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**Introduction**

The First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits state and national laws “respecting an establishment of religion.” Its purpose is to promote religious freedom for all without governmental interference or favoritism. Pursuant to statutory authorization, the New York City Board of Education established a program that allows parents to request that their children be released from public school instruction for religious instruction or devotional exercises for a limited time each day. Students are allowed to leave the school buildings and grounds to go to religious centers for religious instruction or devotional exercises. The same provision makes school attendance compulsory. The students not released stay in the classrooms, and the churches report to the schools the names of children released from public school who fail to report for religious instruction. The regulation further specifies that such programs involve neither religious instruction in public school buildings nor the expenditure of public funds (*Zorach v. Clauson*, 343 U.S. 306, 308-9).

The law was challenged by taxpayers and residents of New York City and whose children attend its public
schools. They contended that both the First Amendment to the United States Constitution and the New York Constitution, Article I section 3, were violated by the released time program. They asserted that the weight and influence of the school is put behind the program for religious instruction. They argued that the public school teachers police the program by keeping tab on the students who are released and by halting classroom activities until the students on leave return from their religious instruction. The plaintiffs also believed that the school was a crutch on which the churches leaned for support in their religious training; that without the cooperation of the schools the “released time” program would be unsuccessful (303 N.Y. 161; 100 N.E.2d 463).

The case that developed in 1952 became known as Zorach v. Clauson (343 U.S. 306). To support their position the plaintiffs cited the 1948 decision of McCollum v. Board of Education (333 U.S. 203) in which the United States Supreme Court four years earlier held that a released time program in Champaign County, Illinois was unconstitutional (Yianilos 199). It found that tax-supported property was being used for religious education and that there was material assistance in the promotion of various sectarian beliefs. The Court therefore held the program was a utilization of the tax-established and tax-supported public school system to aid religious sects in propagating their beliefs, thereby falling within the ban of the Fourteenth Amendment as interpreted in Everson v. Board of Education, 330 U.S. 1 (1947) (American Civil Liberties Union 46).

Majority Opinion

After the McCollum decision, the courts of New York continued to declare the "released time" programs constitutional, contending that the cases could be distinguished on their facts from the McCollum case (Antonis 122). The decision in the McCollum case particularly focused attention on programs of week-day religious education operating in cooperation with the public-school system. The issue in Zorach v. Clauson was whether New York had either prohibited the "free exercise" of religion or had made a law "respecting an establishment of religion" within the meaning of the First Amendment.

There is language in the opinions of the McCollum case which can be used to justify at least two approaches. The first states that all "released time" programs violate the First Amendment. The second states that "released time" programs are not unconstitutional per se, but the facts of each case must be considered to determine whether there is an infringement (R.H. 89). In deciding principal for the case, the Court of Appeals chose the second approach and held that on the facts therein presented, neither the State
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The McCollum case arose when the petitioner challenged the legality of the plan of released time whereby religious teachers employed by the Champaign Council on Religious Education went to public school buildings during the regular hours set apart for secular instruction and then there gave instruction in religion as a substitute for the secular education provided by the compulsory education law (Yianilos 199). It found that tax-supported property was being used for religious education and that there was material assistance in the promotion of various sectarian beliefs. The Court therefore held the program was a utilization of the tax-established and tax-supported public school system to aid religious sects in propagating their beliefs, thereby falling within the ban of the Fourteenth Amendment as interpreted in *Everson v. Board of Education*, 330 U.S. 1 (1947) (American Civil Liberties Union 46).

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Constitution nor the Federal Constitution was infringed upon by the released time program in operation in New York City. The court's opinion addressed these arguments and drew a careful distinction between New York's "released time" program and the McCollum plan. It was pointed out by Justice Douglas that there was no coercion to attend religious instruction and "no religious exercise or instruction is brought to the classrooms of the public schools" (343 U.S. 306, 312). The New York court held that the lesser amount of school support in the New York program constitutionally distinguished it from the Champaign plan, and it considered itself bound by earlier New York precedent upholding a similar program.

The court reasoned that elimination of the program would impair parents' right to direct the rearing and education of their children ("Released Time Reconsidered" 409). Released time is thus attacked as aid and justified as free exercise. By emphasizing the free exercise of religion, the New York court upheld the statute. If the released time program were invalidated, the resulting restraint upon the free exercise of religion would be the inability of parents who so desired to have religious instruction given to their children during one hour of public school time weekly.

