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Church-State and the Zorach Case

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We Are a Religious People

> *"The mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer."* [1]

It is particularly appropriate that Justice Frankfurter enunciated this prophetic proposition in discussing the problem of the proper relationship of Church and State. During the last decade, the Supreme Court has decided three important cases [2] involving the Church-State principle. Each has occasioned sharp dissents by members of the Court; each has aligned lawyers, educators, religious leaders and the public generally into contesting factions; each has created a greater awareness of the significance of the problem and of the necessity for its ultimate solution.

In 1946, the Court was called on to decide whether a New Jersey statute providing for free transportation of parochial, as well as public, school children was constitutional.[3] It was argued that the law was unconstitutional, for it was "an establishment of religion" thus violating the first clause of the First Amendment.[4] This was the first time, in the one hundred and fifty years of its existence, that the Supreme Court had occasion to consider the constitutionality of a state statute in light of the Establishment of Religion Clause. The statute was upheld, but in the process of deciding the case, the Court critically examined the meaning of the pertinent portion of the First Amendment. It concluded that

1 McCollum v. Board of Education, 333 U.S. 203, 212, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

2 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 96 L. Ed. *609 (1952); McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948); Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

3 Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

4 *Id.*, 330 U.S. at 1.

the principle of separation of Church and State was inherent in the First Amendment and that separation meant that: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." [5] The dissenting justices concurred in this conclusion. They differed with the majority in the matter of its application, the latter holding that the granting of "aid" could not be construed so narrowly as to cut off welfare services for children attending parochial schools.[6] The significance of *Everson* was that the first step in the formulation of a "relevant principle" had been taken. It obviously was just the "beginning of the solution" of the problem of the relation of Church and State.

Soon the Court was again confronted with a case involving separation of Church and State. In Champaign, Illinois, the school board had adopted a plan of releasing children from classes during the school day to receive religious instruction, provided that their parents consented to the release. Religious instruction was given by representatives of different sects to the children so released. The instruction was given on the school premises. Those children who were not released continued to pursue their academic studies. Although the Supreme Court of Illinois unanimously upheld this practice,[7] the Supreme Court of the United States shortly, thereafter, decided the *Everson* case with its broad interpretation of the First Amendment. The dissenting justices had indicated that not only transportation of parochial school students, but released time programs were unconstitutional.[8] Accordingly, the *McCollum* case was appealed to the Supreme Court of the United States.

Appellants relied squarely upon the proposition that the released time program was an "establishment of religion"

5 *Id.*, 330 U.S. at 15.

6 *Id.*, 330 U.S. at 16.

7 McCollum v. Board of Education, 396 Ill. 14, 71 N.E. (2d) 161 (1947).

8 Everson v. Board of Education, 330 U.S. 1, 63, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

and thus violated the First Amendment. This case precipitated a more critical analysis of the historicity of the First Amendment. Research by the attorneys furnished the Court an impressive number of original documents involving the legislative history of the First Amendment.[9] These documents, on the whole, demonstrated that our Founding Fathers simply intended to prevent the extension of a legal preference when they framed the First Amendment. As a corollary proposition, the appellees contended that friendly cooperation of Church and State was not unconstitutional. Appellees relied upon the rights of the parents, whose children were attending released time classes. Attorneys for appellant, on the other hand, maintained that the Champaign plan constituted an "aid to all religions" and, hence, was unconstitutional.

The Court adopted this latter view. It declared that the interpretation of the First Amendment in *Everson* was not dicta, but law, and that it exemplified the principle of separation of Church and State. With respect to the released time practice, the Court declared: [10]

> 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. This is not separation of Church and State.

No reference was made to the rights of the parents, whose children were attending the released time classes. The preoccupation of the Court, with the formulation of what it considered a relevant principle involving separation of Church and State, apparently precluded consideration of the parental prerogative. This occasioned considerable con-

9 Brief of Appellees, McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

10 McCollum v. Board of Education, 333 U.S. 203, 212, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

cern.[11] Unequivocally, the proposition that impartial aid might be given to all religions was rejected. The term "aid" as used in *Everson* was given a broad interpretation.

This interpretation of the First Amendment was warmly welcomed by advocates of secularism.[12] The Court's favorable reference [13] to Jefferson's metaphor of "a wall of separation between church and State" was widely acclaimed in secularist circles. On the other hand, the decision was viewed with alarm by those who felt that the traditional norm of cooperation was necessary to the preservation of our form of government.[14] This group felt that a salient had been

