

Better a Catholic than a Communist: Reconsidering *McCollum v. Board of Education* and
Zorach v. Clauson

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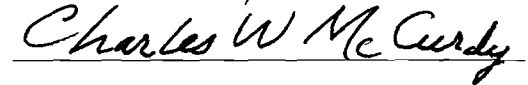



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INTRODUCTION

In 1952, Justice Jackson presciently closed his dissent in *Zorach v. Clauson* by noting that the Court's judgment would "be more interesting to students of psychology and of the judicial processes than to students of constitutional law."¹ The Court's judgment in *Zorach* prompted Justice Jackson's prediction because, in his view, it was a clear departure from the Court's holding four years earlier in *Illinois ex rel. McCollum v. Board of Education*,² a holding that three members of the majority in *Zorach* had joined.³

In 1948, the Court ruled in *McCollum* that the "released time" program in the Champaign, Illinois, schools was an unconstitutional establishment of religion by the state.⁴ Under this program, children, with the permission of their parents, were excused from their regular public school classes for thirty to forty-five minutes per week in order to attend religious education classes. Parents had the option of their children attending Protestant, Catholic, or Jewish education classes taught in the school by members of the local religious groups. Parents were also free to deny permission and have their children continue their secular studies while the other students received religious instruction. Justice Black, writing for the eight justice majority, declared the release time program a violation of the Establishment Clause, citing the use of the public school buildings and the state compulsory education laws.⁵

By 1952, the Court, according to Justices Black, Frankfurter, and Jackson, had executed an about-face on the issue of released time religious education. In *Zorach v.*

¹ 343 U.S. 306, 325 (1952) (Jackson, J., dissenting).

² 333 U.S. 203 (1948).

³ *Zorach*, 343 U.S. at 325 (Jackson, J., dissenting).

⁴ *McCollum*, 333 U.S. at 209–10.

⁵ *Id.*

Clauson, Justice Douglas wrote the majority opinion upholding the constitutionality of the New York City released time plan.⁶ Justice Douglas made two arguments in support of the constitutionality of the New York plan. First, he relied on the only factual distinction between the New York plan and the Champaign plan: the location of instruction. Whereas under the Champaign plan the religious education instructors taught in class rooms on school grounds, under the New York plan the students departed the school and went to nearby churches and synagogues to receive their lessons. Justice Douglas based his second argument on the nature and traditions of the American people. Asserting that Americans are “a religious people whose institutions presuppose a Supreme Being,” Douglas claimed that the New York plan followed the “best of our traditions” by encouraging religious instruction and cooperating with religious authorities “by adjusting the schedule of public events to sectarian needs.”⁷ In light of these traditions, Douglas argued that there could be no constitutional requirement for government to be hostile to religion, which would be the holding if the New York plan were found unconstitutional.

While Justice Douglas’s argument was twofold, only the factual distinction between the Champaign and New York plans was necessary to distinguish the two cases. For Justice Burton this distinction was dispositive. As early as the *McCollum* conference, Justice Burton indicated that he thought there was a distinction between the New York and Champaign released time programs. Justice Burton argued at conference that the “released time issue in NY [was] not before” the Court in *McCollum* and that in New

⁶ *Zorach*, 343 U.S. at 315.

⁷ *Id.* at 313–14.

York, “they had found . . . a proper & constitutional method of letting [released time] be done.” In contrast, the Champaign program was unconstitutional because, while a religious group might rent a school building, here the use of the building was an “intermingling of church and school.”⁸ And in the weeks just before the *McCollum* opinions were handed down, Justice Burton made his support of Justice Black’s majority opinion and Justice Frankfurter’s concurrence contingent upon the justices’ explicit assurances that their respective opinions did not invalidate the New York plan.⁹ Thus, Justice Douglas’s factual distinction in *Zorach* is readily explainable by its necessity and the presence of its antecedent in Justice Burton’s argument in the *McCollum* conference more than four years earlier.

But there is no such ready explanation for the presence of Justice Douglas’s appeal to the presupposition of a Supreme Being. This element of the opinion is legally superfluous, yet its mere presence suggests that there was some audience for the argument. In fact, Justice Douglas’s conference notes confirm that there was an audience for the extra-legal argument. His notes indicate that Justice Frankfurter did not discuss the legal issues at conference, but focused on discrediting the claim of released time proponents that *Zorach* was about secularism in the schools. Frankfurter went so far as to compare the tactics of released time proponents to those of Senator McCarthy.¹⁰ The form of Frankfurter’s argument in conference, as well as Justice Douglas’s appeal in his opinion to America’s religious tradition, suggest that, perhaps, some members of the

⁸ Justice William O. Douglas Conference Notes, Dec. 13, 1947, box 141, No. 90.

⁹ Note, The “Released Time” Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, 83 Yale L.J. 1202, 1219–20 (1974)

¹⁰ Justice William O. Douglas Conference Notes, Feb. 2, 1952, box 211, No. 431.

Court did not believe the factual distinction was dispositive and were open to, or even persuaded by, the religious traditions argument. At the very least, the inclusion of the religious traditions argument suggests that some members of the majority, though certainly not Justice Burton, were skeptical of distinguishing the two cases on the mere location of the religious instruction. This element of Douglas's *Zorach* opinion becomes even more important in light of the incredulity with which the dissenters attacked the factual distinction. According to Justice Jackson, the distinction is "trivial, almost to the point of cynicism, magnifying [*McCollum*'s] nonessential details and disparaging . . . the underlying reason for invalidity."¹¹ Likewise, Justice Black believed that the location of the religious classes was immaterial and that "the *McCollum* decision would have been the same if the religious classes had not been in the school buildings."¹²

Of course, it is also possible that the audience for which Justice Douglas was writing was not on the Court. Justice Douglas may have sought to buttress his argument by appealing to the public that would ultimately receive his opinion. This appeal took the form of a broad statement with which the vast majority of Americans would agree, that "[w]e are a religious people," and an assurance that there was no constitutional requirement "that the government show a callous indifference to religious groups."¹³ Whether Justice Douglas's intended audience for this argument was a fellow justice or the public, the importance of his appeal to the religious nature of Americans, as an

¹¹ *Zorach*, 343 U.S. at 325 (Jackson, J., dissenting).

¹² *Id.* at 316 (Black, J., dissenting) ("Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also 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." (quoting *McCollum*, 333 U.S. at 212)).

¹³ *Zorach*, 343 U.S. at 314.

element of his argument, is equal to that of the factual distinction and any attempt to explain the outcomes in these two cases must account for both elements of Justice Douglas's argument.¹⁴

This thesis offers such an explanation. It accepts that the factual distinction in Justice Douglas's opinion reflects Justice Burton's position that the location of the religious instruction was dispositive. This thesis accounts for Justice Douglas's second argument, that our "institutions presuppose a Supreme Being," by placing *McCollum* and *Zorach* in their wider historical context and considering the effect of external political change on the Court's rulings in these two cases. Specifically, this thesis posits that prior to the Court's decision in *Everson v. Board of Education*, which upheld a school board's practice of reimbursing parents for the cost of transporting their children on public buses to parochial schools,¹⁵ there was a growing suspicion of Catholicism. This suspicion centered on the Church's desire to receive government funds for its parochial schools, as well as on the Catholic approach to education, which was perceived as creating Catholic automatons not suited to democratic practices. The *Everson* decision did nothing to allay these fears and in fact created greater concern.

McCollum gave the Court an opportunity to limit the *Everson* decision and calm fears that the courts would permit Catholics to have their way with education, both by receiving public funds for their parochial schools and by injecting sectarian teachings into

¹⁴ Authors addressing *McCollum* and *Zorach* usually simply accept that the factual distinction was dispositive for the Court and dismiss or ignore Justice Douglas's appeal to America's religiosity. See, e.g., 12 William M. Wiecek, *The Oliver Wendell Holmes Devise: History of the United States Supreme Court* 278 (2006) (describing Douglas's appeal to American religiosity as "gratuitous[]" and "dicta"); Note, *supra* note 9, at 1203 (1974) (failing to discuss Douglas's religious traditions argument).

¹⁵ 330 U.S. 1 (1947).

the public schools through released time programs. Unfortunately, the *McCollum* decision only created more confusion, which manifested itself in the legal challenges mounted against the New York released time program. This thesis asserts that by the time the Court, in *Zorach*, addressed the confusion resulting from its *McCollum* decision, the cultural and political environment had changed sufficiently to affect the tone of the opinion, if not the decision, in *Zorach*. Whereas *McCollum* had been decided in a moment of widespread anti-Catholicism, *Zorach* was decided in a moment of widespread opposition to “Godless” communism. The proponents of released time education seized upon the atheism of Mrs. McCollum, which had previously been insignificant, and Joseph Lewis, a Free Thinker who brought suit in New York prior to Mr. Zorach. Harping on atheism, these proponents of released time education successfully created the impression that opposition to released time education was tantamount to the promotion of atheism and the communistic and totalitarian philosophies that accompanied atheism. Thus, by the time *Zorach* reached the Court, opposition to released time education was seen as opposition to democracy, rather than opposition to Catholic intervention in public education.

This shift in the perception of released time education was aided by developments in 1949 and 1950 that raised fears of communism to the forefront of American consciousness, supplanting the fears of Catholic dominance. In this environment, this thesis argues, some members of the Court were no longer concerned with a growing Catholic influence and instead made *Zorach* one more in a line of cases from the early 1950s in which the Court deferred to states and legislatures when the specter of

communism was raised. Ultimately, the Court reflected the change in society and concluded that, in 1952, it was better to be a Catholic than a communist.

I. *EVERSON*: ANTI-CATHOLICISM AND EDUCATION

A. *Historical Background*

Many commentators have noted that the Modern Establishment Clause dates from the Court's decision in *Everson v. Board of Education* in 1947.¹⁶ But this is only partly true. While *Everson* marked the first significant pronouncement under the Establishment Clause, the forces that resulted in *Everson* were at work long before 1947. *Everson* was but the most recent quarrel between Protestants and Catholics over public support of parochial education.¹⁷ As early as 1840, Protestants and Catholics battled over education, including what version of the Bible, if any, should be read in public schools and whether parochial schools should receive public funding. These battles led, in part, to the development of the widespread Catholic parochial school movement.¹⁸ With Protestants largely attending publicly funded schools, Catholics sought public funding for their parochial schools. For the second half of the nineteenth century and the first half of the twentieth century, Protestants of all types vehemently opposed public funding for "sectarian," that is Catholic, schools.¹⁹

Protestant concern with Catholic education was not limited to public funding. There was also widespread concern that Catholic education retarded the assimilation of

¹⁶ Id.; see Robert S. Alley, Public Education and the Public Good, 4 Wm. & Mary Bill Rts. J. 277, 321 (1995); John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 284 (2001); Note, *supra* note 9, at 1202.

¹⁷ Roger K. Newman, Hugo Black 361 (1994).

¹⁸ Jeffries & Ryan, *supra* note 16, at 300.

¹⁹ Id. at 300–02.

Catholic immigrants into America's democratic society. Public schools were seen as an "introduction to democratic habits, not simply a place to acquire skills."²⁰ Thus, Protestants feared that children attending parochial schools did not receive this introduction to democracy, and that, worse, Catholic schools were instead indoctrinating students with a respect for authority that would incline these students toward authoritarianism and away from democracy.²¹ Reaction to this fear led to the proposal of state laws requiring students to attend public schools.²² Only Oregon's proposed law passed, which resulted in another legal clash between Catholics and Protestants in *Pierce v. Society of Sisters*.²³ In this 1925 ruling, the Court overturned Oregon's law requiring students to attend public schools and affirmed the right of parents to send their children to parochial schools. Protestants could not eliminate Catholic schools, but they could still fight to prevent any public funding for them.

Prior to the 1930s, Catholics had some success in securing state funds for their schools, but in the late 1930s, when the debate over federal aid for grade school education began, Catholics sought federal aid for parochial schools as well. This effort provoked a strong response from Protestants, Jews, and Liberals.²⁴ In 1941, the Baptist Joint Committee on Public Affairs formed in order to fight the growing influence of the Catholic Church, especially on the issues of federal aid to parochial schools and publicly

²⁰ John T. McGreevy, *Catholicism and American Freedom* 182 (2003).

