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## The Supreme Court Rules in Favor of Religious Club's Right to Meet on Public School Premises: Is This "Good News" for First Amendment Rights

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## The Supreme Court Rules in Favor of Religious Club's Right to Meet on Public School Premises: Is This "Good News" for First Amendment Rights

Cover Page Footnote

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# **THE SUPREME COURT RULES IN FAVOR OF RELIGIOUS CLUB'S RIGHT TO MEET ON PUBLIC SCHOOL PREMISES: IS THIS "GOOD NEWS" FOR FIRST AMENDMENT RIGHTS?**

*Thomas A. Schweitzer*<sup>1</sup>

## **INTRODUCTION**

In a significant First Amendment decision which it issued on June 11, 2001,<sup>2</sup> the United States Supreme Court ruled that the request of an evangelical Christian group for children ages 6 to 12, the Good News Club, ("the Club"), to meet in a public school cafeteria after school should have been granted because the school had established a "limited public forum" for outside groups to use its premises during that time.<sup>3</sup> The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ."<sup>4</sup> Like many important constitutional law cases, the case involved an apparent collision between two constitutional rights: the Club's free speech arguments conflicted with the Establishment Clause arguments of its adversaries, the Milford Central School authorities in upstate New York. The majority opinion by Justice Clarence Thomas held that the Club had a free speech right to meet as it requested in the public school and that excluding it from the school because of its religious character constituted unconstitutional "viewpoint discrimination."<sup>5</sup> Justice Thomas's opinion was joined by Justices

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<sup>2</sup> *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), *rev'g* 202 F.3d 502 (2d Cir. 2000).

<sup>3</sup> *Id.* at 108. The Good News Club is a non-denominational Christian youth group with chapters around the country which are sponsored by the Child Evangelism Fellowship, a Christian missionary organization. *Good News Club v. Milford Central School*, 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998).

<sup>4</sup> U.S. CONST. amend. I. Through the "incorporation doctrine", the Supreme Court has made the various "clauses" of the First Amendment, which apply in terms only to Congress, binding also on state and local governments. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>5</sup> *Good News Club*, 533 U.S. at 109, 120.

Rehnquist, O'Connor, and Kennedy, and by Justice Scalia, who also wrote a concurring opinion.<sup>6</sup> Justice Breyer concurred in part;<sup>7</sup> Justices Stevens,<sup>8</sup> Souter<sup>9</sup> and Ginsburg<sup>10</sup> dissented.

This article is a comment on the *Good News Club* case. Its purpose is to describe and to analyze the case, to situate it in the context of free speech and Establishment Clause jurisprudence and to comment critically on the decision and the relevant issues. The first half is descriptive; the second is analytical.

The article begins with a description of prior cases in which student religious clubs sued to challenge their exclusions from public school premises. Next, it describes the origins of the dispute between the Club and the Milford School District and outlines the district court and Second Circuit decisions. Finally, it summarizes in detail the majority, concurring and dissenting opinions of the Supreme Court Justices.

The analytical section begins by outlining the background of officially prescribed prayer and religious instruction in American public schools, which lasted more than a hundred years, starting with the schools' origins in the early Nineteenth Century and ending only during the last half-century with the Court's outlawing of school prayer and its mandating of religious neutrality in the public schools. It is essential to take into account this history in order to understand and appreciate the fears and sensitivities of those who oppose permitting religious clubs to meet on public school premises.

Next, the article analyzes and discusses the two main First Amendment issues in the case: 1) the free speech question, i.e., whether the school district, as part of the local government, was obliged to afford the Club access to the "limited public forum" which both sides agreed it had created in the Milford Central School; and 2) the Establishment Clause question, i.e., whether permitting the club to meet there would breach the constitutionally required separation of church and state. Justice Thomas's opinion

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 127.

<sup>8</sup> *Id.* at 130.

<sup>9</sup> *Id.* at 134.

<sup>10</sup> *Good News Club*, 533 U.S. at 134 (Justice Ginsburg joined in Justice Souter's dissent).

is rather terse and addresses relevant lower court precedent only in passing, so most of this section relates the *Good News Club* decision to the Court's prior cases. The article concludes that the Court correctly decided both the free speech and Establishment Clause issues and that its decision poses no threat either to religious liberty or to the separation of church and state.

### PRIOR CASES INVOLVING RELIGIOUS CLUBS AND THE PUBLIC SCHOOLS

Ever since the Supreme Court first held that the Establishment Clause was binding on the states in *Everson v. Board of Education*,<sup>11</sup> in 1947, the Court's jurisprudence in this area has been marked by bitter internal divisions, seeming inconsistency and at times incoherence. For example, the familiar three-part test of *Lemon v. Kurtzman*,<sup>12</sup> to determine whether the Establishment Clause has been violated, has been criticized by a majority of Supreme Court Justices<sup>13</sup> and has at times been totally disregarded by the Court<sup>14</sup> but has never been officially overruled. The Supreme Court decisions outlawing the non-denominational New York Regents-approved prayer<sup>15</sup> and Bible reading in the

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<sup>11</sup> 330 U.S. at 16.

<sup>12</sup> 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'") (citations omitted). See Thomas A. Schweitzer, *Lee v. Weisman: Whither the Establishment Clause and the Lemon v. Kurtzman Three-pronged Test?*, 9 TOURO L. REV. 401 (1993).

<sup>13</sup> These include Justices Rehnquist, White, Scalia, Thomas, and Kennedy. See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting). Scalia stated;

As to the Court's invocation of the *Lemon* test: like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.

<sup>14</sup> E.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding constitutionality of Nebraska's legislative chaplain against an Establishment Clause challenge).

<sup>15</sup> *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that recitation of a government-selected prayer in the public schools violates the Establishment Clause).

public schools,<sup>16</sup> while controversial when issued, evidently command majority public support today, as does the decision that religion can not be taught in public school classrooms, even as part of a program open without discrimination to teachers of all faiths.<sup>17</sup> There have been vigorous dissents, however, to more recent decisions outlawing officially sponsored prayer at public school graduations<sup>18</sup> and striking down a school board policy permitting students to vote to have a student deliver an "invocation" at a high school varsity football game.<sup>19</sup>

*Engel v. Vitale*<sup>20</sup> and *School District of Abington v. Schempp*<sup>21</sup> engendered widespread and emotional public opposition as well as numerous attempts to amend the First Amendment,<sup>22</sup> none of which, of course, succeeded. Subsequent years witnessed a growing number of student Bible and religious clubs that sought permission to meet in public schools and colleges,<sup>23</sup> a development that might have been spurred by the two cases. In 1981, the Supreme Court in *Widmar v. Vincent*<sup>24</sup> held that the First Amendment was violated when a state college, which had made its facilities available for meetings of a wide range of student groups, thereby creating a "limited public forum" for First Amendment purposes, denied access to a registered student religious group because of an official regulation barring the use of University buildings "for purposes of religious worship or religious teaching."<sup>25</sup>

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<sup>16</sup> *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

<sup>17</sup> *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

<sup>18</sup> See *Lee v. Weisman*, 505 U.S. 577 (1992) (Scalia, J., dissenting) ("The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."); see also Thomas A. Schweitzer, *Lee v. Weisman and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV. 112 (1992).

<sup>19</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 590 (2000) (Rehnquist, J., dissenting) (rejecting the majority's conception of the Establishment Clause).

<sup>20</sup> 370 U.S. at 421.

<sup>21</sup> 374 U.S. at 203.

<sup>22</sup> See, e.g., MARK G. UDOFF, DAVID L. KIRP & BETSY LEVIN, *EDUCATIONAL POLICY AND THE LAW*, 146-48 (West Publishing Co., 3d ed. 1992).

<sup>23</sup> *Id.* at 296.

<sup>24</sup> 454 U.S. 263 (1981).

<sup>25</sup> *Id.* at 265 n.3.

In subsequent cases, Christian student groups attempted to extend the *Widmar* holding to gain the right to meet in public high schools. After courts rejected a few of these attempts,<sup>26</sup> Congress enacted the Equal Access Act,<sup>27</sup> which provides that if a public secondary school which receives federal funds establishes a "limited open forum" by permitting "noncurriculum related student groups" to meet on its premises, it can not deny "equal access" to other student groups on the basis of the "religious, political, philosophical or other content" of the speech at such meetings.<sup>28</sup> When the school authorities at Westside High School in Omaha denied permission to a group of students to form a "Christian Club," the students challenged the denial in federal court.<sup>29</sup> They argued that their exclusion violated the Equal Access Act; their adversaries argued that the Act was unconstitutional.<sup>30</sup> The Supreme Court agreed with the Eighth Circuit and held for the students, concluding that the Equal Access Act was constitutional and that the school had violated it by denying the students access.<sup>31</sup>

The Equal Access Act, and consequently the holding in *Board of Education of the Westside Community Schools v. Mergens*, applies only to public "secondary schools," i.e., high schools (comprising the ninth to twelfth grades).<sup>32</sup> Moreover, since its holding was statutory, *Mergens* did not decide whether younger student members of religious clubs, not covered by the Equal Access Act, have a First Amendment right to meet on their school's premises. The Supreme Court did not reenter this area of First Amendment jurisprudence for a decade after it decided *Mergens*.

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<sup>26</sup> See, e.g., *Bender v. Williamsport Area Sch. Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 583 (3d Cir. 1984); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Brandon v. Guilderland Bd. of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

<sup>27</sup> 20 U.S.C. §§ 4071-4074 (2000).

<sup>28</sup> 20 U.S.C. § 4071(a).

<sup>29</sup> *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 232-33 (1990).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 234 (affirming 867 F.2d 1076 (8th Cir. 1989)).

<sup>32</sup> *Id.* at 250; 20 U.S.C. § 4071(a).

