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Remalian M. Cocar Date

Between a Righteous Citizenship and the Unfaith of the Family: The History of Released Time Religious Education in the United States

By

Remalian M. Cocar

Doctor of Philosophy

History

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Professor Joseph Crespino

Advisor

_____

Professor Fraser Harbutt

Committee Member

_____

Professor Polly Price

Committee Member

Accepted:

_____

Lisa A. Tedesco, Ph.D.

Dean of the James T. Laney School of Graduate Studies

_____

Date

# Between a Righteous Citizenship and the Unfaith of the Family: The History of Released Time Religious Education in the United States

By

Remalian M. Cocar

M.A., Emory University, 2006

B.A., University of Michigan, 2001

Advisor: Dr. Joseph Crespino, Associate Professor, History Department

An abstract of

A dissertation submitted to the Faculty of the

James T. Laney School of Graduate Studies of Emory University

in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

in History

2011

Abstract

Between a Righteous Citizenship and the Unfaith of the Family: The History of Released-Time Religious Education in the United States

By Remalian M. Cocar

This dissertation seeks to understand an important program of religious instruction called released time education. During their school day, public school students with parental permission took religious classes. This happened as they were released from the care of the public school for one hour. Released time began in Gary, Indiana in 1913. By the 1940s, it was estimated that over two million students in the United States participated in released time education.

The main force behind released time education was a group of Mainline Protestants who were concerned with the prospects of young people receiving religious beliefs from Sunday School, their parents, or public schools. This study uncovers the commitment to released time education that most Mainline Protestants had well into the early 1950s. Although by the early 1960s Mainline Protestants would change course and drop their support for any type of religion within the public schools, they remained ardent and steadfast supporters of released-time education well into the mid-1950s. Catholics also joined in the program. In many cities, they provided a separate class for Catholic students. This was one of the first times in American history where Protestants and Catholics cooperated together.

The opposition to released time coalesced in the 1940s and resulted in two major Supreme Court cases. Major groups that opposed released time were the American Civil Liberties Union, the Baptist Joint Committee, and Jewish-American groups. In *McCollum v. Illinois* (1948), the Supreme Court ruled that released time was unconstitutional. But, in *Zorach v. Clauson* (1952), the Supreme Court reversed itself claiming that the earlier *McCollum* decision only meant that released time education could not take place in public school buildings. This project tries to make sense of these seemingly contradictory decisions. A large part of the sea change both in Protestant sentiment and in the Supreme Court decisions seemed to have been caused by anti-Catholicism. These decisions were also part of a larger shift in First Amendment jurisprudence that would lead to the elimination of school prayer by 1962, in *Engel v. Vitale*.

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Table of Contents

# Introduction

This dissertation uncovers the debate over released-time programs in twentieth-century America. Released-time programs were classes of religious instruction for American public school students. The public schools did not sponsor the religious teaching, but allowed outside organizations the right to take students for one hour a week and give them religious teachings. Parental permission was required. The program started in 1913 in Gary, Indiana, and spread through the Midwest and Northeast until World War II. Beginning in 1940, released-time programs expanded into major cities such as New York City, Boston, and Los Angeles. With the increased attention, released-time programs were challenged in the courts, resulting in two Supreme Court decisions. In 1948, in *McCollum v. Board of Education*, the Supreme Court, in an opinion authored by Justice Hugo Black, decided that released-time programs were unconstitutional. However, the relatively broad support for released-time programs in the United States led to many communities interpreting the Supreme Court's decision in a way to continue released-time programs in many communities. Finally, in 1952, in *Zorach v. Clauson*, the Supreme Court, in an opinion authored by Justice William Douglas, validated the constitutionality of released-time programs, a decision that stands to this day.

However, the history of the discourse about released-time's place in American civil society is complicated by the fact that the *McCollum* decision is integrally linked to another Supreme Court decision from 1947. In *Everson v.*

*Board of Education*, Justice Black prepared the way for his *McCollum* opinion of a year later. The *Everson* decision allowed Catholic parochial schools in New Jersey to receive public funds for transportation costs. However, Justice Black's opinion, disassociated from the result, was the beginning of the removal of religion from public schools. In fact, the two opinions complemented each other so well, that many legal analysts refer to the *Everson-McCollum* interpretation of the First Amendment. The historical debate has not centered on the significance of the released-time cases for American civil society. Rather, what historians and legal scholars have been interested in is whether or not the *Everson-McCollum* interpretation of the First Amendment is the correct one, or whether it severely distorts the intent of the First Amendment.

The most important contribution this dissertation makes is by highlighting the role of Protestants in the creation of released-time education and early support of the program which lasted into the 1950s, and in some cases, into the 1960s. When using the term Protestant, this dissertation refers to Mainline, or liberal, Protestants. Evangelicals do not figure in the early parts of this dissertation; their voices were quiet on most matters of public policy until well into the 1970s.

The second major contribution this dissertation seeks to make is to show how a particular understanding of the First Amendment so quickly won out in the Supreme Court by the early 1960s. As late as 1952, in the *Zorach* decision, the Supreme Court seemed to back off from the *Everson-McCollum* interpretation. Why then, did the Court, just a decade later, invalidate a school prayer? This

dissertation seeks to explain the fundamental issues in the legal debate during the 1940s and 1950s and the changing wave not in popular opinion, but in the opinions of Mainline Protestants. This dissertation will also endeavor to show how use was made of anti-Catholicism to further along the *Everson-McCollum* interpretation within Protestant circles.

Contemporary legal analysts have little to say about *McCollum* and *Zorach* per se. Rather, these two cases are referenced by the legal concepts that they represent: separationism and accommodationism. Separationist thinking believes that U.S. courts must uphold a strict separation between anything religious and any component of the federal or state governments. This was the result in 1948 in *McCollum*. Accommodationism, on the other hand, is a legal philosophy that believes that a sphere of cooperation should exist between the state and religion, especially in order to provide accommodations for religious expression. This was the legal result in 1952 in *Zorach*. While this dissertation does not touch on contemporary First Amendment cases, it does inform that debate.[1] The released-time cases are prime examples of these two competing legal philosophies; the historical study of the debates over released time's legality

[1] Among others, for accomodationism, see McConnell, Michael W. 1985 Sup. Ct. Review 1 (1985), "Accommodation of Religion." An example of a prominent separationist is Kent Greenawalt, *Religion and the Constitution, Volume 2: Establishment and Fairness* (Princeton, NJ: Princeton University Press, 2008). There are more nuanced theories, one being neutrality, espoused prominently by Douglas Laycock. Most other scholars, however, seem to agree that neutrality is a difficult thing for judges, even Supreme Court Justices, to bring to the First Amendment. Steven Shiffrin, *The Religious Left and Church-State Relations* (Princeton, NJ: 2007) and Frank S. Ravitch, *Masters of Illusion: The Supreme Court and the Religion Clauses* (New York: NYU Press, 2007) give brief overviews of the released-time cases in their respective books, and offer qualified support for various aspects of the released-time programs. There is one other important voice in the contemporary debate, but they managed to not mention either of the two Supreme Court cases on released-time: Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard UP, 2007). Noah Feldman has also put forth some good ideas and his main work is discussed further below in the introduction.

under the Constitution will also illuminate the context of the early days of separationism and accomodationism.

Numerous law reviews in the 1940s and the 1950s vigorously debate the merits of released-time. In 1949, the *Journal of Public Affairs* hosted a written symposium on the *McCollum* case, ironically containing two of the strongest critiques of the *McCollum* separationist opinion. Leo Pfeffer, the leading separationist of his time, and Edward Corwin and James O'Neill were the most important voices in the legal discourse of the late 1940s and early 1950s.[2] Exchanges between these scholars, along with some other articles, will reveal what legal scholars contemporary with the Supreme Court during the 1940s and 1950s understood the decisions to mean. Two recent articles in law journals have covered the history of religion in the public schools. One very helpful article covers the Establishment Clause and the public schools, but largely skips the released time cases.[3] The other article argues that the released-time cases had much to do with anti-communism – a less than persuasive argument given the much earlier origins of the released-time arguments in the 1920s and 1930s.[4]

Historians have dealt with released-time as part of broader histories of religion or education in twentieth-century America. Patrick Allitt and John McGreevy both treat released-time as part of their broader religious histories of

[2] For notes, see below in chapters three and four.
[3] John C. Jeffries, Jr. and James E. Ryan, "A Political History of the Establishment Clause," *Michigan Law Review* 100 (Nov. 2001): 279-371.
[4] James E. Zucker, "Note: Better a Catholic Than a Communist: Reexaming McCollum v. Board of Education and Zorach v. Clauson," Virginia Law Review 93 (Dec. 2007).

the United States.[5] Jonathan Zimmerman has touched on released time education as part of the culture wars.[6] There are numerous histories of Protestantism, the best being written by the late Robert Handy, professor at Union Theological Seminary.[7] Philip Hamburger's study of separation of Church and State works its way up to 1950, and although it is helpful for this study, it does not finish telling the important story into the 1950s.

The reason that this dissertation is necessary is to put everything together. Scholars have treated fragments of this story, but no scholar has ever put it all together. The released-time programs are usually treated as the prelude to the school prayer case in 1962, *Engel v. Vitale*. This dissertation treats the released-time cases as the main show with the 1962 decision being the postscript, which had already been written by the Court's direction in the *Everson* and *McCollum* cases.

During the colonial period, almost all the colonies had some form of religious establishment.[8] The government of a colony could favor one particular church by collecting taxes on its behalf. There would be no national church in the United States; by contrast, this relationship existed in many European countries at the time. Thomas Jefferson and James Madison are generally credited with

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[5] Patrick Allitt, *Religion in America Since 1945: A History* (New York: Columbia University Press, 2003) and John McGreevy, *Catholicism and American Freedom: A History* (New York: W.W. Norton, 2003).

[6] Jonathan Zimmerman, *Whose America?: Culture Wars in the Public Schools* (Cambridge, MA: Harvard University Press, 2002).

[7] See especially Robert Handy, *A Christian America: Protestant Hopes and Historical Realities* (New York: Oxford University Press, 1984). Martin Marty has written many works and is well-recognized but Handy seems to get at the heart of the Protestant establishment and its decline with more lucidity than Marty.

[8] John F. Wilson, "Introduction," in *Church and State in American History: The Burden of Religious Pluralism*, ed. John F. Wilson and Donald L. Drakeman (Boston: Beacon Press, 1987), xv.

bringing about the idea of religious freedom from the state, first in Virginia, and then in the Constitution of the United States.[9] The curious thing is that although Thomas Jefferson gave America the "wall of separation" metaphor, the language of the First Amendment is much more precise.[10] That precision is what has made it so difficult for Americans to agree on exactly what it means to balance the "free exercise of religion" with the freedom from "establishment of religion." Even though the First Amendment made it clear that there would be no national church, established *state* churches, in Massachusetts and Connecticut, persisted well into the early nineteenth century.

It was in the twentieth century when the legal wrangling over what the First Amendment meant began. The way we understand the separation of Church and State today came into being only in the twentieth century: Theodore Sizer writes about nineteenth century "Americans, when they went to school, attended supposedly secular common schools, which can be more accurately described as liberal Protestant schools. Scuffle though educators and churchmen might, there was a vague consensus on the part of the majority of Americans of how doctrinaire the schools should be."[11] In other words, in nineteenth-century America, there was very little uncertainty about the public schools: they were Protestant, at least in name. There was also great certainty about the relationship between Church and State: the only thing that was disallowed in public schools

[9] Wilson, "Introduction," xvi-xvii.
[10] There is a raging debate among legal scholars and historians as to how important Jefferson's 1802 Danbury letter, containing the wall metaphor, should be taken by judges and Supreme Court Justices. See James Hutson, "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," *William and Mary Quarterly* 56 (3d ser., 1999): 775-90.
[11] Theodore Sizer, "Introduction," in *Religion and Public Education*, ed., Theodore Sizer, (Boston: Houghton Mifflin, 1967), xviii.

was denominational, or sectarian, infighting between Protestants. Therefore, the concept of the complete separation of Church and State did not exist in the minds of most nineteenth-century Americans.[12]

Religion in the public schools is the place where many of the battles of church-state relations in the past sixty years have played out. This is interesting since the public school is, in many ways, a miniature of America. David Tyack describes the democratic aspect of the public schools: "Public school crusaders like Horace Mann believed that schooling should be a common good, open to all, benefiting all, as do clean water and air and leafy parks. The common school was to be public in control and funding. Above all, it was a place for both young and adult citizens to discover common civic ground, and, when they did not agree, to seek principled compromise."[13] Somehow, all in a given American community were to agree on what the public school would do and teach their children. That raised problems, however, as Tyack explains: "For much of our history locally controlled school districts were almost a fourth branch of government, a place where citizens could influence the future of the republic by shaping the education of the next generation. Sometimes it didn't work that way at all. Often Americans did not check their political and religious differences at the school-house door. Immigrants often resisted 'Americanization.' Open conflict arose in school politics between ethnic, religious, racial, and class groups."[14] Here we get

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[12] David Sehat, *The Myth of American Religious Freedom* (New York: Oxford University Press, 2011) tells the story of just how tangled Church and State were in nineteenth-century America. He covers released-time programs for a few pages but does not enter the conversation.
[13] David Tyack, *Seeking Common Ground: Public Schools in a Diverse Society* (Cambridge, MA: Harvard University Press, 2003), 1-2.
[14] Ibid., 2.

to the crux of the matter of church and state. If the public schools are to replicate American citizens and American democracy, should religion play a role in that process? If religion does not have a place in the public schools, where America's democracy is replicated, then should religion have a place in the public sphere? The study of released-time, its supporters and detractors, lends context to the questions about whether or not religion has a place in the public schools. It gets to the most basic problem of church and state: should religion have any place in the public sphere, of which the State is a significant part? All those who wish to consider the issue of Church and State should reckon with the existence and ramifications of the released-time program. It is amazing how many excellent histories of Church and State have so little to say about the released-time movement.[15]

Noah Feldman, a legal scholar, has written one of the most recent and exciting books on Church and State. In the aptly titled *Divided by God*, Feldman argues that "values evangelicals" and "legal secularists," as he labels these two groups, should do their best to get along for the good of the country. He believes both groups have been wrong. His analysis is that "values evangelicals think that the solution lies in finding and embracing traditional values we can all share and without which we will never hold together. Legal secularists think that we can maintain our national unity only if we treat religion as a personal, private matter,

[15] For instance, see Edwin Gaustad, *Proclaim Liberty Throughout All the Land: A History of Church and State in America* (New York: Oxford University Press, 1999), 75-78. In these pages, Gaustad merely summarizes the two Supreme Court cases dealing with released-time, but offers no analysis or comment on the importance of released-time programs.

separate from concerns of citizenship."[16] Instead of those extremes, he proposes that "we should permit and tolerate symbolic invocation of religious values and inclusive displays of religion while rigorously protecting the financial and organizational separation of religious institutions from institutions of government."[17] Although Feldman makes mention of the released-time Supreme Court cases, he makes no mention of released-time in his proposal of how to integrate religion into public society. Given his prescription, one might wonder why not include the released time program as a possible place of compromise between the two groups.

As early as the 1950s, the American Civil Liberties Union (ACLU) was already making accommodations to help Muslim students be excused from public schools for religious holidays.[18] Although, the history of the released-time program mostly included the three Judeo-Christian religions – Protestantism, Catholicism, and Judaism – thinking about released-time programs in a post-9/11 world prompts the question of how many who might support a released-time program in 2011, when the United States has a religious diversity that surpasses anything seen before 1965. It remains notable that the released-time program declined as religious diversity increased in the United States.

The history of released-time deserves a full-scale scholarly treatment. This is a significant program in itself but it also helps illuminate the broader issues of Church and State in the United States. Yet it is a program that not only has not

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[16] Noah Feldman, *Divided by God: America's Church-State Problem – And What We Should Do About It* (New York: Farrar, Straus and Giroux, 2005), 8.
[17] Ibid., 9.
[18] Clifford Forster to William Woolston, January 16, 1950, ACLU Records, Box 798, Folder 31, Seeley G. Mudd Manuscript Library, Princeton University Library.

been fully explored, but scholars who do touch upon it make significant mistakes about released-time. The record needs to be set straight about what the released-time program was, what it accomplished, and what it was all about.

Chapters one and two will introduce the beginning of the released time programs, focusing on Gary, Indiana, but also explore why it was necessary if religion had been so prevalent in the public schools in the nineteenth century. Chapter two will chart the continuing growth of the programs throughout the 1920s and 1930s, along with the arguments Mainline Protestants were making in favor of the necessity of released time programs. Chapters three and four focus on the two Supreme Court cases dealing with released time. They explore the twisted way in which the Supreme Court came to make those decisions, and what that meant for these programs. In chapter five, the dissertation explores the strategy against released time in the mid to late 1950s, and also seeks to show how the debates over released time ended up informing the 1962 school prayer Supreme Court decision, *Engel v. Vitale*. The released time cases were not just an asterisk in the history of religion in the public schools; they were the defining moment.

## Chapter One: The Formative Years

Released-time programs were religious classes taught during the school day to public school students in the United States. Robert Michaelsen uses the term "released-time" for "any program which involves the use of a certain portion of the normal school day for denominationally or interdenominationally sponsored programs in religious education" and where parents have the authority to allow or disallow their children to participate in that religious education.[19] The released-time movement started in 1913. The roots of the released-time program, however, can be traced back to the nineteenth century when it could be safely said that America was a Christian nation, even more specifically, a Protestant nation. The American people, especially after two Great Awakenings, had become a very religious people by the nineteenth century.[20] If during any century, America was a Christian nation, it was the nineteenth.

In two influential articles, R. Laurence Moore does much to capture the complex and changing nature of religion within the public schools and the broader American culture. The rise of public education in the United States is tied to the Massachusetts reformer Horace Mann, the secretary of the

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[19] Robert Michaelsen, *Piety in the Public Schools: Trends and Issues in the Relationship Between Religion and the Public School in the United States* (New York: The MacMillan Company, 1970), 171.

[20] See for instance: Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007) and Mark Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* (New York: Oxford University Press, 2002).

Massachusetts Board of Education from 1837 to 1848.[21] In 1827, Massachusetts created the first law banning religion in the public schools, namely the purchase of books from a particular Christian denomination.[22] This was the period in which American education saw the rise of the term non-sectarian. Non-sectarian meant Protestant teaching upon which all Protestants could agree. Moore continues, "Mann was a strong proponent of the 1827 law and regarded nonsectarian as an easy term to define. Sectarian meant school books that were 'as strictly and exclusively doctrinal as any of the shelves of a theological library.'"[23] So, even though Mann supported Bible reading, it was to be done without comment and without any doctrinal interpretation.

How religion was actually practiced or taught in the public schools during nineteenth century is informative in showing how released-time came to be. R. Laurence Moore has argued that although religion was important to the intellectual development of nineteenth-century American children, it was not in the public school where that development occurred. Rather, he argues, it was the very public theological debates of the nineteenth century that left most everybody aware of the major theological issues.[24] "Nonbelievers and so-called freethinkers shared with Christian intellectuals in the nineteenth century a casual interest in discussing what are to moderns arcane issues of religious dogma," he writes.[25] Even those who migrated far away from orthodox Christianity shared with those

[21] Ibid., 1588.
[22] Ibid.
[23] Ibid.
[24] R. Laurence Moore, "What Children did not Learn in School: The Intellectual Quickening of Young Americans in the Nineteenth Century," *Church History*, 68 (1999), 42-61.
[25] R. Laurence Moore, "What Children did not Learn in School: The Intellectual Quickening of Young Americans in the Nineteenth Century," 54.

Christians the knowledge of the theological sphere. Moore believes this phenomenon explains why even though religion's place in America was declining in the late nineteenth century, many Americans were still quite religious in the early part of the twentieth century. "Over the course of the nineteenth century," he writes, "ministers might have lost their place as America's most significant learned class without disturbing the fact, at least not immediately, that serious thinking in nineteenth-century America remained closely tied to thinking about religion."[26]

On the other hand, Moore argues that Bible reading in nineteenth-century public schools was less present than previously thought.[27] Moore challenges the historiography of practiced religion in nineteenth century America's public schools. He suggests that everybody believes that Bible reading was present in most American public schools in the nineteenth century but he questions whether the practice was that popular.[28] Although Moore does acknowledge that there was a good amount of Bible reading in nineteenth century American public schools, he wants "to correct the notion, propagated by many endorsements of Bible reading, that a clear majority of schoolchildren encountered the Bible as a regular part of the school day."[29] Yet, even if many children read the Bible during the public school day, Moore argues that it was not significant because it was just read.

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[26] Ibid.
[27] R. Laurence Moore, "Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education," *The Journal of American History*, 86 (2000), 1581-1599.
[28] Ibid., 1582.
[29] Ibid., 1583.

Here is the irony that Moore notes. In the public schools of the nineteenth century then, students heard a passage from the Bible yet it was unlikely to make a significant impact on them. However, at home, they may have heard mother and father discussing the latest theological controversy dealing with the Unitarians. Nineteenth century Americans were religious, he argues, but not due to the public school. Moore concludes, "To many, what Mann left of religion in the Massachusetts common schools seemed too tame. From the perspective of a Catholic critic, public school religion was 'the vague transcendentalism of our poetical moralists.' By 1888, when that criticism was made, a majority of Protestant clergy in New England championed Mann's concept of the nonsectarian. Their change of mind, however, was largely an anti-Catholic reflex."[30] Denominational identity was still strong among American Protestants. The reason they became whole-hearted supporters of non-sectarian teachings was their collective fear of Catholicism. Even if some Protestants wanted to challenge Horace Mann's prohibition against sectarian religion in the public schools, they were too scared of Catholic teachings permeating the public school to actually challenge the restrictions on doctrinal teachings.

There was a specific reason why a program like released-time was not considered earlier in the nineteenth century. Moore explains that Mann "disapproved of the Prussian system that allowed different sectarian perspectives to be taught in separate classrooms. That system encouraged children to think

[30] R. Laurence Moore, "Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education," 1589.

'there is no such thing as truth.'"[31] This helps explain how released-time came to be. By the end of the nineteenth century, the combination of non-sectarian Bible reading and anti-Catholicism created a space for released-time programs. The very "Prussian" idea that Mann rejected would be revived in the early twentieth century. And here was the real impact of released-time programs. On the one hand, it appeared innocuous. It was done outside the official school program. Yet, it would also become a part of the school in a way that, as we see from Moore's summary of the nineteenth century situation, religion had never been before in America's public schools.

One of the institutions that predated and influenced released-time was the Sunday School. Sunday School became a quintessential nineteenth-century American institution. The historian Anne Boylan has written: "Millions of children imbibed a shared Protestant nationalism as part of the standard curriculum in both common and Sunday schools."[32] By the beginning of the twentieth century, however, Protestants who depended on Sunday Schools to transmit their faith to the next generation were seeing that many parents, nominally Protestant, were not bringing their children to church on Sunday in order to attend Sunday School. How much could you teach a child in that short of a period of time on Sundays? Sunday School and released-time classes were similar in their curricula. Sunday School associations evolved into Religious Education associations, which were the main Protestant vehicles behind released-

[31] Ibid.
[32] Anne M. Boylan, *Sunday School: The Formation of an American Institution, 1790-1880* (New Haven, CT: Yale University Press, 1988), 3.

time programs. The goal in both cases was evangelism, getting students whose families may not have attended church regularly to come to Sunday School, or, released-time classes.[33]

Catholic immigration to the United States in the nineteenth century started to change the religious dynamic of the nation. Feeling rejected by a mainstream American culture that was largely Protestant, Catholics had set up a network of parochial schools designed to keep a mostly immigrant Catholic youth within the fold. Catholics wanted tax money from the federal government for their parochial schools. Catholics had also made requests, successful in some cases, to end Protestant practices in public schools, such as the reading of the King James Version of the Bible. Until the 1940s, most cases involving school prayer or other aspects of the separation of Church and State were heard in and decided by state courts, as opposed to federal courts. Given that state courts decided these cases, there was no national consensus in the decades before released-time. In 1870, in Cincinnati, the city's school board decided to eliminate Bible reading since the King James Version of the Bible offended Catholics, Jews, Unitarians, and Universalists. The Ohio State Supreme Court gave deference to the local school board, as had been the case in many other state court decisions. The Cincinnati case was so different from all previous similar attempts by Catholics in the United States because in this case the board had stopped a

[33] W.O. Thompson, "A Message from W.O. Thompson – President of the Convention of the International Council of Religious Education," *International Journal of Religious Education* 1 (Oct. 1926): 14. It states that the International Council of Religious Education was an "union between the International Sunday School Association and the Sunday School Council of Evangelical Denominations."

distinctly Protestant practice, instead of defending it.[34] Two other state supreme courts weighed in on the merits of reading the King James Version (KJV) of the Bible: Illinois said this practice was not permissible in 1890, but Michigan allowed it to continue in 1898. Likewise, the courts declared KJV Bible reading to be inappropriate in Wisconsin, but Colorado did allow Bible reading to continue, telling Catholics that they needed to respect the wishes of the majority to have the KJV Bible read. Clearly, the issue of religion in the public schools was unresolved in the legal arena. There was certainly opposition to religious activity in the public schools, but this was due largely to the consequences of anti-Catholicism. In other words, as Hamburger argues, the courts were either anti-Catholic and supported Bible reading in the public schools, or they defended the rights of Catholics and decided to stop the reading of the Bible in the public schools. Now, if released-time gave Protestants, Catholics, and Jews the opportunity to create religious education classes for their own students, what would the law say about that? In 1913, it was unclear, but most Protestants strongly believed released-time would be found legally permissible.

After the Civil War, very slowly, the process of secularization started to take hold on American culture.[35] This made most Protestants quite uncomfortable, although they would hold on to a position of cultural prominence

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[34] This state court case and the others in this paragraph are recently and succinctly summarized in Joan DelFattore, *The Fourth R: Conflicts Over Religion in America's Public Schools* (New Haven: Yale University Press, 2004), 55-61.

[35] James Turner, *Without God, Without Creed: The Origins of Unbelief in America* (Baltimore: Johns Hopkins University Press, 1985) is one of the books that trace the slow decline of religion's prominence in the United States beginning at the end of the Civil War.

until the middle of the twentieth century.[36] So, at the beginning of the twentieth century, especially among Protestants, there was a push for more religious education both to combat secularization, but also in response to the decline of Protestant practices from the public schools. These efforts led to the beginning of the weekday released-time programs.

At the beginning of the twentieth century, there was still plenty of disagreement over the proper meaning of the separation of church and state. Philip Hamburger, a legal scholar, argues that two kinds of "separation" existed. Anti-Catholicism was one reason to support a high wall of separation between religion and government. Edwin Gaustad describes the prevalence of anti-Catholicism: "commonplace were the united efforts to see that no tax monies reached the Roman Catholic parochial schools."[37] In other words, most Mainline Protestants who wanted separation between Church and State meant that they wanted no governmental assistance for Catholic parochial schools. The other reason was what Hamburger refers to as the "Liberal" notion that the government should not coerce anybody to act or think religiously. From this perspective, neither should anyone be subjected to a majority publicly observing their religious views to the exclusion of a minority in a setting such as the public school. Protestants wanted to keep Catholics out of the public school,

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[36] David Hollinger, *Science, Jews, and Secular Culture: Studies in Mid-Twentieth Century American Intellectual History* (Princeton, NJ: Princeton University Press: 1996), 22. Hollinger explains that the process of Protestants being dethroned from their cultural hegemony was delayed by the Immigration At of 1924 which stopped the entry of Catholics into the United States.

[37] Edwin Gaustad, "The Pulpit and the Pews" in *Between the Times: The Travail of the Protestant Establishment in America, 1900-1960*, ed. William R. Hutchison (Cambridge: Cambridge UP, 1989), 43.

Hamburger argues, to keep public funds out of Catholic parochial schools, but not religion, Christianity, and the Bible from the public sphere, let alone from the public schools. Their anti-Catholicism led them to support the separation of Church and State. "Many Protestants assumed that they, unlike Catholics, brought their religion into politics as free individuals who were not as subservient to a single denomination or church," Hamburger writes, "and therefore they criticized Catholics on grounds of separation, without questioning their own political participation."[38] Hamburger argues that Baptists fell into this same category. He writes, "Southern Baptists similarly encountered a conflict between separation and the social gospel and typically resolved the incompatibility simply by applying separation to Catholics but not to Baptists."[39]

Most Protestants were not prepared to go as far in their support of Church-State separation as the liberals, although there was overlap as some Protestants began fitting under Hamburger's category of "liberal." The liberals were disappointed with Protestants who did not consistently oppose religion in the public school and despite liberals' best efforts during "the late nineteenth century...and throughout the first half of the twentieth, the Protestant conception remained popular and even flourished."[40] On the issue of Church and State, this meant banning any Catholic presence or power within the public sphere, but insisting on the Protestant presence as normative. It was within this context that weekday religious education released-time programs appeared. Hamburger

[38] Philip Hamburger, *Separation of Church and* State (Cambridge, MA: Harvard University Press, 2002), 364.
[39] Ibid., 379.
[40] Ibid., 365.

explains, "Although Protestants increasingly understood separation to be a constitutional right, some still worried that separation might limit their own denominational or more broadly Christian role in society."[41] Protestants, who had been so busy fighting Catholicism, realized at the beginning of the twentieth century that religion had been completely shut out of some public schools in order to avoid accusations of sectarianism. Weekday religious education was their policy to compensate for this exclusion.

Catholic fights over Catholic education presented possibilities for religious education in conjunction with public schools. In certain Catholic circles, there was a push to accept that not all Catholic children could go to parochial school. As a corollary of that conclusion, certain Catholic communities developed relationships with the public schools. Church historian Robert Handy describes one program in Poughkeepsie, New York. "Since 1873," he writes, "parochial school buildings had been rented to public school boards for a nominal fee during school hours, and teachers nominated by the local priest were approved and paid by the boards to teach the school curriculum. Religious instruction and observances were permitted only before and after regular school hours."[42] Archbishop John Ireland of St. Paul publicized these types of arrangements at the 1890 National Education Association meeting.[43] The National Education Association was dominated by Mainline Protestants and they might have thought

[41] Ibid., 375.
[42] Robert T. Handy, *Undermined Establishment: Church-State Relations in America, 1880-1920* (Princeton, NJ: Princeton University Press, 1991), 47.
[43] Timothy Walch, "Faribault-Stillwater Plan," in *Encyclopedia of Education Reform and Dissent*, vol. 2, ed. Thomas C. Hunt (Thousand Oaks, CA: Sage Publications, 2010), 371.

how some Catholics stopped Bible reading in public schools, whereas here Catholics were profiting from arrangements with the public schools.

One of the earliest suggestions that receive direct credit for released-time religious education came from Nicholas Butler, an educator who became President of Columbia University. As early as 1896, Butler proposed that "the state shall tolerate all existing forms of religious teaching in its own schools, time being set apart for that purpose." It seems that the idea copied a similar French practice, which gave students a "midweek holiday for religious education." It was known in that country as having "Wednesday afternoon off." Dr. G.U. Wenner presented a paper in 1905 before the Inter-Church Federation that resulted in a resolution being passed recommending "the favorable consideration of the Public School authorities of the country the proposal to allow the children to absent themselves without detriment from the Public Schools on Wednesday...for the purpose of attending religious instruction in their own churches."[44] With religion having been pushed out of the public schools due to anti-Catholicism, many Protestants were looking for a way to re-introduce religion into the public schools. Butler's idea matured into released-time weekday religious education. Wenner published a book about the idea of released-time in 1908.[45] His idea would become reality five years later.

The first released-time program began in Gary, Indiana, in 1913. The city itself had been founded only seven years earlier by the U.S. Steel Corporation.

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[44] J.A.W. Hass, "Week-Day Religious Instruction and the Public Schools," *Religious Education: The Journal of the Religious Education Association* 9 (1914): 26-27.
[45] Robert Michaelsen, *Piety in the Public Schools: Trends and Issues in the Relationship Between Religion and the Public School in the United States* (New York: The MacMillan Company, 1970), 171.

Since a swampy area in northwest Indiana had been transformed into a functioning city in less than a decade, Gary was often referred to as the "Magic City." The U.S. Steel Company dictated the life of the city. Gary was "a steel mill, a company town, an immigrant city." By 1920 immigrants made up over 60 percent of the city's population. Two other groups, besides immigrants from Eastern Europe, rounded out the population of Gary, African-Americans and Mexicans. Though numerous, immigrants did not play a powerful role in governing Gary. The real power broker was U.S. Steel. Its power increased in the city in connection with the Republican Party taking over in 1914. U.S. Steel was "breaking the steelworkers union in 1919," while also "working closely with local Republican politicians, and manipulating the programs and policies of Gary's newspapers, schools, churches, and settlement houses."[46]

When it was not breaking unions, U.S. Steel was trying to provide religious education for Gary's youth. During the 1920s, U.S. Steel donated as much as $4,000 per year to the Board of Religious Education (BRE), the main Protestant organization facilitating released-time education.[47] Although not a huge contribution, it showed that in 1920s Gary, released-time was acceptable to the corporate leaders of the town.

William Wirt had become the superintendent of Gary's schools in 1907. Wirt became renowned throughout the United States for the special platoon schools that he had developed. These platoon schools had children switching

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[46] Raymond A. Mohl and Neil Betten, *Steel City: Urban and Ethnic Patterns in Gary, Indiana, 1906-1950* (New York: Holmes and Meier, 1986), 4-6.
[47] James W. Lewis, *The Protestant Experience in Gary, Indiana, 1906-1975: At Home in the City* (Knoxville, TN: University of Tennessee Press, 1992), 66.

around different activities throughout the day. Another name for this type of school was the work-play-study school. Instead of having a regular school day with strictly academic subjects, the school day was lengthened and extra-curricular activities were included within the school day itself. This was part of the progressive education movement that sought to go beyond the 3 r's of reading, arithmetic, and writing; it aimed to develop the whole child.

Released-time had not been a part of the platoon school concept that Wirt had begun in Gary, Indiana in 1907. But in 1913, a Methodist preacher, Joseph M. Avann, approached Wirt about the option of releasing students for religious education. Avann later reflected that "the men of the church saw an opportunity and they grasped it."[48] Avann had learned that Jewish students were able to spend part of their day at the public school and part of their day at the synagogue, similar to the Catholic arrangements mentioned above. He wanted the same benefit for Protestant children. On October 21st, 1913, Wirt gave an address to the Gary Ministerial Association, the meeting of Protestant ministers. The fact that the public school superintendent gave a speech to the Protestant ministers showed his willingness to accommodate Protestant concerns in the fall of 1913.[49] Wirt opened the public schools to "release" students for weekday religious education during the public school day in the fall of 1913. Wirt believed that everybody educating a child should work together. Wirt had "suggested that one hour of the eight in the Gary School day...shall be used by the home or the public library or the church. This would make it possible for a church to instruct its

[48] Ibid., 62.
[49] Ibid.

children during the week." Wirt offered to "excuse children from the public schools on the written request of their parents," on only one condition: the released-time teachers would be as qualified as public school teachers.[50]

In the fall of 1913, two Protestant ministers, one Presbyterian and the other Episcopalian, and one Reformed Jewish rabbi taught the first released-time classes in Gary.[51] A year later, a total of nine Protestant churches, a Protestant settlement house, and the Reformed Jewish synagogue were providing released-time instruction off of school grounds. By 1917, most of the Protestant churches had joined forces in a body called the Board of Religious Education, which hired three teachers who were teaching 800 released-time students.[52] In 1919, Separate Baptist and Episcopalian programs had reached a total of 200 students, while the Jewish released-time program numbered around 100 students.[53] Through 1918, the number of teachers for the Board of Religious Education had also grown to six and the numbers of students also more than doubled to 2,000.[54] By 1929, the united Protestant program of released-time had 4,800 students in Gary.[55] Statistics from two years earlier indicate that there were a total of 17,000 public school students in Gary, Indiana at the time.[56] Around a quarter of Gary's overall public school student population was in a released-time program by the end of the 1920s. In reality, since most released-time programs were only for

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[50] Seaman and Abernethy, *Community Schools for Week-Day Religious Instruction*, 4.
[51] Lewis, *The Protestant Experience in Gary, Indiana, 1906-1975*, 62.
[52] Ibid., 63.
[53] Ronald D. Cohen, *Children of the Mill: Schooling and Society in Gary, Indiana, 1906-1960*, (Bloomington, IN: Indiana University Press, 1990), 60.
[54] Lewis, *The Protestant Experience in Gary, Indiana, 1906-1975*, 63.
[55] Ibid.
[56] Ibid., 58.

elementary-age children, the total percentage of how many students had been or were currently in released-time programs was probably even greater.

