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Notes

The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court

The United States Supreme Court opened up a new and important area of constitutional litigation in 1947 when in *Everson v. Board of Education*¹ it made the Establishment Clause of the First Amendment applicable to the states through the Fourteenth Amendment. Divided five to four, the Court interpreted the clause to require a "‘high and impregnable’ . . . wall of separation between church and State."² A few months later in *Illinois ex rel. McCollum v. Board of Education*,³ the first "released time" case, the Court was asked to reconsider its interpretation of the Establishment Clause.⁴ The case concerned the constitutionality of the Champaign, Illinois, released time plan, under which students who wished to participate were excused from their secular classes for one period each week in order to attend religious classes held in the public school buildings and taught by teachers employed by various community religious bodies. The Court's decision invalidating this program provoked a fierce reaction.⁵ Four cardinals and ten bishops of the Roman Catholic Church decried it as a victory for "doctrinaire secularism."⁶ Numerous commentators felt that it threatened such traditional practices as prayer and Bible reading in the public schools and tax exemptions for churches.⁷ Distinguished constitutional scholars attacked it on the ground that it was based on an erroneous reading of the history of the First Amendment.⁸ Most telling of all, Justice Jackson observed in his concurring opinion that the Court's decision rested on little but the "prepossessions" of the majority.⁹

1. 330 U.S. 1 (1947).

2. *Id.* at 16, 18, *quoting* Reynolds v. United States, 98 U.S. 145, 164 (1878).

3. 333 U.S. 203 (1948).

4. *See* p. 1211 *infra*.

5. *See* pp. 1222-23 *infra*.

6. N.Y. Times, Nov. 21, 1948, at 63, col. 4.

7. *See* p. 1226 *infra*.

8. *See* note 53 *infra*.

9. 333 U.S. at 238.

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Four years later in *Zorach v. Clauston*¹⁰ the Court upheld the constitutionality of a released time program which differed from the plan found objectionable in *McCollum* chiefly in that the religious classes were not held on public school property. In a striking change from *McCollum*, Justice Douglas's opinion for the Court appeared to indicate that many forms of cooperation between church and State were permissible under the Establishment Clause.¹¹ *Zorach* also provoked much comment and it was widely suggested that adverse reaction to *McCollum* had caused the Court to reconsider its position and to "beat a retreat."¹²

During the twenty years since *McCollum* and *Zorach* were decided, the opinions in those cases have been subjected to intensive study by a host of commentators using the traditional methods of case analysis.¹³ This Note will take a different approach. It will not focus on written opinions in the two released time cases, and it will not employ the traditional methods of case analysis. Instead it will explore the way the Justices function as a group in deciding a case by examining the efforts of members of the Court to persuade their colleagues to change their votes or their written opinions. It will also explore the effect which the interactions¹⁴ among the Justices can have on the outcome of a case, on the way the case is interpreted by lower courts and commentators—and thus on the development of constitutional law.

There are at least three reasons for a reexamination of the released time cases from this perspective. First, it may lead to a better understanding of *McCollum* and *Zorach*, each of which is a fundamental part of the foundation of Establishment Clause precedent, especially in the crucial area of education.¹⁵ Second, a study of the interactions among the Justices in *McCollum* and *Zorach* may reveal some of the competing pressures characteristic of Establishment

10. 343 U.S. 306 (1952).

11. *Id.* at 313-14.

12. Fellman, *Constitutional Law in 1951-1952*, 47 AM. POL. SCI. REV. 126, 160 (1953).

13. See pp. 1222-26, 1228, 1229 *infra*.

14. The term "interactions" is used because of its generality. It includes all of the Justices' oral and written communications with each other concerning the case at hand.

15. As the financial position of church-related schools continues to worsen, the Court will undoubtedly be asked to decide other important cases in this area in the near future. See Brief for National Catholic Educ. Ass'n as Amicus Curiae at 14-17, *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Issues which may soon face the Court include the constitutionality of educational voucher systems, income tax credits for tuition at church-related schools, dual enrollment and shared time plans, public construction and equipment grants to church-related schools, and auxiliary school programs (such as health services, drivers' education courses, and remedial reading classes) furnished free by the state to church-related institutions. See Gianella, Lemon & Tilton: *The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 192-99; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 176-77 (1971).

Clause cases. Members of the Court have observed that a Justice's "prepossessions"¹⁶ or value judgments¹⁷ may be of great significance in this area. And many commentators have suggested that public opinion may be very influential.¹⁸ Third, to paraphrase Justice Jackson's famous and cryptic comment in *Zorach*, a study of the interactions among the Justices during the process of deciding these cases may be as interesting for what it reveals about the way the Supreme Court functions as for what it reveals about constitutional law.¹⁹

The opportunity to examine the Justices' interactions in *McCollum* and *Zorach* is provided by the copious private papers of Justice Harold H. Burton.²⁰ This Note draws on the mass of information contained in his papers to reconstruct the interactions among the members of the Court in the released time cases.

I. Precedent and Background

A. Before 1947

Before the Supreme Court decided *Everson* in 1947, the Establishment Clause was one of the least developed provisions in the Bill

16. See p. 1202 *supra*.

17. Chief Justice Burger referred to Establishment Clause decisions as value judgments in *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970), in which the constitutionality of property tax exemptions for churches was upheld. Consistent with his use of this term, he observed that, in the 20 years since the Court made the Establishment Clause applicable to the states, fixed and predictable standards had not been evolved. He noted that past decisions had been marked by "considerable internal inconsistency" and "what in retrospect may have been too sweeping utterances." *Id.* at 668. Some also illustrated, he said, "the limitations inherent in formulating general principles on a case-by-case basis," *id.*, and "[t]he hazards of placing too much weight on a few words or phrases of the Court," *id.* at 670. His opinion emphasized the importance of historical perspective and a common sense approach. *Id.* at 671. He also emphasized the need for flexibility. *Id.* at 669.

Similarly, a leading scholar of the religion clauses has suggested that the Court's current Establishment Clause standard may become "a convenient label to help the Court announce decisions arrived at on other grounds more difficult to articulate in terms of consistent legal theory." Gianella, *supra* note 15, at 148; see also *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 131-33 (1970).

18. See pp. 1225, 1228 *infra*.

19. Justice Jackson's comment was: "Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law." 343 U.S. at 325.

20. Justice Burton's papers, which are in the Library of Congress, permit a rare glimpse of the internal workings of the Supreme Court. Justice Burton appears to have saved and filed nearly every document which pertained to the work of the Court and came into his possession. These include handwritten, typed, and printed drafts of his opinions; drafts of opinions by others; other communications, including scrawled notes exchanged on the bench and in conference among the Justices; and memoranda by the Justices and their law clerks. In addition, Justice Burton kept a diary throughout his years on the Court. He occasionally took notes during conference discussions and his docket books contain records of preliminary votes on all cases.

Occasional reference is also made to certain papers of Justice Frankfurter in the Library of Congress.

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of Rights. Only two previous decisions had been directly concerned with the meaning of that clause and both had been decided on very narrow grounds.²¹ Aside from these cases, the Court's only references to the Establishment Clause were a handful of fragmentary, conflicting, and highly parenthetical dicta.²² Ironically, the Court's decision which was most relevant to the Establishment Clause cases decided after 1947 did not involve the Establishment Clause at all.²³

While there was very little litigation on establishment of religion issues in the federal courts before 1947, state courts during the 1930's and 1940's, interpreting state constitutional provisions analogous to the Federal Constitution's Establishment Clause, weighed the constitutionality of such practices as Bible reading in the public

21. In *Bradfield v. Roberts*, 175 U.S. 291 (1899), an Act of Congress had appropriated funds for the construction of buildings to serve the indigent on the grounds of privately-owned hospitals in the District of Columbia. Pursuant to this Act, funds were allocated to a hospital incorporated under the laws of the District and operated by an order of Roman Catholic nuns. The Court held that this expenditure was not proscribed by the Establishment Clause since the hospital was not legally a sectarian body, but rather a corporation which would have to be managed in accordance with its charter, which made no mention of religious control. In *Bear v. Leupp*, 210 U.S. 50 (1908), the Commissioner of Indian Affairs, under the direction of the Sioux Tribe, had contracted with the Bureau of Catholic Indian Missions for the education of members of the tribe. The funds used by the Commissioner were funds which he held in trust for the Sioux and which had been paid by the United States for land cessions and in fulfillment of treaty obligations. The Court found that the contract did not violate the Establishment Clause since only private funds owned by the Sioux were involved. *Id.* at 81-82.

22. In *Terret v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815), Justice Story in dicta interpreted a provision of the Virginia Constitution protecting the free exercise of religion, as not forbidding equal aid to all sects. In *Reynolds v. United States*, 98 U.S. 145, 164 (1878), in which the indictment of a Mormon for bigamy was held to be constitutional, the Court referred to a letter written by Thomas Jefferson in 1802 stating that the religion clauses of the First Amendment built "a wall of separation between church and State." The Court continued, "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment" In *Davis v. Beason*, 133 U.S. 333, 342 (1890), in which a law denying polygamists the right to vote was upheld, the Court wrote, "[T]he first amendment . . . was intended . . . to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." And in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), the Court observed parenthetically that "this [the United States] is a religious people," *id.* at 465, and "this is a Christian nation," *id.* at 471.

23. *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930), involved a statute providing free textbooks to all schoolchildren in the state. The statute had been challenged in the Louisiana courts as a violation of a provision of the state constitution forbidding public aid to sectarian schools, but the Louisiana Supreme Court sustained the law on the theory that the books were for the benefit of the children and not the schools. *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929). No Establishment Clause issue was raised before the United States Supreme Court—probably because the Establishment Clause had not yet been made applicable to the states through the Fourteenth Amendment—and the Court unanimously and succinctly rejected the claim that the law violated the Due Process Clause of the Fourteenth Amendment by spending public money for a private purpose. 281 U.S. at 374-75.

schools,²⁴ tax exemptions for churches,²⁵ the wearing of religious garb by public school teachers,²⁶ state aid to sectarian hospitals and asylums,²⁷ and numerous forms of public aid to church-related schools.²⁸ And in the years after World War II, there was a marked trend among state courts to sustain most forms of government aid to and cooperation with religion.²⁹

Released time programs also grew very rapidly during the 1940's.³⁰ By 1948 when *McCollum* was decided it was estimated that more than two million students participated in such programs.³¹ The programs existing in 1948 differed in many respects. One variety, usually labelled "dismissed time," released all students (participants in week-day religious classes and nonparticipants) one hour each week before classes regularly ended.³² Some communities allowed the religious classes to be held on the school premises, but most did not. The programs also differed with regard to the extent of the public schools' involvement in such matters as keeping records of attendance at the religious classes and punishing truancies, informing parents of the existence of the program, assembling the children by sect so that they could be conducted to the religious classes, and punishing misbehavior in or on the way to the classes.³³ In sum, released time programs existed in one form or another in 46 states in 1948³⁴ and legal challenges to the programs in the state courts had been unsuccessful.³⁵

24. See, e.g., *Lewis v. Board of Educ.*, 157 Misc. 520, 285 N.Y.S. 164 (1935), *appeal dismissed*, 276 N.Y. 490, 12 N.E.2d 172 (1937) (holding the practice constitutional); Fellman, *Separation of Church and State in the United States: A Summary View*, 1950 Wis. L. Rev. 427, 450 nn.129, 130.

25. See, e.g., *Garrett Biblical Institute v. Elmhurst State Bank*, 331 Ill. 308, 163 N.E. 1 (1928) (holding them constitutional); Fellman, *supra* note 24, at 454-55.

26. See, e.g., *City of New Haven v. Town of Torrington*, 132 Conn. 194, 43 A.2d 455 (1945); Fellman, *supra* note 24, at 448 nn.117-20.

27. See, e.g., *Kentucky Bldg. Comm'n v. Efron*, 310 Ky. 355, 220 S.W.2d 836 (1949); Fellman, *supra* note 24, at 446-47.