Meanwhile, in another “Good News” case from Missouri with facts quite similar to the Milford, New York case, a younger group of students who had formed a Christian religious group at the Ladue Junior High School won a First Amendment victory in court.<sup>33</sup> This group, the “Good News/Good Sports Club,” which included students between the ages of eleven to fifteen, had not been totally excluded from the school. During the 1991-92 school year, the Club had been permitted to meet at school once a month from 3 to 3:55 p.m., which enabled them to take the late bus home afterward.<sup>34</sup> Following protests to the school board by residents who complained about the religious content of the Club’s meetings, the board changed its policy to reserve the period from 3 to 6 p.m. for athletic activities and meetings of scout groups, relegating the Club and other organizations to a period after 6 p.m.<sup>35</sup> The Club challenged the new policy in federal court.<sup>36</sup> The district court held for defendant school district but the Eighth Circuit reversed, holding that the amended policy resulted in “viewpoint discrimination” which did not serve a compelling governmental interest and therefore violated the First Amendment.<sup>37</sup>

#### GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL

The Milford, New York case<sup>38</sup> originated when Sharon Fournier, wife of Steven Fournier, pastor of the Milford Center Community Bible Church, organized a “Good News Club” for children aged six to twelve at the Milford Central School. Pastor Fournier was a “teacher” at the club, and the couple’s daughter, Andrea, was a Good News member. The Club originally met at Pastor Fournier’s church and members were transported there by school district buses. After the district ceased providing

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<sup>33</sup> *Good News/Good Sports Club v. Sch. Dist. of the City of Ladue*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995).

<sup>34</sup> *Id.* at 1502-3.

<sup>35</sup> *Id.* at 1503.

<sup>36</sup> *Id.* The Club sought injunctive and declaratory relief based on its First Amendment rights.

<sup>37</sup> *Id.* at 1510.

<sup>38</sup> *Good News Club*, 21 F. Supp. 2d at 149.



transportation in September, 1996, the Club formally requested to use the school cafeteria from 3 to 4 p.m. for its weekly meetings.<sup>39</sup>

The state education law, which specifies uses to which school buildings and facilities can be put, permits district residents to use school premises for “instruction in any branch of education, learning or the arts” and for “social, civil 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 opened to the general public.”<sup>40</sup> In addition, school premises can be used for “meetings, entertainment and occasions where admission fees are charged. . .” but not if the proceeds benefit “a society, association or organization of a religious sect or denomination.”<sup>41</sup> Pursuant to §414, the local board of education adopted a “Community Use Policy” which provided in pertinent part that “School premises shall not be used by any individual or organization for religious purposes.”<sup>42</sup> The Club had requested use of the Milford Central School cafeteria for “hearing a [B]ible lesson and memorizing scripture,” and Superintendent Robert McGruder denied the Club’s request on the grounds that this was the equivalent of “religious worship.”<sup>43</sup>

Plaintiffs accordingly brought an action in federal district court under 42 U.S.C. § 1983 to challenge this denial. The court preliminarily enjoined defendant school district from enforcing the ban while the case was proceeding, but it eventually granted defendants’ motion for summary judgment.<sup>44</sup> The district court’s justification for the exclusion of the Club from the Milford Central School was premised on the finding that “its subject matter is

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<sup>39</sup> *Id.*

<sup>40</sup> N.Y. EDUC. LAW § 414(c) (McKinney 2000).

<sup>41</sup> *Id.* § 414(d).

<sup>42</sup> *Good News Club*, 21 F. Supp. at 150. While § 414 did not expressly prohibit access to public school property by student religious clubs. The New York Appellate Division had held in a similar case that a local school district could not permit a student Bible club to meet on school property since religious purposes were not included in § 414’s list of permitted uses. *Trietley v. Bd. Of Educ. Of Buffalo*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (4<sup>th</sup> Dep’t 1978); *Good News Club*, 533 U.S. at 109 n.2. The Supreme Court’s holding in *Good News Club* clearly renders *Trietley* a dead letter.

<sup>43</sup> *Id.* at 149.

<sup>44</sup> *Id.* at 161.

decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under the District's use policies."<sup>45</sup>

The case raised First Amendment "public forum" issues concerning plaintiffs' rights of access to public property. The extent to which people enjoy a First Amendment right of access to public property varies depending on whether it is, for example, a "traditional public forum" like streets and parks, which are generally open to the public,<sup>46</sup> or a "nonpublic forum," which is not.<sup>47</sup> In *Good News Club*, the parties stipulated that Milford Central School was neither of these but rather a "limited public forum"<sup>48</sup> which a state is not obliged to create, but, once it has been created, must be open to the public on a non-discriminatory basis. The Supreme Court has stated that a public forum may be created for a limited purpose or for discussion of certain subjects; when speech addresses a subject not encompassed in the purpose of the forum, it may be excluded provided that the government does not discriminate against it on the basis of viewpoint.<sup>49</sup>

After quoting at length from *Good News* lesson materials and describing the program of the Club's meetings, which included Bible readings, giving prizes for the memorization of Bible verses and exhortations to accept Jesus as one's personal savior,<sup>50</sup> the

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<sup>45</sup> *Id.* at 154.

<sup>46</sup> See, e.g., *Hague v. CIO*, 307 U.S. 496, 515 (1939). The Court stated: [S]treets and parks. . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

<sup>47</sup> E.g., *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 800, 804 (1985) (finding that the Combined Federal Campaign, a charity drive aimed at federal employees which resembles the Community Chest or United fund, was not a traditional public forum, and a presidential Executive Order excluding from the Campaign groups seeking to influence public policy through advocacy, lobbying or litigation did not violate the groups' First Amendment right to solicit charitable contributions).

<sup>48</sup> *Good News Club*, 533 U.S. at 106 (citing Brief for Petitioners at 15-17, and Brief for Respondent at 26).

<sup>49</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); accord *Cornelius*, 473 U.S. at 802.

<sup>50</sup> *Good News Club*, 21 F. Supp. 2d at 154-57.

district court concluded that the Good News meetings consisted of “formal religious instruction and prayer to ‘instill and reinforce Christian faith’ in the children.”<sup>51</sup> Because the Milford Central School had not permitted use of its facilities by similar religious groups for religious instruction or prayer in the past, the court concluded that exclusion of the Good New Club did not violate its First Amendment rights.<sup>52</sup>

### THE SECOND CIRCUIT DECISION

On appeal to the Second Circuit, the Club argued that the defendant school district had been guilty of unconstitutional “viewpoint discrimination” and contended that while other groups, such as the Boy Scouts, Girl Scouts and 4-H Club were permitted to teach moral values, it was prevented from doing so because it sought to teach moral values from a Christian viewpoint.<sup>53</sup> The court of appeals stated that if the Club was “merely...teaching. . .morals from a religious viewpoint,” Milford’s policy of excluding it would not only not comply with § 414 of the State Education Law but “would be unconstitutional viewpoint discrimination.”<sup>54</sup> It stressed, however, that the Club’s activities were not limited to fostering “pure ‘moral and character development;’”<sup>55</sup> instead, the Club’s Christian viewpoint contained the “additional layer” that its moral exhortations were premised on a belief in Christ as Savior.<sup>56</sup> Thus, while school authorities would be obliged to permit “discussion of secular subjects from a religious viewpoint,”<sup>57</sup> lest they be guilty of viewpoint discrimination by excluding such discussion, exclusion of “discussion of religious material through religious instruction and prayer”<sup>58</sup> was legitimate, since it was based on the content or subject matter of the speech rather than its viewpoint, and the school had not previously opened its facilities, a

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<sup>51</sup> *Id.* at 154.

<sup>52</sup> *Id.*

<sup>53</sup> *Good News Club*, 202 F.3d at 509.

<sup>54</sup> *Id.* n.8.

<sup>55</sup> *Id.* at 511.

<sup>56</sup> *Id.* at 509.

<sup>57</sup> *Id.* at 510.

<sup>58</sup> *Good News Club*, 202 F. 3d at 510.

“limited public forum,” to outside groups for religious instruction or prayer.<sup>59</sup>

Needless to say, permitting “discussion of secular subjects from a religious viewpoint,” but forbidding “discussion of religious material through religious instruction and prayer” is a subtle distinction, and may be difficult to apply in practice. Judge Jacobs, dissenting from the Second Circuit opinion, stated: “In my view, when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters.”<sup>60</sup> He further observed that “the sectarian religious perspective will tend to look to the deity for answers to moral questions. The idea that moral values take their shape and force from God seems to me to be a viewpoint for the consideration of moral questions.”<sup>61</sup>

Judge Jacobs’s point is illustrated by the following excerpt from the deposition of Pastor Steven Fournier, which District Judge Mc Avoy quoted in trying to answer the question “What is the genre of Good News’ activities?”:

[B]ecause we are teaching morals from a Christian perspective, we would present that perspective, which is that these morals or these values are senseless without Christ, that is to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy or overcome the desire to do bad things to those who have somehow hurt you.<sup>62</sup>

Assuming, as seems reasonable, that Pastor Fournier is accurately describing how he would teach in a meeting of the Club, this approach combines moral training (counseling children to overcome feelings of jealousy and the desire for revenge) with

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<sup>59</sup> *Id.* at 508; cf. *Good News Club*, 21 F. Supp. 2d at 158.

<sup>60</sup> *Good News Club*, 202 F.3d at 512 (Jacobs, J., dissenting).

<sup>61</sup> *Id.* at 514.

<sup>62</sup> *Good News Club*, 21 F. Supp. 2d at 154-55.

religious instruction (that Christ is the children's savior). Indeed, "moral" and "religious" instruction are impossible to separate for the devout children, whose strongest motive for moral behavior is not a detached philosophical contemplation of the moral superiority of overcoming jealousy and the desire for revenge, but rather the commandment to love God and to love one's neighbor as oneself,<sup>63</sup> which obviously forbids jealousy and the desire for revenge.

As noted above, the Second Circuit upheld the Club's exclusion from Milford Central School because "the Club's activities fall outside the bounds of pure 'moral and character development.'"<sup>64</sup> The court thus implicitly set up a dichotomy between moral training (secular in nature and permissible in the public school forum) and religious instruction (sectarian and not permitted there). Since religious faith is the wellspring of moral principles for devout Christians, as illustrated by Pastor Fournier's deposition statement, this dichotomy begs the question of the nature of moral training and in doing so discriminates against the Christian approach. Judge Jacobs's dissent incisively recognized this fact:

The school district allows use of its facilities by certain groups that focus on "moral development" of young people. The majority argues that the activities of the Club are "quintessentially religious", while the other groups deal only with the "secular subject of morality." The fallacy of this distinction is that it treats morality as a subject that is secular by nature, which of course it may be or

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<sup>63</sup> Jesus affirmed this commandment in a colloquy with a lawyer in the passage preceding the "Good Samaritan" parable in Luke's Gospel:

And behold, a lawyer stood up to put him to the test, saying, "Teacher, what shall I do to inherit eternal life?" He said to him, "What is written in the law? How do you read?" And he answered, "You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind: and your neighbor as yourself." And he said to him, "You have answered right; do this, and you will live."

