

## **An End to the Heckler's Veto:<sup>1</sup>**

### ***Good News Club v. Milford Central School***

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A growing conflict in recent years has centered on whether religious groups can have access to public school facilities. Nearly a decade ago, in *Lamb's Chapel v. Center Moriches Union Free School District*,<sup>2</sup> the Supreme Court recognized for the first time that religious speech, a fully protected subset of free speech, could limit a school board's authority to deny access for a religious use to non-student groups. The result was that the board of *Lamb's Chapel* could not prohibit a church group from using a high school auditorium during non-school hours to present a film series on child discipline. Three years later, the Court extended religious free speech rights in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>3</sup> when it ruled that a university policy which paid for printing publications by student organizations applied to the journal of a religious group that discussed issues from a Christian perspective. In the interim, lower courts continued to struggle over the access rights of religious groups to school facilities.

In *Good News/Good Sports Club v. School District of the City of Ladue*,<sup>4</sup> the Eighth Circuit permitted a religious club in Missouri to use public school facilities after school since a board permitted other groups, including the Boy Scouts and Girl Scouts to do so. Conversely, in *Good News Club v. Milford Central School*,<sup>5</sup> the Second Circuit denied a Good News Club in New York access to school facilities.<sup>6</sup> The Supreme Court agreed to hear an appeal in *Milford*<sup>7</sup> and, as anticipated,<sup>8</sup> ruled that a school board's refusal to permit a club to use school facilities during non-instructional time violated its right to free speech.<sup>9</sup> In light of the Supreme Court's holding, this article reviews the history of the dispute as well as the opinions of the Justices before reflecting on the significance of *Milford* for public schools.<sup>10</sup>

#### *Good News Club v. Milford Central School District Facts*

The Board of Education of the Milford Central School District (the Board) adopted a "Community Use of School Facilities Policy" in August

1992. The policy permitted district residents to “hold social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public” as long as they were not used for religious purposes.<sup>11</sup>

In September 1996 Darleen Fournier submitted a request form to the Board to permit a Good News Club (the Club)<sup>12</sup> to meet in a school cafeteria, after-school, during non-school hours. The Club required a signed parental consent form before a child could participate. After months of communications between Fournier and the superintendent, he denied her request in March, 1997 while permitting the Boy Scouts, Girl Scouts, and 4-H Club to meet because, although they addressed similar topics, they did so from a secular perspective.

Fournier filed suit in a federal trial court in New York in March 1997 on behalf of the Club primarily alleging violations of its constitutional rights under the free speech and equal protection clauses. The trial court granted a preliminary injunction in April, 1997 that remained in effect until October, 1997 at which time the court vacated the injunction and granted the Board’s motion for summary judgment.<sup>13</sup>

The Second Circuit, by a two-to-one margin, affirmed in favor of the Board, relying on many of the same arguments as the trial court.<sup>14</sup> Again disappointed at the outcome, the Club sought further review. The Supreme Court agreed to hear an appeal in *Milford*<sup>15</sup> to resolve a split between the Circuits.

#### *Supreme Court Majority Opinion*

In a six-to-three decision, with the majority opinion written by Justice Thomas, the Supreme Court reversed in favor of the Club, holding that the Board violated its right to free speech by refusing to permit the Club to meet at school facilities during non-instructional time. Justice Thomas began by noting that since the parties agreed that the Board created a limited open forum when it made its facilities available to community groups, the Court would not have to resolve this difficult issue. In creating a limited open forum, Thomas wrote that while the Board was not required to permit all forms of speech, it could not engage in viewpoint discrimination based on the religious content of the Club’s speech.<sup>16</sup>

Justice Thomas’ discussion of whether the Board engaged in impermissible viewpoint discrimination sought guidance from two of the Court’s earlier cases involving religious speech, *Lamb’s Chapel* and *Rosenberger*, discussed earlier. In explaining that the nature of the speech

in *Milford* was virtually indistinguishable from that in *Lamb's Chapel* and *Rosenberger*, the Court was convinced that the Board engaged in impermissible viewpoint discrimination.

In rejecting the Board's claim that even if it had engaged in viewpoint discrimination, the Court feared that doing so might have violated the Establishment Clause. Relying on *Widmar v. Vincent*,<sup>17</sup> wherein it observed that a university would not have violated the Establishment Clause by permitting a religious group to use its facilities and *Lamb's Chapel*, the Court indicated that it was unclear whether the Board's interest in avoiding an Establishment Clause violation justified such viewpoint discrimination. The Court also rejected the Board's attempt to distinguish its situation from *Lamb's Chapel* and *Widmar* on the basis that its policy applied to elementary school children who might have perceived that it endorsed religious activity in which they were coerced to participate. In the process, the Court enumerated five reasons why the Board's fear of an Establishment Clause violation was unpersuasive.