28. See 60 HARV. L. REV. 793 (1947); 50 YALE L.J. 917 (1941).

29. See 96 U. PA. L. REV. 230, 240 (1947).

30. See 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 529 (1950).

31. *Id.* at 525-41; *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 224 (1948). But see L. PFEFFER, CHURCH, STATE, AND FREEDOM 320 (1953), disputing the estimated number of participants.

32. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 222-23 n.14 (1948).

33. See 2 A. STOKES, *supra* note 30, at 526.

34. R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 78 (1963).

35. Programs in which the religious classes were held off school premises had been upheld in California and Illinois. *Gordon v. Board of Educ.*, 78 Cal. App. 2d 464, 178 P.2d 488 (1947); *Latimer v. Board of Educ.*, 394 Ill. 228, 68 N.E.2d 305 (1946). In New York, the Court of Appeals, with Judge Benjamin N. Cardozo joining the majority, had overruled a decision by a lower court invalidating a similar plan. *Lewis v. Graves*, 245 N.Y. 195, 156 N.E. 663 (1927), *overruling sub silentio* *Stein v. Brown*, 125 Misc. 692, 211 N.Y.S. 822 (1925).

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B. *Everson v. Board of Education*³⁶

The contemporary controversy concerning the meaning of the Establishment Clause began in 1947 with *Everson v. Board of Education*. *Everson* involved a challenge to the constitutionality of a local ordinance reimbursing parents of children who attended church-related schools for their children's bus fares on the town's public buses.³⁷ In conference, the United States Supreme Court affirmed the reimbursement by a vote of six to two.³⁸ The two dissenters, Justices Frankfurter and Rutledge, advocated very strict separation of church and State. In their view, any public aid to religious institutions violated the Establishment Clause. The views of the majority were less certain and fixed. They were unsure of the exact scope of the Establishment Clause's prohibition, but they did not feel that the plan before them fell within it. Justice Burton voted for affirmance, although he felt the reimbursement was very unwise. Justice Murphy "passed" in the voting in conference; and as the Court's only Catholic, he wondered whether it might not be best if he abstained altogether.³⁹ Later, Justices Burton and Jackson decided to dissent and Justice Frankfurter made an impassioned appeal to Justice Murphy to cast the deciding vote against the reimbursement.⁴⁰ In the end, however, Justice Murphy voted to affirm

36. 330 U.S. 1 (1947).

37. Finding no violation of the state or federal constitutions, the New Jersey Court of Errors and Appeals had denied a taxpayer's suit to enjoin the reimbursements. *Everson v. Board of Educ.*, 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1946).

38. Docket Book for the 1946 Term, in Box 155 of Harold H. Burton Papers, Manuscript Div. of the Library of Congress [hereinafter cited as Papers].

39. Conference Sheets for the 1946 Term, in Box 164 of Papers.

40. Justice Frankfurter wrote the following letter to Justice Murphy in an attempt to persuade him:

Dear Frank,

You have some false friends—those who flatter you and play on you for *their* purposes, not for your good. What follows is written by one who cares for your place in history, not in tomorrow's columns, as lasting as yesterday's snow. At least your brother and sister would acquit me of anything but disinterestedness. I am willing to be judged by them.

The short of it is that you, above all men, should write along the lines—I do not say with the phrasing—of Bob's opinion in *Everson*. I know what you think of the great American doctrine of Church and State—I also know what the wisest men of the Church, like Cardinal Gibbons thought about it. You have a chance to do for your Country and your Church such as never came to you before—and may never again. The things we most regret—at least such is my experience—are the opportunities missed. For the sake of history, for the sake of your inner peace, don't miss. No one knows better than you what *Everson* is about. Tell the world—and shame the devil.

Anyhow—this comes from one who writes because the truth within him is insistent. Letter from Felix Frankfurter to Frank Murphy, undated, in Box 86 of Felix Frankfurter Papers, Manuscript Div. of the Library of Congress [hereinafter cited as Frankfurter Papers].

and the plan was held constitutional by a shaky vote of five to four.⁴¹

The written opinions in *Everson* reflected the closeness of the decision and the ambivalence which had marked the Court's deliberations. Writing for the Court, Justice Black found the Establishment Clause to prohibit "laws which aid one religion, aid all religions, or prefer one religion over another. No tax in any amount, large or small, can be levied to support any religious activities or institutions. . . . In the words of Jefferson, the [Establishment Clause] was intended to erect 'a wall of separation between church and State.'"⁴²

In support of this stringently separationist interpretation of the Establishment Clause, Justice Black relied exclusively upon an historical argument.⁴³ In brief, the argument, on which Justice Rutledge elaborated in his dissent,⁴⁴ was that since James Madison was the principal author of the First Amendment, his views on the separation of church and State were the best evidence concerning the meaning of the Establishment Clause.⁴⁵ Thomas Jefferson's views were also considered relevant since he collaborated with Madison in the struggle to remove the privileged position of the Episcopal Church in Virginia.⁴⁶

When Justice Black applied his "wall of separation" interpreta-

41. The voting in *Everson* and the two released time cases was as follows:

	<i>Everson</i>	<i>McCullum</i>	<i>Zorach</i>
Vinson	MAJORITY	MAJORITY	MAJORITY
Black	MAJORITY	MAJORITY	dissent
Douglas	MAJORITY	MAJORITY	MAJORITY
Murphy	MAJORITY	MAJORITY	[replaced by Clark: MAJORITY]
Reed	MAJORITY	dissent	MAJORITY
Burton	dissent	MAJORITY	MAJORITY
Frankfurter	dissent	MAJORITY	dissent
Jackson	dissent	MAJORITY	dissent
Rutledge	dissent	MAJORITY	[replaced by Minton: MAJORITY]

Table derived from *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952).

42. 330 U.S. at 15-16. Justice Black had noted preliminarily that the Establishment Clause was made applicable to the states by the Fourteenth Amendment. *Id.* at 8. He thus confirmed what the Court had stated repeatedly in dicta since 1940. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 593 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

43. 330 U.S. at 11-14. There was some support for this theory in previous dicta by the Court. *See* note 22 *supra*.

44. *Id.* at 33-44.

45. And the best evidence on Madison's views, according to this theory, was the Memorial and Remonstrance which he wrote in 1785 in opposition to a bill introduced in the Virginia Assembly by Patrick Henry to levy a tax for the benefit of "teachers of the Christian religion." *Id.* at 11-14, 33-44.

46. This historical theory has provoked much comment both on and off the Court. *See* note 53 *infra*.

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tion of the Establishment Clause to the plan before the Court, he found—somewhat surprisingly—that the wall had not been breached.⁴⁷ Without mentioning *Cochran v. Louisiana State Board of Education*,⁴⁸ Justice Black found that the reimbursement was valid as a method of promoting the safety and welfare of all the schoolchildren of the district. It was not unconstitutional because it may have indirectly benefited the church-related schools as well, for the First Amendment requires the state to be neutral in its treatment of religious groups, not hostile.⁴⁹

Everson drew criticism from all quarters.⁵⁰ Some commentators, while pleased with the interpretation of the Establishment Clause articulated by the Court in dicta, viewed the decision as an ominous precedent which might lead to more substantial forms of state aid to religion.⁵¹ Others, while pleased with the holding, were disturbed by the Court's dicta.⁵² The historical argument advanced by Justices Black and Rutledge also provoked much reaction. Two books which made serious attempts to refute their thesis—*Religion and Education under the Constitution* by J. M. O'Neill and *The First Freedom* by Wilfrid Parsons—soon appeared. Both authors argued that the Establishment Clause had been intended to forbid governmental preference of one religion over another but not nondiscriminatory governmental aid.⁵³

47. 330 U.S. at 18.

48. 281 U.S. 370 (1930). See note 23 *supra*.

49. Justice Jackson, joined by Justice Frankfurter, dissented. 330 U.S. at 18. He found the Court's dicta about the high and impregnable "wall of separation between church and State" irreconcilable with its approval of the challenged plan. Justice Rutledge also wrote a dissenting opinion in which Justices Frankfurter, Jackson, and Burton joined. *Id.* at 28. Advancing the same historical argument which Justice Black had used, Justice Rutledge concluded that the Establishment Clause forbade any use of public funds for religious purposes. Since the cost of transportation was an important element of the cost of schooling and since the purpose of church-related schools was to provide religious education, he felt that the challenged reimbursements were unconstitutional.

50. See R. MORGAN, *THE SUPREME COURT AND RELIGION* 92 (1972).

51. See, e.g., Powell, *Public Rides to Private Schools*, 17 HARV. EDUC. REV. 73, 84 (1947).

52. See, e.g., Murray, *The Court Upholds Religious Freedom*, 76 AMERICA 628 (1947).

53. J. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 43-126 (1949); W. PARSONS, *THE FIRST FREEDOM* 14-50 (1948). This theory was often associated with the Roman Catholic Church: Professor O'Neill taught at a Roman Catholic college and Wilfrid Parsons was a Jesuit priest. Much of the early criticism of Justice Black's theory was authored by well-known Roman Catholics. See, e.g., Murray, *Law or Prepossessions?*, 14 LAW AND CONTEMP. PROB. 21, 27-31, 41-43 (1949). Or it appeared in law reviews of Catholic universities, see, e.g., Schmidt, *Religious Liberty and the Supreme Court of the United States*, 17 FORD. L. REV. 173 (1948); 32 MARQ. L. REV. 138 (1948). And later an exhaustive examination of the issue reached the same conclusion. C. ANTIEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* (1964) (published by the Nat'l Catholic Welfare Conf.).

However, prominent constitutional scholars and historians not associated with the Roman Catholic Church also attacked Justice Black's historical argument, sometimes in

II. *Illinois ex rel. McCollum v. Board of Education*⁵⁴

Less than one year after *Everson*, the Court was faced with another difficult application of the Establishment Clause in *McCollum v. Board of Education*. The Champaign County, Illinois, school board had permitted teachers selected by local religious groups and approved by the superintendent to conduct classes in religion in the school buildings during the school day.⁵⁵ There were separate classes for Protestants, Catholics, and Jews.⁵⁶ The regular public school teachers distributed cards on which the parents were requested to indicate whether they wished their children to participate.⁵⁷ Children who participated received one class period per week of religious instruction.⁵⁸ Records of attendance were kept and trancies were reported to the public school authorities.⁵⁹ Children who did not participate

sharp terms. Edward S. Corwin wrote, "The historical record shows beyond peradventure that the core idea of 'an establishment of religion' comprises the idea of *preference*; and that any act of public authority favorable to religion in general cannot without manifest falsification of history be brought under the ban of that phrase." Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 20 (1949). An historian who reassessed the Court's use of history criticized Justice Black's argument as based on sources "which modern scholars would hesitate to suggest an undergraduate rely upon as anything but a once important, although now outdated view." Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 64-65 (1963). Another concluded that the evidence in support of Justice Black's theory was insufficient. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 137-42.

Mark DeWolfe Howe, while not endorsing the theory that the Establishment Clause did not ban nondiscriminatory government aid to church-related institutions, condemned the Court's historical argument: "By superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer." M. HOWE, *THE GARDEN AND THE WILDERNESS* 4 (1965). Professor Howe contended that the Court had erred by associating the religion clauses exclusively with Jefferson's deistic rationalism and anticlericalism. He felt, instead, that the clauses expressed the principles of Roger Williams, who was chiefly concerned with protecting the churches from the corrupting effects of governmental support. Williams's principles would not forbid all government aids to religion, but only those incompatible with full religious freedom. *Id.* at 10-19.

The Court's historical argument was later reaffirmed in *Abington School Dist. v. Schempp*, 374 U.S. 203, 213-14 (1963) (Clark, J., for the Court); *Engel v. Vitale*, 370 U.S. 421, 427-36 (1962) (Black, J., for the Court); *McGowan v. Maryland*, 366 U.S. 420, 430, 437-38 (1961) (Warren, C.J., for the Court). For the conclusions of an historian who agreed with the Court's theory, see 4 I. BRANT, *JAMES MADISON, FATHER OF THE CONSTITUTION: 1787-1800*, at 268-72 (1950).

54. 333 U.S. 203 (1948).