*Luke* 10:25-28.

<sup>64</sup> *Good News Club*, 202 F.3d at 511 (emphasis added).

not, depending on one's point of view. Discussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially – quintessentially – religious. . . .<sup>65</sup>

Thus, the majority's privileging of secular ways of teaching morality appears arbitrary and has a discriminatory impact on groups like the Good News Club, which will lose their right to participate in a public forum unless they fundamentally alter their approach to moral teaching by cutting out its core of Christian faith.

### THE SUPREME COURT OPINION

The Supreme Court reversed the Second Circuit and ruled for the Club in an opinion written by Justice Thomas and joined by Justices Rehnquist, O'Connor, Scalia and Kennedy and by Justice Breyer in part.<sup>66</sup> The majority ruled that Milford Central School had violated the Club's free speech rights by engaging in "viewpoint discrimination"<sup>67</sup> when it excluded the Club from meeting in the school building, and it further held that this violation was not justified in any way by the Establishment Clause.<sup>68</sup> Justice Scalia wrote a concurring opinion to emphasize that alleged peer pressure on students to participate in the Club's activities could not be considered coercion, and that there was no possibility of state "endorsement" of the Club's activities under the facts of the case.<sup>69</sup> Justice Breyer concurred in part, but he would have remanded the case for further findings of fact.<sup>70</sup> Justices Stevens<sup>71</sup> and Souter<sup>72</sup> dissented on Establishment Clause grounds, and Justice Ginsburg joined Justice Souter's opinion.

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<sup>65</sup> 202 F.3d at 515 (Jacobs, J., dissenting) (internal citations omitted).

<sup>66</sup> *Good News Club*, 533 U.S. at 101-02.

<sup>67</sup> *Id.* at 109.

<sup>68</sup> *Id.* at 102.

<sup>69</sup> *Id.* at 120-27 (Scalia, J., concurring).

<sup>70</sup> *Id.* at 127-30 (Breyer, J., concurring in part).

<sup>71</sup> *Good News Club*, 533 U.S. at 130-34 (Stevens, J., dissenting).

<sup>72</sup> *Id.* at 134-45 (Souter, J., dissenting).

After the standard recitation of public forum law, Justice Thomas raised the question of whether the Club's exclusion constituted viewpoint discrimination and answered it affirmatively. He invoked *Lamb's Chapel v. Center Moriches Union Free School District*,<sup>73</sup> which had not even been cited by the Second Circuit. In *Lamb's Chapel*, which also involved § 414 of the New York State Education Law, a school district denied the applications by an evangelical Christian church to use its facilities: 1) to conduct Sunday morning services; and 2) to show "a family orientated movie from a Christian perspective" in the evening for five consecutive weeks.<sup>74</sup> A long list of mostly secular community organizations had been granted permission to meet on school property, but the defendant school district's Rule 7, promulgated under the authority of § 414, provided that school premises "shall not be used by any group for religious purposes."<sup>75</sup> Noting that child rearing, the subject of the proposed film series, was a permissible subject under the school district's rules and that exhibition of the film series was denied "solely because the series dealt with the subject from a religious standpoint,"<sup>76</sup> the Court concluded that the denial was not "viewpoint neutral", as required in nonpublic forums,<sup>77</sup> but instead constituted unconstitutional viewpoint discrimination.<sup>78</sup>

According to Justice Thomas, the parallels between *Lamb's Chapel* and *Good News Club* were striking: both groups had attempted to address, from a religious standpoint, the teaching of morals and character, which were subjects otherwise permitted under the school district's rules, while the only difference between the two was the inconsequential one that Good News used live storytelling and prayer, while Lamb's Chapel taught lessons through film.<sup>79</sup> Both groups manifested a religious viewpoint, so "the exclusion of the Good News Club's activities, like the

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<sup>73</sup> 508 U.S. at 384.

<sup>74</sup> *Id.* at 387.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 394.

<sup>77</sup> *Id.* at 392-93 (citing *Cornelius*, 473 U.S. at 806, and *Perry Educ. Ass'n.*, 460 U.S. at 49).

<sup>78</sup> *Lamb's Chapel*, 508 U.S. at 394.

<sup>79</sup> *Good News Club*, 533 U.S. 109-10.

exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination."<sup>80</sup>

Justice Thomas also stated that *Good News Club* was governed by *Rosenberger v. Rector and Visitors of the University of Virginia*.<sup>81</sup> In *Rosenberger*, the university had established a "Student Activities Fund," with money from mandatory student fees, with which it paid printing costs of publications issued by student groups. However, the university had withheld this printing subsidy from Wide Awake Productions, a student group, for the sole reason that it "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality,"<sup>82</sup> which was prohibited by the University's Student Activity Fund Guidelines. The Supreme Court, in an opinion by Justice Kennedy, held that this constituted viewpoint discrimination and thus violated Wide Awake's free speech rights, and that it was not justified by the University's need to comply with the Establishment Clause, since the Fund established a neutral government program, whose neutrality was not compromised by the fact that religious

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<sup>80</sup> *Id.* at 110. Justice Thomas sharply chastised Judge Miner of the Second Circuit for ignoring *Lamb's Chapel* in his opinion for the majority: "We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel*, despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn. . ." *Id.* at 109 n.3. It appears that the Second Circuit, unhappy with the increasing divergence between itself and the Supreme Court majority on Establishment Clause issues, was recalcitrantly sticking to its own arguably inconsistent line of cases, including *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676 (2d Cir. 1988), *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997), and *Full Gospel Tabernacle v. Community School District 27*, 164 F.3d 829 (2d Cir.), *cert. denied*, 527 U.S. 1036 (1999). As noted below, Justice Thomas did not explicitly distinguish any of these, although he initially cited *Bronx Household of Faith* in identifying the "conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." *Good News Club*, 533 U.S. at 105. The *Good News Club* decision clearly casts considerable doubt on the continued validity of all three prior Second Circuit cases.

<sup>81</sup> 515 U.S. 819 (1995); *Good News Club*, 533 U.S. at 110.

<sup>82</sup> *Rosenberger*, 515 U.S. at 825.



publications were eligible for the subsidy on the same terms as secular publications.<sup>83</sup>

The Wide Awake publication “challenged Christians to live, in word and deed, according to the faith they proclaim and . . . encouraged students to consider what a personal relationship with Jesus Christ means.”<sup>84</sup> While the University Guidelines did not prohibit religion as a subject matter, they “selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints,”<sup>85</sup> and the Court therefore held that the denial of funding to print Wide Awake was unconstitutional viewpoint discrimination.<sup>86</sup> The Second Circuit, of course, had held that the Good News Club’s activities – focused on teaching children how to cultivate a relationship with God through Jesus Christ – fell “outside the bound of pure ‘moral and character development’” and therefore the Club’s exclusion did not constitute viewpoint discrimination.<sup>87</sup>

Use of the word “pure” here was a mistake for the Second Circuit, just as its failure to even mention the Supreme Court’s *Lamb’s Chapel* decision was a mistake. Justice Thomas reacted with vigor:

We disagree that something that is “quintessentially religious” or “decidedly religious in nature” cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.<sup>88</sup>

He quoted with approval dissenting Judge Jacobs’s statement that “When the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters.”<sup>89</sup> Moreover, Thomas zeroed in on what seemed like discrimination on the part of the Second Circuit panel against religious speech:

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<sup>83</sup> *Id.* at 832, 837, 839, 842.

<sup>84</sup> *Good News Club*, 533 U.S. at 110 (citing *Rosenberger*, 515 U.S. at 826).

<sup>85</sup> *Id.* (citing *Rosenberger*, 515 U.S. at 831).

<sup>86</sup> *Rosenberger*, 515 U.S. at 831.

<sup>87</sup> *See supra*, notes 55-59.

<sup>88</sup> *Good News Club*, 533 U.S. at 111.

<sup>89</sup> *Id.* (citing 202 F.3d at 512 (Jacobs, J., dissenting)).

It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.<sup>90</sup>

Justice Thomas next addressed Milford Central School's arguments that exclusion of the Club was necessary in order for the school to avoid violating the Establishment Clause.<sup>91</sup> While he left open the possibility that a state interest in avoiding an Establishment Clause violation, which can be "compelling," might justify content-based discrimination, he said that it was unclear whether it could justify viewpoint discrimination.<sup>92</sup> In any event, the Court determined that the issue did not need to be addressed in this case, "because we conclude that the school has no valid Establishment Clause interest."<sup>93</sup>

Thomas likened this case to both *Lamb's Chapel* and *Widmar*, free speech cases in which the Supreme Court had rejected Establishment Clause arguments against permitting religious groups to meet on public school premises:

The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel*, the Club's

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<sup>90</sup> *Id.* at 111-12.

<sup>91</sup> *Id.* at 112.

<sup>92</sup> *Id.* at 112-13.

<sup>93</sup> *Good News Club*, 533 U.S. at 113.

meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar*, Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*. Thus, Milford's reliance on the Establishment Clause in unavailing.<sup>94</sup>

Finally, Thomas addressed Milford's argument that the elementary school children involved would perceive that the school was endorsing the Club and would feel coercive pressure to participate because meetings took place on school grounds, even though they occurred after school hours.<sup>95</sup> He gave five reasons why this argument was "unpersuasive": governmental neutrality; the requirement of parental consent; the fact that the Club's activities took place during non-school hours; the fact that the circumstances did not give rise to an impression of endorsement; and the fact that it was equally likely that school children would perceive a hostility to the religious viewpoint if the Club were excluded as that they would "misperceive" endorsement if the Club were allowed to meet in school.<sup>96</sup>

First, Thomas asserted that government "neutrality" in distributing aid or making access available to diverse groups was a strong defense against claims of Establishment Clause violations.<sup>97</sup> As the Court had stated in *Rosenberger*, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."<sup>98</sup>

Second, as far as the danger of "coercive pressure" of the community to take part in the Club's activities is concerned, "the relevant community would be the parents, not the elementary

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 113-14.

<sup>96</sup> *Id.* at 114-19.

<sup>97</sup> *Id.* at 114.

