

**FIRST AMENDMENT – FREEDOM OF SPEECH - A PUBLIC ELEMENTARY SCHOOL’S EXCLUSION OF A CHRISTIAN ORGANIZATION FROM MEETING ON SCHOOL GROUNDS BECAUSE OF THE ORGANIZATION’S RELIGIOUS PERSPECTIVE IS UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION – *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001).**

The United States Supreme Court recently decided whether a state-sponsored school could exclude a private religious organization from holding its meetings on school grounds after school hours. *Good News Club v. Milford Central School*, 121 S. Ct. 2093, 2097 (2001). The Court held that the school could not deny a private organization the opportunity to defend what the Court deemed to be its moral and character-development premise simply because it was taught from a religious perspective. *Id.* at 2107. The Court reasoned that to do so would be contrary to established Free Speech jurisprudence that viewpoints from a religious perspective cannot be discriminated against by a state actor. *Id.* at 2100. The Court noted this as especially true in a limited public forum, as was created by the Milford School in this case. *Id.* The Court deferred a determination of whether the school’s interest in not violating the Establishment Clause could excuse such a viewpoint-based exclusion because it found no valid Establishment Clause claim raised by the school. *Id.* at 2107. Given the fact that this case came before the Court under a summary judgment posture, the Court necessarily made its decisions based upon facts not fully-developed, and upon facts that were presumed. One must question, therefore, the strength of this decision when the Court did not have before it a record fully-developed through the lower courts.

In 1992, Milford Central School (“Milford”) enacted a community use policy pursuant to N.Y. Educ. Law § 414 (McKinney 2000), enumerating specific purposes for which its building may be used after school hours. *Id.* at 2098. Milford’s stated purposes included that district residents could use the school for (1) “instruction in any branch of education, learning or the arts;” or (2) “for social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community. . . .” *Id.* Any party wishing to utilize Milford’s school building after school hours had to be residents of the district and had to have its proposed use approved by Milford.

Stephen and Darleen Fournier (the “Fourniers”) were sponsors of the local chapter of the Good News Club (“Good News”), a “private Christian organization for children aged six to twelve.” As district residents, the Fourniers submitted a request pursuant to Milford’s community use policy seeking permission to hold Good News’ weekly meetings in the school with the stated purpose “to have ‘a fun time of singing songs, hearing a Bible lesson and memorizing scripture.’” *Id.* The District denied the Fourniers’ request because its proposed use was the “equivalent of religious worship,” and thus specifically prohibited by

Milford's exclusion of the use of the school for "religious purposes." *Id.* Good News promptly objected to the decision, and forwarded materials used or distributed at its meetings, along with a written description of a typical meeting. The description showed that Good News' meetings evolved around Bible instruction: from rewarding those children who could recite a Bible verse with a treat, to playing games aimed at learning Bible verses.

After a review of the materials, Milford determined that Good News' activities were the equivalent of religious instruction, and thus proscribed by the community use policy. Milford implied that if Good News' purpose was of a more secular nature, such as the "development of morals from a religious perspective," it would have been approved. *Id.* The Milford Board of Education ultimately denied Good News' request to use Milford's facilities for what it termed "the purpose of conducting religious instruction and Bible study." *Id.*

Petitioners Good News, Mrs. Fournier and her daughter (collectively "Good News"), filed an action against Milford in the United States District Court for the Northern District of New York under 42 U.S.C. § 1983 (2001), alleging violation of "its free speech rights under the First and Fourteenth Amendments, its right to equal protection under the Fourteenth Amendment, and its right to religious freedom under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* (2001)." *Id.* at 2098.