55. *Id.* at 207-09. Although the religious teachers were subject to the approval and supervision of the superintendent, *id.* at 208 n.3, there were no written rules specifying this and in practice no teacher selected by any religious group had ever been turned away. *Id.* at 242 & n.4.

56. *Id.* at 208-09.

57. *Id.* at 207 n.2. The churches bore the cost of printing the cards and the Illinois courts found that distribution of the cards by public school employees did not interfere with their regular work. *Id.*

58. *Id.* at 207-08.

59. *Id.* at 209 n.5.

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continued with their secular studies.⁶⁰ Alleging that the Champaign program violated the First Amendment, Mrs. McCollum, a parent of a public school student and a taxpayer of Champaign, brought an action for mandamus against the local Board of Education.⁶¹

When the case reached the United States Supreme Court, the crucial issue quickly became the validity of the separationist dicta in *Everson*. While counsel for Mrs. McCollum relied heavily on this dicta,⁶² counsel for the school board did not even attempt to reconcile it with the Champaign plan. Armed with the manuscript of Professor O'Neill's book,⁶³ they argued instead, in their briefs and in oral argument, that the Court's historical argument in *Everson* was incorrect and that the Establishment Clause did not forbid government aid to religion, so long as there was no discrimination among sects.⁶⁴

The Court discussed *McCollum* in conference on December 13 and voted seven to one to declare the Champaign program unconstitutional. Only Justice Reed dissented. Justice Murphy, who again passed on the initial vote, later joined the majority. As in *Everson*, Chief Justice Vinson selected Justice Black to write for the Court.⁶⁵

Justice Black circulated the first draft of his opinion to his col-

60. *Id.* at 209. The record in the trial court as to what the nonparticipating students did while the religious classes were in progress is not clear. The practice seems to have varied depending on the percentage of students in the class participating in the released time program. Record at 63-64, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). Justice Frankfurter interpreted the record to mean that the non-participants were often left to their own devices. 333 U.S. at 227. Justice Reed quarreled with Justice Frankfurter about this interpretation. Letter from Stanley Reed to Felix Frankfurter, Jan. 28, 1948, in Box 186 of Papers, *supra* note 38.

The trial court found that the only expenditure of public funds attributable to the program was for the extra heat and light and janitorial service. Record, *supra*, at 69-70.

61. 333 U.S. at 205.

62. See Supplemental Brief for Appellant at 11-15, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). Counsel for Mrs. McCollum concluded his oral presentation in the Supreme Court with the following words: "[W]ithout any hesitancy it can be said that unless this Court is now prepared to delete from the opinions in [*Everson*] the strong language that was used, unless it is prepared to renounce the principles set out by the majority—and, so far as that is concerned, concurred in by the minority—then the decision in this case must necessarily be in favor of the appellant." Record of Oral Argument at 60, *quoted in* R. DRINAN, *supra* note 34, at 77.

63. Pfeffer, *Church and State: Something Less than Separation*, 19 U. CHI. L. REV. 1-3 (1951).

64. Brief for Appellee at 24-100, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948); R. DRINAN, *supra* note 34, at 76-77. An observer at the oral argument in McCollum noted that Justice Black and others on the Court were clearly annoyed by the arguments impugning their historical scholarship, but since counsel for the school board raised no other defense it appeared that the outcome of the case would depend on the Court's decision to approve or to withdraw the Establishment Clause test it had announced in *Everson*. *Id.* Leo Pfeffer, who helped prepare the amicus curiae brief of the Synagogue Council of America, agreed that the status of the *Everson* dicta was the key issue. Pfeffer, *supra* note 63, at 2-3.

65. Docket Book for the 1947 Term, in Box 173 of Papers, *supra* note 38.

leagues in early January. Much of the language and all of the essential arguments were the same as in his final opinion for the Court.⁶⁶ After dealing quickly with the problem of Mrs. McCollum's standing,⁶⁷ he staunchly defended *Everson* against the accommodationist assault. He made it clear that the Court stood by both the holding and the dicta of *Everson*. He rejected the argument that the Establishment Clause required only equal treatment by government for all religions and he reaffirmed the contrasting interpretation set forth in *Everson*.⁶⁸ Turning to the Champaign plan, he explained that it was unconstitutional because it included "use of tax-supported property for religious instruction and . . . close cooperation between the school authorities and the religious council in promoting religious education."⁶⁹ Later he noted an additional factor: "The State also affords sectarian groups an invaluable aid . . . through use of the State's compulsory public school machinery."⁷⁰

A. Phase One: Justice Burton's Compromise

Although the argument propounded by counsel for the school board won considerable support from historians and constitutional scholars,⁷¹ only one member of the Court, Justice Reed, seems to have been swayed by it.⁷² Within the Court, the holding in *Everson* was far more vulnerable to attack than its separationist dicta.

By explicitly reaffirming the holding of *Everson* as well as its dicta, Justice Black rekindled the opposition of the four Justices who dissented in *Everson*. And since one of the members of the five-man *Everson* majority—Justice Reed—was now in dissent, Justice Black's draft could not become the opinion of the Court unless at least one of the *Everson* dissenters endorsed it. The *Everson* dissenters, however, were reluctant to accept *Everson* as binding precedent, since it had been decided less than one year ago and by a shaky vote of five to four.⁷³

After reading Justice Black's draft, Justice Burton, one of the *Everson* dissenters, sent Justice Black a note stating that he was

66. For convenience of reference, the arguments in Justice Black's first circulated draft are cited to the analogous arguments in his final opinion.

67. 333 U.S. at 206.

68. *Id.* at 210-11. The expressions of support for the *Everson* holding were more extensive in the draft than in the final opinion.

69. *Id.* at 209.

70. *Id.* at 212.

71. See note 53 *supra*.

72. Even Justice Reed did not accept it in full. See note 97 *infra*.

73. See p. 1213 *infra*.

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awaiting an opportunity to consider any concurring opinions. Anxious to win him over, Justice Black wrote to Justice Burton on January 6 indicating that he would be glad to consider any changes which dissatisfied members of the majority might suggest.⁷⁴

On the same day, the four *Everson* dissenters (Justices Burton, Frankfurter, Jackson, and Rutledge) met and decided to file a concurring opinion which would express continued opposition to *Everson*. They selected Justice Frankfurter to draft the opinion⁷⁵ and on January 28 Justice Frankfurter sent them copies of a proposed concurring opinion.⁷⁶ Justice Frankfurter's draft contained the same basic arguments as his final opinion.⁷⁷ It was also generously interspersed with expressions of thorough disagreement with the holding in *Everson*. At one point, for example, he wrote, "The result [in *Everson*] so recently announced and by the narrowest margin, concerns too vital a feature of our constitutional system for the issue to be deemed closed."⁷⁸

Justice Burton valued consensus among the members of the Court very highly. When he compared Justice Black's and Justice Frankfur-

74. Justice Black wrote to Justice Burton:

Having been assigned the job of writing for the Court I shall do what I can to reconcile the views of those who agree the case should be reversed. In this delicate field it would seem wise to have a Court opinion if possible, although some views expressed at the conference indicated that accomplishment of such an objective might be difficult. Of course it cannot be done if the parochial school issue is injected into the different issue here.

Letter from Hugo L. Black to Harold H. Burton, Jan. 6, 1948, in Box 186 of Papers, *supra* note 38.

75. Harold H. Burton's Diary [hereinafter cited as Diary], Jan. 6, 1948, in Box 2 of Papers, *supra* note 38.

76. Indicating his desire to hold the *Everson* dissenters together, Justice Frankfurter wrote to them, "It would make me very happy to be able to speak for the four of us, and if I can do so with your help, I am at your disposal. So, please be as free as the freest bird in making suggestions about the draft." Letter from Felix Frankfurter to Harold H. Burton, Jan. 28, 1948, in Box 186 of Papers, *supra* note 38.

77. Arguments in Justice Frankfurter's draft are cited to the analogous arguments in his published opinion. Justice Frankfurter reviewed the history of the secularization of American education and maintained that the public schools had a crucial function to play "as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people." 333 U.S. at 216. In order for the public schools to perform this role, he felt they must be kept "scrupulously free from entanglement in the strife of sects." *Id.* at 216-17. Justice Frankfurter then recounted the development of released time programs in America and examined the program implemented in Champaign. *Id.* at 222-25, 227. He found that under the Champaign plan religious education was "patently woven into the working scheme of the school." *Id.* at 227. This resulted in subtle coercion by the school system on the students to participate; the plan also gave rise to feelings of separatism among the students, feelings which were antithetical to the public school's role of social integration. *Id.* For these reasons, he found the Champaign released time plan unconstitutional, but he carefully limited his holding to the particular plan before the Court. *Id.* at 231.

78. Draft of concurring opinion of Justice Felix Frankfurter, Jan. 28, 1948, in Box 186 of Papers, *supra* note 38. This draft also stated, "We venture to express the hope that this decision may check any encouragement that may have been drawn from the decision in *Everson v. Board of Education*."

ter's opinions, he felt that despite their persistent disagreement about *Everson* they were similar enough to permit some sort of compromise. Accordingly, he wrote to Justices Black and Frankfurter on February 6 suggesting that, with some changes in both opinions, seven Justices could join Justice Black's opinion for the Court and that Justices Burton, Rutledge, and Jackson could join Justice Frankfurter's concurring opinion.⁷⁹ Burton wrote, "I believe there is infinite value to be gained if we can have some joint expression by seven members of the Court in this case instead of having no opinion joined in by more than four members and thus compelling readers to try to discover or imagine the points of difference that made such a division necessary."⁸⁰ Burton listed several minor

79. Letter from Harold H. Burton to Hugo L. Black and Felix Frankfurter, Feb. 6, 1948, in Box 186 of Papers. Justice Burton said here that he felt seven Justices could join Justice Black's opinion, but at other times he felt it was possible that all eight members of the majority might join. He apparently had doubts that Justice Jackson would go along. Handwritten notes, in Box 336 of Papers.

80. Letter from Harold H. Burton to Hugo L. Black and Felix Frankfurter, Feb. 6, 1948, in Box 186 of Papers.

Justice Burton's eagerness to effect a compromise among his colleagues is perhaps best explained as an aspect of the characteristic role he appears to have played in the Court's deliberations. During the past 25 years, social psychologists and sociologists have conducted extensive research on the roles which members of small groups play. For a good summary and bibliography of the research in this area, see Hare, *Groups: Role Structure*, 6 INT'L ENCYC. SOC. SCI. 283 (1968). Probably the leader in this field is Robert F. Bales, whose findings are summarized in Bales, *Task Roles and Social Roles in Problem-solving Groups*, READINGS IN SOC. PSYCH. 437 (E. Maccoby, T. Newcomb & E. Hartley eds. 1958). This research has identified two broad categories of productive small group members: Those in the first, who are sometimes labelled "task specialists," focus their energies on solving the problems at hand as effectively as possible; those in the second category, labelled "social specialists," channel their efforts toward promoting and maintaining friendly relationships among the members of the group while they struggle to perform their task. Bales, *supra*, at 447.

If the findings of small group research are used to analyze the interactions among the Justices in the released time cases, Justice Burton appears to have exhibited all the characteristics of a social specialist. He was primarily concerned with aiding the members of the Court to work together as a group and he was adept at conciliation and compromise. On the other hand, he tended to neglect constitutional doctrine and his views on constitutional issues were uncertain. In *McCullum* his primary concern was achieving a compromise between two strong-willed colleagues, Justices Black and Frankfurter. He worked diligently to harmonize their opinions and conducted a lengthy series of meetings with his colleagues. Despite an angry exchange between Justices Black and Frankfurter in the middle of his efforts, he managed to engineer a delicate compromise. In contrast to his skill in the sphere of the social specialist, he was inconsistent and uncertain in the area of constitutional doctrine, the sphere of the task specialist. Of all the Justices, his views on the Establishment Clause were the most unsettled. In *Everson* he voted first to affirm, then to reverse. See p. 1207 *supra*. In *McCullum*, he straddled nearly the entire spectrum of judicial opinion on that issue; he concurred with Justice Frankfurter's fervent separationist views while he shared Justice Reed's concern for the New York released time program. See pp. 1216-21 *infra*. And later, in *Zorach*, he became the only Justice who had dissented in *Everson* to vote with the majority. See note 41 *supra*.

