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Constitutional Law—Separation of Church and State—New York Release Time Program

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CONSTITUTIONAL LAW—SEPARATION OF CHURCH AND STATE—NEW YORK RELEASE TIME PROGRAM

In 1940 the New York State legislature enacted a statute under which the Commissioner of Education was authorized to establish rules and regulations to permit the absence of school-children from the State's public schools for religious observances and education. N. Y. Education Law §3210 (1940). Pursuant to this enactment a "released time" program for religious instruction was adopted in the City of New York to be held off the public school premises with public school participation limited to releasing from secular instruction for one hour a week those children willing to take religious instruction. This program was challenged by parents of two children attending public schools in the City of New York as being an establishment of a religion prohibited by the First Amendment to the Constitution which provides:

> "Congress shall make no laws respecting the establishment of religion, or prohibiting the free exercise thereof . . ."

HELD, 6-1, that this is not an establishment of religion under the First Amendment of the Federal Constitution made applicable to the States by the Fourteenth Amendment nor under Art. 1, Sec. 3 of the New York State Constitution. *Zorach* v. *Clauson,* 198 Misc. 631, 99 N. Y. S. 2d 339 (Sup. Ct. 1950); *Aff'd.* 278 App. Div. 573, 102 N. Y. S. 2d 27 (2nd Dept. 1951); *Aff'd.* 303 N. Y. 161, 100 N. E. 2d 463 (1951).

In reaching its decision the New York Court of Appeals was confronted with the decision of *McCullom* v. *Board of Education* 333 U. S. 203 (1948), the Supreme Court's most recent interpretation of the "Establishment Clause." It found the facts of the *Zorach* case sufficiently dissimilar to be of constitutional significance and applied its previous holding in *People ex rel Lewis* v. *Graves* 245 N. Y. 195, 156 N. E. 663 (1927); maintaining that it had not been overruled by the *McCullom* case, *supra.* The Court was comforted by the results of *Everson* v. *Board of Education,* 330 U. S. 1 (1947). *Cochran* v. *Louisiana State Board of Education* 281 U. S. 370 (1930), and *Bradfield* v. *Roberts* 175 U. S. 291 (1899), citing them as instances of state action involving incidental benefits to religion that were not objectionable.

The dictum of Justice Frankfurter's concurring opinion in the *McCullom* case, *supra* at 231 where he said:

> " . . . Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us,

> could not withstand the test of the Constitution; others may be found unexceptionable . . ."

was relied upon as further justification for the present holding.

In *McCullom* v. *Board of Education, supra,* a released time program of religious instruction in the public schools of Champaign, Illinois was involved. The outstanding features and according to the New York Court in the principal case, the grounds for distinction were that religious teachers, employed subject to the approval and supervision of the school authorities by private religious groups, gave religious instructions in public school buildings. The New York system has avoided this in seeking to minimize public aid to the program by conducting it outside of public buildings and by retaining no control over the religious teachers. All that the school does besides excusing the pupil is to keep a record in order to see that the excuses are not taken advantage of and the school deceived. The element both systems have in common is that the public school system supplies pupils to organized religious groups for purposes of religious instructions during hours when the children, under the state's compulsory education laws, are required to be in school. The controversy boils down to whether a program whereby children are released on condition that they attend religious classes, is an establishment of a religion.

The First Amendment contains a dual prohibition; it bars not only laws respecting an establishment of religion, but also laws prohibiting the free exercise of religion. Previous cases involving freedom of religion have dealt with prohibitions against the free exercise of religion. Case law has given these words substantive meaning. *Reynolds* v. *U. S.* 98 U. S. 145 (1878), (polygamy outlawed); *Pierce* v. *Society of Sisters* 268 U. S. 510 (1925), (parochial schools upheld); *Cantwell* v. *Connecticut* 310 U. S. 296 (1940), (licensing of religious solicitors held invalid; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943), (compulsory flag salute in schools outlawed). These citations are by no means exhaustive. Generally it can be deduced from these cases that prohibitions as to the free exercise of religion will be held invalid unless the religious practices sought to be prohibited are contrary to good health and morals.

The meaning of the establishment clause because of the comparative novelty of the concept embodied therein is not clear. The cases dealing with it are replete with citations to historical sources that purport to reveal the intent of the Constitutional Fathers in including the phrase in its present wording in the First Amendment. See generally *McCullom* v. *Board of Education, supra* at 212-232. Legal writers have been active in this respect. Pfeffer, *Religion, Education, And The Constitution,* 8 Lawyers Guild Review 387 (1948); Sutherland, *Due Process And Establishment,* 62 Harvard Law Review 1306 (1949); O'Neill, Religion And Education Under The Constitution (1949).