The First Baptist Church of Gary, in addition to the other religious groups already mentioned, sponsored a released-time class. They tried "to correlate the week-day instruction with that of the Sunday School. The American Baptist Publication Society furnished the lessons, the plan providing for the use of the Graded Sunday School lessons on Sunday and additional illustrative and supplemental material for the week-day hours."[57] But, released-time programs were difficult to sustain. William Wirt held the program to high standards of teaching, as he had promised to do. A Sunday School teacher might not be well-prepared, but a released-time teacher had to be. They were judged according to a higher professional standard. Protestants in Gary struggled to marshal the resources, like the Reformed Jews had done, for good quality teachers.

Protestants worked together and wore this unity as a badge of honor. In Gary, however, the story is more about money and less about ecumenical idealism. The individual Protestant churches could not afford to pay teachers and so they decided to pool their resources and form an organization that would hire teachers on behalf of all the Protestant churches. The Protestant churches would have never combined their Sunday School or vacation Bible school programs. But the released-time structure forced Protestants to work together. Whatever theological differences existed between them paled in comparison to the perceived need for general Protestant religious instruction. Even the

[57] Seaman and Abernethy, *Community Schools for Week-Day Religious Instruction*, 5.

Baptists, long known as the most independent Protestant denomination, folded their individual attempt at released-time.[58]

The Protestant Board of Religious Education had hired as many as fourteen teachers by 1922. It also negotiated space in various church buildings for released-time classes. Students would be released during the play or sports period and taken to one of the church buildings. The Board of Religious Education tried "to impress Protestant moral values upon a community that was not predominantly Protestant." The curriculum of the BRE was based on Methodist materials. The stated goals were to bring "each pupil into personal relationship with God" and to cultivate "Christian character" in those students.[59] The Protestant BRE did not stop with simply re-enforcing those values for Protestant children.

Another perceived benefit of released-time education was the ability to "Americanize" immigrant children. It is not coincidental that the program began in a city like Gary with a high percentage of immigrant families. Two historians, Raymond Mohl and Neil Betten, have remarked, "For Gary's Protestant church leaders, becoming an American meant becoming a Protestant, and they sought to attract immigrant children to the church schools."[60] The public librarian of Gary boasted: "As an agency for Americanization of the best sort nothing can equal the Church Schools of Gary."[61] Although most Eastern European immigrants resisted Americanization programs, released-time was in good company.

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[58] Ibid., 8.
[59] Lewis, *The Protestant Experience in Gary, Indiana, 1906-1975*, 62-64.
[60] Mohl and Betten, *Steel City*, 142.
[61] Ibid., 143.

Settlement houses, group homes providing shelter for new immigrants, were emblematic of the Progressive concern for immigrants. In Gary, one settlement house offered sewing classes for immigrant women, yet as they sewed, "girls of every nationality and religion were taught Christian Bible stories and Protestant hymns."[62] The classes served dual purposes – teaching practical skills but also educating them in the Protestant faith. One of the Jewish girls attending that sewing class was forbidden by her father from attending any further classes. He relented but only after the girl promised to pay no more attention to the Protestant hymns.[63] To understand the persistence behind the growth of the released-time movement, the role of Protestants needs to be further addressed.

Protestantism had been the dominant religious force in American culture until roughly the mid-twentieth century. However, by the end of the nineteenth century, Protestantism started to lose its footing. Theological squabbles started to permeate five major Protestant denominations: Disciples of Christ, the Episcopalians, and the northern wings of the Baptists, Methodists, and Presbyterians.[64] This was a reflection that in rapidly industrializing America, Protestants were not as dominant in their cultural position, especially by the 1920s according to Robert Handy, as they had been throughout the entire nineteenth century. One of the ways in which Protestants tried to overcome a possibly declining influence was to unite in various ecumenical, missionary, and Sunday School ventures. This was known as "cooperative Christianity" and

[62] Crocker, *Social Work and Social Order*, 156.
[63] Ibid.
[64] Robert Handy, A Christian America, 113.

although ecumenical, still sought "the full Christianization of American civilization."[65] Therefore, in the next few sections, it should be clear that the released-time movement was one of these broad Protestant united efforts. It transcended denominational structures, and for a while, it also transcended the theological divides that would redefine Protestantism by the 1920s.

Often, scholars refer to Mainline Protestants as liberal Protestants. This refers to the divide that culminated in the 1920s battles between fundamentalists and modernists.[66] Fundamentalist Protestants argued that the Bible should be read literally, while modernist Protestants accepted changes in their tradition, based on changes in understanding of the world due to Darwin, Biblical criticism, and other scientific developments. Modernist Protestants also focused their efforts on this world, best expressed in the Social Gospel Movement.[67] The Social Gospel was Christians focusing on the immediate effect of the coming Kingdom of God: helping people get through life just as Jesus had done. Yet Mainline Protestants were a diverse bunch. They were the leading religious authority in the United States, yet they were undergoing theological changes that would differentiate many from traditional Protestant, or evangelical, beliefs. Mainline Protestants embraced modernity, yet that transformation or acceptance of modernity has not been entirely completed. Martin Marty writes about Mainline Protestants in the early twentieth century saying that "the liberal laity, however,

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[65] Handy 150.
[66] This story is most ably treated by George Marsden in *Fundamentalism and American Culture: The Shaping of Twentieth-Century Evangelicalism, 1870-1925* (New York: Oxford University Press, 1980).
[67] Martin E. Marty, *Modern American Religion: The Irony of It All, Volume 1, 1893-1919* (Chicago: University of Chicago Press, 1986), chapter seven treats this aspect of Protestantism in the early twentieth century.

did not seem to follow the theologians in detail."[68] Even today, there is a continuum among liberal Protestants, many of whom are part of the Mainline Protestant denominations, and more conservative Protestants, typically known as evangelical or fundamentalist. A nuanced understanding of Mainline Protestantism is necessary for understanding released-time programs, since they were the main sponsors of them as a cultural project. In turn, the study of released-time also yields a more complete understanding of the tensions among Mainline Protestants.

The first time a distinction can be made between fundamentalists and evangelicals is in the 1940s. It was not their beliefs that separated them, for those were quite similar before the late twentieth century. Rather, it was their tone and, perhaps more precisely, their willingness, or lack thereof, to unite and advocate a positive program, as opposed to merely attacking the doctrinal errors of the Modernists who remained in the Mainline Protestant denominations.[69] Fundamentalists would never agree to unite with Mainline Protestants, whereas some evangelicals would consider certain such proposals, albeit with still a great amount of skepticism.

The term Mainline Protestants refers to Protestants who, generally after the Civil War, started embracing modernity in their understanding of religion

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[68] Marty, *Modern American Religion*, 41.

[69] Joel A. Carpenter, *Revive Us Again: The Reawakening of American Fundamentalism* (New York: Oxford University Press, 1997), 150-152 for the most direct explanation between the division of evangelicals and fundamentalists. His entire book, however, is an exercise in explaining these two groups in the early and middle parts of the twentieth century. The classic books on fundamentalism's origins, and the battles with the modernist Protestants are: Marsden's book noted above and Ernest Sandeen, *The Roots of Fundamentalism* (Chicago: University of Chicago Press, 1970.) The best single volume on Mainline Protestants after the 1920s is William Hutchison, ed., *Between The Times: The Travail of the Protestant Establishment in America* (New York: Cambridge University Press, 1989.)

and the world. On the other side, the term evangelical refers to Protestants who shunned modernity, believing in the inerrancy, or perfection, of the Bible. Even though the divisions between liberals and fundamentalists culminated in Baptists and Presbyterians splitting in the 1920s, The National Association of Evangelicals (NAE) was not formed until 1942. The relatively late date suggests that evangelicals did not feel completely out of sorts in the Mainline Protestant denominations. The Evangelical Alliance of the nineteenth century had helped set up the Federal Council of Churches (FCC) in 1908, which became the ecumenical body of Mainline Protestants in the United States. An evangelical spirit may very well have animated the FCC's member churches and denominations from 1908 until 1942. Robert Handy, a historian of Protestantism after the Civil War, agrees with the above point.[70] He writes, "perhaps at no point did the evangelical consensus which bridged denominational and theological gulfs show itself more clearly in action than in the common effort to maintain the public schools as part of the strategy for a Christian America."[71] Before looking at the main agency that supported released-time programs, the International Council of Religious Education, it is worth noting the strong presence of Mainline Protestants in Gary, Indiana, where the released-time program had its roots.

The churches of Gary, Indiana seem very representative of the Protestant churches of the United States. The churches partook in the creation of settlement

[70] Encyclopædia Britannica, 2011, "Evangelical Alliance," *Encyclopædia Britannica*, http://www.britannica.com.proxy.library.emory.edu/EBchecked/topic/196812/Evangelical-Alliance.
[71] Robert Handy, *A Christian America: Protestant Hopes and Historical Realities* (New York: Oxford UP, 1971), 101.

houses. The Methodists created the Neighborhood House while the Presbyterians created Campbell House. The historian of settlement houses in Gary and Indianapolis describes the goals of the settlement houses: "Americanization, religious evangelizing, and the improvement of the immigrants' health, housing, and morals." In other words, Gary had settlement houses that were not secular and served a missionary purpose for their sponsor churches. In general, Mainline Protestants, as the twentieth century progressed, became more respectful of other religions and placed less emphasis on conversion to Christianity. Evangelicals, on the other hand, were and still are very deeply concerned with salvation through conversion. The churches that had been supporting both the released-time programs and the settlement houses seemed to be somewhere between the typical evangelical or Mainline Protestant congregations. A student of the Protestants of Gary sums it up as follows: "In Gary, First Presbyterian Church relied heavily as a rule on the evangelical tradition, while City Methodist Church more often embraced the social gospel approach to the city. But in fact each congregation, to some extent, was both evangelical and social gospel."[72] The Social Gospel was a theological focus, typically associated with Mainline Protestants, on helping people and society like Jesus did. Usually, the Social Gospel replaced the evangelical focus on conversion and on Jesus as divine. In Gary, however, the Mainline Protestant churches retained part of an evangelical identity, even as they embraced aspects of the Social Gospel, such as the settlement houses.

[72] James Lewis, *The Protestant Experience in Gary*, 13.

A number of Mainline Protestants in the early twentieth century could not conceive of a complete education without religious instruction. They recognized that the American public school could not give a religious education, but they could not fathom a completely secular education for the nation's children. Mainline Protestants believed in the separation between Church and State, but that often meant keeping money from parochial Catholic schools, while supporting having the King James Bible read in the public, i.e. quasi-Protestant, schools. Hugh Magill, a secretary of the International Council of Religious Education (ICRE), was one of the leading proponents of the released-time movement and the main clearinghouse for the released-time movement. The divisions of the 1920s between fundamentalist and modernist Protestants did not get down to the level of the Sunday School quite so quickly.

Magill's interest was in what every student should learn, regardless of the limitations of the First Amendment. Magill wrote, "No education is complete that does not lead to a consciousness of God and a reverent obedience to His laws."[73] Magill proposed, "Our system of general education must have related to it, and correlated with it, a system of religious education which shall so motivate the lives of the millions of American youth as to conserve and develop the spiritual resources of the nation."[74] He believed that it was the duty of the United States to create a parallel system of education that was not constrained by the limits of separation of Church and State. Possible or impossible, the important

[73] Hugh S. Magill, "Our New Journal," *International Journal of Religious Education* 1 (Oct 1924): 12.
[74] Ibid.

thing was for the next generation of Americans to take stock of their Christian heritage and transmit it to the next generation. The same way that ancient Israelites and colonial Puritans worried about the next generation's wayward paths, Magill and his contemporaries saw in released-time the antidote to such religious declension. The rhetoric used by these religious leaders revealed their grave concern over the secularization that they saw taking place in American society. Another writer in the *International Journal of Religious Education* saw released-time as a response to the "tragic need" of America's children since they were not receiving "compelling religious and moral convictions by which alone a proper life of integrity can be sustained and feverish restlessness of the rising generation be steadied and properly directed."[75] The public school's education was incomplete and that was a dangerous thing for America's future. Magill asked, "Can a system of education that is purely secular produce the highest type of citizen?"[76] His answer was no. Certainly, it could not produce a righteous citizen. Magill and all those involved in the released-time movement were concerned with evangelism, reaching out to lost souls with the message of Christianity. This was no different from missionary activity in the Far East. Magill's idea of a complete education was one that would "lead to a consciousness of God and a faith in God; to an interpretation of the universe in terms of religious ideals and principles; to an acceptance of Jesus Christ as Savior and

[75] "Cooperation of Week-Day Church Schools and Public Schools," *International Journal of Religious Education* 2 (Nov. 1925): 15.
[76] Hugh S. Magill, "The New York Case," *International Journal of Religious Education* 2 (May 1926): 7.

Lord."[77] A complete education would lead to the conversion of the student; an incomplete education, the only one the public schools could offer, would not. Herman Harrel Horne, a professor of the philosophy of education at New York University, agreed that "the American democracy needs religion as well as morality as a basis for good citizenship."[78] Morality was not enough; for the good of America, religion was also necessary for the public schools argued these Protestants. Released-time was there to lay the foundation since the public school could not. An unsigned editorial in the *International Journal of Religious Education* written in 1930 stated that the released-time program was in fact doing a favor to public school education. Released-time, the editorial opined, "make(s) it as easy as possible for the state to discharge its responsibility of giving a complete education to the child."[79] By the time a student went through released-time, according to the beliefs of the Mainline Protestants supporting the programs, the public school would be educating angels, not children. In fact, if religion continued to be excluded from the education of public school students, they would receive a "pagan citizenship," which could not be the foundation of "an enduring democracy and a stable government."[80] For these Mainline Protestants, the connection between the success of the American republic and their religious convictions was very strong.

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[77] Hugh S. Magill, "Facing Together the Impelling Task," *International Journal of Religious Education* 2 (June 1926): 11.
[78] Herman H. Horne, "A Program for the Religious Education of a Community," *International Journal of Religious Education* 5 (October 1928): 14.
[79] "Editorial," *International Journal of Religious Education* 6 (June 1930): 7.
[80] "What's Happening," *International Journal of Religious Education* 14 (November 1938): 38.

When Mainline Protestants argued that a child's education was incomplete without religion, they liked to point to the broader American society and culture, suggesting that this view was widespread. Thomas Shields Young paraphrased a 1925 resolution of the National Education Association: "No person is symmetrically educated without religious education; the public school cannot give religious education. It should, therefore, be the duty of the public school to cooperate with home and church in giving religious education."[81] In fact, Mainline Protestants inhibited a country in which their values were still largely accepted but were increasingly under threat. The National Education Association (NEA), at the time, had many Protestant leaders, and a large majority of school teachers were born and raised as Mainline Protestants. Hugh Magill, the secretary of the International Council on Religious Education, had earlier been the field secretary the NEA.[82] In 1915, the NEA had commissioned a survey asking educators how they could get around the prohibitions so as to teach religion in the public schools.[83] Mainline Protestants were confident that they had authority over the public schools and could mandate the type of education that would be given to America's school children. For yet some time, Mainline Protestants' concerns in the 1920s were still, to a large degree, the concerns of the nation as a whole.

Not only would the transmission of faith from generation to generation fail, not only would Mainline Protestants lose their cultural significance, but the

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[81] Thomas Shields Young, "Shall Public School Property be Used for Week-Day Church Schools?," *International Journal of Religious Education 2* (March 1926): 58.
[82] Hugh S. Magill, "Facing Together the Impelling Task," *International Journal of Religious Education* 2 (June 1926): 11.
[83] "Religious Education Essay Contest," *N.E.A. Bulletin* IV (September 1915): 18.

nation would crumble like the Roman Empire of old. Charles Tuttle, an United States Attorney involved in the defense of New York's released-time programs, argued that "every sober-minded person knows that this great democracy cannot rest upon secular education alone."[84] American democracy required righteous Christian citizens to do their duty to uphold the democracy. In the midst of the wealth and prosperity of the 1920s, Tuttle also contended, "certainly this nation cannot be preserved materially unless it is first and also preserved spiritually."[85] Mainline Protestants such as Tuttle had plenty of religious arguments for the need for released-time program. Only legal arguments could carry weight in court, but the arguments these Mainline Protestants were making played in the court of public opinion – public opinion that in the 1920s was still overwhelmingly favorable to Christian ideals and evangelistic goals of Mainline Protestants.

Although Protestants did not seek to emulate Catholics in adopting a parochial school system, they praised Catholics for achieving what Protestants now desired. This was a real reversal – speaking positively about the Catholics whom Protestants had maligned for over four hundred years, and just about as long in North America. By creating the parochial school system, Union Theological Seminary professor Harrison Elliott wrote that Catholics had "made the only logical answer to this problem; namely, to insist that their children shall

[84] Charles H. Tuttle, "Review of the New York Case," *International Journal of Religious Education* 3 (June 1927): 14.
[85] Ibid.

be provided with an education in which religion is an integral part."[86] Even though Protestants rejected the parochial school model, they did find common ground with Roman Catholics on this one fundamental question. The education of a child was incomplete without religion. Catholics, for all the faults of the parochial schools, had found a way in which to give a complete moral as well as academic education to their children. Protestants, on the other hand, were failing in that responsibility; most agreed that only the released-time program could provide the same sort of complete education without gutting the identity of the democratic public schools.

Besides making the argument that a secular education was incomplete, Mainline Protestants behind the released-time program also wanted to use the program as an evangelization tool. This was in the tradition of the Sunday School innovation from the nineteenth century. But Sunday School programs were still not attracting enough children and their parents. Walter Albion Squires, the Director of Week-Day Religious Education of the Presbyterian Church, U.S.A.,[87] wrote that since "there are fifteen million children of school age in America who attend no Sunday school, or like institution, we can begin to realize the importance of the week-day Church school as an agency for reaching the spiritually neglected children of America."[88] As the gatekeepers of America's moral and religious heritage, Mainline Protestants could speak of the "spiritually

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[86] Harrison S. Elliott, "Are Weekday Church Schools the Solution?," *International Journal of Religious Education* 16 (November 1940): 8.
[87] "Who's Who in the May Journal," *International Journal of Religious Education* 3 (May 1926): 6.
[88] Walter A. Squires, "Recent Worthwhile Results in Week-Day Religious Education," *International Journal of Religious Education* 1 (Oct. 1924): 56.

neglected children" as being their responsibility. Mainline Protestants feared there were other groups in America who could teach those "spiritually neglected children" something else besides the Protestant version of the Christian religion and that is why they acted. Rather, the public school released-time program would be used in the same way as the Sunday School had been used. The clear advantages of the released-time program was that parents did not have to wake up to drive their children to church on Sunday; they had already taken them to school and would be much more likely to sign them over for an hour's worth of religious education. Not only was Sunday School not as effective as a tool for evangelization, it did not afford enough time for Christian students to become rooted in the faith. The principal of Lincoln School in Oak Park, Illinois, wrote much later in 1951 that "one hour of Sunday school obviously is not enough. Many of us in the educational field, welcome and salute the work of the church supported programs of weekday religious education."[89] So, for Mainline Protestants, weekday religious education was an extension of the Sunday School, both in the scope of its audience, and also in the time that could be spent on teaching students about the Christian faith.

Making arguments that the Supreme Court would accept in the early 1950s, Charles H. Tuttle assured his Protestant brethren much earlier that support for released-time would withstand all counter-arguments. He considered an argument against released-time: "The Free Thinkers' Society says, 'Very well, why this plan at all? Just stop the public schools that much earlier and

[89] Marvin J. Schmitt, "I Believe in Weekday Religious Education: A Public School Principal States his Views," *International Journal of Religious Education* 27 (Feb. 1951): 12.

excuse all the children.'" Tuttle admitted that this objection, proposing a dismissed-time program, was "a hard question to overcome." But for Tuttle and the rest of the released-time supporters, the problem was "the implication of the public school system" that it contended that "religion has no part in life. Time is not the question, because the local school can stay open after public school hours. But above all, it helps to create a community conscience for the advantage and necessity of religious education."[90] As a lawyer involved in the released-time court cases in New York in the 1920s and in the late 1940s and early 1950s, Tuttle was well aware of the logical and legal arguments against the released-time program. Yet, even these were convincing enough. Not only was the next generation in need of learning about religion, but it needed to know that religion was an important and integral part of life.

Tuttle and others argued that it was simply unfair to banish religion from the public school; this in and of itself gave the impression to youngsters that religion was in fact not important. This is perhaps at the crux of the pluralist argument in favor of released-time weekday religious education program. Because the public school had expanded so much in terms of how much time a typical student spent there every week, it only made sense to incorporate all aspects of a student's life into his or her education. By excluding religion entirely from the public school, school administrators not interested in religion made a statement that religion was not relevant or important to a student's development

[90] Charles H. Tuttle, "Review of the New York Case," *International Journal of Religious Education* 4 (June 1927): 15.

and education. A good number of Mainline Protestants did not want that to happen or occur.

The beginnings of released-time in Gary, Indiana were part of a larger movement to broaden education from the three r's to include music lessons, industrial education, and, in some cases, religious education. There was space for religion within this context. Outside of Gary, Protestants were making the argument that religion being excluded from the public school was tantamount to taking it out of children's lives. This may have been a fair conclusion, given the increase in the number of hours children were spending in school. However, released-time did make use of the school apparatus, increasing the number of students that would have been exposed to religion had the school apparatus not been used. This too may have been an unfair advantage given to Protestants by the public schools. This was also a debate about whether or not religion should still occupy a prominent space in American public discourse. Protestants who fought for released-time certainly believed religion should still play a prominent role in America.

Mainline Protestants were able to see the results they had predicted. Better behavior among students was a clear indication that the message of Christianity was changing lives. The report from one of the released-time leaders in Cortland, New York suggested that although there had been "opposition" on behalf of public school teachers due to the interruption of the public school education, "as time went on, however, every teacher became convinced of the

value of the work and now all enthusiastically support the program."[91] Released-time's by-product was changed lives. Even skeptical public school teachers were quickly convinced that the interruption of released-time was worth it, given the transformation of their students. Of course, the report was from a partisan in the battle over released-time. But in a culture that was still dominated by Mainline Protestants, enough public school teachers appreciated the supposed transformations in their students to allow released-time to flourish in large numbers in America throughout the 1950s. Mainline Protestants' assumption that if released-time occurred and the results, such as improved behavior among those students, were visible, communities would rise to the defense of the program went along, even with the challenges from the 1910s to the 1950s. George L. Cutton, the Baptist leader in the religious education movement in New York State, also stated that released-time was "a successful business of prevention of crime, indecency and disorder in the future life, and to a marked degree in the present life of our community."[92] The primary mission of the weekday religious education programs was to bring students to a deeper knowledge of the Christian faith, yet supporters noted the advantage that the communities would be rid of juvenile delinquency, truancy, and crime. And, things would only get better as the generation that was being raised under this new program would grow to adulthood. No doubt, these Mainline Protestant

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[91] George L. Cutton, "They Said, 'It Can't be Done'—But It is Done!," *International Journal of Religious Education* 4 (Oct. 1927): 22.
[92] George L. Cutton, "They Said, 'It Can't be Done'—But It is Done!," *International Journal of Religious Education* 4 (Oct. 1927): 44. In Ohio, the case was the same. One Juvenile Court judge credited the weekday religious education program with a decrease in juvenile delinquency. Maxwell Hall, "A County Program of Religious Education," *International Journal of Religious Education* 5 (Jan. 1928): 12.

leaders would argue that the "Greatest Generation" knew how to sacrifice because they had learned about Jesus' sacrifice during released-time.

Mainline Protestants had long dominated America's public schools, much to the chagrin of Roman Catholics. Yet, if things did not change, there were ominous tones coming from the camp of the Mainline Protestants in regards to their continued support of public schools. Luther Weigle, the dean of Yale Divinity School, a bastion of Mainline Protestants, gave the following warning in 1926: "Now you will not misunderstand me. I believe with all my heart and soul in public education. I send my own children, on principle, to the public schools of the community where I live. The public school is the last of our institutions, next to the church, to be surrendered."[93] Certainly, at the time, Mainline Protestants were very far away from abandoning the public school. In 1926, an overwhelming number of teachers and school administrators were still Protestant. He was, however, concerned that one day the public school would be surrendered. But, he and other leaders of the released-time movement would not go down without a fight. Walter S. Athearn, who headed the School of Religious Education and Social Service at Boston University in the 1920s,[94] suggested that the "public school, unaided" could not "guarantee the moral integrity of the moral people."[95] In an odd phrase suggesting that released-time education had to be added to the public school's education, Athearn wrote, "the public school is not

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[93] Luther A. Weigle, "What is Religious Education," *International Journal of Religious Education* 3 (June 1926): 24.
[94] "Who are the Leaders of Thought in Religious Education?" *International Journal of Religious Education* 5 (Feb. 1928): 15.
[95] Walter S. Athearn, "Protestantism's Contribution to Character Building in a Democracy," *International Journal of Religious Education* 3 (June 1926): 27.

the whole thing in American education."[96] In many ways, although Mainline Protestants never retreated like fundamentalists in the 1920s and 1930s, the threat of losing the public school lurked in the minds of some Mainline Protestants in the 1920s.

Historians have found rigid theological differences between evangelical and liberal Protestants. Yet in the 1920s, and for a few more decades, Mainline Protestants wanted the same thing for the public school as evangelicals who would later become a part of the Religious Right. Historians have been correct in identifying vastly different theological approaches to the questions of modernity. Evangelicals, and fundamentalists, believed that the Bible is as true as it was before Charles Darwin, whereas liberal Protestants have adopted a view of the Bible consistent with the findings of modern science. Yet that picture is somewhat misleading, or at least incomplete. Brooks Holifield has unearthed a 1929 survey of Mainline Protestant pastors and found that there was a wide variety of theological beliefs held by those ministers.[97] Also, most historians have forgotten that many Protestant Christians did not engage in the theological debates that culminated in the denominational splits of the 1920s.

The historian Timothy Weber has differentiated among evangelicals. Evangelicals had as much disunity as unity, he argues. One of his most

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[96] Ibid., 27-28.

[97] E. Brooks Holifield, *God's Ambassadors: A History of the Christian Clergy in America* (Grand Rapids, MI: William B. Eerdman's Publishing Company, 2007), 171. Steven Tipton, in *Public Pulpits: Methodists and Mainline Churches in the Moral Argument of Public Life* (Chicago: University of Chicago Press, 2007), does a great job of showing how Methodists, considered to be Mainline Protestants, are still, in the early 21st century, very split over many theological issues. In many ways, this confirms the idea that there was a continuum between Mainline Protestants and evangelicals from 1913 until the 1960s, since one seems to still be present in places like the Methodist Church.

interesting categories that he describes is the "progressive evangelical." Weber writes that "progressive evangelicalism currently consists of a union of elements from the post-World War II 'new evangelical' attempt to transform fundamentalism, the large traditional segment within mainline Protestantism, and other reform-minded believers."[98] Weber's focus on the "large traditional segment" refers to the 500 American Baptist churches that are currently banding against their denomination's move to accept gay marriage. This "traditional segment" played a large role in the released-time movement. These were leaders who were more concerned with Americans losing the young generation to secular forces, even as they remained in denominations that generally accepted evolution. Furthermore, these traditional Mainline Protestants were not terribly different from evangelicals in the past half century. Timothy Weber's grouping of traditional Mainliners with evangelicals is confirmed by the history of the released-time movement and its similarities to the fights over school prayer after 1962. Weber finds a subset of progressive evangelicals to be "pragmatic progressives" who "are willing to do just about anything" to reach out to the larger society.[99] Weber finds that there is continuity between today's megachurches (Bill Hybel's WillowCreek and Rick Warren's Saddleback) and evangelicals going back to the nineteenth century, who "did what they could to reach immigrants, the newly educated, or other people who had little interest in

[98] Timothy Weber, "Fundamentalism Twice Removed: The Emergence and Shape of Progressive Evangelicalism," in *New Dimensions in American Religious History: Essays in Honor of Martin E. Marty*, ed., Jay P. Dolan and James P. Wind, (Grand Rapids, MI: Eerdmans, 1993), 266.
[99] Ibid., 280.

what they had to offer."[100] In this continuum stand the traditional Mainline Protestants who offered the nation weekday religious education on "released-time." This group, of what Weber would call a subset or the progenitors of "progressive evangelicals" or "pragmatic progressives," transcended the Fundamentalist-Modernist debate so as to focus on their mission to reach a generation of young, unconverted Americans in the public schools, and their lapsed parents. In other words, these traditional Mainline Protestants put aside theological squabbles not because they were anti-intellectual, but because they still adhered enough to traditional Protestant theology to believe that anybody who did not practice an active Christianity was going to hell. They felt that they needed to move into the public schools and bring the light of Christ to those students. In fact, many Protestants wanted to transcend the theological divides and focus on evangelism, converting people to Protestant Christianity. The clearest similarity between evangelicals and Mainline Protestants on released-time is that important segments of both groups opposed the *McCollum* decision. The National Association of Evangelicals spoke out against it in 1948, defending the voluntary nature of released-time.[101]

Walter S. Athearn, one of the leaders of the released-time movement in the early decades, wrote that "should the public school base its ethical instruction on naturalistic and materialistic theories of reality the church would find in the public school an agency of agnosticism directly hostile to the spiritual ideals of

[100] Ibid., 281.
[101] Daniel K. Williams, *God's Own Party: The Making of the Christian Right* (New York: Oxford University Press, 2010), 18.

the Christian religion." This would call for "vigorous action on the part of protestant [sic] citizens."[102] Athearn was no fundamentalist, but he was also concerned enough about modernity and secularization to make strident remarks about what was happening to the public school.

The uniting factor for many Protestants, even in the face of the fundamentalist-modernist splits, was evangelism. And evangelism was at the heart of the released-time movement. In Dayton, Ohio, circa 1928, the plan of action included "that some contact be made with the home of each child who has signed a card, through a call, a mothers' meeting, a letter to all mothers, or other plan."[103] The evangelism was meant for the child and the child's family. For Protestants, this was the whole point. Yet, this was also a grave problem for the legal viability of the released-time movement. The apparatus of the state was being used (public schools gave parents the cards that they were to sign giving permission for their sons and daughters to attend released-time or not attend) to create connections that would allow for evangelism.

Luther Weigle, dean of Yale Divinity School from 1928 until 1949, was "amazed to read in the 'Announcement' of the 1927 meeting of the Religious Education Association" the following statement about their view on religion in public schools: "Religious motivation may not be used; the name of God may not be used."[104] Weigle was very much a part of the intellectual milieu of the 1920s

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[102] Walter S. Athearn, "Protestantism's Contribution to Character Building in a Democracy," *International Journal of Religious Education* 3 (June 1926): 27.
[103] Blanche Carrier, "Personal Commitment in the Weekday Church School," *International Journal of Religious Education* 4 (March 1928): 22.
[104] Boardman W. Kathan,"Luther Allan Weigle," Christian Educators of the 20th Century, Talbot School of Theology, http://www2.talbot.edu/ce20/educators/view.cfm?n=luther_weigle. Luther

and was not somebody unaware or unfamiliar with various progressive methods in education. The increasing pluralism that George Coe wrote about and the de-Christianization that was taking place suggested that this would be the trend in the public schools. Luther Weigle was astounded that his fellow Protestants would accept this sort of a proposition. He was not aware that "the stripping of religion from the public schools had gone quite as far as that."[105] He was even more worried that his fellow Protestants were giving up on this necessary fight. "This situation is fraught with danger," he wrote. "It imperils the future of religion among our people, and with religion, the future of the nation itself."[106] Weigle was concerned about the future of the nation, but he was most disappointed with those Protestants who were willing to give up on religion in the public schools. The separation between the ICRE and the REA was not as rigid but the ideologies that had developed clearly show us that the fault lines within Mainline Protestantism were much more complex than often imagined. Throughout the 1920s, and well into the 1960s, there were plenty of Mainline Protestants who did not share the view that God should be removed from the public schools.

Mainline Protestants were not casual about religion in the public schools; they were adamant and intentional. There was a program of character education blossoming in the first few decades of the twentieth century in America's public

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Weigle, "The Relation of Church and State in Elementary Education," *International Journal of Religious Education* 5 (Nov. 1928): 13.

[105] Luther Weigle, "The Relation of Church and State in Elementary Education," *International Journal of Religious Education* 5 (Nov. 1928): 13.

[106] Ibid.

schools. In some ways, it complemented the renewed focus on religious training. But character education did not have a specific religious grounding; it was a de-Christianized program of character training, albeit as far as the particular teacher was also de-Christianized. Mainline Protestants in favor of released-time were not enthusiastic about character education even though it certainly would have benefited every child's behavior. N.F. Forsyth, of the Methodist Episcopal Church, wrote: "The 'Jesus way of living' is concerned with complete living. Consequently there is need for such knowledge and activity as are needed to interpret and motivate all of life in a Christian way. All of life's information, attitudes, motives and behavior need to be shot through with religious meaning."[107] It was not enough for children to receive a good education, even if it was about manners and improved behavior. Rather, for Christians, the "Jesus way of living" required that the whole life be lived under religious guidance. If children were simply taught to be good, then they were missing out on why they had to be good. For Protestants like Forsyth, education was incomplete without religious meaning, even if it was specifically aimed at solving the same problems Protestants claimed to solve by implementing released-time programs. Forsyth also was optimistic that "when public-school men realize that this plus element in religion can never be taught by the State, they will seek a way by which these altogether significant elements may find their way into the educational process."[108] While recognizing that the wall of separation precluded the "Jesus

[107] N.F. Forsyth, "What is Involved in Enlisting Public-School Cooperation?" *International Journal of Religious Education* 5 (May 1928): 29.
[108] Ibid.

way of living" from being taught in the public schools, Forsyth also saw the clear path of released-time that would allow Christian students to be indoctrinated in the "Jesus way." In an editorial in the *International Journal of Religious Education*, Theodore Soares contrasted character education and Christian education with the following dichotomies: "life here and now" versus "life here and thereafter;" "social adjustment" versus "cosmic adjustment;" temporal values" versus "eternal values"; and "reference only to powers resident in human kind" versus "reference in addition to powers inherent in the nature of God and Jesus Christ."[109] The public school had to be secular but secular was not enough when it came to education. Soares concluded, "But we can never be content to rest our case with the character education movement. Something broader, deeper, and higher is needed in America before she can fulfill her destiny in the eyes of God. The extent to which the church believes this will be reflected in the ampleness with which it provides for the thorough-going Christian education of the new generation."[110] America did not just need character, Soares argued, it needed religion. Released-time was a test for the Protestant denominations, and they needed to pass for America's sake. Ultimately, these Mainline Protestants were evangelical enough to require a thoroughly Christian program of character education because true character, they believed, could only be formed through Christianity.

Besides the tendencies that allow us to categorize the Mainline Protestants who supported released-time as "pragmatic progressive evangelicals," there are

[109] Theodore Soares, "Editorial," *International Journal of Religious Education* 6 (July 1929): 5.
[110] Ibid.

accounts that show just how close Mainline Protestants came to evangelicals and even fundamentalists. In 1929, the Lakeview Council of Religious Education asked the Chicago Board of Education for permission to begin a released-time program. The Chicago Council of Religious Education, part of the Chicago Church Federation, supported this plan. The Chicago Church Federation was the Mainline Protestant outfit in town. The news report about this new program in the *International Journal of Religious Education* contained a peculiar piece of information: "although the experimental school is of necessity interdenominational...its teachings will be in accordance with that of the more orthodox of the Protestant or evangelical churches."[111] In all the articles about released-time in the *International Journal of Religious Education,* there is very rarely a mention of the specific teachings of a weekday religious education or released-time program. Clearly, it was unique that this released-time program was going to be more evangelical than a typical released-time program. Yet, there was no lack of support for the program. The main teacher would be "Miss Lucile Desjardins, who...had wide experience teaching in the weekday schools of Birmingham, Alabama."[112] The teacher of Chicago public school students during their released-time had developed her experience in the 1920s South. There were plenty of such connections between released-time, Mainline Protestants, and evangelicals.