²¹ *Id.* at 175–82. See also Jeffries & Ryan, *supra* note 16, at 314.

²² Such laws were proposed in Oregon, Michigan, and Washington. William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917–1927*, 142–47 (1994). Efforts to propose similar laws were made in Alabama, Arkansas, California, Nebraska, Ohio, Oklahoma, Texas, and Wyoming. Philip Hamburger, *Separation of Church and State* 414 (2002).

²³ 268 U.S. 510 (1925).

²⁴ Paul Blanshard, *Religion and the Schools: The Great Controversy* 23 (1963); Jeffries & Ryan, *supra* note 16, at 312–13.

funded transportation to sectarian schools. One year later, the National Association of Evangelicals formed and took a strict separationist position with regard to aid for religious schools.²⁵ The American Civil Liberties Union (“ACLU”) joined these groups in opposing public funding for religious education, including transportation to religious schools.²⁶ Thus, the stage was set for the Supreme Court to adjudicate the latest clash between Protestants and Catholics in *Everson*.

Justice Black’s majority opinion in *Everson* did little to appease anyone on either side of the issue. For most of his opinion, he adopted Jefferson’s famous metaphor of the wall of separation, a “high and impregnable” wall, but in the end, Black concluded that New Jersey’s funding of transportation to Catholic schools did not breach that wall.²⁷ Black’s biographer writes: “The opinion drew criticism from all quarters. Black’s rhetoric and dicta contrasted too sharply with his conclusion and holding to satisfy anyone.”²⁸ The ACLU commented that “[t]he decision does not draw a clear line, nor does it settle a number of current problems involving the separation of church and state.”²⁹ The Joint Conference Committee on Public Relations for the Baptists of the United States released a resolution the day after *Everson* was decided stating: “We deplore this opinion and are convinced it will divide the people of the nation at a time when unity is greatly needed. In view of the religious heritage of America, which Associate Justice Black so eloquently reviewed, the decision is all the more to be

²⁵ Jeffries & Ryan, *supra* note 16, at 313–314.

²⁶ Press Release, ACLU, Supreme Court OK’s Private School Buses, (Feb. 17, 1947).

²⁷ Newman, *supra* note 17, at 363.

²⁸ *Id.*

²⁹ ACLU, Comment on the Supreme Court Decision in the New Jersey Bus Case, Mar. 1947.

deplored.”³⁰ Protestant leaders in Chicago called for Congressional action to over-ride the decision in *Everson*.³¹ Justice Black noted, however, that “the most severe and consistent criticisms of the opinion have come from leading Catholics. In fact their criticism . . . began at the very time when others were criticizing the opinion on the ground that it accorded . . . Catholic[s] . . . something they were not constitutionally entitled to receive.”³²

If there had been any doubt that the issue of public funding for *Catholic* schools, not simply religious schools, was at the heart of the *Everson* case, Justice Jackson cut to the chase in his dissent. He wrote that the parochial schools at issue “are parochial only in name—they, in fact, represent a worldwide and age-old policy of the Roman Catholic Church. . . . Catholic education is the rock on which the whole structure rests.”³³ Jackson went on to quote extensively from Catholic Canon Law regarding the requirement that Catholic children be educated in Catholic schools. Jackson also noted that “the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies,” and that American public schools were, “if not a product of Protestantism, at least more consistent with it than with the Catholic culture and scheme of values.”³⁴ The public funding of transportation to parochial schools at issue in *Everson* was simply the latest in the historical conflict between Protestants and Catholics over education funding.

³⁰ Baptists Hit Ruling on Catholic Schools, N.Y. Times, Feb. 12, 1947, at 27.

³¹ John Evans, Leaders Here Comment, Chi. Daily Trib., Feb. 12, 1947, at 29.

³² Newman, *supra* note 17, at 364.

³³ *Everson*, 330 U.S. at 22–24.

³⁴ *Id.* at 23.

The issue of public funding for Catholic schools had been contentions for decades and the ruling in *Everson* did nothing to quell the debate; in fact, it fanned the flames, especially with federal legislation pending in Congress concerning school funding, including provisions for assistance to parochial schools. Dr. Louie D. Newton, President of the Southern Baptist Convention, on the day *Everson* was decided, said:

I hope and pray that this ominous decision may serve to arouse the nation to support action by which the pressure of ecclesiasticism may be eliminated. The real battle in this war on the time honored control of religious liberty in the United States will take place in Congress when the pending bills to provide federal funds for education with loopholes for use of such funds in parochial schools are argued.³⁵

Other Protestant leaders also turned their attention to the pending legislation and the impact *Everson* might have. Charles Clayton Morrison, editor of the *Christian Century*, did not hide behind neutral, though transparent, terms like “parochial.” He claimed *Everson* should awaken Americans to the “strategy of the Roman Catholic Church in its determination to secure a privileged position in the common life of this country. . . . The Roman Church wants the state to provide for the complete support of its parochial schools with money derived from taxes levied on all citizens.”³⁶ Morrison contended that free textbooks and free bus transportation were the “thin edge of the wedge which would ultimately crack open the Constitution.”³⁷

The remainder of 1947 saw this debate over school funding intensify. Catholic leaders, such as Francis Cardinal Spellman, countered the calls of Protestant leaders by asserting that they were using *Everson* to stir up anti-Catholic sentiments in order to lead

³⁵ Gladstone Williams, *Catholic Ruling Draws Newton’s Ire*, *Atlanta Const.*, Feb. 11, 1947, at 5.

³⁶ *Edge of the Wedge*, *Time*, Mar. 3, 1947, at 94.

³⁷ *Id.*

a “bigoted ‘crusade’ against the Roman Catholic Church.”³⁸ A letter to the editor of *The Washington Post* claimed that “[a]ny attempt to read wicked and sinister meanings into the [*Everson*] decision must be chalked up to an attempt to fan religious hatred and bigotry.”³⁹ Another letter to the editor claimed that the *Everson* Court:

made a noble and democratic decision which, without doubt, will nauseate all the bigots who have frightened fools with their tales of religious bigotry and, with renewed zeal, the apostles of malice and prejudice will now join forces with their brother bigots and put on a national campaign of malice and prejudice which, in eloquence, would become angels.⁴⁰

Liberal organizations found themselves in a quandary over whether to support much of the legislation providing for federal aid to schools. *The Nation* noted the urgency with which states needed assistance in funding education, but blamed the Catholic Church for blocking such legislation by demanding that Catholic schools also receive funding.⁴¹ *The Nation* further intensified the debate between Catholics and non-Catholics (Protestants and secular modernists) when it published, between November 1947 and June 1948, a series of critical articles by Paul Blanshard concerning the Catholic Church’s teachings with respect to medicine, sexual conduct, education, fascism, democracy, censorship, and science.⁴² This series of articles created such uproar

³⁸ John M. Ferren, *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge* 266 (2004).

³⁹ J.B. Ring, Letter to the Editor, *Church And State*, Wash. Post, Feb. 18, 1947, at 8.

⁴⁰ Harry Daniels, Letter to the Editor, *Church And State*, Wash. Post, Feb. 18, 1947, at 8.

⁴¹ *Federal Aid and Catholic Schools*, *The Nation*, May 24, 1947, at 618.

⁴² See Paul Blanshard, *The Catholic Church and Democracy*, *The Nation*, June 5, 1948, at 630; Paul Blanshard, *The Catholic Church and Democracy*, *The Nation*, May 29, 1948, at 601; Paul Blanshard, *Roman Catholic Science*, *The Nation*, May 22, 1948, at 574; Paul Blanshard, *Roman Catholic Science*, *The Nation*, May 15, 1948, at 521; Paul Blanshard, *Roman Catholic Censorship*, *The Nation*, May 8, 1948, at 499; Paul Blanshard, *Catholic Church as Censor*, *The Nation*, May 1, 1948, at 459; Paul Blanshard, *The Catholic Church and Fascism*, *The Nation*, April 24, 1948, at 432; Paul Blanshard, *The Catholic Church and Fascism*, *The Nation*, April 17, 1948, at 416; Paul Blanshard, *The Roman Catholic Church and Fascism*, *The Nation*, April 10, 1948, at 390; Paul Blanshard, *The Catholic Church and Education*, *The Nation*, November 15, 1947, at 525; Paul Blanshard, *The Sexual Code of the Roman Church*, *The Nation*,

that the New York City public schools and the Newark, New Jersey, public schools removed the magazine from their libraries.⁴³

Blanshard's articles, and the positive response they received outside of Catholicism, demonstrate that education was ground zero for what was seen as a larger battle between Catholics and Protestants, Jews, and liberals. In *The Catholic Church and Education*, Blanshard acknowledged "that there has been a tremendous revival of anti-Catholic feeling in the United States in recent months, and its focal point is unquestionably the educational policy of the church."⁴⁴ Yet, he contended that the opposition was not bigoted, but was in response to *Everson* and "various Catholic lobbies in Washington against any federal aid to education in which parochial schools do not share."⁴⁵ Blanshard argued that the Catholic Church was not just seeking funds for its schools, but was actively opposed to public education, mandating that American Catholics boycott public schools, even declaring that Catholics had a duty not to pay taxes in support of public schools. Where public education could not be resisted entirely, Blanshard wrote that it was the goal of the Church to "place Catholics in key positions as teachers and officials in the public-school system."⁴⁶ Finally, Blanshard, a liberal secularist, echoed the sentiments of Morrison, the editor of *Christian Century*, declaring that in *Everson* "the battle lines were drawn for a much larger conflict, of which the bus

November 8, 1947, at 496; Paul Blanshard, *The Catholic Church in Medicine*, *The Nation*, November 1, 1947, at 466.

⁴³ ACLU, 'Nation' Banning Stirs Wide Controversy, *Weekly Bulletin* #1341, July 5, 1948, at 2; ACLU, Removal of 'Nation' From Newark, N.J. Libraries Upheld, *Weekly Bulletin* #1319, February 2, 1948, at 2. The removal of *The Nation* may suggest support for Catholicism, but this was limited to two cities with larger Catholic populations. This is not representative of the rest of the country.

⁴⁴ Blanshard, *The Catholic Church and Education*, *supra* note 42, at 525.

⁴⁵ *Id.*

⁴⁶ *Id.* at 527–28.

fight was only a preliminary skirmish.” He too saw the New Jersey situation as the thin edge of the wedge by which Catholics would seek complete public financial support of parochial schools and “eventual establishment of Catholicism in all public classrooms, as in Spain and Italy.”⁴⁷

This increased anti-Catholic sentiment may have been in response to events within the realm of education, but it was rooted in a concern that Catholicism was fundamentally incompatible with democracy and American culture. Blanshard asserted that Catholic schools were undemocratic institutions because a priest or bishop, ultimately responsible to Rome, controlled the schools. Furthermore, he claimed the schools taught intolerance and opposed national solidarity through teachings such as that the “Pope is the head of a sovereign temporal power which has coequal rights with that of the government of the United States.”⁴⁸ These assertions added to the concerns, dating back to the 1920s and 1930s, that many liberals already had with relations between the Catholic Church and fascist governments. Professor McGreevy has written that “the divide between the Catholics and liberals over Mexico, Italy, and, especially, Spain meant that extended analysis of connections between Catholicism and fascism appeared throughout the liberal press.”⁴⁹ These analyses included “Reinhold Niebuhr’s conclusion that ‘the Catholic Church has cast its lot with fascist politics,’” and noted American scholar, “Lewis Mumford’s regret that ‘the Church has chosen to ally itself with democracy’s chief enemy, fascism.’”⁵⁰ The popularity, in the late 1930’s, of Father

⁴⁷ Id. at 528.

⁴⁸ Id. at 525, 527.

⁴⁹ McGreevy, *supra* note 20, at 173.

⁵⁰ Id.

Charles Coughlin’s anti-Semitic radio program served as further evidence that Catholicism was more in line with fascism than democracy. Academics concluded that “[t]he Catholic church has little sympathy with the democratic idea of free speech” and “sustained a ‘medieval conception of liberty.’”⁵¹

Cumulatively, the perceived Catholic sympathy for fascism, its opposition to birth control, Father Coughlin’s anti-Semitism, an eagerness to censor Hollywood films, and the reluctance to support public education led many Americans to believe Catholicism was not compatible with democracy. Thus, the “thin edge of the wedge” became a threat not just to American public schools, and not just to Protestant religious teachings, but to democracy and the American way of life.