Few occasions have arisen requiring judicial interpretation of the establishment clause. Only four cases before 1947 have dealt with it, *Watson* v. *Jones* 13 Wall. 679 (1872); *Bradfield* v. *Roberts, supra; Quick Bear* v. *Leupp* 210 U. S. 50 (1908); and *The Selective Draft Law Cases* 245 U. S. 366 (1918), and they have not contributed materially to give the words substantive meaning. Indeed, these cases are of such insignificance to the present problem that Justice Rutledge disregarded their effect entirely in proclaiming in *Everson* v. *Board of Education, supra* at 29, that the case forces the Court ". . . to determine squarely for the first time what was 'an establishment of religion' in the First Amendment's conception . . .". Therefore the two authoritative pronouncements which will guide the Court in the *Zorach* case are the *Everson* and *McCullom* decisions.

In the *Everson* case, *supra* the Court upheld the constitutionality of a New Jersey statute which provided for the expenditure of tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it paid the fares of pupils attending public and other schools. The Court reasoned, at page 16, that a state cannot exclude individual members of any faith ". . . because of their faith, or lack of it, from receiving the benefits of public welfare legislation." The *incidental benefits* to a religious group did not invalidate a program designed to promote the welfare and safety of all schoolchildren. The holding of this case would be of no avail in upholding the *Zorach* decision because the *Everson* decision depends upon the existence of a state statute based upon a public policy not designed primarily to aid religion. A statutory policy pronouncement that a religious program is beneficial to the welfare and spiritual well-being of all school children would come squarely within the constitutional ban.

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another, . . ."

McCullom v. *Board of Education, supra* at 210; *Everson* v. *Board of Education, supra* at 15.

It is submitted that the benefits to religion derived through a released time program are not incidental to any valid public purpose and therefore could not be justified by the results of cases holding incidental benefits to religion valid as in the *Cochran, Bradfield* and *Everson* cases, *supra.*

The proponents of released time systems have not allowed to go unnoticed certain practices in our national government which are examples of aid to religion. Congressional Chaplains invoke a daily blessing, *Rules of the House of Representatives,* Rule VII (1943); *Senate Manual* 6 (1947). Chaplains are commissioned officers, 3 *Stat.* 297 (1816). Religious services are conducted in the armed forces, *Army Reg.* No. 60-5 (1944); *U. S. Navy Reg.,* ch. 1, sect. 2, and ch. 34, sect. 1

and 2 (1920). Compulsory attendance is required of cadets at church services on Sunday at both military and naval academies, *Reg. for the U. S. Corps of Cadets* 47 (1947); *U. S. Naval Academy Reg.* Art. 4301 (b). The decisions, both state and federal, dealing with the establishment problem invariably include such examples as proof of the limited application of that part of the First Amendment. The validity of these practices will not be before the Court when it decides *Zorach* v. *Clauson.* While some can be justified as promoting the free exercise of religion, others may be within the ban of Art. VI, sect. 3 of the Constitution which provides:

> " . . . But no religious test shall ever be required as a Qualification to any office or public trust under the United States."

Such examples lack persuasiveness since they are unchallenged and are not endowed with a judicial blessing of constitutionality.

The New York Court largely distinguished the *McCullom* case on the fact that the religious education there was given on the school premises: They held the *degree of aid* insufficient to make the New York City program unconstitutional. In so doing the Court has disregarded the last paragraph of the majority opinion of Justice Black in the *McCullom* case at 212 where he said:

> "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 school machinery. This is not separation of Church and State."

Accordingly, as indicated by Justice Fuld dissenting in the *Zorach* case, the second ground of the decision does not leave any ground for the operation of the *de minimis* principle, therefore, to hold that whatever benefit to religion derived from the New York City program is not a sufficient degree of aid to be judicially noticeable, the Supreme Court must overrule the holding of the *McCullom* case.

The storm of controversy occasioned by the *McCullom* case has shown its unpopularity among many persons even though that case reaffirmed a fundamental American principle which grew out of necessity arising from the multiplicity of sects in early America. Adherence to the establishment doctrine to the point of overruling the New York City program may further disturb domestic tranquillity, something which the clause sought to prevent.

While this writer believes that legal analysis of the problem requires reversal of *Zorach* v. *Clauson,* the path is technically open to the Supreme Court to affirm if it feels that further extension of the constitutional doctrine of establishment will no longer serve a useful purpose in a changing society.

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