The district court dismissed the claim under the Religious Freedom Restoration Act, as it had been held unconstitutional in a previous Supreme Court decision. *Id.* (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). The district court granted a preliminary injunction precluding Milford from enforcing its religious exclusion policy against Good News, and permitting Good News to hold its meetings in the school's facilities. *Id.* at 2099. Good News held its weekly meetings in either a high school or middle school room at Milford for approximately fifteen months before the district court vacated the injunction and granted summary judgment to Milford. *Id.* The district court found that Good News' meetings could not be held in Milford's school building because its subject matter was not "merely a discussion of secular matters from a religious perspective," as permitted under Milford's community use policy. *Id.* Rather, since the subject matter was "decidedly religious in nature," and since Milford had never permitted other religious instruction groups to utilize its limited public forum, Milford could deny Good News access "without engaging in unconstitutional viewpoint discrimination." *Id.* The district court also denied Good News' equal protection claim. *Id.*

The United States Court of Appeals for the Second Circuit affirmed. *Id.* Rejecting Good News' contention that Milford's religious exclusion policy was unreasonable, the court found Good News' activities to be "quintessentially religious" and "outside the bounds of pure 'moral and character development.'" *Id.* Consequently, the court held Milford's religious exclusion as "constitutional subject discrimination." *Id.*

The United States Supreme Court granted *certiorari* to resolve a conflict among the courts of appeals. *Id.* The Court addressed whether speech, in a limited public forum, can constitutionally be excluded because of the religious nature of the speech. *Id.* In order to do so, the Court first considered the type of public forum created by Milford and whether Milford's religious exclusion policy constituted viewpoint discrimination within that forum. *Id.* at 2100. The Court next addressed Milford's argument that its interest in not violating the Establishment Clause outweighed Good News' interest in having access to the school. *Id.* at 2103. In reversing the court of appeals, the Supreme Court held that Milford's denial of access to its limited public forum on the ground that Good News' purpose was religious in nature constituted viewpoint discrimination "in violation of the Free Speech Clause of the First Amendment." *Id.* at 2107. The Court further held that Milford "had not raised a valid Establishment Clause claim;" therefore the Court had no obligation to address whether Milford's viewpoint discrimination would be outweighed by such a claim. *Id.*

Justice Thomas, writing for a six person majority, began by acknowledging that Milford, as a local school district, operated a limited public forum, created when it opened its facilities to limited public use pursuant to its statutorily-authorized community use policy whose restrictions were thus subject to less scrutiny than those in an open or traditional public forum. *Id.* at 2100. (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45-46 (1983)). The Court based this assumption upon the fact that both parties agreed to this classification. *Id.* Consequently, Justice Thomas noted that the Court need not directly address, in this case, whether a school's opening of its facilities pursuant to the enumerated purposes listed in N.Y. Educ. Law § 414 (McKinney 2000) created a limited or traditional public forum. *Id.*

The majority then explained that a limited public forum allows a state actor (in this case, a public school) to restrict the types of speech permitted in that forum, provided that such restrictions do not discriminate against the viewpoint expounded by the speech, and are "reasonable" in relation to the purpose served by the particular forum. *Id.* (citing *Rosenberger v. Rector Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985)). Justice Thomas next applied that test to determine whether Milford's religious exclusion was in fact viewpoint discrimination. *Id.* The Court ultimately concluded that Milford's exclusion of Good News on the basis of its religious nature was in fact viewpoint discrimination because the particular situation between Milford and Good News was virtually indistinguishable from the situations in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) and *Rosenberger*. *Id.*

Justice Thomas explained that *Lamb's Chapel* involved a limited public forum of a local school district, also prohibiting use for religious purposes that excluded a church from showing films in the school that taught "family values from a Christian perspective." *Id.* The Court noted that the school district en-

gaged in unconstitutional viewpoint discrimination by excluding a private group from showing films that discussed the nonreligious topics of family values “from a religious perspective.” *Id.*

Justice Thomas found that Good News addressed a subject matter otherwise permissible to Milford – the moral and character development of children – from a religious perspective, much like the church in *Lamb’s Chapel*. *Id.* at 2101. In fact, the Court noted, the only difference between the activities of Good News and those of the church in *Lamb’s Chapel* was the mode in which each accomplished this; Good News used storytelling and prayer, the church in *Lamb’s Chapel* used films. *Id.* The Court reasoned that since both Good News and the church in *Lamb’s Chapel* employed a religious viewpoint, excluding Good News’ meetings constituted unconstitutional viewpoint discrimination, just as it did for excluding *Lamb’s Chapel’s* films. *Id.*

