

NOTE

BETTER A CATHOLIC THAN A COMMUNIST:
 REEXAMINING *MCCOLLUM V. BOARD OF EDUCATION*
 AND *ZORACH V. CLAUSON*

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|--|------|
| INTRODUCTION..... | 2069 |
| I. <i>EVERSON: ANTI-CATHOLICISM AND EDUCATION</i> | 2074 |
| A. <i>Historical Background</i> | 2074 |
| B. <i>The Debate over Released Time in 1947</i> | 2082 |
| C. <i>The Justices' Awareness of the Religious Tension</i> | 2084 |
| II. <i>MCCOLLUM: EVERSON REVISITED</i> | 2086 |
| A. <i>McCullum as a Catholic Case</i> | 2086 |
| B. <i>Reaction to McCollum</i> | 2093 |
| III. <i>TOWARD ZORACH</i> | 2094 |
| A. <i>The Impact of McCollum in New York</i> | 2094 |
| B. <i>The Role of Atheism</i> | 2097 |
| IV. <i>ZORACH V. CLAUSON AND THE SPECTER OF COMMUNISM</i> | 2104 |
| CONCLUSION..... | 2117 |

INTRODUCTION

IN 1952, Justice Jackson presciently closed his dissent in *Zorach v. Clauson* by noting that the Court's judgment would "be more interesting to students of psychology and of the judicial processes than to students of constitutional law."¹ The Court's judgment in

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

Zorach prompted Justice Jackson's prediction because, in his view, it was a clear departure from the Court's holding four years earlier in *Illinois ex rel. McCollum v. Board of Education*,² a holding that three members of the majority in *Zorach* had joined.³

In 1948, the Court ruled in *McCollum* that the "released time" program in the Champaign, Illinois, schools was an unconstitutional establishment of religion by the state.⁴ Under this program, children, with the permission of their parents, were excused from their regular public school classes for thirty to forty-five minutes per week to attend religious education classes taught within the school by members of local Protestant, Catholic, or Jewish groups. Parents were also free to deny permission and have their children continue their secular studies while the other students received religious instruction.⁵ Justice Black, writing for the eight-Justice majority, declared the released time program a violation of the Establishment Clause, citing the use of the public school buildings and the state compulsory education laws.⁶

By 1952, the Court, at least according to Justices Black, Frankfurter, and Jackson, the three dissenters in *Zorach*, had executed an about-face on the issue of released time religious education. In *Zorach*, Justice Douglas wrote the majority opinion upholding the constitutionality of New York City's released time plan.⁷ Justice Douglas made two arguments in support of the constitutionality of the New York plan. First, he relied on the only factual distinction between the New York plan and the Champaign plan: the location of instruction. Whereas under the Champaign plan the religious education instructors taught in classrooms on school grounds, under the New York plan the students departed the school and went to nearby churches, synagogues, or religious schools to receive their lessons. Justice Douglas based his second argument on the nature and traditions of the American people. Asserting that Americans are "a religious people whose institutions presuppose a Supreme Being," Douglas claimed that the New York plan followed

² 333 U.S. 203 (1948).

³ *Zorach*, 343 U.S. at 315 n.8; id. at 325 (Jackson, J., dissenting).

⁴ 333 U.S. at 209–10.

⁵ Id. at 207–09.

⁶ Id. at 209–12.

⁷ 343 U.S. at 315.

2007]

Better a Catholic than a Communist

2071

the “best of our traditions” by encouraging religious instruction and cooperating with religious authorities “by adjusting the schedule of public events to sectarian needs.”⁸ In light of these traditions, Douglas argued that there could be no constitutional requirement for government to be hostile to religion, which would be the holding if the New York plan were found unconstitutional.⁹

While Justice Douglas’s argument was twofold, only the factual distinction between the Champaign and New York plans was necessary to distinguish the two cases. For Justice Burton this distinction was dispositive. As early as the *McColum* conference, Justice Burton indicated that he thought there was a distinction between the New York and Champaign released time programs. According to Justice Douglas’s notes, Justice Burton argued at conference that the “released time issue in NY [was] not before” the Court in *McColum* and that in New York, “they have found . . . a proper [and] constitutional method of letting [released time] be done.” In contrast, at conference Justice Burton claimed that the Champaign program was unconstitutional because, while a religious group might rent a school building, here the use of the building was an “intermingling of church [and] school.”¹⁰ And in the weeks just before the *McColum* opinions were handed down, Justice Burton made his support of Justice Black’s majority opinion and Justice Frankfurter’s concurrence contingent upon the Justices’ explicit assurances that their respective opinions did not invalidate the New York plan.¹¹ Thus, Justice Douglas’s factual distinction in *Zorach* is readily explainable by the presence of its antecedent in Justice Burton’s argument in the *McColum* conference more than four years earlier and in Douglas’s need to gain at least Justice Burton’s vote in *Zorach*.

But there is no such ready explanation for the presence of Justice Douglas’s appeal to the presupposition of a Supreme Being. This element of the opinion is legally superfluous, yet its mere presence suggests that there was some audience for the argument.

⁸ Id. at 313–15.

⁹ Id. at 314–15.

¹⁰ Douglas conference notes, Ill. ex rel. McCollum v. Bd. of Educ. (Dec. 13, 1947) (Library of Congress (“LOC”), Douglas Papers, Box 141, Case File No. 90).

¹¹ Samuel A. Alito, Note, The “Released Time” Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, 83 Yale L.J. 1202, 1220–21 (1974).

In fact, Justice Douglas's conference notes confirm that there was an audience for the extra-legal argument. His notes indicate that Justice Frankfurter did not discuss the legal issues at conference but focused instead on discrediting the claim of released time program proponents that *Zorach* was about secularism in the schools; Frankfurter went so far as to compare the tactics of released time proponents to those of Senator McCarthy.¹² The form of Frankfurter's argument in conference, as well as Justice Douglas's appeal to America's religious tradition, suggests that, perhaps, some members of the Court did not believe the factual distinction was dispositive and were open to, or even persuaded by, the religious traditions argument. At the very least, the inclusion of the religious traditions argument suggests that some members of the majority, though certainly not Justice Burton, were skeptical of distinguishing the two cases on the mere location of the religious instruction.

The religious traditions element of Douglas's *Zorach* opinion becomes even more important in light of the incredulity with which the dissenters attacked the factual distinction. According to Justice Jackson, the distinction is "trivial, almost to the point of cynicism, magnifying [*McCollum's*] nonessential details and disparaging . . . the underlying reason for invalidity."¹³ Likewise, Justice Black believed that the location of the religious classes was immaterial and that "the *McCollum* decision would have been the same if the religious classes had not been held in the school buildings."¹⁴

Of course, it is also possible that the audience for which Justice Douglas was writing was not on the Court. Justice Douglas may have sought to buttress his argument by appealing to the public that would ultimately receive his opinion. This appeal took the form of a broad statement, with which the vast majority of Americans would agree, that "[w]e are a religious people" and an assurance that there was no constitutional requirement "that the gov-

¹² Douglas conference notes, *Zorach v. Clauson* (Feb. 2, 1952) (LOC, Douglas Papers, Box 211, Case File No. 431).

¹³ *Zorach*, 343 U.S. at 325 (Jackson, J., dissenting).

¹⁴ *Id.* at 316 (Black, J., dissenting) ("Here *not only* are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State *also* affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery." (emphasis added in *Zorach*) (quoting *McCollum*, 333 U.S. at 212)).

2007]

Better a Catholic than a Communist

2073

ernment show a callous indifference to religious groups.”¹⁵ Whether Justice Douglas’s intended audience for this argument was a fellow Justice or the public, the importance of his appeal to the religious nature of Americans, as an element of his argument, is equal to that of the factual distinction, and any attempt to explain the outcomes in these two cases must account for both elements of Justice Douglas’s argument.¹⁶

This Note will offer such an explanation. It accepts that the factual distinction in Justice Douglas’s opinion reflects Justice Burton’s position that the location of the religious instruction was dispositive. This Note, however, will account for Justice Douglas’s second argument, that our “institutions presuppose a Supreme Being,” by placing *McCullum* and *Zorach* in their wider historical context and considering the effect of external political change on the Court’s rulings in these two cases. Specifically, this Note will posit that there was a growing suspicion of Catholicism following World War II and prior to the Court’s 1947 decision in *Everson v. Board of Education*, which upheld a school board’s practice of reimbursing parents for the cost of transporting their children on public buses to parochial schools.¹⁷ This suspicion centered on the Church’s desire to receive government funds for its parochial schools, as well as on the Catholic approach to education, which was perceived as creating Catholic automatons not suited to democratic practices. The *Everson* decision did nothing to allay these fears and in fact created greater concern.

McCullum, then, gave the Court an opportunity to limit *Everson* and calm fears that the courts would permit Catholics to exert their influence over the American educational system, both by receiving public funds for their parochial schools and by injecting sectarian teachings into the public schools through released time programs. The *McCullum* decision, however, only created confusion about

¹⁵ Id. at 313–14 (majority opinion).

¹⁶ Authors addressing *McCullum* and *Zorach* usually simply accept that the factual distinction was dispositive for the Court and dismiss or ignore Justice Douglas’s appeal to America’s religiosity. See, e.g., 12 William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953*, at 278 (Stanley N. Katz ed., 2006) (describing Douglas’s appeal to American religiosity as “gratuitous[]” and “dicta”); Alito, *supra* note 11 (forgoing any discussion of Douglas’s religious traditions argument).

¹⁷ 330 U.S. 1 (1947).

the constitutionality of released time programs, which manifested itself in the legal challenges mounted against the New York program.

This Note will assert that by the time the Court, in *Zorach*, addressed the confusion resulting from its *McCullum* decision, the cultural and political environment had changed sufficiently to affect the tone of the opinion, if not the decision, in *Zorach*. Whereas *McCullum* had been decided in a moment of widespread anti-Catholicism, *Zorach* was decided in a moment of widespread opposition to “Godless” communism. The proponents of released time education seized upon the atheism of Mrs. McCollum, which had previously been insignificant, and Joseph Lewis, a Free Thinker who brought suit in New York prior to Mr. Zorach. Harping on atheism, these proponents of released time education successfully created the impression that opposition to released time education was tantamount to the promotion of atheism and the accompanying philosophies of communism and totalitarianism. Thus, by the time *Zorach* reached the Court, opposition to released time education was seen as opposition to democracy, rather than opposition to Catholic intervention in public education, as it had been at the time of the *McCullum* decision. Through this lens, *Zorach* was one more in a line of cases from the early 1950s in which the Court deferred to states and legislatures when the specter of communism was raised. Ultimately, the decision of the Court reflected the change in society, and the Court concluded that, in 1952, it was better to be a Catholic than a communist.

I. *EVERSON*: ANTI-CATHOLICISM AND EDUCATION

A. *Historical Background*

Many commentators have noted that the modern Establishment Clause dates from the Court’s decision in *Everson v. Board of Education* in 1947.¹⁸ But this is only partly true. While *Everson* marked the first significant pronouncement under the Establishment Clause, the forces that resulted in *Everson* were at work long

¹⁸ See Robert S. Alley, Public Education and the Public Good, 4 Wm. & Mary Bill Rts. J. 277, 321 (1995); John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 284 (2001); Alito, *supra* note 11, at 1202.

before 1947. *Everson* was but the most recent quarrel between Protestants and Catholics over public support of parochial education.¹⁹ As early as 1840, Protestants and Catholics battled over education, including what version of the Bible, if any, should be read in public schools and whether parochial schools should receive public funding. These battles led, in part, to the development of the widespread Catholic parochial school movement.²⁰ With Protestants largely attending publicly funded schools, Catholics sought public funding for their parochial schools. For the second half of the nineteenth century and the first half of the twentieth century, Protestants of all types vehemently opposed public funding for “sectarian,” that is Catholic, schools.²¹

Protestant concern with Catholic education was not limited to public funding. There was also widespread concern that Catholic education retarded the assimilation of Catholic immigrants into America’s democratic society. Public schools were seen as an “introduction to democratic habits, not simply a place to acquire skills.”²² Thus, Protestants feared that children attending parochial schools did not receive this introduction to democracy and that, worse, Catholic schools were instead indoctrinating students with a respect for authority that would incline these students toward authoritarianism and away from democracy.²³ Reaction to this fear led to the proposal of state laws requiring students to attend public schools.²⁴ Only Oregon’s proposed law passed, which resulted in another legal clash between Catholics and Protestants in *Pierce v. Society of Sisters*. In this 1925 ruling, the Court overturned Oregon’s law requiring students to attend public schools and affirmed the right of parents to send their children to parochial schools.²⁵

¹⁹ Roger K. Newman, *Hugo Black* 361 (1994).

²⁰ Jeffries & Ryan, *supra* note 18, at 300–01.

²¹ *Id.* at 300–02, 312–14.

²² John T. McGreevy, *Catholicism and American Freedom* 182 (2003).