[111] "What's Happening in Religious Education," *International Journal of Religious Education* 6 (Oct. 1929): 40.
[112] Ibid.

Mainline Protestants who supported released-time weekday religious education understood America as a Christian nation and they believed that released-time helped preserve that heritage. Hugh Magill, secretary of the ICRE in the 1920s, wrote, "It is important that we keep in mind that from the time of the first settlements in America it has been recognized fact that national morality cannot be maintained without religion, and, therefore, that religion is essential to free government. This principle has been enunciated over and over from the landing of the Pilgrims down to the present day."[113] This version of history passed over the deistic Founding Fathers, yet when Magill's version of events came to the public schools, he was more accurate. "When the first free schools were established in America the distinction between the functions of the church and the state in education was not clearly recognized," he argued, "The religious motive was dominant in the promotion of education, and many of the early public schools taught religion."[114] Going back to Puritan New England, there had been a strong religious element in early American schools. In the nineteenth century, there had been a drop-off. According to Magill, the drop-off was due to the fact that "the public school, representing the state and serving all creeds, could not teach subjects upon which the different religious sects held divergent views."[115] In other words, the only reason that religion, or Christianity, had declined in its importance in the classroom was the realization that in America, Baptists, Methodists, and Presbyterians wanted their children to go to the same public

[113] Hugh S. Magill, "The Church School and the Public School," *International Journal of Religious Education* 2 (Feb. 1925): 10.
[114] Ibid.
[115] Ibid.

school, even with children of Unitarians. In addition to Protestant distinctions, Catholic efforts had also, in some communities, made it difficult to even keep a generic Protestant religion in the classroom. So, Christianity was not ousted from the classroom because Christianity was de-valued, but to avoid sectarian strife.

A weekday religious education program started in rural Iowa shows how some Mainline Protestants understood that religion had been taught in the public schools and they still wanted religion to be taught in the public school. Philip Henry Lotz reported about "Fayette, the seat of Upper Iowa University," that "the president of the public school board of education was interviewed and it was discovered that he was favorable."[116] Although not all school boards throughout America allowed released-time programs, the school boards that did allow released-time drew on the memory of America as a place where religion was a vital part of public education. Walter S. Athearn, head of the School of Religious Education and Social Service at Boston University, went a step further with this argument. Not only had religion been taught in America's public schools, but religion, more specifically Protestantism, had given the world public schools. He wrote, "*The free schools for the masses are the gift of the protestant church to the democratic state* (italics in original)."[117] So, not only had American public schools traditionally hosted Protestant ideas, but the whole project of public schooling came from Protestantism. This argument implied that it was betrayal

[116] Philip Henry Lotz, "How the Week-Day Church School of Fayette, Iowa, Was Organized," *International Journal of Religious Education* 3 (May 1926): 27.
[117] Walter S. Athearn, "Protestantism's Contribution to Character Building in a Democracy," *International Journal of Religious Education* 3 (June 1926): 26.

for Americans or public school administrators, more specifically, to kick out the Protestantism that had, in fact, given birth to the public school.

One reason Protestants gave for the legality of released-time was its connection to parental rights. In the same Iowa town mentioned above, "the parents of 70 per cent of the pupils in grades three, four and five indicated that they desired their children to receive one hour of moral and religious instruction per week during public-school time."[118] This common theme of parental rights would come up frequently in the arguments of released-time proponents before the courts. The importance of this issue and argument would come later. The Protestant assumption was that in Protestant America, if Protestant parents wanted their children to receive Protestant instruction in the public school, then that was the way it would be. Although there was an argument to be made, this argument would be brought under great legal scrutiny by the opponents of released-time programs in Illinois and New York.

Mainline Protestants, however entitled they felt to promote the weekday religious education during released-time, did not want to stray beyond the bounds of legality. Church and State were separate in the United States and they did not feel they needed to cross the lines of legality in order to promote released-time. Mainline Protestants contended that "public education is not anti-religious. It is constitutionally non-religious."[119] Mainline Protestants could, in good conscience, support released-time programs while at the same time insist

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[118] Philip Henry Lotz, "How the Week-Day Church School of Fayette, Iowa, Was Organized," *International Journal of Religious Education* 3 (May 1926): 27.
[119] N.F. Forsyth, "What is Involved in Enlisting Public-School Cooperation? *International Journal of Religious Education* 5 (May 1928): 28.

that no religious activity could take place within the public school. The buzz-word was cooperation. Since the public school could not legally teach about religion, the best that could be hoped for and worked towards was cooperation with the public school, allowing for this released-time. But, this cooperation would in no way endanger the secular space of the public school.

Mainline Protestants saw the national tradition being safeguarded, for the most part, by public school teachers. Charles Tuttle, the attorney representing released-time rights in New York, wrote that "the great bulk of the teachers belong either to the Protestant Teachers' Association or to the Catholic Teachers' Association." Therefore, he concluded that "the public school system...is run, in the main, by people who are...religious in their outlook on life."[120] Tuttle was correct. And here is the heart of the matter. The ideas about the Founding Fathers being pious evangelicals were absurd, but on the matter of the American population, in the 1920s, Tuttle could bet that most people were religious in their outlook. He included Catholics in his counting mechanism; again, another parallel with the Religious Right's coalition between Catholics, Protestants, and other religious groups. And because so many public school teachers were Christian, and because so many school administrators and members of schools boards were also Christian, there was remarkably little opposition to the released-time movement. While there was disagreement over whether or not the public school teachers could actually teach religion in the public schools, what was clear for the supporters of released-time was that they were dealing with a

[120] Charles H. Tuttle, "Review of the New York Case," *International Journal of Religious Education* 4 (June 1927): 14.

mostly Protestant enterprise in the public school. The buzz-word was cooperation. There was nothing to stand in the way of that cooperation, most Protestants had found in their experience. And so, in many communities, urban and rural, across the United States, the public schools were administrated and staffed by enough Protestant, or religious, people throughout the 1920s, 1930s, and 1940s, just as Tuttle and other Mainline Protestants had imagined they would.

Part of what was so painful for Mainline Protestants was the fractured sense of belonging that they were experiencing as part of the battle over released-time. The public school represented the best meeting between Christianity and America. Charles Tuttle wrote, "The public school system is, in the belief of the vast majority, the bulwark of the nation. It is the expression in practice, the outward, visible sign that all men are born free and equal. The public school system is essentially Christian in that respect because it was founded on the principle that there are inherent possibilities for good in every man, given the opportunity to understand him."[121] Democracy was good; the rhetoric of equality down from Jefferson and Lincoln was conflicted but Mainline Protestants did believe, by the twentieth century, in the "inherent" goodness of each man. Not only did Tuttle endorse the project of democracy as worked out by America's public schools, but he claimed that this essentially made the public schools into Christian schools. It was this conflation that was at the core of the Mainline Protestant position on released-time.

[121] Ibid., 13.

The battle had already begun. Mainline Protestants had a righteous indignation that would explain the strength of the released-time program into the 1950s. Maxwell Hall characterized the public school system as one "where pupils would be taught the beauties of the religions of the ancient Greeks and Persians but would have to go to a neighboring church to be taught the Beatitudes or the Twenty-Third Psalm."[122] For Hall, students' leaving the public school so as to be able to be taught religion was shameful in itself. Especially so because of what else they were learning. Protestants thus argued the public school was not only separating itself from religion; it was undermining it. Such cynical views revealed the frustration of American Protestants who had been used to living in an altogether Protestant America.

[122] Maxwell Hall, "Religious Instruction in Public School Buildings," *International Journal of Religious Education* 4 (May 1926): 54.

## Chapter Two: The Spread of Released-Time Religious Education

One of the debates among Protestants who supported released-time was whether it was appropriate to hold the classes in public school buildings. Since the weekday religious education classes were funded and taught by groups and teachers outside of the public school system, would it be a real problem to not transport students to an offsite location and just hold the classes in a public school building? In a 1916 letter, William Wirt wrote that "in no instance is religious instruction permitted in the school building and by school teachers."[123] As has been shown already, various state courts, as early as the 1870s in Ohio, had stopped the practice of Bible reading in public classrooms. There was this general sense that religion could not take place within the public school – if nothing more, this was a strategy to keep the Freethinkers quiet about such arrangements. Wirt wanted to keep things above reproach, but as the Great Depression began a decade and half later, William Wirt did, in 1930, allow use of the public school buildings for released-time classes.[124]

The Great Depression had a dramatic impact on released-time programs in Gary. By 1934, the budget which had been at $19,000 at the end of the 1920s was slashed to just $1,300. James Lewis has remarked that it was incredible that "somehow the church schools managed to survive the Depression decade into the early 1940s."[125] In Ithaca, New York, released-time was likewise affected but

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[123] Lewis, *The Protestant Experience in Gary, Indiana, 1906-1975*, 64.
[124] Ibid.
[125] Ibid., 66.

survived, barely: "The depression came. Churches and charitable organizations cut expenditures. Weekday religious education had a precarious budget but it went bravely on."[126] That the program lasted so long is consistent with the national growth of released-time programs into the 1940s. The Gary, Indiana program lasted for 35 years, ending only in 1948. The reason the program ended had nothing to do with financial difficulties, but rather with an uncertain legal climate. The 1948 Supreme Court decision, *McCollum v. Board of Education*, stated that released-time programs were unconstitutional if they took place in school buildings. Most of Gary's released-time programs did not take place on school grounds, but, like many other released-time programs, Gary figured that the Supreme Court would next move to declare all released-time programs unconstitutional.

The released-time movement in Gary not only survived but thrived. The numbers of students that participated were indeed impressive. Proponents of released-time classes believed those classes were improving children's behavior. There were attempts to connect released-time education with good behavior among Gary, Indiana's youth. A contemporary study, quoted in a recent monograph, described the following scene: "For a city 75% foreign-born and having 8000 negroes many of them just come from the densely peopled 'Black Belt' of the South, Gary does not seem to have a high percentage of juvenile delinquency. It is easy to believe that if it were not for the religious education

[126] Alice Geer Kelsey, "Weekday Religious Education Succeeds," *International Journal of Religious Education* 15 (1939): 19.

agencies of the city, conditions would be far worse than they are."[127] Reflecting their racist opinions, Gary residents of the early twentieth century believed that only something like released-time programs could stop African-Americans and immigrants from juvenile delinquency – this despite the fact that released-time classes, like other extra-curricular activities, were not even offered to African-American students.[128] Another anecdote from Gary tells about the time when visiting seminary students observed a released-time class. In a friendly competition between the seminarians and the fifth and sixth graders, the released-time students had superior Biblical knowledge, leaving the seminary students "hopelessly behind!"[129]

Whether or not this anecdote is entirely true, it brings forth a major point about released-time instruction. Starting in Gary, Indiana, in 1913, two generations of American public school students would have more Biblical, and generally more religious, knowledge, than generations immediately before and certainly more than those to come. The students in released-time programs came close to having religion as a regular part of their public school curriculum. Even though it was being taught only once a week, by a different person than their regular public school teacher, and, most of the time, at a different place, religion was a part of what these students learned daily during their time in the public school system.

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[127] Cohen, *Children of the Mill*, 60.
[128] Mohl and Betten, *Steel City*, 57.
[129] Lewis, *The Protestant Experience in Gary, Indiana*, 65.

Proponents of released-time in Gary also measured success by tracking how many others cities adopted the Gary Plan. Part of this replication had nothing to do with released-time. William Wirt's platoon school was part of the progressive education outlook of the day. For example, New York City public schools had invited Wirt to advise them on the platoon system for the entire system of public schools in NYC. But proponents of released-time were excited that, by 1920, an estimated 300,000 students nationwide were participating in released-time programs in their local communities.[130] The Protestants of Gary, Indiana, rejoiced that released-time was spreading around the United States because of their efforts. The President of the Board of Religious Education, Grant Seaman, said in 1918, "This...seems to be destined to spread...we were blazing a trail that might be followed." A few years later, the superintendent of the BRE, Mary Abernethy wrote that "over 1,000 cities in America" had followed Gary's example of released-time weekday religious education.[131]

One intellectual who knew of Gary's released-time program due to his support of the platoon school was Randolph Bourne, a critic famous for his opposition to World War I and for his exposition of cosmopolitanism. Bourne wrote of the program in Gary: "Religion does not enter the Gary school in any form, not even in Bible reading and prayer. But children may go out, for one hour a day, two, three, or even four times a week, to classes in religious instruction, privately organized and supported by the various churches of the

[130] Cohen, *Children of the Mill*, 61.
[131] Lewis, *The Protestant Experience in Gary, Indiana*, 67. Both of the preceding quotes were on the same page.

city."[132] Bourne explained how released-time activity could take place at the same time as other children going to a religious center or to some other activity that would not traditionally be covered by the public school.[133] Bourne's argument for released-time stemmed from the fact that any activity was permitted for Gary. Bourne noted the leading role of the Mainline Protestant churches in Gary, Indiana: "the Presbyterian, Methodist, and Christian churches are said to have united in engaging a teacher at a relatively high salary. Such coöperation not only insures the services of well-trained and liberal teachers, but must necessarily banish sectarian dogmatism from the teaching."[134] Like Wirt, Bourne defended released-time education, in part, due to the quality of the teachers, yet he noted that released-time was pluralist in nature. "In Gary, the Baptist, Roman Catholic, and Hebrew churches...are said to be giving this special instruction," he observed.[135] Bourne celebrates that this program was open to non-Protestants and represented the religious diversity of the United States, although his use of "Hebrew churches" shows a certain ambivalence towards non-Christian religions. All in all, an early twentieth-century American intellectual was able to appreciate the possibilities of released-time education.

The early attempts in Gary did, in fact, reflect a certain amount of diversity. The first "classes were organized at the Reformed, the United Presbyterian and the Episcopal Churches and also at the Reformed Jewish

[132] Randolph S. Bourne, *The Gary Schools* (Cambridge, MA: The M.I.T. Press, 1970), 53.
[133] Ibid.
[134] Ibid., 54.
[135] Ibid.

synagogue."[136] Seaman and Abernethy refer to Jews, perhaps not surprisingly given stereotypical beliefs, in regards to money. For example, "Jews have found it wise to work this source of income carefully, because in soliciting parents they create in them an interest in the work of the school, which gives it moral support."[137] The Reformed Jewish synagogue also included the costs of weekday religious instruction in its regular budget. In both of these comments, the Protestants of Gary offered admiration, however grudgingly, to their Jewish neighbors. With regards to finances, at least, the message to Protestants was to emulate what the Reformed Jews had done.

Naomi Cohen's work on the Central Conference of American Rabbis (CCAR), one of the most significant Jewish-American groups in the early twentieth century, shows that Jews opposed any connection between religion and the public schools.[138] Yet, in the 1920s, the CCAR came out in favor of dismissed time, a cousin of the released-time program. Yet, Cohen concedes that "a few Jewish leaders commended the released-time plan, and indeed Jewish children participated in the Gary program."[139] The debate among the rabbis over religion and schooling was fierce. Some carried the concerns of atheists and agnostics, others feared a Protestant "takeover" of the schools, and supporters of, at the very least, dismissed time religious education wanted to be a distinct part of the American kaleidoscope. Cohen writes that in between the extremes of rabbinical opinions "were those who believed that at least a partial compromise was

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[136] Seaman and Abernethy, *Community Schools for Week-Day Religious Instruction*, 4.
[137] Ibid., 7.
[138] Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality*, New York: Oxford UP: 1992, 115.
[139] Ibid., 116.

necessary to avert great dangers."[140] Fear was the main motivator behind any Jewish support for released-time, writes Cohen. It would be the late 1940s before Jewish opposition, in cooperation with that of other Protestants and freethinkers, would see significant results. At the very least, there was grudging Jewish support for various forms of religious education attached to the public schools.

So after Protestants had started the released-time programs, they could by the 1920s take stock of their accounts nationwide. William Wirt had published an article in the *Journal of Religious Education* about the released-time program in Gary, Indiana as early as 1916. By the mid-1920s, one author conducted a nationwide study and found that in over 60 schools "7,423 pupils come from church homes, and...4,557 pupils come from nonchurch homes. This means that 62 per cent of the pupils come from homes where parents or guardians belong to church, and that 38 per cent of the pupils come from homes where parents or guardians belong to no church."[141] Just like the Sunday School, released-time programs could reach out to children in an evangelistic manner. This is interesting because children could not attend a particular released-time class without a parental permission slip. In this 1925 study, the students who came from non-church families still received permission from their parents to attend the religion class.

While some communities and states opposed and stopped released-time, the program was legal in most communities across the United States. Floyd

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[140] Ibid., 117.
[141] Philip Henry Lotz, *Current Week-Day Religious Education, Based on a Survey of the Field Conducted under the Supervision of the Department of Religious Education of Northwestern University* (New York & Cincinnati: The Abingdon Press, 1925), 163-164.

Gove, a Harvard Divinity School student, wrote in 1926, "In the majority of states where the matter has come up for legislative action, or for judicial opinion as to the legality of releasing time under the present laws, such action has been favorable. Of the twenty-nine states represented by schools reporting in this study, twenty-one have one or more communities which grant the use of public school time for one or more religious classes each week."[142] By 1940, legislative approval of released-time programs existed in Iowa, Kentucky, Maine, Minnesota, New York, Oregon, South Dakota, West Virginia, Hawaii, and the territory of the Philippine Islands. Kentucky, Maine, New York, and West Virginia had enacted their laws during in 1939 or 1940. Attorney General rulings permitted released-time programs in Illinois, Nevada, Pennsylvania, and Idaho.[143] Since the number of states with released-time programs outnumbered the number of states legally permitting them, a contemporary observed "that the laws in some States are silent on the subject," but clearly most in that state interpreted released-time as legal under the basis of some other law.[144] In some states, for example, there had been earlier laws allowing the release of Catholic students from public school time for confirmation classes.[145] Although there were pockets of opposition, released-time programs grew from 1913 throughout the 1940s due to the legality of the program in most states and jurisdictions.

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[142] For who Gove was, see Erwin L. Shaver, *The Weekday Church School: How to Organize and Conduct a Program of Weekday Religious Education on Released-time* (Boston: The Pilgrim Press, 1956), 23. The quote comes from Floyd Sherman Gove, *Religious Education on Public School Time* (Cambridge, MA: Harvard University, 1926), 94.
[143] Mary Dabney Davis, *Weekday Classes in Religious Education: Conducted on Released School Time for Public-School Pupils* (Washington, D.C.: United States Government Printing Office, 1941), 5.
[144] Ibid., 6.
[145] Ward W. Keesecker, *Laws Relating to the Releasing of Pupils from Public Schools for Religious Instruction*, (Washington, D.C.: United States Government Printing Office, 1953), 3-4.

Catholic released-time programs began as early as the 1920s. Naomi Cohen argues that in regards to released-time, "Protestants were the driving force behind the plans," but "Catholic support came only later," by which she means the 1940s, when the released-time movement would see its greatest growth.[146] However, in Chicago, in 1929, out of 22,500 students who participated in released-time, more students went to 137 Catholic parochial schools than did to 57 Protestant church buildings.[147] Also, Bridgeport, CT, in the same year, had seventeen hundred Protestant children and forty-three hundred Catholic children enrolled in released-time programs.[148] Clearly, Catholic released-time programs existed in the U.S. before 1930.

Before the early 1930s, there was a resistance from Catholics to released-time programs, given that the goal for Catholics was to have all Catholic children in parochial schools, getting a full-time Catholic education. However, it became apparent to Catholic priests that something had to be done for students of Catholic parents who went to public schools. Rev. Leon McNeill wrote, in the 1930s, that "special provision must be made for the religious instruction and training of these children." Even though there were great parochial schools in most major American cities mattered very little. These public school students participated in studies "from which religion is excluded by the law, and in which the atmosphere is not only non-religious but tending always in the direction of positive irreligion." No longer was this Catholic priest concerned with Protestant

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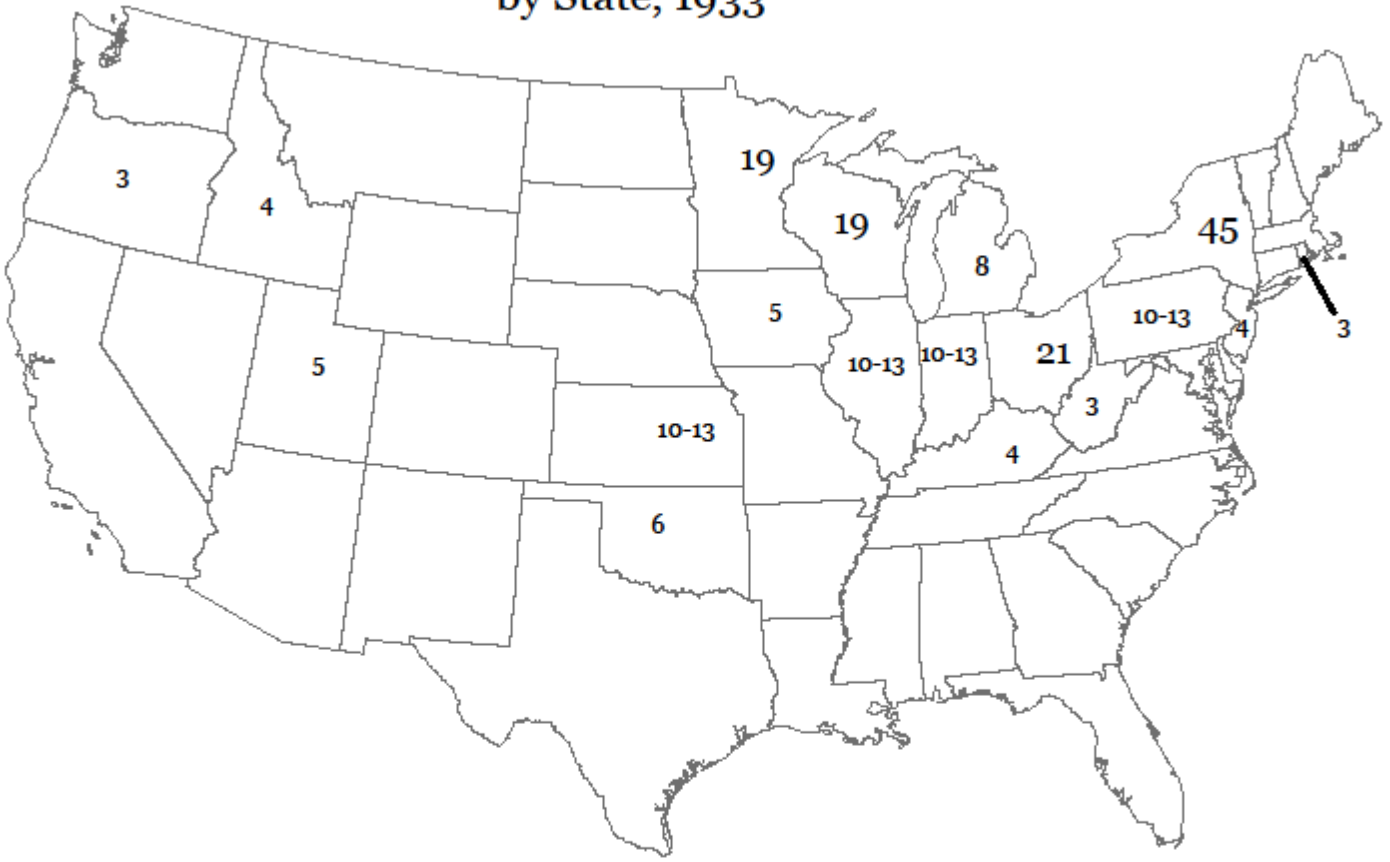
[146] Cohen, *Jews in Christian America*, 116.
[147] Alvin W. Johnson and Frank H. Yost, *Separation of Church and State in the United States*, (Minneapolis, MN: University of Minnesota Press, 1948), 86.
[148] Myron C. Settle, "Weekday Church Schools from Coast to Coast," *International Journal of Religious Education* 5 (1929): 11.

domination of the public schools, with their Protestant prayers and the King James Version of the Bible. Rather, similar to the Protestants who argued for the necessity of religion for America's public school students, Rev. McNeill was concerned with what he saw as the pervasive secularization of the public schools. Like Protestants, this was a numbers game. Rev. McNeill wrote, "the more than 2,000,000 Catholic children attending public schools should be objects of the special solicitude of the teaching Church. Often they are the offspring of mixed marriages and of lukewarm and careless parents." Although Protestants and Catholics continued to have distinct beliefs about God and each other, some of them were becoming more concerned with secularization than with the other.

In 1933, in one survey carried out by the federal government's Office of Education, out of 2,043 cities and towns responding, 218, or just a little over ten percent of these towns, had at least one program of released-time being conducted.[149] New York State had the most released-time programs according to this study from 1933: 45. Ohio had 21, while Wisconsin and Minnesota had nineteen each. Illinois, Indiana, Kansas, and Pennsylvania had between ten and thirteen, while Michigan had eight. From a cursory glance at these top states, it is clear that released-time was primarily found in the Midwest, with some activity in the middle Atlantic states.

[149] Mary Dabney Davis, *Week-Day Religious Instruction Classes for Public School Pupils Conducted on Released-time* (Washington, D.C.: United States Government Printing Office, 1933), 4-5.

## Number of Cities with Released-Time Programs by State, 1933*




Source: Mary Dabney Davis, *Week-Day Religious Instruction Classes for Public School Pupils Conducted on Released Time* (Washington, D.C.: United States Government Printing Office, 1933), 5.

*Although the original only provided a range for Kansas, Illinois, Indiana, and Pennsylvania, it still gives a good sense of the geographical strength of the released-time movement.

By 1933, just twenty years into its history, 367 public school systems across the United States had adopted released-time weekday religious education.[150] The 1933 report by an employee of the United States Office of Education suggested that released-time existed in both heavily populated urban and less populated rural areas. Larger cities had only 23 percent of grade pupils participating in released-time programs, whereas cities with a population between 2,500 and 10,000 people saw 72 percent of their public school children participating in released-time programs.[151] Smaller towns were more homogenous and this led to greater uniformity in how many students were in the released-time classes. Urban versus rural geographic patterns are not the only ones that become apparent from these studies from the 1920s, 1930s, and 1940s. A 1925 study placed released-time programs in 33 states.

Released-time was strongest in northern and Midwestern states with diverse and growing populations such as in Illinois, Ohio, Indiana, New York, Minnesota, Wisconsin, and Pennsylvania."[152] A 1929 study had Ohio with 67,000 students, New York with 37,000 students, Kansas with 28,000 students, and Oregon, Indiana, and West Virginia having somewhere between 10,000 and 20,000 students. The same study did also include Illinois and Minnesota with roughly 6,000 and 7,000 released-time students.[153] It seems that by 1930, released-time had spread across the northern states, all the way to Oregon.

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[150] Davis, *Week-Day Religious Instruction Classes*, 19.
[151] Ibid., 20.
[152] Gove, *Religious Education on Public School Time*, 22.
[153] Myron C. Settle, "Weekday Church Schools from Coast to Coast," *International Journal of Religious Education* 5 (1929): 12.

The absence of southern states among those 33 states is striking given that one would anticipate that released-time would be more popular in the highly religious areas of the Deep South.[154] The International Council of Religious Education, the main group supporting Protestant released-time at the national level, held a conference in Birmingham, Alabama in 1926. Most likely, religion was already so much a part of the regular public school day in the South that Southerners saw no need to separate religion from the regular public school day, as Northerners felt the need in their creation of released-time. A retrospective comparison of released-time programs from 1933 and 1941 yielded the following comment: "In Mississippi the weekday class in religious education reported in the 1932 study has become a regular high-school elective course taught by regular public school teachers."[155] In this case, it is clear that in parts of the South released-time was unnecessary since the concerns about the separation of Church and State were not as great. There were not a sufficient number of non-Protestants in the schools to complain about this religious instruction. The South was the one part of the United States that received very little immigration until well into the late twentieth century.

The only state in the South that did have significant released-time activity was Virginia. Almost as if it did not belong to the mentality of the South, the movement in Virginia resembled that of the Mainline Protestants of the northern states. A student of the Virginia released-time movement insisted that the movement there had not transgressed the boundaries of Church and State.

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[154] Lotz, *Current Week-Day Religious Education,* 24.
[155] Davis, *Weekday Classes in Religious Education*, 13.

Lillian Comey wrote: "From the beginning there has been every effort to preserve the separation of Church and State. In no instance has there been any coercion of the public school pupil by the teachers of religious education."[156] Comey was very careful to cultivate the image that released-time was in fact a program that contributed to the separation of Church and State, in no way bringing them close to each other. The movement in Virginia got its start in the late 1920s. Minor C. Miller was chosen as the General Secretary of the Virginia Sunday School Association in 1924. Four years later, that organization became the Virginia Council of Religious Education, which by 1944 was overtaken by the Virginia Council of Churches and incorporated as the Department of Christian Education. Throughout these changes, Minor C. Miller was at the head of the released-time program.[157] By 1945, the released-time budget in Virginia for these Protestant efforts was $93,355. There were over seventy full-time workers, mostly teachers who were paid out of this budget.[158] The program in Virginia was mostly a rural program, being found in only six Virginia cities, but in 39 counties throughout the state. By 1945, there were 53,091 students enrolled in week-day released-time programs in Protestant programs in Virginia. Around 95% of students in the areas where released-time was offered attended, mirroring the statistics for rural Virginia.[159] The teachers came from ten different denominations.[160] Miller regretted that these teachers could sometimes not be paid as much as they

[156] Lillian Elaine Comey, "The History and Contribution of the Virginia Week-Day Religious Movement" (M.A. thesis, Boston University, 1947), 33.
[157] Ibid., 39, 41.
[158] Ibid., 40.
[159] Ibid., 72.
[160] Ibid., 66.

deserved. He also confirms that the Great Depression greatly weakened the released-time efforts.[161] The regret that the teachers could not be paid more revolved around the pride that was shared with other Mainline Protestants about the excellent quality of their released-time teachers. The first teacher in the program, Grace Glick, had studied religious education at both Northwestern University and Boston University. Ms. Glick had started out teaching released-time classes in Dayton, Ohio and received an annual salary of $1,800 plus a little travel money.[162] A director of county-wide efforts, Florence Hostetter, had received her master's degree from Boston University. Another area supervisor, Elizabeth Longwell, had majored in religious education for B.S. in education at Northwestern. These teachers were not products of backwoods revival meetings; rather they were schooled at some of America's finest universities. They would provide only the best for the students in the weekday released-time programs.

Ohio was the state with the most students in released-time classes.[163] Already by 1925, six of the eight Ohio cities with more than 100,000 residents had released-time programs.[164] Cleveland, Columbus, Youngstown, Toledo, Cincinnati, and Dayton all had released-time programs. In Dayton, Ohio, the Sunday School Council of Religious Education organized the city's released-time classes. There was no Jewish or Catholic participation in the released-time

[161] Ibid., 69.
[162] Ibid., 31.
[163] Myron C. Settle, "Weekday Church Schools from Coast to Coast," *International Journal of Religious Education* 6 (1929): 12.
[164] Maxwell Hall, "Week-Day Religious Instruction in Ohio," *International Journal of Religious Education* 2 (1925): 18.

program there.[165] The released-time classes were held at a Protestant church, not on school grounds. Out of a total of 3,186 total students in grades two through eight, from which grades students went to the released-time classes, around 21.3% were enrolled in the released-time classes.[166] In Cincinnati, a larger city with more diversity, there were 7,425 students enrolled in the released-time programs. For all those students, 245 separate weekly released-time classes were needed.[167] By 1925, there were twelve rural locations where teachers were using the public school rooms. In those places, 10,865 pupils out of a total of 11,100 students in those public school systems were attending released-time classes.[168] The program had spread far beyond the boundaries of these larger towns and cities into rural areas of Ohio such as "Bluffton, Columbus Grove...Grandview Heights, Covington, and Pleasant Hill."[169] In Ohio, state authorities did not block the rapid growth of the released-time movement. The only limit on growth was finding good teachers.[170]

In Cleveland, Ohio, the released-time program began in 1923. Fourteen Protestant denominations cooperated to establish four released-time programs within the city. The Cleveland Council for the Direction and Supervision of Religious Instruction grew to having 26 "coöperative centers" by March of 1926 and 1,930 students being served by those centers. The group was composed, by March of 1926, of 28 Protestant denominations and had an annual budget of

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[165] Mabel Hawkins, "A Study of Weekday Religious Instruction in Saint Louis, Missouri" (M.A. Thesis, Washington University, St. Louis, 1941), 20.
[166] Ibid., 22.
[167] Ibid., 23.
[168] Maxwell Hall, "Week-Day Religious Instruction in Ohio," 19.
[169] Ibid.
[170] Ibid.

$15,000. Initially, in 1923, three public school buildings were used, but opposition had changed that and, in 1926, 26 church buildings were used for the released-time classes.[171]

In Toledo, the Toledo Council of Churches led the released-time program. Specifically, the education department of the Toledo Council of Churches had a budget of $10,000. Twenty Protestant denominations were represented working with 38 public schools, and supplying teachers for 166 separate released-time classes. The one difference in Toledo from many other places in Ohio was the use of part-time teachers. In Toledo "there are ninety teachers employed part-time and paid at the rate of $1.50 per class session. They are mostly married women with previous public school experience."[172] In the 1925-1926 academic year, 5,800 students attended released-time classes in Toledo.[173]

One of the features of the Protestant-led released-time programs was that a good number were not run by individual churches. Rather, some released-time programs were directed by a "council composed of representatives from churches of different denominations."[174] Thus, Protestants argued that "the council control also renders the religious instruction interdenominational in character.[175]

The variety of religious groups sponsoring released-time programs was evident in St. Louis, Missouri. Certain Protestant groups came together to form one class, while Catholics, Lutherans and Christian Scientists also maintained

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[171] Gove, *Religious Education on Public School Time*, 54.
[172] Ibid.
[173] Ibid., 55.
[174] Davis, *Week-Day Religious Instruction Classes*, 9.
[175] Ibid., 10.

their own individual classes.[176] Even groups that were decidedly in a minority position such as the Christian Scientists could avail themselves of the opportunity to use the released-time method for the delivery of religious instruction. As in New York City, even though the four groups (Protestants, Catholics, Lutherans, and Christian Scientists) provided separate religious instruction, they coordinated through one united group called, appropriately, the "Inter-Faith Committee."[177] Even more variety becomes apparent when the seminary efforts of Mormons are considered. In 1932, a total of 30,000 junior and high school students were in the Latter Day Saint Church released-time program. The main difference between all the other programs and the Mormon one was the targeted grades levels. Non-Mormon released-time programs targeted the elementary or grammar school grades. According to another 1933 study, the dispersion of the Mormon seminaries was as follows: 55 in Utah, 18 in Idaho, and 10 in Arizona, Wyoming, and Colorado each. 100 full-time teachers taught these released-time classes.[178]

Despite the growth of released-time in the Progressive Era and the 1920s, opposition to the programs slowly emerged. In the early 1940s the attorney general in Oregon "ruled adversely to the release of pupils for religious instruction," similar to cases in California and Washington.[179] Even if released-time was considered legal in a state, a particular community, school board, or superintendent could disallow released-time in that specific locale. A proponent

[176] Mabel Hawkins, "A Study of Weekday Religious Instruction in Saint Louis, Missouri," 7.
[177] Ibid., 29.
[178] Arthur J. Hansen, "Mormon Weekday Church Schools," *International Journal of Religious Education* 10 (1933): 15.
[179] Davis, *Weekday Classes in Religious Education*, 5.

of weekday religious education released-time had conducted a study in the 1920s where he found survey responses indicating localized opposition. He wrote, "Five schools report that a lack of positive cooperation on the part of public-school teachers, superintendents, principals and boards is the greatest weakness in their schools. In some instances this means sheer indifference; in others refusal to cooperate; in still others positive opposition."[180] But, at a different place in his study, he relied on his own personal observation and came to a quite different conclusion. He wrote, "The interest in these schools is not confined to churches or specifically religious bodies as such. At Atlantic City, in 1921, the National Education Association advocated the need of moral and religious education in public schools. With few exceptions the public school superintendents and principals interviewed by the writer were enthusiastic supporters of the week-day church schools and in at least two instances they were directly responsible for inaugurating them."[181] This inconsistency is important in painting an accurate portrayal of Mainline Protestants and released-time in early twentieth century America. Yes, released-time was accepted in a good number of places, but not everywhere. That opposition would coalesce to bring this issue to the Supreme Court of the United States in 1948, to the chagrin and surprise of the Mainline Protestant supporters of released-time.