Justice Burton seems to have performed a similar role in other cases documented in his papers. *Henderson v. United States*, 339 U.S. 816 (1950), which was probably the most important opinion Justice Burton ever wrote (see Kirkendall, *Harold Burton*, 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2617, 2626 (L. Friedman & F. Israel eds. 1969); 381 U.S. at ix-x (1965)

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changes in the two opinions which he felt would make his compromise possible.⁸¹

Three days later, Justices Burton and Rutledge wrote to Justices Black and Frankfurter suggesting further changes in their drafts. They recommended the deletion from Justice Black's opinion of all references to the *Everson* holding and most of the quotations from

(Solicitor General Cox addressing Court)), provides a good example. In *Henderson* the plaintiff, the NAACP, and the Solicitor General urged the Court to find that the seating plan adopted by the Southern Railroad for use in its dining cars violated the Equal Protection Clause; they also urged repudiation of the separate-but-equal rule. The Court voted unanimously to overturn the plan. Selected to write for the Court, Justice Burton based the holding on a violation of the Interstate Commerce Act. However, the draft of his opinion which he originally circulated also implied that the plan violated the Equal Protection Clause and contained language which seemed to suggest the impending doom of the separate-but-equal rule. *Henderson v. United States* file, in Box 210 of Papers, *supra* note 38. Only one member of the Court, Justice Frankfurter, objected to Justice Burton's opinion. Justice Frankfurter felt that Justice Burton was "borrowing future trouble" by implying that separate facilities were inherently unequal. He especially objected to Justice Burton's reference to the use of curtains to separate black and white diners as "symbolic":

"Symbolic" is the anti-segregation slogan. That is precisely the social objection to segregation, namely that it represents a symbol of inferiority. We cannot introduce it into an opinion without giving just ground to the notion that we have ruled out segregation as such

Letter from Felix Frankfurter to Harold H. Burton, May 31, 1950, in Box 210 of Papers. Justice Frankfurter also objected to other, similar language in Justice Burton's opinion. Although no other Justice supported Justice Frankfurter, Justice Burton decided to yield. Following Justice Frankfurter's suggestions, he removed or watered down all the language which seemed to foreshadow the end of the separate-but-equal rule. *Henderson v. United States* file, in Box 210 of Papers. When the opinion was released, politicians, the black community, the press, and the country in general were especially interested in what the case portended for the future of segregation. See, e.g., NAACP, 1950 ANNUAL REPORT—CIVIL RIGHTS AT MIDCENTURY 23 (1950); Atlanta Constitution, June 6, 1950, at 18, col. 1. Ironically, Justice Frankfurter's pallid substitutes for some of Justice Burton's original language were widely quoted and examined in the press as possible indications of the Court's future course. See, e.g., N.Y. Times, June 6, 1950, at 18, col. 2; Wash. Post, June 6, 1950, at 13, col. 3; Chic. Defender, June 10, 1950, at 1, col. 3; see also L. MILLER, THE PETITIONERS 369-70 (1966). In the only biography of Justice Burton written since his death, only one sentence from his opinion is quoted. It is one of the sentences in *Henderson* which Burton changed to placate Frankfurter. Kirkendall, *supra*, at 2623.

Justice Burton also seems to have been ideally suited by personality and experience for the role of a social specialist. On his skills as a conciliator, see W. McCUNE, NINE YOUNG MEN 234 (1947); Kirkendall, *supra*, at 2626; 381 U.S. vii (1965) (Warren, C.J., describing Justice Burton). For a description of Justice Burton's occasionally unsure grasp of constitutional doctrine, see F. ROELL, NINE MEN 310 (1955). For statistical evidence supporting the theory that Justice Burton was a social specialist, see Atkinson & Neuman, *Toward a Cost Theory of Judicial Alignments: The Case of the Truman Bloc*, 13 MIDWEST J. POL. SCI. 271, 280-82 (1969).

81. In Justice Black's opinion, he suggested deletion of one sentence which explained why the reimbursement in *Everson* was constitutional. And in Justice Frankfurter's opinion, he recommended several revisions which made it clear that the Justices who joined that opinion also agreed with the opinion of the Court. Letter from Harold H. Burton to Hugo L. Black and Felix Frankfurter, Feb. 6, 1948, in Box 186 of Papers, *supra* note 38. Justices Burton and Frankfurter conferred that morning about the proposed changes. Justices Burton, Frankfurter, and Rutledge held further discussions during the afternoon. Diary, *supra* note 75, Feb. 6, 1948. On the following day Justice Black joined them for discussions before and after the regular Saturday conference. Diary, Feb. 7, 1948. Justice Burton spent Sunday studying Justice Frankfurter's and Justice Black's opinions and attempting to harmonize them. Diary, Feb. 8, 1948.

the Court's opinion. They recommended that Justice Frankfurter in return delete from his opinion all criticism of *Everson*.⁸²

On February 10, Justice Burton held a hectic round of conferences concerning the opinions in *McCullum*.⁸³ When he finally convinced Justice Frankfurter not to attack *Everson* in his opinion,⁸⁴ his plan to achieve agreement on a Court opinion seemed to have succeeded. On that same day, however, Justice Jackson circulated his concurring opinion. Frankfurter received it before speaking to Burton,

82. Memorandum from Harold H. Burton and Wiley Rutledge to Hugo L. Black and Felix Frankfurter, Feb. 9, 1948, in Box 186 of Papers.

83. During the morning he met with Justice Douglas and later with Chief Justice Vinson. After the Court session in the afternoon, he met first with the Chief Justice, then with Justice Jackson, then with Justice Frankfurter, and finally with Justices Frankfurter and Douglas together. Diary, *supra* note 75, Feb. 10, 1948.

84. The willingness of Justice Frankfurter, who was deeply opposed to the *Everson* holding, to consider Justice Burton's compromise is probably attributable to a desire not to split the anti-*Everson* bloc on the Court. Justice Frankfurter entertained the hope that *Everson* might some day be overruled. See p. 1213 *supra*. If he had been intransigent and if, as a result, Justices Burton and Rutledge had not joined his opinion, the future influence of the anti-*Everson* bloc would have been greatly diminished.

Justice Black was willing to participate in the compromise and to make changes in his opinion in order to secure its endorsement by a majority of the Justices. This illustrates what appears to be a fairly common occurrence in the interactions among the Justices: the use of a dissenting or concurring opinion to effect changes in the opinion of the Court. See W. MURPHY, *THE ELEMENTS OF JUDICIAL STRATEGY* 37-91 (1964). It is obvious that a Justice may be able to use his vote as a bargaining tool if his colleagues are evenly divided. If the Court is badly fragmented and a majority has been unable to agree on a single opinion, as in *McCullum*, an individual Justice may be able to effect changes in one of the opinions in exchange for his endorsement. A member of the Court like Justice Brandeis, whose opinion carried great weight, might sometimes be able to induce the majority to alter its opinion in exchange for suppressing an individual dissent. A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 205-10 (1957). Finally, on occasions when members of the Court value unanimity very highly, a single Justice might be able to persuade the majority to make concessions simply by threatening to strike out on his own. This phenomenon is noticeable in several of the civil rights cases of the 1950's. Witness, for example, the way in which Justice Frankfurter was able to modify the opinion of the Court in *Henderson v. United States*, 339 U.S. 816 (1950), merely by threatening to concur silently. See note 80 *supra*. And in *Cooper v. Aaron*, 358 U.S. 27 (1958), some of the Justices became enraged when Justice Frankfurter filed a concurring opinion. *Cooper* grew out of the famous attempts to desegregate Little Rock, Arkansas, Central High School and Governor Orval E. Faubus's efforts to prevent it. When the Little Rock school board's request for a two and one-half year delay in implementing integration reached the Supreme Court in *Cooper*, many of the Justices appeared to value unanimity especially strongly. Thus when Chief Justice Warren announced that the Court had unanimously denied the school board's request, he paused noticeably and looked up for emphasis before saying the word "unanimously." J. PELTASON, *FIFTY-EIGHT LONELY MEN* 190 (1961). And when the written opinion was handed down, it was attributed, not to its actual author, but to all the Justices listed with the Chief Justice first and the others following in order of seniority. Given this atmosphere, when Justice Frankfurter circulated his concurring opinion, which did not differ with the Court's opinion in any regard, several of the other Justices signed a two sentence concurring opinion stating that Justice Frankfurter's opinion should not be taken as a dilution of the Court's position. This opinion was withdrawn—although Justice Frankfurter's was not—only after Justice Harlan circulated a tongue-in-cheek opinion which concurred with the Court's opinion, expressed a *dubitante* as to the wisdom of Justice Frankfurter's filing a concurring opinion, and dissented from the concurring opinion filed in response to Justice Frankfurter's opinion. *Cooper v. Aaron* file, in Box 325 of Papers, *supra* note 38.

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but he did not get a chance to read it thoroughly. After reading it at home that night, he was prompted to reconsider the compromise Burton had hammered out. The next day he wrote Burton that he now regretted entering their agreement. Nevertheless, he wrote, he would abide by it because he had received Jackson's draft before entering the agreement and ought to have read it immediately. However, in view of these unusual circumstances, he felt he should send an explanatory memorandum to the conference.⁸⁵

Justice Frankfurter's memo appears to have made Justice Black's blood boil and he fired off an angry reply.⁸⁶ The next day Justice Black wrote to Burton and Rutledge and explained his position. He felt that if Justice Frankfurter was not willing to base the decision in *McCullum* on "principles that were commonly declared in the *Everson* opinion and in Justice Rutledge's dissent," he should state his position in a separate opinion. For his part, Justice Black was unwilling to repudiate those principles "expressly or by failure to refer to them in a Court opinion."⁸⁷ And, he wrote, "Of course it is unthinkable that there should be a public declaration of agreement and a secret statement of disagreement." He thus assumed that any further consideration of Justice Burton's plan was futile.⁸⁸

85. Justice Frankfurter explained to Justice Burton that he was circulating the memo "to avoid all future misunderstandings, since I do not have in everyone the same confidence that I have in you." He added, "The role of the peacemaker is proverbially hard and I am sorry to add to your burdens." Letter from Felix Frankfurter to Harold H. Burton, Feb. 11, 1948, in Box 186 of Papers. Justice Frankfurter's memo read as follows:

Inasmuch as contemporaneous candor often forestalls later misunderstanding, I deem it important to make explicit my position in regard to the *Everson* case.

In deference to the views of others who believe it is desirable to secure a Court opinion in *McCullum*, even though it is to be had by omitting all reference to the *Everson* decision, in the Court opinion in *McCullum*, I am prepared to delete all references to *Everson* in my concurring opinion. But since time has only confirmed my conviction that the decision in *Everson* was wrong and mischief-breeding, and since I attach great importance to the constitutional question involved, I have decided to make it a matter of record that I do not deem myself in the slightest foreclosed by that decision should the issue again come before us. Memorandum for the conference from Felix Frankfurter, Feb. 11, 1948, in Box 186 of Papers.

86. Justice Black wrote:

I have just been handed a memorandum from Justice Frankfurter to the effect that he will not agree to any opinion in the *McCullum* case which makes reference to the *Everson* case. I will not agree to any opinion in the *McCullum* case which does not make reference to the *Everson* case. Time has confirmed my conviction that the decision in the *Everson* case was right, and since I attach great importance to the constitutional question involved, I have decided to supplement the record made by Justice Frankfurter by stating this fact. Of course, there is nothing unusual about one who entertains the belief that the views opposite to his are "mischief-breeding."

Memorandum for the conference from Hugo L. Black, Feb. 11, 1948, in Box 186 of Papers.