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11 Drinan, *The Novel "Liberty" Created by the McCollum Decision,* 39 GEO. L.J. 216, 225-8, (1951); Fahy, *Religion, Education, and the Supreme Court,* 14 LAW & CONTEMP. PROB. 73, 74-6 (1949); Meiklejohn, *Educational Cooperation Between Church and State,* 14 LAW & CONTEMP. PROB. 61, 67-8 (1949); Schmidt, *Religious Liberty and the Supreme Court of the United States,* 17 FORD. L. REV. 173, 179 (1948). Forcefully, John Courtney Murray, S.J., observed: "In the *McCollum* case there was squarely presented to the Court the issue of parental rights in education. And the Court greeted the presentation with a blank, unseeing stare. Yet the issue is woven all through the facts of the case; the whole Champaign plan hung suspended on the right of parents to have effective voice in regard to what their schools should do for their children, what role in the community their schools should play. Yet the Court does not betray by so much as a word any awareness of this outstanding fact of the case. It passes the issue by on the other side of the street, grimly pounding the sidewalk of its own absolutism. What is worse, its clear assumptions are that the public school system belongs singly to the state and is under its sole supervision; that its functions are determined solely by the state; that the state's compulsory education machinery grinds away with only the state at the controls; that even the child's time in school is owned by the government; that the child has a 'legal duty' to put all this time in on secular subjects, none on religious subjects, apart from the state's sovereign permission, which (the Court says) the state is constitutionally powerless to give." Murray, *Law or Prepossessions?,* 14 LAW & CONTEMP. PROB. 23, 36 (1949).

12 BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA (1949); BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 201-8 (1950); MOEHLMAN, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 53-7 (1951); NEWMAN, THE SECTARIAN INVASION OF OUR PUBLIC SCHOOLS (1925); THAYER, THE ATTACK UPON THE AMERICAN SECULAR SCHOOL 179-99 (1951).

13 McCollum v. Board of Education, 333 U.S. 203, 211, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

14 O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 219-53 (1949); PARSONS, THE FIRST FREEDOM 158-78 (1948); VAN DUSEN, GOD IN EDUCATION (1951); Corwin, *The Supreme Court as National School Board,* 14 LAW & CONTEMP. PROB. 3 (1949); Drinan, *supra* note 11; Fahy, *supra* note 11, at 73; Meiklejohn, *supra* note 11, at 61; Murray, *supra* note 11; Sullivan, *Religious Education in the Schools,* 14 LAW & CONTEMP. PROB. 92 (1949). The American Bar Association forcefully stated: "The *McCollum* case may be one

established which, if expanded, would seriously jeopardize the private institutional system, the full exercise of the parental right, and the religious genesis of our culture.

Immediately, battle lines were established and advocates of absolute separation of Church and State, admitting of no cooperation between these societies, prepared tracts, pamphlets and books, designed to buttress the ruling of the Court. Similarly, those opposed to the decision wrote extensively in law journals and periodicals in an attempt to create a climate of public opinion favorable to the proposition that Church and State should cooperate within well defined limits. Those upholding this latter view refused to accept the *McCollum* decision as the answer to proper relationship of Church and State.[15]

Paradoxically, it was the advocates of absolute separation who initiated litigation which would require the Court again to review the problem of harmonizing the Church-State relationship. Apparently, fully confident that the Court had answered the problem completely, instead of just "beginning the solution," actions were brought to apply the *McCollum* decision to other released time plans. Success was encountered in St. Louis.[16] Thereupon, the New York released time law was subjected to judicial scrutiny.

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of those fateful decisions which is ignored at the time and regretted in the future. It deserves thorough consideration now. . . . The latent consequences of the ruling could hardly be over-emphasized. It is a pronouncement by our Supreme Court on a fundamental principle, not only of national policy but of our civilization and way of life. . . .

The traditionally religious sanctions of our law, life and government, are challenged by a philosophy and a judicial propensity which deserves the careful thought and concern of lawyers and people." *"No Law But Our Own Prepossessions"?*, 34 A.B.A.J. 482, 483, 485 (1948).

15 THE CHRISTIAN IN ACTION, OUR BISHOPS SPEAK 193 (Huber ed. 1951); Brief for National Council of Churches, Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 96 L. Ed. *609 (1952).

16 Balaza v. Board of Education (Cir. Ct. of St. Louis, Mo., Div. No. 3, No. 18369), quoted in BUTTS, *op. cit. supra* note 12, at 207-8. In *Balaza* the Circuit Court of St. Louis held that a released time plan conducted off of the school premises was unconstitutional.

This law, as implemented by regulations of the Commissioner of Education,[17] provided that, on the consent of the parents, children might be released one hour a week for the purpose of receiving religious instructions from representatives of their faith. The instruction was given off of the school premises, but during the school day. The statute involved authorized "absence for religious observance" [18] and was an amendment to the compulsory education law.

The New York courts, after subjecting the law to close examination, held that there was no violation of the state or federal constitutions.[19] The case was then appealed to the

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17 "The Regulations Adopted by the State Commissioner of Education Pursuant to the 1940 statutory mandate, the State Commissioner of Education promulgated, on July 4, 1940, the Following Regulations which are set forth in the petition and are still in force (R. 15-16):

'1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.

'2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

'3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

'4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

'5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

'6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular school in such district shall be the same for all such religious schools.' "

Brief for Intervenor, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, p. 11, Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 96 L. Ed. *609 (1952).

18 N.Y. EDUCATION LAW § 3210-1 (b), which was added as an amendment to § 3210 in 1940 (N.Y. Laws 1940, c. 305), provides: "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

19 Lewis v. Spaulding, 193 Misc. 66, 85 N.Y.S. (2d) 682 (Sup. Ct. 1948), *appeal dismissed,* 299 N.Y. 564, 85 N.E. (2d) 791 (1949); Zorach v. Clauson, 303 N.Y. 161, 100 N.E. (2d) 463 (1951). The New York Court of Appeals in the *Zorach* case stated, 100 N.E. (2d) at 468: "While extreme care must, of course, be exercised to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion' but also laws 'prohibiting the free exercise thereof'. We must not destroy one in an effort to preserve the other.