B. The Debate Over Released Time in 1947

In the midst of this tension over Catholicism and education was the subject of released time programs in public schools. In August 1947, the Catholic Central Verein of America cited, as evidence of persistent “prejudice and hatred against the Catholic church,” opposition to an ambassador to the Vatican, untrue claims by Protestant leaders with regard to separation of church and state, opposition to furnishing transportation to parochial schools, and opposition to released time for religious instruction.⁵² Released time programs allowed students at public schools to, with the permission of their parents, receive religious education during school hours. Individuals affiliated with local religious groups, who were not paid by the public schools, delivered the religious instruction. Parents indicated whether they wanted their child to receive education from

⁵¹ Id. at 173–74.

⁵² Catholic Verein Says Bias Persists, N.Y. Times, Aug. 21, 1947, at 10.

the Catholic, Protestant, or Jewish instructor. Parents could also choose for their child not to receive any instruction, in which case the child continued their secular studies. Most plans offered no more than one hour of religious education per week and the instructors reported attendance to the school, who recorded it.⁵³ In 1947, nearly a million Catholic students in over ten thousand schools received religious instruction through released time programs.⁵⁴

The debate over released time education did not simply pit Catholics against Protestants, Jews, and liberals, as the debate over public funding of parochial schools had. Instead, while many of the parties took positions consistent with their stance on school funding, many Protestants supported released time education; though others, including the Southern Baptists, joined the liberal groups in opposition. At the American Education Fellowship conference held shortly after *Everson* was decided, members of various liberal groups, including the ACLU, the Ethical Culture Society, and Planned Parenthood, gathered to denounce released time education. They charged that “[r]eleased time religious instruction tends to emphasize sectarianism rather than create a dynamic for democratic living,” and that following *Everson*, “other attempts will be made to break down the separation of church and state.”⁵⁵ Likewise, the National Community Relations Advisory Council (“NCRAC”) and the Synagogue Council of America jointly denounced released time practices, as did the American Jewish Congress (“AJC”).⁵⁶ Leo Pfeffer of the AJC wrote that, “[b]y bringing religious differences into the public schools, the

⁵³ *Zorach*, 343 U.S. at 308; *McCollum*, 333 U.S. at 205.

⁵⁴ Catholics in U.S. Rise to 2,268,173, N.Y. Times, June 13, 1947, at 27.

⁵⁵ New Methods Urged in Teaching Religion, N.Y. Times, Mar. 15, 1947, at 11.

⁵⁶ Religious Links to School Decried, N.Y. Times, May 16, 1947, at 21.

[released time] program is a divisive influence, and in actual practice frequently promotes inter-religious friction and disharmony.”⁵⁷ The Protestant Teachers Association countered that, “released-time religious training classes . . . brought about better understanding among the major religious faiths,” and the superintendent of New York public schools denied that released time education was divisive.⁵⁸ Meanwhile, Archbishop McNicholson, head of the National Catholic Educational Association, called for a “decrease [in] the deplorable tension between Catholic and public schools,” and expressed his hope that “public school administrators will favor the released-time program as a practical method to eliminate the menace of religious illiteracy,” while not threatening “the most rigorous interpretation of American freedom of religion.”⁵⁹

C. The Justices’ Awareness of the Religious Tension

The Court was not oblivious to the religious clashes engaged in by the general public. It is evident that, internally, the justices recognized that the public did not view *Everson* as a case simply concerning the establishment of religion, but rather as a case concerning the public funding of *Catholicism*. Justice Jackson acknowledged as much in his dissent and other justices acknowledged this internally when they thought their own religious background might prove significant to the outcome. Justice Murphy, as the only Catholic on the Court, initially abstained in *Everson*, recognizing that the public

⁵⁷ Sees Error in Plan of Religious Study, N.Y. Times, Dec. 26, 1947, at 32.

⁵⁸ City School Training in Religion is Hailed, N.Y. Times, Nov. 16, 1947, at 17.

⁵⁹ Unity Among Schools Urged by Archbishop, N.Y. Times, Jul. 6, 1947, at 38. Despite the cacophony of debate and the fierce opposition largely focused in New York, the New York legislature passed a bill on March 19, 1947, giving formal state approval to local released time plans that had been in place for years, as well as approving public funding for health and medical services at public and parochial schools. Pass Released –Time Bill: Both Houses Back Welfare Aid, Religious Teaching in State, N.Y. Times, March 20, 1947, at 17.

perceived it as a “Catholic case.”⁶⁰ His abstention became an issue when the Court deadlocked at four votes to affirm and four to reverse. Justice Frankfurter recognized the position in which Murphy found himself and sought to persuade him not to join the majority, despite his Catholicism.⁶¹ Likewise, once Murphy provided the decisive vote to the majority, Frankfurter took account of his own Jewish heritage and felt he could not write a dissent because people would discount it as the anti-Christian view of a liberal Jew.⁶²

While Justices Murphy and Frankfurter’s religious backgrounds made them especially aware of the religious issues, specifically Catholic education issues, in *Everson*, other justices would have been just as aware of the issues and the larger societal debate over Catholic education. As Professor McGreevy has noted, several of the justices “shared a suspicion of Catholic intentions,” with respect to education.⁶³ Justice Douglas, during oral argument in *Everson*, passed a note to Justice Black stating, “[i]f the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business.”⁶⁴ Black, of course, had his own anti-Catholic history as a former member of the Ku Klux Klan who, in 1928, had vigorously opposed his fellow Democrat, Al Smith, the first Catholic presidential nominee by a major party. During his initial Alabama Senate campaign, Black, reportedly, “could make the best anti-Catholic speech you ever heard.”⁶⁵

⁶⁰ Sidney Fine, *Frank Murphy* 568 (1984).

⁶¹ *Id.* at 569–570.

⁶² *Id.* at 569.

⁶³ McGreevy, *supra* note 20, at 184.

⁶⁴ *Id.* at 184–85.

⁶⁵ *Id.* at 185.

Additionally, Black spoke of being greatly influence by the writings of Paul Blanshard.

Black's son later related that his father "suspected the Catholic Church. He used to read all of Paul Blanshard's books exposing the power abuse in the Catholic Church."⁶⁶

Similarly, Frankfurter demonstrated his suspicion of the Catholic Church through his support for Blanshard. He corresponded with one of Blanshard's proofreaders and advisers and secretly offered advice to those fighting the New York and New Jersey school bans of *The Nation* following the publication of Blanshard's articles criticizing Catholicism.⁶⁷

Justice Burton had his own connection to Blanshard. Burton, a lifelong Unitarian, served as the national moderator of the American Unitarian Association, which represented all Unitarian parishes in the United States and Canada.⁶⁸ While he was moderator, the American Unitarian Association, through Beacon Press, published *American Freedom and Catholic Power*, the book that resulted from noted Unitarian Paul Blanshard's earlier series of articles in *The Nation*.⁶⁹ Following the *Everson* decision, the American Unitarian Association sponsored an event at the Jefferson Memorial to celebrate Jefferson's religious views. With four Supreme Court justices in attendance, a Unitarian leader offered a veiled criticism of Catholicism when he called for a Christianity "free of all autocratic ecclesiastical control over the mind and conscience of its individual members."⁷⁰

⁶⁶ Id. at 186.

⁶⁷ Id. at 185

⁶⁸ <http://www.harvardsquarelibrary.org/unitarians/burton.html>

⁶⁹ McGreevy, *supra* note 20, at 185.

⁷⁰ Id. at 184.

Finally, Justice Rutledge expressed his suspicion of Catholicism in a post-conference memo concerning *Everson*. He wrote that this case was “really a fight by the Catholic schools to secure this money from the public treasury. It is aggressive and on a wide scale. There is probably no other group which is either persistent in efforts to secure this type of legislation or insistent upon it.”⁷¹ Rutledge clearly did not believe Catholic efforts to gain influence were limited to the funding issues addressed in *Everson*, but anticipated other challenges to the notion of separation of church and state expressed in his *Everson* dissent. On the same day that the Court delivered its opinion in *Everson*, *Time* magazine reported on what would become the next challenge to Rutledge’s conception: the Illinois Supreme Court upheld the constitutionality of the Champaign released time program, making the United States Supreme Court the next stop for Vashti McCollum’s suit to stop religious education in public schools.⁷²

II. *McCollum*: *Everson* REVISITED

A. *McCollum* as a Catholic Case

These connections to anti-Catholic organizations and authors do not suggest that these justices simply voted against the Catholic position; Justice Black’s opinion in *Everson* makes that clear. The evidence of a general level of suspicion toward Catholic educational policies, as well as evidence that the justices viewed *Everson* as a “Catholic case,” does increase the likelihood that the justices would view the upcoming *McCollum* case as another “Catholic case.” At the very least, the justices were aware of the released

⁷¹ *Id.* at 185.

⁷² Camel’s Nose?, *Time*, Feb. 10, 1947, at 61.

time controversy and the Catholic position in support of it. It is more likely that many of the justices were both aware and skeptical of Catholic support for released time.

In late November 1947, a week and a half prior to the oral argument of *McCollum* before the Supreme Court, *The Washington Post* reported on a speech given in Texas in opposition to released time. Mrs. Eugene Meyer, wife of the chairman of the board of *The Washington Post*, told the Texas State Teachers Association that released time programs increased sectarian division, and she called on Catholic leaders to support the separation of church and state and to accept the reasoning and limitations to state support of parochial schools set forth in the opinions of Justices Black and Rutledge in *Everson*.⁷³ This story prompted a letter to the editor in support of released time education, asserting that religious education actually promoted tolerance and understanding.⁷⁴ But, as an editorial published the day of the *McCollum* oral argument demonstrates, many people saw *McCollum* and the whole released time debate as just another front in the battle between Catholics and Protestants. The editorial board of *The Washington Post* contended that, “[t]he violent debates now raging between Protestant and Catholic church leaders have necessarily been carried over into the schools by the released-time program.”⁷⁵

To *The Post*, and many other Americans, released time was yet another issue that found Protestants and Catholics on opposing sides: Catholics supporting the programs and Protestants opposing them. On their face, the released time plans around the country seemed neutral, allowing parents to choose Catholic, Protestant, or Jewish instruction for

⁷³ Religious Tolerance in Public School Released Time Opposed, Wash. Post, Nov. 29, 1947, at 11.

⁷⁴ Kathleen Fenton, Letter to the Editor, Religion in Schools, Wash. Post, Dec. 6, 1947, at 8.

⁷⁵ Editorial, Church and School, Wash. Post, Dec. 8, 1947, at 10.

their children. In practice, however, Catholic students were more likely to participate in released time religious instruction, perhaps because, as Justice Jackson noted, the public schools were already very Protestant, including daily scripture readings from the King James Bible and non-denominational prayers. Because Catholic students were more likely to participate, and because of the Catholic leadership's vocal support for released time programs, these programs came to be seen as a potential means for Catholics to gain a foothold in public schools. Citing the New York City released time program, *The Post* stated that, of the 110,000 participants, "80 per cent are Catholic, 15 per cent Protestant, and 5 per cent Jewish." The overwhelming number of Catholic participants, according to *The Post*, explained why Catholics, "a minority group[,] . . . assert [their] influence in Brooklyn, where [they] happen[] to predominate."⁷⁶ And, *The Post* predicted this scenario would repeat itself, as one would expect, until "we shall soon have Protestant, Catholic or Jewish public schools, with rebellious minorities everywhere."⁷⁷

On December 8, 1947, the United States Supreme Court heard two hours of oral argument on the subject of released time education. The released time program in place in the Champaign, Illinois, public schools in 1947 was the subject of *McCullum v. Board of Education*. Mrs. Vashti McCollum, an atheist, brought suit on behalf of her son, James Terry McCollum.⁷⁸ The Champaign Council of Religious Education, a private organization, had established a released time program in the Champaign public schools in 1940. The council paid for instructors, materials, and incidentals in order to provide

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *People ex rel. McCollum v. Board of Education*, 71 N.E.2d 161, 162 (Ill. 1947); *Baptists Back Fight on School Religion Class*, Chi. Daily Trib., Nov. 17, 1947, at 41.

religious education to students in grades four through nine. Elementary students received thirty minutes of instruction per week, while the junior high students received forty-five minutes of instruction per week. Catholic, Protestant, and Jewish classes were taught, but additional groups were able to participate on equal terms, and parents had the option of sending their child to any of the offered classes, or to none of the offered classes.⁷⁹ The religious instructors conducted class in the public school classrooms and reported attendance to school authorities.⁸⁰ Mrs. McCollum claimed that religious instruction in the public schools constituted state support for religion, which violated the First Amendment's Establishment Clause, as applied to the states through the Fourteenth Amendment. She also claimed the program violated the Illinois and Federal constitutional guarantees of freedom of religion because the program was voluntary in name only. By segregating students into religious groups, she argued, those not affiliated with any group felt embarrassed and stigmatized, resulting in a pressure to conform by joining one of the religious groups. This pressure, along with the subtle pressure exerted by the school administration in sending home the registration cards, amounted to an abridgment of her son's religious freedom.⁸¹

While the clash over released time education was not strictly between Catholic and non-Catholic groups, there was a presumption among many that *McCollum* was an opportunity to stop the growth, portended in *Everson*, of Catholic influence in

⁷⁹ *McCollum*, 71 N.E.2d at 162–63.