87. Letter from Hugo L. Black to Harold H. Burton and Wiley Rutledge, Feb. 12, 1948, in Box 186 of Papers.

88. *Id.*

Justices Burton and Rutledge persisted nevertheless. Justice Rutledge wrote to Justice Burton, "These tempers flash too fast. But often they cool after the flash."⁸⁹ At first, Justices Burton and Rutledge felt that there was still a chance to convince seven Justices to sign Justice Black's opinion. If they failed in that effort, they planned to ask Justices Black and Frankfurter to make very minor changes in their opinions and to join both. This would ensure a majority opinion of the Court.⁹⁰ By March, they had concluded that a seven-man majority opinion was unattainable and they fell back on their alternative position.⁹¹ Justice Burton wrote to Justice Rutledge and listed the changes he felt they should request in Justice Frankfurter's and Justice Black's opinions. Some references to *Everson* would remain in Justice Black's opinion, although they recommended deletion of a few. Explicit criticism of *Everson* would be removed from Justice Frankfurter's opinion, but the continued disagreement of the *Everson* dissenters would still be clearly implied.⁹² On March 2, Justice Burton conferred at length with Justices Frankfurter and Black.⁹³ The next day he wrote in his diary that a final compromise had been reached.⁹⁴ The final opinions were approved at the regular Saturday conference three days later on March 6. When final agreement was reached, Justice Rutledge slipped Justice Burton a handwritten note which said merely, "Harold, Congratulations on a fine job." Obviously proud of his achievement, Justice Burton drew a complicated diagram on the note depicting the shifting alignments of the Justices during the consideration of the case.⁹⁵

Justice Burton's compromise had dealt with a single problem: the status of the Court's decision in *Everson*. In *McCullum*, *Everson* had been under attack from both accommodationists and separationists. The school board had urged repudiation of *Everson's* separationist dicta. And the *Everson* dissenters had planned to use *McCullum* to express their continued disagreement with *Everson's* holding in the hope that it might be reversed in the future. In addition, since Justice Reed, who had been in the majority in *Everson*, was now in dissent, it had appeared that there were not five Justices who approved of both the holding and the dicta in *Everson* and

89. Letter from Wiley Rutledge to Harold H. Burton, undated, in Box 186 of Papers.

90. *Id.*

91. Diary, *supra* note 75, March 2, 1948.

92. Letter from Harold H. Burton to Wiley Rutledge, March 2, 1948, in Box 186 of Papers.

93. Diary, March 2, 1948.

94. Diary, March 3, 1948.

95. Letter from Wiley Rutledge to Harold H. Burton, March 6, 1948, in Box 336 of Papers.

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who could thus endorse Justice Black's opinion for the Court.⁹⁶ With the Court's ground-breaking Establishment Clause precedent in this dubious condition, Justice Burton attempted to engineer a delicate compromise between two strong-willed colleagues, Justices Black and Frankfurter. Although the compromise was only cosmetic, it necessitated complex and protracted negotiations more characteristic of peace talks than of the normal pattern of interactions on the Court. These negotiations dominated the Court's deliberations in *McCollum* from early January, when Justice Black first circulated his proposed opinion, until three days before the final opinions were officially approved in early March. Thus most of the Court's attention in *McCollum* was focused on the problem of the status of *Everson*. Other aspects of *McCollum*, most notably its implications for other government-sponsored activities of a religious nature, were hardly discussed at all.

B. Phase Two: The Implications of *McCollum*

Justice Reed, the only dissenter in *McCollum*, circulated the first draft of his opinion in January. His argument at this point was essentially the same as in his final opinion.⁹⁷ Probably the most important part of Justice Reed's opinion was his exploration of *McCollum*'s effect on released time programs which differed from Champaign's.⁹⁸ Justice Reed observed that the opinion of the Court and Justice Frankfurter's concurring opinion did not specify which element or elements of the Champaign plan rendered it unconstitutional. Was it the use of public school buildings, the distribution

96. See p. 1212 *supra*.

97. (The arguments in Justice Reed's draft are cited to the analogous arguments in his final opinion.) Although Justice Reed agreed with *Everson*'s declaration that the state could not "aid" religion even if it distributed its benefits to all sects evenhandedly, he would define aid as "purposeful assistance to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions." 333 U.S. at 248. He distinguished such aid from the Champaign plan and from a broad category of traditional governmental practices. This category included the subsidies upheld in *Everson* and *Cochran*, subsidies which he described as "incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society." *Id.* He also distinguished many government-sponsored activities of a religious nature which were "embedded in our society by many years of experience." *Id.* at 256. These included the daily invocation in Congress, chaplains in the armed forces, and compulsory church attendance in the military academies. *Id.* at 253-55.

98. The facts concerning at least one other variety of released time had been presented to the Court in *McCollum*. The Protestant Council of New York had filed an amicus curiae brief in order to inform the Court of the details of the New York program, in which the religious classes were held off school premises. Brief for Protestant Council of New York as Amicus Curiae at 2-15, Illinois *ex rel.* *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

of the request cards by secular teachers, the maintenance by the public school system of records of attendance at religious classes?⁹⁹ He concluded from the "tenor of the opinions" that they invalidated all released time plans.¹⁰⁰

At an early point in the Court's deliberations, Justice Reed began to discuss the released time question with Justice Frankfurter. On January 28, he sent a long memorandum to Justice Frankfurter criticizing various aspects of Justice Frankfurter's draft opinion. He argued that the chief factual distinction between the Champaign and New York plans, the use of the public school buildings in Champaign, was not of constitutional significance.¹⁰¹ And after noting Justice Frankfurter's contention that the Champaign program exerted pressure on the students to participate and that it fostered feelings of divisiveness, he argued that the New York plan was no less coercive or divisive. "[I]f the Champaign program is unconstitutional," he wrote, "the New York program must fall for the same reasons."¹⁰² Justice Reed felt that both plans were constitutional. However, he concluded by urging Justice Frankfurter to express his rationale in terms which could not be applied to the New York plan.¹⁰³

Except for the correspondence between Justices Reed and Frankfurter¹⁰⁴ there is no evidence that the Court considered or discussed the implications of *McCollum* on the New York released time plan and other programs until the last week before the final opinions were sent to the printer. In early March, when final agreement on his compromise was at hand, Justice Burton shifted his attention to this question. He insisted to both Justices Black and Frankfurter that in order for him to join their opinions they must not invalidate

99. 333 U.S. at 240.

100. *Id.*

101. Letter from Stanley Reed to Felix Frankfurter, Jan. 28, 1948, in Box 186 of Papers, *supra* note 38.

102. *Id.*

103. *Id.*

104. *Id.* Justice Frankfurter sent Justice Reed a letter reminiscent of his appeal to Justice Murphy in *Everson*:

Dear Stanley,

Please read this and then re-read it and try to understand what it is trying to say. Unless you do understand the deep thought expressed in this letter believe me you cannot understand the real issues that underlie "released time" problems. You cannot appreciate the true significance of "separation of church and state" as a basic principle of our democracy. For ours is a unique democracy, composed not only of "a people gathered and to be gathered from many nations and many tongues," *Hurtado v. Calif.*, 110 U.S. 516, 531, but of the greatest variety of religious faiths. As a principle enshrined in our Constitution, the requirement of the separation of church and state calls for the most rigorous enforcement—judicial. Letter from Felix Frankfurter to Stanley Reed, Feb. 1, 1948, in Box 93 of Frankfurter Papers, *supra* note 40.

the New York released time plan.¹⁰⁵ Of course, if Justice Burton did not join these opinions, his entire elaborate compromise would collapse. Justices Black and Frankfurter gave Justice Burton assurances that, to use his phrase, they had "excluded" the New York plan¹⁰⁶ and Burton joined both opinions.

Precisely what Justices Black and Frankfurter meant when they assured Justice Burton was never made clear. There are at least two plausible alternatives. They might have meant that they had not made up their minds about the constitutionality of the New York plan and that their opinions truly left it an open question. On the other hand, they might have meant that their opinions "excluded" the New York plan in a formal sense only, *i.e.*, that no language in their opinions would make it impossible for a Justice who joined them to vote in favor of the New York plan at a later time, or that the New York plan was excluded simply because it was not before the Court at that time.

Although not conclusive, the evidence strongly suggests that Justice Frankfurter had already decided that the New York plan was invalid and that his assurances to Justice Burton were based on an "exclusion" in the formal sense only. Ironically, his opinion contained language explicitly limiting its holding to the Champaign plan.¹⁰⁷ Despite this language, Justice Reed, who had discussed the released time question with Justice Frankfurter at length, concluded that Justice Frankfurter's opinion doomed all released time programs.¹⁰⁸ Justice Reed urged Justice Frankfurter to clarify his opinion if he did not intend this result, but Justice Frankfurter took no action.¹⁰⁹ Most significantly, in response to Justice Burton's requests for assurances that his opinion did not invalidate the New York plan, Justice Frankfurter sent a note which implied strongly that the prin-

105. Handwritten notes, in Box 336 of Papers, *supra* note 38.

106. *Id.* Justice Reed, however, told Justice Burton that Justice Frankfurter's opinion did not. *Id.*

107. Justice Frankfurter's opinion contained the following statement:

We do not consider, as indeed we could not, school programs not before us which, though colloquially categorized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable.

333 U.S. at 231. Justice Frankfurter's phrase "as indeed we could not" may well have signalled that this limitation was formal and perfunctory. His statement two sentences later of what his opinion did find constitutionally important was broad enough to encompass all released time programs: "We find that the basic Constitutional principle of absolute separation was violated when the State of Illinois . . . sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangements." *Id.*

108. *Id.* at 240; handwritten notes, in Box 336 of Papers, *supra* note 38.

109. See p. 1220 *supra*.

ciples embodied in the dissents in *Everson* required invalidation of the New York plan.¹¹⁰

The evidence also indicates that Justice Black's assurances were meant in a purely formal sense. Unlike Justice Frankfurter's opinion, Justice Black's opinion did not contain any language specifically limiting its holding to the facts of the Champaign plan. On the day before the final opinions in *McColum* were approved in conference, Justice Burton wrote to Justice Black suggesting that he add a sentence to this effect.¹¹¹ The petitioner's prayer, which Justice Black's opinion quoted, requested that the Board of Education be ordered to end "all instruction in and teaching of religious education in all public schools"¹¹² Justice Jackson's opinion had cited this language as evidence that *McColum* might one day endanger Bible reading and prayer in the public schools and even secular classes in which religion, religious literature, or religious music was discussed.¹¹³ In light of Justice Jackson's observations, Justice Burton requested that Justice Black add to his opinion a sentence excluding the New York plan as well as the more remote applications of *McColum* to which Justice Jackson had referred.¹¹⁴ Justice Black, however, refused. In addition, when the Court decided *Zorach v. Clauson*¹¹⁵ four years later, Justice Black maintained that he saw no difference of constitutional significance between the New York and Champaign plans and that he had attempted to make this "categorically clear" in his opinion in *McColum*.¹¹⁶ This assertion by Justice Black is wholly inexplicable if his assurances to Justice Burton are interpreted in other than a formal sense.

C. *Reactions and Interpretations*

As soon as *McColum* was handed down, it was greeted with adverse criticism "almost without parallel in volume and intensity."¹¹⁷ Catholic spokesmen and evangelical Protestants delivered the brunt of the criticism. Although *McColum* was praised by most liberal

110. The entire note read as follows:

Harold,

If you have not already seen it, I will tell you that you have committed yourself against the N.Y. "released time." But not by joining my opinion!

Letter from Felix Frankfurter to Harold H. Burton, undated, in Box 336 of Papers.

111. Letter from Harold H. Burton to Hugo L. Black, Mar. 5, 1948, in Box 186 of Papers.

112. 333 U.S. at 205.

113. *Id.* at 234-36.

114. Letter from Harold H. Burton to Hugo L. Black, Mar. 5, 1948, in Box 186 of Papers.

115. 343 U.S. 306 (1952).

116. *Id.* at 316.