Supreme Court of the United States, which assumed jurisdiction of the action.[20]

The written and oral arguments of the appellants reflected the view that the First Amendment had erected an absolute wall of separation which eliminated anything approaching close cooperation of Church and State, even in an area of mutual interest. Reliance was placed exclusively on the *McCollum* decision. The proposition was advanced that the essence of the *McCollum* decision was the utilization of the compulsory education machinery of the state, and that this factor was just as important, functionally, in the New York law as in the Champaign plan. The position had a surface validity, but failed to reckon with the fact that the problem of the relationship of Church and State had not been finally settled in *McCollum.*

Appellees distinguished the New York system and the Champaign plan by pointing out that in the former religious instruction was not given in the school room. The significance of this position was not confined to the proposition that no tax supported property was being used for religious instruction; but, rather, that "the momentum of the whole school atmosphere" [21] was not placed behind the religious instruction program. A second, and highly pertinent argument, was that the New York law did no more than recognize the right of parents to determine, within reasonable bounds, the educational content of public education. It was asserted that the freedom of conscience and religious convictions of the parents were at stake.[22] Strong reliance was placed upon the famous *Oregon School* case, *Pierce v. Society of Sisters.*[23]

We cannot, therefore, be unmindful of the constitutional rights of those many parents in our State (we are told that some 200,000 children are enrolled in the released time programs in this jurisdiction, and ten times as many throughout the nation) who participate in and subscribe to such programs."

20 28 U.S.C. § 1257 (2) (Supp. 1951).

21 McCollum v. Board of Education, 333 U.S. 203, 230, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

22 Counsel for Intervenor stated this proposition in the following manner: "Millions of parents throughout this country believe with deepest conviction that

The Court, after considering the case for several months, upheld the constitutionality of the New York law in a six to three decision. Justice Douglas, who wrote the opinion for the majority, rejected the compulsory education law argument. He stated: [24]

> No one is forced to go to the religious classroom. . . . A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.
>
> There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. . . . The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request.

The Court recognized the fact that the school and the state cooperate with the religious instruction program. This

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the momentum of secularism is a basic cause of the world's ills, and that it undermines the very cornerstone of our freedom as expressed in these constitutional Preambles and in the Declaration of Independence. Those millions of parents have a constitutional right so to believe, and to demand reasonable freedom and respect for that belief in and amid the education of their children.

"Can other parents or other groups now use these same constitutional guaranties to impose upon everyone, including the State itself, their own theories as to the contents and implications of the education of other people's children? Can they force upon other parents the task of endeavoring to undo after the child's 'business hours' the implications which those other parents fear?" Brief for Intervenor, *supra* note 17, at p. 22, Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 96 L. Ed. *609 (1952).

23 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). Referring to the basic position of the Intervenor, Counsel stated: "They believe that the very essence of constitutional liberty in this country was unanimously expressed by the Supreme Court of the United States in *Pierce v. Society of Sisters,* 268 U.S. 510, in the following historic and profoundly American statement, the truth and wisdom of which have been increasingly solemnized by the tragic human history of the years since its utterance (pp. 534-5):

'Under the doctrine of *Meyer v. Nebraska,* 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the *liberty of parents and guardians to direct the upbringing and education of children under their control.* . . . The fundamental theory of liberty upon which all governments in this Union repose *excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.* The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' (Underscoring ours.) We submit that the time is ripe for reaffirmance of the basic principles thus enunciated." Brief for Intervenor, *supra* note 17, at p. 4.

24 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 682, 96 L. Ed. *609 (1952).

is one of the most significant implications of the decision, for it differs from the suggestion, latent in the *McCollum* case, that this type of cooperation of Church and State is unconstitutional. Justice Black, writing for the majority in *McCollum,* referred to the "close cooperation" between the school authorities and the religious council in promoting religious instruction, as one of the unconstitutional elements.[25]

Any analysis of the decision indicates that the approval of cooperation between the state and religious authorities stems from a shift in the basic philosophy underlying the approach to the Church-State relationship. The shift is from neutrality between religion and irreligion to the recognition of the fact that: [26]

> We are a religious people whose institutions presuppose a Supreme Being. . . . 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.

This is not the first time that the Supreme Court has espoused this philosophy; [27] however, it is a timely reaffirmation, for the preservation of our form of democracy demands cooperation of Church and State. It is the seed bed of our culture.[28] The truth of this proposition was clearly recognized

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25 McCollum v. Board of Education, 333 U.S. 203, 209-10, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

26 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 684, 96 L. Ed. *609 (1952).

27 Rector of Holy Trinity Church v. United States, 143 U.S. 457, 12 S. Ct. 511, 514, 36 L. Ed. 226 (1892); United States v. Macintosh, 283 U.S. 605, 625, 51 S. Ct. 570, 75 L. Ed. 1302 (1931); Terrett v. Taylor, 9 Cranch 43, 3 L. Ed. 650 (U.S. 1815).