<sup>98</sup> *Good News Club*, 533 U.S. at 114 (citing *Rosenberger*, 515 U.S. at 839).

school children,”<sup>99</sup> since parental permission was required for children to attend the Club’s meetings. For this reason, the children could not be coerced into participating in the Club’s religious activities.<sup>100</sup>

Third, Thomas confronted the suggestion that elementary school children are “more impressionable” than older children and therefore more likely to perceive that Milford would be endorsing the Club if it permitted it to meet on school premises.<sup>101</sup> Thomas stated that whatever weight the Court had given the factor in the past, “we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.”<sup>102</sup> He distinguished the graduation prayer case, *Lee v. Weisman*,<sup>103</sup> on the grounds that attendance was obligatory for students,<sup>104</sup> and the football prayer case, *Santa Fe Independent School District v. Doe*,<sup>105</sup> because that prayer took place at a school-sponsored event.<sup>106</sup>

Milford had also cited *Edwards v. Aguillard*,<sup>107</sup> in which the Supreme Court struck down a Louisiana law forbidding the teaching of evolution as part of the public school curriculum unless accompanied by a lesson on creationism because it served no secular purpose and was intended to endorse a religious viewpoint, in violation of the Establishment Clause. Thus, the law’s fatal flaw was that the state government was taking control of the public school curriculum to promote beliefs based on religion.<sup>108</sup> The Court mentioned in *Edwards* that students were susceptible to

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<sup>99</sup> *Id.* at 115.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> 505 U.S. at 586-87. In *Lee*, the Court held that it was unconstitutional for a public school district to invite a rabbi to offer an invocation and a benediction at a middle school commencement ceremony and to provide him with guidelines concerning the prayers’ content.

<sup>104</sup> *Good News Club*, 533 U.S. at 115.

<sup>105</sup> 530 U.S. at 301 (holding that the school’s policy of “permitting student-led, student-initiated prayer at football games violates the Establishment Clause”).

<sup>106</sup> *Good News Club*, 533 U.S. at 115-16.

<sup>107</sup> 482 U.S. 578 (1987).

<sup>108</sup> *Id.* at 582.

pressure in the classroom.<sup>109</sup> In addition, Milford had cited *Illinois ex rel. McCollum v. Board of Education*,<sup>110</sup> where the Court invalidated a school district program which excused public school children from their regular class during the school day to attend classes taught by clergymen, and *Schempp*,<sup>111</sup> in which the court found unconstitutional the reading of Bible verses in Pennsylvania public schools at the beginning of each school-day. Thomas distinguished all these cases on the grounds that unlike *Good News Club*, they involved activities during the regular school day.<sup>112</sup>

Fourth, Thomas maintained that the facts of *Good News Club* did not support an inference of school endorsement of the Club's activities. The meetings were held not in elementary school classrooms but in a combined high school and middle school resource room.<sup>113</sup> The instructors were not school teachers. It was not clear that "young children are permitted to loiter outside classrooms after the schoolday has ended," and they must understand the significance of requiring parental permission forms.<sup>114</sup> All these factors, according to Thomas, made it unlikely that small children would perceive endorsement here.<sup>115</sup>

Fifth, Thomas turned the endorsement argument against the defendant school district by emphasizing the opposite danger:

Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.<sup>116</sup>

The latter danger was exacerbated by the fact that the school also contained older students through the twelfth grade, and members of the public were permitted to use the building after hours; these

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<sup>109</sup> *Id.* at 583-84.

<sup>110</sup> 333 U.S. at 212.

<sup>111</sup> 374 U.S. at 223.

<sup>112</sup> *Good News Club*, 533 U.S. at 115-17.

<sup>113</sup> *Id.* at 118.

<sup>114</sup> *Id.* at 117-18.

<sup>115</sup> *Id.* at 117-20.

<sup>116</sup> *Id.* at 118.

groups might learn of the Club's exclusion "and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement."<sup>117</sup> Thus, the risk that school children could "misperceive" endorsement did not warrant restricting the Club's freedom of speech:

We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest member of the audience might misperceive.<sup>118</sup>

Since there was no obvious significance to the fact that elementary school children might witness the Club's activities on school premises, the Court concluded that "permitting the Club to meet on the school's premises would not have violated the Establishment Clause."<sup>119</sup> Therefore, it held as follows:

When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.<sup>120</sup>

The Second Circuit decision was reversed and remanded.

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<sup>117</sup> *Good News Club*, 533 U.S. at 118.

<sup>118</sup> *Id.* at 119.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 120. Needless to say, the plain import of the Court's holding is that Milford's "Community Use Policy," prohibiting use of school property "by any individual or organization for religious purposes," *Good News Club*, 21 F. Supp. at 150, is unconstitutional.

## JUSTICE SCALIA'S CONCURRENCE

Justice Scalia joined the Court's opinion, but he wrote a concurring opinion emphasizing why he thought the Establishment Clause issue in *Good News Club* was not even close. For constitutional purposes, he believed that the extent of "coercive pressure" on the students was "zero."<sup>121</sup> As for "peer pressure" of students on one another, the "compulsion of ideas" rather than "coercion" was at work, and such activities, if private, comprise "one of the attendant consequences of a freedom of association that is constitutionally protected."<sup>122</sup> "The private right to exert and receive that compulsion (or to have one's children receive it) is 'protected' by the Free Speech and Free Exercise Clauses. . .", and "A priest has as much liberty to proselytize as a patriot."<sup>123</sup>

Quoting his own opinion for the Court in *Capitol Square Review and Advisory Board v. Pinette*,<sup>124</sup> Scalia asserted that "religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."<sup>125</sup> He stated that that is also true where, as in *Good News Club*, "private speech. . . occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses."<sup>126</sup> Under these circumstances, he contended, it made no difference whether the Club's exclusion was characterized as viewpoint or subject-matter discrimination, since there was no legitimate reason whatever under the Establishment Clause to exclude the Club from the school.<sup>127</sup>

Scalia identified the crux of the dissenters' disagreement with the Court as their belief that it was proper to exclude such "purely religious" speech by the Club as urging children "who already believe in the Lord Jesus as their Savior" to "stop and ask

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<sup>121</sup> *Id.* at 120-21 (Scalia, J., concurring).

<sup>122</sup> *Good News Club*, 533 U.S. at 121.

<sup>123</sup> *Id.* (emphasis in original).

<sup>124</sup> 515 U.S. 753 (1995).

<sup>125</sup> *Good News Club*, 533 U.S. at 121 (quoting *Pinette*, 515 U.S. at 770).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 122.

God for the strength and the 'want'. . .to obey Him," and inviting children who "don't know Jesus as Savior" to "trust the Lord Jesus to be their Savior from sin."<sup>128</sup> He asserted that the dissenters believed that such speech could be legitimately excluded from the school without viewpoint discrimination, but he disagreed with this view.

Scalia noted that the defendant school had opened its facilities to any "use pertaining to the welfare of the community . . .," including "shaping the moral and character development of children."<sup>129</sup> Thus, the Boy Scouts of America could endeavor to instill character in boys for secular reasons, and a group could use Aesop's Fables to teach moral values.<sup>130</sup> It was only when a group like Good News engaged in character training based on its faith in God that access was denied.<sup>131</sup> Scalia eloquently argued that the dissenters' approach would justify viewpoint discrimination because only religious speakers' basic premises underlying their morality were ruled out of bounds. He stated:

From no other group does respondent require the sterility of speech that it demands of petitioners. The Boy Scouts could undoubtedly buttress their exhortations to keep "morally straight" and live "clean" lives. . .by giving *reasons* why that is a good idea – because parents want and expect it, because it will make the scouts "better" and "more successful" people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered – because God wants and expects it, because it will make the Club members "saintly" people, and because it emulates Jesus Christ. The Club may not, in other words, independently discuss the religious premise on which its views are based – that God exists and His assistance is necessary to morality. It may not defend the

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<sup>128</sup> *Id.* at 123.

<sup>129</sup> *Id.* at 123-24.

<sup>130</sup> *Good News Club*, 533 U.S. at 124.

<sup>131</sup> *Id.*



premise, and it absolutely must not seek to persuade the children that the premise is true. The children must, so to say, take it on faith. This is blatant viewpoint discrimination. Just as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God's will are useless if the listeners do not believe that God exists. Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise – and in respondent's facilities every premise but a religious one may be defended.<sup>132</sup>

Scalia further noted that it was the same kind of “viewpoint restriction” which the Court had struck down in *Rosenberger*, in which the private student newspaper which had been denied a subsidy said that its mission was “to encourage students to consider what a personal relationship with Jesus Christ means”<sup>133</sup> and its mission further stated: “[t]he only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation.”<sup>134</sup> He stated that Justice Souter would justify exclusion of the Club because its meetings were essentially “an evangelical service of worship”<sup>135</sup> but claimed that the Court in *Widmar* had held that the distinction between worship and other religious speech was neither intelligible nor relevant to the constitutional issue.<sup>136</sup>

#### JUSTICE BREYER'S OPINION

Justice Breyer “concurred in part” with the Court's decision.<sup>137</sup> He emphasized that government neutrality is only one

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<sup>132</sup> *Id.* at 124-25 (citations omitted) (emphasis in original).

<sup>133</sup> *Id.* at 125 (quoting *Rosenberger*, 515 U.S. at 826).

<sup>134</sup> *Id.* (quoting *Rosenberger* 515 U.S. at 865 (Souter, J., dissenting) (quoting the student paper)).

<sup>135</sup> *Good News Club*, 533 U.S. at 126.

<sup>136</sup> *Id.* (citing *Widmar*, 454 U.S. at 269, n. 6).

<sup>137</sup> *Id.* at 127-30 (Breyer, J., concurring in part).

of the factors relevant to determining whether there is an Establishment Clause violation, and the critical Establishment Clause question here might be “whether a child, participating in the Good New Club’s activities, could reasonably perceive the school’s permission for the club to use its facilities as an endorsement of religion.”<sup>138</sup> Moreover, he suggested that given the case’s procedural posture, the Court could not fully answer the Establishment Clause questions the case raised; he noted that the factual record was incomplete and that the Court had made assumptions about other facts.<sup>139</sup> Consequently, he, argued, it would be appropriate for both parties to have an opportunity on remand to adduce further evidence, should they so desire.<sup>140</sup>

#### JUSTICE STEVENS’S DISSENT

Justice Stevens, while conceding that the case was “undoubtedly close,”<sup>141</sup> dissented.<sup>142</sup> He said that speech for “religious purposes,” which was precluded from public schools by Section 414 of the New York Education Law, could be divided into three categories: 1) “speech about a particular topic from a religious point of view,” 2) worship, and 3) proselytizing.<sup>143</sup> He acknowledged that “[a] public entity may not generally exclude even religious worship from an open public forum,”<sup>144</sup> but insisted that it had broad discretion to preserve public property for its intended use, i.e., to maintain a “limited public forum.”<sup>145</sup> Milford, he noted, did not intend to exclude all speech in the first category, but merely speech constituting worship and proselytizing speech, which if permitted might foster divisiveness and might “tend to separate young children into cliques that undermine the school’s educational mission.”<sup>146</sup> Stevens saw nothing unconstitutional in excluding the second and third categories from the Milford schools

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<sup>138</sup> *Id.* at 127-28 (emphasis added).