First, the Court explained that allowing the Club to meet at school would ensure, rather than threaten, neutrality toward religion since the group sought to be treated neutrally and given the same access to facilities as the other organizations that covered the same topic. Second, the Court viewed the Board's fear of coercion as misplaced because insofar as parents chose whether their children would attend the meetings, they, the adults, rather than the students, should have been the focus of the Board's concern. Third, the Court indicated that regardless of any earlier statements that it may have made about the impressionability of children in the context of a the Establishment Clause,<sup>18</sup> it never foreclosed private religious conduct during non-instructional hours simply because it took place on school grounds while elementary school children may be present. Fourth, the Court conceded that even if it were to consider the misperceptions of children about whether the Board's permitting the meetings to take place violated the Establishment Clause, the facts of the case simply did not support this position. Among the factors that the Court considered were that children were not permitted to remain in school once the class day was over, the meetings were in a combined high school resource room and middle school special education classroom rather than in an elementary school room,<sup>19</sup> and children ranged in age from six-to-twelve, well beyond the span in a normal classroom setting. Fifth, the Court explained that even if it were to inquire into the minds of children, it was unclear whether their misperceptions of the meetings as endorsement of religion were any greater than their perception of hostility to religion if the Club was prohibited from using school facilities.

The Court concluded that since it did not foresee any risk of an Establishment Clause violation in permitting the Club to meet in school, there was no reason to depart from its early judgments in *Lamb's Chapel* and *Widmar* and so reversed the judgment of the Second Circuit.

#### *Concurrences and Dissents*

Justice Scalia joined the opinion of the Court but wrote a separate concurrence to clarify two points.<sup>20</sup> First, he disagreed with the Court's discussion of coercive pressure and perceptions of endorsement on the basis that they had no impact in *Milford*. Second, Justice Scalia expounded his views on the nature of viewpoint discrimination. Justice Breyer agreed with the Court's holding that the meetings could take place on school grounds but concurred separately because he did not fully agree with the majority's rationale.<sup>21</sup> More specifically, he was concerned not only that students might have perceived that school officials endorsed religion by permitting the meetings to take place but also that the lower courts failed to examine the Establishment Clause question sufficiently.

Justice Stevens, although conceding that "this case is undoubtedly close,"<sup>22</sup> dissented. He did so based on his belief that since the Board created a limited forum inviting the public to use its facilities for educational and recreational purposes, it had the authority to exclude the Club because it engaged in proselytizing religious speech that did not rise to the level of worship. Justice Souter, joined by Justice Ginsberg, dissented largely on the basis that since the Club meetings were heavily devotional, they should not have been permitted on school grounds.<sup>23</sup> He also argued that since neither he, nor the majority, had a full understanding of the facts, the Court should have returned the dispute to the lower courts for a ruling on the merits of whether the Club was engaged in inappropriate religious use of public school facilities.

#### *Reflections*

As is typical in Supreme Court cases involving religion, the five different judicial opinions in *Milford* presented a variety of contrasting approaches to interpreting the extent to which a school board can control the use of its facilities. Most broadly, in *Milford* a fractured Court continues to support freedom of speech, albeit in a religious context, consistent with *Lamb's Chapel* and *Rosenberger*. Additionally, the Court revealed its ongoing unwillingness to permit viewpoint discrimination to exclude religious speech in schools especially when an activity is neither school sponsored nor part of a school day.

The efforts of school boards to prohibit religious uses while permitting secular ones raises a fundamental question whether such decision-making represents hostility toward religion. In *Milford* the Court clearly reiterated its long-standing prohibition against this kind of hostility.<sup>24</sup> Earlier, in *Board of Education of Westside Community Schools v. Mergens*, wherein the Court upheld the constitutionality of the Equal Access Act, Justice O'Connor's majority opinion took a broad swipe at a board's prohibition of in-school religious meetings by observing that "if a State refuse[s] to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."<sup>25</sup>

One can argue that, if refusing to provide equal access to religious groups during school hours can represent hostility, then hostility seems to be an even more plausible claim when the access sought is after school hours. Avoiding hostility to religion was particularly an issue in *Milford* since, for example, parents had to return signed permission forms before their children could participate and pupils who were not taking part in an after-school activity typically left the building at the end of the day.

*Milford* had an almost immediate impact on access issues in lower courts. A week to the day after *Milford*, the Court vacated and remanded a case from Louisiana over whether a prayer group could use public school facilities for a meeting. In *Campbell v. St. Tammany Parish School Board*,<sup>26</sup> the Fifth Circuit ruled that a school board had not created a limited open forum even though it permitted school buildings to be used for civic and recreational meetings as well as entertainment and other but prohibited partisan political activity, for-profit fund-raising, and religious services. It will be interesting to observe whether the board in *Tammany*, and for that matter, *Milford*, make any changes in their use policies.

