary religious instruction within the framework of public education. If it may do so, then the use of public property, the incurring of incidental expenses, and the consequent administrative involvement are constitutionally irrelevant.

Mr. Justice Frankfurter contended in *McCollum* that released-time for religious instruction during school hours created an "obvious pressure upon children to attend."³⁴ Now, this contention may reflect the unarticulated premise that the state enjoys primary rights in the education of children, and that as a consequence religious instruction in the public schools can only be state-sponsored and state-endorsed. Or the contention may echo the argument of Mr. Justice Black that released-time programs employ the state's compulsory education laws to compel pupils to attend religious instruction. But the contention may rather reflect the fear that the majority choosing religious instruction would psychologically and socially pressure nonparticipants to conform. Mr. Justice Frankfurter expressed the fear this way:

The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. . . . The children belonging to . . . nonparticipating sects will thus have inculcated in them a feeling of separatism. . . . As a result . . . [released-time] sharpens the consciousness of religious differences at least among some of the children committed to . . . [the public school's] care. These are consequences not amenable

³⁰ *Id.* at 306.

³¹ *Id.* at 314.

³² *Id.* at 226 n.10.

³³ *Cf.* *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

³⁴ *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948).

to statistics. But they are precisely the consequences against which the Constitution was directed. . . .³⁵

Many assert that “coercion” means nothing more than physical or mental intimidation. Thus Mr. Justice Douglas in the Regents’ Prayer and *Abington* cases denied that merely psychological and social pressure constituted coercion even though the religious exercises there involved were certainly state-sponsored.³⁶ In any case, whether called “coercion” or not, the state cannot consistently with the principle of neutrality so weight a released-time program against the nonparticipant as to pressure him to attend religious instruction. The question of inherent weighting is this: Does a released-time program create built-in pressures on students to participate antecedent to their parents’ choice?

Where the state sponsors religious exercises or fails to assure a truly equal alternative for the nonparticipant, the state, of course, is the responsible agent for engendering the inherent pressure on students to attend. But where the state is not the sponsor, and a truly equal alternative is available to the nonparticipant, such psychological and social pressures as come to bear on the children of nonbelievers do not derive from the state but solely from the consequences of parental choice. The fact that children are young and impressionable may change the quantity but not the quality of the pressure; that is still consequent upon the exercise of parental choice and not built into the program itself. The public authorities are not

obliged to insulate children any more than adults from an awareness of religious differences. Indeed, the state could not shelter them from the fact of religious diversity even if it would. The public schools may better serve their students by acquainting them with the normal incidence of religious differences which they will find in later life than by attempting to create an illusory impression of uniformity where none exists.

That a majority of parents are likely to choose religious instruction with resulting psychological and social pressures on non-participants should be constitutionally irrelevant. If a majority of parents opted against sectarian religious instruction, obviously the pressures would then operate against participants. Yet no nonbeliever would allow a believer to complain that the public authority under these circumstances was illegally pressuring his child against religious instruction. In fact, that was precisely the situation in the Champaign, Illinois junior high school under the released-time program struck down in *McCullum*. There 80% of the students did not attend religious instruction.³⁷ The choice or rejection of religious instruction by a majority of parents, in my opinion, should be accorded no constitutional weight. The nontheist parent exercises a completely free choice as long as an alternative truly equal to religious instruction is available to his child. What he really would object to in such a case would be the opportunity for the theist parent to choose a period of religious instruction for his own child.

The contention of Mr. Justice Frankfurter that released-time during school hours for voluntary religious instruction coerced children to attend may also reflect the conviction that the program there involved did not offer

³⁵ *Id.* at 227-28.

³⁶ *School Dist. of Abington Township v. Schempp*, *supra* note 26, at 228-29; *Engel v. Vitale*, 370 U.S. 421, 438 (1962).

³⁷ Transcript of Trial Record, p. 177.

an alternative which was in fact equally attractive to nonparticipants. In my view, an equal alternative is the crux of the whole problem of released-time. Unless that condition is fully satisfied, then the built-in weight of the program would favor the believer over the nonbeliever or even the organized believer over his unorganized brethren. The principle of neutrality surely prohibits such discriminatory treatment. But what constitutes an equal alternative?