⁸⁰ *McCollum*, 333 U.S. at 209.

⁸¹ *Id.* at n.1; *McCollum*, 71 N.E.2d at 164.

education.⁸² Examining the groups that filed amicus briefs, it is apparent that many Protestants were undeterred by McCollum's atheism and willing to support her fight against released time education. The only religious group to support the Champaign Board of Education with an amicus brief was the Protestant Council of New York, who sought to defend their own released time program. In contrast, the Southern, Northern, and National Baptist Conventions filed amicus briefs on behalf of Mrs. McCollum, as did the Seventh Day Adventists, the American Unitarian Association, the Synagogue Council of America, and the NCRAC.⁸³ Liberal groups, such as the ACLU and American Ethical Society also filed amicus briefs in support of McCollum.⁸⁴

Within the Court, it is not as clear that the justices saw *McCollum* as a strictly Catholic issue, although they certainly saw it as part of the separation of church and state issue, which, as discussed above, was in large part a Catholic issue. Nonetheless, Justice Frankfurter saw the Champaign released time program as a "Protestant move to get members and support."⁸⁵ Likewise, Justice Jackson viewed the released time program in Champaign as primarily Protestant. In the *McCollum* conference, he commented that the

⁸² The ACLU's amicus brief reminded the Court that *Everson* had "left doubts in the minds of many and has caused great controversy," and that *McCollum* was an "opportunity [to] restat[e] and apply[] the great principles of religious freedom and separation." Brief of American Civil Liberties Union as Amicus Curiae Supporting Appellant at 39, *McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948) (No. 90). The ACLU also tied *McCollum* to *Everson* by asserting that the "[t]wo great drives . . . to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made" were the introduction of "religious education and observances into public schools. . . . [and efforts] to obtain public funds for the aid and support of various private religious schools." *Id.*

⁸³ Dillard Stokes, Supreme Court Urged to Ban Public School Bible Classes, *Wash. Post*, Dec. 9, 1947, at 1. The Synagogue Council of America and the NCRAC did include a strong statement disclaiming their support for McCollum's "anti-religious views" and "deplor[ing] the fact that the sponsors of the original petition shoes this case as a means of inscribing such anti-religious matter on the public record and for confusing the basic issue in this case by dragging into it the unrelated issues of atheism versus religion." Brief for the Synagogue Council of America and the Nat'l Cmty. Relations Advisory Council as Amici Curiae Supporting Appellant at 5–7, *McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948) (No. 90).

⁸⁴ Stokes, *supra* note 83, at 1; see also notes 132–36 *infra*, and accompanying text.

⁸⁵ Justice William O. Douglas Conference Notes, Dec. 13, 1947, box 161, No. 90.

“support of Catholics with transportation and denial of Protestants of this right loads the dice in this country.”⁸⁶ The other justices apparently did not indicate any view at conference with respect to whether the Champaign plan primarily benefited Catholics or Protestants. Chief Justice Vinson and Justices Black and Rutledge simply voted to reverse, while Justice Murphy, who had been absent due to illness during oral argument, passed at conference. Justice Burton believed the issue in *McCollum* was the intermingling of church and school through the rent-free use of the school buildings by the religious groups. Burton made clear that the Court was not considering the New York released time plan, which he seemed to presume was a “proper [and] constitutional method of” releasing children part time for religious education. Reed saw the case as simply a question of whether or not religious groups could use public facilities, which he believed they could and was, therefore, the only vote to affirm.⁸⁷

It might be easy to dismiss a claim that prevailing concerns over Catholic involvement in education influenced the Court in *McCollum* given that none of the justices discussed the case at conference in terms Catholicism, and, in fact, two justices explicitly saw it as a Protestant case. It is clear, however, that even as the Court considered granting certiorari to Mrs. McCollum’s appeal, the case was viewed in terms of *Everson*. One of Justice Douglas’s clerks, in a memo regarding whether the Court should accept the case, wrote: “On the merits it seems to me a close and difficult case. . . . Perhaps this is the time to put reinforcements in the wall between church and state for which Everson drew the blueprints. Here the religion is moved right into the school

⁸⁶ *Id.*

⁸⁷ *Id.*

buildings.”⁸⁸ One author has concluded, after reviewing Justice Burton’s conference notes for *McCollum*, that “most of the Court’s attention in *McCollum* was focused on the problem of the status of *Everson*.”⁸⁹ Given that the justices perceived *Everson* as a “Catholic case,” and that *McCollum* was, except in Justice Reed’s view, about the status of *Everson*, *McCollum* was necessarily a case concerned with addressing the issues raised in *Everson*, namely the increasing influence of Catholicism on education. *McCollum* again raised the issue of anti-Catholicism, which *Everson* had encouraged.

While the Court heard oral argument, deliberated, and wrote its opinions, the debate over Catholic educational policies continued in the society at large. Protestants and Other Americans United for Separation of Church and State (“POAU”), an organization formed in response to the *Everson* ruling with the sole purpose of defending the separation of church and state, engaged in a heated exchange with the National Catholic Welfare Conference (“NCWC”) over Catholic involvement in public education, as well as the controversy surrounding the appointment of an ambassador to the Vatican.⁹⁰ POAU initially called for an end to the ambassadorship to the Vatican and announced “an effort . . . to prevent public support of sectarian schools” in its “manifesto” issued on January 11, 1948.⁹¹ This prompted responses from the Knights of Columbus (“K of C”), as well as the NCWC. The K of C response declared that POAU would “fall of its own weight because, despite its disavowal of anti-Catholicism, it is

⁸⁸ Memorandum from Justice Douglas’s Clerk, JRW, to Justice Douglas (May 27, 1947), box 161, folder 90.

⁸⁹ Note, *supra* note 9, at 1211, 1219.

⁹⁰ Jeffries & Ryan, *supra* note 16, at 315–16.

⁹¹ Protestant Group Hits Parochial Aid, N.Y. Times, Mar. 8, 1948, at 20; K. of C. Criticizes ‘Separation’ Drive, N.Y. Times, Jan. 13, 1948, at 1.

loaded with an intolerance generally unacceptable to the American people as a whole.”

Furthermore, the K of C characterized the manifesto as an attack on the patriotism of anyone, especially Catholics, who disagreed with POAU’s interpretation of the First Amendment.⁹² John T. McNicholas, Archbishop of Cincinnati, responded on behalf of the NCWC that Catholics were not seeking to destroy the separation of church and state by seeking funding for parochial schools. Instead, he asserted that “[d]espite the dogmatic assertions of the [POAU], there is no authoritative interpretation of the First Amendment,” and “[o]ur history shows many precedents of government aid to private schools.”⁹³ McNicholas concluded by declaring that the manifesto was “not as crude as those issued by Know-Nothing-ism or Ku-Kluxism, but certainly one bound to arouse intolerance, suspicion, hatred and conflict between religious groups.”⁹⁴

Just before the Court delivered the *McCullum* decision, POAU challenged Archbishop McNicholas’s claim that Catholics were not attempting to destroy the separation of church and state by pointing to an incident within McNicholas’s own Cincinnati archdiocese. The Catholic-majority school board of North College Hill, a suburb of Cincinnati, incorporated a parochial school into the public school system, with the school board paying the salaries of the nuns serving as teachers, as well as paying rent to the archdiocese for use of the building.⁹⁵

Thus, as the justices considered the issue of released time education, they were surrounded by a raging debate over the activities of Catholics in relation to schools and to

⁹² K. of C. Criticizes ‘Separation’ Drive, *supra* note 91.

⁹³ Denies Catholics Oppose Separation, N.Y. Times, Jan. 26, 1948, at 17.

⁹⁴ *Id.*

⁹⁵ Protestant Group Hits Parochial Aid, *supra* note 91.

world politics. The debate began well before their decision in *Everson*, but that decision had served to fuel the debate and added to the outcry. In the months leading to oral argument in *McCollum*, the Court was aware of the continued debate, and in the months following oral argument, the debate grew. Additionally, the Court's internal disagreements over *Everson* resurfaced with *McCollum*, causing the justices to revisit their entire debate over the separation of church and state doctrine in the public school context. In this environment, the justices must have considered the implications their decision would have, and given their own suspicions of Catholicism, it seems likely that they were influenced by the wider church-state and Catholic-Protestant debates occurring at the time. In the end, the Court declared the Champaign plan unconstitutional on the grounds that use of the physical facilities constituted financial support for religious instruction and use of the compulsory education laws constituted coercive state action, both in violation of the Establishment Clause.⁹⁶

B. Reaction to McCollum

The reactions to the *McCollum* decision fell along expected lines. As the *Chicago Daily Tribune* reported, the Court's decision "was received with mixed emotions by religious leaders yesterday. The range was from jubilation to stunned silence."⁹⁷ Roman Catholics denounced the decision, while POAU praised it, and Baptists both praised and denounced the ruling.⁹⁸ Most newspaper editorials hailed the decision. In a survey of

⁹⁶ *McCollum*, 333 U.S. at 212.

⁹⁷ Rev. John Evans, Bible Teaching Decision Brings Mixed Reaction, *Chi. Daily Trib.*, Mar. 10, 1948, at 19.

⁹⁸ *Id.*; Newton Hails Decision on Religious Courses, *Atlanta Const.*, Mar. 9, 1948, at 4.

nineteen different newspapers, only two wrote editorials opposed to the decision.⁹⁹ The *Chicago Daily Tribune* wrote that, though the Champaign plan “was as inoffensive a plan as could well have been devised,” the justices’ ruling “conform[s] pretty accurately to [the views] of the bulk of the population of this country. Most of us are glad that the question has been settled as it has been.” Additionally, “[t]he decision is doubly welcome because the question of the division of church and state, particularly as it concerns the schools, has been making for a good deal of ill-will lately between Catholics and Protestants.”¹⁰⁰ The editors recognized that their hope that tensions between the two camps would ease was possibly naïve, but they did not realize that their claim “[t]hat the decision of the court seem[ed] to have settled the main question involved in the controversy,” would prove so incorrect.¹⁰¹

Immediately upon the delivery of the *McCollum* opinion, school administrators and state attorney generals sought to determine the impact of the decision on their school’s plan of religious education. Likewise, organizations like the ACLU sought to extend the ruling to all released time programs.¹⁰² In Champaign, the president of the Illinois Church Council believed the decision meant “that religious education in local schools is ‘now out the window’ and that the decision probably ‘clears up the matter once

⁹⁹ See Stuart Nagel & Robert Erikson, Editorial Reactions to Supreme Court Decisions on Church and State, 30 Pub. Opinion Q. 647, 649 (1966-67) (reviewing twenty-four newspapers, eight of which supported the *McCollum* decision, seven of which did not run an editorial on the decision, seven of which were unavailable, and the two, the St. Louis Globe and Dallas Morning News, that opposed the decision); Editorial, The Supreme Court’s Illinois School Decision, Balt. Sun, Mar. 10, 1948, at 12 (supporting the *McCollum* decision, though not included in Nagel and Erikson’s analysis).