²³ *Id.* at 175–82; see also Jeffries & Ryan, *supra* note 18, at 314.

²⁴ Such laws were proposed in Oregon, California, Texas, Oklahoma, Ohio, Wyoming, Arkansas, Nebraska, Michigan, and Washington. William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917–1927*, at 142–47 (1994). Efforts to propose similar laws were also made in Alabama. Philip Hamburger, *Separation of Church and State* 414 (2002).

²⁵ 268 U.S. 510, 534–36 (1925).

Though Protestants could not eliminate Catholic schools, they could still fight to prevent any public funding for them.

Prior to the 1930s, Catholics had some success in securing state funds for their schools, but when the debate over federal funds for grade school education began in the late 1930s, Catholics sought federal aid for parochial schools as well. This effort provoked a strong response from Protestants, Jews, and Liberals.²⁶ In 1941, three Baptist groups formed the Baptist Joint Committee on Public Affairs in order to fight the growing influence of the Catholic Church, especially on the issues of federal aid to parochial schools and publicly funded transportation to sectarian schools. One year later, the National Association of Evangelicals formed and took a strict separationist position with regard to aid for religious schools.²⁷ The American Civil Liberties Union (“ACLU”) joined these groups in opposing public funding for religious education, including transportation to religious schools.²⁸ Thus, the stage was set for the Supreme Court in *Everson* to adjudicate the latest clash between Protestants and Catholics over education.

Justice Black’s majority opinion in *Everson* did little to appease anyone on either side of the issue. For most of his opinion, he adopted Jefferson’s famous metaphor of the wall of separation, a “high and impregnable” wall, but in the end, Black concluded that New Jersey’s funding of transportation to Catholic schools did not breach that wall.²⁹ Black’s biographer writes, “The opinion drew criticism from all quarters. Black’s rhetoric and dicta contrasted too sharply with his conclusion and holding to satisfy anyone.”³⁰ The ACLU commented that “[t]he decision does not draw a clear line, nor does it settle a number of current problems involving separation of church and state.”³¹ The Joint Conference Committee

²⁶ Paul Blanshard, *Religion and the Schools: The Great Controversy* 23 (1963); Jeffries & Ryan, *supra* note 18, at 306–07, 312–18.

²⁷ Jeffries & Ryan, *supra* note 18, at 313–14.

²⁸ Supreme Court OK’s Private School Buses, *Wkly. Bull.* #1268 (ACLU, New York, N.Y.), Feb. 17, 1947, at 1, *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series I, Reel 11 (Microfilming Corp. of Am.).

²⁹ 330 U.S. at 16–18; see also Newman, *supra* note 19, at 363.

³⁰ Newman, *supra* note 19, at 363.

³¹ ACLU, Comment on the Supreme Court Decision in the New Jersey Bus Case (1947), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series IX, Reel 93, Frame 1947–3 (Microfilming Corp. of Am.).

2007]

Better a Catholic than a Communist

2077

on Public Relations for the Baptists of the United States released a resolution the day after *Everson* was decided stating that “[w]e deplore this opinion and are convinced that it will divide the people of the nation at a time when unity is greatly needed. In view of the religious heritage of America, which Associate Justice Black so eloquently reviewed, the decision is all the more to be deplored.”³² Protestant leaders in Chicago called for congressional action to override the decision in *Everson*.³³ Justice Black noted, however, that “the most severe and consistent criticisms of the opinion have come from leading Catholics. In fact their criticism . . . began at the very time when others were criticizing the opinion on the ground that it accorded . . . Catholic[s] . . . something which they were not constitutionally entitled to receive.”³⁴

If there had been any doubt that the issue of public funding for Catholic schools, not simply religious schools, was at the heart of the *Everson* case, Justice Jackson cut to the chase in his dissent. He wrote that the parochial schools at issue “are parochial only in name—they, in fact, represent a world-wide and age-old policy of the Roman Catholic Church. . . . Catholic education is the rock on which the whole structure rests”³⁵ Jackson went on to quote extensively from Catholic Canon Law regarding the requirement that Catholic children be educated in Catholic schools. He also noted that “the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies” and that American public schools were, “if not a product of Protestantism, at least . . . more consistent with it than with the Catholic culture and scheme of values.”³⁶ Justice Jackson, therefore, recognized that the public funding of transportation to parochial schools at issue in *Everson* was simply the latest episode in the long-running conflict between Protestants and Catholics over education funding.

The issue of public funding for Catholic schools had been contentious for decades and the ruling in *Everson* did nothing to quell the debate; in fact, it fanned the flames, especially with federal leg-

³² Baptists Hit Ruling on Catholic Schools, N.Y. Times, Feb. 12, 1947, at 27.

³³ John Evans, Leaders Here Comment, Chi. Daily Trib., Feb. 12, 1947, at 29.

³⁴ Newman, supra note 19, at 364.

³⁵ 330 U.S. at 22, 24 (Jackson, J., dissenting).

³⁶ Id. at 23.

2078

Virginia Law Review

[Vol. 93:2069]

islation pending in Congress concerning school funding, including provisions for assistance to parochial schools. Dr. Louie D. Newton, President of the Southern Baptist Convention, on the day *Everson* was decided, said,

I hope and pray that this ominous decision may serve to arouse the nation to support action by which the pressure of ecclesiasticism may be eliminated. The real battle in this war on the time honored control of religious liberty in the United States will take place in Congress when pending bills to provide federal funds for education with loopholes for use of such funds in parochial schools are argued.³⁷

Other Protestant leaders also turned their attention to the pending legislation and the impact *Everson* might have. For instance, Charles Clayton Morrison, editor of the *Christian Century*, claimed *Everson* should awaken Americans to the “strategy of the Roman Catholic Church in its determination to secure a privileged position in the common life of this country. . . . The Roman Church wants the state to provide for the complete support of its parochial schools with money derived from taxes levied on all citizens.”³⁸ Morrison contended that free textbooks and free bus transportation were the “thin edge of the wedge which would ultimately crack open the Constitution.”³⁹

The remainder of 1947 saw this debate over school funding intensify. Catholic leaders, such as Francis Cardinal Spellman, countered the calls of Protestant leaders by asserting that they were using *Everson* to stir up anti-Catholic sentiments in order to lead a “bigoted ‘crusade’ against the Roman Catholic church.”⁴⁰ Letters written to the editors of major newspapers following *Everson* demonstrate that the issue received nationwide attention and contemplation. For instance, a letter to the editor of *The Washington Post* claimed that “[a]ny attempt to read wicked and sinister meanings into the [*Everson*] decision must be chalked up to an attempt to fan

³⁷ Gladstone Williams, *Catholic Ruling Draws Newton's Ire*, *Atlanta Const.*, Feb. 11, 1947, at 5.

³⁸ *Edge of the Wedge?*, *Time*, Mar. 3, 1947, at 94, 94.

³⁹ *Id.*

⁴⁰ John M. Ferren, *Salt of the Earth, Conscience of the Court: The Story of Justice* Wiley Rutledge 266 (2004).

2007]

Better a Catholic than a Communist

2079

religious hatred and bigotry.”⁴¹ Another letter to the editor claimed that the *Everson* Court

made a noble and democratic decision which, without doubt, will nauseate all the bigots who have frightened fools with their tales of religious bigotry and, with renewed zeal, the apostles of malice and prejudice will now join forces with their brother bigots and put on a national campaign of malice and prejudice which, in eloquence, would become angels.⁴²

Liberal organizations found themselves in a quandary over whether to support much of the legislation providing for federal aid to schools. *The Nation*, a liberal weekly publication, noted the urgency with which states needed assistance in funding education but blamed the Catholic Church for blocking such legislation by demanding that Catholic schools also receive funding.⁴³ *The Nation* further intensified the debate between Catholics and non-Catholics (Protestants and secular modernists) when it published, between November 1947 and June 1948, a series of critical articles by Paul Blanshard concerning the Catholic Church's teachings with respect to medicine, sexual conduct, education, fascism, democracy, censorship, and science.⁴⁴ This series of articles created such uproar that the public school systems in New York City and Newark, New Jersey, removed the magazine from their libraries.⁴⁵

⁴¹ J.B. Ring, Letter to the Editor, “Church And State,” Wash. Post, Feb. 18, 1947, at 8.

⁴² Harry Daniels, Letter to the Editor, “Church And State,” Wash. Post, Feb. 18, 1947, at 8.

⁴³ Federal Aid and Catholic Schools, *Nation*, May 24, 1947, at 618.

⁴⁴ See Paul Blanshard, The Catholic Church and Democracy, *Nation*, June 5, 1948, at 630; Paul Blanshard, The Catholic Church and Democracy, *Nation*, May 29, 1948, at 601; Paul Blanshard, Roman Catholic Science, *Nation*, May 22, 1948, at 574; Paul Blanshard, Roman Catholic Science, *Nation*, May 15, 1948, at 521; Paul Blanshard, Roman Catholic Censorship, *Nation*, May 8, 1948, at 499; Paul Blanshard, The Catholic Church as Censor, *Nation*, May 1, 1948, at 459; Paul Blanshard, The Catholic Church and Fascism, *Nation*, Apr. 24, 1948, at 432; Paul Blanshard, The Catholic Church and Fascism, *Nation*, Apr. 17, 1948, at 416; Paul Blanshard, The Roman Catholic Church and Fascism, *Nation*, Apr. 10, 1948, at 390; Paul Blanshard, The Catholic Church and Education, *Nation*, Nov. 15, 1947, at 525; Paul Blanshard, The Sexual Code of the Roman Church, *Nation*, Nov. 8, 1947, at 496; Paul Blanshard, The Catholic Church in Medicine, *Nation*, Nov. 1, 1947, at 466.

⁴⁵ “Nation” Banning Stirs Wide Controversy, *Wkly. Bull. #1341* (ACLU, New York, N.Y.), July 5, 1948, at 2, *microformed on* The Am. Civ. Liberties Union Recs. & Pub-

Blanshard's articles, and the positive response they received from non-Catholic audiences, demonstrate that education was ground zero for what was seen as a larger political battle between Catholics on the one hand and a coalition of Protestants, Jews, and liberals on the other. In "The Catholic Church and Education," Blanshard acknowledged "that there has been a tremendous revival of anti-Catholic feeling in the United States in recent months, and its focal point is unquestionably the educational policy of the church."⁴⁶ Yet he contended that the opposition was not bigoted, but instead was in response to *Everson* and "the fight of various Catholic lobbies in Washington against any federal aid to education in which parochial schools do not share."⁴⁷ Blanshard argued that the Catholic Church was not just seeking funds for its schools but was actively opposed to public education, mandating that American Catholics boycott public schools, even declaring that Catholics had a duty not to pay taxes in support of public schools. Where public education could not be resisted entirely, Blanshard wrote that it was the goal of the Church "to place Catholics in key positions as teachers and officials in the public-school system."⁴⁸ Finally, Blanshard, a liberal secularist, echoed the sentiments of Morrison, the editor of *Christian Century*, declaring that in *Everson* "the battle lines were drawn for a much larger conflict, of which the bus fight was only a preliminary skirmish."⁴⁹ He too saw the *Everson* ruling as the thin edge of the wedge by which Catholics would seek complete public financial support of parochial schools and the "eventual establishment of Catholicism in all public classrooms, as in Spain and Italy."⁵⁰

This increased anti-Catholic sentiment may have been in response to events within the realm of education, but it was rooted in

lications, 1917-1975, Series I, Reel 11 (Microfilming Corp. of Am.); Removal of "Nation" from Newark, N.J. Libraries Upheld, Wkly. Bull. #1319 (ACLU, New York, N.Y.), Feb. 2, 1948, at 2, *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917-1975, Series I, Reel 11 (Microfilming Corp. of Am.). The removal of *The Nation* may suggest support for Catholicism, but this was limited to two cities with larger Catholic populations and was not representative of the rest of the country.

⁴⁶ Blanshard, *The Catholic Church and Education*, supra note 44.

⁴⁷ *Id.*

⁴⁸ *Id.* at 527-28.

⁴⁹ *Id.* at 528.