<sup>139</sup> *Id.* at 128-29.

<sup>140</sup> *Good News Club*, 533 U.S. at 129.

<sup>141</sup> *Id.* at 134 (Stevens, J., dissenting).

<sup>142</sup> *Id.* at 130-34.

<sup>143</sup> *Id.* at 130-31.

<sup>144</sup> *Id.* at 130.

<sup>145</sup> *Good News Club*, 533 U.S. at 130 (citing cases which have so held).

<sup>146</sup> *Id.* at 131-32

while permitting the first category,<sup>147</sup> to which the film in *Lamb's Chapel* and the Christian student newspaper in *Rosenberger* belonged.<sup>148</sup>

#### JUSTICE SOUTER'S DISSENT

Justice Souter's dissent, which Justice Ginsburg joined, contended that it was error for the Court to reach the Establishment Clause issue, which he said the lower courts had not even addressed.<sup>149</sup> Souter stated that the Club had not objected to the reasonableness of Milford's policy prohibiting use of its facilities for religious purposes, so in his view the sole issue for the Supreme Court was whether Milford had misapplied its policy in a way that would amount to imposing a viewpoint-based restriction on speech in its forum.<sup>150</sup> He answered that question in the negative.

Souter premised the principal part of his dissent on "the accepted rule that a government body may designate a public forum subject to a reasonable limitation on the scope of permitted subject matter and activity, so long as the government does not use the forum-defining restrictions to deny expression to a particular viewpoint on subjects open to discussion."<sup>151</sup> He quoted several excerpts from a sample Good News lesson to show that the Club engaged in prayer and that it invited and encouraged children to recognize Jesus as their savior.<sup>152</sup> He stated that while the majority had blandly characterized the Club's activity as "teaching of morals and character, from a religious standpoint,"<sup>153</sup> they failed to acknowledge that it was more than that and in fact constituted a Christian worship service:

It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian

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<sup>147</sup> *Id.* at 133.

<sup>148</sup> *Id.* n. 3.

<sup>149</sup> *Id.* at 135 (Souter, J., dissenting).

<sup>150</sup> *Good News Club*, 533 U.S. at 136.

<sup>151</sup> *Id.* at 135.

<sup>152</sup> *Id.* at 137-38.

<sup>153</sup> *Id.* at 139 (internal citations omitted).

point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion.<sup>154</sup>

He further agreed with Justice Stevens that “Good News’s activities may be characterized as proselytizing and therefore as outside the purpose of Milford’s limited forum.”<sup>155</sup>

Accordingly, Souter argued that the lower courts had correctly concluded that “the undisputed facts in this case differ from those in *Lamb’s Chapel*, as night from day.”<sup>156</sup> In *Lamb’s Chapel*, the Court had unanimously held it unconstitutional for a school to “permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.”<sup>157</sup> That case involved plainly unconstitutional viewpoint discrimination; Souter clearly believed that in contrast, Milford in *Good News* had excluded from school premises not speech from a religious viewpoint but rather the entire subject matter areas of worship and proselytizing.<sup>158</sup>

The case had been litigated in the lower courts principally on the limited public forum issues, and Milford only raised its claim that granting Good News’s application would violate the Establishment Clause to demonstrate that it had a compelling interest in denying the application.<sup>159</sup> Accordingly, Souter contended that it was error for the Court even to decide the Establishment Clause issues, and that this was “in derogation of this Court’s proper role as a court of review.”<sup>160</sup> He regarded this as usurpation of the trial court’s fact-finding role and favored a remand on all other issues in the case to determine such facts as

whether Good News conducts its instruction at the same time as school-sponsored extracurricular and athletic activities conducted by school staff and volunteers; whether any other community groups

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<sup>154</sup> *Id.* at 138.

<sup>155</sup> *Good News Club*, 533 U.S. at 138 n. 3 (citing Justice Steven’s dissent) (internal citations omitted).

<sup>156</sup> *Id.* at 137.

<sup>157</sup> *Lamb’s Chapel*, 508 U.S. at 393-94.

<sup>158</sup> *Good News Club*, 533 U.S. at 138, 138 n.3.

<sup>159</sup> *Id.* at 139.

<sup>160</sup> *Id.*

use school facilities immediately after classes end and how many students participate in those groups; and the extent to which Good News, with 28 students in its membership, may “dominate the forum” in a way that heightens the perception of official endorsement.<sup>161</sup>

Nevertheless, while disclaiming the ability to decide the Establishment Clause issues on the basis of such an incomplete set of facts, Souter asserted that even the incomplete record in the case contained disturbing hints of an Establishment Clause violation.<sup>162</sup> While the majority had relied on *Lamb’s Chapel* and *Widmar*, whose facts it deemed “materially indistinguishable”<sup>163</sup> from the facts in *Good News Club*, Souter found an absence of similar facts in the *Good News Club* record.<sup>164</sup> The Court in *Widmar* had emphasized that the case involved young adults who were less impressionable than younger students, and that the access granted to the same university facilities for numerous other groups negated any inference of official endorsement of the student religious group.<sup>165</sup> Similarly, in *Lamb’s Chapel*, the school property had repeatedly been used by a wide variety of other private organizations, and the program in question was addressed to adults.<sup>166</sup> In contrast, *Good News* involved schoolchildren, whose impressionability the Court had often recognized.<sup>167</sup> Only four

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<sup>161</sup> *Id.* at 140 (citations omitted).

<sup>162</sup> *Id.* at 140-41.

<sup>163</sup> *Good News Club*, 533 U.S. at 141 (citing majority opinion).

<sup>164</sup> *Id.* (Souter, J., dissenting).

<sup>165</sup> *Id.* (citing *Widmar*, 454 U.S. at 274, n. 14.).

<sup>166</sup> *Id.* at 142 (citing *Lamb’s Chapel*, 508 U.S. at 395).

<sup>167</sup> *Id.* at 142-43. Justice Souter emphasized this factor in distinguishing *Good News Club* from *Widmar* and *Lamb’s Chapel*:

The cohort addressed by Good News is not university students with relative maturity, or even high school pupils, but elementary school children as young as six. The Establishment Clause cases have consistently recognized the particular impressionability of schoolchildren, see *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), and the special protection required for those in the elementary grades in the school forum, see *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573,

other outside groups had met in the school, and the Club's meetings uniquely began immediately after the school day ended.<sup>168</sup> Thus, even on this limited record, Souter concluded that

there is a good case that Good News's exercises blur the line between public classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not. Thus, the facts we know (or think we know) point away from the majority's conclusion. . . .<sup>169</sup>

### ANALYSIS

Since both parties stipulated that Milford had created a limited public forum when it opened its facilities in 1992,<sup>170</sup> the first question addressed by Justice Thomas was whether the Club's free speech rights had been violated.<sup>171</sup> The second question was whether any such violation was justified by Milford's concern that permitting the club to meet in its building would violate the Establishment Clause.<sup>172</sup> One cannot fully appreciate or evaluate the significant legal issues posed by the case without referring to the history of officially sponsored religious exercises in American public schools.

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620, n. 69 (1989). We have held the difference between college students and grade school pupils to be a "distinction [that] warrants a difference in constitutional results," *Edwards v. Aguillard, supra*, at 584, n. 5 (internal quotation marks and citation omitted).

<sup>168</sup> *Good News Club*, 533 U.S. at 144.

<sup>169</sup> *Id.* at 144-45.

<sup>170</sup> The Supreme Court in *Lamb's Chapel* had declined to decide whether a school district's opening of its facilities pursuant to N.Y. Educ. Law § 414 created a limited or a traditional public forum. 508 U.S. at 391-92; *Good News Club*, 533 U.S. at 106. Because of the parties' agreement that Milford had created a limited public forum, the Court simply assumed that this was the case. See *supra* note 48.

<sup>171</sup> *Good News Club*, 533 U.S. at 107.

<sup>172</sup> *Id.* at 112.

## RELIGION IN AMERICAN PUBLIC SCHOOLS: HISTORICAL BACKGROUND

There is a long history of religious exercises and influences in American public education which is repugnant to the contemporary understanding of the principle of separation of church and state. For many years, such exercises, which included official prayers and Bible reading, placed pupils who were members of minority religions in difficult dilemmas of conscience in which they either had to participate in prayers and other activities which were antithetical or offensive to their own religious beliefs, or else remain silent or ask to be excused and thereby risk ostracism by their peers. A series of cases brought by religious minority students sensitized the Supreme Court to these dilemmas and impelled it to require public school religious neutrality in order to preserve separation of church and state and to protect such students from being placed in such dilemmas.

In the midst of the emotional hyper-nationalism engendered by World War II, the Supreme Court in 1940 in *Minersville School District v. Gobitis*<sup>173</sup> upheld the constitutionality of a Pennsylvania statute requiring schoolchildren to salute the American flag; two Jehovah's Witnesses children, whose religion deemed the salute idolatry, had sued after they were expelled from school for refusing to salute the flag.<sup>174</sup> Only three years later, the Court in *West Virginia Board of Education v. Barnette*<sup>175</sup> recoiled from the short shrift it had given to the rights of conscience of public school students in *Gobitis* and overruled the decision.<sup>176</sup> Ever since then, the Court has empathized with the dilemmas faced by children whose religious beliefs are violated by official school precepts or practices. In *Barnette*, the choice faced by Jehovah's Witnesses students who believed the flag salute to be idolatry was stark: either comply or be expelled.<sup>177</sup> The dilemma of the Unitarian children of the named plaintiff in *Abington School District v.*

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<sup>173</sup> 310 U.S. 586 (1940).

<sup>174</sup> *Id.* at 591.

<sup>175</sup> 319 U.S. 624 (1943).

<sup>176</sup> *Id.* at 642.

<sup>177</sup> *Id.* at 630 ("Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.").