¹⁰⁰ Editorial, Religion in the Schools, Chi. Daily Trib., Mar. 12, 1948, at 20.

¹⁰¹ *Id.*

¹⁰² ACLU Board Meeting Minutes, Mar. 15, 1948, ¶ 3.

and for all.”¹⁰³ In Chicago, where students left school property to receive their released time religious education, it was unclear whether the Court’s ruling reached all released time programs or just those conducted on school property.¹⁰⁴ In Maryland, administrators ended released time classes on school property and churches arranged for them to continue off school grounds.¹⁰⁵ The Washington, D.C., schools did not have a released time program, but expressed uncertainty as to whether the Court’s ruling impacted their practice of daily Bible reading and recitation of the Lord’s Prayer.¹⁰⁶ Meanwhile, the Fairfax, Virginia, school board decided to continue its program of religious instruction in its public schools pending the Virginia Attorney General’s interpretation of *McCorm*; they also expressed the opinion that the Court did not intend to reach morning Bible reading or recitation of the Lord’s Prayer.¹⁰⁷ In Georgia, the Assistant Attorney General opined that the Court’s ruling did not render unconstitutional the state law requiring daily Bible reading in public schools, though another expert thought the “Chattanooga Plan,” similar to the Champaign released time program and popular throughout the South, was called into question.¹⁰⁸

III. TOWARD *ZORACH*

A. The Impact of McCorm in New York

While school districts across the country wrestled with what exactly *McCorm* prohibited, attention focused more intensely on the New York City public schools and

¹⁰³ Ruling in Religion Dispute is Pleasing to Vashti McCorm, Chi. Daily Trib., Mar. 9, 1948, at 16.

¹⁰⁴ Rev. John Evans, Church Council Acts to Retain Bible Teaching, Chi. Daily Trib., Mar. 11, 1948, at B4.

¹⁰⁵ Religious Teaching Ends Temporarily at Gaithersburg and Rockville, Wash. Post, Mar. 11, 1948, at B1.

¹⁰⁶ Schools Continue Prayer Recitation, Wash. Post, Mar. 12, 1948, at 20.

¹⁰⁷ Fairfax School Bible Studies Continuing, Wash. Post, Mar., 17, 1948, at 1.

¹⁰⁸ School Bible Reading Not Illegal, Shaw Says, Atlanta Const., Mar. 10, 1948, at 2.

their released time program. The size of the New York City public schools and the number of participants in their released time program guaranteed the attention of many groups opposing released time. The battle over the New York program was forecast by the amicus brief filed in support of released time by the Protestant Council of New York and the amicus briefs filed in opposition by the ACLU and AJC, both headquartered in New York City.¹⁰⁹ These briefs ensured that the justices were familiar with the New York plan, which was identical to the Champaign plan, except that the religious instruction in New York occurred off school grounds. In fact, Justice Reed’s dissent specifically addressed the New York plan and Justice Frankfurter made a passing reference to, presumably, the New York plan.¹¹⁰ Frankfurter wrote that “[w]e 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.”¹¹¹ In fact, the phrase, “not before us,” reflected Justice Burton’s words in conference when he stated that the “released time issue in NY is not before us.”¹¹² In conference, Justice Burton went on to take a strong position on the constitutionality of the New York plan. Not only did he say that the New York plan was not before the Court, but he thought they should “use” the *McCullum* decision “to make that clear” because, in New York, “they have found thus a proper and constitutional method of letting [release time] be done that way.”¹¹³ In contrast, he said, “released time here[, in *McCullum*,] is interlocked with the school system—[the] system is used for

¹⁰⁹ Stokes, *supra* note 83.

¹¹⁰ 333 U.S. at 250–52 & n.20 (Reed, J. dissenting); *Id.* at 231 (Frankfurter, J. concurring).

¹¹¹ *Id.* at 231 (Frankfurter, J. concurring).

¹¹² Justice William O. Douglas Conference Notes, Dec. 13, 1947, box 161, No. 90.

¹¹³ *Id.*

religious education,” and while “religious groups might rent a building . . . here there is intermingling of church and school.”¹¹⁴

The uncertainty Justice Reed expressed in his *McCollum* dissent regarding the constitutionality of the New York plan under the majority opinion, as well as the debate that would ensue and eventually result in *Zorach v. Clauson*, indicate that the Court did not, as Justice Burton had urged, “make it clear” that the New York plan was constitutional. In his dissent, Justice Reed wrote, of both Justice Black’s majority opinion and Justice Frankfurter’s concurrence, that they “seem to leave open for further litigation variations from the Champaign plan.”¹¹⁵ This was likely a reference to the New York plan given the amicus briefs and the discussion in conference. Reed went on, writing:

I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional. Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council’s instructors? None of the reversing opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional.¹¹⁶

Various groups immediately confirmed Reed’s speculation that further litigation would ensue. The *New York Times* reported the day after the *McCollum* decision was delivered that both the Public Education Association (“PEA”) and the United Parents Association (“UPA”) predicted legal action against New York’s released time

¹¹⁴ *Id.*

¹¹⁵ *McCollum*, 333 U.S. at 239–40 (Reed, J. dissenting).

¹¹⁶ *Id.*

program.¹¹⁷ On March 10, 1948, two days after the Court rendered its decision, the ACLU issued a press release stating its belief that *McCollum* “invalidated all systems of released time religious education,” including the New York system under which “250,000 New York City pupils are released during school hours for religious instruction away from school.”¹¹⁸ Accordingly, the ACLU indicated it would pursue litigation to enforce its view of *McCollum*. That same day, the New York City Superintendent of Schools virtually guaranteed litigation over the New York system when he announced that he did not believe *McCollum* had any bearing on the New York system.¹¹⁹ The school board’s attorney proved prescient when he said he “thought it would take another Supreme Court decision to ‘settle this for New York City.’”¹²⁰ Meanwhile, the Synagogue Council of America and the NCRAC joined the ACLU in expressing the view that, after *McCollum*, the New York City plan was also unconstitutional.¹²¹ Leo Pfeffer, of the AJC, attacked the distinction that the Champaign plan involved the use of public school classrooms, whereas the New York City plan did not. He argued that, given the amicus brief by the Protestant Council of New York, the Justices were familiar with the differences between the two systems and, notwithstanding Justice Frankfurter’s disclaimer, had the Court “intended to limit its decision to the Champaign pattern it would . . . expressly have said so.”¹²²

¹¹⁷ Expect Fight Here on ‘Released Time’, N.Y. Times, Mar. 9, 1948, at 20.

¹¹⁸ Press Release, ACLU, ACLU Holds McCollum Decision Bans All Religious Teaching Plans (Mar. 10, 1948).

¹¹⁹ Court Religious Ban Held Not to Affect City Schools, N.Y. Times, Mar. 10, 1948, at 1.

¹²⁰ Id.

¹²¹ Id.

¹²² Leo Pfeffer, Letter to the Editor, Religion in the Schools, N.Y. Times, Mar. 12, 1948, at 22.

B. The Role of Atheism

As school districts and groups opposed to released time programs debated the significance of the location of the instruction, either on school grounds as in the Champaign plan or off-grounds as in the New York plan, the rest of the country reacted to the Court's decision as well. As mentioned above, newspaper editorials largely supported the decision, but they also prompted responses critical of the Court. Many of the letters to the editor highlighted that Vashti McCollum was an atheist.¹²³ Obviously not everyone cited McCollum's atheism as cause for concern: recall she had the support of the Southern Baptist Convention. In response to a letter to the editor stressing Mrs. McCollum's atheism, one writer addressed the issue: "Because of Mrs. McCollum's avowed atheism, many persons . . . have lost sight of the real issue behind the court's decision. The real reason is that the Constitution provides for the complete separation of church and state." The writer concluded, "[i]t is the will of the American people, rather than the mere whim of Mrs. McCollum, that has wrought this decision."¹²⁴

Others joined in downplaying McCollum's atheism as the motivation for her suit. These groups claimed atheism had nothing to do with the lawsuit or the outcome, that the Court's decision was merely an affirmation of the traditional American position on the separation of church and state and that it was actually in support of religion. The ACLU's legal counsel said, the "fact that Mrs. McCollum happens to be a rationalist or atheist is of no significance whatever. . . . The principle decided by the Supreme Court would have been just as applicable whether she were a Protestant or a Catholic, a

¹²³ See, e.g., Dan J. Loden, Letter to the Editor, *Atheism and the Courts*, *Balt. Sun*, Mar. 12, 1948, at 16; Mrs. E.B. Stout, Letter to the Editor, *Religion in Schools*, *Wash. Post*, Mar. 15, 1948, at 8.

¹²⁴ Dorothy W. Frohman, Letter to the Editor, *Wash. Post*, Mar. 19, 1948, at 22.

Christian or a non-Christian, a believer or a non-believer.”¹²⁵ The Institute on Church and State wrote: “Finally, it should be emphasized that the *McCollum* decision is in the interests of religion and not opposed to it. The men who wrote the First Amendment were, and the members of the Supreme Court today are, the friends and not the enemies of religious conviction.”¹²⁶ And Dr. George E. Beauchamp of the Washington Ethical Society wrote that, because of the Court’s decision, “[t]he home and church will assume fully the responsibilities rightfully theirs.”¹²⁷

Despite these claims, the connection between *McCollum*’s atheism and the Court’s decision were continually made. Monsignor John S. Middleton, secretary for education of the Archdiocese of New York, declared that “[t]hrough the ‘articulate atheism of one parent’ the ‘rights of all parents to freedom of religious education for their children are in danger of being invaded in this country.’”¹²⁸ In fact, he attributed the Court’s decision to *McCollum*’s atheism saying, “[t]he atheism of one parent wrung from the Supreme Court of the United States the dangerous and disconcerting decision on released time in the notorious Champaign case.”¹²⁹ In addition, people connected atheism with the communist and totalitarian threats of the day. Just four days after the *McCollum* decision, one *Washington Post* reader wrote against the activities of POAU on these grounds:

It was with much personal distaste that I read the March 8 account of the latest doings of the Protestants and others united for separation of

¹²⁵ Press Release, *supra* note 118.

¹²⁶ Dr. William H. Kilpatrick, Dr. Vivian T. Thayer, et al., Letter to the Editor, Religion in the Schools, N.Y. Times, Apr. 15, 1948, at 24.

¹²⁷ Dr. George E. Beauchamp, Letter to the Editor, Wash. Post, Mar. 19, 1948, at 22.

¹²⁸ Parents Are Urged to Defend ‘Rights’, N.Y. Times, Sep. 13, 1948, at 15.

¹²⁹ *Id.*

church and state [sic]. The action seems to me to be extremely short-sighted when read in the context of your front page. With the Communist threat to Europe increasing every day why is it that here at home there is so much sniping at the only group which is really united against the threat?

In fact it seems almost diabolical that the target is religious education which is our strongest bulwark against atheistic communism.¹³⁰

This sentiment existed prior to *McCollum*, but it became more prevalent and played a key role in future litigation over the New York released time program.¹³¹

Though Mrs. McCollum's atheism was widely reported before she appealed her lawsuit to the Supreme Court, this did not prevent religious organizations or others from supporting her cause, and largely doing so without any reservations or public disclaimers.¹³² Mrs. McCollum's atheism simply was not that important an element the

¹³⁰ Edward Mitchell, Letter to the Editor, Wash. Post, Mar. 12, 1948, at 22.

¹³¹ See *Delaying of Peace is Laid to Russia*, N.Y. Times, May 19, 1947, at 19 ("The Archbishop at the breakfast denounced the proposal to eliminate 'released time,' Terming the proposal 'distinctly pro-Nazi,' . . . an attack upon the religious freedom upon which this country was founded' and that far from severing religion and state, it would 'lead to Government-sponsored religion as in a totalitarian state.'") Part of Charles Tuttle's amicus brief on behalf of the Protestant Council of the City of New York argued that the New York released time plan was an "antidote" to the "secularism and her twin-sister materialism" that were responsible for the "disorders and tragedies of our time." Tuttle argued that the New York plan allowed parents to fulfill "what they regard as their duty not only toward their children but toward the system of public education itself and toward democracy." *Petition and Brief for The Protestant Council of the City of New York as Amicus Curiae Supporting Appellees at 19–26, McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948) (No. 90). The Supreme Court's disregard for this argument in 1948 and its recognition of it, in the form of Douglas's appeal to religion, in 1952 suggest that circumstances had changed in the years between *McCollum* and *Zorach*, and that those changes affected the Court.

