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Ministerial Draft Exemption and the Establishment Clause

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THE MINISTERIAL DRAFT EXEMPTION AND THE ESTABLISHMENT CLAUSE

Ministers and divinity students enjoy a special exemption from the military draft.[1] The exemption is generally granted where a relatively large amount of time is spent in the preaching and teaching of religion,[2] or where a student makes a reasonably convincing showing that he is studying full time in preparation for the ministry.[3] The number of young men who rely on the exemption is significant.[4]

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1 Selective Service Act of 1948, § 6(g), 62 Stat. 611, 50 U.S.C. App. § 456(g) (1964):

> Regular or duly ordained ministers of religion, . . . and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title.

Id. § 16(g), 62 Stat. at 624-25, 50 U.S.C. App. at § 466(g):

> (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial [*sic*], ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regnlar and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
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> (2) The term "regnlar minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regnlar minister.
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> (3) The term "regular or duly ordained minister of religion" does not include a person who irregnlarly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial [*sic*], rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

The exemption is untouched by recent draft reform. Selective Service Amendment Act of 1969, 83 Stat. 220; Exec. Order No. 11,497, 34 Fed. Reg. 19019 (1969).

2 *E.g.*, Dickinson v. United States, 346 U.S. 389 (1953); United States v. Jones, 382 F.2d 255 (4th Cir. 1967); United States v. Hurt, 244 F.2d 46 (3d Cir. 1957); Hacker v. United States, 215 F.2d 575 (9th Cir. 1954).

3 *E.g.*, United States *ex rel.* Berman v. Craig, 207 F.2d 888 (3d Cir. 1953); United States v. Bartelt, 200 F.2d 385 (7th Cir. 1952); United States *ex rel.* Levy v. Cain, 149 F.2d 338 (2d Cir. 1945).

4 As of June 30, 1967, 101,474 men were classified IV-D, the classification of the ministerial exemption. This constituted approximately 0.3% of all living registrants (including those over the age of liability). 1967 ANNUAL REPORT OF THE DIRECTOR OF SELECTIVE SERVICE 70.

The exemption originated in the draft law of 1917[5] and has been retained in each subsequent draft statute with only minor variations.[6] The legislative purpose for the exemption is not clear, although it probably involved deference to both the spiritual needs of the people and the inherently peaceful nature of the ministry.[7]

The preference granted to men choosing to do religious work may violate the establishment clause of the first amendment.[8] Past challenges of the exemption on establishment clause grounds have failed, but not so convincingly as to preclude further argument. In the *Selective Draft Law Cases*,[9] the Supreme Court summarily dismissed the establishment clause objection to the 1917 Act[10] by saying that its unsoundness was too apparent to require explanation.[11] When next made, more than fifty years later, the argument was again rejected in a district court decision[12] resting on the *Selective Draft Law Cases*, on a presumption of validity stemming from the subsequent reenactment of the exemption, and on the principle that Congress could exempt any

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5 Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78:

> [R]egular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools . . . shall be exempt from the selective draft herein prescribed . . . .

6 Selective Training and Service Act of 1940, ch. 720, § 5(d), 54 Stat. 888, provided:

> Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

The Selective Service Act of 1948, §§ 6(g), 16(g), ch. 625, 62 Stat. 609, 624, included the exemption as it now reads.

7 Cornell, *Exemption from the Draft: A Study in Civil Liberties*, 56 YALE L. J. 258, 263 (1947). One frequently quoted exchange in the House of Representatives in 1917 gives at least one man's view of the purpose of the exemption:

> Mr. BLACK. Does the gentleman know any reason why a minister of the Gospel should be excepted any more than a lawyer or a banker or a farmer?
>
> Mr. QUIN. Oh, yes; a minister of the Gospel ministers to the people. We need somebody, while we are following this war-mad cry, while we are resorting to every endeavor to break down Prussianism, we need somebody inspired by God on high to preach to our women and children and those men above 25 years of age who are left at home to enjoy their usual pursuits. [Laughter]. Do not take the ministers of the Gospel from them. Leave a semblance of the followers of the lowly Nazarene back at home to preach to the people, to bury the dead, and marry the youth of the land.