*Schempp*<sup>178</sup> was less harsh: their father testified that while the family, as Unitarians, objected to the public school's program of Bible reading, he directed his children not to exercise their right to leave the room lest they be considered to be "oddballs" by their peers.<sup>179</sup> Nevertheless, *Schempp* and *Engel*<sup>180</sup> firmly established the principle that the Establishment Clause outlawed official prayers and Bible reading in public schools.

American public school history is full of incidents in which official practices have violated students' consciences. The Catholics in New York City established their parochial school system in the 1830's largely because the "public" schools explicitly taught a form of non-denominational Protestantism,<sup>181</sup> and Catholic students were punished for refusing, at the direction of their priests, to recite passages from the Protestant King James Version of the Bible in school.<sup>182</sup> Until recent times, public schools in various Southern states have conducted Bible study classes with a Protestant viewpoint, although Catholic and Jewish children were ordinarily permitted to leave the classroom during these periods.<sup>183</sup>

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<sup>178</sup> 374 U.S. at 203.

<sup>179</sup> *Id.* at 208, 208 n.3.

<sup>180</sup> 370 U.S. at 421; *see supra* note 15.

<sup>181</sup> *See* DIANE RAVITCH, *THE GREAT SCHOOL WARS, NEW YORK CITY, 1805-1973*, ch. 4 (1974); MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 148-50 (Carolina Academic Press, 1996).

<sup>182</sup> *E.g.* *Donahoe v. Richards*, 38 Me. 379 (1854) (upholding expulsion from public school of Bridget Donahoe who, following the urging of a Jesuit priest, refused to read from the Protestant King James Bible as directed by the local school committee; the Jesuit was later tarred and feathered by townspeople); *Commonwealth v. Cooke*, 7 Am. L. Reg. 417, 419 (Police Court, Boston, Mass. 1859) (teacher who beat Catholic boy repeatedly on the hands for a half hour "with a rattan stick, some three feet in length, and three-eighths of an inch thick" for his refusal to recite from the King James Bible exonerated). The court held that the required reading of the Bible "is no interference with religious liberty", *id.* at 423, and to permit substitution of the (Catholic) Douay Version would violate the Massachusetts Constitution, which required "neutrality" among religious sects. *Id.* at 424-45; *see also* *Ferriter v. Tyler*, 48 Vt. 443 (1876) (upholding expulsion of Catholic students for being absent from school to attend mass on a Catholic holy day).

<sup>183</sup> Despite their obvious unconstitutionality, such practices persist. In a recent case, the Freedom from Religion Foundation, Inc., challenged the "Bible Education Ministry" in the public schools of Rhea County, Tennessee. *Doe v.*



Religious indoctrination in public schools, moreover, was not limited to practices mandated by government and school administrators. In numerous recent instances, teachers have violated the requirement of institutional neutrality and tried to impose their own religious views on their students. An earlier case involving a chapter of the Good News Club in Reynoldsburg, Ohio furnished an example of this.<sup>184</sup> The Reynoldsburg Club was founded in the 1970s by Roberta Penwell, a teacher at Herbert Mills Elementary School, and met weekly at 3:30 p.m. on school property immediately after classes ended. After the School Board decided to require the Club to meet at 6:30 p.m. instead of 3:45 p.m., some of the fifth and sixth grade members of the Club and their parents sued the superintendent in federal district court.<sup>185</sup> The court found:

In her capacity as a teacher, and during her regularly scheduled classes, Mrs. Penwell has also recited prayers on special occasions, permitted a moment of silence after the pledge of allegiance, allowed religious material to be placed on a table in the classroom, displayed religious sayings on her

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Porter, 188 F. Supp. 2d 904 (E.D. Tenn. 2002). In 1925, the Rhea County Courthouse was the site of the famous "Monkey" trial, in which high school teacher John Scopes was tried for violating the Tennessee statute criminalizing the teaching of "evolution theory" in the public schools. Scope's attorney, the renowned Clarence Darrow, was pitted against William Jennings Bryan, an evangelical, former presidential candidate, who represented the state. During the trial, Bryan expressed the wish that a school might be established in Dayton, the county seat of Rhea County, "to teach the truth from a Biblical perspective," and Bryan College was subsequently founded. *Id.* at 906. Under the "Bible Education Ministry," Bryan College undergraduates instructed public school pupils from kindergarten through grade five in the Bible and Christian doctrine for thirty minutes each week during regular school hours. *Id.* at 907. The pupils sang songs like Jesus Loves Me," and the Bible was taught as religious truth. Parental consent was never obtained for pupils to participate, and there was no evidence that any child had ever opted out. *Id.* The court held the program unconstitutional under *Illinois el rel. McCollum*. *Id.* at 911. See also, *Doe v. Human*, 725 F. Supp. 1503 (W.D. Ark. 1989), *aff'd*, 725 F.2d 857 (8<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 922 (1991); *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983); *Wiley v. Franklin*, 468 F. Supp. 133 (E.D. Tenn. 1979).

<sup>184</sup> *Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd*, 979 F. 2d 851 (6<sup>th</sup> Cir. 1992).

<sup>185</sup> *Id.* at 1007.

wall, distributed bibles to her class, and invited students to attend Club meetings.<sup>186</sup>

Moreover, while seven other adults, none of whom were school employees, assisted Mrs. Penwell in leading Club meetings, Mrs. Penwell greeted children at the Club meetings, took attendance and distributed materials for class projects.<sup>187</sup> In response to these improper and probably unconstitutional actions, the school admonished Mrs. Penwell in writing that her employment would be jeopardized if she persisted in such behavior. In addition, to avoid the appearance of school sponsorship of the Club, Superintendent Endry directed that the Club's meeting time be postponed until 7:30 p.m.<sup>188</sup>

A teacher in a recent Texas public school case also grossly overstepped the bounds of propriety and indeed constitutionality when he promoted his religion and attacked another religion in class.<sup>189</sup> The parties' stipulated facts revealed that

in April 1993, while plaintiff Jane Doe II was attending her seventh grade Texas History class, her teacher, David Wilson, handed out fliers advertising a Baptist religious revival. Jane Doe II asked if non-Baptists were invited to attend, prompting Wilson to inquire about her religious affiliation. On hearing that she was an adherent of the Church of Jesus Christ of Latter Day Saints (Mormon), Wilson launched into a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils. Wilson's comments inspired further discussion among Jane Doe II's classmates, some of whom reportedly noted that "[h]e sure does make it

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<sup>186</sup> *Id.* at 1006-07.

<sup>187</sup> *Id.* at 1006.

<sup>188</sup> *Id.* at 1007. When the club appealed the time change to the School Board, the board changed it to 6:30 p.m. When Club members challenged the 6:30 p.m. time in federal district court as a violation of various First Amendment rights, however, the court ruled against them and granted summary judgment to defendant superintendent of schools. *Id.* at 1016.

<sup>189</sup> *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5<sup>th</sup> Cir. 1999), *aff'd*, 530 U.S. 290 (2000). The Supreme Court affirmed the lower courts' conclusion that student-led prayers at public high school football games violate the establishment clause.

sound evil,” and “[g]ee, . . . it’s kind of like the KKK, isn’t it?” Jane Doe II was understandably upset by this incident . . . .<sup>190</sup>

After Jane Doe II’s mother complained to the school district authorities about Wilson’s actions, which violated the district’s policies barring the distribution of religious literature in class, Wilson was given a written reprimand and was directed to apologize to the Does and to his class.<sup>191</sup>

These two cases illustrate the penchant of some public school teachers to violate students’ rights to religious neutrality in the classroom both by promoting their own denomination and by attacking others. Plainly, the fear that young impressionable pupils will be exposed to improper sectarian influences from teachers and others in their schools is not chimerical. In light of the fact that compulsory attendance laws make students a captive audience, the courts must guard against such abuses.<sup>192</sup>

In summary, American history provides numerous examples of cases in which students in public schools have been exposed to religious influences and even subjected to religious coercion that violated their religious beliefs and rights of conscience. Not only the First Amendment, but basic decency requires that the state, which compels them to attend school, must

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<sup>190</sup> *Doe*, 168 F.3d at 810.

<sup>191</sup> *Id.* For another example of public school teacher participation in prayer meetings on school premises, see *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391 (10<sup>th</sup> Cir. 1985).

<sup>192</sup> This point was made by Justice Brennan in the passage from the *Edwards* opinion cited by Justice Souter in *Good News Club*:

The court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the students and his or her family. Students in such institutions are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.

482 U.S. at 584 (emphasis added; footnotes omitted); see also *supra*, note 167.

protect their rights of conscience and must guard against such abuses. The circumstances are quite different, however, when student clubs are permitted to meet on school premises, without any official endorsement, after the school day has ended and all students are free to depart. At that juncture the school authorities, by yielding space to student voluntary organizations for their meetings, are likely to have established a "limited public forum" from which particular viewpoints cannot be discriminatorily excluded.

### THE PUBLIC FORUM ISSUE

As noted above, the first issue identified by Justice Thomas was whether the free speech rights of the Club, with its religious character, had been violated by the refusal of the Milford school authorities to allow it access to the school's limited public forum. The Club's principal argument for access to Milford Central School classrooms was based on public forum doctrine. The contrast between Justice Thomas's approach to this subject and the approach of the lower courts furnishes a fascinating illustration of the elusive nature of this doctrine.

Under First Amendment public forum doctrine, a local government, which owns property which it is not obliged to make available for everyone's expressive use, can establish a "limited public forum" permitting some uses but excluding others.<sup>193</sup> Government officials, however, are not allowed to discriminate between different viewpoints concerning the same subject matter.<sup>194</sup> In *Tinker v. Des Moines Independent School District*,<sup>195</sup> the landmark case for students' free speech rights on public school premises, the school authorities prohibited students from wearing black armbands to school to protest the Vietnam War because they feared disturbances would result.<sup>196</sup> The school authorities' position was undermined by the fact that they had permitted the wearing of other political symbols, including even the Nazi Iron

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<sup>193</sup> See *Cornelius*, 473 U.S. at 800; *Perry Educ. Ass'n.*, 460 U.S. at 37.

<sup>194</sup> *Barnette*, 319 U.S. at 624.

<sup>195</sup> 393 U.S. 503 (1969).

<sup>196</sup> *Id.* at 504-05.