¹³² See *Camel's Nose?*, supra note 72 ("Mrs. Vashti McCollum, 33, an angry atheist of Champaign, . . . planned to appeal to the U.S. Supreme Court. . . . Religion, fumed Mrs. McCollum, is 'a racket based on fear and prejudice and a chronic disease of the imagination contracted in childhood.'"); supra note 83 and accompanying text. But see *Brief for the Synagogue Council of America and the Nat'l Cmty. Relations Advisory Council as Amici Curiae Supporting Appellant at 5–7, McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948) (No. 90) ("We wish to make clear our regret that the appellant chose to use this case as a medium for the dissemination of her atheistic beliefs and injected into the record the irreligious statements it contains. We wish not only to dissociate ourselves completely from the anti religious views of the appellant, but wish also to deplore the fact that the sponsors of the original petition chose this case as a means of inscribing such anti-religious matter on the public record and for confusing the basic issue in this case by draggin into it the unrelated issues of atheism versus religion."). Insofar as this one example, among all of the briefs, of concern regarding McCollum's atheism suggests, contrary to this thesis, that atheism was a significant concern in 1948, the Court's apparent disregard for the amici's concern in 1948

case. The Champaign School Board was even willing to argue in their brief to the Supreme Court that their released time plan would permit “[a]dditional groups, even atheists, . . . to participate in the program on the same terms [as the Protestant, Catholic, and Jewish groups].”¹³³ Similarly, in December 1947, the ACLU issued a press release publicizing its amicus brief in support of McCollum’s position. The ACLU felt no pressure to include a statement distancing itself from McCollum’s atheism.¹³⁴ Likewise, in its March 10, 1948, press release, the Union did not distance itself from any perceived attack on religion, although it did downplay McCollum’s atheism.¹³⁵ In contrast, following the *McCollum* decision, as the connection between atheism and communism became a focus, the ACLU, in opposing released time, always included a statement clarifying they were not opposed to religion, but simply opposed to religion in public schools.¹³⁶

and its acknowledgement in the form of Douglas’s appeal to religion in 1952 strengthens the claim that something changed in the years between *McCollum* and *Zorach* and the Court was affected.

¹³³ Appellees’ Statement Opposing Jurisdiction and Motion to Dismiss at 6, *McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948) (No. 1374).

¹³⁴ Press Release, ACLU, For Release Sunday, December 7, 1947. In its amicus brief of over forty pages, the ACLU did include the following sentence: “By this brief we do not, expressly or impliedly, criticize religion or religious sects or private denominational schools.” Brief of American Civil Liberties Union as Amicus Curiae in Support of Appellant at 2, *McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948) (No. 90). The limited nature of this disclaimer when compared to the disclaimers employed following the *McCollum* decision, see note 136 *infra*, supports the claim that the ACLU was not concerned about being associated with atheism.

¹³⁵ Press Release, ACLU, *supra* note 118.

¹³⁶ As a general example, see the ACLU Press Release of November 1, 1949, concerning the ACLU position on released time, stating:

The [ACLU] statement denied any interest on the part of the New York Committee in advancing the opinions of “free thinkers”, agnostics “or other groups or individuals skeptical of religious claims and values, and no desire to interfere in any way with the beliefs of churches or other religious organizations.”

It added that members of the ACLU are deeply interested in the promulgation of religious teachings and spirit, “but they do not believe such inculcation has any place in school buildings or on school time.” The statement pointed to the fact that the chairman of the New York Committee, and Dr. John Haynes Holmes, chairman of the Board of Directors of the National ACLU, were both clergymen.

As discussions regarding a test case to challenge the New York released time program went forward, the ACLU was acutely aware of avoiding the atheism label then being applied to the *McCollum* decision. The concern with the stigma attached to atheism quickly expanded to include concern over the communist and totalitarian labels that were concomitant with atheism.

As noted earlier, immediately after the Court handed down the *McCollum* decision, groups opposed to released time announced their intention to bring a test case in New York. The Society of Free Thinkers, a group of atheists and rationalists, announced, through Arthur C. Cromwell, president of the Rochester chapter and father of Vashti McCollum, their intention to bring court action.¹³⁷ On May 5, 1948, the Freethinkers of America brought suit through Joseph Lewis, their president, against the Commissioner of Education of the State of New York and the Board of Education of the City of New York.¹³⁸

The ACLU had the opportunity to join a Humanist-Freethought sponsored lawsuit and, presumably, they could have joined the Lewis suit given that Arthur Garfield Hays, counsel to the ACLU, served in a private capacity as Lewis's attorney.¹³⁹ The ACLU did not pursue either option because of their desire to avoid being associated with atheists. Minutes from an informal meeting held by the ACLU on March 25, 1948, to set forth a strategy for developing a test case establish that the ACLU, UPA, PEA, and the AJC shared the view that they would need Protestant support in challenging the New York

¹³⁷ Court Religious Ban Held Not to Affect City Schools, *supra* note 119.

¹³⁸ Suit on 'Released Time', N.Y. Times, May 6, 1948, 1948, at 25.

¹³⁹ Letter from Sherman D. Wakefield, Managing Editor, Progressive World, to Roger Baldwin, Director, ACLU (Apr. 25, 1948); Letter from Clifford Forster, Staff Counsel, ACLU, to David Ashe, United Parents Association, et al. (May 5, 1948).

released time plan.¹⁴⁰ This reflected both a concern with avoiding the stigma of association with atheists, as well as recognition that released time was still seen by many as a Catholic issue. The ACLU also chose not to join the Lewis suit because it was brought in Lewis's capacity as a taxpayer, rather than as a parent with a child subject to released time education, which they thought was essential.¹⁴¹ Later, the ACLU made explicit its desired plaintiff. In a letter to David Ashe of the UPA, the ACLU asked him to have his group look "for a good solid white Protestant plaintiff with a child or children in one of our public schools, preferably in New York County."¹⁴²

Not only did the ACLU decide not to join the Freethinkers suit, they sought to distance themselves, despite the fact that their counsel, Arthur Garfield Hays, was representing Lewis. They also believed they were in competition with the Lewis suit. In late May, 1948, the ACLU decided, because of the Lewis suit, "to rush its case as quickly as possible" and to make "[e]very effort . . . to secure a Protestant plaintiff with the question of a Jewish co-plaintiff representing the Jewish community to be held open for a later discussion."¹⁴³ On May 28, 1948, the ACLU, UPA, AJC, and others announced to the press their plans to file an independent suit challenging the constitutionality of the New York program. In a strong joint statement, the groups "stressed that they were disassociating themselves from the action by Mr. Lewis. His 'sole motive in bringing the suit' they charged, 'was to further his anti-religious propaganda.'"¹⁴⁴

¹⁴⁰ Minutes of an Informal Meeting on Released Time (Mar. 25, 1948).

¹⁴¹ *Id.*

¹⁴² Letter from Clifford Forster, Staff Counsel, ACLU, to David Ashe, United Parents Association (May 12, 1948).

¹⁴³ Minutes of Informal Committee on Released Time Meeting (May 27, 1948).

¹⁴⁴ Freethinkers Hit Religious Program, N.Y. Times, May 29, 1948, at 15.

During the oral arguments for *Lewis*, it became apparent that the ACLU's concern with the liability of the atheist label was not without merit and the ACLU took note of its eventual opposition's tactics. Leo Pfeffer reported on the argument to the Joint Strategy Committee on Released Time Test Case in a memorandum. According to Pfeffer, counsel for the City of New York "spoke at considerable length about the evils of Hitlerism, Stalinism, Communism, atheism and the Godless state."¹⁴⁵ Pfeffer also reported that Charles Tuttle, on behalf of the New York Coordinating Committee for Released Time, argued "that secular education is very bad, brings on ware [sic], crime, etc." Tuttle also "waved at the American flag and said that Nazism is a very bad thing and that is where irreligion will bring you to."¹⁴⁶ Not only did the attorneys arguing to preserve the New York released time plan stress the connection between atheism and totalitarianism, but they also ignored that Arthur Garfield Hays was functioning in his individual capacity and not representing the ACLU. Tuttle repeatedly invoked the ACLU's name and indicated they ought to support the New York plan instead of opposing it.¹⁴⁷ The oral argument in *Lewis* served as a preview of the arguments that would eventually be used against the ACLU in *Zorach*. This preview reinforced the importance of finding the proper plaintiff in order to avoid the "irreligious" and "totalitarian" labels.¹⁴⁸

¹⁴⁵ Memorandum from Leo Pfeffer to Joint Strategy Committee on Released Time Test Case (June 2, 1948).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Of course, the ACLU also realized that its opposition would distinguish the New York plan from the Champaign plan at issue in *McCollum* on the grounds that the religious instruction under the New York plan occurred off of school grounds, while the religious instruction under the Champaign plan used occurred on school grounds. See notes 118–22 and accompanying text.

A letter from the PEA confirms the concern with which the ACLU approached choosing a prospective plaintiff. Frederick C. McLaughlin, the Educational Director of the PEA, wrote Clifford Forster, Staff Counsel for the ACLU, to suggest a potential plaintiff, Mr. Tessim Zorach. McLaughlin related that Zorach was active in the Episcopal church and his son attended a public school with a released time program. Furthermore, Zorach understood the issue and was “prepared to withstand whatever adverse propaganda is forthcoming.”¹⁴⁹ McLaughlin was also careful to reveal that Zorach did not have contact with “left-wing groups” and that he was “presently employed by the Eastern Cooperative Wholesale, and coops have been one group shunned and disdained by the Communists in this country.”¹⁵⁰ The concern over these details indicates the ACLU anticipated arguments similar to those in the Lewis oral argument and had to ensure they would not be open to such attacks, or those levied against McCollum after her suit.

IV. *ZORACH V. CLAUSON* AND THE SPECTER OF COMMUNISM

As of July 14, 1948, the ACLU and the other groups agreed that the pleadings for *Zorach* would not set forth organizational support for the suit; thus, one attorney, Kenneth W. Greenawalt, would represent Zorach. While some members of the committee opposed the addition of a Jewish co-plaintiff, it was still an open question.¹⁵¹ On July 27, 1948, the suit was filed with the addition of a Jewish co-plaintiff, Mrs. Esta

¹⁴⁹ Letter from Frederick C. McLaughlin, Educational Director, PEA, to Clifford Forster, Staff Counsel, ACLU (June 16, 1948).

¹⁵⁰ *Id.*

¹⁵¹ Summary of Conclusions Reached at Strategy Committee Meeting for Released Time Case Held at Frank Karelsen’s Office (July 14, 1948). See also *Zorach v. Clauson*, 99 N.Y.S.2d 339, 339 (N.Y. Sup. Ct. 1950).

Gluck. As the *New York Times* reported, both Zorach and Gluck were parents of children who attended public schools with released time programs, as well as Episcopal and Hebrew Sunday schools, respectively.¹⁵²

Over the course of the next two years, while the *Zorach* suit languished in the New York trial court, the Freethinker's suit was dismissed because Lewis's petition failed "to state facts sufficient to constitute a cause of action."¹⁵³ On November 15, 1948, the New York Supreme Court, the trial court, held that Justice Frankfurter's opinion in *McCollum* specifically stated that it was not intended to reach all released time programs, and that Justice Black's opinion of the Court was reasonably interpreted not to reach all programs. Thus, on the facts pleaded by Lewis, there were sufficient differences, namely the location of the instruction, between the New York City plan and the Champaign plan to determine that the *McCollum* ruling did not apply.¹⁵⁴ Lewis and his attorney, Hays, initially appealed, but after they received pressure from the AJC and ACLU they withdrew the case in favor of the "more factual" *Zorach* suit.¹⁵⁵

From July 1948, when the *Zorach* suit was first filed, until June 1950, when the trial court ruled against Zorach, the public debate over released time education continued with both sides making the expected arguments. Opponents of released time programs argued that *McCollum* had declared all such programs unconstitutional, while advocates of released time posited that the location of instruction was a relevant distinction that left

¹⁵² Religious Program Brings School Suit, N.Y. Times, July 28, 1948, at 25.