55 CONG. REC. 983 (1917). Earlier, Representative Quin had stated, "Surely it would be humiliating to have the agents of the War Department drag the minister of God away from his congregation and conscript him into the Army." *Id.*

8 "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

9 245 U.S. 366 (1918).

10 Note 5 *supra*.

11 245 U.S. at 390.

12 United States v. Branigan, 299 F. Supp. 225 (S.D.N.Y. 1969).

group as part of a design "to minimize the disruptive force of the statute upon the national well-being."[13] These cases cannot be accepted as conclusive, for the half century since the *Selective Draft Law Cases* has witnessed a virtual rebirth of the establishment clause.

I

THE DEMANDS OF THE ESTABLISHMENT CLAUSE

The Supreme Court has considered the establishment clause in a series of cases beginning with its 1947 decision in *Everson v. Board of Education*.[14] Although the clause's scope is still somewhat unclear, two principal tests of an "establishment" have been formulated. Combined with the remainder of the relevant case law, these tests impose an overriding requirement of governmental neutrality.

The first test is the strict separation or no-aid principle announced in *Everson*.[15] There, the Court stated that neither state nor federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another," and concluded that the establishment clause was intended to create, in Jefferson's words, " 'a wall of separation between church and State.' "[16] A dissenting opinion representing the views of four Justices agreed with the separation principle and emphatically stated that the object of the establishment clause "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form

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13 *Id.* at 232.

14 330 U.S. 1 (1947) (state-financed transportation for parochial school children upheld). Despite its prominent place in the Bill of Rights, the establishment clause was largely ignored by the Court until *Everson*. The cases subsequent to *Everson* are: McCollum v. Board of Educ., 333 U.S. 203 (1948) (on-premises released-time program struck down); Zorach v. Clauson, 343 U.S. 306 (1952) (off-premises released-time program upheld); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws upheld); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961) (same); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961) (same); Torcaso v. Watkins, 367 U.S. 488 (1961) (required affirmation of belief in God as prerequisite for holding public office struck down); Engel v. Vitale, 370 U.S. 421 (1962) (state-composed school prayer struck down); School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading in public schools struck down); Board of Educ. v. Allen, 392 U.S. 236 (1968) (state program to provide textbooks to parochial school children upheld).

15 *See* P. KAUPER, RELIGION AND THE CONSTITUTION 61 (1964).

16 330 U.S. at 15-16. Though arguably dictum, since the challenged program was upheld, the passage from which the quotation is taken has become a standard, quoted with approval in five subsequent major cases: Board of Educ. v. Allen, 392 U.S. 236, 242 (1968); School Dist. v. Schempp, 374 U.S. 203, 215 (1963); Torcaso v. Watkins, 367 U.S. 488, 493-94 (1961); McGowan v. Maryland, 366 U.S. 420, 443 (1961); McCollum v. Board of Educ., 333 U.S. 203, 210 (1948).

of public aid or support for religion."[17] This "wall of separation" principle was affirmed in *McCollum v. Board of Education*,[18] the next establishment clause case.

Subjected to this demanding test, the ministerial exemption fails. The Selective Service Act singles out ministers of religion for preferred treatment.[19] In so doing the Act gives twofold aid—individual and institutional—to religion. Solely because they preach or study religion, some young men are relieved of a duty imposed on others engaged in non-religious work. Religious groups are therefore given the benefit of the uninterrupted service of their personnel, a benefit not granted to non-religious organizations. Although not financial, this is aid in a very real sense, both to those who choose to practice religion professionally and to the religious groups and beliefs they serve.[20]

The other test is propounded in *School District v. Schempp*,[21] a 1963 case invalidating Bible reading in the public schools. Citing *Everson* as authority, the Court crystallized its test:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[22]

Although it is unclear what effect dual purposes, secular and religious, would have, it seems reasonable that a predominantly religious purpose would violate the test.[23] At any rate, both the purpose *and* the primary effect of legislation must be secular for it to be valid.