⁵⁰ *Id.*

2007]

Better a Catholic than a Communist

2081

a larger concern that Catholicism was fundamentally incompatible with democracy and American culture. For many liberals, Catholic schools differed from public schools in important respects that ultimately threatened democratic values. For instance, Blanshard asserted that Catholic schools were undemocratic institutions because a priest or bishop, ultimately responsible to Rome, controlled the schools. Furthermore, he claimed the schools taught intolerance and opposed national solidarity through certain teachings, such as that the “Pope is the head of a sovereign temporal power which has coequal rights with that of the government of the United States.”⁵¹

These assertions added to the concerns of many liberals, dating back to the 1920s and 1930s, that the Catholic Church was unduly sympathetic to fascist governments. Professor John McGreevy has written that “the divide between Catholics and liberals over [the establishment of fascist dictatorships in] Mexico, Italy, and, especially, Spain meant that extended analysis of connections between Catholicism and fascism appeared throughout the liberal press.”⁵² Prominent thinkers like the theologian Reinhold Niebuhr were willing to declare that “the Catholic Church has cast its lot with fascistic politics,” while the influential critic Lewis Mumford similarly regretted that “the Church has chosen to ally itself with democracy’s chief enemy, fascism.”⁵³ Many liberals also believed the Catholic Church had helped elements hostile to democracy advance within the United States. In particular, the pre-World War II popularity of Father Charles Coughlin, a Catholic priest whose anti-Semitic radio program led to the formation of various Christian Front groups, served as evidence to many that Catholicism enabled the spread of authoritarian politics.⁵⁴ Liberals also noted efforts by various Catholics, both lay and clerical, to suppress the views of academics, writers, and political agitators with which the Church disagreed, leading sociologist John Mecklin to complain that Catholics had “little sympathy with the democratic idea of free speech” and sustained only a “medieval conception of liberty.”⁵⁵

⁵¹ Id. at 525, 527.

⁵² McGreevy, *supra* note 22, at 173.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id. at 173–74.

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

B. The Debate over Released Time in 1947

In the midst of this tension over Catholicism and education was the subject of released time programs in public schools. In 1947, the year *Illinois ex rel. McCollum v. Board of Education* was argued, nearly a million American public school students in over ten thousand schools received Catholic religious instruction through released time programs.⁵⁶ In August of that year, the Catholic Central Verein of America, a national Catholic organization, cited, as evidence of persistent "prejudice and hatred against the Catholic church," opposition to an ambassador to the Vatican, untrue claims by Protestant leaders with regard to separation of church and state, opposition to furnishing transportation to parochial schools, and opposition to released time for religious instruction.⁵⁷ Released time programs allowed students at public schools, with the permission of their parents, to receive religious education during school hours. Individuals affiliated with local religious groups, who were not paid by the public schools, delivered the religious instruction. Parents indicated whether they wanted their child to receive education from the Catholic, Protestant, or Jewish instructor. Parents could also choose that their child not receive any instruction, in which case the child continued his or her secular studies. Most plans offered no more than one hour of religious education per week, and the instructors reported attendance to the school, which recorded it.⁵⁸

The debate over released time education did not simply pit Catholics against Protestants, Jews, and liberals, as the debate over

⁵⁶ Catholics in U.S. Rise to 25,268,173, N.Y. Times, June 13, 1947, at 27.

⁵⁷ Catholic Verein Says Bias Persists, N.Y. Times, Aug. 21, 1947, at 10.

⁵⁸ See, e.g., *Zorach*, 343 U.S. at 308 & n.1; *McCollum*, 333 U.S. at 205.

2007]

Better a Catholic than a Communist

2083

public funding of parochial schools had. Instead, while many of the parties took positions consistent with their stance on school funding, many Protestants supported released time education; others, however, including the Southern Baptists, joined the liberal groups in opposition. For example, at the American Education Fellowship conference held shortly after *Everson* was decided, members of various liberal groups, including the ACLU, the Ethical Culture Society, and the Planned Parenthood Federation, gathered to denounce released time education. They charged that “[r]eleased time religious instruction tends to emphasize sectarianism rather than create a dynamic for democratic living” and that following *Everson*, “other attempts will be made to break down the separation of church and state.”⁵⁹ Likewise, the National Community Relations Advisory Council (“NCRAC”) and the Synagogue Council of America jointly denounced released time practices.⁶⁰ Finally, Leo Pfeffer, in a pamphlet released by the American Jewish Congress (“AJC”), wrote that “[b]y bringing religious differences into the public schools, the [released time] program is a divisive influence, and in actual practice frequently promotes inter-religious friction and disharmony.”⁶¹

The Protestant Teachers Association countered that “released-time religious training classes . . . brought about better understanding among the major religious faiths,” and the superintendent of New York public schools denied that released time education was divisive.⁶² Meanwhile, Archbishop McNicholas, head of the National Catholic Educational Association, called for a “decrease [in] the deplorable tension between Catholic and public schools” and expressed his hope that “public school administrators will favor the released-time program as a practical method to eliminate the menace of religious illiteracy,” while not threatening “the most rigorous interpretation of American freedom of religion.”⁶³

⁵⁹ *New Methods Urged in Teaching Religion*, N.Y. Times, Mar. 15, 1947, at 11.

⁶⁰ *Religious Links to School Decried*, N.Y. Times, May 16, 1947, at 21.

⁶¹ *Sees Error in Plan of Religious Study*, N.Y. Times, Dec. 26, 1947, at 32.

⁶² *City School Training in Religion Is Hailed*, N.Y. Times, Nov. 16, 1947, at 17.

⁶³ *Unity Among Schools Urged by Archbishop*, N.Y. Times, July 6, 1947, at 38. Despite the cacophony of debate and the fierce opposition largely focused on the released time program in New York City, the New York legislature passed a bill on March 19, 1947, giving formal state approval to local released time plans that had been in place for years, as well as approving public funding for health and medical

C. The Justices' Awareness of the Religious Tension

The Court was conscious of the denominational hostility underlying the debate over the role of religion in schools. The Justices recognized that the public did not view *Everson* as a case simply concerning the establishment of religion, but rather as a case concerning the public funding of *Catholicism*. Justice Jackson acknowledged as much in his dissent, and other Justices acknowledged this internally when they thought their own religious backgrounds might prove significant to the outcome. Justice Murphy, the only Catholic on the Court, initially abstained in *Everson*, recognizing that the public perceived it as a Catholic case, even joking to Justice Rutledge that he was disqualified because it was “a Baptist-papist fight.”⁶⁴ His abstention became an issue when the Court deadlocked, with four votes to affirm and allow the busing program, and four votes to reverse and strike it down. Justice Frankfurter recognized the position in which Murphy found himself and sought to persuade him not to join the majority, despite Murphy’s Catholicism.⁶⁵ Likewise, once Murphy provided the decisive vote to the majority, Frankfurter took account of his own religious identity and felt he could not write a dissent because people would discount it as the anti-Christian view of a liberal Jew.⁶⁶

While Justices Murphy’s and Frankfurter’s religious backgrounds sensitized them to the sectarian undercurrents in *Everson*, their colleagues were similarly aware of the issues and the larger societal debate over Catholic education. As McGreevy has noted, several of the Justices “shared a suspicion of Catholic intentions” with respect to education.⁶⁷ In jest, Justice Douglas, during oral argument in *Everson*, passed a note to Justice Black stating, “[i]f the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business.”⁶⁸ Black, a former member of the Alabama Ku Klux Klan, had his own anti-Catholic history. During

services at both public and parochial schools. Pass Released-Time Bill: Both Houses Back Welfare Aid, Religious Teaching in State, N.Y. Times, Mar. 20, 1947, at 25.

⁶⁴ Sidney Fine, Frank Murphy: The Washington Years 568 (1984).

⁶⁵ Id. at 569–70.

⁶⁶ Id. at 569.

⁶⁷ McGreevy, *supra* note 22, at 184.

⁶⁸ Id. at 184–85.

2007]

Better a Catholic than a Communist

2085

his initial Alabama Senate campaign, Black reportedly “could make the best anti-Catholic speech you ever heard,” and during the 1928 presidential election, he vigorously opposed fellow Democrat Al Smith, the first Catholic presidential nominee by a major party.⁶⁹ This was more than just political posturing: Black’s son later related that his father “suspected the Catholic Church. He used to read all of Paul Blanshard’s books exposing the power abuse in the Catholic Church.”⁷⁰ Similarly, Frankfurter demonstrated his suspicion of the Catholic Church through his support for Blanshard. He corresponded with one of Blanshard’s proofreaders and advisers and secretly offered legal advice to those fighting the public school bans of *The Nation* following the publication of Blanshard’s articles criticizing Catholicism.⁷¹

Justice Burton had his own connection to Blanshard. Burton, a lifelong Unitarian, served as the national moderator of the American Unitarian Association, which represented all Unitarian parishes in the United States and Canada.⁷² While he was moderator, the American Unitarian Association, through Beacon Press, published the bestselling *American Freedom and Catholic Power*, the book that resulted from noted Unitarian Paul Blanshard’s earlier series of articles in *The Nation*.⁷³ Following the *Everson* decision, the American Unitarian Association sponsored an event at the Jefferson Memorial to celebrate Jefferson’s religious views. With four Supreme Court Justices in attendance, a Unitarian leader offered a veiled criticism of Catholicism when he called for a Christianity “free of all autocratic ecclesiastical control over the mind and conscience of its individual members.”⁷⁴

Finally, Justice Rutledge expressed his suspicion of Catholicism in a post-conference memo concerning *Everson*. He wrote that this case was “really a fight by the Catholic schools to secure this money from the public treasury. It is aggressive and on a wide

⁶⁹ Id. at 185.

⁷⁰ Id. at 186.

⁷¹ Id. at 185.

⁷² Thomas Blair, Harold Hitz Burton: Mayor, Senator, and Supreme Court Justice, <http://www.harvardsquarelibrary.org/unitarians/burton.html> (last visited Aug. 19, 2007); see also Athern Park Daggett, Introduction to *The Occasional Papers of Mr. Justice Burton*, at xi–xii (Edward G. Hudon ed., 1969).

⁷³ McGreevy, *supra* note 22, at 166, 185.

⁷⁴ Id. at 184.

scale. There is probably no other group which is either persistent in efforts to secure this type of legislation or insistent upon it.”⁷⁵ Rutledge clearly did not believe Catholic efforts to gain influence were limited to the funding issues addressed in *Everson*, but anticipated other challenges to the notion of separation of church and state expressed in his *Everson* dissent. On the same day that the Court delivered its opinion in *Everson*, *Time* magazine reported on what would become the next challenge to Rutledge’s conception: the Illinois Supreme Court had upheld the constitutionality of the Champaign released time program, making the U.S. Supreme Court the next stop for Mrs. Vashti McCollum’s suit to stop religious education in public schools.⁷⁶

II. MCCOLLUM: EVERSON REVISITED

A. McCollum as a Catholic Case

These connections to anti-Catholic organizations and authors do not suggest that these Justices simply voted against the Catholic position; Justice Black’s opinion in *Everson v. Board of Education* is confirmation of that.⁷⁷ The evidence of a general level of suspicion toward Catholic educational policies, as well as evidence that the Justices viewed *Everson* as a “Catholic case,” does, however, increase the likelihood that the Justices would view the upcoming *McCollum* case as another “Catholic case.” Further, it is likely that many of the Justices were skeptical of Catholic motivation in support of released time.

In late November 1947, a week and a half before the Supreme Court heard oral argument in *McCollum*, the released time controversy was hotly debated among the public, and the debate was well documented by the nation’s newspapers. *The Washington Post*, for example, reported on a speech given in Texas in opposition to released time. Mrs. Eugene Meyer, wife of the chairman of the board of *The Washington Post*, told the Texas State Teachers Association that released time programs increased sectarian division. She also called on Catholic leaders to support the separation of church and state, including the reasoning and limitations to state support of

⁷⁵ Id. at 185.

⁷⁶ Camel’s Nose?, *Time*, Feb. 10, 1947, at 61.

⁷⁷ See *supra* notes 29–30 and accompanying text.

2007]

Better a Catholic than a Communist

2087

parochial schools set forth in *Everson* by Justices Black and Rutledge.⁷⁸ As an editorial published the day of the *McCollum* oral argument demonstrates, many people saw *McCollum* and the released time debate as another issue in the battle between Catholics and Protestants. The editorial board of *The Washington Post* contended that “[t]he violent debates now raging between Protestant and Catholic church leaders have necessarily been carried over into the schools by the released-time program.”⁷⁹

To *The Washington Post*, and many Americans, released time was yet another issue that found Protestants and Catholics on divergent sides, with Catholics supporting the programs and Protestants opposing them. On their face, the released time plans around the country seemed neutral, allowing parents to choose Catholic, Protestant, or Jewish instruction for their children. In practice, however, Catholic students were more likely to participate in released time religious instruction. This was likely the situation because, as Justice Jackson noted, the public schools were already very Protestant, often including daily scripture readings from the King James Bible and nondenominational prayers.⁸⁰ Because of the greater likelihood of Catholic student participation and the Catholic leadership’s vocal support for released time programs, these programs came to be seen as a potential means for Catholics to gain a foothold in public schools. Citing the New York City released time program, *The Washington Post* stated that, of the 110,000 participants, “80 per cent are Catholic, 15 per cent Protestant, and 5 per cent Jewish.”⁸¹ The overwhelming number of Catholic participants, according to *The Washington Post*, explained why Catholics, a minority group generally, were able to exert their influence in public schools located in Catholic-dominated boroughs and neighborhoods, such as Brooklyn.⁸² And, *The Washington Post* predicted, this scenario would repeat itself, as one would expect,

⁷⁸ Religious Training in Public School Released Time Opposed, Wash. Post, Nov. 29, 1947, at 11.