117. D. FELLMAN, *RELIGION IN AMERICAN PUBLIC LAW* 89 (1965).

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Protestant groups and Jewish organizations,¹¹⁸ criticism of the decision seems to have drowned out the praise.¹¹⁹

In view of the large number of released time programs which existed at the time *McCullum* was decided, it is surprising that only a few were challenged in the courts in the aftermath of that decision. Released time programs in which the public school buildings were not used were enjoined by local judges in St. Louis and Portland.¹²⁰ With the exception of these cases, the only plan challenged in the courts was that of New York State.¹²¹

After *McCullum* was handed down, the New York released time plan, in which religious classes were held off school premises, was quickly challenged. The New York courts upheld the plan.¹²² They found it factually distinguishable from the Champaign program and interpreted *McCullum* to mean that "at least five of the nine Justices of the United States Supreme Court were in agreement upon the proposition that 'Released Time' as such is not unconstitutional."¹²³ Relying on Justice Frankfurter's explicit limitation of the holding in *McCullum*, they counted Justice Frankfurter and the three Justices who had joined his opinion: Justices Burton, Jackson, and Rutledge. They also counted the lone dissenter, Justice Reed.¹²⁴

118. See 2 A. STOKES, *supra* note 30, at 522.

119. See D. FELLMAN, *supra* note 117, at 89.

120. See Patric, *The Impact of a Court Decision: Aftermath of the McCullum Case*, 6 J. PUB. LAW 455, 462-63 (1957).

121. Attorneys General in at least 11 states wrote formal opinions explaining the reach of *McCullum*. Not surprisingly, they interpreted it as restrictively as possible. Attorneys General from five of these states felt that programs in which the religious classes were not held on the school premises were not affected. 11 CAL. OP. ATT'Y GEN. 184 (1948); 1948-50 NEV. ATT'Y GEN. REP. 66; 23 ORE. ATT'Y GEN. REP. 473 (1948); 1947-48 PA. OP. ATT'Y GEN. 140; 1949-50 S.D. ATT'Y GEN. REP. 1. The Attorneys General of Massachusetts and Minnesota rendered similar opinions informally by letter. See Patric, *supra* note 120, at 461. The Attorney General of Indiana wrote that it was unclear at that time whether the state's off-premises released time program could be sustained. 1948 IND. ATT'Y GEN. REP. 233.

Attorneys General in at least two states ruled that all released time (as distinguished from "dismissed time") programs were unconstitutional. 1949-50 COLO. ATT'Y GEN. REP. 112; 38 WIS. OP. ATT'Y GEN. 281 (1948).

Three Attorneys General ruled that released time programs in which the public school classrooms were used were not necessarily unconstitutional. 1947-48 FLA. ATT'Y GEN. REP. 318; 1947-48 VA. OP. ATT'Y GEN. 158; 43 W. VA. OP. ATT'Y GEN. 48 (1948). In addition, it was estimated that 15 to 50 percent of the nation's released time programs utilizing public school classrooms were continued despite *McCullum*. Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777, 784 (1959).

122. *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E.2d 463 (1951); *Lewis v. Spaulding*, 193 Misc. 66, 85 N.Y.S.2d 682 (Sup. Ct. 1948).

123. *Lewis v. Spaulding*, 193 Misc. 66, 69-71, 85 N.Y.S.2d 682, 686-87 (Sup. Ct. 1948). See *Zorach v. Clauson*, 303 N.Y. 161, 169-70, 100 N.E.2d 463, 466 (1951).

124. See cases cited in note 123 *supra*. Although unwilling to write off Justice Black and the members of the Court who had joined only his opinion (*i.e.*, Chief Justice Vinson and Justice Douglas), the New York courts felt their approval was less likely.

The New York courts' interpretation of the positions of the Justices was entirely consistent with the written opinions they had endorsed, but Justice Burton's papers reveal that in fact that interpretation was badly mistaken. Justice Frankfurter had already made up his mind in 1948 that the New York plan was unconstitutional and his reservation of the question in *McCollum* was probably meant only in a formal sense. If anything, Justice Frankfurter's interpretation of the Establishment Clause called for even stricter separation of church and State than Justice Black's. Consequently, it was not surprising that, when *Zorach v. Clauson*¹²⁵ was decided by the United States Supreme Court, the votes of key Justices were the opposites of the New York courts' predictions: Chief Justice Vinson and Justice Douglas, both of whom had joined Justice Black's opinion in *McCollum*, approved the plan, whereas Justices Frankfurter and Jackson disapproved.¹²⁶

McCollum also unleashed a deluge of legal commentary and a welter of conflicting and often badly mistaken interpretations. Relying on Justice Frankfurter's explicit limitation of the holding of *McCollum*, several commentators agreed with the New York courts' assessment of the positions of the majority and the dissent with regard to released time programs which differed from Champaign's.¹²⁷ Another went so far as to intimate that Justice Frankfurter had considered dissenting.¹²⁸

Two distinguished constitutional scholars, Professors Edward S. Corwin and Arthur E. Sutherland, characterized *McCollum* as a bold attempt by the Court to announce principles which would settle all future Establishment Clause controversies.¹²⁹ In reality, of course, as Justice Burton's papers reveal, *McCollum* was a very tentative compromise reached only after painstaking negotiations. The Court's time was consumed by those negotiations, which concerned cosmetic

125. 343 U.S. 306 (1952).

126. See note 41 *supra*.

127. 2 A. STOKES, *supra* note 30, at 518; 37 IOWA L. REV. 286, 291 (1952). One commentator remarked, "These justices [the four Justices who signed Justice Frankfurter's concurring opinion] believed that the court was fundamentally correct in its decision, but wished to put on record certain facts and considerations to prevent the decision being taken as a precedent which would necessarily bar certain released time programs of a somewhat different character from that in force in Champaign." 2 A. STOKES, *supra*, at 518.

128. 9 OHIO ST. L.J. 336, 342 (1948).

129. Corwin, *supra* note 53, at 22; Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1343 (1949). In Professor Corwin's words, it was one of "those high-flying *tours de force* in which the Court has occasionally indulged, to solve 'forever' some teasing problem—slavery, for example, in the *Dred Scott* case—or to correct, as in the *Pollock* case, 'a century of error.'" Corwin, *supra*, at 22.

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aspects of Justice Black's and Justice Frankfurter's opinions. Virtually no time seems to have been spent discussing far-reaching Establishment Clause issues.

Professor Sutherland also suggested that *McCollum* might indicate that the *Everson* precedent was in danger.¹³⁰ Other commentators speculated that the Court had granted certiorari in *McCollum* or had rendered its decision in order to appease the "national cry of protest and alarm" which had met its decision in *Everson*.¹³¹ In fact, however, the positions of the members of the Court with regard to *Everson* seem to have hardened, rather than shifted; and it was the Justices' intransigence which required Justice Burton's compromise.

The commentators differed widely in their opinions as to which aspect or aspects of the Champaign plan had rendered it unconstitutional. The opinions of Justices Black and Frankfurter referred to at least five factors which contributed to the holding in *McCollum*¹³² and most of the possible combinations of these factors were offered by various commentators as the test announced by the Court.¹³³ Interestingly, there was one simple and plausible interpretation which no commentator advanced: That in the course of their

130. Sutherland, *supra* note 129, at 1335.

131. R. DRINAN, *supra* note 34, at 75-76. See 9 OHIO ST. L.J. 336, 342 (1948).

132. (1) Use of public school buildings or public funds. 333 U.S. at 209. (2) Use of the compulsory school attendance law to induce student participation. *Id.* at 212. (3) Sectarian divisiveness. *Id.* at 227. (4) Close cooperation between church and government officials. *Id.* at 209. (5) Psychological coercion of nonparticipants to attend religious classes. *Id.* at 227.

133. Some felt that the use of the public school classrooms was the crucial factor. See, e.g., 32 MARQ. L. REV. 138, 145 (1948); 22 ST. JOHN'S L. REV. 253, 256 (1948). But others disagreed. See, e.g., Waite, *Jefferson's "Wall of Separation": What and Where?*, 33 MINN. L. REV. 494, 513 (1949); 27 TEXAS L. REV. 256, 258 (1948). Several singled out the use of the compulsory school attendance law to induce students to attend religious classes. See, e.g., 3 OKLA. L. REV. 84, 86 (1950); 3 RUTGERS L. REV. 115, 121 (1949). Others felt it was the divisiveness and separatism which the plan fostered by dividing the schoolchildren into sects. See, e.g., 16 GEO. WASH. L. REV. 556, 558-59 (1948). Still others felt that the crucial factor was the coercion to attend religious classes, a coercion which the plan exerted by segregating the children who did not wish to participate. See, e.g., Sutherland, *supra* note 129, at 1343. Expenditure of public funds and close cooperation between church authorities and school officials were also mentioned. See, e.g., 1 BAYLOR L. REV. 79 (1948). Many commentators felt that the Court had articulated a multi-factor test. See, e.g., 49 COLUM. L. REV. 836 (1949) (use of public school buildings and such coercive features as close cooperation of public school authorities, supervision by public school teachers, publicizing of programs in school, separation of children by religion within school before release, use of truancy mechanism); 19 GEO. WASH. L. REV. 716 (1951) (use of compulsory school attendance mechanism, close cooperation of public school authorities); 46 MICH. L. REV. 828 (1948) (use of compulsory school mechanism and public school buildings); 37 U. VA. L. REV. 1146 (1951) (use of public school property, cooperation of public school authorities, compulsory school attendance machinery); Note, *Tracing the "Wall": Religion in the Public School System*, 57 YALE L.J. 1114 (1948) (use of compulsory school attendance mechanism, divisiveness, use of public buildings or funds).

deliberations the Justices had never identified precisely which factors rendered the Champaign plan unconstitutional.¹³⁴

The commentators also disagreed about the effect which *McCullum* would have on released time plans which differed from Champaign's. Most of the commentators, including those who favored the decision and those who disapproved, felt it represented a complete ban on all released time programs,¹³⁵ but a minority felt that some or all of the programs in which the religious classes were not held on the school premises might not be affected.¹³⁶ *McCullum* also led to widespread speculation among the commentators that many well-established forms of cooperation between church and State other than released time programs would soon be declared unconstitutional.¹³⁷

III. *Zorach v. Clauston*¹³⁸

A. *The Decision*

The issue of the constitutionality of the New York released time program reached the United States Supreme Court in 1952 in *Zorach v. Clauston*. In conference, the Justices upheld the program by a vote of six to three,¹³⁹ a tally that never varied. Justice Douglas wrote the opinion for the Court. He explicitly reaffirmed *McCullum*¹⁴⁰ but stated that the released time plan involved in that case differed from the New York plan since the public school classrooms were not used¹⁴¹ and the "force of the public school" was not used to promote the religious instruction.¹⁴² Although the opinions of the New York

134. This possibility was raised 24 years later in R. MORGAN, *supra* note 50, at 142 n.16.

135. E.g., *No Law But Our Own Prepossessions*, 34 A.B.A.J. 482, 483 (1948); Comment, *Church and State in American Education*, 43 ILL. L. REV. 374, 386 (1948); Note, *supra* note 133, at 1119; 17 GEO. WASH. L. REV. 516, 523-24 (1949); 23 NOTRE DAME LAW. 456 (1948); 9 OHIO ST. L.J. 336, 341 (1948).

136. E.g., 16 ALBANY L. REV. 85, 89 (1952); 32 MARQ. L. REV. 138, 145 (1948); 22 ST. JOHN'S L. REV. 253, 256 (1948).

137. E.g., Fellman, *supra* note 24, at 473-75 (chaplains for Congress and the armed forces, religious services in hospitals and prisons, use of the Bible for oaths, use of the G.I. Bill at church-related schools, the National School Lunch Act, tax exemptions for churches); Sutherland, *supra* note 129 (incorporation of religious bodies, tax exemptions, "In God We Trust"); Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968 (1949) (tax exemptions for churches); Note, *supra* note 133, at 1119 (Bible reading and the Lord's prayer in public schools "endangered").

138. 343 U.S. 306 (1952).

139. Docket Book for the 1951 Term, in Box 230 of Papers, *supra* note 38.

140. 343 U.S. at 315.

141. *Id.* at 308-09.