There is no readily apparent secular purpose for the ministerial exemption.[24] Its most probable purpose is to free religious professionals and organizations from any hardships the draft might impose and to

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17 330 U.S. at 31-32, *quoted with approval in* School Dist. v. Schempp, 374 U.S. 203, 217 (1963). Since the *Everson* majority upheld the challenged program, the four dissenters were advocating an even stronger separation doctrine than that applied by the majority.

18 333 U.S. 203 (1948).

19 Note 1 *supra*.

20 The no-aid principle is not limited to financial aid. "The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree." Everson v. Board of Educ., 330 U.S. 1, 33 (1947) (dissenting opinion).

21 374 U.S. 203 (1963).

22 *Id.* at 222.

23 *See id.* at 223-24.

24 Concern for free exercise of religion may have been a legislative purpose, but it does not justify the exemption. *See* notes 47-49 and accompanying text *infra*.

avoid having to force clergymen to fight.[25] So viewed, the exemption is clearly religious. The exemption might have been prompted by a concern for the spiritual needs of the people. Spiritual needs, however, are inseparable from religious needs, and such a concern therefore evidences a religious purpose.[26] Congress may have been motivated by a belief that the exemption would enhance homefront morale in time of war and generally benefit the well-being of the people. An argument of this type, however, was rejected in *Schempp*.[27] Although seeking to strengthen the nation's military efforts might be classified under the secular purpose of national defense, the use of an essentially religious means to effectuate it is impermissible. The government cannot aid religion as a means of furthering purportedly secular ends.[28] Therefore, even if a secular purpose can be found, the ministerial exemption may be an invalid way of effecting it.

The primary effect of the exemption is to aid religion at both the personal level and the institutional level.[29] In view of the number of men relying on the exemption, it is not an insubstantial aid.[30] If there is any secular effect, it is not primary, as required by the

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25 *See* note 7 *supra*. Congress intended, however, that the exemption be a narrow one, limited to the leaders of religious groups and not available to those claiming to be ministers merely by virtue of membership in a sect. S. REP. No. 1268, 80th Cong., 2d Sess. 13 (1948); *see* Dickinson v. United States, 346 U.S. 389, 394 (1953).

26 Some legislators have openly recognized the exemption as an aid to religion. In discussing the exemption as part of the 1940 Act, Senator Maloney said:

> Here in the United States . . . we should make every effort not only to preserve religion but to extend it. No people can have too much religion, regardless of the faith they profess; and if religion should fail here in any degree my hope would be lessened.

86 CONG. REC. 9851 (1940).

27 There the Court refused to uphold a religious means (Bible reading) to accomplish purposes that the state claimed to be secular—"the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." School Dist. v. Schempp, 374 U.S. 203, 223 (1963).

28 The government may not

> by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served.

McGowan v. Maryland, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring). Mr. Justice Brennan, concurring, took a narrower view in School Dist. v. Schempp, 374 U.S. 203, 231 (1963): "[T]he Constitution enjoins those involvements of religious with secular institutions which . . . use essentially religious means to serve governmental ends where secular means would suffice." There is no indication that homefront morale cannot be preserved without the ministerial exemption since a large proportion of ministers are beyond draft age.

29 *See* text accompanying notes 19-20 *supra*.

30 Note 4 *supra*.

Schempp test, but rather derivative from, and dependent on, the advancement of religion.[31]

The *Everson* and *Schempp* tests combine with the other establishment clause cases to yield the fundamental principle of the clause as construed by the Supreme Court—the principle of government neutrality. There is considerable difference of opinion, both within the Court itself[32] and among commentators,[33] regarding the definition of this principle. Its basic meaning, however, is clear: (*1*) there can be no discrimination among religions or sects;[34] (*2*) there can be no purposeful preference of religion over non-religion, and no purposeful aid to religion in general;[35] and (*3*) any aid to or hindrance of religion must be an incidental effect of the government's pursuit of legitimate secular ends.[36]

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31 Mr. Justice Frankfurter, although writing before *Schempp*, clarified the concept of primary effect:

> If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state.