From 1940 to 1952, the released-time movement expanded rapidly. It was early during this period when released-time programs began in major American cities like Boston, New York City, and Los Angeles. This led to a greater general

[180] Philip Henry Lotz, *Current Week-Day Religious Education*, 357.
[181] Ibid., 25.

awareness of the movement. With this greater publicity, released-time also encountered more opposition than it had in more homogenous middle America. This opposition culminated in two Supreme Court cases that would determine the fate of the released-time movement: *Illinois ex. rel. McCollum v. Board of Education* (*McCollum*) in 1948 and *Zorach et al. v. Clauson et al.* (*Zorach*) in 1952. But one of the first places that released-time was challenged was in New York City.

On November 15th, 1920 the New York City Board of Education considered a plan to close "the Public Schools at 2 o'clock on the afternoons of each Wednesday to permit the pupils to receive religious instruction."[182] Although scholars would wrongly refer to the New York City released-time as "dismissed time," this 1920 program is rightly referred to as "dismissed time." [183] In this plan, the public school was in no way monitoring which students went home and which ones went to the religious classes at the nearby church or YMCA. The public school, or the state, was saying that it would allow for this one hour every week to be used in whatever way the parents wanted. The dismissed time program reveals the inadequacies of both sides of the released-time argument. On the one hand, if dismissed time already allowed students to receive weekly religious instruction, then why add released-time? On the other hand, those who opposed released-time claimed that they had no problems with dismissed time.

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[182] "HOUR FROM SCHOOL FOR RELIGION URGED :Bishop Burch, Rabbi Schulman and Other Clergymen Indorse Movement.GOOD CITIZENSHIP THE AIM Speakers Before Education BoardCommittee Say They OpposeUnion of State and Religion. Quotes Clemenceau Criticises Statistics." *New York Times*, November 16, 1920.
[183] Donald E. Boles, *The Bible, Religion, and the Public Schools* (Ames, IA: University of Iowa Press, 1963), 178.

However, that only became the case when dismissed time appeared to be the less dangerous of the two alternatives that were being considered for religious education on public school time. For example, at one of the board meetings where the New York City Board of Education was considering dismissed time, Thomas Wright, a Free Thinker, argued that religion generally was unhelpful to society by suggesting that religious people were mostly in jail while "pagans and peoples of other beliefs" were spared from incarceration at the highest rate.[184] This was clearly not an endorsement for dismissed time or for a space for religion in the public sphere. Another opponent of dismissed time concluded that 7,000 hours existed annually when students were not in public school. Why could they not give religious instruction in one of those hours, she asked?[185] Finally, Rabbi Joseph J. Silverman of Temple Emanu-El stated that to release students early for the explicit purpose of religious instruction "was contrary to the spirit of true Americanism, and the people would resent any such action on the part of the board."[186] If these individuals could not support dismissed-time programs, they certainly were not going to support released-time programs.

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[184] "HEARING IS BEGUN ON SCHOOL CLOSING :Proposal to Permit Pupils to Get Religious Training Wednesday Afternoons Opposed.BOARD ROOM IS CROWDEDProponents of Resoultion ot PresentTheir Arguments at Meetingon Nov. 15." *New York Times*, November 9, 1920.

[185] "HEARING IS CLOSED ON RELIGIOUS HOUR :School Committee Will Consider Arguments For and Against Time for Instruction. FORM OF PLAN CRITICISED Contended That Children Should Be Dismissed Without Statement of Purpose. Wants to Know About Odd Hours. Ministers Favor Plan. FEARS EFFECT ON SCHOOLS. Anning S. Prali Discusses Proposed Religious Teaching Plan." *New York Times*, November 23, 1920.

[186] "HEARING IS CLOSED ON RELIGIOUS HOUR :School Committee Will Consider Arguments For and Against Time for Instruction. FORM OF PLAN CRITICISED Contended That Children Should Be Dismissed Without Statement of Purpose. Wants to Know About Odd Hours. Ministers Favor Plan. FEARS EFFECT ON SCHOOLS. Anning S. Prali Discusses Proposed Religious Teaching Plan." *New York Times*, November 23, 1920.

Ultimately, the dismissed time plan never came into being. The opposition of the President of the Board of Education might give a clue as to the fate of the dismissed time program. In an address Anning S. Prall gave in late 1920, he said that he foresaw "the break-up of our great school democracy" when "children will begin to compare their respective religions." When "Tommy notices that his friend George goes to one church," maybe "he will think his church the best, and then he will think that George is not quite so good as he is."[187] The President of the Board was clearly uncomfortable with religious pluralism.

With no dismissed-time, Protestants established weekday religious education centers around New York City. These were typically housed in Protestant churches and the time of the program was *after* school. By 1922, some churches had already established these programs. Madison Avenue Baptist Church had a daily program where ten pupils came for religious instruction; most churches only had weekly programs.[188] The numbers were not great, and at the end of 1922, Protestants were gearing for a big push. All pastors of the 1200 Protestant churches in New York City at the time were invited to a meeting on January 29th, 1923 of the Protestant Teachers' Association. Their goal was "to promote the religious and moral welfare of the children of New York." Since 1917, many members of the Protestant Teachers' Association had spearheaded the weekday religious instruction.[189] Growth had been slow even though the

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[187] Ibid.
[188] Special from Monitor Bureau. "PROTESTANTS PLAN DAY-SCHOOL SYSTEM :Mass Meeting Called for 850 New York Pastors to Lay Out Instruction Course Finds Ignorance of Creeds Full Information Desired Favorable Action Taken." *The Christian Science Monitor*, December 9, 1922.
[189] Special from Monitor Bureau. "PROTESTANTS PLAN DAY-SCHOOL SYSTEM :Mass Meeting Called for 850 New York Pastors to Lay Out Instruction Course Finds Ignorance of Creeds Full

Protestant Teachers' Association was working closely with the major Protestant churches and pastors of the city. By 1923-24, only twenty five centers of weekday religious education had been established. This slow growth and a perceived lack of progress among Protestants was likely one of the reasons why there was a push for released-time.

Protestants had already doubted their collective teaching abilities. When the debate was on-going in 1920 over whether or not dismissed time would be acceptable to the school board, Protestants publicly lamented that should the board approve the plan, Protestants would not be ready. The Rev. Dr. Henry Sloane Coffin said that "Our Roman Catholic friends have their curates and their sisters and our Jewish friends have their rabbinical schools." It was almost like a (semi-)friendly competition. Coffin continued, "It will be a disgrace to us Presbyterians that we cannot live down if the Board of Education passes this ruling and we are not able to do the work."[190] One opponent of the dismissed time plan, Arthur Craig, concurred, stating that he had taught in a Protestant week-day school and it was miserable. He also concluded that the Catholics and Jews were not asking for dismissed time because they had successfully found modalities through which to teach their children about their particular faith tradition.[191]

Catholics joined Protestants in supporting religious instruction in the public schools, while most Jewish-Americans suspected that any configuration

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Information Desired Favorable Action Taken." *The Christian Science Monitor,* December 9, 1922. See also "PRISON SENTENCES HIGHEST SINCE 1917." *New York Times*, December 26, 1924.
[190] "PROTESTANTS NOT PREPARED TO TEACH." *New York Times*, June 15, 1920.
[191] "HEARING IS CLOSED ON RELIGIOUS HOUR." *New York Times*, November 23, 1920.

including Church and State would not end up well for them. As released-time programs were growing from the 1920 to the 1940s, Jews were being expelled from Russia, and undergoing the Holocaust. Even those who would disagree with Jewish-American opposition to released-time education might understand the fears underlying that opposition.

On the part of proponents of released-time, there was at the very least an attempt to portray a tri-partite push for this after-school religious education, most certainly in major cities across America. The *New York Times* reported in late 1924: "Catholic and Jewish organizations of teachers have been formed and are conducting centres for their children, so that the three divisions are working with unity of aim to give religious instruction to the children of the city."[192] This statement seems to have fit the Protestant message of all three faiths pursuing the same goal. By 1933, it seemed like Protestants had gained their footing, having 157 centers for week-day religious education, but by the 1930s they were also clamoring for the possibility of released-time programs.[193]

What changed in New York City was that the state of New York had passed a law, the Laughlin-Coudert law, which mandated that "pupils who apply to their local school boards must receive an hour off from school each week for outside religious instruction."[194] This certainly placed more pressure on the New York City Board of Education to accept released-time than there was in 1920 to accept dismissed-time. Long Islanders started released-time programs in February of

[192] "PRISON SENTENCES HIGHEST SINCE 1917." *New York Times*, December 26, 1924.
[193] "URGES SCHOOLS SEND PUPILS TO CHURCH." *New York Times*, November 19, 1933.
[194] "SCHOOLS POSTPONE FAITH-STUDY ISSUE." *New York Times*, October 24, 1940.

1940.[195] Two members of the NYC Board of Education stated that the arguments against released-time instruction should have been offered to the state legislature and that the board was only carrying "out the legislation."[196] On November 10, 1940, the New York City Board of Education also officially approved released-time religious education. The Board voted 6-1 to approve the program, while also strongly stipulating that teachers not make "any comment in the classroom regarding the attendance or absence of the children at the religious classes." This all happened against great opposition. John Dewey was there when the Board had its vote. He said, "We are people of many races, many faiths, creeds and religions. I do not think that the men who made the Constitution forbade the establishment of a state church because they were opposed to religion. They knew that the introduction of religious differences into American life would undermine the democratic foundations of this country."[197] This was very different from Randolph Bourne's perception of released-time. Although Dewey certainly brought forth great respect, released-time already had momentum in New York City. In fact given how many people showed up to oppose the board's decision that momentum certainly had to be there. The *New York Times* account revealed this meeting to have been the most attended meeting in a long time. There was also the expectation of tension, given that "a half dozen policemen were on duty to keep order." There was tension, but in that meeting, it was clear

[195] "SCHOOL TIME CUT FOR CHURCH STUDY: Special to THE NEW YORK TIMES." *New York Times*, February 3, 1940.
[196] "SCHOOL TIME VOTED FOR CHURCH STUDY." *New York Times*, November 14, 1940.
[197] "Religious Study Periods Approved for N.Y. Schools." *Christian Science Monitor*, November 14, 1940.

that the majority opposed the introduction of released-time, and they were there to make their voices heard.[198]

The logistics of the released-time program revolved around the last hour of one school day, initially each Wednesday, when students whose parents so requested would be allowed to leave for religious instruction.[199] This led to the conclusion that the New York program was a dismissed time program. Although the proposals around 1920 had centered around dismissed time, things were different twenty years later. The standard work on American relations between church and states around 1950 gave the following definition of dismissed time: "instruction on 'dismissed time'—that is at the close of the school day."[200] Anson Phelps Stokes assumed that programs like the New York City one were examples of dismissed time. That definition is faulty. For a program to be an example of dismissed-time religious instruction, it was necessary that all students be dismissed from the public school. However, starting in 1940-41, in New York City, the Superintendent of Schools, Harold G. Campbell stated "that children who do not elect to go to a religious class will get regular secular instruction from their teachers," meaning that not all students would be released with those going to the religious instruction classes.[201] Therefore, even if the school would not know to which church the released children were going to, the school would still be making the distinction between those attending a religious instruction class

[198] "SCHOOL TIME VOTED FOR CHURCH STUDY." *New York Times*, November 14, 1940.
[199] "Churches Formulate Plan to Train Pupils 1 Hour a Week When Program Is Approved." *New York Times*, October 26, 1940.
[200] Anson Phelps Stokes, *Church and State in the United States*, vol II. New York: Harper & Brothers, 1950.
[201] "Churches Formulate Plan to Train Pupils 1 Hour a Week When Program Is Approved." *New York Times*, October 26, 1940.

and those who were remaining in the public school for another hour for "secular" learning.

For both legal purposes and simply a clear understanding, the difference between released and dismissed time programs must be understood. The one in New York City was a released-time program. Again, opponents of released-time were not crazy about dismissed time but there was a slight distinction that might have left room for some compromise.

The first released-time program in NYC would begin in February 1941, with a fuller program scheduled for the fall of 1941. The grades that would be released for religious education would be third through eighth. Teachers were required to "have at least a master of arts degree in religious education," while public school teachers could not comment or make students aware of the released-time instruction. Protestant children of eight and nine years of age would be in a course entitled, "God, the Loving Father" while students from nine to twelve years old would study one out of three courses: "What It Means To Be a Christian," "The Life of Christ," and "The History of the Christian Church."[202] Whether those courses were religiously divisive or promoted brotherhood would be the main debate about released-time in New York City over the next decade.

At first, it seemed that the growth of the released-time program would be limited. The initial meeting was "called by Walter M. Howlett, secretary of the religious education department of the Greater New York Federation of Churches," or the main Protestant group in New York City. But, Alexander

[202] "New York Religious Groups To Instruct School Children." *Christian Science Monitor*, November 21, 1940.

Dushkin represented the Jewish Education Committee at the meeting, while the Catholic Archdiocese of New York had its director of religious education, Rev. William A. Scully, at the meeting.[203] So, this was going to be an ecumenical program, with at least some Jewish participation. In early 1941, there were about 3,000 students in the released-time program.[204] By May 1941, the number was up to over 5,000 children.[205] By the end of May, the exact count was 6,322 students. The religious make-up was as follows: 2,959 Catholic children, 2,550 Protestant children, and 813 Jewish children.[206] The head of the Protestant Inter-Denominational Committee on Released-time for Religious Education, Rev. Dr. Warren M. Blodgett predicted that 30,000 students would be enrolled in released-time programs in the fall of 1941. But he was concerned that Protestants were not as ready as Catholics "to take advantage of the one free hour each week permitted by the Board of Education."[207] In fact, in the fall of 1941 the total number of registrations was 101,633 children, far exceeding the previous summer's estimate of 30,000. The great majority of the new students were Catholic students; the outcome of the program's attendance numbers throughout the 1940s would reflect a high percentage of Catholic students relative to Protestant students.[208]

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[203] "SCHOOL TIME STUDY OF RELIGION PUT OFF." *New York Times,* November 28, 1940.
[204] "3,500 Attend Religious Courses As City School Program Starts." *New York Times,* February 6, 1941.
[205] "RELIGIOUS TIME OFF IN SCHOOLS SCORED." *New York Times,* May 1, 1941.
[206] "Article 17 -- No Title." *New York Times,* May 27, 1941.
[207] "FREE TIME PLAN GROWING." *New York Times,* October 3, 1941.
[208] "113,069 STUDY RELIGION :Classes for Pupils of Public Schools Well Attended." *New York Times,* July 3, 1942.

With the program started, the struggle would center on maintaining, ending, or limiting the program throughout the 1940s. In the fall of 1940, Mrs. Schecter of the United Parents Association announced that the released-time program would be monitored from the very beginning, wanting to make sure that it was "wholly voluntary" or that no groups would "teach foreign ideologies" such as communism or fascism "under the guise of religious instruction."[209] Accusations that would later be leveled at the opponents of released-time programs were now being thrown at the supports of the program. However, proponents of the movement stressed that the religious instruction promoted "tolerance and brotherly love." That attempt was demonstrated by a favorable newspaper account relating a story that was taught in one released-time class: "In a number of cases the children heard the story of Roger Williams, who befriended a Catholic and Jewish traveler and then gave them warm shelter and wholesome food to eat."[210]

But the supporters of the released-time program also tested the limits of the released-time arrangement with the public schools. Students at the released-time classes "received little red buttons with white question marks on them." These buttons "were designed to bring the religious education experiment to the attention of more children and parents." Although only the Protestant children received these buttons, the contention was "that no particular religion will be advanced through this method, but that the religious courses in general will be

[209] "SCHOOL TIME STUDY OF RELIGION PUT OFF." *New York Times*, November 28, 1940.
[210] "3,500 Attend Religious Courses As City School Program Starts." *New York Times*, February 6, 1941.

exploited."[211] Very shortly thereafter, at a meeting between the Greater New York Interfaith Committee and the Board of Education, both groups mutually decided to discontinue the handing out of those buttons, and any conflict on the matter was averted.[212]

Released-time weekday religious education also extended to other major cities. Los Angeles began a program in the fall of 1944. In addition to the combination of Mainline Protestants, Catholics, and Jewish-Americans, two other groups were part of the religious instruction kaleidoscope: evangelicals and Christian Scientists.[213] In Los Angeles, out of the 7,000 students in released-time during that first semester, 199 were Jewish, 3,465 were Catholics, and the remaining 3,277 were some form of Protestant, receiving teaching from the Mainline Protestant group, the evangelical group, or the Christian Science group. The Church Federation, or the Mainline Protestant group, had by far the most of the Protestants, with around 2,500 students enrolled in their classes. Controversy arose in Los Angeles as well. The Los Angeles Board of Education was advised by its counsel that state legislation had provided for an optional plan and the Board simply had to make sure not to promote the religious instruction.[214] Boston had started its released-time program in 1941.[215] In San Diego, 1200 students participated in released-time programs during 1946-1947,

[211] "3,500 Attend Religious Courses As City School Program Starts." *New York Times*, February 6, 1941.
[212] "RELIGIOUS BUTTONS FOR PUPILS ENDED." *New York Times*, February 8, 1941.
[213] "Schools Plan Church, Hour." *Los Angeles Times*, September 25, 1944.
[214] "RELIGIOUS TIME RULED LEGAL IN CITY SCHOOLS." *Los Angeles Times*, Oct 12, 1945.
[215] "School Classes In Religion To Start This Week." *The Christian Science Monitor*, Oct 2, 1944.

but the school board decided to end the program in 1947.[216] San Diego reflected this nationwide trajectory, where released-time programs were growing, but the opposition to released-time programs was also crystallizing.

As the released-time programs spread into more cities and grew in the total number of student participants, they were also going to draw more attention from their opponents. Although the 1940s was probably the best decade for released-time programs, all it would take was one Supreme Court decision to end the movement. However, very few Mainline Protestants in the 1940s could imagine that happening.

An editorialized position of the *International Journal of Religious Education* stated that the released-time movement transcended the modernist-fundamentalist divide and contained members from across the Protestant theological spectrum. The unsigned editorial concluded, "If one were to survey the total mass of curriculum materials published by the denominations in the International Council and listen in behind the doors to the teaching done in their church schools, he would find a larger proportion of both the older and the newer, with a probable preponderance of the more conservative."[217] This analysis by one of the leaders of the released-time movement suggested that the various denominations that participated in this movement were a mix of denominations with liberal and conservative theological positions, as late as the early 1940s, more than a decade after the infamous 1920s battles. The editorial continued,

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[216] "The Southland." *Los Angeles Time,* May 14, 1947.
[217] "How Liberal is Christian Education,?" *International Journal of Religious Education* 18 (Feb. 1942): 3.

"But when one looks at the composite views and will of Christian education –as expressed in the official judgments of the denominations singly and of the International Council of Religious Education—he does not find a commitment to either the liberal or the traditional wing." Rather, these groups presented "an attempt to fuse the values of both into a whole that will be stronger than either alone."[218] This group of Protestants that reached out to over two million American public school students and their families were not overwhelmingly affected by the modernist-fundamentalist split. As described in this editorial, the released-time movement sought to unite Protestants and paper over the theological differences that had occurred amongst them. The International Council of Religious Education wanted to be a "servant of the movement" allowing for "a fellowship of persons and groups ranging all the way from liberals of varying degrees, through moderates, to conservatives of different degrees. That fellowship is one of the unique values of the movement. People of varied views stimulate and enrich each other."[219] The idea was to reach the unconverted, and clearly the division of denominations over theological squabbles was not going to contribute to that effort. A great number of American Protestants intentionally put aside theological differences to contribute to this program of released-time education.

The history of released-time suggests that as a whole Mainline Protestants before circa 1965 were united in the goal to evangelize the nation, specifically the nation's children through weekday religious education. They were not as foreign

[218] Ibid.
[219] Ibid.

to the nation's mainstream culture as evangelicals are today. That fact may explain the stunning success of the released-time programs.

The group of Mainline Protestants who strongly adhered to liberal theology would eventually oppose released-time programs, even before the Supreme Court addressed their Constitutional merits in 1948 and 1952. To get a full picture of the Mainline Protestant view of weekday religious education on released-time, Mainline Protestants opponents of released-time programs must also be considered. They mostly published in *The Journal of Religious Education* but sometimes they also published articles in the *International Journal of Religious Education*, a journal very much in favor of the released-time programs. *The Journal of Religious Education* became the home of those who were more skeptical of the merits of released-time in an increasingly liberal Protestantism and a diverse and secularizing America. Its origins in 1908 stemmed from an ecumenical organization in which even John Dewey played a part, whereas the *IJRE* published articles only having to do with Protestant religious education.

At the 1940 meeting of the Religious Education Association (REA), George A. Coe argued that religion in the public schools was not democratic. For Coe, "the democratic way of dealing" with religion in the public school was "namely: in friendly converse to consider the evidence with a willingness to let one's ideas be modified thereby."[220] In other words, public schools should only teach a form of comparative religion. This was the only democratic way of considering religion.

[220] George A. Coe, "What Sort of Religion?" *International Journal of Religious Education* 18 (Nov. 1940): 13.

Coe believed that "every particular religion has faults as well as virtues." In effect, what was occurring with released-time was that "some religions would like to have their virtues recognized by the public school, not one of them would consent to have its faults as much as mentioned there."[221] Clearly, for Coe and some Mainline Protestants, the unique nature of Christianity had begun to not look that unique anymore. Protestantism had just as many faults as did Catholicism or Judaism. Coe suggested that it was unfair for the released-time movement to exist even within the limited pluralism of the recently emerged Judeo-Christian culture. Coe continued, "There are other types of religion and of attitude towards life, some of which have had a profound influence upon our culture. Our citizens are entitled to an equal knowledge of all of them. It is true that Catholics, Protestants, and Jews together constitute a majority of the population. But how, in this part of the world, can a majority religion, even if we grant that it exists, seriously ask for a monopoly in public instruction?" Coe was a part of a growing number of liberal Protestants who would welcome the new religious diversity of America, especially after the 1965 immigration reforms signed by President Lyndon Johnson. These reforms permitted the first mass waves of immigration from East Asia into the United States since the 1920s. Coe had earlier, towards the beginning of the twentieth century, voiced his support for released-time. Coe was correct in surmising that released-time programs would not long exist in an even more diverse religious world than the Judeo-Christian one that had existed in America until the 1960s. The proponents of

[221] Ibid., 14.

weekday religious education in the public schools were aware of Coe's arguments. His comments were printed in the *International Journal of Religious Education*. Coe had founded the Religious Education Association in 1908. The REA included non-Christian perspectives and views on Christianity, whereas the ICRE generally focused on Christian perspectives. There was overlap between the two organizations and their journals, but the *IJRE*, as late as the *early* 1960s, was still promoting weekday released-time education, whereas the *Journal of Religious Education* had ceased to do so much earlier. The proponents of released-time simply did not care. Their main motive was to evangelize the next generation of Americans to be good Christians, Coe's views notwithstanding. These arguments occurred within the larger family of Mainline Protestants. Released-time became less important to Protestants, not only because Mainline Protestants lost their significance in the United States after the early 1960s, but also because released-time education, and what it stood for, also lost its significance for Mainline Protestants, as evidenced by Coe's transformation in the earlier decades.

As late as 1948, the most influential Mainline Protestant leaders shared the above sentiments. In 1948, leaders such as Harry Emerson Fosdick, Reinhold and Richard Niebuhr joined in a statement criticizing the *McCollum* decision which had apparently struck down released-time programs: "[It is] important for our great religious communities, without obscuring their differences of faith and policy, to explore the possibilities of working together. Only as we realize such possibilities shall we succeed in maintaining the religious foundations of our

national life."[222] Four years later, when the Supreme Court shockingly validated released-time's constitutionality in *Zorach*, Niebuhr's journal celebrated the decision recognizing, as an editorial stated, what had been "long accepted as part of our national tradition."[223] Mainline Protestants' support for released-time programs was strong and would last beyond the 1950s.

From the mid-1940s to the early 1950s, a process would start that would begin to transform the America these Mainline Protestants had helped create and maintain, and to which they had become accustomed. In the next two chapters, these two Supreme Court decisions will show the tensions that existed between the old America and the one that would ultimately emerge in the late 1960s, with the help of Mainline Protestants. The fights over released-time were significant in this transformation.

[222] Lois V. McClure, "They Want Weekday Religious Education: A Survey of Reactions to the Campaign Case Decision," *International Journal of Religious Education* 23 (Sep. 1948): 8.
[223] "Editorial Note," *Christianity and Crisis*, 12 (May 1952): 58.

# Chapter Three: The *McCollum* Case

As released-time programs spread and grew numerically in the 1940s, the program's supporters had reason to cheer. That enthusiasm would soon be tempered by the ensuing court battles over released time education. However, the opposition to released-time programs became focused and challenged released-time programs in the mid-1940s, in direct response to their growth. Previous opposition had amounted to very little. But, in the 1940s, a diverse set of groups, including the American Civil Liberties Union and Jewish-American groups, started to create a coalition to oppose released-time efforts. This chapter looks at the beginning of the clashes over released time education. The first Supreme Court case, *McCollum v. Board of Education*, was heard in late 1947 and was decided in early 1948. This decision, penned by Justice Hugo Black, struck down released time education and declared it to be on the wrong side of the wall of separation.

In addition to an analysis of *McCollum*, this chapter takes a look at a First Amendment religion case the Supreme Court had decided one year earlier. In the *Everson* case, the Supreme Court assessed whether state funding for transportation of Catholic students to parochial schools in New Jersey was constitutional. While this issue had little do with released-time in public schools, the *Everson* opinion written by Justice Black as well, made statements applicable to First Amendment issues in general about the proper relationship between religion and the state. Many of those ideas would inform the Supreme Court's

decision a year later in *McCollum*. That is why this chapter begins with a brief discussion of the *Everson* decision from 1947. Briefly, this chapter will focus briefly on how opinions on separation may have been divided by anti-Catholicism within various Protestant circles.

In 1947, the Supreme Court decided the *Everson* case, the first major separation of Church and State case in the post-World War II era.[224] Justice Hugo Black authored the majority decision. Black favored a strict separation of church and state and constructed a theoretical foundation for the strict separation of church and state throughout his *Everson* opinion. Justice Black found New Jersey could pay for the transportation of students to Catholic parochial schools; this, Black held, was not a violation of the principle of separation. The case requires further analysis for two reasons: 1) the *McCollum* decision was similar to the *Everson* decision in its reasoning and 2) the differences between Catholics and Protestants, which help to explain the story of released-time programs, are better explained given the context of the *Everson* case.

In *Everson*, Justice Black introduced the first mention of Thomas Jefferson's wall of separation into Constitutional law. He wrote, "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." However, Black concluded, somehow, that New Jersey had not "breached" the wall.[225]

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[224] The most helpful volume on *Everson* is Jo Renée Formicola and Hubert Morken, eds., Everson *Revisited: Religion, Education, and Law at the Crossroads* (Rowman and Littlefield: Lanham, MD, 1997.)

[225] *Everson v. Board of Education*, 330 U.S. 18.

Justice Black was leading the Court into a new direction theoretically, even though the outcome of his decision appeared to contradict the apparent move towards separation. "There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause," referring to the incorporation of the First Amendment religion clauses via the Fourteenth Amendment.[226] Black favored a sweeping overhaul of the relationship between Church and State including an end to "the efforts to carry on religious teachings in the public school in accordance with the tenets of a particular sect."[227] This might have been an oblique reference to released time education. Justice Black's fellow Justices were quite perplexed, in the end, how Black could conclude that aid to transportation of Catholic students squared with the high wall between church and state that he advocated for in *Everson*. For instance, Justice Robert Jackson's dissent in *Everson* claimed that "the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion."[228] This conundrum was further complicated by the legal change that was going on in First Amendment jurisprudence in the 1940s.

The *Everson* opinion is also significant because it was the first Supreme Court case where the Justices "incorporated" the First Amendment to apply to the states on religion. What this meant is that the Court used the Fourteenth Amendment to enforce the establishment clause of the First Amendment against

[226] *Everson v. Board of Education*, 330 U.S. 15.
[227] *Everson v. Board of Education*, 330 U.S. 14.
[228] *Everson v. Board of Education*, 330 U.S. 19.

the states. After 1791, when the First Amendment had been ratified, as has been noted earlier, states could still have an established church, where the individual state financed an official state religion. There is a foundational debate as to whether or not the First Amendment meant to stop states from establishing religion, or simply meant that it was up to each state whether or not to have an institutionalized state church. The Fourteenth Amendment, bringing about racial equality after the Civil War, had nothing to do with religion, superficially at least, but the Supreme Court settled that from the 1940s onward, the First Amendment's religious clauses would apply to the states.[229] Incorporation was immediately debated, and remains controversial among legal scholars.[230] John Jeffries and James Ryan argue in regards to incorporation that "if the original Establishment Clause aimed to confirm the exclusive authority of the States over religion, invoking that provision to disallow state aid to religion is paradoxical and perverse."[231] In other words, the question of incorporation is further tied up in the debate over what exactly the First Amendment was meant to restrict states from doing as far as religion was concerned. These nettlesome issues were not

[229] Joan DelFattore, *The Fourth R: Conflicts Over Religion in America's Public Schools*, 61-63 provides a basic overview of *Everson*.
[230] See footnote 47 of Daniel Dreisbach, "*Everson* and the Command of History," 51 in Jo Renée Formicola and Hubert Morken, eds., Everson *Revisited: Religion, Education, and Law at the Crossroads* (Rowman and Littlefield: Lanham, MD, 1997) for a summary of the literature on the incorporation debate. Foundational articles in the debate over incorporation are Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?", *Stanford Law Review* 2 (1949), and William Winslow Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority," *University of Chicago Law Review* 22 (1954).
[231] Jeffries, C. John Jr. and Ryan, E. James, "A Political History of the Establishment Clause," *Michigan Law Review* 100, Nov. 2001, 295.

explained much by Justice Black in any of his late 1940s decisions regarding the First Amendment.

Additionally, Justice Black overlooked a major flaw of the New Jersey law in order to declare it constitutional. The New Jersey law did not allow public funds to be used for the transportation of students attending for-profit private schools.[232] Apparently, some of those private schools were Protestant schools, but Justice Black did not acknowledge that in his opinion, writing that "we put to one side the question as to the validity of the statute against the claim that it does not authorize payment for the transportation generally of school children in New Jersey."[233] Before the more abstract constitutional issues, this would have been enough to challenge the fairness of the New Jersey law. However, Justice Black was more interested in arguing that even equal assistance to all religions by the government was a violation of the First Amendment's prohibition against the establishment of religion. Justice Black was trying to make a larger point about religion and the state, and he seemed relatively unconcerned with the details of this particular New Jersey law.

Justice Black's ruling in *Everson* is even more puzzling, given the reputation that Justice Black had gained for his anti-Catholicism. Philip Hamburger explains that upon Justice Black's nomination to the Supreme Court, Catholics vigorously opposed Black due to his involvement with the Ku Klux Klan in Alabama.[234] Hamburger quotes Justice Black's son reminiscing, "The Ku Klux

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[232] *Everson v. Board of Education*, 330 U.S. 4.
[233] *Everson v. Board of Education*, 330 U.S. 5.
[234] Philip Hamburger, *Separation*, 461-462.

Klan and Daddy...only had one thing in common. He suspected the Catholic Church. He used to read all of Paul Blanshard's books."[235] Blanshard was the leading anti-Catholic intellectual of the 1940s and 1950s. Thus, Justice Black's opinion in *Everson* becomes even more confusing. In private, however, Justice Black made clear that he did not really intend to facilitate government help for Catholic parochial schools. Justice Black confided in a friend: "the Everson decision in nowise approved or encouraged the granting of any tax funds to church aid."[236] Most thought that was exactly what *Everson* had done. Justice Black made the decision to use *Everson* to distance himself from his past, while at the same time, he brought confusion and conflict through his decision. At the very least, Justice Black knew that it would be harder for Protestants, especially Baptists and others that had participated in the *Everson* case, to support other types of religious activity in the public schools after they had so vigorously pursued the denial of public funding to Catholics.

In the short term, the *Everson* decision escalated anti-Catholicism. The only Catholic on the Supreme Court, Frank Murphy, voted with the majority to uphold the funding.[237] Justice Jackson, dissenting in *Everson*, came close to suggesting that Catholic schools were un-American when he wrote, "Our public school, if not a product of Protestantism, at least is more consistent with it."[238] Like Justice Jackson, most observers were not aware of Justice Black's private

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[235] Ibid., 463.
[236] *Oral Memoirs of Joseph Martin Dawson*, 194-196 (1972), Texas Collection, Baylor University, Waco, Texas, quoted in Philip Hamburger, *Separation*, 469.
[237] Sidney Fine, *Frank Murphy: The Washington Years* (Ann Arbor: The University of Michigan Press, 1984), 571, implies that Justice Murphy voted the way he did in *Everson* not in spite of, but because he was a Catholic.
[238] *Everson v. Board of Education*, 330 U.S. 23.

thoughts on the matter. To Protestants, it seemed as if *Everson* had opened the floodgates for state aid to Catholic schools. The person to whom Justice Black had revealed his true feelings on the matter was Joseph Martin Dawson, a leading Southern Baptist proponent of a complete separation of church and state. Dawson later said that "we had lost a battle, but won the war!"[239] What he meant was that the *Everson* decision was more significant for the way it ushered in a new way of interpreting the First Amendment, especially in regards to religion in the public schools, than for the technical decision about the New Jersey case. However, most observers did not understand this, and those who were opposed to federal aid for Catholic schools rallied in opposition to Justice Black's *Everson* decision. There was an additional component to the *Everson* case that suggested the new direction in First Amendment law. Justice Wiley Rutledge's dissent gave a good indication of the direction in which the Supreme Court would move in regards to the "wall" of separation in regards to public schools even though *Everson* was technically not about public schools.[240] Rutledge's dissent echoed the main themes in Justice Black's opinion, but chastised him for the outcome that he had engineered.

A group based on anti-Catholic sentiment was fueled by the *Everson* decision. In 1947, Southern Baptists, along with some Mainline Protestants, started Protestants and Other Americans United for Separation of Church and

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[239] Joseph Martin Dawson, *A Thousand Months to Remember, An Autobiography* (Waco: Baylor University Press, 1964), 194, quoted in Hamburger, *Separation*, 462.
[240] In an admiring biography, Fowler V. Harper, *Justice Rutledge and The Bright Constellation* (Indianapolis: Bobbs-Merrill, 1965), 71, calls Rutledge's dissent a "classic" and praises it as the cornerstone for the *Engel* and *Abington* decisions. This is also another example of scholars bypassing the released time cases.

State (POAU).[241] Dawson, a confidante of Justice Black, was a key player in the new organization, which was started just months after the Supreme Court handed down the *Everson* decision. Sarah Barringer Gordon argues that POAU was mostly concerned with Catholics, and that their approach to separation was very different from the views of the ACLU, at least until the 1960s.[242] Some Mainline Protestants avoided POAU for its anti-Catholic overtones and, as a result, Gordon concludes POAU never gained strength in the Northeast.[243] There was clearly a divide between Protestants who wanted to move past anti-Catholicism and others who still thought the Catholic Church to be dangerous, as evidenced by concern over President's Kennedy election in 1960. For certain groups in POAU, such as Southern Baptists, anti-Catholicism had been a consistent focus in their efforts to keep church and state separate. On the other hand, Reinhold Niebuhr's journal, *Christianity and Crisis*, editorialized against POAU stating, "This may become an alliance between Protestants and secularists who also strongly oppose any connection between Churches and public education but who, themselves, have developed in many cases a humanistic religion of democracy which they do seek to incorporate in public education."[244] These Protestants were already sensing, weeks before the *McCollum* decision, that Protestants should be more concerned with secularization than with Catholics. Before the 1960s or Ronald Reagan, the issue of abortion, or the culture wars, released-time had brought some

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[241] Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (Belknap Press of Harvard UP, Cambridge, MA: 2010), 69.
[242] Ibid., 69.
[243] Ibid., 75.
[244] "Editorial Notes," *Christianity and Crisis*, 8 (January 1948).