¹⁵³ State System of Releasing Pupils For Religious Training Is Upheld, N.Y. Times, Nov. 16, 1948, at 1.

¹⁵⁴ Id.

¹⁵⁵ ACLU Weekly Bulletin #1382 (Apr. 18, 1949); Letter from Shad Polier, AJC, to Arthur Garfield Hays, Lewis' Attorney (Mar. 25, 1949).

the New York plan, and others, within the constitutional bounds set forth in *McCollum*.¹⁵⁶

Opponents countered by focusing on Justice Black's closing paragraph in *McCollum*, claiming that all released time programs, regardless of the location of instruction, assisted religion "through the use of the state's compulsory public school machinery."¹⁵⁷ As Professor Edward S. Corwin said, in *McCollum* the Court attempted to solve a "teasing problem," but instead "created great uncertainty."¹⁵⁸

As the two sides debated the reach of *McCollum* during this time, the wisdom of released time, apart from its constitutionality, was also at the center of the debate.

Opponents of released time asserted that it was divisive and destroyed the unity required to sustain America's democracy.¹⁵⁹ Advocates of released time pointed to a growing American secularism that had to be countered or the country risked becoming a Godless, totalitarian or communist state.

An exchange typifying this debate occurred at the regional conference of the American Association of School Administrators, a department of the National Education Association. Dean Ernest O. Melby of the New York University School of Education spoke against released time education while Dr. Paul C. Reinert, President of St. Louis University, advocated on its behalf. Melby declared: "We must have a total educational experience for children that breathes and lives the ethical and moral basis for our

¹⁵⁶ See George Dugan, Weekday Classes in Religion Go On, N.Y. Times, Feb. 11, 1949, at 21 (reporting that the International Council of Religious Education declared that "released-time instruction as a 'generalized conception' is legal provided it is held off the school premises").

¹⁵⁷ 333 U.S. at 212; see Editorial, Church and State, Wash. Post, Nov. 17, 1948, at 10.

¹⁵⁸ Decision on Study of Religion Scored, N.Y. Times, Oct. 15, 1948, at 20.

¹⁵⁹ See Editorial, Secularism, Wash. Post, Nov. 28, 1948, at B4; Mrs. Meyer Decries Free School Time, N.Y. Times, Dec. 5, 1948, at 59 (asserting that school boards allowed released time programs "lest they be accused of being 'Godless' if not communistic"). But see Charles A. Hart, Letter to the Editor, Released Time, Wash. Post, Dec. 18, 1948, at 8.

democracy. Released time for religious teaching . . . reminds pupils of their differences from one another and frustrates teachers and pupils in building an integrated education program.”¹⁶⁰ In response, Reinert claimed that opposition to released time was founded on a dubious understanding of the First Amendment and that, if that view was accepted, then one must concede that the state could dictate all education, which “is tantamount to opening wide the door to statism or totalitarianism.”¹⁶¹

A radio show in New York titled *Ethical Issues in the News* reported on the released time issue and offers another example of the stock arguments made by both sides. The show noted that some “have viewed [released time education] in terms of fighting anti-democratic ideas, hoping that religion would arouse an awareness of higher powers . . . to offset statism, and a respect for the individual over and against totalitarian controls. Some have considered it a way of fighting Communism; some as a way of resisting Godlessness and immorality.” It also noted that opponents of released time were “accused of being anti-religious and Godless, and neglectful of moral values.”¹⁶² In contrast, opponents of released time “hold that there is a crucial question of democratic freedom and democratic institutions involved.” It was on First Amendment grounds that the Supreme Court ruled in *McCullum* and these are the same grounds relied upon in the fight against the New York released time program. The program continued:

This does not for one moment mean that the opponents of the program are anti-religious or against the religious education of children. They are merely trying to protect the religious freedom of the child and the home, and at the same time protect the integrity of the public educational system

¹⁶⁰ Benjamin Fine, *Educators Debate Place of Religion*, N.Y. Times, Mar. 2, 1949, at 30.

¹⁶¹ *Id.*

¹⁶² Algernon D. Black, *Religious Instruction and the Child*, *Ethical Issues in the News*, June 19, 1949, WMCA, 10:30 PM.

for the sake of the children and for the sake of the our democracy whose future rests on public education.¹⁶³

This focus on secularism and, depending on one's perspective, its importance in building the unity necessary for democracy or its role in encouraging the Godlessness that leads to totalitarianism and communism, gained salience with the events of 1949 and 1950. In October 1949, Mao Zedong proclaimed the establishment of the People's Republic of China as the Communists had overcome the last remnants of Nationalists on mainland China. That same year, the Soviet Union developed its own nuclear bomb. In February 1950, Senator Joseph McCarthy made his famous speech declaring the presence of known Communists working and shaping policy in the State Department. And with the conviction of Alger Hiss in his second trial in January 1950, the American people were faced with the growing specter of international communism, as well as the domestic infiltration of communism.

By 1950, these events, and others, had created what one historian has called an "atmosphere of fear."¹⁶⁴ This fear of communism and its handmaiden atheism had certainly been present prior to 1949; however, with the events of 1949 and 1950, communism and atheism became greater concerns and their influence is evident in the debates over released time education and, specifically, in the New York trial court's ruling in *Zorach*. Justice DiGiovanna dismissed the *Zorach* suit as a matter of law, citing the earlier decision in *Lewis*, which distinguished the New York plan from the Champaign plan at issue in *McCollum*.¹⁶⁵ The court again cited to the language in

¹⁶³ *Id.*

¹⁶⁴ Eric Foner, *The Story of American Freedom* 255 (1998).

¹⁶⁵ *Zorach*, 99 N.Y.S.2d at 345–46, 349.

Frankfurter's concurrence disclaiming *McCollum* as a ruling that reached all released time plans.¹⁶⁶ Here, it seemed, Burton's desire to exclude the New York plan from *McCollum*'s reach was being realized. DiGiovanna, however, did not simply rule against *Zorach* on constitutional grounds. He also attacked the wisdom of prohibiting released time education, writing:

To permit restraint upon State and local educational agencies which are lawfully authorized to grant released time to our young citizens who wish to take religious instruction would constitute a suppression of this right of religious freedom. . . . It would be a step in the direction of and be consonant with totalitarian and communistic philosophies existing in jurisdictions wherein atheism and the suppression of all religions are preferred to the freedom of the individual to seek religious instruction and worship. Such would be the result or conclusion if the relief sought herein by the petitioners was to be granted.¹⁶⁷

Within the group of organizations that organized the *Zorach* suit, DiGiovanna's opinion was a clear defeat and one that Leo Pfeffer attributed to their inability to counter the public relations campaign waged by Charles Tuttle and the Greater New York Coordinating Committee on Released Time. In a letter to Kenneth W. Greenawalt discussing strategy for the appeal, Pfeffer expressed his desire to get a positive article in the *New York Times*. He continued:

You know how deeply I feel that decisions such as Justice DiGiovanna's are made possible only because of the bad public relations which the attack on released time has evolved [sic], to a large extent as a result of the activities, on one hand, of Joseph Lewis and, on the other hand, by Charles Tuttle, both of whom are anxious to make it appear that the fight against released time is a fight of atheism against religion.¹⁶⁸

¹⁶⁶ Id. at 347–48.

¹⁶⁷ Id. at 344.

¹⁶⁸ Letter from Leo Pfeffer to Kenneth W. Greenawalt (Aug. 28, 1950).

Greenawalt agreed that public relations were important and that their “opponents are very active in building up good press for their position.”¹⁶⁹

With the advent of the Korean War on June 25, 1950, only six days after DiGiovanna’s ruling, the public relations task for Zorach and the ACLU became more difficult. The conflict between the Communist North Koreans and the South Koreans, with Americans fighting alongside, would last longer than the entire appellate process as *Zorach* made its way to the United States Supreme Court, with the Court finally issuing its opinion in April 1952. The ACLU and AJC amici curiae briefs to the Supreme Court of New York, Appellate Division are evidence that both organizations recognized the importance of addressing the claim that their opposition to released time education was evidence of anti-religious and pro-communist views. In their first point, the AJC attempted to link their opponents with the communists by pointing out the similarity between one of the arguments used by the Board of Education and that of communists in a recent “communist trial.”¹⁷⁰ Half of the brief sought to rebut Justice DiGiovanna’s claim that prohibiting released time would be a step toward an atheistic communist or totalitarian philosophy. To begin with, the AJC asserted its own religious ties, including a list of thirty-five Jewish organizations represented by their amicus brief.¹⁷¹ They then pointed to the religious organizations that supported McCollum’s lawsuit, including the Southern Baptists Convention, three other Baptist Conventions, and the Seventh Day

¹⁶⁹ Letter from Kenneth W. Greenawalt to Leo Pfeffer (Aug. 29, 1950).

¹⁷⁰ Brief for The American Jewish Committee, et al. as Amici Curiae Supporting Appellants at 12–13, *Zorach v. Clauson*, 278 A.D. 573 (N.Y. App. Div. 1951).

¹⁷¹ Id. at 14–17.

Adventists.¹⁷² Finally, the brief asserted that the lower court's implication that opponents of released time supported communism was rebutted by the "reputation and character of the organizations which have opposed released time in New York City." These are, the brief continued, "all . . . responsible organizations whose attachment to democracy and opposition to communism are long established."¹⁷³

The ACLU, in its Statement of Interest of Intervenors, set forth a disclaimer making clear its opposition to communism. It stated that "[a]ll members of the Civil Liberties Union are democrats. . . . [T]he Union . . . is opposed to any form of the police state or the single-party state, or any movement in support of them, whether Fascist, Communist, or known by any other name."¹⁷⁴ The necessity of these disclaimers and arguments persisted throughout the appellate process. To the New York Court of Appeals, the ACLU argued that support for separation of church and state was not necessarily motivated by irreligion.¹⁷⁵ Likewise, the AJC reprised its claims that it was not atheistic, nor supportive of communism or totalitarianism, and regardless, these were false issues distracting from the basic question of separation.¹⁷⁶ Similarly, both the brief and reply for the appellants, Zorach and Gluck, consisted largely of counter arguments to DiGiovanna's claim that granting their relief would be a step toward communism or totalitarianism. They also devoted significant space to countering the respondents'

¹⁷² Id. at 22–23.

¹⁷³ Id. at 28–29

¹⁷⁴ Brief for The Committee on Academic Freedom of the ACLU & The New York City Civil Liberties Committee as Amici Curiae Supporting Appellants at 3, *Zorach v. Clauson*, 278 A.D. 573 (N.Y. App. Div. 1951).

¹⁷⁵ Brief for The Committee on Academic Freedom of the ACLU & The New York City Civil Liberties Committee as Amici Curiae Supporting Appellants at 2, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951).

¹⁷⁶ Brief for The American Jewish Committee, et al. as Amici Curiae Supporting Appellants at 17–29, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951).

accusations of irreligion and attempts to associate them with Lewis and the atheistic Free Thinkers Society.¹⁷⁷ Upon announcing that they would appeal their case to the United States Supreme Court, Kenneth W. Greenawalt repeated this mantra and disclaimed any anti-religious intentions.¹⁷⁸

Thus, the issue of released time education, which began with *McCollum* as a lawsuit to keep religion out of schools, and, in light of *Everson*, took on the issue of Catholic attempts to receive government funds for parochial schools, became focused on atheism as the vanguard for communism and totalitarianism. This transition is key to understanding the United States Supreme Court's differing opinions in *McCollum* and *Zorach*. This is not to say that by 1952 Americans were no longer concerned with the growing influence of the Catholic Church and its, at best, tepid support for what many understood as the separation of church and state. The POAU continued to criticize Catholic policies, especially its continued efforts to receive federal funds for its parochial schools.¹⁷⁹ And in 1949-1950, the book form of Paul Blanshard's critical articles in *The*

¹⁷⁷ Brief on Behalf of Petitioners-Appellants at 10-14, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951); Reply Brief for Petitioners-Appellants at 22, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951). Charles Tuttle used the tactic of associating the ACLU with Joseph Lewis throughout the history of the New York released time debate. At oral argument in the *Lewis* case he asserted the ACLU was involved through Arthur Garfield Hays. At oral argument in the Supreme Court Appellate Division he again linked the ACLU through Hays to Lewis. Letter from George Soll, Associate Staff Counsel, ACLU, to R. Lawrence Siegel (Nov. 30, 1950). Finally, he used his brief to the New York Court of Appeals to associate *Zorach* and Gluck with Lewis and the atheism of the Free Thinkers Society. Reply Brief for Petitioners-Appellants at 24, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951).