McGowan v. Maryland, 366 U.S. 420, 466 (1961) (concurring opinion). It is difficult to bring any secular end purportedly served by the exemption within the requirement of being independent of the advancement of religion. To the extent it is furthered at all (*see* note 28 *supra*), homefront morale, the most probable secular effect, could only be furthered derivatively, through the grant to religion of preferred treatment. If, on the other hand, the term "primary" is taken to mean "most important," the exemption's primary effect is still most probably to aid religion. Aid to religion is immediate and clear, while any secular effect is remote and hypothetical.

32 *See, e.g.*, the five opinions in School Dist. v. Schempp, 374 U.S. 203 (1963).

33 *See* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 12-13 (1964); P. KAUPER, *supra* note 15, at 64-67; P. KURLAND, RELIGION AND THE LAW 16-18 (1962); L. PFEFFER, CHURCH, STATE AND FREEDOM 178-80 (rev. ed. 1967); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 516-22 (1968).

34 "Neither [a state nor the Federal Government] can pass laws which aid one religion . . . or prefer one religion over another." Everson v. Board of Educ., 330 U.S. 1, 15 (1947); *accord*, Engel v. Vitale, 370 U.S. 421 (1962).

35 "Neither [a state nor the Federal Government] can pass laws which . . . aid all religions . . . ." Everson v. Board of Educ., 330 U.S. 1, 15 (1947). In the *Schempp* case, Mr. Justice Clark declared that "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another." 374 U.S. at 216.

36 This principle is best illustrated in the Sunday closing law cases. Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). *McGowan* emphasized the secular purposes of the Sunday closing laws and asserted that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." 366 U.S. at 442. Drawing the line is admittedly difficult. Board of Educ. v. Allen, 392 U.S. 236, 242 (1968).

The ministerial exemption results in discrimination among religious sects. Ministers of the more orthodox sects generally have little trouble in obtaining draft exemptions, while those serving sects relying on a lay or volunteer ministry often encounter difficulty.[37] A lay ministry, such as that of the Jehovah's Witnesses, consists of all the members of the sect, who devote varying amounts of time to door-to-door preaching but must spend relatively large amounts of time in secular work to earn a livelihood. Although exemption is generally granted to those with a high ratio of religious time to secular time,[38] a considerable percentage of such a sect's ministerial force is not exempted.[39] More conventional sects, such as the Methodists and Roman Catholics, on the other hand, enjoy the services of a ministerial force untouched by the draft.[40] A differentiation also affects young men preparing for the ministry in the manner prescribed by their sect but not attending a "recognized" divinity school.[41] Although the statute has been held not to impose a test of orthodoxy,[42] it nevertheless disadvantages unorthodox sects. Again, the effect is a dual one, felt at both individual and institutional levels.

Of the many interpretations of the neutrality principle that have been offered, two seem especially relevant. One commentator dubs the controlling principle "political neutrality," asserting that its thrust is that religious activities and groups should not be excluded from schemes of governmental regulation simply because they are religious, and that religious groups should be in a position of political equality with other

37 The bulk of the litigation concerning the exemption has involved Jehovah's Witnesses, who rely on a volunteer ministry. Since all members of the sect claim to be ministers, the courts have based their decisions on the amount of time spent in religious activities, often as compared to time spent in secular work. *See, e.g.*, Dickinson v. United States, 346 U.S. 389 (1953); United States v. Jones, 382 F.2d 255 (4th Cir. 1967); United States v. Hurt, 244 F.2d 46 (3d Cir. 1957); Hacker v. United States, 215 F.2d 575 (9th Cir. 1954). In this way the courts separate those who do religious work as a "vocation" from those who do such work only "irregularly or incidentally." 50 U.S.C. App. § 466(g) (1964).

38 Dickinson v. United States, 346 U.S. 389, 394 (1953).

39 Regarding the role of prejudice, see Comment, *Ministerial Exemption from Selective Service System*, 19 SYRACUSE L. REV. 996 (1968).