**Minority Opinion**

Justice Black, Frankfurter and Jackson each dissented from the majority opinion of the Supreme Court. Justice Black held the opinion that the New York City program was a "combination of Church and State" because of "the use of the State's compulsory public school machinery" (343 U.S. 306, 316). Justice Frankfurter contended that, with the released time program, sectarian education was being substituted for secular education with the cooperation of the City and that the program involved coercion. Justice Jackson joined Justice Frankfurter's opinion and added that the City was virtually rounding up customers for the religious education program (Cord 172).

**The Positions of the ACLU and Robert Cord**

The ACLU believes that the opening words of the First Amendment to the Constitution sets forth a dual guarantee of religious liberty. Both the "establishment clause" and the "free exercise clause" operate to protect the religious liberty and freedom of conscience of all Americans. They further their position stating that one of the fundamental principles of the Supreme Court's Establishment Clause jurisprudence is that the Constitution forbids not only state practices that "aid one religion... or prefer one religion over another," but also those practices that "aid all religions" and thus endorse or prefer religion over non-religion (Lynn 1-3, 67). Regarding released time education, the ACLU has taken the position that schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend; however, schools may not allow religious instruction by outsiders on premises during the school day (ACLU, "Religion in Public Schools").

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Robert L. Cord, a Professor of Political Science at
Northeastern University, furthers the position taken by the ACLU believing that the separation of Church and State as envisioned by Jefferson and Madison in the First Amendment of the Constitution is consistent with a moderate separationist approach. “The state may choose to use sectarian means to accomplish secular ends as long as it refrains from the assumption of ecclesiastical authority or sectarian partisanship” (Buckley xi). Cord further states that those who agree with the complete independence of religion and government have precluded the making of vital public policy decisions where the Constitution intended them to be made in the free and open arena of the political process. Justice Douglas’s opinion for the Court in Zorach emphasized that the Court is not endorsing the New York program as a wise educational institution but stresses that those value judgments are political considerations that are not relevant to the constitutional issue (Cord, 174).

**Writer’s Position**

Judge Desmond brought the real problem into focus when he stated in the concurring opinion:

The basic fundamental here at hazard is not... any so-called (but nonexistent)... "principle" of complete separation of religion from government... The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the State-mandated minimum of secular learning, and the right of parents to raise and instruct their children in any religion chosen by the parents... Those are true and absolute rights under natural law, antedating, and superior to, any human constitution or statute. (Antonis 123)

Quoting Kent, Judge Desmond pointed out in his concluding sentence, “the Constitution ‘never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law’” (Antonis 124). The first Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the “free exercise” of religion and an “establishment” of religion are concerned, the separation must be complete and unequivocal. However, the First Amendment does not say that, in all respects there shall be a separation of Church and State. It studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.

In support of Judge Desmond’s observation the United States has more than 1,500 different religious bodies, and 360,000 churches, mosques, and synagogues; the U.S. is the most religiously diverse, and one of the most devout countries in the world. Moreover, there is unparalleled religious liberty and sectarian strife is relatively rare. Ninety percent of Americans believe in God; more than half say they pray at least once a day, and church membership has remained at the same level—63 percent of the population according to the Census Bureau—for more than thirty years (ACLU, “Protecting
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Justice William O. Douglas explained it best when writing the opinion of the United States Supreme Court in *Zorach v. Clauson*:

> We are religious people whose institutions presuppose a Supreme Being. We are guaranteed the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. (343 U.S. 306, 313-314)

**Current Situation**

The neutral position taken by the Supreme Court in *Zorach v. Clauson*, has made it impossible for there to be a criterion established in which to base future Court decisions. The Courts have been left to develop criteria with which to determine when "alleged" aid to religion has been in keeping with the Federal Constitution and when it has not (Cord, 180). Developing this criteria has essentially demanded a case-by-case review by the United States Supreme Court of almost every claim pressed in the state and lower federal courts that the Establishment of Religion Clause of the First and Fourteenth Amendments has been violated.

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Works Cited


Todd Lundell

Facts of the Case

The School Board of Minersville, Pennsylvania, under the authority of the state, adopted a resolution making it compulsory to salute the flag and recite the pledge of allegiance as part of a daily patriotic exercise. As members of the Jehovah’s Witnesses religious group, the Gobitis children, ages twelve and ten, believed that saluting the flag was a type of idol worship and that one’s allegiance should only be given to God. In accordance with these beliefs the children refused to participate in either the salute or the allegiance ceremonies. After being expelled from school, their father brought suit to compel the school board to reinstate them, alleging that the expulsion directly violated the First and Fourteenth Amendments. An injunction against the expulsion was granted by the Federal District Court (21 F. Supp. 581) and was upheld by the Third Circuit Court of Appeals (108 F. 2d 683). The case came before the Supreme Court of the United States on April 25, 1940 (310 U.S. 586).