Protestants and Catholics together, notwithstanding the efforts of POAU and Justice Black.

One of the most prominent people involved in the released-time controversies of the 1940s and 1950s barely made it into a footnote of the appellants' brief in the Zorach case, the second of the two released-time Supreme Court cases, which validated the legality of released-time. J.M. O'Neill had been the Chairman of the Committee on Academic Freedom of the American Civil Liberties Union (ACLU) until, on July 1st, 1948, he announced his resignation to Roger Baldwin, the Chairman of the ACLU at the time.[245] O'Neill was not resigning due to any conflict with the general mission of the ACLU. He insisted that he remained committed to "full civil liberties for everyone of every race, every color, every creed, and every political philosophy."[246] The reason he was resigning was because of his disagreement with "a pamphlet on the separation of church and state in education."[247] He let his fellow ACLU leaders know that he was publishing a book that would directly contradict this pamphlet on the subject of religion's place in the public schools under the First Amendment.

J.M. O'Neill published *Religion and Education Under the Constitution* in 1949. However, his ideas, by then, had already been a part of the Supreme Court battle over released-time. The lawyers for the Champaign, Illinois school board in the 1948 *McCollum* case wrote a letter to O'Neill that he included in his book.

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[245] J.M. O'Neill to Roger Baldwin, July 1, 1948, ACLU Records, Box 798, Folder No. 6, Seeley G. Mudd Manuscript Library, Princeton University
[246] J.M. O'Neill to Roger Baldwin, July 1, 1948, ACLU Records, Box 798, Folder No. 6, Seeley G. Mudd Manuscript Library, Princeton University
[247] J.M. O'Neill to Roger Baldwin, July 1, 1948, ACLU Records, Box 798, Folder No. 6, ACLU Records, Seeley G. Mudd Manuscript Library, Princeton University

John L. Franklin, of Champaign, and Owen Rall, of Chicago, wrote, "Striking similarities between Professor O'Neill's work...occurred because, by personal consultation with the author in the summer of 1947, by extended correspondence with him while we were preparing our argument, and by our examining a large section of his manuscript, we" could "draw freely upon the author's fertile ideas."[248] The brief that presented the first pro-released-time case to the Supreme Court came from a Catholic, who also happened to be a former member of the ACLU. O'Neill's argument for a literal interpretation of the First Amendment will be evident in the *McCollum* briefs.

In the 1920s, two New York lower courts had weighed into the matter of released-time cases, coming to different results, one invalidating the program, the other affirming its legality.[249] An appeals court in 1927 agreed with the opinion that released time programs were within the legal bounds of the First Amendment.[250] Litigation might have continued but it seems that the Great Depression and World War II put a halt to the legislation. It would be 1945, before released-time would be tried in any court system again.

The first Supreme Court case on released-time originated in Champaign, Illinois. On August 11th, 1945, the Champaign School Board responded to a lawsuit brought against it asking for the end of released-time religious

[248] J.M. (James) O'Neill, *Religion and Education Under the Constitution* (New York: Harper & Brothers, 1949), xii.
[249] Stein v. Brown, 211 N.Y.S. 822 and People v. Graves 219 N.Y.S. 189.
[250] People v. Graves 245 N.Y. 195.

education.[251] The initial trial was to be conducted by a three-judge panel on September 10th, 1945. The School Board denied "that the teaching of voluntary religious education violated any state or federal laws or constitutions." The concern for many who believed that released-time should be ended was the plaintiff: Vashti McCollum, "a former University of Illinois dancing instructor, who termed herself a 'rationalist' which, she said, makes her position virtually that of an atheist." Although many religious people opposed released-time, McCollum's lawsuit seemed to be made "on frankly antireligious grounds." Much was made of McCollum's religious beliefs, or lack thereof. Mrs. McCollum's lawyer, Landon Chapman, was preparing the argument that the teaching of religion through released-time classes was "sectarian in a broad sense in that those who believe in God are one sect, and those who do not believe in God are another sect." In this way, released-time programs favored the theist "sect," and discriminated against the atheist "sect."[252] Mrs. McCollum's father was Arthur G. Cromwell, president of the Freethinkers Society of Rochester, New York.[253] He had been the plaintiff in one of the New York cases back in the 1920s, as mentioned above.

Besides the identity of the plaintiff and the legal argument being made, the Champaign released-time program was different from many other such programs

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[251] "Suit From Atheist's Standpoint Hits at Illinois School Religion." *The Christian Science Monitor (1908-Current file)*, August 11, 1945, http://www.proquest.com.proxy.library.emory.edu/ (accessed June 7, 2011).
[252] "Suit From Atheist's Standpoint Hits at Illinois School Religion." *The Christian Science Monitor (1908-Current file)*, August 11, 1945, http://www.proquest.com.proxy.library.emory.edu/ (accessed June 7, 2011).
[253] "Supreme Court Votes 8 to 1 To Ban Religious Classes In Nation's Public Schools." *The Washington Post (1923-1954)*, March 9, 1948, http://www.proquest.com.proxy.library.emory.edu/ (accessed June 7, 2011).

in a way that made it more vulnerable to this type of lawsuit. The released-time classes in Champaign took place in the public school building. Although no public school teachers were involved, this was still something that the Chicago Church Federation opposed, along with the International Council of Religious Education, based in Chicago, which thought it "'unwise' to use school-rooms for religious education."[254] Other Protestants, although not opposed to using the public school, also realized that this would make the entire movement of released-time more vulnerable to legal action.

Ultimately, the Supreme Court's decisions about released-time programs would hinge on this issue of where the released-time programs took place. By 1941, it appears that less than half of released-time programs in a government survey held classes in the public school building. The study summarized, "For 272 elementary school systems, 111 (41 percent) hold the classes in the school buildings; 156 (57) percent hold them in churches or other buildings outside the schools such as community centers, the village or city hall, homes, a local seminary or mission, and buildings of the Y.M.C.A. and Salvation Army."[255] An earlier study from the 1920s reported a slightly different picture: "Of 279 schools reported, 201 meet in church buildings and 48 in public school buildings."[256] So, either this reflected variation that is impossible to verify accurately, or there was a trend towards using the public school building more often from the 1920s to the 1940s. It certainly was more convenient but it also posed dangers. When public

[254] "Suit From Atheist's Standpoint Hits at Illinois School Religion." *The Christian Science Monitor (1908-Current file)*, August 11, 1945, http://www.proquest.com.proxy.library.emory.edu/ (accessed June 7, 2011).
[255] Davis, *Weekday Classes in Religious Education*, 27.
[256] Gove, *Religious Education on Public School Time*, 104.

school buildings were used for released-time classes, enrollments tended to be higher. States such as Ohio made it easier to use the public school building for other purposes than public school education, while states such as Wisconsin made it difficult to use them for anything but public school education.[257] Released-time organizations had to grapple with the fact that they while they emphasized the fact that the public school was not providing the released-time program with anything (not the teacher's salary, not the curriculum), by using public school buildings they were opening themselves up to the attack that they were, in fact, being aided by the public school.

By the end of January 1947, it became clear that the Supreme Court would hear the arguments over the Champaign released-time case. On January 22nd, 1947, the Illinois Supreme Court upheld the lower court's finding that the Champaign released time program did not violate the Constitution of the United States.[258] In another case, *Latimer v. Illinois*, the Illinois Supreme Court upheld a similar decision protecting the Chicago released-time plan. So, by early 1947, every court in Illinois that had ruled on released time had also deemed the plan to be constitutional. In the *McCollum* case, the Illinois Supreme Court wrote that "our government very wisely refuses to recognize a specific religion but this cannot mean that the Government does not recognize or subscribe to religious ideals. To deny the existence of religious motivation is to deny the inspiration

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[257] Ibid., 104-105.
[258] "Supreme Court Test Slated In Religious Education Case." *The Christian Science Monitor (1908-Current file)*, January 29, 1947, http://www.proquest.com.proxy.library.emory.edu/ (accessed June 7, 2011).

and authority of the Constitution itself."[259] This was one viewpoint – it remained unclear to see how a post-*Everson* Supreme Court would evaluate this argument.

The Supreme Court agreed to take the Champaign released-time case. Vashti McCollum presented her main complaint to the state courts of Illinois as a taxpayer, but realized that only a complaint about religious freedom would bring her case under the jurisdiction of the Supreme Court.[260] Part of her argument, in the briefs her lawyers submitted before the Supreme Court, was that not all religions could participate in the released-time program. One brief stated, "the alleged freedom to teach all religions does not exist in this case." McCollum's lawyers quoted a brief on behalf of the Champaign released-time program which stated that "lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching."[261] This statement is consistent with the general Mainline Protestant desire to avoid sectarian theological fights, or to keep out fundamentalist ideas. Yet, here, McCollum's side presented this as a statement, which suggests that the state, specifically "the superintendent of schools of said School District Number 71," decided which

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[259] "Supreme Court Test Slated In Religious Education Case." *The Christian Science Monitor (1908-Current file)*, January 29, 1947, http://www.proquest.com.proxy.library.emory.edu/ (accessed June 7, 2011).
[260] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). BRIEF IN OPPOSITION. File Date: 5/15/1947. 11 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519601>
[261] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). BRIEF IN OPPOSITION. File Date: 5/15/1947. 11 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519604>

religions would have access to students through the released-time program.[262] This was an important point since one of the main defenses of released-time was that it was predicated on equal and open access for all faiths. In the 1940s and 1950s, this was, however, construed by most school administrators as referring to Protestants, Catholics, and Jews, with few exceptions such as in Utah. McCollum, a Freethinker, was trying to suggest that released-time administrators were not open to certain groups, and therefore released-time programs could not rely on the umbrella of freedom of religion.

One of the things that confused many Americans after the Supreme Court would hand down its 1948 *McCollum* decision was whether or not released-time was banned entirely or whether it had just been pushed out of the public school buildings. This lack of clarity originated with the appellant's argument. McCollum and her lawyers thought they would have a better chance for success if they contrasted the Champaign program with released-time programs in New York and Chicago that took place off of school property. One of McCollum's briefs cites two court cases and suggests that "neither of these cases involved the bringing of sectarian instruction into public schools by sectarian instructors. Each gives the student an additional hour within which to join his sectarian instructors upon their own premises. The issue in these cases was essentially

[262] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). BRIEF IN OPPOSITION. File Date: 5/15/1947. 11 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519604>

different from that here presented."[263] It almost sounds as if this paragraph was an endorsement of released-time programs that took place off of school grounds. Of course, it was not, but McCollum's lawyers chose to make a narrow point about the specific location of the Champaign program in order to improve their chance of success in this case. Finally, in regards to *Everson* and the positive result for financial aid to Catholic schools that had been approved by that decision, McCollum's lawyers noted that the released-time program was different from *Everson* by stating that it was much more a violation of separation to have "sectarian" instruction in the public schools than to pay for the transportation of Catholic students.[264]

The appellee, the Board of Education of School District No. 71, Champaign County, Illinois, asked the Supreme Court to dismiss McCollum's appeal and also argued that there was no federal question presented for the Supreme Court to evaluate.[265] The Board's lawyers stressed that the released-time teachers were paid by the Champaign Council on Religious Education and the school district

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[263] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). BRIEF IN OPPOSITION. File Date: 5/15/1947. 11 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519605>

[264] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). BRIEF IN OPPOSITION. File Date: 5/15/1947. 11 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519606>

[265] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). STATEMENT. File Date: 5/15/1947. 15 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519436>

did not spend a penny on the program.[266] They were clear to suggest that if atheists asked for a released-time program, they would be accommodated, along with Protestants and Catholics; the Board also recognized that there was not a Jewish class in every year, but there had been one.[267] This was all to suggest that released-time was in no way a program devoted to one particular religious cause, but rather to religious freedom for all religions to utilize the program. As for the fact that the program took place on school grounds, that was simply meant to avoid "the hazard from traffic to which children would be exposed" on their way to the distant churches of the city.[268] In other words, the Board of Education was not trying to bring religion into the public school room; once again, they were merely facilitating the freedom of religion and removing the obstacle of distance, and the inherent dangers, between the churches and the public schools.

Another interesting point that is raised in the brief of the Board's lawyers is about bullying and released-time programs. Although they acknowledged Vashti McCollum's son was bullied for his atheism, the Board's lawyers wrote that the Supreme Court of Illinois "held that no stigma was attached to the

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[266] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). STATEMENT. File Date: 5/15/1947. 15 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519436>

[267] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). STATEMENT. File Date: 5/15/1947. 15 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519437>

[268] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). STATEMENT. File Date: 5/15/1947. 15 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519437>

Appellant's son because he did not take religious education. The trial judges had made the same finding and the evidence supports such holding."[269] They were suggesting that since the trial record held that no harassment had occurred due to released-time programs, it should not be made a part of the decision by the Supreme Court of whether or not to take on the McCollum appeal.

Beyond merely suggesting that a specific instance of harassment towards McCollum's son could not be proven, the Board's lawyers expanded their argument to suggest that it was likely that no harassment was occurring. They cited "numerous students who did not take religious education" but "did not feel the slightest embarrassment at not participating." They also listed numerous reasons why students did not take released-time classes: enough religion from church or behind on regular schoolwork.[270] What they were trying to suggest was that McCollum's point that her child was ridiculed for being an atheist was too simplistic. The Board was trying to point out that simply refusing to attend released-time classes did not immediately identify a child as an atheist. So, if he was ridiculed, the Board asked, why were the other students not attending released-time classes not ridiculed?

As for the fact that there was a distinction made between those students who attended religious classes and those who did not, the Board's legal argument

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[269] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). STATEMENT. File Date: 5/15/1947. 15 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519441>

[270] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). STATEMENT. File Date: 5/15/1947. 15 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519441>

was that the Supreme Court had already ruled in a previous case in a way to deny McCollum's argument. The Board's lawyers cited *West Virginia State Board of Education v. Barnette* where the Supreme Court held that children did not have to salute the flag or "recite an oath of allegiance to the Nation." The flag salute, although not mandatory, argued the Board's lawyers, made evident religious differences. However, the Court had not thought that a reason to dismiss the entire practice, even though they permitted dissenting students to not participate. In general, they suggested that things would get very ridiculous should anything that brought out religious differences be eliminated.[271]

The two sides in *McCollum* were divided over the ruling in the *Everson* case. The American-Jewish groups, the ACLU, and the Baptists all applauded Justice Black's decision earlier that year and argued along the lines that he set forth. They had a relatively easy time, given what Justice Black had established in the *Everson* case. The other groups, such as the Champaign School Board, decided not to argue for released-time within Justice Black's framework. Rather, they attempted to tell Justice Black that he was wrong. Using the framework set by J.M. O'Neill, the Champaign School Board brief contained a long denunciation of Justice Black's *Everson* decision. In this view, neither the literal interpretation of the First Amendment, nor Thomas Jefferson and James Madison's actions after the Bill of Rights had been ratified suggested that a program such as

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[271] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). STATEMENT. File Date: 5/15/1947. 15 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 04 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3904519442>

released-time was unconstitutional. Although a bold move, this strategy would backfire.

The Supreme Court heard oral arguments in the Champaign case on December 8th, 1947. They lasted two hours and revealed much about the thinking of some Supreme Court Justices. One exchange included Justice Harold Burton asking whether or not invalidating the Champaign program would invalidate programs where the released-time instruction took place off of school grounds. Mrs. McCollum's lawyer, Walter F. Dodd, answered that would not necessarily be the case, but numerous briefs submitted before the Court had asked for just that. The attorney for the Champaign School Board, John L. Franklin, misled the Justices when he said that the classes were "educational" but not "doctrinal." These classes were not merely teaching about religion; they were helping children believe in a particular religious narrative. One of the places where two Supreme Court Justices cornered Mr. Franklin was on the issue of "whether all creeds and faith were equal under the plan." Justices Felix Frankfurter and Stanley Reed were probably getting at the fact that Jewish participation in the Champaign program had ended in 1944. Justice Jackson admonished both sides to be careful with their arguments. To the proponents, Jackson said: "There are a great many devout people who believe in religion who oppose public instruction and use of public schools for religious teaching. I think you are going a little too far to hold these people irreligious." To the opponents of released-time, Jackson admonished them to not be concerned with how released-time affected students,

since the Supreme Court was only deciding on the legality of the matter, but not its merits as far the children's welfare was concerned.[272]

Justice Hugo Black asked the Champaign Board's lawyer, John L. Franklin, who contended that the First Amendment meant that one religion alone could not be established, whether the "State could vote five million dollars out of tax money to aid religions, if it treated all on the same basis." Franklin answered that this was already the case with tax exemptions for church property. Black inquired if the public school could allow seven and a half hours a day for released-time religious education but only one hour of regular school work. Cornered, Franklin said this too would be okay, as long as all religions had equal access.

The Supreme Court rendered the *McCollum* decision by an 8-1 majority of the U.S. on March 8th, 1948. The decision made it illegal to hold released-time religious instruction on school grounds. Most of the participants in released-time, and its opponents, viewed the *McCollum* decision as a ban just on released-time programs that took place in the public school buildings. The *Christian Science Monitor* said that "whether its decision goes farther than this remains uncertain and very likely will have to be determined by other test cases."[273] Justice Hugo Black, who wrote the majority opinion, said: "The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective

[272] "RELIGION IN SCHOOLS TESTED ON LEGALITY." *New York Times*, December 9, 1947.
[273] "Supreme Court Strengthens Wall Separating Church From State." *The Christian Science Monitor*, March 9, 1948.

sphere."[274] This was the idea that Justice Black had developed in the *Everson* case: incorporating a strict separation of Church and State. In the case of released-time religious education, Justice Black, and the other seven Justices who agreed with him, believed that weekday religious education was an example of too close a collaboration between Church and State. There was but one dissent, Justice Stanley Reed. Justice Reed wondered what propelled the majority decision: "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 for the classes and the appearance of the Council's instructors?"[275] Justice Reed would stand in a minority in the 1948 case, but his viewpoint would be mostly validated by the *Zorach* opinion to come in 1952.

Although Justice Black wrote the majority opinion, it seemed that the more interesting opinions were two very different concurring opinions written by Justices Felix Frankfurter and Robert Jackson. Justice Frankfurter's opinion was twenty pages long and, the *Washington Post* opined, his concurrence "read as though it was written to be a majority opinion." Justice Frankfurter called for the "complete separation between the state and religion."

Finally, Justice Jackson's concurrence was quite puzzling. The *Washington Post*, again, remarked that "Justice Jackson gave an opinion

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[274] "RELIGIOUS TEACHING IN SCHOOLS BARRED BY SUPREME COURT." *New York Times*, March 9, 1948. See also, "Supreme Court Votes 8 to 1 To Ban Religious Classes In Nation's Public Schools." *The Washington Post*, March 9, 1948.
[275] "Supreme Court Strengthens Wall Separating Church From State." *The Christian Science Monitor*, March 9, 1948.

concurring with the majority, but which had far more the tone of a dissent."[276] Justice Jackson's most interesting point was that different localities might feel differently about religion in the public schools and perhaps the Supreme Court should not try to set a national standard for communities across the country in how to deal with this issue. That point alone made it seem puzzling as to why Justice Jackson joined both the majority and Justice Frankfurter's concurring opinion, while he voiced doubts about the decision as strongly as did Justice Reed, the only dissenter in the case.

In *McCollum*, the argument in the conference of the Supreme Court Justices was not about whether to uphold the religious education program, because eight of nine did not think the program was constitutional. The problem was how and if the holding to strike down the Illinois released-time program would work around the *Everson* decision. If government should not, or only in a limited manner, assist religious schools, they reasoned religion should not enter into the public school arena. Justice Frankfurter agreed with Justice Black in the *McCollum* case but wanted to overturn *Everson*, an opinion that Justice Black cherished. Justice Frankfurter ultimately shied away from making too much of *Everson* in his lengthy *McCollum* concurrence, as part of an agreement that Frankfurter reached with Black.[277] Having resolved the infighting, the majority decision was a powerful statement against released-time, although the concurrences by Justices Frankfurter and Jackson, plus a dissent by Justice Reed,

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[276] "Supreme Court Votes 8 to 1 To Ban Religious Classes In Nation's Public Schools." *The Washington Post*, March 9, 1948.
[277] Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994), pp. 364-365.

left room in the imagination of released-time supporters to believe that released-time could survive even after *McCollum*.

Justice Black made it clear in this 1948 opinion that the problem he saw was not the use of school buildings for religious instruction. Rather, the problem was that "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."[278] Justice Black was opposed to having public schools even facilitate religious instruction. It did not matter that they would provide fair access to all religions or would do so in a non-coercive manner. He did not accept the argument that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions."[279] Integrating the work of religion and of the government was the problem for Justice Black. There was also the problem of where the non-participating students would go since "they were required to leave their classrooms and go to some other place in the school building in pursuit of their secular studies."[280] With these germinating thoughts on religion and government, Justice Black gave the first modern-day disestablishment ruling, the first case to find that the government had actually established a religion. In this early decision, all these factors led Justice Black to conclude that government and religion, Church and State, were not separate in this program. The logical conclusion was to strike down the released-time

[278] *Illinois ex rel. McCollum v. Board of Education of School District No. 71. Champaign County, Illinois, et. al.*, 333 U.S. 203, 212 (1948).
[279] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 211.
[280] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 209.

program, something that many thought should have been the logical conclusion of *Everson* as well. More dangerous then the financial connection between Church and State, Justice Black thought, was the institutional assistance that the State, through public schools, could give to religion.

Justice Frankfurter provided a lengthy history of the released-time program, in which he attempted to lay out the basis for how intermingled church and state could become and how dangerous that was. He wrote, "Traditionally, organized education in the Western world was Church education," and when "the State intervened, it used its authority to further aims of the Church."[281] Historically, Western education had been Christian and Frankfurter's use of this historical fact was to argue that there was already a predisposition for American schools to teach Christianity. Justice Frankfurter was Jewish, and Jewish intellectuals were keenly aware of the fact that America had been a Protestant nation. By employing the history of the released-time program, Frankfurter was arguing that education needed to be de-Christianized. He was not arguing that it should be replaced with the Jewish tradition but rather with a democratic, secular public school. The Jewish-American groups submitting briefs influenced Justice Frankfurter's opposition to released-time.[282]

David Hollinger has argued that Jewish intellectuals had a liberalizing effect on mid-twentieth century American life. Felix Frankfurter was a part of that movement, only with a louder voice than his counterparts in academia or literary circles possessed. His call for a cosmopolitan America was loud and

[281] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 213.
[282] Cohen, *Jews in Christian America*, 143.

clear; the most important locale for America's destiny was the public school. For Frankfurter, the public school was "at once the symbol of our democracy and the most pervasive means for promoting our common destiny." If America was to become the land where Jew and Christian could reside side by side, in Frankfurter's opinion, the public school would have to play a key role in the formation of children who could grow up to tolerate others. The greatest apparent threat to his vision was religion, since it had and could sow disharmony. He concluded, "In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." [283] Historically, thus, we must place Justice Frankfurter in the context of American Jewish intellectuals who played a key role in American secularization. This is one example where Felix Frankfurter, among other Justices, used the law to shape American culture. Furthermore, he was the Jewish intellectual who played the most decisive role in institutionalizing secularization in American civic life.[284]

Felix Frankfurter developed his philosophy on Church-State issues well before the religious education cases first arrived at the Supreme Court; he never once wavered from those views. An article in his case files exemplifies the heart of Frankfurter's philosophy. This article was "Democracy and Parochial Schools," written by Joseph Blau, a philosophy professor at Columbia University. Blau

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[283] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 231.
[284] David Hollinger, *Science, Jews, and Secular Culture: Studies in Mid-Twentieth-Century American Intellectual History* (Princeton, 1996), 25-26, 42, 49, and 52-53. The above pages are where Hollinger talks about Frankfurter but never in the context of him being a Supreme Court Justice and never assigning him a grand role. Hollinger is more interested in how Oliver Wendell Holmes befriended Frankfurter when he was a professor at Harvard Law School.

wrote that Jews had started a few parochial schools during the colonial era. Once democracy began to gain a firm grip in America, Jews changed course and proceeded to embrace the public school.[285] This was the reasoning closest to Frankfurter's mind. Democracy's bulwark, the public school, had to be delivered from the pull of divisive religion. Frankfurter's vision of the public school, and implicitly of America, was of a secular America. He had left an active Jewish observance as a teenager and proclaimed himself a "reverent agnostic."[286] This "reverent agnostic" was friends with Reinhold Niebuhr, the famous Mainline Protestant theologian. Frankfurter was not a Christian, but he partook in the general culture of liberal Christian intellectuals. Frankfurter scorned the conservative side of American Christianity. Frankfurter wrote a letter to Black, four years after the *McCollum* decision and immediately after the *Zorach* decision of 1952, which scholars have used to show a healing of the rift between Black and Frankfurter. Frankfurter wrote in this letter to Black about the material that their evangelical critics bestowed upon them for their opinions and called the material "some rancid Billie [sic] Graham stuff whereby we shall be reviled as atheists."[287]

Frankfurter shared his philosophical beliefs with John Dewey, who showed up in person to oppose the New York City Board of Education's adoption of released-time. Justice Frankfurter appealed to John Dewey, the great

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[285] *The Felix Frankfurter Papers* (microform, 3 parts, 209 reels, University Publications of America, 1986), Part 1, Reel 60.
[286] Harlan B. Phillips, *Felix Frankfurter Reminisces* (New York: Renyal & Company, 1960), 289-291. The "reverent agnostic" quote is on p. 291.
[287] Felix Frankfurter to Hugo Black, March 5, 1952, Folder No. 431 Oct. Term 1951 Zorach v. Clauson, Box 313, Hugo Black Papers (Manuscript Division, Library of Congress, Washington, D.C.).

American philosopher and educator, as an authority figure. In a draft of his *McCollum* concurrence, Frankfurter erased a footnote, which originally stipulated that "John Dewey himself and the John Dewey Society are unalterably opposed" to the released-time programs. He had written that the released-time movement had borrowed certain ideas from John Dewey. Frankfurter felt so strongly about Dewey that he initially wanted to make it clear that Dewey was not on the side of religious education.[288] The bottom line was the idea that Frankfurter shared with all these other intellectuals: a commitment to a secular society.

In his *McCollum* concurrence, Justice Frankfurter envisioned the coercion occurring in public schools as more powerful than Justice Black had. The child who declined to go to the religion classes was required to go to "a study period during which he [was] often left to his own devices" and would "presumably [be] deemed a truant."[289] Frankfurter argued that the students who decided not to attend the religion classes would face consequences, yet he also allowed for the fact that the students, except for having to stay in the building, were free to do as they pleased. Frankfurter appeared willing to allow accommodation of the public school schedule to a period of religious instruction if the schools dismissed all the students, and they would be free to go home or to church as they pleased. Again using his knowledge of the released-time program, Frankfurter opined that the schools might "might have drawn upon the French system, known in its American manifestation as 'dismissed time, 'whereby one school day is shortened

[288] *The Felix Frankfurter Papers* Part 1, Reel 22.
[289] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 227.

to allow all children to go where they please, leaving those who so desire to go a religious school."[290] Dismissed time might have been a potential bridge between the two sides where the school would have no part whatsoever in the religious instruction, but the time would be available for students to go to religious instruction. Yet, as shown earlier in this chapter, dismissed-time in 1920s New York City had an array of opponents very similar to the opponents of released-time in 1940s New York City.

Justice Jackson's 1948 case files further reveal his motivations. An undated, handwritten piece of paper from 1948 defended Protestants in their quest for released-time programs. Robert Jackson was a Protestant whose children attended private Christian schools.[291] His sympathy centered on the fact that Protestants were merely trying to catch up with their Catholic counterparts in terms of religious education. He further emphasized the plight of Protestant children when he wrote that public schools had become irreligious. Jackson wrote, "There are but two significant mass education forces in the United States – Catholic schools and irreligion schools." Jackson had a dose of anti-Catholicism, for he talked about their "influence magnified by cohesion and discipline." He finished this one-page memo by summarizing the fact that the public school was "an institution that flourished only in Protestant countries," and now Protestants were the ones closed out of the public school. [292] In fact, numerous Baptists and other Protestants supported the complete separation of Church and State in the

[290] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 230.
[291] *Zorach v. Clauson et al.*, 343 U.S. 306, 324.
[292] Handwritten Memo, folder Supreme Court – O.T. 1947 No. 90 Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign Co. Ill. et al., Box 143, Robert H Jackson Papers (Manuscript Division, Library of Congress, Washington, D.C.).

immediate post-World War II era. While some Mainline Protestants accepted complete secularization, numerous Protestants were simply angry that local and state governments were funding Catholic parochial schools. It appears that in 1948 Justice Jackson's reasoning for separating Church and State was a typical Protestant discomfort with funding Catholic religious education. Justice Jackson had some Southern Baptist publications in his case files, confirming clearly that he was well aware of the anti-Catholic Protestant rationale for the separation of Church and State.[293]

Justice Jackson concurred in the decision to strike down the Illinois program but appeared to be quite reluctant about doing so. His first reason was a reluctance to set up national standards for schools since that would improperly affect local custom. [294] Jackson wrote, "Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments." Jackson wrote this in the context of religious education and this appears to be a strong endorsement of religious pluralism. According to Jackson's logic, each community would have its own character, which the Supreme Court should not disturb. That would apply to a Protestant community in the South, which desired to inculcate those values in the children of the schools in their community, as it would apply to a Catholic community on the Canadian

[293] These publications from the Southern Baptist Convention are in folder Supreme Court – O.T. 1947 No. 90 Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign Co. Ill. et al. folder #2, Box 143, Robert H Jackson Papers (Manuscript Division, Library of Congress, Washington, D.C.).
[294] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 234.

border of Maine. Justice Jackson would be tempted to extend the same logic to racial segregation.[295]

Justice Jackson felt that by taking the claims against religion in schools seriously, the Court could get itself into a quagmire. He wrote, "If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." Would a Baptist who found the idea of square dancing or dressing up for Halloween be able to sue and get the public schools to eliminate those activities? Jackson believed that by granting the McCollum child, whose parents were Freethinkers or atheists (depending on one's usage), the right to strike at what he did not like in public schools, the Court would open the opportunity to all religious sects to try and strike at what they found displeasing. Not only could various religious groups claim they did not like something but how could the Supreme Court rule what was appropriate education about religion and what was inappropriate religious education. Jackson doubted whether it was wise "to isolate and cast out of secular education all that some people may reasonably regard as religious instruction."[296] Jackson was referring to how numerous academic subjects implied talking about religion, such as the study of the Bible in the English language. Jackson was not attacking pluralism in his concurrence,

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[295] Michael M. Uhlmann, "The Road Not Taken," *Claremont Review of Books* IV, no. 3 (2004), http://www.claremont.org/publications/crb/id.1073/article_detail.asp (accessed 24 May 2011). Justice Jackson wrote a memo at some point in early 1954 where he wrote the following: "But I am satisfied that it would retard acceptance of this decision if the Northern majority of this Court should make a Pharisaic and self-righteous approach to this issue or were inconsiderate of the conditions which have brought about and continued this custom or should permit a needlessly ruthless decree to be promulgated."

[296] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 235.

but rather the extreme way that he saw his colleagues interpreting the Establishment Clause. He was not opposed to all sorts of religious groups practicing their own religion, only to the efforts of various groups to "disestablish" religion even when it was not necessary, in his view.

Jackson certainly did not intend to promote religious education in schools but he showed an incredible understanding for teachers communicating religious truth. He defended teachers for expressing their sectarian preferences. He wrote, "It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed."[297] Jackson was making a distinction between the Judeo-Christian tradition and other religions. Jackson was somewhat more parochial than someone like Frankfurter, and thus it comes as no surprise that Jackson showed tolerance for outright evangelization, if it were to occur in public schools. He continued, "When instruction turns to proselytizing and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry."[298] His goal was to show that this was a complex case to enter. In doing so, however, he revealed that he was not as distressed with religion in public education as were some of his colleagues. Finally, yet importantly, Jackson attacked the legal basis of the majority opinion's holding. He concluded that the issue at hand was "a matter on

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[297] Memo, folder Supreme Court – O.T. 1947 No. 90 Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign Co. Ill. et al., Box 143, Robert H Jackson Papers (Manuscript Division, Library of Congress, Washington, D.C.). In Jackson's handwritten notes, there was a different spelling of Mohammed: Mahomet, which suggests that the religion of Islam was something distant and unfamiliar for Jackson.

[298] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 236.

which we can find no law but our own prepossessions."[299] This was not very subtle condemnation of Justice Black's majority opinion. Jackson's comment was perceptive but the Constitution did allow Justices to apply either of the two clauses. The Justices were free to choose which clause they would apply with more fervor. In the process, it is true, they were selecting, perhaps based on their "prepossessions," between secularization and religious pluralism.

The clearest voice of dissent in the *McCollum* case was Stanley Reed. Justice Reed invoked the tradition of American religiosity in the same way that Justices Black, et al. had invoked the tradition of the separation of Church and State. Where Reed was innovative was in rejecting a textual interpretation of the Constitution in this matter. Reed wrote, "The great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people...the history of past practices is determinative of the meaning of a constitutional clause, not a decorous introduction to the study of its text."[300] If, according to Reed, Americans had not obeyed a strict separation of Church and State, then Jefferson and Madison were to be overruled by the practices of the American people. Reed, along with Douglas's 1952 *Zorach* opinion, would clearly show that a majority of the American people had been and still were quite religious. Even Justice Frankfurter commended Reed for his opinion. Frankfurter wrote to Reed, "Your present dissent stirs in me a respect which the proposed Court opinion in

[299] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 237.
[300] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 256.

McCollum is far from generating."[301] Although Frankfurter agreed with nothing in Reed's analysis, Reed's view did manage to gain some respect, and Justice Douglas would carry on some of the same arguments in the *Zorach* case.

Justice Burton did not write any of the religion case opinions. Yet he too was important to their outcomes in two ways. First, he facilitated the *McCollum* opinion by acting as a mediator between Black and Frankfurter.[302] Second, he was a crucial vote in both the *McCollum* and *Zorach* cases. He was one of three Justices who made it clear in 1948 that he would uphold a released-time program if the program did not take place within the school building. The New York City program challenged in *Zorach* was a released-time plan where students received religious instruction during school hours but off school property. Samuel Alito, writing later in 1974, argues that Burton received assurances from Justices Black and Frankfurter that the *McCollum* decision would not discredit the New York City program.[303] Mary Berry, his biographer, could not discern evidence for why Burton made such a distinction between religious instruction in a school building and outside of the school building.[304] Unitarians, although rejected by more evangelical Protestants, were still connected, however loosely, to the Mainline Protestant culture dominating the United States up until the middle part of the twentieth century. Alito's argument would thus make sense of Justice Burton's switch from 1948 to 1952.

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[301] John D. Fassett, *New Deal Justice: The Life of Stanley Reed of Kentucky* (New York: Vantage Press, 1994), 442.
[302] Mary Frances Berry, *Stability, Security, and Continuity: Mr. Justice Burton and Decision-Making in the Supreme Court 1945-1958* (Westport, CT: Greenwood Press, 1978), 54-59.
[303] Samuel Alito, "Notes: The 'Released Time' Cases Revisited: A Study of Group Decisionmaking by the Supreme Court," *Yale Law Journal* 83, no. 6 (1974): 1202-1236.
[304] Ibid., 54-55.

Nevertheless, Burton did provide a key vote to stop religious instruction on school grounds. Burton's involvement with the national leadership of the American Unitarian Association indicates that he took his Unitarian religion seriously. One letter from the group asked him to write a short essay "on: 'Why I Believe in Advancing Religious Liberalism.'" The letter from the American Unitarian Association described "the liberal religion of Thomas Jefferson, Ralph Waldo Emerson and Horace Mann." The letter continued by describing Unitarianism as, "above all, a positive emphasis on the democratic process in religion."[305] The letter to Burton presented both Jefferson and Mann as Unitarians but both were historical figures who played an important role in the separation of the American state and church. Most Justices quoted Thomas Jefferson's writings in the religion cases and some Justices cited the work of Horace Mann in keeping the Massachusetts schools free of religious influence. Apparently, for Justice Burton and a few other Justices, these historical figures came to life as heroes who had defended a worthy cause. The most comprehensive link between the letter and the philosophy of Justice Burton is the connection between democracy and religion. The proponents of the separation of Church and State placed great emphasis on the public school as the standard bearer of democracy. Justice Burton's religion claimed the same mantle of democracy. Democracy in this context signified cosmopolitanism for here democracy did not refer to voting rights but rather involved the ability to change

[305] Melvin Arnold to Harold Burton, January 17, 1946, Folder 3 Correspondence 1945 Term American Unitarian Association, Boston, Mass. 1945-1946, Box 56, Harold H. Burton Papers, (Manuscript Division, Library of Congress, Washington, D.C.).

the fixed tenets of doctrine and dogma. Justice Burton's religious views informed his perception of the religion cases. Burton's record also sheds light on the other Justices and how religious or philosophical views shaped the Court's decisions in the religion cases.