Mr. Justice Frankfurter and Mr. Justice Jackson conceded in *Zorach* what only the most doctrinaire secularist would deny, that the public school may close its doors to free students to repair to a place outside the school for religious devotions or instructions.³⁸ This program would simply shorten one school day and allow each student to make what use he wishes of the "dismissed-time." Of such a program, Mr. Justice Frankfurter rightly concluded, no nonbeliever would have grounds for complaint. But parents of religious conviction may still ask why they who enjoy the primary rights may not specify religious instruction for their children within the formal process of public school education. In my opinion, "dismissed-time" is a step in the right direction but does not fully honor the rights of parents as to the formal education of their children within the public schools themselves. Of course, administrative difficulties with released-time programs may make religious instruction after school hours the only practical solution. In that case, the religious classes could be held on the school premises without violating the principle of neutrality as long as the facilities were equally available to all religious and ethical persuasions. Since the

classes would not constitute part of the scholastic curriculum, the public school would not be obliged to provide an alternative for nonparticipants. However, devising a school bus schedule in rural and suburban areas satisfactory to both participants and nonparticipants might offer an insuperable challenge to a "dismissed-time" program.

In *McCullum*, Mr. Justice Frankfurter likewise appeared to approve a play period as an alternative for the nonparticipants in a released-time program of voluntary religious instruction, at least when conducted off the school premises. That arrangement, Mr. Justice Frankfurter thought, would "not cut into public school instruction or truly affect the activities or feelings of the children who did not attend the church schools."³⁹ Most children, I am sure, would accept a recreation period as equal or superior to any instruction. But the nonparticipant in the released-time program, or at least his parents, might well feel that a choice restricted to a nonacademic period of recreation and a formal period of religious instruction would be inherently weighted against the former, since the nonparticipant's schooling is altogether suspended while his fellow students receive formal instruction. If the primary purpose of a school is to instruct and of a student to learn, then the nonparticipant in released-time may, with reason, ask for secular instruction or extra-curricular activity as an alternative to religious instruction. Of course, the play period might be coupled with academic alternatives to offer the nonparticipant a choice.

Far less attractive than recreation as an alternative to religious instruction is a study

³⁸ *Zorach v. Clauson*, 343 U.S. 306, 320, 323, 324 (1952).

³⁹ *Illinois ex rel. McCullum v. Board of Educ.*, *supra* note 34, at 224.

period, which, even without the usual connotation of marking time scholastically, cannot claim equality to formal instruction. Indeed, the fact that a study period was the alternative offered to the nonparticipant in the Illinois and New York released-time programs may explain the decision in *McCullum* and the dissent in *Zorach*. Terry McCollum was required to attend a study period during which he was often left to his own devices.⁴⁰ Similarly, under the New York released-time program of religious instruction off the school premises, schooling was “more or less suspended” for nonreligious attendants.⁴¹ This led Mr. Justice Jackson to charge that the New York program served as a “temporary jail for a pupil who will not go to Church.”⁴² In all probability, the majority in *McCullum* and the dissenters in *Zorach* would not have altered their opinion had the nonparticipants been offered a different alternative. But they did object at least in part, and with reason, to the equality of a study period as the only alternative to religious instruction.

On the other hand, any secular instruction or extra-curricular activity scheduled at the same time as the sectarian religious instruction would surely offer to nonparticipants a fully equal alternative. We must recognize, however, that limitations of space and staff will tightly control the number of possible academic alternatives to religious instruction, although the public school can and must make at least one of these available to nonparticipants in the released-time program. The additional alternative of a recreation period would both widen the nonpar-

ticipant's option and relieve the strain on academic facilities and faculties.

By a similar logic, the public school might schedule objective courses about religion at the time when sectarian religious instruction was permitted. This would follow the dicta in the opinions of Justices Clark, Brennan, and Goldberg that teaching about religion was secular, not religious, instruction. Unfortunately, the Justices did not clarify exactly how teaching about religion differed from the teaching of religion. The distinction surely should not be taken to suggest that the latter is maliciously biased or void of intellectual content. Rather, the distinction should be taken to express the fact that the teaching of religion does not simply expose the tenets of a particular religious creed but also explains every reality, learning, and dissenting opinion related to those tenets. In short, the teaching of religion, as distinguished from the teaching about religion, presupposes and nourishes a particular religious faith. Undoubtedly the composition of objective and graded courses about religion would prove a challenge. But this is a type of problem which has taxed the resources of educators in all subjects. The lower grades might begin with a descriptive study of the religious history of this country, while the higher grades might undertake a comparative analysis of the major communities of religious belief. The courses might study the Bible on various levels, as Mr. Justice Clark suggested, “for its literary and historic qualities.”⁴³

There is no reason, to be sure, why students who fulfill the requirements of secular instruction, including instruction about religion, should not receive academic credit for

⁴⁰ Transcript of Trial Record, p. 255; cf. Illinois *ex rel. McCollum v. Board of Educ.*, *supra* note 34, at 227.