Justice Thomas next detailed *Rosenberger* as involving a state university that denied funding for the publication of a student organization that offered a Christian perspective. *Id.* at 2101-02. The Court analogized the publication in *Rosenberger* to the activities of Good News, stating that they both emphasized the role of Christianity in developing morals and character. *Id.* at 2102. Justice Thomas reiterated the Court’s holding in *Rosenberger* that “the denial of funding was unconstitutional” viewpoint discrimination since the university apparently singled out student journal organizations “with religious editorial viewpoints.” *Id.* The majority reasoned that Good News’ activities could not be considered any more “religious” than the content of the publication in *Rosenberger*, therefore Milford’s exclusion of Good News must also be viewpoint discrimination. *Id.*

The Court further discredited the court of appeals by holding that Milford’s community use policy could not summarily exclude Good News’ activities just because they were religious in nature. *Id.* The Court stated that activities such as those engaged in by Good News could also be characterized as teaching morals and character with a religious foundation, much as other groups use loyalty or teamwork as their foundation, both of which are satisfactory for protection under the Free Speech Clause. *Id.* The Court explained that the added element of religious instruction did not dilute or “taint” a lesson on morals and character any more than other viewpoints did. *Id.*

The Court rejected Justice Souter’s label of Good News’ activities as constituting the “evangelical service of worship,” and instead concluded that Good News used religion as the viewpoint “from which ideas are conveyed.” *Id.* Consequently, the Court found that Good News’ use of religion was in fact a mere viewpoint. *Id.* The Court thus concluded its analysis on viewpoint discrimination by holding that since the substance of Good News’ activities was indistinguishable from those in *Lamb’s Chapel* and *Rosenberger*, the Court must necessarily find that Milford engaged in viewpoint discrimination. *Id.* Determining Milford’s religious exclusion to be viewpoint discrimination, Justice Thomas found no need to address whether the exclusion would be unreasonable based on

the purpose served by Milford's limited public forum. *Id.* at 2100.

Justice Thomas next addressed if Milford's viewpoint discrimination conduct was outweighed by its interest in not violating the Establishment Clause, by noting that Milford's inability to put forth a valid Establishment Clause claim negated the Court's consideration of this issue. *Id.* at 2103. The majority supported its position by analogizing the present case to *Lamb's Chapel* and *Widmar v. Vincent*, 454 U.S. 263 (1981), where similar Establishment Clause defenses were rejected. *Id.* In applying *Lamb's Chapel* to the present case, the Court pointed out that Good News' meetings were also held after school hours, without the sponsorship of Milford, and was open to any student with parental consent, not just to members of the club. *Id.* In addition, the Court found that Milford had made the school grounds available to other organizations, as did the defendant in *Widmar*. *Id.* The Court thus found that under *Lamb's Chapel* and *Widmar*, Milford did not have a claim that members of the community would think Milford was endorsing religion or any particular religion. *Id.* The majority disagreed with Milford that Good News' activities placed coercive pressure upon the elementary school children to participate in the activities. *Id.* Moreover, the Court found that Milford had no right to deny Good News equal access to its facilities for any public use time, whether immediately after school, or later in the day. *Id.*

The Court discredited Milford's neutrality argument by holding that allowing Good News to meet in the school when school children might still be present, to speak about "the same topics as other groups," would embody, not deny, the neutrality principle. *Id.* at 2104. Thus, the Court concluded that Milford simply could not argue that its loyalty to the Establishment Clause forced it to exclude Good News. *Id.* The majority also addressed Milford's argument that the *community* would feel coercive pressure to participate in Good News' activities. *Id.* (emphasis added). The Court posited that the "community" at issue was really the *parents* of the children, since the children could not attend the meetings without parental approval and consent. *Id.* (emphasis added). Therefore, Justice Thomas concluded, the children could not possibly be coerced into participating in Good News' activities. *Id.*