In the legal community, there was no consensus. In fact, a couple of leading lights went to great lengths to argue their cases in law reviews. The most significant defender of released-time, besides J.M. O'Neill, was Edward Corwin. Daniel Dreisbach refers to Corwin as "the late dean of American constitutional scholars" and calls his response to the *McCollum* decision "the most influential article written on *McCollum*."[306] On the other side, the most influential defender of the Court's position in *McCollum* was Leo Pfeffer. Pfeffer was the lead Jewish-American lawyer in the New York case; the only reason he was not the lawyer in charge was because of the desire to not alienate Protestants. He would become known as the pre-eminent legal expert on Church and State throughout the 1950s and 1960s.

Edward Corwin cited a recent Court decision, showing just how radical the 1947 and 1948 decisions were. As late as 1943, the Supreme Court had decided in *Barnette* that children of Jehovah's Witnesses could opt out of saluting the flag. Corwin reasoned that the implication of that decision was that the practice itself was not invalidated. Corwin also was bothered given Justice Black's focus on

[306] Dreisbach 28.

coercion given that the trial court had found no evidence of coercion, certainly none greater than the 1943 students had faced to salute the flag.[307]

Corwin used another Supreme Court precedent to argue that even if the alleged coercion had taken place in the Champaign case, it would not be an establishment of religion per se. The 1925 case in question, *Pierce v. Society of Sisters*, validated the parental right to send children to parochial schools. Corwin's argued as follows: "Compulsory school laws which permit attendance at parochial schools are constitutional, notwithstanding the compulsion which is thereby lent such schools in 'recruiting' pupils. This compulsion is, in fact, immensely more evident than that which was put upon pupils to avail themselves of the Champaign 'released time' program."[308] This argument would be put to use by the defenders of the New York City released-time program. If parents had the right to choose to a full-time religious education for their children, why was it legally wrong for them to request an hour's worth of religious education within the public education for their children?

Corwin anticipated a response to the question he posed. Corwin continued, "the question accordingly arises whether this right is confined to parents who can afford to send their children to parochial or other private schools; whether, in other words, parents who must for financial or other reasons send their children to the public schools have no right to guide their education to the extent of demanding that the education there available shall include some

[307] Edward Corwin, "The Supreme Court as National School Board," *Law and Contemporary Problems* 14 (1949): 8.
[308] Corwin 20.

religious instruction, provided nobody's freedom of religion is thereby impaired?"[309] Corwin went so far as to accuse the Supreme Court of depriving the parents of students in released-time programs of their free exercise of religion rights.[310] Long before *Brown v. Board of Education* brought forth massive resistance, Corwin's reasoning pondered the rise of religious private schools in the wake of decisions such as *McCollum* and, later on, *Engel* and *Abingdon*.[311]

Corwin also attacked the Supreme Court for its incorporation of the First Amendment applying against the states. He wrote, "The Fourteenth Amendment does not authorize the Court to substitute the word 'state' for 'Congress' in the ban imposed by the First Amendment on laws 'respecting an establishment of religion.' So far as the Fourteenth Amendment is concerned, states are entirely free to establish religions, provided they do not deprive anybody of religious liberty."[312] In other words, opposing incorporation meant that states were not held to the same standard as Congress, by the First Amendment's establishment clause.

Corwin acknowledged that he was not the only thinker taking apart the legal basis of the *Everson* and *McCollum* decisions. Corwin wrote, "I am indebted to J.M. O'Neill, *Religion and Education Under the Constitution*. This work, now in press is a devastating assault upon the *McCollum* decision from

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[309] Ibid.
[310] Ibid.
[311] For a judicious treatment of whether Southern Christian schools are segregationist academies or reactions to the Supreme Court's disestablishment of religion in public schools, see Joseph Crespino, "Civil Rights and the Religious Right," in Bruce Schulman and Julian Zelizer, eds., *Rightward Bound: Making America Conservative in the 1970s* (Harvard University Press: Cambridge, MA, 2008).
[312] Corwin 19.

several angles."[313] For all the identifying remarks about Catholic scholars in this debate, Corwin did not see O'Neill as a Catholic, but rather as a fellow scholar who had made excellent points.

O'Neill's major attempt was to discredit the Supreme Court's use of history in the *Everson* and *McCollum* and to show how radical of a departure those two decisions were from any previous Supreme Court precedent. O'Neill came to this subject not as a Catholic thinker; in fact, he attacked certain Catholic positions on the authority of the Church in the United States. Rather, he came to the problem from a civil liberties perspective.[314] He recognized the strategy of what he called "the current campaign to subvert the First Amendment" was to portray the issue as a "Catholic vs. a Protestant fight."[315] O'Neill's major project was historical – to show that Jefferson, Madison, and the Constitution meant something completely different from what the Court had suggested in the two cases.[316] He cited Corwin, among other Constitutional scholars, to argue that the First Amendment meant no more than Congress not being allowed to construct or support a national church.[317]

Leo Pfeffer, the leading legal voice in support of *Everson* and *McCollum* agreed that the Supreme Court had misused the history of the First Amendment. However, that did not matter. He wrote, "the precise intent of the framers and adopters of the First Amendment, while interesting, is not decisive. Probably

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[313] Corwin 14, footnote 44.
[314] O'Neill xi.
[315] O'Neill 31.
[316] O'Neill 44, and generally chapters five and six.
[317] O'Neill 45.

there was no single clear intent."[318] Pfeffer very quickly disengaged from the historical debate, arguing that there were more important things that should frame the religion cases. Given the way the debate over the First Amendment still rages in the legal community, it is amazing that Pfeffer would made such concessions in 1948. What is even more amazing is that Pfeffer agreed with critics of incorporation: "Here, too, the Court may have been manifesting the advanced political mores of 1947 rather than expressing the specific intent of 1868."[319] However, by 1951, O'Neill's arguments had forced Pfeffer to engage the history of the First Amendment.[320] However, Pfeffer's main strategy was to associate O'Neill's position with the Catholic Church. He wrote that "it is not unfair to say that the O'Neill thesis is the official position of the Catholic Church." While he acknowledged that Corwin and others were not Catholics, he still concluded about the anti-*McCollum* position that "Catholics represent its most assiduous proponents."[321] Although this would become true in later decades, this was certainly not the case in the early 1950s.

In the year after the *McCollum*, it became clear to both the supporters and detractors of released-time that released-time programs would not go away. In 1949, the National Education Association (NEA) came out with a study suggesting that the *McCollum* decision had reduced the number of released-time

[318] Leo Pfeffer. *Lawyers Guild Review* 8 (May 1948): 391.
[319] Pfeffer 391.
[320] For an example of the difference three years made, see Leo Pfeffer, "Church and State: Something Less Than Separation," *University of Chicago Law Review* 19 (1951): 1-29.
[321] Ibid., 3-4.

programs, but had in no way come close to eradicating the movement.[322] The NEA's Research Division sent out 5,100 questionnaires but only received around 2,600 responses.[323] Around 1,600 communities had never had any religious education program in their public schools. Just over 300 communities had had some type of program but did not have it during the 1948-1949 school year. Over half of these three communities gave the *McCollum* case as the reason for why they no longer had a released-time program. Finally, about 700 communities, out of the 2,600 responding, had some "program of religious instruction."[324]

According to these numbers, a little over a quarter of the responding schools had released-time programs (26.8%), while three-quarters of the schools did not (73.2%). If the 150 communities that had discontinued released-time would be added into the mix, then a total of 850 communities would still have had released-time education. That would come out to about 32%, signaling that, at most, there was a decline in released-time programs of between five and ten percent due to the *McCollum* decision. The estimates for the areas that had replied came out to be 700,000 students participating in released-time classes, out of a possible 5,000,000 students. This came out to be fourteen students out of 100 (14%). It appears that they estimated that, on average, half of the students in a given community with released-time would participate in it. Since another 2,500 communities did not respond to the survey, the total number might have

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[322] National Education Association, *The Status of Religious Education in the Public Schools*, Washington: 1949.
[323] "Most School Systems in U.S. Report No Religious Work," *The Christian Science Monitor*, August 9, 1949.
[324] "Most School Systems in U.S. Report No Religious Work," *The Christian Science Monitor*, August 9, 1949.

been around 1.5 million. This number seems to indicate that the *McCollum* decision did reduce the number of released-time programs but by no more than a quarter of the total number of programs that had existed in 1948 before the Supreme Court's ruling. In 1950, there were a total of 25,706,000 students in America's public schools.[325] Thus, a conservative estimate would be that at least 5% of all America's public school students were receiving some form of released-time program in 1950. Higher estimates would bring that percentage closer to 10%.

Also a part of the NEA 1949 survey was that 43 states had some form of released-time instruction program, while the top states, decided by the percentage of communities having some form of religious education in the public schools were: Utah, New York, Minnesota, North Carolina, Rhode Island, and Oregon.[326] Maryland, Nevada, New Hampshire, Wyoming, Alaska, and the District of Columbia had no religious education while Vermont only had dismissed time programs. Still, released-time education had spread dramatically by the end of the 1940s in geographic terms. Given its strength, it was to be expected that the Supreme Court would address the issue once again.

[325] U.S. Census Bureau, "No. HS-20. Education Summary – Enrollment, 1900 to 2000, and Projections, 2001," www.census.gov/statab/hist/HS-20.pdf.
[326] "Most School Systems in U.S. Report No Religious Work," *The Christian Science Monitor,* August 9, 1949, http.

# Chapter Four – The *Zorach* Case

The 1952 Supreme Court decision, *Zorach v. Clauson* stands as precedent to this day since the Court has not taken another released-time case since then. Equally important, the *Zorach* case was one of the last gasps of the Protestant establishment. However, it was equally celebrated by Catholics. The *Zorach* decision would remain the exception for decades to come to the trend of disestablishment in the public schools. The Supreme Court would rule against religious practice after religious practice having to do with the public schools. Yet, there stood this one 1952 case that was so different. Finally, the 1952 case was important because the parties realized that this was the case. They understood that they had to put forth their best arguments because, unlike *McCollum*, this decision would clearly spell out if released-time was constitutional or not. The stakes were high, and there is every reason to fully understand this case, as it was the last major act in the fight over released-time.

It did not take long after the Justices had submitted their opinions in *McCollum* for the judicial process to begin again. The initial lawsuit that would bring about the next Supreme Court case was filed on July 27th, 1948, not even five months after the *McCollum* case had been decided. Tessim Zorach and Esta Gluck of Brooklyn, New York, were the parents who were officially suing the New York City Board of Education to stop the released-time program. Both parents were religious: Mr. Zorach had his child attending a Protestant Episcopal Sunday school, while Mrs. Gluck had her children attending public school in Brooklyn,

but also a Hebrew religious school in the afternoons.[327] This was intentional: no longer would it be as easy to malign the opponents of the released-time movement as being against religion. The lesson of Vashti McCollum had been learned. Among the organizations that had solicited them as clients in such as a case were the American Civil Liberties Union, the American Jewish Congress, the American Jewish Committee, the Synagogue Council of America and local New York City groups, such as the Public Education Association. The lawsuit maintained that the released-time program in New York City was an "exercise of pressure and coercion to secure attendance by the children for religious instruction."[328] The opponents of released-time were not convinced that the *McCollum* decision was expansive enough to outlaw released-time programs that took place outside of school buildings. The lawsuit also suggested that the released-time program in New York City caused "divisiveness because of differences in religious beliefs and disbeliefs." They were careful to not attack religion but divisiveness, something that had a similar ring to what Protestants had referred to as sectarian division.

On June 19, 1950, the Supreme Court of Kings County, a trial court,[329] held that the New York City released-time program was "radically dissimilar" from the Champaign program and thus legal under the *McCollum* decision.

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[327] "Suit Hits Religious Classes In New York Public Schools." *The Christian Science Monitor,* July 28, 1948.
[328] "RELIGIOUS PROGRAM BRINGS SCHOOL SUIT." *New York Times,* July 28, 1948.
[329] *Zorach v. Clauson,* 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 10 May 2011 http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504616. It is unfortunate that the name of this trial court gives the impression of it being New York's highest court – it was not. In fact, it was the bottom rung of New York state's court system.

Justice Anthony Di Giovanna of Brooklyn wrote that separation of Church and State had "never meant freedom from religion, but rather freedom of religion. 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."[330] Justice Di Giovanna listed a few points of how the New York City program was different. Mr. Zorach and Mrs. Gluck, and the several organizations supporting their lawsuit, were going to appeal to the New York Court of Appeals.[331]

On January 15th, 1951, the next court on the ladder of New York's appellate structure also ruled in a three to two decision that the New York City released-time program was constitutional. The majority wrote that "petitioners have failed to allege facts sufficient to establish any invasion of their constitutional rights by the adoption of the regulations complained of, or the operation thereunder of the 'released-time program.'" The programs were constitutional because they did not force any students to join this program. Missing, in the opinions of these state courts, was the essential element of coercion.

The minority dissent acknowledged that the facts between Champaign's program and New York's were different. Yet, it maintained that "the New York City program is void in that it is integrated with the state's compulsory education system, which assists the program of religious instruction carried on by separate

[330] "COURT DENIES SUIT ON RELEASED-TIME." *New York Times*, June 20, 1950.
[331] "Released-time for Religion Upheld for Pupils in N.Y." *Christian Science Monitor*, June 21, 1950.

religious acts."[332] Here were the two different viewpoints that could not be reconciled and would lead to the Supreme Court by 1952.

The final and highest New York state court was the State Court of Appeals. In a 6-1 decision, this court too upheld the New York City program. Again, a similar distinction was made: "governmental aid to, and encouragement of, religions generally, as distinguished from establishment or support of separate sects, has never been considered offensive to the American constitutional system." This opinion, written by Judge Charles W. Froessel, continued, "the Constitution does not demand that every friendly gesture between church and state shall be discountenanced." Judge Froessel's holding was strongly worded while addressing the potential danger of a high wall of separation between Church and State. He wrote, "This 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." Finally, Judge Froessel called the right of parents to enroll their children into released-time classes a constitutional right, based on "the free exercise thereof" permitted to Americans. Supporters of released-time saw it as a free exercise, while opponents saw coercion as its main feature. In the dissenting opinion, Associate Judge Stanley Fuld reiterated the claim that to oppose released-time programs was not to be opposed to religion. Judge Fuld wrote, "time has taught, and the Supreme Court by its decision in the McCollum case has reaffirmed, the wisdom and necessity of maintaining a 'wall * * * high and impregnable' between church and state, between public school secular education

[332] "COURT BACKS TIME FOR FAITH TEACHING." *New York Times*, January 16, 1951.

and religious observance and teaching."[333] On December 11, 1951, the Supreme Court agreed to hear the New York City case.[334] Among other states, Massachusetts joined the state of New York in defending the released-time program before the Supreme Court.[335] The Catholic effort was not very visible but it certainly lent credibility to the idea that so much of America, in the form of the state attorneys general, wanted the Supreme Court to support released-time programs. As in the *Everson* case, the National Catholic Welfare Conference worked with Catholic bishops throughout various states to convince state attorneys general to submit a friend of the Court brief in favor of released-time programs, in *Zorach*. For example, on January 19th, 1952, the Attorney General of Minnesota, J.A.A. Burnquist, wrote to the Most Reverend John G. Murray: "In accordance with the suggestion by the Right Rev. Msgr. Howard J. Carroll, I am writing him for the purpose of authorizing the adding of my name as Attorney General of Minnesota to the briefs of other Attorneys General."[336] The political power of Catholics in various states was being put to use on behalf of released-time.

In the beginning of 1952, the scene had been set for the final showdown in the released-time battle. The Supreme Court was once again going to be receiving briefs from the interested parties and would re-visit the matter of released-time. If its 1948 decision left things somewhat unclear, certainly, four

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[333] "Court Backs School Program Of Outside Religious." *New York Times*, July 12, 1951.
[334] "HIGH COURT TO RULE ON 'RELEASED-TIME'." *New York Times*, December 12, 1951).
[335] "Kelly Asks Ruling On Released-time." *Christian Science Monitor*, January 15, 1952.
[336] J.A.A. Burnquist to Most Reverend John G. Murray, January 19, 1952, Box 119, File 10.119.15, NCWC/USCC Gen. Secretary/Exec. Dept. Collection, The American Catholic History Research & University Archives, The Catholic University of America, Washington, D.C.

years later, the Supreme Court would clarify matters. How they would rule was what everybody was trying to influence through the briefs they submitted. The opponents of released-time had put together the best lawyers from the ACLU and from the leading American-Jewish groups. Their brief would rest upon the belief that the Supreme Court was compelled to follow its previous tracks from the late 1940s, which suggested that released-time was done and over.

The lawyers working for the appellants in the *Zorach* case were a powerhouse team. Kenneth Greenwalt of the ACLU took the lead, but Leo Pfeffer, who would come to be known as the expert on Church-State relations in the United States by the 1950s, was the brain of the legal team.[337] Together, the briefs that were produced were forcefully intelligent. The briefs put forth by the opposing side were also very keen – and they had to be in order to have any chance of success against the lawyers they were up against.

The fact about the parents in the case being religious was made evident for the Justices: the parents in the case, Tessim Zorach and Esta Gluck, did not allow their children to participate in released-time programs, even though, outside of public school hours, both sent their children to religious classes in the Episcopalian and Jewish traditions.[338] In June of 1948, a few months after *McCollum*, they asked the New York Board of Education to discontinue the

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[337] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 09 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504597>

[338] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 10 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504612>

released-time program; as a result of the failure to do so, Zorach and Gluck, and their attorneys, began their judicial journey.[339] Great care was taken to present the two petitioners as religious. A brief before the Supreme Court lamented this necessity: "It is regrettably necessary again to state that appellants' opposition to released-time is in no way motivated by hostility to religion or religious education. As alleged in the petition, the children of appellants receive religious instruction at their respective religious schools completely independent of the public school system. Manifestly, therefore, appellants are not motivated by anti-religious considerations."[340] Whether this be seen as the pressures of Joseph McCarthy's America or an America that was still very religious, it was clear that caution here was to be labeled as anti-religion or, worse, atheistic.

Not only were the two appellants in the case religious, but their attorneys labored to show that significant religious groups, such as the "Baptists [sic] Joint Conference Committee on Public Relations, representing the largest Protestant denomination in the United States" had opposed released-time in the *McCollum* case.[341] The lawyers made an impassioned plea to have the case decided on its

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[339] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 10 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504612>

[340] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 10 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504625>

[341] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 10 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504626>

merits, not allowing "the real issues herein" to "be muddled by unfair references to totalitarianism, communism or atheism."[342] This smart argument, although ultimately ineffective, was necessary to remind the Justices that religious people could oppose released-time.

The argument for the plaintiff lawyers was simple. Based on both *Everson* and *McCollum*, this was an easy decision. They were reminding the Justices to be consistent and evaluate the New York program based on Justice Black's previous opinions, along with Justice Frankfurter's concurrences, from those two earlier cases. The brief stated, "The New York system of released-time, therefore, cannot be sustained unless this Court changes the meaning of the First and Fourteenth Amendments as expressed by both the majority and minority in the *Everson* case and reiterated in the *McCollum* case."[343] The Justices may not have liked being boxed in like this, but it certainly seemed that if their previous decisions were correct, and the plaintiffs believed it to be so, than the New York program would also be terminated. Ultimately, that turned out to not be the case, but based on what these lawyers knew before the decision was handed down, it certainly was a smart strategy.

Based on those two previous decisions, the lawyers for Zorach and Gluck contended that "pupils compelled by law to go to school for secular education

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[342] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 10 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504629>

[343] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 10 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504630>

were released in part from their legal duty upon the condition that they attend religious classes; this was unquestionably a utilization of the tax-established public school system to aid religious groups to spread their faith; the state had afforded sectarian groups an invaluable aid in that it helped provide pupils for their religious classes through use of the state's compulsory public school machinery, contrary to the First Amendment's principle of separation of Church and State."[344] This was not an illogical conclusion to draw from *Everson* and *McCollum*. Another piece of proof that the Supreme Court had meant to strike down the New York City released-time program in the *McCollum* decision was the Court's awareness of the New York program when "a brief *amicus* had been filed therein by Charles H. Tuttle, Esq., attorney for the intervenor in the present case, setting forth in detail the nature of the New York released-time system."[345] No better proof could exist, than that which stipulated that the Supreme Court had knowingly given its 1948 decision, with full awareness of the New York City program as well. What should have been unclear was whether or not a majority of Justices would view the New York and Champaign programs as similar.

The appellants took some definite shots at the released-time program. They described released-time as a corrupt bargain: the state "compelled all children to attend school for a specified numbers of hours weekly for secular

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[344] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 10 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504634>

[345] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 17 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504636>

instruction" and "then, in effect, entered into an agreement with willing parents to release their children in part from that obligation, if they used the released-time to participate in religious instruction."[346] Regardless of whether or not school buildings were used, released-time programs used "compulsory, public school machinery as an aid in recruiting children for religious instruction."[347] They made the program sound sinister and suggested a level of collusion between the public schools and the religious authorities.

The appellants needed to refute arguments that Justice Frankfurter's *McCollum* concurrence had allowed for some released-time programs to survive. The appellants' brief stated, "the portion of Mr. Justice Frankfurter's opinion which refers to the obvious fact that some forms of religious instruction for school children 'could not withstand the test of the Constitution; others may be found unexceptionable', 333 U. S. 203, 231, is in no way inconsistent with the strong expressions recited above. The only specific plans...in that portion are those in which children receive religious instruction on Saturday and Sunday or in which the school day is shortened one day a week for all pupils, excusing or 'releasing' them 'to go where they please.' 333 U. S. 203, 230." Here was the shadow of dismissed time – a program that had been opposed in New York City in the early 1920s. One can hardly venture to say if dismissed time would have

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[346] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 17 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504634>

[347] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 17 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504634>

been immune from legal challenges in the 1940s; it certainly did not look like that in the 1920s. Not only was dismissed time not under discussion in the Supreme Court cases, but they were effectively claiming to be able to read Justice Frankfurter's mind as to what he meant in the 1948 concurrence. They were correct since Justice Frankfurter had no intention of sanctioning any form of released-time religious instruction.

Referring again to Justice Frankfurter's concurrence from 1948, the appellants found a vague term by which to judge the New York City released-time program. They wrote, "this 'momentum,' then, is the crucial test in Mr. Justice Frankfurter's view. Applying that test in the instant case plainly requires invalidation of the New York program on the admitted facts. It cannot seriously be questioned that, under the New York plan, 'the momentum of the whole school atmosphere and school planning is presumably put behind religious instruction * * * precisely in order to secure for the religious instruction such momentum and planning.' 333 U. S. 203, 230-31. This is the chief purpose of any released-time plan."[348] Since they were basing their argument on a direct quotation from a Justice who had been in the majority in *McCollum*, the appellants apparently felt they did not have to prove this. They merely suggested that this was the case with the New York City program. Whether or not any released-time program had momentum was a difficult issue to tackle. Clearly, momentum was a very suggestive concept that showed that the Board of

[348] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 17 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504642>

Education was helping to add to the number of students receiving religious education. Of course, whether or not they were doing anything besides simply allowing the program was difficult to determine. Nevertheless, the appellants felt they had a very supportive Supreme Court on their side.

The attorneys who were working to have released-time declared unconstitutional made a secondary argument based on the *Everson* interpretation of the First Amendment. They wrote, "Even if the *McCollum* case had never been decided, we submit that the meaning of the First Amendment as stated by this Court in the *Everson* case would require a determination adverse to the New York release time program."[349] This was interesting for two reasons. First, was this an attempt to break apart the unity between Protestants and Catholics as they supported released-time together? Second, this demonstrates that the confidence of these lawyers was based not on one Supreme Court decision, but on two – certainly, with both of these cases, it was hard to imagine a reversal for the forces fighting religion within the public schools.

One of the arguments that the appellants made was that the state could not prefer one religion over the other. They made the claim that released-time did, in fact, favor one religion over others. This was difficult to do, given that Protestant, Catholic, and Jewish students all went out to separate places. However, the appellants argued that although "non-preferential aid to religious groups may be possible in theory...it is doubtful it [had] ever been achieved in

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[349] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 17 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504644>

practice."[350] In other words, given the history of the state's interventions preferring one religion over others, it was probable that released-time was being operated in a similar fashion. They continued: "All the reported cases on the validity of Bible reading in the public schools in which the version of the Bible used is disclosed involved the Protestant version; most of the cases were suits brought by Catholic parents. Cases involving...the furnishing of free textbooks or free transportation to parochial schools, all involve preferential treatment accorded to the Catholic religion."[351] Only, released-time did not create that same divide between Catholics and Protestants; there was even some Jewish participation in the New York City program. The old animosities simply were not present within the New York program. Released-time presented a different set of issues, but very different from the old ones where Catholics and Protestants were, usually, at each other's throats.

The appellants were willing to concede, for argument's sake, that perhaps there was non-preferential assistance to religion through released-time. Even this, they argued, would be unconstitutional. The appellants framed the issue this way: "The promoters of the program have repeatedly stressed the great benefit received by religious groups from the public school system by reason of the operation of the released-time program. The Greater New York Coordinating

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[350] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 17 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504645>

[351] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 17 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504645>

Committee on Released-time of Jews, Protestants and Roman Catholics, urged and was granted the right to intervene in this case because it was, in the words of the New York statute, Civil Practice Act, Section 1298, 'specially and *beneficially* interested in upholding' the validity of the released-time program. (Emphasis supplied.) The International Council of Religious Education, whose Department of Week-day Religious Education promotes released-time programs throughout this country, has asserted with pride that use of the public school system as a recruiting agency for religious instruction has been enormously successful."[352] The appellants were very upset because the body that organized the New York City released-time program was on equal footing with the New York City Board of Education and the New York State Education Commissioner in the case. This was clear proof that they were benefiting from the state's aid – how could they not be? They had already been made an equal partner. The second part of the passage deals with main Protestant group behind released-time seen in chapter two. It is clear that the organizers of released-time benefited from having all the children in their city or community in one place. But, did this really suggest the state assisting religion, or was merely facilitating its free exercise?

In the Champaign case, the respondents attacked the bulk of the *Everson* opinion which incorporated the wall of separation into constitutional jurisprudence, based on the writings of J.M. O'Neill. Aware of this, the appellants in the 1952 New York City case attempted to pull this argument back

[352] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504648>

into the mix. The respondents in *Zorach*, as shown below, did not employ this argument since the Court had rejected it in the *McCollum* decision. Appellants had this on their side and they were trying to bait the respondents. They did this legitimately since the lower-court judges in New York State had discussed the wall of separation. In doing so, they allowed the appellants to basically ask the Supreme Court to simply restate their earlier decisions. "We submit that the New York released-time program, no less than the Champaign system, must fall unless the *Everson-McCollum* principles are repudiated. Realization of this result, we believe, is implicit in the majority opinion of the Court of Appeals in the present case, and is explicit in Judge Desmond's concurring opinion. The burden of the latter's opinion is a frontal attack upon the *Everson-McCollum* interpretation of the First Amendment."[353] The appellants brought forth this conflict between the Supreme Court's 1947 and 1948 opinions on one side– its most recent comments on released-time and Church-State in general – and on the other side, the interpretation of the First Amendment that was commonly used to support released-time programs. The appellants reinforced this point about the counter-interpretation which was "twice rejected by this Court" but had "found ready acceptance and passionate defense in some religious circles."[354] It is remarkable that the respondents in this case had tried so hard to avoid this confrontation;

[353] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504658>

[354] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504658>

whereas in *McCollum*, the Champaign school board made Justice Black's interpretation of the First Amendment central to its case. Here, though, not a word from the respondents.

What exactly was that difference with Justice Black? The appellants spelled it out, using quotes from the appeals court: "To Judge Desmond, no 'so-called * * * "principle" of complete separation of religion from government' has ever existed (R. 126). He contends that 'an argument contrived for the proposition that * * * release of children from secular schools for religious education amounts to "an establishment of religion" or prohibits the free exercise thereof * * * construes the First Amendment by ignoring its language, its history and its obvious meaning, and by substituting, for its plain wording and intendment, the metaphor * * * or loose colloquialism of a "wall between church and State"' which 'has never been more than a figure of speech.'"[355] In its most basic form, the First Amendment simply states that Congress cannot make a national church, or cannot stop any religious group from practicing their religion. So, the argument against the *Everson-McCollum* interpretation was that in no way, shape or form had the framers of the First Amendment intended to do away with something like released-time. What also went hand in hand with this argument was the idea that the "wall of separation" was unfairly used to adjudicate matters of Church and State since it was not part of the Constitution or the any other legal code of the United States until the 1947 *Everson* decision.

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[355] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504658>

This approach was greatly unsuccessful in 1948 in the *McCollum* case and that is why the proponents of released-time in New York did not use it. That is also why the appellants worked hard to bring this forth – it seemed that there was no way that the Supreme Court could logically walk away from its 1947 and 1948 decisions and then endorse released-time!

Ultimately, whatever the historical antecedents of the case were, the appellants made clear that they thought true religious freedom required the end of the released-time program. The appellants' brief suggested: "No real effort has been made by them to refute the fact that the principle is necessary to the preservation of religious freedom."[356] They were astutely pointing out that the decisions of the Supreme Court in 1947 and 1948, in their opinion, were initiating true religious freedom in the United States. They pointed to the fact that the proponents of released-time were more concerned with using the state for their purposes than with preserving everybody's religious freedom. However, this ignored the historical questions about the original intent of the First Amendment that supporters of released time had mentioned.

There is one final point that the appellants addressed in their briefs. In order to understand that point, an understanding of a 1925 Supreme Court case is necessary. In *Pierce v. Society of Sisters*, the Supreme Court ruled that states could require children go to school, but that they did not have to attend public

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[356] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504659>

school.[357] Based on *Pierce*, supporters of released-time argued that if parents had a right to send their children to religious schools full-time, they certainly had the right to ask that their students receive one hour of religious education per week. The brief for the appellants cited a dissent by a judge in the appeals process. He wrote about the pro-released-time argument, saying that it "goes too far. It assumes that, even though the child is enrolled in a public school, the parent has a constitutional right to remove him therefrom for any period and at any time for instruction in sectarian religious courses. The *Pierce* case stands for no such proposition. The Supreme Court there held only that the state cannot constitutionally prevent parents from determining themselves where their children shall be educated and whether that education shall be sectarian or non-sectarian."[358] The appellants also suggested that released-time was different from releasing students in order to celebrate holy days in their religious tradition since those happened only so often. In other words, they believed that the *Pierce* opinion did not allow for parents to pick and choose between religious and secular instruction; they felt parents committed to the public school gave up the religious option.

The appellants closed a masterful brief with an adamant request to connect released-time with the larger concern of Church and State. "Today, renewed pressures are being exerted by some, in education and elsewhere, to

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[357] Mark Yudof, "Pierce v. Society of Sisters," in *The Oxford Companion to the Supreme Court of the United States*, edited by Kermit L. Hall (New York: Oxford University Press, 1992), 634-635.
[358] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504668>

break down [the] historic American principle of complete separation of Church and State – to put into the wall of separation a gate here and an opening there. For the good of state and religion, this principle must be maintained firmly and clearly, and must not become entangled in corrosive precedents, sought to be created, one a time, in the shape of a claimed 'exception' to the principle." In truth, that is exactly what the *Zorach* opinion looks after more than a half century of Church-State jurisprudence.

The briefs of the respondents are most interesting for the omission already noted: no major attack on *Everson*'s re-orientation of Church-State issues. In fact, the Greater New York Coordinating Committee on Released-time of Jews, Protestants and Roman Catholics cited the outcome in that case: namely, state financial assistance was given to Catholic parochial schools.[359] So, rather than fight the direction that *Everson* gave to Church-State jurisprudence, they chose to simply choose the part of *Everson*, its conclusion, which suited them. Looking at *Pierce*, *Everson* and some other cases, the respondents wrote, "In all these decisions religious believers are told that the First Amendment 'does not require the State to be their adversary'; that the public school may not use its educational authority in ways or with implications which 'hamper' or are contrary to religious convictions of the parents or which requires to undo what they fear therefrom; and that, in the name of public welfare, the State may relieve them of the cost of

[359] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLEE'S BRIEF. File Date: 1/29/1952. 87 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901503460>

transporting their children to parochial schools of their choice."[360] In effect, these respondents were making the case that released-time fit into a tradition of not only religious freedom but also a freedom granted to parents to choose the type of education for their children.

This was critical in the 1950s, the respondents contended, not, ironically, because of the Cold War. They pondered that "every thoughtful observer of contemporaneous American trends in thinking is aware of an increasing conviction throughout our country that the crisis at home and abroad is *a moral crisis*, and that the real danger which confronts us is not the massing armed power of Soviet Russia which we can defeat, but rather is in our own midst and consists of the deadening secularism in American and the western world which threatens to choke the sources of spiritual power."[361] Charles Tuttle, the author of this brief, and other Mainline Protestants, had been making these types of arguments long before the Cold War. Certainly, the Supreme Court may have been influenced by the Cold War to appear as not abandoning America's religiosity; however, the respondents in this case had a slightly different focus, one that pre-dated the Cold War that began in 1945.

The respondents also endeavored to show that the New York City program was different than the Champaign program. There were certainly differences,

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[360] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLEE'S BRIEF. File Date: 1/29/1952. 87 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901503462>

[361] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLEE'S BRIEF. File Date: 1/29/1952. 87 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901503480>

such as the use of school buildings in Illinois, but not in New York City. However, the other differences were insignificant.[362] Although, the use of school buildings may have been a critical issue, the appellants and respondents probably guessed that most of the Justices would not see a marked difference between the released-time programs.

That some schools discontinued released-time and that the majority kept the program after *McCollum* is clear. However, what is interesting is what the federal government did with the decision. The appellants included an interesting piece of information about the Office of Indian Affairs in footnote eleven of their brief, located within the Interior Department. Apparently, in 1949, the Office of Indian Affairs discontinued released-time programs.[363] The process in the state of New York, where court after court decreed the legality of released-time in a post-*McCollum* legal environment changed people's opinions about the appropriateness of released-time even before the *Zorach* decision had been handed down. In 1951, the Solicitor of the Interior Department allowed a released-time program in Guam based on the results in the New York state courts.[364] The respondents were using this as a rebuttal against the appellants'

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[362] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLEE'S BRIEF. File Date: 1/29/1952. 87 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901503490>

[363] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLANT'S BRIEF. File Date: 1/23/1952. 92 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 17 May 2011 <http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901504638>

[364] *Zorach v. Clauson*, 343 U.S. 306 (1952). APPELLEE'S BRIEF. File Date: 1/29/1952. 87 pp. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning. Emory University Robert W. Woodruff Library. 18 May 2011

claim that all post-1948 decisions concerning released-time religious education followed an interpretation of *McCollum* that banned all such programs. Yet, all of this was irrelevant – as soon as the Supreme Court would rule on released-time programs once again, all the local, state, and territorial decisions would matter no more.

In a most surprising move, on April 28th, 1952, the Supreme Court upheld the constitutionality of the New York City released-time program in a six to three decision. Justice Douglas wrote the majority opinion, even though he had been in the majority in the *McCollum* case as well. "We are a religious people whose institutions presuppose a supreme being," Justice Douglas wrote in a famous passage. "When the state encourages religious instruction or coöperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." The three dissenting Justices were Felix Frankfurter, Hugo Black, and Robert Jackson. Their main idea was that coercion was present and that was not taken into account by the majority opinion.[365] While the dissents would continue to build the framework for disestablishment law, Douglas's opinion modified disestablishment law and strengthened free exercise law.