Cross, in the past.<sup>197</sup> Justice Fortas commented for the Court: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."<sup>198</sup> As the Second Circuit has stated, "[T]he government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."<sup>199</sup>

Justice Thomas wrote that the facts of *Lamb's Chapel* and *Rosenberger* closely resembled the facts of *Good News Club* and controlled its outcome.<sup>200</sup> In *Lamb's Chapel*, the Court held that it was unconstitutional for the New York school district to exclude from its school a church that wanted to present films teaching family values from a Christian perspective, since the teaching of family values was otherwise permissible under the rule governing access to its limited public forum.<sup>201</sup> It concluded that the district's rule, which prohibited use by any group for religious purposes, entailed impermissible viewpoint discrimination.<sup>202</sup> The Court found *Lamb's Chapel* virtually indistinguishable from *Good News Club*.<sup>203</sup>

Similarly, the Court in *Rosenberger* held that the University of Virginia had engaged in viewpoint discrimination when a student organization was denied funding for printing expenses because its publication, "Wide Awake", embodied a

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<sup>197</sup> *Id.* at 510.

<sup>198</sup> *Id.* at 511.

<sup>199</sup> *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) (quoted in *Good News Club*, 21 F. Supp. 2d at 153).

<sup>200</sup> *Good News Club*, 533 U.S. at 109-112.

<sup>201</sup> *Lamb's Chapel*, 508 U.S. at 394.

<sup>202</sup> *Id.*

<sup>203</sup> According to Justice Thomas, "[t]he only apparent difference between the activity of *Lamb's Chapel* and the activities of the *Good News Club* is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas *Lamb's Chapel* taught its lesson through films. This distinction is inconsequential. Both modes of speech use a religious viewpoint. Thus, the exclusion of the *Good New Club's* activities, like the exclusion of *Lamb's Chapel's* films, constitutes unconstitutional viewpoint discrimination." *Good News Club*, 533 U.S. at 109-10.

Christian viewpoint.<sup>204</sup> The denial of funding was unconstitutional because the University, which funded a wide variety of student publications with diverse viewpoints, “selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints.”<sup>205</sup> The facts of both *Lamb’s Chapel* and *Rosenberger*, where public education institutions denied access or benefits to a limited public forum because of the applicants’ religious character, are obviously similar to those of *Good News Club*.

The Club based its claim of access to Milford Central School classrooms on public forum doctrine. It argued that since access to Milford Central School had been granted to the Boy Scouts, Girl Scouts and 4-H Club, all of which aimed to inculcate moral values in their student members, and it was engaged in similar moral instruction, it must be granted similar access.<sup>206</sup> If it were excluded from the limited public forum at Milford Central School, it maintained that this would constitute unconstitutional viewpoint discrimination.<sup>207</sup>

However, in 1992 Milford had adopted a “Community Use Policy” which did not permit the use of school facilities for religious purposes, and this was policy upheld by both lower courts. Since no other religious group had been given access to Milford Central School to hold its meetings, the defendants could plausibly argue, and the lower courts agreed, that in excluding the Club they had not engaged in unconstitutional viewpoint discrimination.<sup>208</sup> District Judge McAvoy declared that the school district’s 1992 Community Use Policy, which created a limited public forum, “is not anti-religious; it is intended to prohibit all outside groups from using District facilities for religious purposes.”<sup>209</sup> He concluded that “the Good News’ activities constitute religious instruction that is conceptually of a different genre than the secular subject matter dealt with by these other

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<sup>204</sup> *Good News Club*, 533 U.S. at 110 (citing *Rosenberger*).

<sup>205</sup> *Id.* (citing *Rosenberger*, 515 U.S. at 131).

<sup>206</sup> *Good News Club*, 21 F. Supp. 2d at 158.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 154; *Good News Club*, 202 F.3d at 105.

<sup>209</sup> *Good News Club*, 21 F.Supp.2d at 158

clubs [the Boy Scouts, Girl Scouts, and 4-H Club].”<sup>210</sup> The Second Circuit agreed that the other clubs’ activities did not remotely resemble the religious instruction and prayer that the Club provided, and therefore the Club’s exclusion from Milford Central School’s facilities “was based on content, not viewpoint.”<sup>211</sup>

Influenced by Establishment Clause precedent, the lower courts no doubt felt uncomfortable at the idea of religious worship in public school premises, even if conducted by a private group after the school day had ended.<sup>212</sup> It was impossible, however, to deny the accuracy of the Club’s statement that it engaged in the moral education of its members, just like the Boy Scouts and Girl Scouts. Accordingly, the lower courts tried to separate moral training, which was permissible in public schools, from religious instruction, which was not. Such a dichotomy is not only impossible for devout Christians, whose entire moral code is informed by, and has its sources in, religious faith, but it got the lower courts tied up in conceptual knots.

Thus, District Judge McAvoy posed the basic issue in the case as follows: “Is the content religious, as alleged by the defendant? Or is the content non-religious, but presented from a religious viewpoint, as alleged by the plaintiffs. . . ?”<sup>213</sup> After summarizing in detail the Club’s activities, he concluded that “Good News is a religious organization whose proposed use deals specifically with religious subject matter—and not, as plaintiffs contend, merely a religious perspective on secular subject

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<sup>210</sup> *Id.*

<sup>211</sup> *Good News Club*, 202 F.3d at 511.

<sup>212</sup> This may account for Judge Miner’s studied disregard of the Supreme Court’s case which was most closely on point with the fact pattern in *Good News Club*, i.e., *Lamb’s Chapel*. While it might have been more congenial for Judge Miner and the Second Circuit to ignore a Supreme Court decision which had reversed them, as noted above, this drew the wrath of Justice Thomas. See *supra* note 80. Judge Miner’s evident discomfort with religious activities on public school premises may have been due to his feeling that this would make students of other religions feel like outsiders: “The activities of the Club clearly and intentionally communicate Christian beliefs by teaching and by prayer, and we think it eminently reasonable that the Milford school would not want to communicate to students of other faiths that they were less welcome than students who adhere to the Club’s teachings.” *Id.* at 509.

<sup>213</sup> *Good News Club*, 21 F. Supp. 2d at 150-51.

matter.”<sup>214</sup> Similarly, Circuit Judge Miner concluded that “the Club’s activities fall outside the bounds of pure ‘moral and character development,’”<sup>215</sup> and the critical distinction to make was “between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer.”<sup>216</sup>

The distinction between “religious content” and “non-religious [content which is] presented from a religious viewpoint” is fine indeed if not non-existent, as is the distinction between “religious subject matter” and “a religious perspective on secular subject matter.” So is the distinction between “the discussion of secular subjects from a religious viewpoint,” on the one hand, and “religious instruction” on the other. Indeed, these statements sound like hair-splitting doubletalk. Plainly, dissenting Circuit Judge Jacobs was correct when he stated that “[i]n my view, when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters.”<sup>217</sup>

The Supreme Court, of course, concluded that Milford had engaged in impermissible viewpoint discrimination against the “religious viewpoint.”<sup>218</sup> If one focuses on the manifold differences in belief between and among the various religions, the idea of a generic “religious viewpoint” might seem incoherent. On the other hand, despite their doctrinal differences, all devoutly religious people share a common interest in not having their views excluded from a limited public forum. Because of the invidious

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<sup>214</sup> *Id.* at 160.

<sup>215</sup> 202 F.3d at 511. Believing Christians might well take exception to the court’s implications that the root of their moral and character development, their faith in Jesus Christ who is their supreme teacher, is “impure”.

<sup>216</sup> *Id.* at 510 (citing *Bronx Household of Faith*, 127 F.3d at 215).

<sup>217</sup> *Id.* at 512 (Jacobs, J., dissenting). The lower court judges were not the only ones who experienced difficulty in categorizing the Good News Club’s activities: Justice Stevens said that it was religious speech “aimed principally at proselytizing or inculcating belief in a particular religious faith,” *Good News Club*, 533 U.S. at 130 (Stevens, J., dissenting), while Justice Souter labeled it essentially “an evangelical service of worship.” *Id.* at 138 (Souter, J., dissenting). Justice Scalia took pleasure in pointing out the fact that the dissenting justices could not agree on exactly what type of religious speech the Good News Club was engaging in. *Id.* at 125 (Scalia, J., concurring).

<sup>218</sup> *Good News Club*, 533 U.S. at 120.



discrimination against religiously oriented groups embodied in the Milford access rule, which appears impossible to justify conceptually, the Court's finding of unconstitutional viewpoint discrimination seems correct.<sup>219</sup>

#### THE ISSUE OF GOVERNMENT ENDORSEMENT OF THE GOOD NEWS CLUB AND COERCIVE PRESSURE OF PUPILS TO PARTICIPATE

As noted above, Milford argued that children would perceive that the school was endorsing the Club and would feel coercive pressure to participate in its activities if permitted to meet in school classrooms. In support of this claim, both Milford and Justice Souter cited *Edwards*, in which the Supreme Court had struck down Louisiana's "Creationism Act".<sup>220</sup> Justice Brennan in *Edwards* had emphasized the importance of keeping sectarian influences out of the public school classroom, since "[s]tudents in such institutions are impressionable and their attendance is involuntary."<sup>221</sup>

What is perhaps most striking about *Good News Club* is that for the first time, the Supreme Court has approved meetings on public school premises by an explicitly religious club aimed at grammar school children, i.e., six-to-twelve-year-olds. In doing so, the Court appears to have dropped its traditional emphasis on the impressionability of young children, which was supposed by many to increase the danger of perceived government endorsement, and consequently of an Establishment Clause

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<sup>219</sup> In public forum doctrine analysis, every "viewpoint" implicitly has its opposite. A key underlying question is how one defines the opposite of "religion" in this context. One writer says that it is "antireligion," and this is consistent with the views of the lower court judges in the *Good News Club* case. Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174 (Fall 1986). She notes that Professors Laycock and McConnell, both "accommodationists," have suggested that religion is not a subject matter but instead a viewpoint, and hence intrinsically controversial. *Id.* at 189, 189 n. 91. For them, (and apparently the majority in *Good News Club*), the opposite of religion is "nonreligion." *Id.* at 182.

<sup>220</sup> See *supra* note 192.

<sup>221</sup> *Edwards*, 482 U.S. at 583-84.

violation, even if a religious group were merely afforded access to public school premises without any government sponsorship or direction.<sup>222</sup> In addition, while the Club meetings occurred after school and were not part of the official school program (or of an official school function such as commencement exercises or athletic events), they took place immediately after classes ended and were directed at students at the school who were present because they had just completed their classes.