In *Milford* the Court rejected the Second Circuit's suggestion that the principle prohibiting hostility toward religion undergirding the Equal Access Act does not appear to extend to after-school religious groups under the Free Speech and the Establishment Clauses. Had the Court adopted the Second Circuit's analysis, the resulting anomaly would have been that while school officials could have been considered hostile to religion if they refused to treat student religious groups the same as other noncurricular related student groups during noninstructional time in the school day, they might not have been considered hostile to religion by refusing a religious-oriented community group use of school premises after school when other non-religious community groups are permitted such use as in *Milford*.

*Conclusion*

The result in *Milford* was clearly good news to the Good News Club, an organization sponsored by Child Evangelism Fellowship, which operates in 142 countries and has 4,622 Good News Clubs that meet on school property in the United States.<sup>27</sup> In light of *Milford*, it will be interesting to see if Good News Clubs expand their horizons. Regardless of how Good News Clubs follow up, this much is certain: *Milford* is unlikely to be the Court's last word on the place of religious speech in public schools.

*Notes*

1. Writing for the Court, Justice Thomas eloquently declared that it would no longer “employ . . . a modified heckler’s veto in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.” *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2106 (2001).
2. 508 U.S. 384 (1993).
3. 515 U.S. 819 (1995).
4. 28 F.3d 1501 (8<sup>th</sup> Cir. 1994) *rehearing and suggestion for rehearing en banc denied*.
5. 202 F.3d 502 (2d Cir. 2000).
6. *See Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997) (affirming that a school board’s refusal to permit a church to conduct regular religious meetings in a school auditorium during non-school hours was not viewpoint discrimination, even though other social and community groups were permitted to use facility because its policy prohibiting religious services was reasonable and viewpoint neutral).
7. *cert. granted*, 121 S. Ct. 296 (2000).
8. For a prognostication of the outcome, *see* Ralph D. Mawdsley & Charles J. Russo, “Religious Groups and the Use of Public School Facilities: An Ongoing Controversy.” *School Business Affairs*, Vol. 67, No. 2, 45-50 (2001).
9. *Good News*, *supra* note 1.
10. For a lengthier and more extensive discussion of this case, *see* Charles J. Russo & Ralph D. Mawdsley (in press), “And the Wall Keeps Tumbling Down: The Supreme Court Upholds Religious Liberty in *Good News Club v. Milford Central School*.” *Education Law Reporter*.
11. *Good News Club v. Milford Cent. Sch.*, 21 F. Supp.2d 147, 150 (N.D.N.Y. 1998).

12. A Good News Club is affiliated with a nonprofit organization, Child Evangelism Fellowship, a missionary organization which states that its purpose is “to instruct children in moral values from a Christian perspective.” Among the services provided by the Fellowship are “teaching materials, prayer booklets for distribution called ‘Daily Bread’ and training to Club leaders.” *Good New Club v. Milford Cent. Sch.*, 202 F.3d 502, 504 (2d Cir. 2000).

13. *Supra*, note 11.

14. *Supra*, note 5.

15. *cert. granted*, 121 S. Ct. 296 (2000).

16. In *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983), the Court explained a forum can be public, limited (or designated), or nonpublic (or closed). A street or park is a public forum. *Id.* at 45. A limited forum, as at issue in *Milford*, is one “which the state has opened for use by the public as a place for expressive activity . . . even though it was not required to create the forum in the first place.” *Id.* A nonpublic forum is one, such as a public school classroom, that the government has not turned over to public communications. *Id.* at 48.

17. 454 U.S. 263 (1981).

18. The Court’s concerns over the impressionability of children and fears of coercion emerged in *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down school sponsored prayer at a public middle school graduation ceremony).

19. The trial court, *supra* note 11 at 149 spoke of the cafeteria while the Supreme Court, *supra* note 1 at 2106 mentions these combined facilities. The Court did not address or clarify this apparent inconsistency.

20. *Id.* at 2107 (Scalia, J., concurring).

21. *Id.* at 2111 (Breyer, J., concurring).

22. *Id.* at 2112, 2114 (Stevens, J., dissenting).

23. *Id.* at 2115 (Souter, J., dissenting).

24. *See e.g., Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (in permitting a public school board to dismiss students early to attend religious classes, the Court observed that: “the First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.”).

25. 496 U.S. 226, 248 (1990).

26. 231 F.3d 937 (5<sup>th</sup> Cir. 2001), *cert. granted, earlier judgment vacated and remanded*, 121 S. Ct. 2518 (2001).

27. Linda Greenhouse, *Top Court Gives Religious Clubs Equal Footing in Grade Schools*, New York Times, June 12, 2001, at A-1.