⁷⁹ Editorial, Church and School, Wash. Post, Dec. 8, 1947, at 10.

⁸⁰ *Everson*, 330 U.S. at 23 (Jackson, J., dissenting).

⁸¹ Editorial, supra note 79.

⁸² Id.

until “we shall soon have Protestant, Catholic or Jewish public schools, with rebellious minorities everywhere.”⁸³

On December 8, 1947, the U.S. Supreme Court heard two hours of oral argument in *McCullum* on the released time program offered by the Champaign, Illinois, public schools. Vashti McCollum, an atheist, brought suit on behalf of her son, James Terry McCollum.⁸⁴ The Champaign Council of Religious Education, a private organization, had established a released time program in the Champaign public schools in 1940. The council paid for instructors, materials, and incidentals in order to provide religious education to students in grades four through nine. Elementary students received thirty minutes of instruction per week, while the junior high school students received forty-five minutes of instruction per week. The program offered Catholic, Protestant, and Jewish classes, but additional groups were able to participate on equal terms, and parents had the option of sending their child to any of the offered classes or to none at all.⁸⁵ The religious instructors conducted class in public school classrooms and reported attendance to school authorities.⁸⁶ Mrs. McCollum claimed that religious instruction in the public schools constituted state support for religion, which violated the First Amendment’s Establishment Clause as applied to the states through the Fourteenth Amendment. She also claimed the program violated the Illinois and federal constitutional guarantees of freedom of religion because the program was voluntary in name only. By segregating students into religious groups, she argued, those not affiliated with any group felt embarrassed and stigmatized, resulting in a pressure to conform by joining one of the religious groups. These subtle pressures amounted to an abridgment of her son’s religious freedom.⁸⁷

While the clash over released time education was not strictly between Catholic and non-Catholic groups, there was a presumption among many that *McCullum* was an opportunity to stop the

⁸³ *Id.*

⁸⁴ *People ex rel. McCollum v. Bd. of Educ.*, 71 N.E.2d 161, 162 (Ill. 1947); *Baptists Back Fight on School Religion Class*, *Chi. Daily Trib.*, Nov. 17, 1947, at 41.

⁸⁵ *McCullum*, 71 N.E.2d at 162–63.

⁸⁶ *McCullum*, 333 U.S. at 209.

⁸⁷ *Id.* at 207 n.1; *McCullum*, 71 N.E.2d at 164.

2007]

Better a Catholic than a Communist

2089

growth, portended in *Everson*, of Catholic influence in education.⁸⁸ Examining the groups that filed amicus briefs, it is apparent that many Protestants were undeterred by McCollum's atheism and were willing to support her fight against released time education. The only religious group to support the Champaign Board of Education with an amicus brief was the Protestant Council of New York, which sought to defend its own released time program. In contrast, the Southern, Northern, and National Baptist Conventions filed amicus briefs on behalf of Mrs. McCollum, as did the Seventh Day Adventists, the American Unitarian Association, the Synagogue Council of America, and the NCRAC.⁸⁹ Liberal groups, such as the ACLU and the American Ethical Society, also filed amicus briefs in support of McCollum.⁹⁰

Within the Court, it is not as clear that the Justices saw *McCollum* as a strictly Catholic issue, although they certainly saw it as part of the separation of church and state debate, which, as discussed above, was in large part about Catholicism. Nonetheless, Justice Frankfurter saw the Champaign released time program as a "Protestant move to get members [and] support."⁹¹ Likewise, Justice Jackson viewed the released time program in Champaign as primarily Protestant. In the *McCollum* conference, he commented

⁸⁸ The ACLU's amicus brief reminded the Court that *Everson* had "left doubts in the minds of many and has caused great controversy" and that *McCollum* was an "opportunity [to] restat[e] and apply[] the great principles of religious freedom and separation." Brief of American Civil Liberties Union as Amicus Curiae at 39, *McCollum*, 333 U.S. 203 (No. 90). The ACLU also tied *McCollum* to *Everson* by asserting that the "[t]wo great drives . . . to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made" were the introduction of "religious education and observances into the public schools" and efforts "to obtain public funds for the aid and support of various private religious schools." *Id.*

⁸⁹ Dillard Stokes, Supreme Court Urged to Ban Public School Bible Classes, Wash. Post, Dec. 9, 1947, at 1. In their amicus brief, the Synagogue Council of America and the NCRAC did include a strong statement disclaiming their support for McCollum's "anti-religious views" and "deplor[ing] the fact that the sponsors of the original petition chose this case as a means of inscribing such anti-religious matter on the public record and for confusing the basic issue in this case by dragging into it the unrelated issues of atheism versus religion." Brief of Amici Curiae and Motion of the Synagogue Council of America and the National Community Relations Advisory Council at 6, *McCollum*, 333 U.S. 203 (No. 90).

⁹⁰ Stokes, *supra* note 89; see also *infra* notes 140–44 and accompanying text.

⁹¹ Douglas conference notes, Ill. ex rel. McCollum v. Bd. of Educ. (Dec. 13, 1947) (LOC, Douglas Papers, Box 141, Case File No. 90).

that the “support of Catholics with transportation [and] denial of Protestants of this right loads the dice in this country.”⁹² According to Justice Douglas’s conference notes, the other Justices apparently did not indicate any view at conference with respect to whether the Champaign plan primarily benefited Catholics or Protestants. Chief Justice Vinson and Justices Black and Rutledge simply voted to reverse, while Justice Murphy, who had been absent due to illness during oral argument, passed at conference. Justice Burton believed the issue in *McCollum* was the intermingling of church and school through the rent-free use of the school buildings by the religious groups. Burton made it clear that the Court was not considering the New York released time plan, which he seemed to presume was a “proper [and] constitutional method of” releasing children part time for religious education.⁹³ Justice Reed saw the case as simply a question of whether or not religious groups could use public facilities; as he believed they could, his was the only vote to affirm.⁹⁴

Given that none of the Justices discussed *McCollum* at conference in terms of Catholicism, and two Justices explicitly saw it as a Protestant case, it might be easy to dismiss a claim that concerns over Catholic involvement in education influenced the Court. It is clear, however, that even as the Court considered granting certiorari to Mrs. McCollum’s appeal, it viewed the case in terms of *Everson*. One of Justice Douglas’s clerks, in a memo regarding whether the Court should accept the case, wrote, “On the merits it seems to me a close and difficult case. . . . Perhaps this is the time to put reinforcements in the wall between church and state for which *Everson* drew the blueprints. Here the religion is moved right in to the school buildings.”⁹⁵ One author has concluded, after reviewing Justice Burton’s conference notes for *McCollum*, that “most of the Court’s attention in *McCollum* was focused on the problem of the status of *Everson*.”⁹⁶ Given that the Justices per-

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Memorandum from Justice Douglas’s Clerk, JRW, to Justice Douglas, People ex rel. McCollum v. Bd. of Educ. (May 27, 1947) (LOC, Douglas Papers, Box 161, Case File No. 90).

⁹⁶ Alito, *supra* note 11, at 1211, 1219.

2007]

Better a Catholic than a Communist

2091

ceived *Everson* as a Catholic case and that *McCollum* was, except in Justice Reed's view, about the status of *Everson*, *McCollum* was necessarily a case concerned with addressing the issues raised in *Everson*—namely the increasing influence of Catholicism on education. Thus, *McCollum* again raised the issues of Catholicism and education, issues that, following *Everson*, had resulted in increased anti-Catholicism.

While the Court heard oral argument, deliberated, and wrote its opinions, the debate over Catholic educational policies continued in society at large. Protestants and Other Americans United for the Separation of Church and State ("POAU"), an organization formed in response to the *Everson* ruling with the sole purpose of defending the separation of church and state, engaged in a heated exchange with the National Catholic Welfare Conference ("NCWC") over Catholic involvement in public education, as well as the controversy surrounding the appointment of an ambassador to the Vatican.⁹⁷ POAU initially called for an end to the ambassadorship to the Vatican and announced "an effort . . . to prevent public support of sectarian schools" in its "manifesto" issued on January 11, 1948.⁹⁸ This prompted responses from the Knights of Columbus, as well as the NCWC. The Knights of Columbus's response declared that POAU would "fall of its own weight because, despite its disavowal of anti-Catholicism, it is loaded with an intolerance generally unacceptable to the American people as a whole." Furthermore, the Knights of Columbus characterized the manifesto as an attack on the patriotism of anyone, especially Catholics, who disagreed with POAU's interpretation of the First Amendment.⁹⁹ John T. McNicholas, Archbishop of Cincinnati, responded on behalf of the NCWC that Catholics were not seeking to destroy the separation of church and state by seeking funding for parochial schools. Instead, he asserted that "[d]espite the dogmatic assertions of the [POAU], there is no authoritative interpretation of the First Amendment" and that "[o]ur history shows many precedents of

⁹⁷ Jeffries & Ryan, *supra* note 18, at 315–16; Protestant Group Hits Parochial Aid, N.Y. Times, Mar. 8, 1948, at 20.

⁹⁸ K. of C. Criticizes 'Separation' Drive, N.Y. Times, Jan. 13, 1948, at 1; Protestant Group Hits Parochial Aid, *supra* note 97.

⁹⁹ K. of C. Criticizes 'Separation' Drive, *supra* note 98.

government aid to private schools.”¹⁰⁰ McNicholas concluded by declaring that the manifesto was “not as crude as those issued by Know-Nothing-ism or Ku-Kluxism, but certainly one bound to arouse intolerance, suspicion, hatred and conflict between religious groups.”¹⁰¹

Just before the Court delivered the *McColum* decision, POAU challenged Archbishop McNicholas’s claim that Catholics were not attempting to destroy the separation of church and state by pointing to an incident within McNicholas’s own Cincinnati archdiocese. POAU asserted in an open letter that the Catholic-majority school board of North College Hill, a suburb of Cincinnati, had incorporated a parochial school into the public school system, paid the salaries of the nuns serving as teachers, and paid rent to the archdiocese for use of the building.¹⁰²

Thus, as the Justices considered the issue of released time education, they were surrounded by a raging debate over the activities of Catholics in relation to schools and to world politics. The debate began well before their decision in *Everson*, but the decision served to fuel the debate and added to the outcry. In the months leading to oral argument in *McColum*, the Court was aware of the continuing debate and, in the months following oral argument, the debate escalated. Additionally, the Court’s internal disagreements over *Everson* resurfaced with *McColum*, causing the Justices to revisit their entire debate over the separation of church and state doctrine in the public school context. In this environment, the Justices must have considered the implications their decision would have and, given their own suspicions of Catholicism, it seems likely that they were influenced by the wider church-state and Catholic-Protestant debates occurring at the time. In the end, the Court declared that the Champaign plan was an unconstitutional violation of the Establishment Clause on two separate grounds: first, that use of the physical facilities constituted financial support for religious instruction; and second, that use of the compulsory education laws constituted coercive state action.¹⁰³

¹⁰⁰ Denies Catholics Oppose Separation, N.Y. Times, Jan. 26, 1948, at 17.

¹⁰¹ Id.

¹⁰² Protestant Group Hits Parochial Aid, supra note 97.

¹⁰³ *McColum*, 333 U.S. at 212.

2007]

Better a Catholic than a Communist

2093

B. Reaction to McCollum

Reactions to the *McCollum* decision fell along expected lines. As the *Chicago Daily Tribune* reported, the Court's decision "was received with mixed emotions by religious leaders yesterday. The range was from jubilation to stunned silence."¹⁰⁴ Roman Catholics denounced the decision, the POAU praised it, and Baptists both praised and denounced the ruling.¹⁰⁵ Most newspaper editorials hailed the decision. In a survey of eighteen different newspapers, only two wrote editorials opposed to the decision.¹⁰⁶ The *Chicago Daily Tribune* wrote that, though the Champaign plan "was as inoffensive a plan as could well have been devised," the Justices' ruling "conform[s] pretty accurately to [the views] of the bulk of the population of this country. Most of us are glad that the question has been settled as it has been." Additionally, "[t]he decision is doubly welcome because the question of the division of church and state, particularly as it concerns the schools, has been making for a good deal of ill-will lately between Catholics and Protestants."¹⁰⁷ While the editors recognized the possible naïveté of their hope that tensions between the two camps would ease, they did not realize that their claim that "[t]he decision of the court seems to have settled the main question involved in the controversy" would prove so incorrect.¹⁰⁸

Immediately upon the delivery of the *McCollum* opinion, school administrators and state attorneys general sought to determine the impact of the decision on their schools' plan of religious education. Likewise, organizations like the ACLU sought to extend the ruling

¹⁰⁴ John Evans, Bible Teaching Decision Brings Mixed Reaction, *Chi. Daily Trib.*, Mar. 10, 1948, at 19.