142. *Id.* at 315. Justice Douglas also noted that all the costs, including the cost of the application blanks for the program, were borne by the religious groups. In context, he appears to have intended this as a distinction between the New York and Cham-

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courts had listed many other differences between the two programs,¹⁴³ Justice Douglas did not mention any of them.¹⁴⁴ Justices Black, Frankfurter, and Jackson wrote separate dissenting opinions arguing that the New York released time plan was unconstitutional because it employed the compulsory school attendance law to induce students to attend religious instruction.¹⁴⁵

The opinions in *Zorach* show that the members of the Court were as confused, or at any rate as sharply divided, as the commentators with regard to just what the Court had decided in *McCollum*. Justice Black wrote that he felt that his opinion in *McCollum* made it "categorically clear" that the New York plan was unconstitutional,¹⁴⁶ but six other Justices, including three who had joined his opinion in *McCollum*, disagreed. All three dissenting opinions charged the majority with misreading *McCollum* and Justice Jackson implied that the majority's misinterpretation was purposeful.¹⁴⁷ It seems very likely that at least part of the cause of this disagreement was the ambiguous stipulations which Justice Burton made with Justices Black and Frankfurter just before *McCollum* was handed down. Justices Black and Frankfurter seem to have regarded those stipulations as reserving judgment on the New York plan in a formal sense only, whereas Justices Burton and Douglas and Chief Justice Vinson

paign plans. *Id.* at 308-09. But the trial court in *McCollum* found that no public funds, except the nominal amounts attributable to use of the public school classrooms, had been expended in Champaign. Record at 70, Illinois *ex rel.* *McCollum v. Board of Educ.*, 333 U.S. 206 (1948). For a discussion of the ambiguity in Justice Douglas's distinction between the two plans as explained in *Zorach*, see p. 1230 *infra*.

143. See *Lewis v. Spaulding*, 193 Misc. 66, 72, 85 N.Y.S.2d 682, 688-89 (Sup. Ct. 1948). The court distinguished the New York plan from the Champaign plan on the basis of numerous additional features including the following: Participating students were not separated by sect within the school; the public school system did not supervise the religious teachers or courses and did not distribute the registration cards; public school teachers neither solicited pupil participation nor publicized the program; the public school system did not use truancy rules to enforce attendance; and nonparticipating students did "significant educational work" in their usual classrooms.

144. Justice Douglas recognized that the First Amendment requires "complete and unequivocal" separation of church and State, but he did not believe this meant that government and religion were required to be hostile, suspicious, and unfriendly. 343 U.S. at 312. Thus, he noted, churches enjoy tax exemptions and police and fire protection; prayers are recited in the legislative halls; presidential messages appeal to God; oaths are given in courts. *Id.* at 312-13. He analogized the New York program to the practice of excusing public school students from attendance on holy days recognized by their religion. "We are a religious people whose institutions presuppose a Supreme Being," he wrote. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Id.* at 313-14.

145. *Id.* at 316-17, 321, 323-24. Justice Frankfurter, as in *McCollum*, also mentioned the divisiveness which he felt released time programs engendered.

146. *Id.* at 323.

147. *Id.* at 316. "The distinction attempted between that case [*McCollum*] and this is trivial to the point of cynicism. . . . A reading of the Court's opinion in that case along with its opinion in this case will show such differences of overtones and undertones as to make clear that the *McCollum* case has passed like a storm in a teacup." *Id.* at 325.

may well have interpreted them in a broader sense. As a result, the interactions among the Justices in *Zorach* were marked by sharp exchanges concerning the meaning of *McCollum*.

After Justice Frankfurter had read Justice Douglas's opinion for the Court, he added a paragraph to his opinion and stated that the majority was breaking faith with the principles which eight Justices had approved in *McCollum*.¹⁴⁸ Justice Douglas responded by adding footnote eight to his opinion. He pointed out that, at the time *McCollum* was decided, Chief Justice Vinson, Justice Burton, and he had felt that the New York plan was not prejudged by that case. As evidence, he quoted Justice Frankfurter's language specifically limiting the holding of his opinion in *McCollum*. And in what may have been a veiled reference to Justice Burton's stipulation, he referred to Justice Frankfurter's limitation of the holding in that case as a "reservation of the question" now before the Court and he pointedly noted that Justice Burton had joined Justice Frankfurter's opinion.¹⁴⁹ Justice Frankfurter responded to this by adding footnote two to his opinion. He stated that his reservation in *McCollum* had not referred to the New York plan or to any other particular released time plan.¹⁵⁰

B. Interpretations

In attempting to explain the Court's decision in *Zorach*, a large number of commentators, noting the harsh criticism levied against *McCollum* and the difficulty of reconciling it with *Zorach*, suggested that the pressure of public opinion had caused the Court to switch its position on the issue of released time. Over the years an impressive list of constitutional scholars and experts on the Supreme Court has subscribed to this thesis. Among its adherents were Leo Pfeffer¹⁵¹ and Professors Philip B. Kurland,¹⁵² Paul G. Kauper,¹⁵³ C. Herman Pritchett,¹⁵⁴ and David Fellman.¹⁵⁵ The interactions among the Jus-

148. Memorandum for the Court from Felix Frankfurter, Apr. 24, 1952, in Box 219 of Frankfurter Papers, *supra* note 40.

149. Memorandum to the conference from William O. Douglas, Apr. 25, 1952, in Box 219 of Frankfurter Papers.

150. Memorandum for the Court from Felix Frankfurter, Apr. 25, 1952, in Box 219 of Frankfurter Papers.

151. L. PFEFFER, *supra* note 31, at 170-71, 351-53.

152. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 73 (1961).

153. Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 839 (1954).

154. C. PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* 14 (1954).

155. Fellman, *supra* note 12, at 160; D. FELLMAN, *supra* note 117, at 88. Sorauf, *supra* note 121, at 791, also endorsed this theory. The following raised or suggested the possibility: W. MARNELL, *THE FIRST AMENDMENT; THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA* 206 (1964); G. SPICER, *THE SUPREME COURT AND FUNDAMENTAL FREEDOMS* 138 (2d ed. 1967); R. DRINAN, *supra* note 34, at 83-84.

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tices in the released time cases, however, strongly suggest that this theory is wrong. Three Justices (Burton, Vinson, and Douglas) who had voted to declare the Champaign program unconstitutional later voted to uphold the constitutionality of the New York plan.¹⁵⁶ Justice Burton's communications with Justices Black and Frankfurter during the Court's deliberations on *McCollum* show that he was strongly inclined at that time to find the New York plan constitutional and he relied on stipulations with Justices Black and Frankfurter to preserve that question. As Justice Douglas implied in his exchange of footnotes with Justice Frankfurter in *Zorach*, Chief Justice Vinson and he may also have relied on Justice Burton's stipulations. In any event, since both Justices Black and Frankfurter assured their colleagues in *McCollum* that they had "excluded" the New York program, it is hard to accuse Justice Burton, Justice Douglas, and Chief Justice Vinson of changing positions as a result of public pressure when they later approved the New York plan.

Another outwardly plausible theory advanced to explain *Zorach* was that the Court had retreated from the stance it took in *McCollum* because it became alarmed by the threat *McCollum* posed to such traditional practices as tax exemptions for churches and prayer in the public schools.¹⁵⁷ According to this theory, although Justice Reed's dissent in *McCollum* had not persuaded any of his colleagues when written, they were later struck by the "countless instances, cited in Reed's opinion, of government aid to religion," and they realized that all of these practices were endangered by the "sweeping principles" *McCollum* had announced.¹⁵⁸ Thus in *Zorach* the Court took the opportunity to circumscribe *McCollum* drastically.

Although this thesis is plausible on its face, the interactions among the Justices strongly suggest that it is incorrect in nearly every particular: In *Zorach* the Justices appear to have been concerned about the New York released time plan, not about *McCollum*'s collateral effects; Justice Reed's dissent in *McCollum* appears to have influenced other Justices at the time it was written¹⁵⁹ rather than in subsequent years; and what attracted their attention was Justice Reed's discussion of the New York program instead of his list of traditional government entanglements with religion.

156. See note 41 *supra*.

157. F. O'BRIEN, *JUSTICE REED AND THE FIRST AMENDMENT 154-70* (1957).

158. *Id.* at 154.

159. It seems to have prompted Justice Burton's stipulations.

IV. Subsequent Interpretations of the Released Time Cases by the Supreme Court

Since the released time cases form an integral part of the foundation of Establishment Clause precedent, members of the Supreme Court have discussed them repeatedly in subsequent cases. However, the Justices themselves seem to have had little more success than the commentators in articulating their exact meaning.

Even Justice Douglas, who authored the Court's opinion in *Zorach*, has had difficulty distinguishing the New York plan upheld in that case from the Champaign plan declared unconstitutional in *McCollum*. At various points in his opinion in *Zorach*, Justice Douglas mentioned three factors which were not present in the New York plan but which had led to the holding in *McCollum*: First, Champaign had expended some public funds for its program;¹⁶⁰ second, religious classes met in public school buildings;¹⁶¹ third, the force of the public school system had been used to propagate religion.¹⁶² Since Justice Douglas did not elaborate on these distinctions, their precise meaning was not at all clear. The first (expenditure of public funds) and the second (use of the public school buildings) seemed to amount to the same thing, since it could be said that public funds were spent under the Champaign plan only because some funds were allocable to the use of classrooms for the religious classes, either for the heat or lighting provided or on some other basis.¹⁶³ The third distinction was wholly conclusory and Justice Douglas did not make its factual basis clear. It too may have rested on the use of the public school classrooms in Champaign, since that was the only clear factual distinction between the plans brought out in Justice Douglas's opinion. Less plausibly, it may have referred to the minor factual distinctions identified by the New York courts¹⁶⁴ but not explicitly mentioned by Justice Douglas. Justice Douglas's discussion of *McCollum* in *Engel v. Vitale*¹⁶⁵ added to the confusion. At one point in his concurring opinion, he stated, without mentioning *Zorach*, that the Champaign released time plan had violated the Establishment Clause because it had involved "indoctrination" and "proselytizing."¹⁶⁶ This statement raised an obvious problem: If the Champaign plan

160. 343 U.S. at 308-09.

161. *Id.*

162. *Id.* at 315.

163. See note 142 *supra*.

164. See note 143 *supra*.

165. 370 U.S. 421 (1962) (a short nondenominational prayer approved by the New York State Regents for use in the public schools held to violate the Establishment Clause).

166. *Id.* at 439.

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was unconstitutional chiefly because it entailed proselytizing and indoctrination, it was not at all clear why the New York plan was not also unconstitutional¹⁶⁷—unless for some unexplained reason, the indoctrination found in *McCollum* was a result of the use of the public school buildings. Justice Douglas has at several points implied such a basis for the cases, but he has never explained his views clearly.¹⁶⁸ In his concurring opinion in *Abington School District v. Schempp*,¹⁶⁹ Justice Brennan drew this connection explicitly. Justice Brennan argued that the use of the school buildings in Champaign was the crucial factor, not because it resulted in expenditure of public funds, but because it invested the religious teachers "with all the symbols of authority at the command of the lay teacher."¹⁷⁰ Such investiture did not occur in *Zorach*, since the religious classes were held off the public school premises.¹⁷¹

Although it is not clear exactly what significance Justice Jackson attached to the use of the public school buildings in *McCollum*, brief references to *McCollum* in two cases decided before *Zorach* suggest that he might not have shared Justice Brennan's view that such use was important because it symbolically invested the religious teachers with the authority of the State.¹⁷²

167. If the test against which the New York plan was measured in *Zorach* was whether it involved indoctrination or proselytizing, one might ask why Justice Douglas did not refer to the minor factual distinctions (listed by the New York courts) between the New York and Champaign plans which differentiated the plans. See note 143 *supra*.