40 Unfairness in this different treatment was recoguized by Justices Black and Douglas, who favored extending the exemption to all persons recognized as ministers by their sects, regardless of the amount of time spent in religious work. Cox v. United States, 332 U.S. 442, 455-57 (1947) (Douglas, J., dissenting).

41 50 U.S.C. App. § 456(g) (1964). *See, e.g.*, Tyrell v. United States, 200 F.2d 8 (9th Cir.), *cert. denied*, 345 U.S. 910 (1952). For an analysis of how the lack of uniform standards results in discrimination, see Comment, *Discrimination Caused by Lack of Standards in Student Ministerial Draft Classifications*, 1969 UTAH L. REV. 239.

42 Dickinson v. United States, 346 U.S. 389, 395 (1953).

groups.[43] The ministerial draft exemption places religious groups in a preferred position over non-religious groups rather than in a position of political equality. Another writer contends that the free exercise and establishment clauses read together prohibit any classification on the basis of religion for purposes of governmental action.[44] Clearly, the exemption classifies men on the basis of their religious activities for purposes of draft treatment. Neutrality, however conceived, must mean that the government cannot favor individuals or groups merely because of their religious activities.[45]

The principle of neutrality prohibits governmental hostility to religion.[46] Denial of the ministerial exemption would not constitute hostility, but would only subject religions and religious professionals to the same burdens as non-religious groups and individuals. Any negative effect on religion would be an incidental one, stemming from the secular purpose of raising military manpower, with no disproportionate burden falling on religion or religious groups.

In some situations preferred treatment for religious groups may be required or justified by the free exercise clause.[47] Some suggest that the ministerial exemption is so justified,[48] but this position is unsupportable. Subjecting ministers and divinity students to the draft would not deny their free exercise of religion; they would be free to practice

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43 Giannella, *supra* note 33, at 519-20.

44 P. KURLAND, *supra* note 33, at 18.

45 Other theories of neutrality, though not uniform in their positions, generally indicate that the exemption should be seriously questioned. *See* authority cited in note 33 *supra*.

46 [The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

47 School Dist. v. Schempp, 374 U.S. 203, 296-99 (1963) (Brennan, J., concurring). *See also* Sherbert v. Verner, 374 U.S. 398 (1963).

48 Mr. Justice Brennan, in discussing the possibility that the free exercise clause might sometimes validate practices otherwise barred by the establishment clause, has suggested that free exercise considerations might support the ministerial exemption, and that "hostility, not neutrality, would characterize . . . the withholding of draft exemptions for ministers and conscientious objectors." School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (concurring opinion).

In 1940 one Senator contended that

such an exemption is necessary. Religion, of necessity, must have a place of importance in a democracy, and the function of a democratic government is to encourage in every way possible the free exercise of religion. It is obvious and beyond argument that to subject ministers of religion to compulsory military training is to seriously interfere with, if not completely to suspend, this right.

86 CONG. REC. 10293 (1940).

their religion to the same extent as all other inductees, and would even be free to preach and teach their faith, either informally or through the chaplaincy. Upon termination of their military service, they could resume their professional religious work. If they were religiously opposed to participation in war, they would have the full benefit of the special provisions available for conscientious objectors.[49] Nor would elimination of the ministerial exemption infringe the free exercise rights of church members. A large percentage of clergymen is certainly beyond draft age, and the absence of younger ministers for military reasons would only be temporary. The loss of manpower would thus not be crippling. Congregations would be free to carry on their religious activities, subject only to the same disadvantage faced by all non-religious groups and organizations.

II

HARMONIZING THE CONFUSING PRECEDENTS

The establishment clause cases have a common theoretical foundation, but the actual decisions may cause confusion; four of the eight major cases have upheld the challenged governmental action.[50] Three of these cases are easily reconciled with the thesis that the establishment clause invalidates the ministerial draft exemption. *Everson v. Board of Education*[51] upheld a program under which public school boards reimbursed parents, including those whose children attended parochial schools, for the cost of their children's bus transportation to school. The Court, after announcing the strict separation principle, upheld the program on the basis of the child benefit theory: individual members of religious groups may not, because of their faith or lack of it, be excluded from receiving the benefits of general public welfare legis-

49 50 U.S.C. App. § 456(j) (Supp. IV, 1969). That some ministers would obtain conscientious objector status does not mean that eliminating the ministerial exemption would be without practical effect. Conscientious objectors are required to contribute noncombatant or civilian service to meet their military obligation. Also, many ministers would not qualify as conscientious objectors and would thus face the same service as other men. *See* note 65 *infra*.