¹⁰⁵ Eugene Gressman, Mr. Justice Murphy—A Preliminary Appraisal, 50 *Colum. L. Rev.* 29, 31–32 (1950); Evans, *supra* note 104; Newton Hails Decision on Religious Courses, *Atlanta Const.*, Mar. 9, 1948, at 4.

¹⁰⁶ See Stuart Nagel & Robert Erikson, Editorial Reaction to Supreme Court Decisions on Church and State, 30 *Pub. Opinion Q.* 647, 649 (1966–67) (reviewing twenty-four newspapers, of which eight supported the *McCollum* decision, seven did not run an editorial on the decision, seven were unavailable, and two, the *St. Louis Globe* and *Dallas Morning News*, opposed the decision); Editorial, The Supreme Court's Illinois School Decision, *Sun (Balt.)*, Mar. 10, 1948, at 12 (supporting the *McCollum* decision, though not included in Nagel and Erikson's analysis).

¹⁰⁷ Editorial, Religion in the Schools, *Chi. Daily Trib.*, Mar. 12, 1948, at 20.

¹⁰⁸ *Id.*

to all released time programs.¹⁰⁹ In Champaign, the president of the Illinois Church Council believed the decision meant “that religious education in local schools is ‘now out the window’ and that the decision probably ‘clears up the matter once and for all.’”¹¹⁰ In Chicago, where students left school property to receive their released time religious education, it was unclear whether the Court’s ruling reached all released time programs or just those conducted on school property.¹¹¹ In Maryland, administrators suspended released time classes on school property and churches arranged for them to continue off school grounds.¹¹² The Washington, D.C., schools did not have a released time program but expressed uncertainty as to whether the Court’s ruling impacted their practice of daily Bible reading and recitation of the Lord’s Prayer.¹¹³ Meanwhile, the Fairfax, Virginia, school board decided to continue its program of religious instruction in its public schools pending the Virginia Attorney General’s interpretation of *McCullum*; it also expressed the opinion that the Court did not intend to reach morning Bible reading or recitation of the Lord’s Prayer.¹¹⁴ And in Georgia, the Assistant Attorney General opined that the Court’s ruling did not render unconstitutional the state law requiring daily Bible reading in public schools.¹¹⁵

III. TOWARD *ZORACH*

A. *The Impact of McCollum in New York*

While school districts across the country wrestled with what exactly *McCullum* prohibited, attention focused more intensely on the New York City public schools and their released time program. The size of the New York City public schools and the number of

¹⁰⁹ Minutes of the Meeting of the Board of Directors of the ACLU ¶ 3 (Mar. 15, 1948), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series I, Reel 11 (Microfilming Corp. of Am.).

¹¹⁰ Ruling in Religion Dispute Is Pleasing to Vashti McCollum, Chi. Daily Trib., Mar. 9, 1948, at 16.

¹¹¹ John Evans, Church Council Acts to Retain Bible Teaching, Chi. Daily Trib., Mar. 11, 1948, Pt. 3, at 4.

¹¹² School-Church Classes Closed in 2 Md. Towns, Wash. Post, Mar. 11, 1948, at B1.

¹¹³ Schools Continue Prayer Recitation, Wash. Post, Mar. 12, 1948, at 20.

¹¹⁴ Fairfax School Bible Studies Continuing, Wash. Post, Mar. 17, 1948, at 1.

¹¹⁵ School ‘Bible Reading’ Not Illegal, Shaw Says, Atlanta Const., Mar. 10, 1948, at 2.

2007]

Better a Catholic than a Communist

2095

participants in their released time program guaranteed the attention of many groups opposing released time. The battle over the New York program was forecast by the amicus brief filed in support of released time by the Protestant Council of New York and the amici briefs filed in opposition by the ACLU and the Synagogue Council of America, both headquartered in New York City.¹¹⁶ These briefs ensured that the Justices were familiar with the New York plan, which was identical to the Champaign plan, except that the religious instruction in New York occurred off school grounds.

In fact, Justice Reed's dissent specifically addressed the New York plan, and Justice Frankfurter made a passing reference to, presumably, the New York plan.¹¹⁷ Frankfurter wrote that "[w]e do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial."¹¹⁸ Frankfurter's argument directly reflects Justice Burton's words in conference when he stated that the "released time issue in NY is not before us."¹¹⁹ In conference, however, Justice Burton went on to take a strong position on the constitutionality of the New York plan. According to Justice Douglas's conference notes, not only did he say that the New York plan was not before the Court, but he thought they should "use" the *McColum* decision "to make that clear" because, in New York, "they have found . . . a proper [and] constitutional method of letting [released time] be done."¹²⁰ In contrast, he said, "released time [in *McColum*] is interlocked with the school system—[the] system is used for religious education," and while "religious groups might rent a school [building]. . . here there is intermingling of church [and] school."¹²¹

The uncertainty Justice Reed expressed in his *McColum* dissent regarding the constitutionality of the New York plan under the majority opinion, as well as the debate that would ensue and eventu-

¹¹⁶ Stokes, *supra* note 89.

¹¹⁷ *McColum*, 333 U.S. at 250–52 & nn.20–21 (Reed, J., dissenting); *id.* at 231 (Frankfurter, J., concurring).

¹¹⁸ *Id.* at 231 (Frankfurter, J., concurring).

¹¹⁹ Douglas conference notes, *Ill. ex rel. McColum v. Bd. of Educ.* (Dec. 13, 1947) (LOC, Douglas Papers, Box 141, Case File No. 90).

¹²⁰ *Id.*

¹²¹ *Id.*

ally result in *Zorach v. Clauston*, indicates that the Court did not, as Justice Burton had urged, “make it clear” that the New York plan was constitutional. In his dissent, Justice Reed wrote that both Justice Black’s majority opinion and Justice Frankfurter’s concurrence “seem to leave open for further litigation variations from the Champaign plan.”¹²² This was likely a reference to the New York plan given the amici briefs and the discussion in conference. Reed went on:

I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional. Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council’s instructors? None of the reversing opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional.¹²³

Various groups immediately confirmed Reed’s speculation that further litigation would ensue. *The New York Times* reported the day after the Court delivered the *McCollum* decision that both the Public Education Association (“PEA”) and the United Parents Association (“UPA”) predicted legal action against New York’s released time program.¹²⁴ On March 10, 1948, two days after the Court rendered its decision, the ACLU issued a press release stating its belief that *McCollum* “invalidated all systems of released time for religious education,” including the New York system under which “250,000 New York City pupils are released during school hours for religious instruction away from school.” Accordingly, the ACLU indicated it would pursue litigation to enforce its

¹²² *McCollum*, 333 U.S. at 239–40 (Reed, J., dissenting).

¹²³ *Id.* at 240.

¹²⁴ Expect Fight Here on ‘Released Time,’ N.Y. Times, Mar. 9, 1948, at 20.

2007]

Better a Catholic than a Communist

2097

view of *McCollum*.¹²⁵ That same day, the New York City Superintendent of Schools virtually guaranteed litigation over the New York system when he announced that he did not believe *McCollum* had any bearing on the New York system.¹²⁶ The school board's attorney proved prescient when he said he "thought it would take another Supreme Court decision to 'settle this for New York City.'"¹²⁷ Meanwhile, the Synagogue Council of America and the NCRAC joined the ACLU in expressing the view that, after *McCollum*, the New York City plan was also unconstitutional.¹²⁸ Leo Pfeffer, of the AJC, attacked the distinction that the Champaign plan involved the use of public school classrooms, whereas the New York City plan did not. He argued that, given the amicus brief by the Protestant Council of New York, the Justices were familiar with the differences between the two systems, and, notwithstanding Justice Frankfurter's disclaimer, had the Court "intended to limit its decision to the Champaign pattern it would . . . expressly have said so."¹²⁹

B. The Role of Atheism

As school districts and groups opposed to released time programs debated the significance of the location of the instruction, either on school grounds, as in the Champaign plan, or off-grounds, as in the New York plan, the rest of the country reacted to the Court's decision as well. As mentioned above, newspaper editorials largely supported the decision, but the decision also prompted responses critical of the Court. Many of the letters to the editor highlighted that Vashti McCollum was an atheist.¹³⁰ Obviously, not everyone cited McCollum's atheism as cause for concern: recall she

¹²⁵ Press Release, ACLU, ACLU Holds *McCollum* Decision Bans All Religious Teaching Plans (Mar. 10, 1948), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917-1975, Series I, Reel 11 (Microfilming Corp. of Am.).

¹²⁶ Court Religious Ban Held Not to Affect City Schools, N.Y. Times, Mar. 10, 1948, at 1.

¹²⁷ *Id.*

¹²⁸ See *id.*

¹²⁹ Leo Pfeffer, Letter to the Editor, Religion in the Schools, N.Y. Times, Mar. 12, 1948, at 22.

¹³⁰ See, e.g., Dan J. Loden, Letter to the Editor, Atheism and the Courts, Sun (Balt.), Mar. 12, 1948, at 16; E.B. Stout, Letter to the Editor, Religion in Schools, Wash. Post, Mar. 15, 1948, at 8.

had the support of the Southern Baptist Convention. In response to a letter to the editor stressing Mrs. McCollum's atheism, one writer addressed the issue: "Because of Mrs. McCollum's avowed atheism, many persons . . . have lost sight of the real issue behind the court's decision. The real reason is that the Constitution provides for the complete separation of church and state." The writer concluded, "It is the will of the American people, rather than the mere whim of Mrs. McCollum, that has wrought this decision."¹³¹

Others joined in downplaying McCollum's atheism as the motivation for her suit. These groups claimed atheism had nothing to do with the lawsuit or the outcome, but rather, that the Court's decision was merely an affirmation of the traditional American position on the separation of church and state and that it was actually in support of religion. The ACLU's legal counsel said, "The fact that Mrs. McCollum happens to be a rationalist or atheist is of no significance whatever The principle decided by the Supreme Court would have been just as applicable whether she were a Protestant or a Catholic, a Christian or a non-Christian, a believer or a non-believer."¹³² The Institute on Church and State wrote, "Finally, it should be emphasized that the McCollum decision is in the interests of religion and not opposed to it. The men who wrote the First Amendment were, and the members of the Supreme Court today are, the friends and not the enemies of religious conviction."¹³³ And Dr. George E. Beauchamp of the Washington Ethical Society wrote that, because of the Court's decision, "[t]he home and church will assume fully the responsibilities rightfully theirs."¹³⁴

Despite these claims that the *McCollum* decision had nothing to do with atheism, the connection between McCollum's atheism and the Court's decision continued to appear in the press. Monsignor John S. Middleton, secretary for education of the Archdiocese of New York, declared that "[t]hrough the 'articulate atheism of one parent' the 'rights of all parents to freedom of religious education

¹³¹ Dorothy W. Frohman, Letter to the Editor, Religion in the Schools, Wash. Post, Mar. 19, 1948, at 22.

¹³² Press Release, ACLU, supra note 125.

¹³³ Vivian T. Thayer et al., Institute on Church and State, Letter to the Editor, Religion in the Schools, N.Y. Times, Apr. 15, 1948, at 24.

¹³⁴ George E. Beauchamp, Letter to the Editor, Religion in the Schools, Wash. Post, Mar. 19, 1948, at 22.

2007]

Better a Catholic than a Communist

2099

for their children are in danger of being invaded in this country.”¹³⁵ In fact, he attributed the Court’s decision to McCollum’s atheism, saying that “[t]he atheism of one parent wrung from the Supreme Court of the United States the dangerous and disconcerting decision on released time in the notorious Champaign case.”¹³⁶ In addition, people connected atheism with the communist and totalitarian threats of the day. Just four days after the *McCollum* decision, one *Washington Post* reader wrote against the activities of POAU on these grounds:

It was with much personal distaste that I read the March 8 account of the latest doings of the Protestants and others united for separation of church and state [sic]. The action seems to me to be extremely short-sighted when read in the context of your front page. With the Communist threat to Europe increasing every day why is it that here at home there is so much sniping at the only group which is really united against the threat?

In fact it seems almost diabolical that the target is religious education which is our strongest bulwark against atheistic communism.¹³⁷

This sentiment existed prior to *McCollum*, but it became more prevalent after the Court’s decision and played a key role in future litigation over the New York released time program.¹³⁸

¹³⁵ Parents Are Urged to Defend ‘Rights,’ N.Y. Times, Sept. 13, 1948, at 15.

¹³⁶ Id.

¹³⁷ Edward Mitchell, Letter to the Editor, Catholic Schools, Wash. Post, Mar. 12, 1948, at 22.

