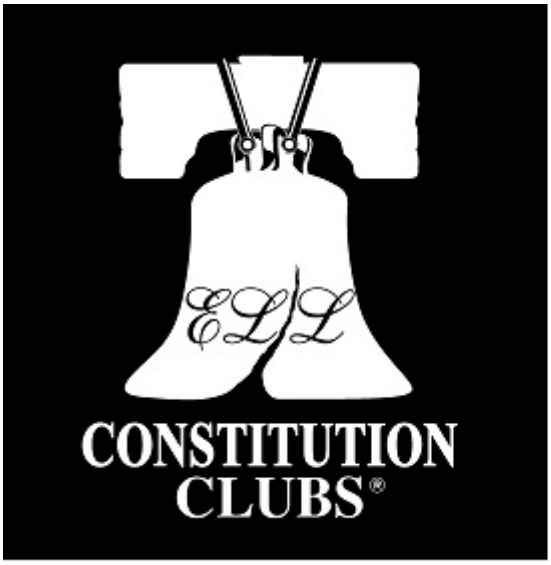

***Zorach v. Clauson* (1952)** - Establishment - Justice Douglas - 6/3.

Issue: In this released time program, students who wish to have religious instruction are permitted to leave the school premises to attend. The others stay in classrooms.

Held: This program is constitutional.

Reasoning: Unlike the program in McCollum v. Board of Education[1], this program involves neither religious instruction in public classrooms **nor expenditure of public funds**. Church and State must be separated. The separation must be complete and unequivocal. The 1st Amendment does not say, however, that in every and all respects there shall be a separation of Church and State... Otherwise the state and religion would be aliens to each other — hostile, suspicious and even unfriendly. Municipalities would not be permitted to render police and fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals of the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the 1st Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court." We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds.

[1]Case 1A-R-023 on this website.

Take a close look at Douglas's list. Do any items stand out as fundamentally set apart from the others?

The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act. **We are a religious people whose institutions presuppose a Supreme Being.** We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. 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. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here. The problem, like many problems in constitutional law, is one of degree. Here, the public schools do no more than accommodate schedules to a program of outside religious instruction.

Dissent: Justice Black/Frankfurter/Jackson. I see no difference between the invalid *McCollum* system and this one. Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery...The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious

sects over nonbelievers or vice versa is just what I think the 1st Amendment forbids...**Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God.** The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government...Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The 1st Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law. **State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of "co-operation," to steal into the sacred area of religious choice.**

Dissent: Frankfurter. The Court tells us that in the maintenance of its public schools, "[The State government] can close its doors or suspend its operations" so that its citizens may be free for religious devotions or instruction. If that were the issue, it would not rise to the dignity of a constitutional controversy. Of course, a State may provide that the classes in its schools shall be dismissed, for any reason, or no reason, on fixed days, or for special occasions. The essence of this case is that the school system did not "close its doors" and did not "suspend its operations." There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. If every one is free to make what use he will of time wholly unconnected from schooling required by law — those who wish sectarian instruction devoting it to that purpose, those who have ethical instruction at home, to that, those who study music, to that — then of course there is no conflict with the 14th Amendment. The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend. The school system is very much in operation during this kind of released time. If its doors are closed, they are closed upon those students who do not attend the religious instruction, in order to keep them within the school. That is the very thing which raises the constitutional issue. **The deeply divisive controversy aroused by the attempts to secure public school pupils for sectarian instruction would promptly end if the advocates of such instruction would content to have the school "close its doors or suspend its operations" — that is, dismiss classes in their entirety, without discrimination — instead of seeking to use the public schools as the instrument for securing attendance at denominational classes. The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes — an attitude that hardly reflects the faith of the greatest religious spirits.**

Dissent: Jackson. This released time program is founded upon a use of the State's power of coercion,

which, for me, determines its unconstitutionality. **My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar. The day that this country ceases to be free for irreligion it will cease to be free for religion — except for the sect that can win political power.** The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected.

It is by no means suggested that this case is wrongly decided. However, please keep Justice Douglas's reasoning in mind when you come to his concurrence in *Engel v Vitale*. There, his sole reason for disallowing prayer in public school is the unconstitutional "expenditure of public funds" for the few seconds it takes a paid teacher to say a prayer. Does not a teacher in *Zorach* eat up at least as many pennies monitoring the attendance of students at religious exercises off campus as do the *Engel* teachers when they utter a prayer? Perhaps Justice Douglas should have left well enough alone when embarking on a principle that does not hold up over time.

Having said that, he makes a very good point that, in effect, this "released time" program is nothing more than allowing a teacher to dismiss a student to attend a religious function with his/her family. Logically, (permission for one) = (permission for many) = the *Zorach* "released time program." And, surely, our Constitution does not forbid a public teacher from letting a child out of school for a family religious function. Yet, the dissent makes good points, as well. And, what of a *Cantwell* argument? Who decides if the religious exercise any given student attends is, indeed, sanctioned religion? The public school superintendent! Maybe, on occasion, theory gets in the way of a practice that is truly OK. Such are the difficulties faced by our Justices.