# Frankfurter: Dissent

MR. JUSTICE FRANKFURTER, dissenting.

By way of emphasizing my agreement with MR. JUSTICE JACKSON s dissent, I add a few words.

The Court tells us that, in the maintenance of its public schools, “[The State government] can close its doors or suspend its operations” so that its citizens may be free for religious devotions or instruction. If that were the issue, it would not rise to the dignity of a constitutional controversy. Of course a State may provide that the classes in its schools shall be dismissed, for any reason, or no reason, on fixed days, or for special occasions. The essence of this case is that the school system did not “close its doors” and did not “suspend its operations.” There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. If everyone is free to make what use he will of time wholly unconnected from schooling required by law -- those who wish sectarian instruction devoting it to that purpose, those who have ethical instruction at home, to that, those who study music, to that -- then of course there is no conflict with the Fourteenth Amendment. **[p. 321]** The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released time program are compelled to attend. The school system is very much in operation during this kind of released time. If its doors are closed, they are closed upon those students who do not attend the religious instruction, in order to keep them within the school. That is the very thing which raises the constitutional issue. It is not met by disregarding it. Failure to discuss this issue does not take it out of the case.

Again, the Court relies upon the absence from the record of evidence of coercion in the operation of the system. “If, in fact, coercion were used,” according to the Court,

“if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.”

Thus, “coercion” in the abstract is acknowledged to be fatal. But the Court disregards the fact that, as the case comes to us, there could be no proof of coercion, for the appellants were not allowed to make proof of it. Appellants alleged that

“The operation of the released time program has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction.”

This allegation -- that coercion was, in fact, present and is inherent in the system, no matter what disavowals might be made in the operating regulations -- was denied by appellees. Thus, were drawn issues of fact which cannot be determined, on any conceivable view of judicial notice, by judges out of their own knowledge or experience. Appellants sought an opportunity to adduce evidence in support of these allegations at an appropriate trial. And though the courts below cited the concurring opinion in *McCollum v. Board of Education,* 333 U. S. 203, 333 U. S. 226, to “emphasize the importance of detailed **[p. 322]** analysis of the facts to which the Constitutional test of Separation is to be applied,” they denied that opportunity on the ground that such proof was irrelevant to the issue of constitutionality.*See* 198 Misc. 631, 641, 99 N.Y.S.2d 339, 348-349; 303 N.Y. 161, 174 175, 100 N.E.2d 463, 469.[[1]](#footnote-1)

When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established. When such is the case, there are weighty considerations for us to require the State court to make its determination only after a thorough canvass of all the circumstances and not to bar them from consideration. *Cf. Chastleton Corp. v. Sinclair,* 264 U. S. 543; *Hammond v. Schappi Bus Line,* 275 U. S. 164. If we are to decide this case on the present record, however, a strict adherence to the usage of courts in ruling on the sufficiency of pleadings would require us to take as admitted the facts pleaded in the appellants' complaint, including the fact of coercion, actual and inherent. *See* Judge Fuld, dissenting below, 303 N.Y. at 185, 100 N.E.2d at 475. Even on a more latitudinarian view, I cannot see how a finding that coercion was absent, deemed critical by this Court in sustaining the practice, can be made here, when appellants were prevented from making a timely showing of coercion because the courts below thought it irrelevant.

The result in the *McCollum* case, 333 U. S. 203, was based on principles that received unanimous acceptance by this Court, barring only a single vote. I agree with MR. JUSTICE BLACK that those principles are disregarded **[p. 323]** in reaching the result in this case.[[2]](#footnote-2) Happily they are not disavowed by the Court. From this, I draw the hope that, in future variations of the problem which are bound to come here, these principles may again be honored in the observance.

The deeply divisive controversy aroused by the attempts to secure public school pupils for sectarian instruction would promptly end if the advocates of such instruction were content to have the school “close its doors or suspend its operations” -- that is, dismiss classes in their entirety, without discrimination -- instead of seeking to use the public schools as the instrument for securing attendance at denominational classes. The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes -- an attitude that hardly reflects the faith of the greatest religious spirits.

1. Issues that raise federal claims cannot be foreclosed by the State court treating the allegations as “conclusory in character.” 303 N.Y. 161, 174, 100 N.E.2d 463, 469. This is so even when a federal statute is involved. Brown v. Western R. of Alabama, 338 U. S. 294. A fortiori, when the appeal is to the Constitution of the United States. [↑](#footnote-ref-1)
2. The reservation made by four of the Justices in the McCollum case did not, of course, refer to the New York situation any more than it referred to that form of “released time” under which the whole student body is dismissed. This was the reservation:

“We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that, before us, could not withstand the test of the Constitution; others may be found unexceptionable.”

333 U.S. at 333 U. S. 231. [↑](#footnote-ref-2)