50 Board of Educ. v. Allen, 392 U.S. 236 (1968) (state-provided textbooks for parochial school children); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws); Zorach v. Clauson, 343 U.S. 306 (1952) (released-time program for off-school religious education); Everson v. Board of Educ., 330 U.S. 1 (1947) (state-financed transportation for parochial school children). *See also* Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961) (Sunday closing laws); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961) (Sunday closing laws).

51 330 U.S. 1 (1947).

lation.[52] Such reasoning is inapplicable to the draft exemption; rather than including individuals in a general welfare scheme[53] without regard to religion, the exemption relieves certain individuals from a general obligation solely because of their religious activities. Such a direct preference is clearly distinguishable from the kind of incidental benefit allowed in *Everson*. *McGowan v. Maryland*,[54] which upheld Sunday closing laws, and *Board of Education v. Allen*,[55] which upheld the loaning of books to parochial school children, are similarly distinguishable. Using an approach similar to the one taken in *Schempp*, the Court found secular purposes and primary effects, with any effects on religion being only incidental.[56] The ministerial exemption fails to meet these standards.

The decision most difficult to reconcile is *Zorach v. Clauson*,[57] which bears a superficial factual resemblance to the draft exemption. There, the Court upheld the release of public school children during the school day to attend religious classes in local churches. As with the draft exemption, individuals were released from a duty imposed on others in order to spend time engaged in religious activity. On the basis of this similarity, *Zorach* arguably controls the question of whether the exemption is constitutional. Such a conclusion, however, is ill-founded; there are three principal reasons why *Zorach* should not control.

First, the factual differences between the two situations are crucial. Although perhaps alike in principle, there is a great difference in degree between the release of a child from one hour of school per week and the complete release of a young man from a two-year military obligation. The former may be dismissed as insubstantial, but the latter may not. Nor is the difference entirely one of degree. One of the

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52 *Id.* at 16. The rationale included a concern for safeguarding free exercise. *Id.*

53 It has consistently been held that there is no constitutional right to exemption from the draft, and that any exemptions granted are matters of legislative grace. *See* Dickinson v. United States, 346 U.S. 389, 394 (1954); Parrott v. United States, 370 F.2d 388 (9th Cir.), *cert. denied*, 387 U.S. 908 (1969); United States v. Mohammed, 288 F.2d 236 (7th Cir.), *cert. denied*, 368 U.S. 820 (1961).

54 366 U.S. 420 (1961).

55 392 U.S. 236 (1968).

56 The *McGowan* Court recognized the continuing possibility of violating the establishment clause:

> We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the fact of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.

366 U.S. at 453.

57 343 U.S. 306 (1952).

Court's main arguments in *Zorach* was that since a teacher could excuse an individual from school on a particular occasion to attend a religious activity, there was no reason why an organized system of release should be invalid.[58] This reasoning cannot be applied to the ministerial exemption, for there is no comparable possibility of individual release from military service to engage in religious activity. In addition, the *Zorach* Court's characterization of the program in question was that of a government institution adjusting its operating schedule in deference to the religious interests of the people.[59] Relieving ministers from military liability is not an adjustment of a schedule; rather, it is an unwarranted use of governmental power to favor religion.

Another reason why *Zorach* should not control is the presence of a policy in the selective service system that was not a factor in *Zorach* —fairness and equality of treatment. This concern for fairness is epitomized by the recent institution of the lottery system of draft selection.[60] Equality and fairness are not achieved by exempting religious professionals and students from the draft while practitioners and students of other professions are subject to call.