28 In the words of Thomas Jefferson: "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God." PADOVER, THE COMPLETE JEFFERSON 677 (1943). Walter Lippman has reached that conclusion: "What separates us from the totalitarian regime is our belief that man does not belong to the state. . . . They said that man belonged to his Creator, and that since he was, therefore, an immortal soul, he possesssed inalienable rights as a person which no power on earth had the right to violate. . . . The liberties we talk about defending today were established by men who took their conception of man from the great central religious tradition of Western civilization, and the liberties we inherit can almost certainly not survive the abandonment of that tradition." Lippman, *The Forgotten Foundation,* New York Herald

at the time the First Amendment was adopted. So Justice Story, commenting on the First Amendment observed: [29]

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive the encouragement from the state, so far as it is not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

A similar observation was made in an article in the September, 1789, issue of the widely read magazine, "American Museum," which was devoted to a discussion of the proposed amendments to the Constitution.[30]

These are but a few of the statements which could be adduced to demonstrate the proposition that, at the time of the framing and adoption of the First Amendment, the people had a keen appreciation of the necessity for cooperation between Church and State. They fully realized that cooperation and mutual assistance were the best bulwark against a union of Church and State, for, otherwise, competition between the two entities would naturally arise.[31] This competition would ultimately reduce either Church or State to a condition of subjection. This had been the invariable history of Church-State relations. England was a perfect example. When the Crown refused to recognize the authority of the Church with respect to marriage, competition immediately ensued, with the result that the Church became a department

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Tribune, Dec. 17, 1938, p. 15, col. 1, 2. See also 3 STOKES, CHURCH AND STATE IN THE UNITED STATES 706 (1950).

29 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 700 (Abr. 1833).

30 "Schools ought to be formed with the gradual settlement of this country, and provided with sensible teachers, who *shall instruct their pupils in those capital principles of religion, which are generally received, such as the . . . attributes of God, his rewards and judgments, a future state,* etc." [Emphasis supplied.] Collin, *Remarks on the amendments to the federal constitution* in 6 THE AMERICAN MUSEUM 235, 236 (1789).

31 PARSONS, *op. cit. supra* note 14, at 92-3.

or agency of the State. It was fully realized that cooperation was the via media between union and a devitalizing separation of Church and State, erroneously termed "neutrality." [32] Actually, Church and State are natural partners.[33]

Fortunately, neither the states nor the Federal Government adopted an attitude of indifference to religion. Chaplains were assigned to the armed forces and the Congress, and were paid from public funds; the properties of religious institutions were granted tax exemption; lands were granted to missions; religious schools were retained for the instruction of Indian tribes; the use of public buildings was extended to religious organizations; and provision was made for acquainting school children with the basic concepts of religion. Many more examples could be set forth, but these are sufficient to indicate that for 160 years Church and State have been following a policy of cooperation with no ill effects to either. Each is independent in its own sphere, each is in a healthy condition.

It should be noted that all of these examples had a shadow of unconstitutionality cast over them by *McCollum,* the juridical philosophy of which was summed up in the concurring opinion of Justice Frankfurter in the following manner: [34]

> We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best

32 Everson v. Board of Education, 330 U.S. 1, 18, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

33 Pope Leo XIII, *The Christian Constitution of States in* THE GREAT ENCYCLICAL LETTERS OF POPE LEO XIII 107, 114 (1903). Commenting on this encyclical, Father Parsons observes: "But Leo continues. This distinction between church and state, by the very nature of the two, requires co-operation as well, since 'each of these two powers has authority over the same subjects.' They must, therefore, co-operate; otherwise, 'two powers would be commanding contrary things, and it would be a dereliction of duty to disobey either of the two,' for both state and church come from God, though in different ways. How they co-operate will necessarily be left to circumstances, which will decide whether the co-operation be close and immediate or remote and indirect. The important thing that Leo was thinking of is the conscience of the individual." PARSONS, *op. cit. supra* note 14, at 91-2.

34 McCollum v. Board of Education, 333 U.S. 203, 232, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

> for religion." *Everson v. Board of Education,* 330 U.S. at 59. If nowhere else, in the relation between Church and State, "good fences make good neighbors."

Therefore, it became apparent that the repudiation of this philosophy is the most significant element of the Court's decision in the *Zorach* action. It emphasizes the fact that there was an important shift in the philosophical approach to the question. That there was such a shift in the philosophy of the Church-State relationship is disclosed not only by a comparison of the *McCollum* decision with that of *Zorach,* but is confirmed by an analysis of the dissent of Justice Black, who had occasion to write the opinion for the Court in *McCollum.* In his *Zorach* dissent, Justice Black stated: [35]

> . . . I mean to do more than give routine approval to our McCollum decision. I mean also to reaffirm my faith in the fundamental philosophy expressed in McCollum and Everson v. Board of Education. . . .