The Court refused to extend its Establishment Clause jurisprudence to exclude private religious activities during non-school hours just because the activities took place on school grounds when elementary school children may have been present. *Id.* In fact, the Court found its precedent regarding the impressionability of schoolchildren to be inapplicable to the present case. *Id.* Further to this point, Justice Thomas distinguished the cases relied upon by Milford to show no such extension of the Establishment Clause. *Id.* at 2105. The Justice found the holding in *Lee v. Weisman*, 505 U.S. 577, 592 (1992) to be inapposite because, unlike the mandatory attendance at school graduation on school grounds in *Lee*, the Milford school was used for a non-school function and without government sponsorship. *Id.* The Court also distinguished *Edwards v.*

*Aguillard*, 482 U.S. 578 (1987) as “too remote” to support Milford’s position because unlike the teaching of evolution as part of the school curriculum in *Edwards*, the present situation involved non-schoolteachers giving lessons after school hours to those who were not required to attend, and the school itself was not involved in nor advancing religion. *Id.* at 2105. The Court thus concluded that there was no real possibility that Milford’s elementary schoolchildren were coerced as the students had been in *Lee* and *Edwards*. *Id.*

The majority further distinguished other cases as not applicable to the case at bar because the cases focused on the impressionability of schoolchildren to activities taking place during school hours. *Id.* (citing *Illinois ex. rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Illinois*, 333 U.S. 203 (1948); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *School Dist. of Abington Township v. Schempp* 374 U.S. 203 (1963)). In contrast, the Court concluded that the potential impressionability of school children simply was not an issue here primarily because Good News’ activities took place after school hours without any school involvement or endorsement. *Id.*

In continuing to discredit Milford’s Establishment Clause argument, the Court next stated that even assuming *arguendo* that the impressionability of school children should be considered in this case, this case did not support a finding that small children believed that Milford was endorsing religion in their school. *Id.* at 2106. Justice Thomas noted that the meetings were never actually held in an elementary school classroom; that the instructors were not school teachers; that the children that attended Good News’ meetings ranged in age from six to twelve (not a “normal” classroom setup); and that there was no evidence that the young children stayed around the classrooms after the end of the school day. *Id.* In fact, Justice Thomas found these facts could just as easily give the perception that Milford was discriminating against Good News’ viewpoint in excluding it from its forum. *Id.* The Court also posited that there were more upperclassmen in the school than elementary schoolchildren, and that members of the public at large also utilized the school grounds after hours pursuant to Milford’s community use policy. *Id.* Thus the Court concluded that “any bystander” could easily know of Milford’s policy and its exclusion of Good News and could thus “suffer” from viewpoint discrimination just as easily as a school child could. *Id.*

The Court disagreed with Justice Souter’s dissent that more facts were needed to determine whether an Establishment Clause violation had occurred. *Id.* at 2107. Specifically, the Court noted that it was not necessary to know when and to what extent other groups used Milford’s facilities, because Milford’s policy constituted a limited public forum available for use by groups presenting any viewpoint. *Id.* The Court pointed out that there is not an automatic Establishment Clause violation simply because groups presenting a religious viewpoint happen to use the forum. *Id.*

Justice Thomas posited that the risk that small children might perceive endorsement did not justify excluding Good News. *Id.* at 2106. The Justice further found that the countervailing interests of Good News in its free speech rights – rights which the Court already found to be violated by Milford’s viewpoint discrimination – further justified the conclusion that permitting Good News to meet on school premises would not violate the Establishment Clause. *Id.* at 2106-07. In conclusion, the Court affirmed its holdings in *Lamb’s Chapel*, *Rosenberger* and *Widmar*, and reversed and remanded the matter back to the Court of Appeals. *Id.* at 2107.