¹³⁸ See *Delaying of Peace Is Laid to Russia*, N.Y. Times, May 19, 1947, at 19 (“The Archbishop at the breakfast denounced the proposal to eliminate ‘released time’ Terming the proposal ‘distinctly pro-Nazi,’ [the Archbishop] said it was ‘an attack upon the religious freedom upon which this country was founded’ and that, far from severing religion and state, it would ‘lead to Government-sponsored religion as in a totalitarian state.’”) Part of Charles Tuttle’s amicus brief on behalf of the Protestant Council of the City of New York argued that the New York released time plan was an “antidote” to the “secularism and her twin-sister materialism” that were responsible for the “disorders and tragedies of our times.” Tuttle argued that the New York plan allowed parents to fulfill “what they regard as their high duty not only toward their children but toward the system of public education itself and toward democracy itself.” Petition and Brief, Amicus Curiae, by the Protestant Council of the City of New York at 19–26, *McCollum*, 333 U.S. 203 (No. 90). The Supreme Court’s disregard for this argument in 1948 and its recognition of it, in the form of Douglas’s appeal to re-

Though Mrs. McCollum's atheism was widely reported before she appealed her lawsuit to the Supreme Court, this did not prevent religious organizations or others from supporting her cause and largely doing so without any reservations or public disclaimers.¹³⁹ For most, Mrs. McCollum's atheism was a nonissue. The Champaign School Board was even willing to argue in its brief to the Supreme Court that its released time plan would permit "[a]dditional groups, even atheists, . . . to participate in the program on the same terms [as the Protestant, Catholic, and Jewish groups]."¹⁴⁰ Similarly, in December 1947, the ACLU issued a press release publicizing its amicus brief in support of McCollum's position. The ACLU felt no pressure to include a statement distancing itself from McCollum's atheism.¹⁴¹ Likewise, in its March 10, 1948,

ligion, in 1952 suggest that circumstances had changed in the years between *McCollum* and *Zorach* and that those changes affected the Court.

¹³⁹ See *Camel's Nose?*, supra note 76 ("Mrs. Vashti McCollum, 33, an angry atheist of Champaign, . . . planned to appeal to the U.S. Supreme Court. . . . Religion, fumed Mrs. McCollum, is 'a racket based on fear and prejudice and a chronic disease of the imagination contracted in childhood.'"); Stokes, supra note 89; see also note 89 and accompanying text. But see Brief of Amici Curiae and Motion of the Synagogue Council of America and the National Community Relations Advisory Council, supra note 89, at 5-7 ("We wish to make clear our regret that the appellant chose to use this case as a medium for the dissemination of her atheistic beliefs and injected into the record the irrelevant statements it contains. We wish not only to dissociate ourselves completely from the anti-religious views of the appellant, but wish also to deplore the fact that the sponsors of the original petition chose this case as a means of inscribing such anti-religious matter on the public record and for confusing the basic issue in this case by dragging into it the unrelated issues of atheism versus religion."). It is true that this one brief, out of the many filed in 1948, expressed concern about McCollum's atheism and might even suggest, contrary to the contention of this Note, that atheism was a more significant concern in 1948 than were the Catholics. However, the fact that the Court apparently disregarded this concern about atheism in 1948, yet acknowledged it in 1952, in the form of Douglas's appeal to religion, strengthens the claim that something changed in the years between *McCollum* and *Zorach* and that this change had an influence on the Court.

¹⁴⁰ Statement Opposing Jurisdiction and Motion to Dismiss at 6, *McCollum*, 333 U.S. 203 (No. 1374).

¹⁴¹ Press Release, ACLU, For Release Sunday, December 7, 1947, *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917-1975, Series I, Reel 11 (Microfilming Corp. of Am.). In its amicus brief of over forty pages, the ACLU did include the following sentence: "By this brief we do not, expressly or impliedly, criticize religion or religious sects or private denominational schools." Brief of American Civil Liberties Union as Amicus Curiae at 2, *McCollum*, 333 U.S. 203 (No. 90). The limited nature of this disclaimer when compared to the disclaimers employed following the

2007]

Better a Catholic than a Communist

2101

press release, the ACLU did not distance itself from any perceived attack on religion, although it did downplay McCollum's atheism.¹⁴²

In contrast, following the *McCollum* decision, as the connection between atheism and communism became a focus, the ACLU, in opposing released time, always included a statement clarifying that it was not opposed to religion, but simply opposed to religion in public schools.¹⁴³ As discussions regarding a test case to challenge the New York released time program went forward, the ACLU was acutely aware of avoiding the atheism label then being applied to the *McCollum* decision. The concern with the stigma attached to atheism quickly expanded to include concern over the communist and totalitarian labels that were concomitant with atheism.

As noted earlier, immediately after the Court handed down the *McCollum* decision, groups opposed to released time announced their intention to bring a test case in New York.¹⁴⁴ The Society of Free Thinkers, a group of atheists and rationalists, announced through Arthur C. Cromwell, president of the Rochester chapter and father of Vashti McCollum, its intention to bring court action.¹⁴⁵ On May 5, 1948, the Freethinkers of America brought suit through Joseph Lewis, their president, against the Commissioner of Education of the State of New York and the Board of Education of the City of New York.¹⁴⁶

McCollum decision, see *infra* note 143, supports the claim that the ACLU was not concerned about being associated with atheism.

¹⁴² Press Release, ACLU, *supra* note 125.

¹⁴³ As a general example, see the ACLU Press Release of November 1, 1949, asserting the ACLU position on released time:

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

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

Press Release, ACLU (Nov. 1, 1949), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917-1975, Series I, Reel 11 (Microfilming Corp. of Am.).

¹⁴⁴ See *supra* note 124 and accompanying text.

¹⁴⁵ Court Religious Ban Held Not to Affect City Schools, *supra* note 126.

¹⁴⁶ Suit on 'Released Time,' N.Y. Times, May 6, 1948, at 25.

The ACLU had the opportunity to join a Humanist-Freethought sponsored lawsuit, and, presumably, it could have joined the Lewis suit given that Arthur Garfield Hays, counsel to the ACLU, served in a private capacity as Lewis's attorney.¹⁴⁷ Because of its desire to avoid being associated with atheists, the ACLU did not pursue either option. The ACLU held an informal meeting on March 17, 1948, to discuss implementing the *McCollum* decision. The ACLU, UPA, PEA, and the AJC all agreed to develop a New York test case and that Protestant support was key to building on the success of *McCollum*.¹⁴⁸ This reflected both a concern with avoiding the stigma of association with atheists, as well as recognition that released time was still seen by many as a Catholic issue. The minutes also indicate that the participants agreed that a proper plaintiff for the test case would be a parent with a child subjected to released time, which is an additional reason the ACLU chose not to join the suit brought by Lewis in his capacity as a taxpayer, rather than as a parent with children in the public schools.¹⁴⁹ Later, the ACLU made explicit its desired plaintiff. In a letter to David Ashe of the UPA, the ACLU asked him to have his group look "for a good solid white Protestant plaintiff with a child or children in one of our public schools, preferably in New York County."¹⁵⁰

Not only did the ACLU decide not to join the Freethinkers suit, it sought to distance itself from the lawsuit, despite the fact that its counsel was representing Lewis. It also believed it was in competition with the Lewis suit. In early May 1948, the ACLU decided,

¹⁴⁷ New York Supreme Court Upholds Released Time for Religious Education, *Wkly. Bull.* #1361 (ACLU, New York, N.Y.), Nov. 22, 1948, *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917-1975, Series I, Reel 11 (Microfilming Corp. of Am.); Letter from Clifford Forster, Staff Counsel, ACLU, to David Ashe, United Parents Ass'n et al. (May 5, 1948), *microformed on* Am. Civ. Liberties Union Archives, 1950-1990, Series IV, Reel 605, Frame 557 (Scholarly Resources, Inc.); Letter from Sherman D. Wakefield, Managing Editor, *Progressive World*, to Roger Baldwin, Dir., ACLU (Apr. 25, 1948), *microformed on* Am. Civ. Liberties Union Archives, 1950-1990, Series IV, Reel 605, Frame 572 (Scholarly Resources, Inc.).

¹⁴⁸ Minutes of an Informal Meeting on Released Time, ACLU (Mar. 23, 1948), *microformed on* Am. Civ. Liberties Union Archives, 1950-1990, Series IV, Reel 605, Frame 580 (Scholarly Resources, Inc.).

¹⁴⁹ *Id.*

¹⁵⁰ Letter from Clifford Forster, Staff Counsel, ACLU, to David Ashe, United Parents Ass'n (May 12, 1948), *microformed on* Am. Civ. Liberties Union Archives, 1950-1990, Series IV, Reel 605, Frame 556 (Scholarly Resources, Inc.).

2007]

Better a Catholic than a Communist

2103

because of the Lewis suit, “to rush its case as quickly as possible” and to make “[e]very effort . . . to secure a Protestant plaintiff with the question of a Jewish co-plaintiff representing the Jewish community to be held open for a later discussion.”¹⁵¹ On May 28, 1948, the ACLU, UPA, AJC, and others announced to the press their plans to file an independent suit challenging the constitutionality of the New York program. In a strong joint statement, the groups “stressed that they were disassociating themselves from the action by Mr. Lewis. His ‘sole motive in bringing the suit[,]’ they charged, ‘was to further his anti-religious propaganda.’”¹⁵²

During the oral arguments for *Lewis*, which the ACLU used as an opportunity to take note of its eventual opposition’s tactics, it became apparent that the ACLU’s concern with the liability of the atheist label was not without merit. Leo Pfeffer reported on the argument to the Joint Strategy Committee on Released Time Test Case in a memorandum. According to Pfeffer, counsel for the City of New York “spoke at considerable length about the evils of Hitlerism, Stalinism, Communism, atheism and the Godless state.”¹⁵³ Pfeffer also reported that Charles Tuttle, on behalf of the New York Coordinating Committee for Released Time, argued “that secular education is very bad, brings on ware [sic], crime, etc.” Tuttle also “waved at the American flag and said that Nazism is a very bad thing and that is where irreligion will bring you to.”¹⁵⁴ Not only did the attorneys arguing to preserve the New York released time plan stress the connection between atheism and totalitarianism, but they also ignored that Arthur Garfield Hays was functioning in his individual capacity and not representing the ACLU. Tuttle repeatedly invoked the ACLU’s name and indicated it ought to support the New York plan instead of opposing it.¹⁵⁵ The oral argument in *Lewis* served as a preview of the arguments that would eventually be used against the ACLU in *Zorach*. This preview reinforced the

¹⁵¹ Minutes of Informal Committee on Released Time Meeting, ACLU (May 27, 1948), *microformed on* Am. Civ. Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frame 553 (Scholarly Resources, Inc.).

¹⁵² Freethinkers Hit Religious Program, N.Y. Times, May 29, 1948, at 15.

¹⁵³ Memorandum from Leo Pfeffer to Joint Strategy Committee on Released Time Test Case (June 2, 1948), *microformed on* Am. Civ. Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frames 551–52 (Scholarly Resources, Inc.).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

importance of finding the proper plaintiff in order to avoid the “irreligious” and “totalitarian” labels.¹⁵⁶

A letter from the PEA confirms the concern with which the ACLU approached choosing a prospective plaintiff. Frederick C. McLaughlin, the Educational Director of the PEA, wrote Clifford Forster, Staff Counsel for the ACLU, to suggest a potential plaintiff: Mr. Tessim Zorach. McLaughlin related that Zorach was active in the Episcopal Church and that his son attended a public school with a released time program. Furthermore, Zorach understood the issue and was “prepared to withstand whatever adverse propaganda [would be] forthcoming.”¹⁵⁷ McLaughlin was also careful to reveal that Zorach did not have contact with “left-wing groups” and that he was “presently employed by the Eastern Co-operative Wholesale, and the coops have been one group shunned and disdained by the Communists in this country.”¹⁵⁸ The concern over these details indicates that the ACLU anticipated arguments from the City of New York similar to those made in the *Lewis* oral argument and that it wanted to ensure it would not be vulnerable to these attacks or to the types of attacks levied against McCollum after her suit.

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

As of July 7, 1948, the ACLU and the other groups agreed that the pleadings for *Zorach v. Clauson* would not set forth organizational support for the suit; thus, Kenneth W. Greenawalt would be the only attorney of record representing Zorach.¹⁵⁹ While some members of the committee opposed the addition of a Jewish co-plaintiff, it was still an open question.¹⁶⁰ On July 27, 1948, the suit

¹⁵⁶ Of course, the ACLU also realized that the City of New York would distinguish its plan from the Champaign plan at issue in *McCollum* on the grounds that the religious instruction under the New York plan occurred off of school grounds, while the religious instruction under the Champaign plan occurred on school grounds. See *supra* notes 125–28 and accompanying text.

¹⁵⁷ Letter from Frederick C. McLaughlin, Educ. Dir., PEA, to Clifford Forster, Staff Counsel, ACLU (June 16, 1948), *microformed on* Am. Civ. Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frame 572 (Scholarly Resources, Inc.).

¹⁵⁸ *Id.*

¹⁵⁹ See *Zorach v. Clauson*, 99 N.Y.S.2d 339, 339 (Sup. Ct. 1950).