Perhaps it may be objected that the Court formally reaffirmed the *McCollum* decision and separation of Church and State. True, but the reaffirmation did not include the underlying philosophy, hence the juridical effect of *McCollum* has been altered. Cases must now be decided in the light of a new emphasis — emphasis on cooperation. This cooperation is naturally limited in its application. It must be exercised in a judicious manner — in a manner designed best to implement the exercise of freedom of religion. This was done effectively in the case at bar, for at stake was the exercise of the religious freedom of parents who wished to have their children receive religious instruction at such a time that the child would not be given the impression that it was an unimportant extra-curricular experience. They knew that the exclusion of God from the classroom left much more than an educational vacuum to fill; it created a wall of resistance to the parental inculcation of religious principles.[36]

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35 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 686, 96 L. Ed. *609 (1952).

36 The Catholic Bishops of the United States in their statement on secularism, issued November 14, 1947, called attention to this fact in the following

This philosophy which the Court has embraced is neither new [37] nor artificial. It is the natural norm of the Church-State relationship in a nation which has a religious orientation. After all, such cooperation, in the words of Justice Douglas, merely "respects the religious nature of our people and accommodates the public service to their spiritual needs.[38]

It is difficult fully to evaluate the widespread implications of this new attitude of the Court — an attitude which, while dormant for a while, is in harmony with the genesis and the history of this Nation. Concepts of separation of Church and State, in order to enjoy a constitutional sanction, must henceforth be stripped of their secularistic implications. Secular orthodoxy, which already had been carried to absurd lengths,[39] has been disestablished. In its place, we have a concept of separation of Church and State which involves the restriction of each society to its distinct sphere of activity, with cooperation in areas of mutual interest, such as education and marriage. Each, for instance, has authority

words: "In the rearing of children and the forming of youth, omission is as effective as positive statement. A philosophy of education which omits God, necessarily draws a plan of life in which God either has no place or is a strictly private concern of men. . . . There would be less danger for the future of our democratic institutions if secularism were not so deeply intrenched in much of our thinking on education." THE CHRISTIAN IN ACTION, OUR BISHOPS SPEAK, *op. cit. supra* note 15, at 140.

37 See note 27 *supra.*

38 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 684, 96 L Ed. *609 (1952).

39 For instance, in Perez v. Lippold, 32 Cal. (2d) 711, 198 P. (2d) 17 (1948), which involved the right of a Negro and a white person to marry, the county attorney predicated his position upon a secularistic concept of separation of Church and State: "Conformity to this basic principle of separation of Church and State requires that in determining the constitutional scope of the state's power to regulate the civil right to marry, no consideration may be given to the religious aspect of marriage. This being the case, it follows that the civil right to marry is not and cannot be protected by the constitutional guarantees of freedom of religion." Brief of the Attorney General of the State of California, Perez v. Lippold, 32 Cal. (2d) 711, 198 P. (2d) 17 (1948). Attention is likewise called to State *ex rel.* Singelmann v. Morrison, ...La....., 57 S. (2d) 238 (1952), where it was argued that the erection of a public statue of Mother Cabrini on a public square was a violation of separation of Church and State, Mother Cabrini being a canonized saint of the Roman Catholic Church.

over particular aspects of education and marriage, to cite a few examples. The harmonious exercise of this authority will inevitably result in the maintenance of religious liberty.

True, the Court not only formally reaffirmed the *McCollum* decision, but also left its language intact. The language of the Supreme Court in *Everson,* and later repeated in *McCollum,* to the effect that the state may not "aid" religion, was not modified. From the moment that this language was first used, it was asserted that the term "aid" was a "spacious concept" [40] and that it admitted of varying interpretations.[41] The Supreme Court now has taken the position that the term "aid" means that Church and State may cooperate to serve the "spiritual needs" of the people, providing that such cooperation does not infringe the freedom of others to exercise their religion. As we have seen, this vital principle is not new, but rather, is one which has given distinctive character to democracy as we in the United States know it.[42]

Interpretation of the term "aid," in such a manner as to exclude all cooperation between Church and State, though dominant for a few years, could hardly survive, for it involved a conflict between two portions of both the *Everson*

40 McCollum v. Board of Education, 333 U.S. 203, 213, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

41 Pfeffer, *Religion, Education and the Constitution,* 8 LAW. GUILD REV. 387, 391, 399 (1948). In this law review article, Mr. Pfeffer, who was of Counsel for Plaintiff in the *Zorach* action, took the following position: ". . . the precise intent of the framers and adopters of the First Amendment, while interesting, is not decisive. . . . The generation which adopted the Amendment expressed as a basic principle of American democracy the broad concept of separation of church and state. The evolution of that concept, did not end in 1791. It is a continuing evolution, and each generation must interpret the meaning of separation for itself in the light of its conception of American democracy and the enlightened political thinking of the day. . . . The struggle is a continuing one and the evolution erratic. . . . We are, even today, still far removed from a complete separation of religion and government, although the trend to the present time has clearly been in the forward direction." Separation of Church and State is, according to this rather widely held view, a creature of the *political thinking of the day.* This hardly accords with the classic concept of constitutional principles. Nor does it give us a definitive norm for solving the many complex Church-State problems. The process is one of adaptation and application, not of evolution.