168. See W. DOUGLAS, *THE BIBLE AND THE SCHOOLS* 11 (1966). Another factor made Justice Douglas's treatment of *McCollum* in *Engel* even more confusing. Justice Douglas had stated that the issue posed was whether the Constitution forbade the state to finance a religious exercise and he answered that it did. 370 U.S. at 437. Later in the opinion he argued that the Constitution prohibited public aid in any amount to church-related institutions. He was even prepared to find that the amount of public money allocable to the 20 seconds spent by each public school teacher in leading the prayer each morning was enough to render the prayer unconstitutional. *Id.* at 441. If this were so, then surely the small amount of public funds allocable to the use of the classrooms for religious instruction in the Champaign plan was also enough to render that plan unconstitutional. But, strangely, Justice Douglas did not seem to feel that this issue was involved in *McCollum*: He stated that the Champaign plan had not been invalidated on that basis and that therefore *McCollum* did not control *Engel*. *Id.* at 439.

Justice Douglas's most recent discussions of *McCollum* and *Zorach* have not clarified their meaning. In *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), in which he repudiated his vote with the majority in *Everson*, *id.* at 708, he made it clear that he still adhered to *Zorach* and felt that it was distinguishable from *McCollum*. *Id.* at 701. One year later, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), he added to the difficulty of understanding the nature of that distinction by noting with approval that *McCollum* had held that a state could not use its compulsory public school machinery to induce pupils to attend religious classes. *Id.* at 640-41. If that was the holding of *McCollum*, *Zorach* cannot be explained.

169. 374 U.S. 203, 261-63 (1963).

170. *Id.* at 261-62.

171. *Id.* at 262.

172. In *Saia v. New York*, 334 U.S. 558 (1948), a member of the Jehovah's Witnesses had used a sound truck to deliver a sermon in a public park and had been convicted of violating a municipal ordinance prohibiting the use of sound trucks with-

Justice Harlan also did not accept the symbolic distinction which Justice Brennan drew between the two released time programs. Justice Harlan felt that it made no difference that public school classrooms had been used in one case and not in the other. He therefore concluded in his concurring opinion in *Welsh v. United States*¹⁷³ that *Zorach* had been wrongly decided and that both plans were unconstitutional.¹⁷⁴

Justice Black, who wrote for the Court in *McCollum*, has maintained that there were two independent grounds for the decision in that case. First, as he pointed out in dissent in *Zorach*, the Champaign plan was unconstitutional because it used the compulsory school attendance law to induce children to attend the religious classes.¹⁷⁵ Second, as he noted sixteen years later in his dissent in *Board of Education v. Allen*,¹⁷⁶ the plan was unconstitutional because public funds were used "to support the agencies of private religious organizations the taxpayers oppose."¹⁷⁷

Chief Justice Warren entered the released time quagmire in his opinion for the Court in *McGowan v. Maryland*,¹⁷⁸ in which a Maryland law forbidding the sale of certain items on Sunday was upheld. At the end of his opinion, the Chief Justice attempted to distinguish the Maryland law from the released time plan invalidated in *McCollum*, at that time the only case in which the Court had struck down a state action as a violation of the Establishment Clause. The Chief Justice mentioned four factors which had rendered the Champaign plan unconstitutional: First, it had coerced children to participate in religious services; second, the students who did not attend the religious classes had no alternative but to remain in their usual classrooms; third, the plan had involved direct cooperation be-

out a permit. In *Kunz v. New York*, 340 U.S. 290 (1951), an abrasive religious speaker was denied a permit to speak in a public park and was convicted of disorderly conduct when he later did so. In both cases the Court reversed the convictions on free speech grounds and in both Justice Jackson dissented. One of the arguments he advanced was that *McCollum* had established that "the Constitution will not suffer tax-supported property to be used to propagate religion." *Id.* at 311 n.10 (dissenting). See *Saia v. New York*, *supra*, at 569 (dissenting). Justice Jackson did not elaborate on this conclusion, but it seems unlikely that it was based on the view that the religious speakers involved in those cases were invested with the symbols of governmental authority when they spoke in public parks.

173. 398 U.S. 333 (1970) (interpreting the definition of a conscientious objector under the Selective Service Act, 50 U.S.C. App. § 456(j) (1970)).

174. *Id.* at 361 n.13. Justice Harlan had intimated this earlier in *Walz*. 397 U.S. at 696.

175. 343 U.S. at 316.

176. 392 U.S. 236 (1968) (holding constitutional a New York law which provided free secular textbooks for all students, including those at church-related schools).

177. *Id.* at 251.

178. 366 U.S. 420 (1961).

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tween church and government officials; fourth, tax-supported buildings were used.¹⁷⁹ The Chief Justice, however, did not refer to the New York plan considered in *Zorach*, which would seem to involve all of these factors except the use of the school buildings.

In summary, more than twenty years of repeated discussion of *McColum* and *Zorach* by Justices of the Supreme Court have failed to elucidate the distinction between them. Justice Black felt that the expenditure of public funds in *McColum* was one distinguishing feature, but Justice Brennan disagreed. Justice Brennan was alone in his belief that the symbolic investiture of religious exercises with the authority of the state, which resulted from the use of public buildings in *McColum*, distinguished the cases. Justice Douglas felt that "proselytizing" or "indoctrination" distinguished *McColum* from *Zorach*, but Justice Harlan thought both plans encouraged religion. Chief Justice Warren listed coercion of the students to participate as one of the reasons for the Champaign plan's invalidity, but Justice Brennan felt that the New York plan was indistinguishable on this basis.¹⁸⁰ Chief Justice Warren also listed cooperation between church and government officials, but the opinion of the Court in *Zorach* did not mention any facts which distinguished the New York plan from the Champaign plan in this respect.

Conclusion

The released time cases illustrate, probably as well as any cases can, that the pattern of interactions among the Justices can have a profound effect on how a Supreme Court opinion will be interpreted. In the released time cases, the interactions caused confusion among the lower courts and commentators and they even appear to have led to sharp divisions among the Justices themselves in *Zorach*.

Lower courts and commentators were misled for a number of reasons. First and probably most important, they were misled because they did not know about Justice Burton's secret, last-minute stipulations with Justices Black and Frankfurter in *McColum*. Had they known of these stipulations, of course, they probably would not have suggested that the Court took the position it did in *Zorach* as a result of unfavorable public reaction to *McColum*. Similarly, the theory that the Court switched in *Zorach* because it had recognized the wide impact which *McColum* could have on traditional

179. *Id.* at 452-53.

180. *Abington School Dist. v. Schempp*, 374 U.S. 203, 261 (1963).

forms of cooperation between government and religion would not have been propounded.

Second, much too much was read into Justice Frankfurter's limitation of the holding of his opinion in *McCullum*. This led to the erroneous conclusion, drawn by the New York courts and others, that the members of the Court who endorsed Justice Frankfurter's opinion were more likely than their colleagues to approve other forms of released time.

Third, many commentators interpreted *McCullum* incorrectly because they assumed that the Court had reached agreement on a precise test of the constitutionality of released time programs. The fact that Justices Burton and Rutledge joined both Justice Frankfurter's and Justice Black's opinions—which were quite dissimilar—compounded the confusion. Commentators were unsure whether to regard only Justice Black's opinion or both opinions as the pronouncement of the Court.¹⁸¹

Finally, many commentators badly misinterpreted the released time cases because they attempted to discern the motivations or long-term intentions of the Justices from the written opinions. Commentators hypothesized—erroneously—that the Justices intended *McCullum* as a final solution to Establishment Clause problems, that public pressure had caused the Justices to retreat in *Zorach*, that *McCullum* represented a retreat from *Everson* caused by the pressure of public opinion, and that fear that *McCullum* would lead to invalidation of practices such as tax exemptions for churches and prayer in the public schools caused the Justices to circumscribe *McCullum* severely in *Zorach*. Perhaps the most extreme example was the suggestion by one commentator who had no actual knowledge of what occurred in conference in *Zorach*, that Justice Jackson had dissented in that case because he was angered by a comment Justice Douglas made in conference.¹⁸²

In addition to confusing the commentators, the interactions in *McCullum*—specifically Justice Burton's stipulations—probably confused the Justices themselves when *Zorach* reached the Court. Justices Black and Frankfurter appear to have regarded those stipulations as insignificant formalities, whereas Justices Burton and Douglas

181. See Pfeffer, *Religion, Education and the Constitution*, 8 LAWYERS GUILD REV. 387, 398 (1948).

182. G. SCHUBERT, *DISPASSIONATE JUSTICE—A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* 65 (1969). Professor Schubert reached this conclusion on the basis of "internal evidence" in Justice Jackson's opinion.

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and Chief Justice Vinson seem to have attributed a broader meaning to them.

It is certainly not possible on the basis of an analysis of the released time cases alone to formulate a list of rules which will prevent a reader of Supreme Court opinions from being misled as a result of the interactions of the Justices. In all likelihood such a list could never be compiled. But the analysis of the released time cases does suggest several approaches which may be helpful. First, the reader should be very hesitant about attempting to discern the Justices' motivations from the written opinions. A long list of outwardly plausible but badly mistaken interpretations resulted from attempts to discern the motivations and intentions of the Justices in the released time cases and illustrates this point. Second, the reader should learn to detect certain unmistakable signs in the written opinions that the Justices bargained or negotiated extensively.¹⁸³ In *McCollum*, the fact that Justices Burton and Rutledge signed Justice Black's and Justice Frankfurter's dissimilar opinions was such a sign. The reader who detects signs of extensive bargaining should remember that the written opinion may not represent the actual position of any of the Justices who signed it. Finally, the reader should remember that sometimes the members of the Court may decide a case without reducing their rationale to precise terms. Occasionally, as appears to have been the case in *McCollum*, this may result from the pattern of interactions among the Justices. In those cases, like *McCollum*, where the ambiguity in the final opinions results from the Court's failure to decide certain questions, even the most exacting textual exegesis cannot penetrate that ambiguity.¹⁸⁴

The interactions in the released time cases may even have contributed to the confusion in which the meaning of those cases has been left despite repeated efforts by individual Justices to explain them. When the Court was considering *McCollum*, its attention was focused on Justice Burton's delicate compromise on the status of *Everson*. The factors which rendered the Champaign plan unconstitutional were not identified precisely and, except for Justice Bur-

183. As an illustration of this approach, see Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 & n.7 (1957).

184. While some of the better commentary on *McCollum* noted that dual endorsements by Justices Burton and Rutledge made it very hard to extract the rationale of the case, see, e.g., Note, *supra* note 133, at 1116, none took the obvious next step of concluding from this that the *McCollum* opinions were, to borrow a phrase, "desperately negotiated documents." Bickel & Wellington, *supra* note 183, at 3 & n.7. Had they recognized this, the reason for the ambiguity in the Court's rationale would have suggested itself immediately.

ton's hurried and ambiguous stipulations, the implications of *McCollum* for other plans and other practices were hardly discussed at all.¹⁸⁵ If the implications of *McCollum* had been fully discussed, Justices who did not wish to invalidate all released time programs might have insisted that the holding be cast in narrower terms or they might even have changed their votes. As it was, Justice Burton publicly endorsed the broad pronouncements of the opinions declaring the Champaign plan unconstitutional, while privately attempting to keep the constitutionality of the New York plan an open question. He does not appear to have explained to his colleagues how he reconciled those positions; and since he turned his attention to the question of the New York plan only in the last few days before *McCollum* was handed down, it is quite possible that he never resolved that problem in his own mind. Other Justices, aware of Justice Burton's stipulations, may have taken the same approach he did. The inconsistency between the broad nature of the principles which support the majority opinions in *McCollum* and Justice Burton's private agreement to keep the constitutionality of the New York plan an open question may well have contributed in *McCollum* and *Zorach* to the inconsistencies which have never been wholly and convincingly explained.

185. In addition, because counsel for the school board relied almost exclusively on the argument that the *Everson* dicta were based on bad history and should therefore be repudiated, the implications of *McCollum* were not explored in the briefs or in oral argument. As an observer at the oral argument wrote, "[T]he three-hour oral pleadings conducted on December 8, 1947, in the *McCollum* case could not possibly have left the eight members of the Court [Justice Murphy was absent] with any idea of the enormous significance of the issues they were being asked to adjudicate." R. DRINAN, *supra* note 34, at 76.