¹⁶⁰ Summary of Conclusions Reached at Strategy Committee Meeting for Released Time Case Held at Frank Karelsen’s Office (July 14, 1948), *microformed on* Am. Civ.

was filed with the addition of a Jewish co-plaintiff, Mrs. Esta Gluck. As *The New York Times* reported, both Zorach and Gluck were parents of children who attended New York City public schools with released time programs, as well as Episcopal and Hebrew Sunday schools, respectively.¹⁶¹

Over the course of the next two years, the *Zorach* suit languished in the New York trial court. Meanwhile, the Freethinkers' suit was dismissed because Lewis's petition failed "to state facts sufficient to constitute a cause of action."¹⁶² On November 15, 1948, the New York Supreme Court (the trial court) held that Justice Frankfurter's opinion in *McCullum* specifically stated that it was not intended to reach all released time programs and that Justice Black's opinion for the Court was reasonably interpreted not to reach all such programs. Thus, on the facts pleaded by Lewis, there were sufficient differences between the New York City plan and the Champaign plan—namely, the location of the religious instruction—to determine that the *McCullum* ruling did not apply.¹⁶³ Lewis and his attorney, Hays, initially appealed, but after they received pressure from the ACLU, AJC, and others, they withdrew the case in favor of the "more factual" *Zorach* suit.¹⁶⁴

From July 1948, when the *Zorach* suit was first filed, until June 1950, when the trial court ruled against Zorach, the public debate over released time education continued with both sides making the expected arguments. Opponents of released time programs argued that *McCullum* had declared all such programs unconstitutional,¹⁶⁵ while advocates of released time posited that the location of instruction was a relevant distinction that left the New York plan and

Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frame 543 (Scholarly Resources, Inc.).

¹⁶¹ Religious Program Brings School Suit, N.Y. Times, July 28, 1948, at 25.

¹⁶² State System of Releasing Pupils for Religious Training Is Upheld, N.Y. Times, Nov. 16, 1948, at 1.

¹⁶³ Id.; see also *Lewis v. Spaulding*, 85 N.Y.S.2d 682, 689 (Sup. Ct. 1948).

¹⁶⁴ N.Y. Released Time Case Withdrawn for Better Suit, Wkly. Bull. #1382 (ACLU, New York, N.Y.), Apr. 18, 1949, at 1, *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series I, Reel 11 (Microfilming Corp. of Am.); see also Letter from Shad Polier, AJC, to Arthur Garfield Hays, Lewis's Attorney (Mar. 25, 1949), *microformed on* Am. Civ. Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frames 517–18 (Scholarly Resources, Inc.).

¹⁶⁵ See, e.g., Pfeffer, *supra* note 129.

others within the constitutional bounds set forth in *McCollum*.¹⁶⁶ Opponents countered by focusing on Justice Black's closing paragraph in *McCollum*, claiming that all released time programs, regardless of the location of instruction, assisted religion "through use of the State's compulsory public school machinery."¹⁶⁷ As Professor Edward S. Corwin noted, the *McCollum* Court attempted to solve a "teasing problem" but instead "created great uncertainty."¹⁶⁸

As the two sides debated the reach of *McCollum* during this time, the wisdom of released time, apart from its constitutionality, was also at the center of the controversy. Opponents of released time asserted that it was divisive and destroyed the unity required to sustain America's democracy.¹⁶⁹ Advocates of released time pointed to a growing American secularism that had to be countered to avoid the risk that the country would become a godless, totalitarian, or communist state.¹⁷⁰

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

¹⁶⁶ See George Dugan, *Weekday Classes in Religion Go On*, N.Y. Times, Feb. 11, 1949, at 21 (reporting that the International Council of Religious Education declared that "released-time instruction as a 'generalized conception' is legal provided it is held off the school premises").

¹⁶⁷ 333 U.S. at 212; see Pfeffer, *supra* note 129; Editorial, *Church and State*, Wash. Post, Nov. 17, 1948, at 10.

¹⁶⁸ *Decision on Study of Religion Scored*, N.Y. Times, Oct. 15, 1948, at 20.

¹⁶⁹ See *Mrs. Meyer Decries Free School Time*, N.Y. Times, Dec. 5, 1948, at 59 (asserting that school boards allowed released time programs "lest they be accused of being 'Godless' if not communistic"); Editorial, *Secularism*, Wash. Post, Nov. 28, 1948, at 4B. But see Charles A. Hart, *Letter to the Editor, Released Time*, Wash. Post, Dec. 18, 1948, at 8 (charging that Mrs. Meyer's argument was asserted without supporting evidence and professing to have personally witnessed "the very opposite of friction" in communities employing released time education).

¹⁷⁰ See *National Catholic Welfare Conference, Statement by Catholic Bishops Attacking Secularism as an Evil*, N.Y. Times, Nov. 21, 1948, at 63.

2007]

Better a Catholic than a Communist

2107

their differences from one another and frustrates teachers and pupils in building an integrated education program”¹⁷¹ In response, Reinert claimed that opposition to released time was founded on a “dubious interpretation” of the First Amendment and that, if that view was accepted, one must concede that the state could dictate all education, which “is tantamount to opening wide the door to statism or totalitarianism.”¹⁷²

A radio show in New York titled *Ethical Issues in the News* reported on the released time issue and offers another example of the stock arguments made by both sides. The show noted that some

have viewed [released time education] in terms of fighting anti-democratic ideas, hoping that religion would arouse an awareness of higher powers . . . to offset statism, and a respect for the individual over and against totalitarian controls. Some have considered it as a way of fighting Communism; some as a way of resisting Godlessness and immorality.¹⁷³

It also noted that opponents of released time were “accused of being anti-religious and Godless, and neglectful of moral values.” The program countered, however, that those opponents were typically moral and religious people who merely believed “that there is a crucial question of democratic freedom and democratic institutions involved.”¹⁷⁴ Their opposition to the New York released time program was, according to the radio program, grounded in the same First Amendment arguments relied upon by the Supreme Court in *McCullum*. The program continued:

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

¹⁷¹ Benjamin Fine, *Educators Debate Place of Religion*, N.Y. Times, Mar. 2, 1949, at 30.

¹⁷² *Id.*

¹⁷³ *Ethical Issues in the News: Religious Instruction and the Child* (WMCA radio broadcast June 19, 1949), *microformed on* Am. Civ. Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frames 504–08 (Scholarly Resources, Inc.).

¹⁷⁴ *Id.*

dren and for the sake of our democracy whose future rests on public education.¹⁷⁵

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

By 1950, these events and others had created what one historian has called an "atmosphere of fear."¹⁷⁶ This fear of communism, and its handmaiden atheism, had certainly been present prior to 1949. With the events of 1949 and 1950, however, communism and atheism became even greater concerns. Their influence is evident in the public debates over released time education and in the New York trial court's ruling in *Zorach*. Justice DiGiovanna dismissed the *Zorach* suit as a matter of law, citing the earlier decision in *Lewis*, which distinguished the New York plan from the Champaign plan at issue in *McCollum*.¹⁷⁷ The court again cited to the language in Justice Frankfurter's concurrence disclaiming *McCollum* as a ruling that reached all released time plans.¹⁷⁸ Here, it seemed, Justice Burton's desire to exclude the New York plan from *McCollum*'s reach was being realized. DiGiovanna, however, did not simply rule against *Zorach* on constitutional grounds. He also attacked the wisdom of prohibiting released time education:

To permit restraint upon State and local educational agencies which are lawfully authorized to grant released time to our young

¹⁷⁵ Id.

¹⁷⁶ Eric Foner, *The Story of American Freedom* 255 (1998).

¹⁷⁷ *Zorach v. Clauson*, 99 N.Y.S.2d 339, 345-46, 349-50 (Sup. Ct. 1950).

¹⁷⁸ Id. at 347.

2007]

Better a Catholic than a Communist

2109

citizens who wish to take religious instruction would constitute a suppression of this right “of” religious freedom. . . . It would be a step in the direction of and be consonant with totalitarian and communistic philosophies existing in jurisdictions wherein atheism and the suppression of all religions are preferred to the freedom of the individual to seek religious instruction and worship. Such would be the result or conclusion if the relief sought herein by the petitioners was to be granted.¹⁷⁹

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

You know how deeply I feel that decisions such as Justice Di Giovanna’s [sic] are made possible only because of the bad public relations which the attack on released time has evolved [sic], to a large extent as a result of the activities, on one hand, of Joseph Lewis and, on the other hand, by Charles Tuttle, both of whom are anxious to make it appear that the fight against released time is a fight of atheism against religion.¹⁸⁰

Greenawalt agreed “that public relations are important and that our opponents are very active in building up a good press for their position.”¹⁸¹

With the advent of the Korean War on June 25, 1950, only six days after DiGiovanna’s ruling, the public relations task for *Zorach* and the ACLU became more difficult. The conflict between the communist North Koreans and the South Koreans, with Americans fighting alongside, would last longer than the entire appellate

¹⁷⁹ Id. at 344.

¹⁸⁰ Letter from Leo Pfeffer, AJC, to Kenneth W. Greenawalt (Aug. 28, 1950), *microformed on* Am. Civ. Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frames 467–68 (Scholarly Resources, Inc.).

¹⁸¹ Letter from Kenneth W. Greenawalt to Leo Pfeffer, AJC (Aug. 29, 1950), *microformed on* Am. Civ. Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frame 466 (Scholarly Resources, Inc.).

process as *Zorach* made its way to the U.S. Supreme Court, with the Court finally issuing its opinion in April 1952. The ACLU and AJC amici curiae briefs to the Supreme Court of New York, Appellate Division, are evidence that both organizations recognized the importance of addressing the claim that their opposition to released time education was evidence of antireligious and pro-communist views. In its first point, the AJC attempted to link its opponents with the communists by pointing out the similarity between one of the arguments used by the Board of Education and that of communists in a “recent communist trial.”¹⁸² Half of the brief sought to rebut Justice DiGiovanna’s claim that prohibiting released time would be a step toward an atheistic communist or totalitarian philosophy. To begin with, the AJC asserted its own religious ties, including a list of thirty-five Jewish organizations represented by its amicus brief.¹⁸³ It then pointed to the religious organizations that supported McCollum’s lawsuit, including the Southern Baptist Convention, three other Baptist conventions, and the Seventh Day Adventists.¹⁸⁴ Finally, the brief asserted that the lower court’s implication that opponents of released time supported communism was “rebutted by the reputation and character of the organizations which have opposed released time in New York City.” These are, the brief continued, “[a]ll . . . responsible organizations whose attachment to democracy and opposition to communism are long established.”¹⁸⁵

The ACLU, in its Statement of Interest of Intervenors, set forth a disclaimer making clear its opposition to communism. It stated that “[a]ll members of the Civil Liberties Union are democrats. . . . [T]he Union is opposed to . . . any form of the police state or the single-party state, or any movement in support of them, whether Fascist, Communist or known by any other name.”¹⁸⁶ The necessity

¹⁸² Amici Curiae Brief Submitted on Behalf of the American Jewish Committee et al. at 12–13, *Zorach v. Clauson*, 102 N.Y.S.2d 27 (App. Div. 1951), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series VIII, Reel 86, Frame 1531 (Microfilming Corp. of Am.).

¹⁸³ Id. at 14–17.

¹⁸⁴ Id. at 22–23.

¹⁸⁵ Id. at 28–29.

¹⁸⁶ Brief in Behalf of the Committee on Academic Freedom of the American Civil Liberties Union and the New York City Civil Liberties Committee as Amici Curiae Supporting Appellants at 3, *Zorach v. Clauson*, 102 N.Y.S.2d 27 (App. Div. 1951), *mi-*

2007]

Better a Catholic than a Communist

2111

of these disclaimers and arguments persisted throughout the appellate process. The ACLU argued to the New York Court of Appeals (New York's highest state court) that support for separation of church and state was not necessarily motivated by irreligion.¹⁸⁷ Likewise, the AJC reprised its claims that it was not atheistic, nor supportive of communism or totalitarianism, and, regardless, these were false issues distracting from the basic question of separation.¹⁸⁸ Similarly, both the brief and reply for the appellants, Zorach and Gluck, consisted largely of counterarguments to DiGiovanna's claim that granting their relief would be a step toward communism or totalitarianism. They also devoted significant space to countering the respondents' accusations of irreligion and attempts to associate them with Lewis and the atheistic Freethinkers of America.¹⁸⁹ Upon announcing that they would appeal their case to the U.S. Su-

croformed on The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series VIII, Reel 86, Frame 1531 (Microfilming Corp. of Am.).

¹⁸⁷ Brief in Behalf of the Committee on Academic Freedom of the American Civil Liberties Union and the New York City Civil Liberties Committee as Amici Curiae at 2, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series VIII, Reel 86, Frame 1531 (Microfilming Corp. of Am.).

¹⁸⁸ Amici Curiae Brief Submitted on Behalf of the American Jewish Committee et al. at 17–21, 27–29, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series VIII, Reel 86, Frame 1531 (Microfilming Corp. of Am.).