42 Corwin, *supra* note 14, at 20-1.

and *McCollum* decisions. The one, which set forth the Court's definition of separation of Church and State; the other, which stated that the State may not be the adversary of religion. The middle ground and the constitutional ground of cooperation is obviously most consistent with religious liberty. The alternative does not involve "neutrality," but rather, "hostility." The Court clearly realized this when it stated that the failure to accommodate public service to spiritual needs "would be preferring those who believe in no religion over those who do believe. . . . We cannot read into the Bill of Rights such a philosophy of hostility to religion." [43] The above statement is the last and concluding one of the majority opinion. Significantly, it represents the fact that the Court was deeply concerned with developing a basic juridical philosophy of separation of Church and State consistent with the traditions of this country — the traditions which, translated into action, have resulted in a widespread enjoyment of freedom of religion.

A careful reading of the *Zorach* majority opinion fails to disclose a reliance on the "wall of separation" theory. Wisely, the Court has refrained from relying upon a metaphor as a basis for decision. Justice Jackson, in his dissenting opinion, critically remarks that "The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected." [44] Actually, the so-called wall of separation on which *McCollum* was based, has searchingly been re-examined by the Court. It now becomes less a wall and more a line of orderly demarcation defining the rights of both government and religion. Quite obviously, too much reliance has been placed upon a "wall of separation" metaphor.[45] It has been a constant source of

43 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 684-5, 96 L. Ed. *609 (1952).

44 *Id.*, 72 S. Ct. at 689.

45 "It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called 'wall of separation' may be built so high and so broad as to impair both State and church, as we have come to know them. Indeed, we

confusion.[46] Long before extensive reliance was placed on the "wall of separation," Justice Cardozo gave a clear warning against reliance upon metaphors.[47] Now, in the *Zorach* pronouncement, we have a clarification and a more sensible definition of the correlative rights of religion and government. A norm has been established which will enable the court more intelligently to appraise questions involving Church and State.

Another encouraging aspect of *Zorach* is the refusal by the Court to consider the wisdom or the expediency of the released time program, as a basis for constitutional decision.[48] In the *McCollum* decision, considerable attention was given to the question of "divisiveness." An analysis of arguments based upon divisiveness will inevitably disclose that this proposition is directed solely to the wisdom of the plan. Regardless of this fact, the brief of counsel for plaintiff and his oral argument before the Supreme Court in *Zorach* disclosed a persistent reliance on the alleged element of divisiveness. Divisiveness and discrimination are entirely different concepts. Discrimination has constitutional significance; divisiveness, legislative significance. Regardless of this fact, much attention is given to the proposition by Justice Frankfurter.

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should convert this 'wall', which in our 'religious nation', Church of Holy Trinity v. United States, 143 U.S. 457, 470, 12 S. Ct. 511, 36 L. Ed. 226, is designed as a reasonable line of demarcation between friends, into an 'iron curtain' as between foes, were we to strike down this sincere and most scrupulous effort of our State legislators, the elected representatives of the People to find an accommodation between constitutional prohibitions and the right of parental control over children." Zorach v. Clauson, 303 N.Y 161, 100 N.E (2d) 463, 467-8 (1951).

46 "The wall of separation is a very satisfying metaphor. It has a fine, tangible, firm sound. No one can doubt where a stone wall is. But a metaphor is generally more effective as a slogan than usable as a definition. . . ." Sutherland, *Due Process and Disestablishment,* 62 HARV. L. REV. 1306, 1311 (1949).

47 "A fertile source of perversion in constitutional theory is the tyranny of labels," Snyder v. Massachusetts, 291 U.S. 97, 114, 54 S. Ct. 330, 78 L. Ed. 674 (1934). Unfortunately, much of the re-thinking on the question of separation of Church and State was characterized by the very practice condemned by the late Justice Cardozo. The tyranny of the label "wall of separation" dealt a severe blow to released time courses of religious instruction and threatened many other traditional American practices.

48 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 684, 96 L. Ed. *609 (1952).

In his *Zorach* dissenting opinion, he refers to the case as the "deeply divisive controversy." [49] Justice Frankfurter's concurring opinion in the *McCollum* action dealt at length with the proposition that released time is a divisive practice and, hence, cannot be sustained.[50] It is reasonable to believe that, in future cases involving the Church-State relationship, this question will not be considered a proper one for judicial consideration.

An attempt fully to evaluate a Supreme Court decision of such widespread implications, as that of *Zorach v. Clauson,* within a month after it was handed down would be premature. Already, many contradictory statements have found their way into respected publications. Some go so far as to say that the *McCollum* decision has been reversed by implication.[51]

In summary, a tentative analysis of the two decisions indicates that the Supreme Court still considers the *McCollum* decision as a binding authority. The reliance upon the proposition that Government may not aid religion still persists, but the interpretation of the term "aid," as we have seen, is much more narrow than in *McCollum.* "Aid" must now be interpreted in light of the proposition, "We are a religious people." This is the key to the significance of the *McCollum* decision. A new norm has been established determining the judicial content of the constitutionally critical term "aid." This new norm carries with it the tradition of cooperation of Church and State, and, implicitly, cooperation of parents with the State. To put it succinctly, we again may rely upon a "common sense" [52] approach to the solution of the Church-State controversy, and in so doing, may be assured that long established judicial techniques for solving constitutional con-

49 *Id.,* 72 S. Ct. at 688.