¹⁷⁸ Highest Court to Get Released Time Issue, *N.Y. Times*, July 14, 1951, at 6.

¹⁷⁹ See, e.g., 1,400 Attend Rally on Religious Liberty, *N.Y. Times*, Apr. 23, 1952, at 31 ("Dr. Dawson also censured Catholics for attempts, he said, to break down American practices separating church and state, citing efforts to obtain public support for parochial schools, parochial school bus service, and church hospitals."); Kenneth Dole, Religious Teaching in Schools Hit, *Wash. Post*, Apr. 25, 1952, at B1 (POAU leaders warned "that 'released-time' religious instruction in public schools is a threat to liberty, and plays into the hand of the Catholic hierarchy.").

Nation, American Freedom and Catholic Power, proved to be a best-seller.¹⁸⁰

Greenawalt even attempted to use the lingering suspicion of Catholicism in his brief to the New York Court of Appeals. He noted the irony of “certain religions . . . opposed on principle to separation of Church and State, and to the secular public school system and to non-sectarian education generally,” that is, Catholicism, asserting the principle of *Pierce*, parental choice, in its argument in support of released time. Greenawalt wrote that “[t]he State, in this country, accords parents far greater rights and freedom in the selection of schools for their children than do some of the religious organizations to which such parents belong.”¹⁸¹ That such appeals to the Catholic disdain for public education, which were so important in Paul Blanshard’s articles, carried little weight with the New York court suggests that concerns about Catholicism may have diminished since *McColum* was decided.

In fact, with the rise of communism, Catholics became a more sympathetic group, even an ally in the struggle against communism. Pope Pius XII was known as an avid anti-communist and in 1949 he issued a decree excommunicating all Catholics belonging to the Communist party.¹⁸² Catholic leaders also began to issue statements highlighting the common cause among Catholics, Protestants, and Jews in fighting communism. At an annual breakfast of Catholic teachers, one leader declared that the world was currently “[t]wo minds at war, the mind of the world and the mind of Christ. On one side you have the Communists and on the other side are the Catholics, Protestants and Jews who believe

¹⁸⁰ McGreevy, *supra* note 20, at 166.

¹⁸¹ Reply Brief for Petitioners-Appellants at 26, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951).

¹⁸² Thomas Bokenkotter, *A Concise History of the Catholic Church* 351, 353 (Revised & Expanded ed. 1990).

in God.”¹⁸³ Another leader speaking to Catholics claimed that Catholic interests and American interests were in line with one another on the subject of combating communist aggression.¹⁸⁴ The American Bishops themselves stressed that Catholics were part of a united American opposition to the atheistic communism spreading around the world in 1950. Not only did the Bishops claim that American Catholics stood with the rest of America, but they stood with them in the most contentious area: education. In their statement on the education of children, the American Bishops announced: “In the present grim international struggle, the American people have resolutely championed this cause of human freedom. We have committed ourselves to oppose relentlessly the aggression of those who deny to man his God-given rights and who aim to enslave all mankind under the rule of Godless materialism.”¹⁸⁵ The Bishops went on to explicitly tie their support of the fight against this materialism to their support for released time education, arguing that the state should not be indifferent to religious education; democracy depends on morality grounded in religion, therefore, the state ought to support released time religious instruction.¹⁸⁶

At the same time Catholics emphasized their unity with all Americans in fighting atheism and communism, Protestants were being called to fight communism by instilling religion. At the Protestant Teachers Association meeting in 1950, teachers were told that the real conflict between the West and Stalinism, “which is ‘first of all atheism, a

¹⁸³ Teacher Aid Urged in Religious Study, N.Y. Times, Nov. 6, 1950, at 34.

¹⁸⁴ Red Fight Termed Vital for Catholics, Wash. Post, Nov. 16, 1950, at B11 (“Catholic interests are ‘vitaly involved’ in America’s overseas programs combating Communist aggression.”).

¹⁸⁵ Text of the Statement by Catholic Bishops in United States on Education of Children, N.Y. Times, Nov. 19, 1950, at 44.

¹⁸⁶ Id.

profound and rationalized disbelief in God,” was a spiritual conflict. With hundreds of thousands of children coming “‘from homes bare of religion,’ . . . the responsibility for laying the ‘foundations of spiritual power’ in children rests with the public schools.”¹⁸⁷ With both Protestants and Catholics fighting communism, specifically through calls for religious education, it is only reasonable to conclude that tensions between the two groups would decrease. The common enemy of communism gave Catholics and Protestants something to rally around and distract them from each other.

Whereas the Supreme Court considered *McColum* in an atmosphere dominated by the backlash against the *Everson* decision and general suspicion of Catholicism and its interaction with American public schools, the Court in 1952 considered *Zorach* in an atmosphere of decreased suspicion of Catholicism, but outright panic over the spread of communism. Justice Hugo Black’s biographer, Roger K. Newman, described the time after McCarthy’s speech and Alger Hiss’s conviction as a time when “‘morale was undermined, initiative stifled, [and] courage throttled.’”¹⁸⁸ Newman contends that “[a]ll most Americans heard” in McCarthy’s speech “was the word ‘Communist,’” which sent a shiver “up the country’s collective spine” as the “‘red hunt’ became the nation’s fixation.”¹⁸⁹ From 1950 on, the Court repeatedly ruled against any party or issue connected to communism. For example, the Court upheld the criminal prosecution of communist leaders under the Smith Act in *Dennis v. United States*,¹⁹⁰ while in *American*

¹⁸⁷ Asia Held Seeking a ‘Practical’ Way, N.Y. Times, Nov. 19, 1950, at 28.

¹⁸⁸ Newman, *supra* note 17, at 400.

¹⁸⁹ *Id.*

¹⁹⁰ 341 U.S. 494 (1951).

*Communications Association v. Douds*¹⁹¹ and *Garner v. Board of Public Works*¹⁹² the Court rejected First Amendment challenges to local and federal laws requiring oaths of allegiance that disavowed the Communist party. The concern with the threat of communism that dominated the country clearly affected the Court, and its ruling in *Zorach* was no different.

Justice Douglas's conference notes from *Zorach* confirm that Catholicism was not an issue, but that the threat of communism and the accusations that this suit was about promoting atheism over religion were important influences. Unlike the *McCollum* conference, none of the justices discussed released time in sectarian terms; there was no mention of Protestantism or Catholicism as there had been in the *McCollum* conference. In fact, it seems there was little discussion at all, except from Chief Justice Vinson and Justice Frankfurter. The Chief Justice focused his comments on whether *Zorach* and *Gluck* had standing to bring the suit, and then distinguished their suit from *McCollum* on the grounds that "school funds and school time are not used" in New York,¹⁹³ though school time clearly was used. Justice Frankfurter, on the other hand, did not discuss the legal issues, but rather how the case and opposition to released time had been presented by religious groups as an attempt to promote atheism and communism. He saw the efforts of the religious groups as a campaign to scare the Court and Americans into accommodating their desire for religious education in the public schools. Justice Frankfurter compared these groups to Senator McCarthy saying, "McCarthyism is a dirty smearing technique—there are other groups who do smear and some of them are

¹⁹¹ 339 U.S. 382 (1950).

¹⁹² 341 U.S. 716 (1951).

¹⁹³ Justice William O. Douglas Conference Notes, Feb. 2, 1952, box 211, No. 431.

religious groups.”¹⁹⁴ Frankfurter’s observation seems correct, at least insofar as Charles Tuttle and others sought to tie *Zorach* to the *Lewis* suit and to the Free Thinkers and their atheistic views.

Not only was Justice Frankfurter unable to convince a majority of the Court that the New York plan was unconstitutional, he was also unable to convince them that “secularism” in the schools was not an issue in the case, that it was simply an attempt to distract from the real issue in *McCollum* and *Zorach*: separation of church and state.¹⁹⁵ Instead of agreeing with Frankfurter, Douglas embraced the notion that striking down the New York released time education plan would encourage secularism in the schools and was tantamount to announcing that the Constitution required the promotion of atheism. Hence, Douglas appealed to the religious nature of America and the Constitution, writing, “[w]e are a religious people whose institutions presuppose a Supreme Being.”¹⁹⁶ In earlier drafts of Douglas’s opinion, he stated this view in even starker terms with an explicit rejection of atheism: “[w]e are a God-fearing people whose every institutions [sic] presuppose not atheism or agnosticism, but a faith in a God.”¹⁹⁷ Douglas also included the following paragraph in a circulated draft of his opinion:

To make the assumption that Church and State must always be at arm's length and never cooperate would be to assume that our government was formed to promote the cause of the atheist and the agnostic; that we are a godless people; that religion is taboo in public institutions; that any weight or support which a teacher or a governor or a mayor gives to a religious program is illegal.¹⁹⁸

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Zorach*, 343 U.S. at 313.

¹⁹⁷ Justice William O. Douglas Pencil Draft of *Zorach v. Clauson* Opinion, box 219, No. 431.

¹⁹⁸ Justice William O. Douglas Desk Copy of *Zorach v. Clauson* Opinion, Mar. 26, 1952, box 219, No. 431. This paragraph was present in the original pencil draft of the opinion as well; it obviously remained until some time after the Desk Copy was edited.

These two explicit denials that the government had to promote atheism demonstrate that Douglas accepted, and was arguing on, the terms set forth by the proponents of released time education, that released time was necessary to combat atheism.

Given the nature of Justice Frankfurter's argument in conference and the statements in Justice Douglas's draft opinions, as well as his published opinion, it is clear that atheism and communism were issues that carried some import with at least some of the justices. By considering released times in terms of the relationship between government and atheism and agnosticism, rather than the relationship between the government and Catholicism or Protestantism, as had been done in *Everson* and *McColum*, the majority acknowledged the changed circumstances in which they decided *Zorach*. Instead of being concerned with Catholic or Protestant influences in the schools, the majority was now concerned with atheism and agnosticism, which cannot be separated from communism and totalitarianism.

CONCLUSION

In the end, the released time program of religious instruction in Champaign was conducted on school property, while the instruction in New York was conducted off of school property. This distinction cannot be denied and was clearly dispositive for Justice Burton. However, the presence of Justice Douglas's appeal in *Zorach* to the religiosity of America suggests that location of instruction was not only irrelevant and unpersuasive to the three *Zorach* dissenters, but that it was also not dispositive for the rest of the majority, save Justice Burton. Thus, this second argument offered by Justice Douglas requires an explanation, as does its implication that some members of the majority were persuaded,

or at least influenced, by the view that ruling against the New York plan was equivalent to requiring the government to support atheism.

This thesis offered an explanation for both. By placing *McCullum* and *Zorach* in their wider historical context, the Court's unwillingness to simply follow *McCullum* as precedent in *Zorach* and the necessity for Justice Douglas's religious argument become apparent. Following *Everson*, the concern surrounding Catholicism and education grew exponentially, making *McCullum* an ideal case to quell fears concerning Catholic involvement in the public schools by strengthening the "wall of separation." While communism was a concern at the time of *McCullum*, its connection to education was not explicit in the debates over released time. Following *McCullum*, however, the rhetoric concerning released time programs shifted and proponents of released time focused on the connection between atheism and communism. In light of the increased fear of communism in the early 1950s, the connection between atheism and communism influenced the public's view of released time, and arguably influenced the Court's view as well, resulting in Justice Douglas's famous statement on American religiosity and the Court's decision to uphold the New York released time plan. Between 1948 and 1952, Americans generally came to believe that communism was a larger threat than Catholicism. Likewise, the Court, in *Zorach*, concluded it was better to be a Catholic than a communist.