The major point in Douglas's opinion for the Court was that there was no need for a *complete* separation of church and state. Justice Douglas based that opinion on his reading of the First Amendment that "does not say that in every

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<http://galenet.galegroup.com.proxy.library.emory.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW3901503494>

[365] "SCHOOL RELIGION ISSUE UPHELD BY HIGH COURT." *Chicago Daily Tribune (1923-1963)*, Apr 29, 1952, http://www.proquest.com.proxy.library.emory.edu/ (accessed June 7, 2011).

and all respects there shall be a separation of Church and State." Douglas went on to list superfluous examples to support his contention. One was that firefighters could not help save parishioners from a burning church because that too would break the wall of separation between Church and State. While that would probably not occur under even the strictest interpretation of the First Amendment, the example reveals Douglas's philosophy. He thought that religion and government could cooperate in some respects. He was afraid that if a complete separation occurred, the relationship between Church and State would become "hostile, suspicious, and even unfriendly."[366] Justice Douglas set parameters for the Church-State relationship on one side, making sure they were opposed to each other. What, if any, limits did he set on how friendly religion and government could become with each other?

While the State could encourage religion, it could not do so for a particular sect, denomination, or creed, according to Douglas. Ideally, the United States would have a "government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma."[367] Here, Justice Douglas was responding to two critiques found in the *Zorach* dissents. First, Douglas believed government could aid religion without favoring one religious tenet or group over another. Other Justices, as we shall see below, vigorously denied this. Second, Douglas defended government aid to religion by showing that even if government aided religion, particular beliefs or sects would still rise and fall on their own merits. Justice Douglas did not see government

[366] *Zorach v. Clauson*, 343 U.S. at 312.
[367] *Zorach v. Clauson*, 343 U.S. at 313.

boosting attendance for the religion classes. Rather, he believed that the inherent appeal of Protestantism, Catholicism and Judaism, respectively, attracted however many adherents participated in those classes. Justice Douglas laid out the specifics of the case in order to prove this point.

In order to show that the government did not overstep the proper bounds of the disestablishment clause, Justice Douglas endeavored to show exactly how the government was not providing religious instruction. There was no use of public school buildings and there was no use of public school funds. Justice Douglas believed this to be an important factor because he stressed that "all costs, including the applications blanks [a]re paid by the religions organizations."[368] This last fact emphasized the principle that the religious organizations themselves were taking the initiative, even down to the minute details of application forms. Douglas gives the impression that this was a sort of free enterprise system where religions competed to gain the attention of children. Government was no more of an active player than is a college fair organizer who is not endorsing any of the faiths. Neither is that organizer insisting all should go to college but only providing the information for those who desire to attend. This extended analogy seems the best way to describe how Justice Douglas viewed the benevolent Church-State relationship in this instance.

Justice Douglas, rather than seeing the New York program as an establishment of religion by the State, saw it as a free exercise of religion. Justice Douglas was primarily interested in whether New York had "prohibited the 'free

[368] *Zorach v. Clauson*, 343 U.S. at 308.

exercise' of religion."[369] Justice Douglas's view of free exercise of religion was predicated on his view of America as a religious country, including religious tolerance: "We guarantee 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."[370] Justice Douglas was not celebrating any particular faith, but rather America's tradition of religious freedom. In his zeal to protect religious freedom, Justice Douglas was ready to see in the New York released-time program not an establishment of religion but a protection of free exercise and religious freedom. Justice Douglas had initially wanted to write that "we are a God-fearing people" but later substituted "religious" for "God-fearing."[371] That sort of language is suggestive that Justice Douglas, for all his cosmopolitan leanings, retained many qualms about removing religion from public schools. His "God-fearing" language may have been a throwback to a view of America as a Christian nation. His mention of American religion combined with his mention of American diversity confirmed that he was a firm supporter of religious pluralism.

Specifically, Justice Douglas saw the state of New York promoting the free exercise of religion by accommodating its schedule for "sectarian needs." In fact, Justice Douglas maintained that, "the public schools do no more than accommodate their schedules to a program of outside religious instruction." This was like allowing a Jewish child to skip a day of school because of a religious holiday, such as Yom Kippur. What Justice Douglas put under the penumbra of

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[369] *Zorach v. Clauson*, 343 U.S. at 310.
[370] *Zorach v. Clauson*, 343 U.S. at 313.
[371] Rough Draft of *Zorach* opinion, p.6, Folder No. 431 – Zorach v. Clauson O.T. 51 Galley Drafts, Box 219, William O Douglas Papers (Manuscript Division, Library of Congress, Washington, D.C.).

the free exercise clause was the right of students to have part of their school day be devoted to religious instruction, albeit outside of the public schools. The *Zorach* opinion refers to this accommodation as following "the best of our traditions."[372] There is no doubt that the dissenters in the case did not feel the same way.

The theme of coercion ran throughout all three of the *Zorach* dissents. They attempted to maintain a link between the New York program and the Illinois program outlawed in *McCollum*. Justice Black wrote, "*McCollum* thus held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do."[373] For Justice Black, the holding of *McCollum* did not revolve around the use of the school building or of school funds but around the time, in which the children were under the school's supervision that the school used for religious instruction. Justice Frankfurter agreed in his dissent, saying that it would be alright if the school closed down an hour earlier "for any reason, or no reason, on fixed days, or for special occasions."[374] The crux of the matter for those in dissent was that this was happening during the school day and that coercion existed. In the mind of Justice Frankfurter, the coercion was there because the school did not let all children out of school; only those who wanted to attend religious instruction. Justice Jackson reiterated the same basic point, analyzing the "released" part of

[372] *Zorach v. Clauson*, 343 U.S. at 314.
[373] *Zorach v. Clauson*, 343 U.S. at 317.
[374] *Zorach v. Clauson*, 343 U.S. at 320.

the released-time program. Besides enforcing compulsory school attendance, the State was offering each student "some of it [the time mandated in school] be 'released' to him on condition that he devote it to sectarian religious purposes."[375] For all these three dissenting Justices, the problem with the New York program was that the school, in some way, had broken down the wall between Church and State. Justice Jackson, specifically, thought that the "released" label was a misnomer for coercing students to use that time for religious instruction. These dissents defined coercion as using the enforcement powers of the state to keep students in a study hall because they refused to attend the religion classes. Had the religion classes been truly voluntary, the dissenting Justices posited, the school would have dismissed all students and then those who truly desired to attend the religion classes could do so while the rest would be free to go where they pleased. For the dissenters, this was the major problem with Justice Douglas's opinion.

In order to respond to Justice Douglas's assertion about American society's religiosity, the three dissents focused on what they considered true religion, practiced fully in the absence of coercion. Justice Black wrote, "Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God."[376] Under the coercive system applied in New York schools, true religion would not prosper because people would only practice it because of fear, not because of love. These extra-legal commentaries are quite interesting in revealing the Justices'

[375] *Zorach v. Clauson*, 343 U.S. at 324.
[376] *Zorach v. Clauson*, 343 U.S. at 319.

perceptions about religion in America. Yet, these remarks are essential for they help us better understand their decisions about religion in American society. Justice Frankfurter chided the denominations that used this released-time program to instruct children. "The unwillingness of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes – an attitude that hardly reflects the faith of the greatest religious spirits."[377] For Frankfurter, these were strongly held views. He continued, "It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar."[378] A contemporary analyst wrote in 1960 about Felix Frankfurter's involvement in the religious education cases and found him violating three of his most dearly cherished legal convictions. A commentator wrote in 1960 that Frankfurter had "a good deal of pluralist theory interwoven in his philosophy." In the religion cases, Frankfurter abandoned the principles of federalism, interpreting the Constitution instead of making glosses on the Constitution and, finally, he turned "certain provisions of the Bill of Rights into very rigid concepts."[379] Thomas, a professor of political science at Goucher College, concluded that Frankfurter interfered in the local control of public schools against his principles and included something in his opinions that was not in the Constitution, the wall of separation, only because he

[377] *Zorach v. Clauson*, 343 U.S. at 323.
[378] *Zorach v. Clauson*, 343 U.S. at 324-325.
[379] Helen Shirley Thomas, *Felix Frankfurter: Scholar on the Bench* (Baltimore: The Johns Hopkins Press, 1960), 63, 136 and 235 for the three points respectively.

felt very strongly about the outcome that he wanted in the religious education cases.[380]

By 1952, Justice Jackson had reconsidered his thoughts on the released-time programs. In 1952, in a letter to Justice Frankfurter, Jackson apologetically stated that his wavering in 1948 was simply a fear of usurping local control over public schools.[381] By 1952, Jackson lamented that the *Zorach* decision was a major setback, while in 1948 Jackson did not even want to take these sorts of religious education cases. It is true that Jackson had dissented in *Everson* but that dealt strictly with Catholic schools. In *McCollum*, when the issue included Protestants, Jackson hesitated. By 1952, Jackson's motivation for upholding the separation of Church and State had shifted from a typical Protestant reasoning to a more cosmopolitan one. Gone is the language of 1948 that ridiculed dissenting students who claimed a special status for their social protest. In 1948, he had originally written the following, although he crossed it out later: "That the way of the dissenter is hard is the law of life. The Constitution protects the right to dissent, but it does not protect a nonconformist against social disapproval. We are asked to help him by prohibiting all others from going to religion classes so that he may not appear singular in his irreligion."[382] This was the impulse

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[380] Gordon Cleveland, "News and Notes," *The Journal of Politics* 23 (Aug. 1961): 611.
[381] After the McCollum decision was handed down, Edwin Corwin, a Constitutional scholar, wrote an article entitled "The Supreme Court as National School Board" in which he criticized the Court's decision. Justice Jackson had a copy of Corwin's article that can be found in his papers in folder Supreme Court – O.T. 1947 No. 90 Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign Co. Ill. et al. folder #2, Box 143, Robert H Jackson Papers (Manuscript Division, Library of Congress, Washington, D.C.). On Corwin's stature, see Melvin I. Urofsky *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne Publishers, 1991), 168.
[382] Rough Draft of *McCollum* Concurrence, p. 2, folder Supreme Court – O.T. 1947 No. 90 Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign Co. Ill. et al. folder

Jackson felt and later erased from his concurrence in McCollum. He felt the claims by the McCollum child were too much. That was in 1948. His 1952 case files reveal a concern with "compulsory godliness" where religion would be compulsory. Not only that but any religion in schools would have produced "quarrels," in his opinion. The influence of Frankfurter on Jackson is something that may have produced this change. Whatever the causes, Jackson exemplified two different reasons for upholding the separation of Church and State, with cosmopolitanism eventually gaining hold in his mind as the primary reason by 1952. [383] Justice Jackson may have wondered if released-time was assisting only one of America's religions, namely Catholics.

Ultimately, Justice Douglas wrote the opinion he wrote in 1952 because he feared that Protestantism had given up too much ground with the *Everson* decision. He wrote, in a memo to Justice Black, "If 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."[384] Most of this story revolves around the lingering tensions between Protestants and Catholics, with the growing push for secularization, led by the ACLU and American-Jewish groups. The only dilemma that remains is why Justice Douglas would, ten years later, join the opinion of Justice Black stopping those same Protestant prayers. It

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#2, Box 143, Robert H Jackson Papers (Manuscript Division, Library of Congress, Washington, D.C.).

[383] Robert H. Jackson to Felix Frankfurter, April 30, 1952, Supreme Court – O.T. 1951 Cases No. 431 Zorach and Gluck v. Clauson et. al. folder, Box 175, Robert H. Jackson Papers (Manuscript Division, Library of Congress, Washington, D.C.). The focus on coercion is seen in a Rough Draft of a *Zorach* dissent, Supreme Court – O.T. 1951 Cases No. 431 Zorach and Gluck v. Clauson et. al. folder, Box 175, Robert H Jackson Papers (Manuscript Division, Library of Congress, Washington, D.C.).

[384] John T. McGreevy, *Catholicism and American Freedom: A History* (W.W. Norton: New York, 2003), 185.

was the victory of the ACLU and their allies in their push for secularization, as shown in the next chapter.

So, with the reprieve that *Zorach* gave to the movement, released-time would continue in America. To this date in 2011, the Supreme Court has not heard another released time case since its 1952 *Zorach* ruling.

## Chapter Five: Opponents, Engel, Released-Time, 1952-2000

Opposition to released-time programs continued into the later 1950s, and was very much a part of the intellectual environment that led to the school prayer Supreme Court decision of 1962. This chapter looks at how effective that opposition was in the late 1950s and what paths it took. The 1962 and 1963 Supreme Court decisions on prayer and the reading of the Bible were informed by the same reasoning that Justice Black had used in his *Everson* and *McCollum* decisions. If voluntary religious classes were a breach of the wall between church and state, then certainly religious exercises that took place in the classroom, and allowed the students no opportunity to leave the room would be an even greater violation of the principle of separation. Although *Zorach* would not be explicitly overruled, perhaps out of deference to Justice Douglas, the 1960s Supreme Court decisions most clearly followed the path set by Justice Black in *Everson* and *McCollum*. The end of the chapter will briefly chart the path of released-time programs from 1962 until 2000.

One of the clearest and earliest voices of opposition to released-time came from *The Washington Post*. As early as December 8th, 1947, the day of the oral arguments in *McCollum*, the *Post* concluded, "wherever this program [released-time] has been forced upon our public schools, the tensions created among the children, their parents and the local communities have almost invariably resulted in unfortunate manifestations of one kind or another." Controversy had erupted in Brooklyn over the singing of Christmas carols, unrelated to the released-time

programs of New York City. However, the *Washington Post* saw a direct connection. Furthermore, the *Post* expressed "hope [that] the religious groups who still advocate the released-time program will withdraw from the public schools before court decisions or popular indignation subject them to the damaging effects of an enforced retreat."[385] The direction against released-time programs came from the top of the newspaper's organizational structure. Agnes Meyer, the wife of the *Post*'s chairman of the board, Eugene Meyer, made speeches in opposition to released-time programs. She blamed both Protestant and Catholic ministers for "battering down the school doors in order to get a hearing from children."[386] Meyer gave the opponents of released-time programs a significant voice through the editorial pages of *The Washington Post* throughout the late 1940s and early 1950s, when the Supreme Court cases were being tried and discussed.

Two books figured significantly in the decisions of the Supreme Court. They were important because three different Justices (Frankfurter, Black and Douglas) cited both of them. They grew out of the discussion about released-time programs in the 1940s and 1950s, but they also informed the debate about the school prayer case in 1962. Both were monographs dedicated to arguing for the strict separation of Church and State.

Vivian Thayer, in *Religion in Public Education*, charts out the development of public education in the nineteenth century. Justice Jackson had

[385] "Church And School." *The Washington Post*, December 8, 1947.
[386] "Religious Training in Public School Released-time Opposed." *The Washington Post*, November 29, 1947.

a copy of a book review of Thayer's book written by Leo Pfeffer, a Jewish lawyer involved in many Church-State cases.[387] Thayer was part of the Ethical Culture movement and was involved in the fight against released-time in New York City. In Thayer's account, American public education failed in the inter-war period. It had neglected moral values and focused on the scientific and psychological in education. Thayer found an antidote in John Dewey's *Moral Principles in Education*. In this method, schools would not teach religious truth but only moral principles and ethical standards. As the name of John Dewey invokes, this enterprise would be philosophical instead of religious. Thayer, however, was disappointed that instead of adopting Dewey's plan singularly, numerous people reverted to promoting religious education in the public schools. Of course, the inter-war period featured the Great Depression, and this explained for Thayer, the resurgence of the popularity of religious education. Thayer wrote, "It is a psychological fact that fear prompts people to revert to early patterns of behavior."[388] This was somewhat dismissive of traditional religion and he found a more hopeful alternative outside the boundaries of religion altogether.

Thayer proposed a way for public schools to teach morals without teaching religion. Thayer quotes from an address at the Society for Ethical Culture, to the effect that prisoners were more religious than the general population and hence religion obviously did not reduce crime.[389] The McCollum family, who sued the Illinois released-time program, was a part of the Society for Ethical Culture. This

[387] Leo Pfeffer review of Thayer, Folder Supreme Court – O.T. 1946 No. 52 Everson v. Board of Education of the Township of Ewing et al., Box 137, Robert H. Jackson Papers (Manuscript Division, Library of Congress, Washington, D.C.).
[388] V.T. Thayer, *Religion in Public Education* (New York: The Viking Press, 1947), 73.
[389] Thayer, *Religion in Public Education*, 109.

was an attempt to show that morals could exist without religion. The comparison was inappropriate since the study measured the rate of prisoners' religiosity against the general population's rate of church membership, not against the number of people who considered themselves religious. To drive the point home, Thayer argued that a majority of Americans were not religious [again using the 43 % church membership figure] and that intellectuals, who "have thought earnestly and long on the issues of life and death," were the least religious of all classes.[390] What Thayer accomplished was denying the monopoly that religion was thought to have on morals and character education. This way, he moved the intellectual boundaries to allow the Supreme Court to justify its removal of religious education from the public schools by saying that the removal would not automatically mean the loss of morals. In other words, Thayer's approach freed the Court from critics who would say that with the loss of religion, the country's future would be lost. Thayer was powerfully espousing religious cosmopolitanism where all religions would be collapsed into an amalgamation of ethics, philosophy. This did not take into consideration the possibility of religious pluralism. Thayer was unalterably opposed to religion, not pondering going from a relatively monolithic religious society to a diverse one but one where religion still mattered.

Finally, in a chapter on how "Religious Teaching Compromises the School," Thayer works to show just that. Two issues stand out. The first is that minority students who refused to participate in religious education were

[390] Thayer, 122-123.

"subjected to the taunts and jeers on the playground."[391] This was a common theme in the Justices' opinions. The dissents in *Zorach* bitterly complained that coercion was a main element in the released-time program. Ironically, Thayer coupled this fear of coercion or peer pressure with an ideal of assimilation. That ideal of assimilation had become "a positive ideal" in American civic life.[392] It is ironic that that Thayer insisted upon minority rights when it came to barring religious education in schools but then ignored minority rights when he promoted the idea of the public school as the venue of assimilation. This inherent contradiction was also present in numerous Supreme Court decisions. The Justices were concerned about minority religions but were not concerned about reducing those same religions into a common denominator of democracy and tolerance.

The second influential book was *The Church as Educator*, by Conrad Moehlman, a professor of Church History at The Colgate-Rochester Divinity School whose writings delighted Justice Black, as described below. Moehlman connected the argument against religion in public schools with the broader culture of pluralism in the immediate post-World War II period. Moehlman wrote about the founding of the United Nations as a turning point. "Christianity's claim to uniqueness, often questioned in theory, faded before the facts at San Francisco. The meetings could not be opened with Christian prayers."[393] This liberal Protestant professor fully embraced the ecumenical

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[391] Thayer, 131.
[392] Thayer, 134.
[393] Conrad H. Moehlman, *The Church as Educator* (New York: Hinds, Hayden & Eldredge, Inc., 1947), iii.

spirit of the United Nations. In such a context, he argued that sectarian teaching in schools was wholly out of character with the new religious spirit arising out of the ashes of the Holocaust. To his mind, "the public school, far from being 'godless,' ha[d] merely been making the necessary religious adjustments to keep in step with developing American life."[394] The public school was becoming a place where religious cosmopolitanism thrived. The Supreme Court Justices who wanted to argue for strict separation of Church and State, could do so on the grounds that America was a highly diverse place and sectarian teaching or any sort of religion would have the same detrimental effect as religious wars. This they certainly did argue. Moehlman advocated religious ecumenicalism. He wrote in, "When procedure to line up the youngsters for the 'religion' classes segregates Americans as Catholics, Lutherans, other Protestants, Jews, cultists, smaller sects, non-church-going pupils, a consciousness of religious cleaves is inevitable and it is baneful."[395] This was the same argument made about ethnic identities and consciousness. As ethnic identities were to be reduced to one American identity, so too various religions were to be reduced to a common denominator of democracy.

The Supreme Court, at least until the Rehnquist Court, ultimately decided to value the Establishment Clause over the Free Exercise Clause. Their interpretation of the Establishment Clause was to remove all non-academic mention or practice of religion from the public school, the arena where students formed their primary notions about citizenship, democracy, tolerance, et cetera.

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[394] Moehlman, *The Church as Educator*, 102.
[395] Moehlman, 106.

Dissenters from the final direction the Supreme Court cases took – Justices Reed, Jackson perhaps, Douglas and Stewart – would have given more weight to the Free Exercise Clause. In a sense, they would have allowed government, if not to aid, at least to allow religions to co-exist equally in the public sphere, namely the public school system.

Another one of the main groups that worked against released-time was the American Civil Liberties Union (ACLU.) They worked hand in hand with the Jewish-American organizations opposed to released-time and cooperated to the extent that they decided together, at various points, who would take the lead at any particular moment in the campaign against released-time.

After 1952, the ACLU and the other groups involved in the *Zorach* case took a wait-and-see approach. But, by no means, did they stop working against released-time. Throughout the 1950s, the ACLU kept its position against released-time and quietly worked to undermine it in various states and localities, sometimes through its state chapters and sometimes through its allies.

When letters came in asking for information about the released-time question, the ACLU would provide leading journal articles, but would also lead them to who they considered the top expert. Louis Joughin, Research Director for the ACLU, wrote in a letter dated October 8, 1954: "The center of learned opinion is the American Jewish Congress...where Leo Pfeffer is associate counsel."[396] In another letter, Herb Levy, Staff Counsel for the ACLU national office in New York City, also suggested to somebody that they should contact

[396] Louis Joughin to Alan B. Peabody, October 8, 1954, Box 800, Folder 11, ACLU Records, Seeley G. Mudd Manuscript Library, Princeton University Library

Pfeffer and the American Jewish Congress. But, he also added this caveat: "You can rest assured that his organization will not take action of this matter before consulting with us and the other members of the committee, composed of protestant groups as well."[397] Part of the official strategy of the ACLU was to make it seem that Protestants also opposed released-time groups. Care was taken to make it clear that not all opponents of released-time were like Vashti McCollum, a freethinker, or an atheist. So, even though, the American Jewish Committee was taking the lead because of Leo Pfeffer, the ACLU still tried to portray Protestants as being in charge. There was a double strategy on the part of the ACLU: to make it seem like more Protestants opposed released-time and also to cultivate more opposition among Protestants against released-time. Part of this project was to incite anti-Catholicism among Protestants. One memorandum in the files of the ACLU entitled, "Background and Status of the Released-time Program in New York," revealed that out of the 100,000 released-time students in New York City, 80% were Catholic students. Anti-Catholicism was alive among Protestants well into 1960. The ACLU memo was especially powerful for the added statistic, which most newspaper accounts carrying the first statistic did not have as well. Catholic students, the ACLU memo stated, only made up 28% of all public school students in New York City, and were thus severely overrepresented in the released-time program. The implied argument here was made to the Protestant audience: Catholics are dominating released-time and you should oppose it.

[397] Herb Levy to Harriett F. Pilpel, July 9, 1953, ACLU Records, Box 800, Folder 11, Seeley G. Mudd Manuscript Library, Princeton University Library

Within the ACLU files is also found joy and celebration about when another domino fell against released-time. In May 1954, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith put out a Joint Memorandum about how the Attorney General of Nevada, W.T. Mathews, had concluded "that the so-called 'Utah Released-time Program' violates the statutes and constitution of the state of Nevada."[398]

The ACLU was happy to help both members of the ACLU and those who were seeking membership understand where they stood on the released-time question after *Zorach*. Helen Bailie of Nantucket, Massachusetts was confused in 1954 thinking that *McCollum* had ended released-time education but then hearing "that pupils are released still on request of parents."[399] In response to her confusion, Louis Joughlin quoted a recent ACLU publication. It said, "the ACLU...agrees with Justice Jackson...when he observed that the school 'serves as a temporary jail for a pupil who will not go to church.'"[400]

But the ACLU also realized that it had lost on released-time in 1952, and while they would keep on fighting, they would do so with great circumspection. In response to a letter referencing a situation in Connecticut where apparently there was "use of the public school building by the Catholic Church for religious instruction." Clearly, the ACLU was opposed to this, wrote Herb Levy. Yet, he also wrote, "However, since the United States Supreme Court has ruled that the

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[398] Joint Memorandum, May 15, 1954, ACLU Records, Box 800, Folder 11, Seeley G. Mudd Manuscript Library, Princeton University Library
[399] Helen J. Bailie to ACLU, Feb. 7, 1954, ACLU Records, Box 800, Folder 11, Seeley G. Mudd Manuscript Library, Princeton University Library
[400] Louis Joughin to Helen J. Bailie, Feb. 15, 1954, ACLU Records, Box 800, Folder 11, Seeley G. Mudd Manuscript Library, Princeton University Library

New York City Released-time law is not unconstitutional, which as I read the opinion is a virtual overruling of its decision in the McCollum case, I would not favor the bringing of a test case on the use of the school building. I should think that it might boomerang the wrong way. In other words, this is a case I think we should win but probably could not."[401] The ACLU was clearly intent on finding the right way to readdress the released-time issue but they were going to be quite patient. They were also very realistic that the Supreme Court could not be depended upon to once again reverse itself, as it had in *Zorach*. In another letter, Louis Joughin conceded, "of course the ACLU is opposed to released-time (Zorach case) but on that we done got licked, and there is no use arguing the main idea."[402] The ACLU was going to fight at the edges but they would be slow to major action. One of those edges was "the idea of having groups of public school children leave the public school building at each hour during the day in order to go to nearby religious schools is staggering. It would represent complete integration of curriculum arrangement and administrative action." Louis Joughin continued on this topic writing, "I know that this is the only way that the church schools could probably obtain full-time teachers, but their need does not change the Constitution."[403] This was an old trick Protestant trick in many released-time projects. In order to keep a full-time teacher employed, the council typically had the teacher go to different schools on different days and take out

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[401] Herb Levy to Harriet F. Pilpel, July 9, 1953, ACLU Records, Box 800, Folder 11, Seeley G. Mudd Manuscript Library, Princeton University Library
[402] Louis Joughin to F. Raymond Marks, March 18, 1955, ACLU Records, Box 800, Folder 37, Seeley G. Mudd Manuscript Library, Princeton University Library
[403] Louis Joughin to F. Raymond Marks, March 18, 1955, ACLU Records, Box 800, Folder 37, Seeley G. Mudd Manuscript Library, Princeton University Library

different grades at different times. Here, the ACLU was again not attacking the main program, but was trying to make it much more difficult for released-time programs to be successful. Small victories were all the ACLU could hope for in the post-*Zorach* environment.

When asked to comment on what exactly the Supreme Court's twin decisions from 1948 and 1952 actually meant, the ACLU responded in interesting ways. In one letter, Louis Joughin wrote about a proposed released-time program: "these proposals appear to avoid the unconstitutional practice forbidden by the McCollum case (instruction on the school premises)."[404] In this instance, the ACLU, at least privately, acknowledged that, at least in light of the *Zorach* decision, *McCollum* meant only that released-time programs had to occur off of school property.

Sometimes the action was not at headquarters in New York City. In one particular instance, the battle was being carried out by the Ohio Civil Liberties Union. Louis Joughin, referencing a phone call, wrote, "When Ralph Rudd said that there had been some success in dealing with released-time in Columbus, I was unfortunately sorting out some papers, and didn't get a clear picture. Could I have the briefest note on the matter?"[405] The folks in Ohio obliged Jouhgin's curiosity. Basically, even in 1957, most Ohio released-time programs seemed to have been occurring in public school classrooms. On February 15th, 1957, the Dayton Church Federation decided to take their released-time classes off of

[404] Louis Joughin to F. Raymond Marks, March 18, 1955, ACLU Records, Box 800, Folder 37, Seeley G. Mudd Manuscript Library, Princeton University Library
[405] Louis Jouhgin to Ralph Rudd, Martha Thomas, April 12, 1957, ACLU Records, Box 801, Folder 42, Seeley G. Mudd Manuscript Library, Princeton University Library

public school grounds, even though this would result in fewer students attending them. Why would they do that? Martha Thomas wrote, "The decision was widely hailed by Dayton newspapers and appears to have been accomplished by general accord." Everybody seems to have been happy, but how did it take place? Thomas continues, "The Dayton CLU (Civil Liberties Union) Chapter had of course been watching this situation for many months, and were prepared to approach proper persons for a new ruling from the Ohio Attorney General, had the Church Federation not acted first. The CLU in Dayton must be credited privately with at least part of the victory – but of course we can not claim so publicly."[406] Although the letter does not specify what concrete influence the Ohio Civil Liberties Union (OCLU), or its Dayton branch, had over the Dayton Church Federation, it certainly seems to imply that it did have enough influence to get the released-time program off of school grounds voluntarily, with not attorney general ruling or any court injunction. This is a big part of the story of the decline of released-time. Mainline Protestants had pioneered the introduction of released-time programs into the public schools. In places like Ohio, they had blanketed the state, and even entered the actual public school building. But, by the late 1950s, as the case in Dayton illustrated, Protestants either felt less entitled, or they started to have less enthusiasm about the whole project of released-time weekday religious education.

The issue in Ohio did not end with Dayton, since many other places in Ohio still practiced released-time instruction in the public school buildings.

[406] Martha Thomas to Louis Joughin, May 9, 1957, ACLU Records, Box 801, Folder 42, Seeley G. Mudd Manuscript Library, Princeton University Library

Working with the Anti-Defamation League (ADL) regional office in Ohio, the Ohio Civil Liberties Union considered that the next move was to get Ohio's attorney general to rule that all released-time programs in the state had to exit the public school buildings. The OCLU "spent many fruitless months considering this approach. However – it was finally determined – largely because of ADL's findings this was shooting for the moon. The persons who are empowered to request such a ruling – such as the State Board of Education or county prosecutors – simply were not immediately available or friendly to making such request. In short the practical politics of the situation were for our purposes insuperable."[407] So, there were political limits to pushing their opposition to released-time, but they were keenly aware of those limits. There was also, ironically, a lament from the Ohio people about the lack of released-time instruction in one particular city. Martha Thomas wrote, "Cleveland (unfortunately) has had no released-time program – or we may have been able to come to grips with the problem long before this."[408] It was easier to stir up opposition to released-time in more heterogeneous communities, specifically cities. But, since most of Ohio's released-time programs were spread out in smaller towns and rural areas, it was harder to attack released-time.

Most everybody could agree that the Ohio Civil Liberties Union was simply asking the released-time programs to follow the *McCollum* ruling and that is true. But, it was part of a broader, yet subtle strategy in the 1950s where the ACLU was

[407] Martha Thomas to Louis Joughin, May 9, 1957, Box 801, Folder 42, ACLU Records, Seeley G. Mudd Manuscript Library, Princeton University Library
[408] Martha Thomas to Louis Joughin, May 9, 1957, ACLU Records, Box 801, Folder 42, Seeley G. Mudd Manuscript Library, Princeton University

consciously trying to weaken released-time, given that it had little legal recourse after the *Zorach* decision. The legal plan in Ohio was to sue the State Auditor for using public funds, school facilities, for released-time instruction. It is unclear whether or not this case was ever filed, but it did not get far, since released-time continued in Ohio well into the 1960s. However, the way in which the OCLU was crafting its case is very revealing. The OCLU reached out to Dr. David Spitz, a political science professor at Ohio State University, and asked him to be the plaintiff in such a case. They did not want to risk a public school teacher's career by making him or her the plaintiff. In addition to his qualification of being a university professor, the OCLU informed him of one other major consideration. Martha Thomas wrote, "We think the case would be much strengthened if the taxpayer were a member of some Protestant Church, the more orthodox the better. The major Protestant groups have long been severely critical of the U.S. Supreme Court interpretations that prohibit state aid to religious education (on a non-preferential basis) and have been quite vociferous in their demands that the public school be used to further religious education. (The fact that this position is basically inconsistent with the Protestant opposition to use of tax-raised funds for parochail (sp) schools is faced by only a small Protestant group, who emphasize the separation of church and state regardless.)"[409] Spitz was a political scientist who wrote on anti-democratic tendencies in the United States. "Anti-democratic" was a code description for how Catholics threatened American democracy. In any case, the OCLU's position on Protestants was clear: they were the main

[409] Martha Thomas to David Spitz, May 23, 1957, ACLU Records, Box 801, Folder 42, Seeley G. Mudd Manuscript Library, Princeton University Library

obstacle to removing released-time programs, they were hypocritical, but they were also susceptible to certain arguments. The ACLU and its state networks, such as the OCLU, had Protestants figured out very well in the 1950s and used this to their advantage.

Sometimes, though, they did not realize the depth of commitment to released-time that some Protestants still had in the late 1950s. Georgia Harkness was a Mainline Protestant theologian, whose last teaching position was at the Pacific School of Religion in Berkeley, California. Although she, like most Protestant liberals, had moved away from the belief in original sin, by the 1950s, she was once again reckoning with need for divine intervention for human progress.[410] The ACLU chastised Harkness due to her support for released time. The ACLU of Northern California was trying to end the released-time program in Berkeley under the auspices of the Berkeley-Albany Council of Churches. Georgia Harkness wrote to the North California branch of the ACLU, threatening to withdraw her membership over the issue: "May I remind you that the freedom of religious belief and worship guaranteed by our Constitution does not mean, and was never intended to mean, freedom <u>from</u> religion. The instruction which is now being offered in connection with the public schools is in keeping with the Supreme Court decision on the Zorack (sp) case and is wholly legal. To oppose it is therefore an affront to civil liberties rather than their defense."[411] To a friend, Pat Malin, Executive Director of the national ACLU, she wrote incredulously: "I

[410] Michael L. Westmoreland-White, "Neglected Theologian: Georgia Harkness," Pilgrim Pathways: Notes for a Diaspora People, entry posted February 20, 2010, http://pilgrimpathways.wordpress.com/2010/02/20/neglected-theologian-georgia-harkness.
[411] Georgia Harkness to undisclosed recipient, Jan. 31, 1958, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library

should also be interested to know whether opposition to week-day religious instruction is a general policy of the A.C.L.U. or is based simply on a prejudice of the local division."[412] It is understandable that the ACLU response would be harsh. After some confusion as to who should respond to Ms. Harkness, Ernest Besig, the Executive Director of the Northern California ACLU took the lead. Besig took great offense that Ms. Harkness quoted the *Zorach* outcome as definitive. He wrote, "For many years the U.S. Supreme Court ruled that 'separate but equal' treatment of Negroes and other racial minorities constituted equal protection of the laws. The ACLU disagreed with that ruling and we exercised our constitutional right to oppose it. Happily the Court now agrees with our position. I hope they will change their minds with respect to released-time."[413] He sent that letter to the national office with a handwritten note: "Lou: I take it that Mr. Malin's friend loses her tolerance once her own ox is gored. Ernie"[414] Once Patrick Malin saw all this correspondence, he denounced his old friend: "I am amazed that she should be <u>for</u> released-time, more amazed still that she doesn't know about the guarantee of freedom <u>from</u> religion. She also shocked me by not knowing that our position – like my own personal position – has all along been identical with yours." The ACLU's position was clear and Protestants had to decide whether or not they would get in line with it. Patrick Malin would

[412] Georgia Harkness to Patrick Malin, Jan. 31, 1958, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library
[413] Ernest Besig to Georgia Harkness, Feb. 3, 1958, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library
[414] Ernest Besig to Louis Joughlin, Feb. 19, 1958, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library

give his old friend one more chance, promising to argue some more with her the next time they would meet.[415]

Just a few years before *Engel*, released-time programs were still being challenged in the courts. In Oregon, a judge upheld released-time in June 1958.[416] In Ohio, a month earlier, the Attorney General of Ohio wrote a letter acknowledging that *McCollum* disallowed the use of public school buildings for released-time instruction, but he was unwilling to write a formal opinion to that effect.[417] In Minnesota, a Presbyterian minister, Rev. Alvin C. Currier, had convinced the superintendent of schools in his town to remove released-time classes from the public schools. As a result of this intervention, Reverend Currier was joining the ACLU.[418] Even more important than winning victories like the one in Ohio was the victory of converting more and more Protestants to the cause of the ACLU on released-time. In a clipping of an article from *Civil Liberties*, the magazine of the ACLU, there is a concrete example of the pressure that the ACLU was putting on Mainline Protestants to give up their support for released-time. The ACLU's Illinois division urged the Church Federation of Greater Chicago "not to inject religious controversy into public education" anymore. The Federation had been responsible for organizing released-time classes in Chicago since 1929. The other thing that was going on was the amalgamation of released-time

[415] Patrick Malin to Ernest Besig, Feb. 27, 1958, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library
[416] Joint Memorandum, July 10, 1958, The American Jewish Committee and The Anti-Defamation Leagues of B'nai B'rith, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library
[417] Joint Memorandum, June 9, 1958, The American Jewish Committee and The Anti-Defamation Leagues of B'nai B'rith, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library
[418] Donald G. Paterson to Alvin C. Currier, Jan. 14, 1958, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library

programs with other issues of religion in the public schools: school prayer, Bible reading, aid to parochial schools, and the teaching about religion in academic subjects. When the Church Federation of Greater Chicago called for the elimination of "secularism" from the public schools, in 1959, the ACLU simply replied that it hoped that "the Church Federation will urge its members to concentrate on religious education in the home and church."[419] This did not tackle the issue of released-time, but simply made it seem that the Protestants were not doing their job well and then using the public schools to make up for their lapses. The 1950s ended with two other victories for the ACLU. Attorneys general in Arizona and Wisconsin ruled against the exercise of released-time in their respective states.[420] If released-time programs were slowly losing the support of Protestant America, then certainly religious exercises that took place in the public school classroom were in even greater legal danger.