⁴¹ *Zorach v. Clauson*, *supra* note 38, at 324.

⁴² *Ibid.*

⁴³ *School Dist. of Abington Township v. Schempp*, *supra* note 26, at 225.

their work. But may, or should, students who attend sectarian religious instruction have the same opportunity? There is nothing in the nature of sectarian religious instruction, if genuinely informative and not devotional, to preclude scholastic standing. Many colleges and universities, even those under state auspices, grant credit for courses taken in departments of theology. To deny that religious instruction has intellectual content would only betray hostile philosophical or theological presuppositions. Yet, while nothing in the nature of sectarian instruction, as such, conflicts with scholastic standing, the involvement of the state as supervisor of public education well might. Sectarian instruction in lower education would not readily lend itself to the objective standards of higher education in the certification of teachers or the composition of curricula. Hence, the choice between state control over religious instruction and religious instruction without state supervision should rule out academic credit for such courses. For similar reasons, the state should bear the expense of the secular alternative to religious instruction but not that of the religious instruction itself.

We should note that secular instruction at state expense with academic credit at the same time as religious instruction at sectarian expense without academic credit would surely offer an equal alternative to students who do not participate in the released-time program. In fact, the alternative is more attractive than the religious instruction. Yet this paradox only serves to illustrate the deficiency of a purely quantitative analysis of problems arising under the establishment clause. The first amendment forbids the state to *prefer* religious belief over disbelief or disbelief over religious belief; it does not prohibit apparent inequalities where the

public authority acts for a reason which excludes a preferential design or weighting. Here the state has ample grounds to deny credit and support for sectarian religious instruction, although the incidental result is an apparent inequality in relation to the alternate secular instruction.

Perhaps no released-time program would prove administratively feasible if, contrary to the experience of the thirteen states with programs off the school premises,⁴⁴ all or most sects sought separate classes. Perhaps, religious instruction during school hours in public school classrooms could not be joined to at least one equally attractive alternative for nonparticipants without overtaxing the facilities of the public school.⁴⁵ Perhaps, so few parents and students would want religious instruction that the disproportionate burden on public school space and time would not justify the institution or continuance of a released-time program. But these are all problems for the local school board, not the courts. In my opinion, the constitutional mandate of governmental neutrality in matters of belief and disbelief would be fully

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⁴⁴ California, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, New York, North Dakota, Oregon, Pennsylvania, South Dakota, and West Virginia allow released-time under the *Zorach* rule.

⁴⁵ Administrative difficulties with religious instruction during school hours in public school classrooms would not necessarily bar released-time off the school premises or dismissed-time on the premises. We should note, however, that these programs would create transportation problems in rural and suburban areas. In the case of released-time off the school premises, the participating children might lose most of that time in transportation to and from the place of instruction. In the case of dismissed-time on the school premises, the participating children might miss school bus transportation to distant homes.

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(Continued)

satisfied if the released-time program remained open to all sects and offered at least one equal alternative to nonparticipants.

From what has been said to this point, it should be clear that I agree with the many commentators who regard *McCollum* and *Zorach* as fundamentally inconsistent. In my view, the released-time programs there involved rise or fall together. If *McCollum* is to be justified on the ground that the study period offered to Terry McCollum did not constitute a truly equal alternative to religious instruction, then *Zorach* was wrongly decided because the same alternative was there available. Following that interpretation of *McCollum*, however, would not jeopardize the constitutionality of religious instruction during school hours in public school classrooms where a fully equal alternative is available to nonparticipants. On the

other hand, if *McCollum* and *Zorach* rest on broader grounds, as appears likely, then *Zorach* and not *McCollum* was the case rightly decided.

I think that I have also made clear my belief that the two fundamental constitutional principles involved in released-time programs for voluntary religious instruction are the primacy of parental rights in the education of children and the necessity of an equally attractive alternative for nonparticipants. If both principles are followed, then I do not see how released-time can be condemned without violating the neutrality between belief and disbelief which the Supreme Court has held the first amendment to enjoin. In the matter of religious instruction within the framework of formal education, Americans must examine their consciences and determine just how sincerely they accept the primacy of parental rights. The result should not be in doubt once the issue is fully laid bare.