In *Edwards*, of course, the state government used its control of the public school curriculum to promote beliefs based on religion in regular classes.<sup>223</sup> The Milford Good News Club, in contrast, enjoyed no official sponsorship by either state or local authorities, nor was it seeking official endorsement of its programs. It did not ask to meet during the school day or to affect the school's curriculum. The authorities had denied the Club the right to meet on school premises and there was no record of teacher participation in or sponsorship of the Club.<sup>224</sup> Justice Thomas effectively distinguished *Edwards* from *Good News Club* on this basis:

[T]he facts are simply too remote from those here. . . *Edwards* involved the content of the curriculum taught by state teachers *during the schoolday* to children required to attend. Obviously, when individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent, the concerns expressed in *Edwards* are not present.<sup>225</sup>

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<sup>222</sup> See, e.g., Teitel, *supra* note 219, at 178.

<sup>223</sup> *Edwards*, 482 U.S. at 583.

<sup>224</sup> Unlike the Ohio Good News Club in *Quappe*, see *supra* note 184, public school teachers apparently played no role in the Milford Good News Club. According to the deposition testimony of Rev. and Mrs. Fournier, they themselves conducted the club meetings when it met at their church, and there was no indication in the record that this would change if they were allowed to meet at the school.

<sup>225</sup> *Good News Club*, 533 U.S. at 116-17 (emphasis in original). *Illinois ex rel. Mc Collum*, 333 U.S. 203, which Milford had cited for its position that the Good News Club's religious objectives would be advanced by the state through compulsory attendance laws, was distinguishable on similar grounds. *Good News Club*, 533 U.S. at 116 n.6.

Despite the fact that the Club had neither sought nor received any official endorsement of its program, and it did not seek to meet during the schoolday or to influence the school's curriculum, Milford's attorneys argued that students at the school would perceive that the school was endorsing the Club and would feel coercive pressure to take part in its activities, since those activities were to take place on school grounds.<sup>226</sup> As noted above, Justice Thomas gave five reasons why this argument was unpersuasive.<sup>227</sup> The first reason was the neutrality principle, which led Thomas to conclude that the Club deserved the same right of access as other groups engaged in character training, like the Boy Scouts and Girl Scouts.<sup>228</sup>

The other factors Justice Thomas cited in rejecting this argument focused on how its meetings were arranged. The fact that parents had to give permission before their children could attend Club meetings<sup>229</sup> certainly made it impossible to directly coerce the children to attend, as Thomas noted, but this did not take into account the possibility of considerable peer pressure for them to do so. Of course, to the extent that such peer pressure might exist, it is itself constitutionally protected if it consists of purely private speech and is something the listener must expect in a society which protects freedom of speech.<sup>230</sup>

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<sup>226</sup> *Good News Club*, 533 U.S. at 113-14,

<sup>227</sup> See *supra* discussion accompanying notes 96-120.

<sup>228</sup> *Good News Club*, 533 U.S. at 114.

<sup>229</sup> *Id.* at 115. This was conceded by Justice Souter. *Id.* at 142 n.4 (Souter, J., dissenting).

<sup>230</sup> Justice Scalia's comment on this connection correctly states First Amendment doctrine:

As to coercive pressure: Physical coercion is not at issue here; and so-called "peer pressure," if it can even been [sic] considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected. . . . What is at play here is not coercion, but the compulsion of ideas. . . .

*Id.* at 121 (Scalia, J., concurring) (citations omitted). Children belonging to religious minorities might, of course, feel self-conscious about the fact that many of their peers have enthusiastically joined a club to which they cannot assent. But there is no majority religion in the United States, and every single religion is a minority in some parts of the country. We all must learn to tolerate and even to respect the expression of views and beliefs with which we fundamentally disagree. It is futile to attempt to create a religion-free zone in

Justice Thomas was also correct in distinguishing the other cases Milford cited in support of its argument that children would be subjected to subtle coercive pressures if the Club were allowed to meet on school premises. He emphasized that all of those case, unlike *Good News Club*, involved either official activities during the regular school day<sup>231</sup> or else an important official school function.<sup>232</sup> In addition to the fact that the Club's meetings were held after the end of the school day, other factors negated any appearance of official endorsement of the Club's activities by the school authorities: the Club met in high school or middle school rooms, not in one of the classrooms of its elementary school members; the children varied in ages, unlike the situation in the typical elementary school classroom; and the instructors were not schoolteachers.<sup>233</sup> Thus, there was no objective basis for the Milford schoolchildren to perceive official endorsement of the Club's meetings here, while "hostility toward the religious viewpoint" might be perceived if it were excluded.<sup>234</sup> Under these circumstances, it would be wrong to tailor Establishment Clause jurisprudence to the possible subjective misperceptions of the youngest children.<sup>235</sup>

Justice Souter appeared unable to refute these points persuasively. He emphasized what he called significant differences between *Good News Club* and *Rosenberger*, *Lamb's Chapel* and *Widmar*, the cases on which the majority had relied. *Lamb's Chapel* involved an evening film series on child-rearing open to the general public, whereas the Club meetings were open only to elementary grammar school children and were held immediately following the end of the school day.<sup>236</sup> *Widmar* and *Rosenberger* not only involved university students, who were

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public schools, and the First Amendment does not permit us to try to do so. Thus, religious free speech by private individuals must be protected even in public schools, so long as the rights of atheists, dissenters and minority religions are sedulously protected.

<sup>231</sup> *Edwards*, 482 U.S. at 578; *Illinois ex rel. McCollum*, 333 U.S. at 203; *Mergens*, 496 U.S. at 226; *Schempp*, 374 U.S. at 203.

<sup>232</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290; *Lee*, 505 U.S. at 577.

<sup>233</sup> *Good News Club*, 533 U.S. at 116-18.

<sup>234</sup> *Id.* at 118.

<sup>235</sup> *Id.* at 119.

<sup>236</sup> *Id.* at 144 (Souter, J., dissenting).

much less impressionable than six-to-twelve year-olds, but the fact that the respective forums in those cases were open to a wide range of differing ideologies and groups with diverse views negated any possible inference that the university was endorsing the religious use in question.<sup>237</sup> Souter reasoned that “[t]he timing and format of Good News’s gatherings, on the other hand, may well affirmatively suggest that *imprimatur* of officialdom in the minds of the young children”, because it was one of only four outside groups identified as meeting in the school, and was evidently the only one which met right after the end of the school day.<sup>238</sup> He concluded that

there is a good case that Good News’s exercises blur the line between public classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not. Thus, the facts we know (or think we know) point away from the majority’s conclusion. . . .<sup>239</sup>

Souter’s one important point is the greater impressionability of young children; he did not, however, convincingly demonstrate the significance of that impressionability in this context or why the children would be unable to distinguish between the Club’s evangelism and the regular school classes which preceded it. He ignored the fact that the Club’s meetings were held away from elementary school classrooms and presided over by outsiders instead of schoolteachers, both factors which reinforce the dividing line between public classroom instruction and private religious indoctrination. Souter’s stress on the fact that only three other outside groups (the Boy Scouts, Girl Scouts and 4-H Club) met at Milford School is irrelevant: the facts of the case disclose no effort by the authorities to exclude other outside groups in a discriminatory manner, so the Club should not be penalized

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<sup>237</sup> *Id.* at 143.

<sup>238</sup> *Good News Club*, 533 U.S. at 144 (emphasis in original).

<sup>239</sup> *Id.* at 144-45.

merely because other outside groups have not taken advantage of the same opportunities as it has.<sup>240</sup>

In summary, while the facts of *Good News Club* made it a case of first impression, the Supreme Court's holding in the case is a natural outgrowth of its free speech jurisprudence. While the Court has continued to outlaw any kind of official endorsement of religion as a violation of the Establishment Clause,<sup>241</sup> it has continued to protect private free speech, and even religious speech, on public premises. On the whole, the possibility that even impressionable elementary school children would feel coercive pressure to participate in the Club's activities or perceive that Milford School was officially endorsing the Club seems greatly exaggerated. Therefore, the Court's traditional strong support for freedom of speech properly trumped the chimera of establishment arising from permitting religious speech in a public school building.

## CONCLUSION

The issues in *Good News Club* lie at the confluence of two important streams of First Amendment jurisprudence: freedom of speech and separation of government and religion. For the past forty years, the Supreme Court has elaborated and implemented the principle that the Establishment Clause requires that no one, much less children whose attendance at school is mandated by compulsory attendance laws, should be subjected to indoctrination by an arm of government in the tenets of a particular religion or even to government endorsement of religion in general. During

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<sup>240</sup> Justice Thomas made this point in an incisive response to Justice Souter: Justice SOUTER suggests that we cannot determine whether there would be an Establishment Clause violation unless we know when, and to what extent, other groups use the facilities. When a limited public forum is available for use by groups presenting any viewpoint, however, we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.

*Id.* at 119 n.9.

<sup>241</sup> See, e.g., *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290; *Lee*, 505 U.S. at 577.

the same period, the Court has reaffirmed its staunch support for robust freedom of speech for varying viewpoints in public forums.

In most instances, public school authorities have tried to conform school programs and practices to constitutional requirements and to avoid Establishment Clause violations. In the zealous endeavor to root out any instance of official endorsement of religion from public schools, however, some state and local governments, including those in New York, went too far. Use of public school premises by outside groups has been widely permitted for many years. Faced with the obviously delicate situation of outside religious groups desiring access to public school property to hold their meetings and programs, many governments took the easy way out and totally excluded such groups. Such bans, however, do not fit comfortably with the Court's freedom of speech jurisprudence. Just as barring even the mention of God and religion as permissible subjects of discourse in the schools could violate the freedom of speech of religious students, so also the exclusion of outside religious groups from public school premises after hours while welcoming all other kinds of outside groups appears to constitute impermissible content-based discrimination against religion.

The Supreme Court has moved in recent years towards a synthesis and reconciliation of its free speech and establishment clause jurisprudence. On the one hand, it has sedulously prohibited any kind of practice, including prayer at school programs outside the school day, which might appear to provide official endorsement of religion. On the other hand, it has sharply distinguished officially sponsored or endorsed religious speech in the schools from genuinely private religious speech in the same location. In protecting the latter, it has done no more than to logically extend its staunch defense of the right of free speech on controversial topics, including religion, to public forums which had become discriminatorily religion-free zones.

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