¹⁸⁹ Brief on Behalf of Petitioners-Appellants at 10–14, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series VIII, Reel 86, Frame 1531 (Microfilming Corp. of Am.); Reply Brief for Petitioners-Appellants at 22, *Zorach v. Clauson*, 100 N.E.2d 463 (N.Y. 1951), *microformed on* The Am. Civ. Liberties Union Recs. & Publications, 1917–1975, Series VIII, Reel 86, Frame 1531 (Microfilming Corp. of Am.). Charles Tuttle used the tactic of associating the ACLU with Joseph Lewis throughout the history of the New York released time debate. At oral argument in the *Lewis* case, he asserted the ACLU was involved through Arthur Garfield Hays, who was general counsel for the ACLU but was representing Lewis solely in an individual capacity. At oral argument in the Supreme Court Appellate Division, he again linked the ACLU through Hays to Lewis. Letter from George Soll, Assoc. Staff Counsel, ACLU, to R. Lawrence Siegel (Nov. 30, 1950), *microformed on* Am. Civ. Liberties Union Archives, 1950–1990, Series IV, Reel 605, Frame 433 (Scholarly Resources, Inc.). Finally, he used his brief to the New York Court of Appeals to associate Zorach and Gluck with Lewis and the atheism of the Freethinkers of America. Reply Brief for Petitioners-Appellants, *supra*, at 24.

preme Court, Kenneth W. Greenawalt repeated this mantra and disclaimed any antireligious intentions.¹⁹⁰

Thus, the issue of released time education, which began with *McCullum* as a lawsuit to keep religion out of schools and, in light of *Everson*, took on the issue of Catholic attempts to receive government funds for parochial schools, became focused on atheism as the vanguard for communism and totalitarianism. This transition is key to understanding the U.S. Supreme Court's differing opinions in *McCullum* and *Zorach*. This is not to say that by 1952 Americans were no longer concerned with the growing influence of the Catholic Church and its, at best, tepid support for what many understood as the separation of church and state. The POAU continued to criticize Catholic policies and especially the Catholic Church's continued efforts to receive federal funds for its parochial schools.¹⁹¹ And in 1949 and 1950, *American Freedom and Catholic Power*, the book form of Paul Blanshard's critical articles in *The Nation*, proved to be a bestseller.¹⁹² Greenawalt even attempted to use the lingering suspicion of Catholicism in his brief to the New York Court of Appeals. He noted the irony of "certain religions . . . opposed on principle to a separation of Church and State, and to the secular public school system and to non-sectarian education generally," that is, the irony of Catholics asserting the principle of *Pierce*, parental choice, in their argument in support of released time.¹⁹³ Greenawalt wrote that "[t]he State, in this country, accords parents far greater rights and freedom in the selection of schools for their children than do some of the religious organizations to which such parents belong."¹⁹⁴ That such appeals to the Catholic disdain for public education, which were so important in Paul Blanshard's articles, carried little weight with the New York court

¹⁹⁰ Highest Court to Get Released Time Issue, N.Y. Times, July 14, 1951, at 6.

¹⁹¹ See, e.g., 1,400 Attend Rally on Religious Liberty, N.Y. Times, Apr. 23, 1952, at 31 ("Dr. Dawson also censured Catholics for attempts, he said, to break down American practices separating church and state, citing efforts to obtain public support for parochial schools, parochial school bus service and church hospitals."); Kenneth Dole, Religious Teaching in Schools Hit, Wash. Post, Apr. 25, 1952, at 1B ("American Protestants were warned . . . [by a speaker at an annual POAU meeting] that 'released-time' religious instruction in public schools is a threat to liberty, and plays into the hands of the Catholic hierarchy.").

¹⁹² McGreevy, supra note 22, at 166.

¹⁹³ Reply Brief for Petitioners-Appellants, supra note 189, at 26.

¹⁹⁴ Id.

2007]

Better a Catholic than a Communist

2113

suggests that concerns about Catholicism may have diminished since *McCollum* was decided.

In fact, with the rise of communism, Catholics became a more sympathetic group, even an ally in the struggle against communism. Pope Pius XII was known as an avid anti-communist, and in 1949 he issued a decree excommunicating all Catholics belonging to the Communist Party.¹⁹⁵ Catholic leaders also began to issue statements highlighting the common cause among Catholics, Protestants, and Jews in fighting communism. At an annual breakfast of Catholic teachers, one leader declared that the world was currently “[t]wo minds at war, the mind of the world and the mind of Christ. On one side you have the Communists and on the other side are the Catholics, Protestants and Jews who believe in God”¹⁹⁶ Another Catholic leader claimed that Catholic interests and American interests were in line with one another on the subject of “combatting [sic] Communist aggression.”¹⁹⁷ The American Bishops themselves stressed that Catholics were part of a united American opposition to the atheistic communism spreading around the world in 1950. Not only did the Bishops claim that American Catholics stood with the rest of America, but they stood with them in the most contentious area: education. In their statement on the education of children, the Catholic Bishops of the United States announced that “[i]n the present grim international struggle, the American people have resolutely championed the cause of human freedom. We have committed ourselves to oppose relentlessly the aggression of those who deny to man his God-given rights and who aim to enslave all mankind under the rule of Godless materialism.”¹⁹⁸ The Bishops went on to explicitly tie their support for the fight against this materialism to their support for released time education, arguing that the state should not be indifferent to religious education; democracy depends on morality grounded in relig-

¹⁹⁵ Thomas Bokenkotter, *A Concise History of the Catholic Church* 393 (rev. & expanded ed. 2004).

¹⁹⁶ *Teacher Aid Urged in Religious Study*, N.Y. Times, Nov. 6, 1950, at 34.

¹⁹⁷ *Red Fight Termed Vital for Catholics*, Wash. Post, Nov. 16, 1950, at 11B.

¹⁹⁸ Text of Statement by Catholic Bishops in United States on Education of Children, N.Y. Times, Nov. 19, 1950, at 44.

ion, and, therefore, the state ought to support released time religious instruction.¹⁹⁹

At the same time Catholics emphasized their unity with all Americans in fighting atheism and communism, Protestants were being called to fight communism by instilling religion in American children. At the Protestant Teachers Association meeting in November 1950, teachers were told that the real conflict between the West and Stalinism, “which is ‘first of all atheism, a profound and rationalized disbelief in God,’” was a spiritual conflict. With “‘hundreds of thousands of children com[ing] from homes bare of religion’ . . . the responsibility for laying the ‘foundations of spiritual power’ in children rests with public schools.”²⁰⁰ With both Protestants and Catholics fighting communism, specifically through calls for religious education, it is reasonable to conclude that tensions between the two groups would decrease. The common enemy of communism gave Catholics and Protestants something to rally around and distract them from each other.

Whereas the Supreme Court considered *McCullum* in an atmosphere dominated by the backlash against the *Everson* decision and general suspicion of Catholicism and its interaction with American public schools, the Court in 1952 considered *Zorach* in an atmosphere of decreased suspicion of Catholicism but outright panic over the spread of communism. Justice Hugo Black’s biographer, Roger K. Newman, described the time after McCarthy’s speech and Hiss’s conviction as a time when “morale was undermined, initiative stifled, [and] courage throttled.”²⁰¹ Newman contends that “[a]ll most Americans heard [in McCarthy’s speech] was the word ‘Communist,’” which sent “[a] shiver . . . up the country’s collective spine” as “[t]he ‘red hunt’ became the nation’s fixation.”²⁰² From 1950 to 1956, the Court repeatedly ruled against any party or issue connected to communism.²⁰³ For example, the Court upheld the

¹⁹⁹ Id.

²⁰⁰ Asia Held Seeking a ‘Practical’ Way, N.Y. Times, Nov. 19, 1950, at 28.

²⁰¹ Newman, *supra* note 19, at 400.

²⁰² Id.

²⁰³ See Marc Rohr, Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era, 28 San Diego L. Rev. 1 (1991) (detailing a history of communism and the Supreme Court before and after *Dennis v. United States*); William M. Wiecek, The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States*, 2001 Sup. Ct. Rev. 375, 376–79 (noting that the

2007]

Better a Catholic than a Communist

2115

criminal prosecution of communist leaders under the Smith Act in *Dennis v. United States*,²⁰⁴ while in *American Communications Ass'n v. Douds*²⁰⁵ and then later in *Garner v. Board of Public Works*²⁰⁶ the Court rejected First Amendment challenges to local and federal laws requiring oaths of allegiance that disavowed the Communist Party (as in *American Communications Ass'n*), or affidavits stating whether the prospective government employee had ever been a member of the Communist Party (as in *Garner*). The concern with the threat of communism that dominated the country clearly affected the Court, and its ruling in *Zorach* was no different.

Justice Douglas's conference notes from *Zorach* confirm that Catholicism was not an issue but that the threat of communism and the accusations that this suit was about promoting atheism over religion were important influences on the Justices' decision. Unlike the *McCullum* conference, none of the Justices discussed released time in sectarian terms; according to Justice Douglas's conference notes, there was no mention of Protestantism or Catholicism as there had been in the *McCullum* conference. In fact, it seems there was little discussion at all, except from Chief Justice Vinson and Justice Frankfurter. The Chief Justice focused his comments on whether *Zorach* and *Gluck* had standing to bring the suit and then distinguished their suit from *McCullum* on the grounds that "school funds [and] school time are not used" in New York²⁰⁷—this, despite the fact that time clearly *was* used. Justice Frankfurter, in contrast, did not discuss the legal issues, but rather how the case and opposition to released time had been presented by religious groups as an attempt to promote atheism and communism. He saw the efforts of the religious groups as a campaign to scare the Court

Court's Cold War decisions from 1950 to 1956 "appear anomalous, seen against the broad sweep of the First Amendment's development in the twentieth century," and positing that "the Court imposed on Communists a special and diminished status under the Constitution," because "[t]he Justices of the Supreme Court were not exempt from the fears and beliefs of other Americans. . . . [and i]t was natural for the Justices to employ the anticommunist image as a kind of general template to make sense of legal issues coming before them in cases implicating the liberties of Communists").

²⁰⁴ 341 U.S. 494, 516–17 (1951).

²⁰⁵ 339 U.S. 382, 385–86, 415 (1950).

²⁰⁶ 341 U.S. 716, 719, 723–24 (1951).

²⁰⁷ Douglas conference notes, *Zorach v. Clauson* (Feb. 2, 1952) (LOC, Douglas Papers, Box 211, Case File No. 431).

and Americans into accommodating their desire for religious education in the public schools. Justice Frankfurter compared these groups to Senator McCarthy, saying that “McCarthyism is a dirty smearing technique—there are other groups who do smear [and] some of them are religious groups.”²⁰⁸ Frankfurter’s observation seems correct, at least insofar as Charles Tuttle and others sought to tie *Zorach* to *Lewis* and the Freethinkers’ atheistic views.

Not only was Justice Frankfurter unable to convince a majority of the Court that the New York plan was unconstitutional, he was also unable to convince them that “secularism” in the schools was not an issue in the case but rather just an attempt to distract the Court from the real issue in *McCullum* and *Zorach*: separation of church and state.²⁰⁹ Instead of agreeing with Frankfurter, Douglas embraced the notion that striking down the New York released time education plan would encourage secularism in the schools and was tantamount to announcing that the Constitution required the promotion of atheism. Hence, Douglas appealed to the religious nature of America and the Constitution, writing that “[w]e are a religious people whose institutions presuppose a Supreme Being.”²¹⁰ In earlier drafts of Douglas’s opinion, he stated this view in even starker terms with an explicit rejection of atheism: “We are a God-fearing people whose every institutions [sic] presuppose not atheism or agnosticism, but a faith in a God.”²¹¹ Douglas also included the following paragraph in a circulated draft of his opinion:

To make the assumption that Church and State must always be at arm’s length and never cooperate would be to assume that our government was formed to promote the cause of the atheist and the agnostic; that we are a godless people; that religion is taboo in public institutions; that any weight or support which a teacher or a governor or a mayor gives to a religious program is illegal.²¹²

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Zorach*, 343 U.S. at 313.

²¹¹ Douglas pencil draft of opinion, *Zorach v. Clauson* (LOC, Douglas Papers, Box 219, Case File No. 431).

²¹² Douglas desk copy of opinion, *Zorach v. Clauson* (Mar. 26, 1952) (LOC, Douglas Papers, Box 219, Case File No. 431). This paragraph was present in the original pencil

2007]

Better a Catholic than a Communist

2117

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

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

CONCLUSION

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

This Note offers an explanation for the divergent opinions in the two cases and specifically accounts for Justice Douglas's second argument. By placing *McCullum* and *Zorach* in their wider historical context, the Court's unwillingness to simply follow *McCullum* as

draft of the opinion as well. Douglas pencil draft of opinion, *supra* note 211. It obviously remained until some time after the desk copy was edited.

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