In 1962, in *Engel v. Vitale*, the Supreme Court ruled that voluntary classroom prayer, but that which was lead by a teacher, was unconstitutional. In a technical sense, this was very similar to the *McCollum* decision, given that this was taking place within the school building. However, with the school prayer decision -- along with the 1963 decision, *Abington School District v. Schempp*, outlawing Bible reading in public school classrooms -- the Supreme Court created

[419] Clipping from *Civil Liberties*, "School Religion Idea Criticized in Chicago," May 1959, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library
[420] Joint Memorandum, Mar. 23, 1959, The American Jewish Committee and The Anti-Defamation Leagues of B'nai B'rith, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library and Joint Memorandum, July 22, 1959, The American Jewish Committee and The Anti-Defamation Leagues of B'nai B'rith, ACLU Records, Box 802, Folder 26, Seeley G. Mudd Manuscript Library, Princeton University Library

a sense among many Americans that religious education was both not welcome in the classroom, nor was it welcome within the system of public education.

The most momentous of the cases dealing with religion and public education was *Engel v. Vitale* (1962), commonly known as the school prayer case. This case revolved around a group of students who sued New York over a voluntary teacher-led prayer in New York schools. The prayer was in the Judeo-Christian tradition but was non-sectarian, and it was short, lasting around twenty seconds. Justice Black received the assignment to write the opinion in this case as he had done before in *McCollum*. Black focused on the history of official prayer in England and New England. He teased out the irony of how the debates over the Book of Common Prayer in England had caused the Puritans to emigrate to North America, yet, once in North America, these same religious dissenters "passed laws making their own religion the official religion of their respective colonies."[421] Only Virginia, as opposed to Massachusetts and other colonies, had established religious toleration by the time of the American Revolution. Justice Black saw the laws of Virginia as becoming part of the Constitution because "by the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State."[422] As Justice Brennan would argue in a later concurrence, the use of history was selective, and Justice Black's foray was no less subjective. He admitted that the prayer in the New York schools appeared "relatively insignificant when compared to the governmental encroachments upon religion

[421] *Engel v. Vitale*, 370 U.S. 421, 427 (1962).
[422] *Engel v. Vitale*, 370 U.S. at 429.

which were commonplace 200 years ago,"[423] but immediately reminded his readers that any establishment of religion was dangerous.

Justice Black's *Engel* opinion inscribed into law the view that the Establishment Clause was more important than the Free Exercise Clause when dealing with religion in public schools. He wrote, "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[424] This statement most clearly expresses the judicial philosophy that the Warren Court settled upon in the religion cases and demonstrates the link between *McCollum*, *Engel*, and *Abington*. Throughout the late 1940s and early 1950s, there was a tug of war between the Free Exercise and Establishment Clauses. Justice Jackson had warned in 1948 that the Justices' own "prepossessions" would influence this type of case. For Justice Black, only if the government had infringed directly on the right of free exercise, could a person bring forth a suit. However, if a plaintiff were to cry foul against the government for the establishment of religion, even *in*direct influence would allow the courts to find against the government. Here, he expounded his judicial theory that the Establishment Clause was more important than the Free Exercise Clause. This was the moment when it became clear that the Supreme Court would favor, for a few decades at least, religious cosmopolitanism over religious pluralism. The ideas of Frankfurter and Black were now comfortably in the majority.

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[423] *Engel v. Vitale*, 370 U.S. at 436.
[424] *Engel v. Vitale*, 370 U.S. at 430.

Justice Black had come from Alabama and had participated in the Ku Klux Klan. Yet, he was able to shed that past and become an important figure in mid-twentieth century American liberalism.[425] The case files of Justice Black reveal no wavering on the religion cases. He wrote three of the five major cases and stayed the course for sixteen years. His case files reveal the depth and contours of his liberal ideas. Had Justice Black only had an anti-Catholic idea of separation, as opposed to a secular idea of separation, he probably would not have written either *McCollum* or *Engel* decisions. It is important to note that he moved past older Southern Baptist notions of separation. Black was a very intellectually curious individual.[426] He corresponded with Conrad Moehlman, a Church historian and a major critic of the released-time movement, received Moehlman's books and articles, which he professed to have read with delight, even given his time constraints.[427] Like Harold Burton, when Black mentioned Horace Mann in his opinions, he did not view Mann simply as a historical figure, but rather as a hero who fought to keep "sectarian" influences outside the public school. Black kept "Thoughts from the Writings of Horace Mann" celebrating the Horace Mann centennial in his case files. Black celebrated the same "common

[425] Tony Freyer, *Hugo L. Black and the Dilemma of American Liberalism* (Glenview, IL: Scott, Foresman/Little, Brown Higher Education, 1990).
[426] For a catalogue of many of Justice Black's books, although not those mentioned in this paper, see Daniel J. Meador, *Mr. Justice Black and His Books* (Charlottesville, VA: UP of Virginia, 1974).
[427] Hugo Black to Conrad Moehlman, June 27, 1952, Folder No. 431 Oct. Term 1951 Zorach v. Clauson, Box 313, Hugo Black Papers (Manuscript Division, Library of Congress, Washington, D.C.). Arthur Moehlman sent Justice Black two of Conrad Moehlman's books and he was thanked by Justice Black in Hugo Black to Arthur Moehlman, April 21, 1947, Folder General Correspondence Books, 1946-49, Hugo Black Papers (Manuscript Division, Library of Congress, Washington, D.C.).

school" which Mann had championed one hundred years before.[428] In a letter from T.V. Smith, editor of a philosophy journal, Justice Black read an appraisal of himself that went like this: "a Supreme Court Justice, who [took] time to inform himself of the spiritual undercurrents...of our western culture." Smith was going to send Black a book on Thomas Paine, an ardent anti-clerical deist. As the Founding Fathers looked to the classical Greeks for wisdom, so too did Justice Black and the other Justices look to Jefferson and the other Founding Fathers for wisdom on this problem of the separation of Church and State. Black also received help from historians who helped him interpret what the Founding Fathers did. Justice Black developed a friendship with the historian Charles Beard.[429] In an introduction to a book about Justice Black, Beard wrote that while he disagreed with Black's *Everson* opinion, he nonetheless thought that Black was "even above Justice Holmes and Brandeis in the record of judicial resistance to governmental encroachments on the liberties of press and speech."[430] In the portion of the Everson *case* before announcing that Catholic schools could receive state money, Black expounded on the importance of maintaining a high wall between Church and State by quoting from Charles Beard's *The Republic*.[431] Beard was surely satisfied with Black's opinion in *McCollum* and would have been quite pleased to see *Engel* had he lived that long.

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[428] "Thoughts from the Writings of Horace Mann," Folder General Correspondence Books 1936-37, Box 17, Hugo Black Papers (Manuscript Division, Library of Congress, Washington, D.C.).
[429] Hugo Black to Charles Beard, December 19, 1942, Folder General Correspondence Books 1940-42, Box 17, Hugo Black Papers (Manuscript Division, Library of Congress, Washington, D.C.).
[430] Charles A. Beard, "Introduction," in John P. Frank, *Mr. Justice Black: The Man and His Opinions* (New York: Alfred Knopf: New York, 1949), xiii.
[431] Newman, *Hugo Black*, 362-363.

Like Frankfurter, Justice Black was a part of American liberalism and was clearly more concerned with stopping the establishment of religion then protecting free exercise.

The Chief Justice of the Supreme Court participated in the case, but did not view it as a terribly important one. While the United States was very agitated in 1962 about the school prayer decision, Warren ranked the reapportionment case, from the same year, as the most important case in his tenure as Chief Justice, and implicitly the most important case of 1962.[432] Warren did not take a leadership role in the *Engel* case.[433] Warren's bench memo for *Engel* does illuminate the reasoning behind his decision to go along with Justice Black. The Chief Justice apparently decided the merits of the case on the basis that *McCollum* was controlling for the *Engel* case. Douglas's conference notes indicate that Justice Black mentioned *McCollum*, his opinion, in the judicial conference about *Engel*. In any case, Warren was completely in agreement with Black. Warren did not see the twenty-second New York Board of Regents prayer as insignificant compared to the weekly teaching of religious material. Rather, he wrote, "the practice here involved is even more invidious than that involved in McCollum since here the teacher rather than the outside instructor, does the 'instructing.'" [434] Warren also recognized arguments that Jefferson and Madison did allow some intermixture of Church and State. However, since schools were

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[432] Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court – A Judicial Biography* (New York: New York UP, 1983), p. 439.
[433] Schwartz, *Super Chief*, 438.
[434] Earl Warren, bench memo, p. 16, Supreme Court File Conference Memos O.T. 1961 Appellate #461-475 folder, Box 224, Earl Warren Papers (Manuscript Division, Library of Congress, Washington, D.C.).

associated with learning, public schools required special caution about what religious material, if any, their teachers propagated. Warren continued, "I myself would find this practice more in keeping with a mere recognition of our spiritual heritage if only the teacher said the prayer; instead the students join in and are taught to 'acknowledge...dependence on God. A prayer in Congress is not likely to aid religion; the saying of a prayer in school, as pet[itione]rs say – a place associated with learning, probably does."[435] Warren was sure that reversing the New York plan would not abolish chaplains or end any mention of God in public life. He also seemed to imply that keeping the spiritual, or Protestant, heritage of the nation was an important consideration. Nevertheless, he was steadfast upon insisting that the New York prayer, though short, would indoctrinate the students with certain theological views embedded in the prayer. In response to the accusation of establishing "secularism" as a religion, Warren responded, "This seems to be nonsense."[436] Warren was in total concurrence with the views of Justice Black, et al. on this matter. As Chief Justice, Warren added a weighty seal of approval to the project Black and Frankfurter had begun over a decade before *Engel*.

Justice Douglas concurred in *Engel v. Vitale* but maintained some of his old objections from the *Zorach* opinion. He was convinced that no "element of compulsion or coercion" operated in the New York schools.[437] He also maintained that the *McCollum* case was not controlling because in *Engel*, unlike

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[435] Earl Warren, bench memo, pp. 17-18, Supreme Court File Conference Memos O.T. 1961 Appellate #461-475 folder, Box 224, Earl Warren Papers (Manuscript Division, Library of Congress, Washington, D.C.).
[436] Ibid., p.
[437] *Engel v. Vitale*, 370 U.S. at 438.

*McCollum*, there was "no effort at indoctrination and no attempt at exposition."[438] Douglas, unlike Warren, declared the prayer theologically inconsequential. Justice Douglas showed just how different the 1960s Supreme Court climate was from the earlier climate. In 1952, the Supreme Court had allowed for religious instruction, in the sense of teaching children which belief system to adopt. In 1962, what the Court struck down was a vague prayer that was said in the same breath as the Pledge of Allegiance. Granted, a government-paid teacher was leading the school prayer and no student could have escaped from the classroom, or should have. Justice Douglas did not feel entirely comfortable with the decision. He summarized his feelings by writing, "A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads."[439] Justice Douglas expressed the philosophy of religious pluralism by writing the above sentence. Douglas himself was not religious in the traditional sense, but he was fascinated with Eastern religions, which he often encountered on his hiking visits to the Himalayas. He had written at length about the environment and the wilderness but Douglas made no mention of any of the religious education cases in his autobiography.[440] Douglas, thus, was not parochial in the same sense as Justice Jackson may have been, or Justice Reed. Douglas was a "cosmopolitan" man. Yet, he reasoned that if most of the students in a classroom wanted to say a prayer, they should have that right. This was not about making the few students

[438] *Engel v. Vitale*, 370 U.S. at 439.
[439] *Engel v. Vitale*, 370 U.S. at 442.
[440] William O. Douglas, *The Court Years, 1939-1975: The Autobiography of William O. Douglas* (New York: Random House, 1980).

who did not say the prayer feel bad; rather, for Douglas, it was about ensuring that all religions, those in the majority and in the minority, could have the freedom of expression.

Justice Douglas ended up concurring in *Engel*. That did not mean he was very comfortable with his decision. His conference notes from April 3, 1962 indicate that he was, along with seven other colleagues, ready to reverse the New York school prayer. Yet, a desk copy of a rough draft of what turned out to be his concurrence, had Mr. Justice Douglas dissenting. The words "Do not cir," meaning do not circulate, were at the top of the page and one can only wonder if his colleagues ever knew that he was planning to dissent at one time.[441] For those wondering why Douglas's concurrence sounds so much like a dissent, there is a simple explanation: at one point, it was. Legal scholar and activist Nadine Strossen wrote that Douglas progressed from his *Zorach* decision to his *Engel* concurrence, ending up with a better understanding of the importance of religious freedom.[442] This potential dissent in *Engel* shows clearly that Justice Douglas did not travel very far from 1952 to 1962.

The way Justice Douglas brought himself to concur in the result was that he opposed public financing of religion. This way of looking at the problem seems odd since Douglas recognized that the time taken by the teacher to lead the prayer was "miniscule as compared with the salaries appropriated by state legislatures and Congress for chaplains to conduct prayers in the legislative

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[441] Rough draft of Engel concurrence, folder No. 468 (a) Engel v. Vitale O.T. 61 Galley Proofs, Box 1276, William O Douglas Papers (Manuscript Division, Library of Congress, Washington, D.C.).
[442] Nadine Strossen, "The Religion Clause Writings of Justice William O. Douglas," in Stephen L. Wasby, ed., *"He Shall Not Pass This Way Again": The Legacy of Justice William O. Douglas* (Pittsburgh: University of Pittsburgh Press for the William O. Douglas Institute, 1990), 92.

halls."[443] For him, this was the principle he would have applied throughout the federal government: no financing of religion with public monies. This led him to ask if the Court should not reconsider the *Everson* decision. Here, Douglas was in direct contrast to Black, the unrepentant author of *Everson*. Black had decided that aid to parochial schools was constitutional while a theologically trivial prayer was not. Douglas concluded that aid to parochial schools violated the separation of Church and State and therefore a school prayer would violate the wall of separation as well. Justice Stewart's sole dissent added little except to point out that the case of England and the Book of Common Prayer, cited by Justice Black in the majority opinion, was irrelevant since England, from the sixteenth century to the present, had had an established church. The United States did not, and therefore, should not be concerned with an insignificant prayer in the public schools. Justice Stewart's views would remain in the minority.

In *Abington School District v. Schempp* (1963), the Court extended its prohibition of school prayer to the reading of the Bible in public schools. Justice Tom Clark wrote the majority opinion. The opinion strengthened the distinction that Justice Black had drawn between the Free Exercise and Establishment clauses in *Engel*. Clark wrote, "The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."[444] By 1963, this idea had become law and was "apparent" to Justice Clark. For those who

[443] *Engel v. Vitale*, 370 U.S. at 441.
[444] *School District of Abington Township, Pennsylvania, et al. v. Schempp et al.*, 374 U.S. 203, 223 (1963). This case was decided together with *Murray et al. v. Curlett*.

challenged the disparity in interpreting the two clauses, Clark admonished that the Free Exercise Clause had "never meant that a majority could use the machinery of the State to practice its beliefs."[445] Those who argued for school prayer, the Court now perceived to be manipulating government since they were in the majority. This shows how the inequality of the First Amendment religion clauses showed great concern for minority religions. To fend off criticism that the Court was allowing a "'religion of secularism,'" or secular humanism, Clark wrote that the State could not act "affirmatively opposing or showing hostility to religion."[446] However, the tenet from *Zorach* did not apply, in Clark's opinion, to their ruling. Although this ruling did not change the law but merely reinforced it, Justice Brennan's concurring opinion gave a new rationale for the holdings in *Engel* and *Abington*.

Since so much of the analysis the Supreme Court put into the religion cases was historical, it seems odd that Justice Brennan would want to do away with the historical analysis. Brennan put the holdings of the Warren Court on firmer ground by saying that the circumstances of the early 1960s, not the history of what Thomas Jefferson had thought, dictated how the Court should interpret the Constitution. It is worth repeating that Brennan was in complete agreement with the majority of the Warren Court on a strict separation of Church and State and was only working to buttress the separation on firm legal principles.

The reasons that Brennan gave for abandoning the historical analysis were twofold. First, he wrote how "the structure of American education has greatly

[445] *Abington v. Schempp*, 374 U.S. at 226.
[446] *Abington v. Schempp*, 374 U.S. at 225.

changed since the First Amendment was adopted."[447] Justice Brennan here was referring to the rise of the public school, which was non-existent in the eighteenth century and thus the Constitution could not have covered what occurred in the public school. Indeed, many of the arguments about Jefferson revolved around what he proposed and implemented at the University of Virginia, a place of higher education. Brennan continued his concurrence by adding, "our religious composition makes us a vastly more diverse people than were our forefathers."[448] The views of Jefferson and Madison were not controlling for Brennan because Brennan argued that, comparatively speaking, the diversity of the early republic was nowhere as great as the diversity of 1960s America. Thus, historical analysis could have led one to argue that a prayer in the Judeo-Christian tradition was not sectarian and that perhaps Madison and Jefferson would have approved of such a voluntary prayer. Justice Brennan did not want to take that risk. Of course, Brennan also had a lengthy section on the history of religion in public schools, but for him, the history was largely illustrative. The principle of strict separation could stand without the historical analysis. What Brennan did take from the Constitution was the general principle of separation, which he interpreted through the lens of the religious diversity in America. Really, the *Zorach* case stood apart, and to this day looks like an anomaly in an otherwise uniform move away from religious pluralism to religious cosmopolitanism. Ultimately, however, although *Zorach* gave legal protection to released-time, it could not offer protection from other factors.

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[447] *Abington v. Schempp*, 374 U.S. at 238.
[448] *Abington v. Schempp*, 374 U.S. at 240.

As this chapter has demonstrated, something changed among Mainline Protestants in the late 1950s. The historian Philip Gleason writes, "The socio-religious atmosphere had changed markedly when the next landmark cases were decided in the early 1960s. The religious revival was well-nigh forgotten by then, and the 'death of God' loomed just over the horizon."[449] After 1963, released-time would survive legally unscathed by *Engel* or *Abingdon* but its decline would soon be apparent.

Although evangelical and Mainline Protestants collaborated in the 1920s, it may be that such connections became fewer as the decades passed. Jonathan Zimmerman, a historian of education, has found numerous examples of competition between fundamentalists and Mainline Protestants during the 1940s and early 1950s.[450] From the 1920s to the 1960s, more Mainline Protestants associated with the ICRE position as opposed to the REA position: religious education necessary in public schools, as opposed to respecting other faiths (or non-faiths) and discontinuing religion in public schools. But, even in the 1960s, a leader in the Ohio Council of Churches recommended that cooperation be extended to evangelicals in an effort to maintain and even expand released-time programs throughout Ohio.[451]

It was estimated that the number of public school students in released-time programs, or some other form of religious class within the public school,

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[449] Philip Gleason, "Blurring the Line of Separation: Education, Civil Religion, and Teaching About Religion," *Journal of Church and State* (19) 1977: 521.
[450] Jonathan Zimmerman, *Whose America?: Culture Wars in the Public Schools* (Cambridge, MA: Harvard University Press, 2002), 147-149.
[451] Lillian E. Comey to undisclosed recipients, Feb. 27, 1961, OHIO HIST SOCIETY, OHIO COUNCIL OF CHURCHES MSS 457 microfilm 2.

had grown from two million in the 1940s to four million by the end of the 1950s.[452] As evangelicals entered into the arena of released-time, religious issues would become more contested. In late 1969, there were about 5,000 students participating in the evangelical released-time classes in Los Angeles. The director, Mrs. Ollie Cotterell, had the following to say about evolution: "Boys and girls sometimes act like monkeys, but I can prove with the Bible we didn't come from monkeys. Children in the fourth, fifth and sixth grades simply accept what we teach."[453] When that attitude was translated into conservative efforts to remove evolution from public school curricula, new battles between the rising Religious Right and the ACLU would ensue. However, in the released-time classes, protected by *Zorach*, creationism could be promoted without any interference.

Starting in the mid-1960s, the number of Mainline Protestants started to decline. In addition to their ambivalence over whether or not to continue supporting released-time, Mainline Protestants were declining in their membership totals. By the end of the 1970s, sociologists estimate that Mainline Protestant denominations such as the Episcopal Church, the United Presbyterian Church, and the United Methodist Church lost as much as 10% of their mid-1960s numbers.[454] For all of the Catholic support released-time had received, it was still the creation of Mainline Protestants. With their decline, the hopes for released-time to continue were anything but certain.

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[452] Jonathan Zimmerman, *Whose America?: Culture Wars in the Public Schools* (Cambrige, MA: Harvard University Press, 2002), 152.
[453] "Origin of Man: Creation Theory Far From Dead" *Los Angeles Times*, December 25, 1969.
[454] Wade Clark Roof and William McKinney, *American Mainline Religion* (New Brunswick, NJ: Rutgers University Press, 1987), 20.

In the 1970s, a "Federal District Court found that a released-time program in Harrisonburg, Va., was unconstitutional, when measured against the various principles that the Supreme Court has adopted in recent religion cases."[455] In *Smith v. Smith*, the Federal appeals agreed that the district court had interpreted the case correctly based on the recent rules that the Supreme Court had laid down. However, the appeals court reversed the district court and found Harrisonburg's released-time program to be constitutional because *Zorach* had never been overturned and was still controlling when it came to deciding released-time cases. In January 1976, the Supreme Court, without comment decline to take this case, and by not doing so, kept released-time constitutional in these United States of America.[456]

A year later, the ACLU filed a federal lawsuit against the Logan (Utah) Board of Education that was aimed to dismantle the close relationship between the Church of Jesus Christ of Latter-Day Saints and the public schools, as exhibited through released-time and the granting of credit for some of those classes. The Salt Lake City District was the only school district in Utah to not allow credit for these classes, but it did allow released-time classes where no credit was given.[457] In 1982, a federal appeals court declared the granting of credit as unconstitutional but upheld released-time in Utah.[458]

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[455] "Summary of Actions Taken by the United States Supreme Court." *New York Times,* January 20, 1976.
[456] "Summary of Actions Taken by the United States Supreme Court." *New York Times,* January 20, 1976.
[457] "Suit Seeks to Ban Mormon-Class Credit." *Los Angeles Times,* April 23, 1977.
[458] "A crumbling wall between CHURCH and STATE?" *Christian Science Monitor,* June 2, 1982.

As late as 1982, the city of Los Angeles, no suburbs included, had 5,600 fourth, fifth, and sixth graders participating in released-time programs. John Dart, currently editor of *The Christian Century*, in a Los Angeles Times article introduced the story as follows: "In a little-known but well-established program, public school children in hundreds of American cities learn and recite prayers of their religious tradition during school hours." This article was written in the context of reporting Ronald Reagan's then recent endorsement of a constitutional amendment supporting voluntary school prayer. It is ironic that so many were fighting for school prayer in the 70s, 80s, 90s, and beyond, but had no idea about the possibilities or realities of released-time. One group that did was the U.S. Catholic Conference, which was disappointed that Reagan's suggestion did not go further. The U.S. Catholic Conference wanted the amendment to include a provision for released-time to be re-introduced within the public school buildings, thereby keeping *Zorach* but eliminating *McCollum*. The director of the evangelical released-time classes, Jim Bray, acknowledged that having classes in the public school would make it much easier, since volunteers to accompany the children from the public school to the local church were difficult to find. By 1982, the evangelical released-time classes had surpassed the Mainline Protestant classes in numbers of students. 2,500 children were in the evangelical classes and 1,500 children were in the classes sponsored by the Mainline Los Angeles Council of Churches. In addition, 100 children were in a Jewish program.

Reasons for the decline since the 1960s were given as being a decline in "church-going" and the rise of private religious schools.[459]

Just outside of Los Angeles, in Orange County, released-time in the 1980s was conducted on "side street adjacent to the school's playground," in a trailer aptly named, "Chapel on Wheels."[460] Besides the decline in Mainline Protestantism, the chipping away of the ACLU, one of the other main reasons for the decline of released-time was the rise of the suburbs. The nearby church of the city was not as nearby in the suburbs. This idea in Orange County was an unique idea to circumvent the challenge of not holding released-time on school grounds, but at the same time making it convenient for children to walk to released-time classes, even when the nearest church was miles away.

Finally, theological differences between evangelicals and Mainline Protestants and the lack of denominational strength among evangelicals led to the decline of released-time programs. In the early 1960s, the National Association of Evangelicals expressed their support for released-time classes.[461] However, this did not necessarily translate into support from evangelicals, and certainly not fundamentalists, for released-time programs in local communities. The director for the Ohio Weekday Religious Education Teachers' Association suggested to those concerned about the growth of the movement that those more "conservative or fundamentalist churches" that did not participate could be

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[459] "5,600 L.A. Students Take Time Off for Prayers During School Hours." *Los Angeles Times*, May 15, 1982.
[460] "'Chapel on Wheels' Is Rolling." *Los Angeles Times*, December 14, 1986.
[461] Lillian E. Comey, Weekday Religious Education Department (Ohio Council of Churches) Meeting Minutes, April 24, 1961, Ohio Council of Churches Records, 1919-1956, MSS 457 microfilm 2, Ohio Historical Society Manuscript Collections.

persuaded to do so if they would be provided with a copy of the statement of the National Association of Evangelicals supporting the program.[462] The lack of trust between evangelicals and Mainline Protestants was certainly standing in the way of continued growth for the released-time program past the 1960s.

By the late 1980s, there were still 14,000 students across Virginia enrolled in released-time programs.[463] By the 1990s, although released-time programs had dwindled numerically, it seems that most Americans had come to accept released-time programs, at least in theory. President Bill Clinton, in 1995, wrote a famous memorandum about religious expression in the public schools. Among many other issues, on released-time, the memo stipulated that "schools have the discretion to dismiss students to off-premises religious instruction provided that the schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day."[464] Around the same time, the ACLU had also come on board to supporting released-time religious education. After years, if not decades, of trying to eliminate released-time programs, the ACLU came out in support of released-time.

In 1993, a survey by the National Association of Released-time Christian Education estimated that 250,000 students at the time were enrolled in released-time programs. Throughout the 1990s, and into 2000, it appeared that not only evangelicals were making use of the possibility of released-time but Muslims as

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[462] Lillian E. Comey to undisclosed recipients, Feb. 27, 1961, Ohio Council of Churches Records, 1919-1956, MSS 457 microfilm 2, Ohio Historical Society Manuscript Collections.
[463] "Busing Thrives For Students' Bible Classes." *The Washington Post*, November 11, 1989.
[464] "PRAYER AND TEACHING." *The Christian Science Monitor*, July 17, 1995.

well.[465] It is difficult to tell how widespread Muslim released-time classes are but two points are worth making. However evangelical Christians may or may not tolerate Muslim released-time programs remains to be seen, but it is clear that the ACLU will fight for the right of Muslims to have released-time programs.

There are traces of released-time programs even into the new millennium, but a good point with which to end the story is New York City in 2000. The released-time program was still around in New York City, but with the irony that the program started by Protestants, by 2000, had virtually no Protestant representation. In 2000, there were less than 1,000 Jewish students participating in released-time programs in New York City. Reasons given were the dispersal of Jewish-Americans across the city and immigrant Jews not having strong religious affiliations. According to the New York City Board of Education, the total figure of students taking part in released-time in the fall of 2000 were slightly above 9,000. The most vigorous geographical area was Staten Island, where over 3,000 students were taking released-time classes, almost one out of ten elementary students on Staten Island.[466] Two things were clear: Roman Catholics still supported the program. But, for all their support, the number of released-time students had declined significantly from the 1940s, when around 100,000 students in New York participated in released-time classes.

[465] "PRAYER AND TEACHING." *The Christian Science Monitor*, July 17, 1995.
[466] "Fewer Pupils in Catechism Programs." *New York Times*, October 11, 2000.

# Epilogue

Within a period of about four months in 1970 and 1971, three figures in the story of released-time died. Agnes Meyer, who had opposed released-time programs through the pages of the *Washington Post* editorials, died in late summer of 1970. She was remembered for having "denounced...the Catholic Church for its opposition to federal aid for public schools."[467] No longer was her particular opposition to released-time remembered. James O'Neill died a few weeks later, on September 20th, 1970. In his obituary, he was, in fact, remembered for arguing that released-time programs were the best way to have religion in the public schools.[468] On January 26th, 1971, Charles Tuttle, the leader of New York City's Protestants on behalf of released-time, died as well.[469] He was remembered for being on the successful side in the *Zorach* case. Although, the story of released-time programs continued beyond the early 1970s, these three deaths represent a passing of an era.

Opponents of religion in the public schools, after this time, would have little reason to oppose released-time programs since there was no more threat of a dominant Christian religion. As early as 1950, the ACLU was starting to take up the right of Muslim students to be excused for certain holidays, even as they were heavily involved in the effort to end released-time programs. Mainline Protestants would lose both their power to influence American culture and would

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[467] "Agnes E. Meyer: Writer, Critic, Champion of Reform." *The Washington Post*, September 2, 1970.
[468] "Prof. James O'Neill, 88, Dead; Expert on Church-State Ties." *New York Times*, September 21, 1970.
[469] "Charles H. Tuttle, Civic Leader Here for Many Years, Dies at 91." *New York Times*, January 27, 1971.

also lose in the numbers game, in contrast to the growth of evangelicals. Finally, very few Catholics advocating religion in the public schools could claim that they had been a part of the ACLU's leadership. It was a different era. Certainly, released-time was not the most important thing going on, but for these three individuals, released-time was an important part of their world. Released-time also reveals a little bit about the world in which it existed.

In the nineteenth century, the United States had been a Christian nation. If the government had never adopted a religious belief, the people certainly had. As was discussed earlier, there is historical disagreement as to exactly how many religious exercises occurred in the public schools of nineteenth-century America. But, it is clear that children were raised in a time of rich theological discourse in their homes and in public society. There were certainly conflicts, especially between Protestant and Catholic. Few, however, would have questioned the inherent goodness of teaching religion, at least in the abstract, to students.

By the beginning of the twentieth century, Mainline Protestants were unhappy with the public schools. Had religion been neglected due to the school having so many other important things to now teach? Had the battles between Protestants and Catholics resulted in a policy of no religion to avoid conflicts? Whatever the reasons, Protestants began to despair that if schools were not teaching religion, then perhaps nobody was. There were parents, of course, and the Sunday School. But both of those possibilities inspired doubt in many Mainline Protestants. If certain courts had eliminated Protestant practices out of fairness towards Catholics, then why begin another program of religious

education connected to the public schools? Protestants, by the beginning of the twentieth century, were so frightened by secularization that they were willing to risk having to work with Catholics, which was a possibility built into the released time program. Secularization had become a greater concern than the Roman Catholic Church for some. Although Mainline Protestants had accepted modernity, they were still concerned by the accompanying secularization. The growth of released time education complicates the notion of the decline of Mainline Protestants. Certainly, released time may have been a last gasp to hold the country for God, but the program's very success demonstrated the power that Mainline Protestants possessed well into the 1950s. Reinhold Niebuhr exhibited this combination. In the late 1940s and 1950s, Niebuhr was a well-known and respected figured in American public life who advocated released time and specifically stated that secularization was much more dangerous than Catholics were.

As released time education was growing, Catholics felt justifiably intrigued. Here was a program that allowed for equal Catholic use. This would be another venue for the education of Catholic children in their faith tradition. So, by the 1940s, Protestants and Catholics were making use of the same type of program in many communities across the United States. This was a unique moment given the historical animosities, which still existed in the country. It was also part of the larger World War II religious revival and the recent creation of a Judeo-Christian culture which included Protestants, Catholics, and Jews. Released time flourished in this brief moment of inter-religious harmony.

In the legal world, the released time cases reflected a sea change in thinking about religion in the public schools. Clearly, the *Zorach* case repeated traditional notions of religion's place in American schools, but *McCollum* was the better predictor of what would eventually happen in the defining 1962 school prayer case. Justice Black and Justice Frankfurter, along with those who supported them, set out to apply the First Amendment's religious clauses to the states. In addition, these Justices meant to suggest that state neutrality, where aid was given to all religions, was also unacceptable. The debates over released time continue in other venues. In 2000, in a narrow 5-4 decision, the Supreme Court upheld an after school Bible study on school premises in *Good News Club v. Milford Central School*. In order to understand the full picture of First Amendment law, the released time cases are a necessary component.

The released time cases are also of utmost importance in understanding the 1962 Supreme Court case. The released time program made an attempt to keep some distance between the religious education program and the public schools – different teachers, no school funds, etc. When school prayer was evaluated, it was said in the classroom and was led by the public school teacher. Clearly, the parameters that Mainline Protestants had set for released time education's legality meant that the school prayer would be declared unconstitutional. Although the shock came to many Americans in 1962 that religion would no longer be tolerated in America's public schools, the *McCollum* decision fourteen years later predicted the demise of religion in any form from America's public schools.

The *Zorach* decision remained an anomaly in mid-twentieth century First Amendment jurisprudence. It single-handedly saved the released time program without offering serious reasoning as to how it overturned *McCollum* without explicitly criticizing it. What is equally curious is to how Justice Douglas would become, in the 1960s, a greater separationist than Justice Black had been. There seem to have been two reasons for the reversal in *Zorach*. The practical aspect is that to a few Justices, including Justice Douglas, it seemed that the 1948 decision had reserved judgment on the New York case, with its feature of holding released time off of school premises as opposed to the Champaign program taking place in the public school building. With certain assurances from 1948, at least three Justices switched their position due to the location of released time program in New York being off of school grounds.

The other reason for the Supreme Court's ambivalence was anti-Catholicism. There was a sense among certain Supreme Court Justices that Protestants had received the short end of the stick with *Everson* and *McCollum*. Catholics were allowed parochial school aid, whereas Protestants lost their only vehicle for religious instruction during the school week. This did not seem fair to some, and the *Zorach* decision may have been offered as a corrective to that.

Although anti-Catholicism produced a victory of sorts for released time, very soon anti-Catholicism would be used to reduce Protestant support for released time. After *Zorach*, the ACLU and other groups opposed to released time were stunned and needed to regroup. In doing so, they settled on crafting a state-by-state strategy where they would weaken the resolve of Protestants to

support released time. Part of this strategy was to emphasize over and over how released time was a creature of Catholics and how dangerous that was. This was false given that released time had started out mainly as a Protestant program. But, it was an effective strategy which saw more and more Protestants foregoing their support for the program. Anti-Catholicism had lasted almost as long as Protestant support for religion in public schools. It is not coincidental that they both ended at around the same time in the early 1960s.

What did all of this mean? In many ways, that is a question that still needs much uncovering of further evidence and exploration of how the end of released time reflected a change in the American landscape. One thing is for sure: the decline of Mainline Protestants left Catholics as the prime defenders of religion in public society. It is hard to forget that as late as the 1950s, Protestants would have ridiculed that proposition. One further development was that Protestant-Catholic cooperation would be renewed but with a different Protestant group. The rise of evangelicals and the Religious Right in the 1970s seems to have been made possible due to Mainline Protestantism's abandonment of its traditional support for religion in American public society.

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