50 McCollum v. Board of Education, 333 U.S. 203, 217, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

51 Information Service, National Council of Churches of Christ in the United States, May 17, 1952, p. 4, col. 1.

52 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 683, 96 L. Ed. *609 (1952).

troversies will again be relied upon. Uncertainty and confusion are removed from the judicial approach to Church-State cases. The reaffirmation of the validity of the traditional relationship between Church and State satisfies the necessity for defining clearly the boundaries of the principle of separation of Church and State, in such a way as to limit its application in a manner harmonious with the basic traditions of this country. This much the Court has accomplished, and admittedly the contribution to the ultimate solution of the problem of the relations of Church and State has been substantial. The fact remains, however, that the problem has not been fully answered. The apparent strength and appeal of the dissenting opinions attest to this fact.

To turn now to the Church-State question as it applies to education, it appears that it will not be solved until more critical attention is given to the nature and effect of the compulsory education law. The reasoning of the Court in *Everson, McCollum* and *Zorach* points to this necessity.

The *Zorach* majority opinion merely states there is no coercion, no violation of the compulsory education law, without explaining why there was no violation. Coercion is at the heart of the dissenting opinion of Justice Jackson. For instance, his dissent begins with the following comment: [53] "This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality." Justice Black and Justice Frankfurter similarly emphasized the proposition that the compulsory school law was used in such a way as to promote religious education.

There is indeed considerable confusion involving the constitutional implications of the concept. For example, Justice Jackson stated, in his concurring opinion in *McCollum,* that: [54]

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53 *Id.,* 72 S. Ct. at 689.

54 McCollum v. Board of Education, 333 U.S. 203, 233, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

> Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground.

Nor is this the only point of confusion involving the element of coercion. The dissenting opinions uniformly state that the compulsory education law immediately affects the child, rather than the parent.[55] Actually, this law is only operative upon parents.[56] The failure to recognize the true character of the operation of compulsory educational laws has been the source of much of the confusion and misunderstanding in Church-State cases in the field of education. The position of parents, with relation to the compulsory educational laws, has been completely ignored, with the result that improper emphasis has been placed upon the nature and effect of these laws.[57]

If it were true that this law relates primarily and directly to children, then it is exceedingly difficult to harmonize the position of the dissenting justices in the *Zorach* action, as well as the majority opinion in the *McCollum* case, with the precedent established in the *Oregon School* case,[58] for the

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55 Justice Black, dissenting, remarked: "The state thus makes religious sects beneficiaries of its power to compel *children* to attend secular schools." [Emphasis supplied.] Zorach v. Clauson, ...U.S...., 72 S. Ct. 679, 686, 96 L. Ed. *609 (1952). Similarly, Justice Jackson argued: "Stripped to its essentials, the plan has two stages, first, that the State compel *each student* to yield a large part of his time for public secular education and, second, that some of it be *'released' to him* on condition that he devote it to sectarian religious purposes." [Emphasis supplied.] Zorach v. Clauson, *supra,* 72 S. Ct. at 689.

56 LOUGHERY, PARENTAL RIGHTS IN AMERICAN EDUCATIONAL LAW: THEIR BASES AND IMPLEMENTATION 66-72 (1952).

57 See note 11 *supra.*

58 Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). This conflict between the *Oregon School* case and the *McCollum* decision was clearly demonstrated by Father Murray: "This silence on the parental right is equivalent in the context to positive statement. It implicitly qualifies the *Pierce* doctrine; now apparently the child is not a creature of the state — until he crosses the threshold of a public school. Parents have a right to direct the education of their children — limited by the exigencies of a 'unifying secularism' that is a constitutional necessity in public education. The Court's silence on the parental right argues that it is not a factor in the case; and this is particularly damaging at the present moment, when this right is under

compulsory educational law, to the extent that it is operative, is not confined solely to public school attendance. The inconsistency between the *Pierce* case and the *McCollum* decision, the thinking of which is embraced in the dissenting opinions in *Zorach,* has been extensively noted by constitutional and educational authorities.[59] Actually, much of the difficulty disappears when the concept of compulsory education is given its proper orientation, that is, when it is considered in conjunction with parental rights. The child attends school, public, private, or parochial, in pursuance of the exercise of the natural duty of parents to educate their children. It is only when parents fail or refuse to fulfill this duty, that the state's compulsory educational machinery comes into active operation. In other words, the operation of the compulsory education law is contingent on the failure of parents to fulfill their natural function of providing an education for their children. Therefore, it cannot be validly argued that children attend school solely as a result of the compulsory education law. This might be true in the case of a child who had been committed to a state institution and over whom the state exercised its authority as *parens patriae* in the primary sense, but it does not apply to a child who is a member of a family, and is subject to the jurisdiction of a family.

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open or veiled or unconscious attack from highly articulate groups. It tends to undermine the juridical status of the parental right in American law. Correlatively, it tends to render exclusive the rights of the state in education. In a moment of delicate balance it weights the scales, as I said, in favor of a philosophy of education of decidedly statist flavor. And the parental right which, as a sheer immunity, is already like the smile on some sort of disembodied educational Cheshire cat, begins to fade under the Court's unseeing stare." Murray, *supra* note 11, at 36.