Finally, reliance on *Zorach* is unconvincing because of its relative weakness as a precedent. Although the case has not been overruled, the Court's reasoning is neither clear nor sound. One of the Court's justifications for its decision was that to strike down the challenged program would be to show hostility to religion, an assertion that the Court purported to substantiate by exaggerated and misleading examples.[61] The real basis of the decision was pragmatic—a reluctance, based on the notion that some accommodation is permissible, to become constitutionally involved in relatively harmless school programs and

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[58] *Id.* at 313. The Court felt, perhaps on free-exercise grounds, that it would be undesirable to prohibit individual release. *Id.* at 314.

[59] *Id.* at 314-15.

> [W]e cannot expand [McCollum v. Board of Educ., 333 U.S. 203 (1948) (released-time program of in-school religious education *held* invalid)] to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people.

Id. at 315.

[60] The draft lottery system, designed to further equality and fairness of treatment by means of random selection during a limited period of liability, was put into effect on Nov. 26, 1969, by Exec. Order No. 11,497, 34 Fed. Reg. 19019. The change was made possible by the Selective Service Amendment Act of 1969, 83 Stat. 220.

[61] The Court expressed fear, *inter alia*, that "[m]unicipalities would not be permitted to render police or fire protection to religious groups," and "[p]olicemen who helped parishioners to their places of worship would violate the Constitution." 343 U.S. at 312. Reliance on such exaggerations is unsound, since they could be realized only if religious groups were denied benefits generally conferred on all others, an occurrence repugnant to neutrality and specifically contrary to *Everson*. *See* text at notes 51-52 *supra*.

similar situations.[62] Because of this basis, *Zorach* has not been heavily relied on in later cases. Rather, later cases, especially *Schempp*, have reasserted the neutrality principle and extended its application.[63] *Zorach*, though a part of establishment clause law, is a relatively small part.[64] It is not sufficient to save the ministerial exemption from its conflict with the rest of the case law.

CONCLUSION

The ministerial draft exemption is both unfair and unconstitutional. Its unfairness has even been recognized publicly by religious groups calling for its abolition.[65] More important, the exemption violates the principles of the establishment clause. The governmental action involved is sufficiently analogous to that dealt with in the existing cases[66] that it should be subject to the same constitutional limitations.[67]

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62 343 U.S. at 312-13. *See* P. KAUPER, *supra* note 15, at 70. Minimal accommodation may even be required by the free exercise clause.

63 School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

64 "Today's judgment will be more interesting to students of psychology and of the judicial process than to students of constitutional law." Zorach v. Clauson, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting). *Zorach* was only a temporary retreat from *Everson* and *McCollum*. L. PFEFFER, *supra* note 33, at 177.

65 At a recent Senate hearing, William P. Thompson, speaking as Stated Clerk of the General Assembly of the United Presbyterian Church, said:

> Finally, I would raise the question of the propriety of the Selective Service IV-D exemption classification for ordained clergy and ministerial students. The 175th General Assembly . . . recognized this problem and recommended that ministers and ministerial students accept their responsibilities as citizens for the defense and security of the Nation through voluntary service as military chaplains or by submitting themselves to the provisions of the Selective Service System.

Hearings on S. 1432 Before the Senate Comm. on Armed Services, 90th Cong., 1st Sess. 373 (1967). The North American Area Council of the World Alliance of the Presbyterian and Reformed Churches, with only United States churches voting, adopted the following resolution on January 11, 1967:

> At the present time the United States Selective Service Act of 1951 provides automatic draft exemption for ordained Clergy and students for the ministry. Instead of this exemption, the North American Area Council recommends that clergy and candidates for the ministry be treated similarly to all professional personnel.

Id. at 373-74.

66 The Supreme Court has often expressed its principles in broad, absolute terms instead of narrower ones that would have been sufficient for each case. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203, 222 (1963); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

67 Standing to assert establishment clause claims has been allowed with increasing liberality. *Compare* Flast v. Cohen, 392 U.S. 83 (1968), *with* Doremus v. Board of Educ., 342 U.S. 429 (1952).