59 Corwin, *supra* note 14, at 20; Drinan, *supra* note 11, at 227-8. Professor Meiklejohn states the problem: "Under the 'released time' plan pupils are released 'in part' from their legal duty. Under the parochial school plan they are released altogether. In both cases attendance is 'compelled by law' for the sake of what Justice Black calls 'the spreading of faith.' Why, then, is the partial release regarded as an 'establishment of religion' while the total release for the same purpose is not so regarded? It would seem that if the *McCollum* decision stands, the parochial school system, together with all other religious school systems, must be abolished. And, by direct implication, if the schools are to remain, the decision must go." Meiklejohn, *supra* note 11, at 67-8.

In a democracy such as ours, the rights of the parents are paramount.[60] Such being the case, it cannot validly be argued that state power is being used to "aid religion" or to "coerce children." In the operation of released time programs, the element of coercion applies only to parents, not to children. Obviously, if the state's coercive power is not applicable to children, and if children, as demonstrated, attend school, whether it be public or non-public, in accordance with the exercise of the parental duty to educate, then it is erroneous to argue that there is a violation of separation of Church and State. As a matter of fact, too much emphasis is placed upon the term "Church" rather than upon parents. Even the majority opinion in *Zorach* had very little to say about the part which the parents play in the educational process. It is true that the Court did refer to the fact that the parents must first give their consent and approval before a child may participate in the program. Unfortunately, the Court did not elaborate on this fundamental proposition, and thereby missed an excellent opportunity to settle a vexatious problem.

The Court of Appeals of the State of New York, on the contrary, emphasized the role of parents.[61] It would be natural to assume that the Court, in light of the strong emphasis placed upon the parental right in the decision of the New York Court of Appeals and in the briefs of the state and the intervenor-respondent, The Greater New York Coordinating Committee on Released Time, would similarly place more

60 Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

61 Zorach v. Clauson, 303 N.Y. 161, 100 N.E. (2d) 463, 468-9 (1951). Here the court stated: "Moreover, parents have the right to educate their children elsewhere than in the public schools, provided the State's minimum requirements are met, Education Law, § 3204; Pierce v. Society of the Sisters . . . and thus, if they wish, choose a religious or parochial school where religious instruction is freely given. That being so, it follows that parents, who desire to have their children educated in the public schools but to withdraw them therefrom for the limited period of only one hour a week in order to receive religious instruction, may ask the public school for such permission, and the school may constitutionally accede to this parental request. There is nothing in the Constitution commanding that religious instruction may be given on the Sabbath alone, and on no other day."

emphasis on the basic parental right involved in this case. The Court's opinion rather seems to stem from the proposition that, since "We are a religious people," cooperation of Church and State is constitutionally acceptable. While, admittedly, this is a substantial step forward, the cooperation involved was actually between the state and the parents. Religious sects were not the primary beneficiaries of the action of the New York Legislature in enacting the released time law, but rather the parents and the home.

Unless emphasis is placed upon the paramount right of the parents, courts will tend towards the proposition that, during the time covered by the compulsory education law, the child is the creature of the state rather than the parents. It was this fact which lead the New York Coordinating Committee on Released Time to observe in its brief: "Stated nakedly, the issue in its ultimate reach is between state absolutism in public education and the natural and constitutional rights of parents." [62] This was not an overstatement of the issue, as evidenced by Justice Jackson's observation that the state compelled: [63]

> . . . each student to yield a large part of his time for public secular education and second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes.

This proposition assumes that the state has an exclusive control or monopoly over the time of the child during the compulsory educational period. Fortunately, this proposition was not adopted by the Court. The majority did not, however, specifically meet and refute this argument, but rather placed emphasis on the constitutionality of cooperation — cooperation of Church and State, not cooperation between the state and parents for the benefit of the child. This latter proposition appears only by implication in the opinion of the Court. Significantly, however, it is not rejected. A decision

62 Brief for Intervenor, *supra* note 17, at p. 28.
63 Zorach v. Clauson, ...U.S....., 72 S. Ct. 679, 689, 96 L. Ed. *609 (1952).

in favor of the plaintiffs would have involved a repudiation of this parental prerogative.

In the words of Professor Corwin, "it seems unlikely that the Court is out to emancipate children from their parents!" [64] However, it is time for the Court to take appropriate action to put the question at rest. The priority of the rights of parents in the matter of the education of their children needs reaffirmation, for today there is a contest between totalitarian and democratic philosophies of education.[65] The principle that "the child is not the creature of the state" [66] has suffered from the silence of the Court when the issues called for its application. It is hoped that the Court will, at its next opportunity, act to reaffirm this vital principle, just as today it has restored to judicial favor the proposition that, "We are a religious people."

*George E. Reed**

64 Corwin, *supra* note 14, at 19.

65 Father Murray states: "There is a clash of basic philosophies of education and of democracy. In addition there is a clash of power; for behind the philosophy of education as the agent of a unifying, democratic secularism powerful organized forces are aligned — professional educational associations, for instance, and other groups pursuing ideological interests. And the contention, I repeat, primarily is not over money but over principle. . . ." Murray, *supra* note 11, at 35.

66 Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

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