Concurring in the opinion, Justice Scalia made two major points. *Id.* (Scalia, J., concurring). First, the Justice joined the majority’s opinion that Milford did not make out a valid Establishment Clause claim, but believed it to be due to a total lack of relevancy for Milford’s coercive pressure and perceptions of endorsement arguments. *Id.* The concurrence noted that Good News’ activities really called for a “compulsion of ideas,” a private right which is protected under the Free Speech and Free Exercise Clauses, and by the Establishment Clause. *Id.*

Justice Scalia expounded that religious expression is not violative of the Establishment Clause when it consists of private speech occurring in a limited public forum, is publicly announced, that is open to a broad range of uses, and is not just involving religious uses. *Id.* at 2108 (Scalia, J., concurring). The Justice went further to state that in this context, any erroneous misperceptions about endorsement were irrelevant. *Id.* In further support, the Justice reiterated his concurrence in *Lamb’s Chapel* that no endorsement was present simply because a school gives nondiscriminatory access of its facilities to all groups, some of which may turn out to be private religious groups. *Id.*

Justice Scalia also made the point that Milford’s exclusion of Good News from its forum would fail First Amendment scrutiny regardless of whether it was viewpoint discrimination or subject-matter discrimination because excluding a group “because it is religious” is simply not a legitimate, nor a protected justification. *Id.* The concurrence believed the real contention in this case concerned the fact that portions of Good News’ meetings were more than mere secular discussions from a religious viewpoint. *Id.* at 2109 (Scalia, J., concurring). The Justice disagreed with the dissenters and the court of appeals that the presence of additional religious-based speech at Good News’ meetings converted it from an activity that taught morals and character, and could therefore be excluded. *Id.* This was especially true, according to Justice Scalia, since Good News’ activities developed the morals and character of children and otherwise “pertain[ed] to the welfare of the community,” as expressly permitted by Milford’s community use policy. *Id.*

Justice Scalia concluded that Milford in fact committed viewpoint discrimination because it expected a higher standard from Good News than it did of any other group authorized to use its forum. *Id.* The Justice reasoned that Good News was the victim of “blatant viewpoint discrimination” because Milford’s community use policy effectively allowed every premise but a

community use policy effectively allowed every premise but a religious one to be defended. *Id.* According to Justice Scalia, there is a dual right to not only present a religious-based viewpoint, but also to defend it. *Id.* at 2110 (Scalia, J., concurring).

Justice Scalia next addressed the points of the dissenters, disregarding the concern that the type of religious speech upon which Good News based its teachings necessarily warranted its exclusion. *Id.* Justice Scalia noted that Justice Stevens' characterization of Good News' speech as "proselytizing" did not exclude it from protection because the same speech had been involved and permitted in *Rosenberger*. *Id.* The Justice also noted that the other groups utilizing the Milford forum were permitted to "inculcate children with their beliefs," therefore Good News must also be permitted. *Id.*

In addressing the dissent of Justice Souter, the concurrence pointed to the Court's holding in *Widmar*, which rejected any constitutional distinction between worship and religious speech to support the conclusion that even if Good News' speech was characterized as worship, it would still be protected. *Id.* (citing *Widmar*, 454 U.S. at 269). In this case, the Justice furthered, private religious speech is involved, not government-sponsored speech, therefore licensing and monitoring must be checked, even though a state has some authority to restrict subject matter in a limited public forum. *Id.*

Justice Scalia concluded his concurrence by noting since the dissenters could not agree what category of speech Good News' activities fell into, any distinctions drawn were clearly not within the competency of the courts to administer, particularly if they relate to the content of speech. *Id.* at 2111 (Scalia, J., concurring). Further, the Justice held, the courts could not tolerate the degree of state monitoring that would be required of private religious speech by the dissenters' view. *Id.*

Justice Breyer, concurring in part, ultimately agreed with the majority's opinion, but set forth three other "observations." *Id.* at 2111 (Breyer, J., concurring). First, the Justice noted that neutrality of the government with regard to religion was but one important factor to consider in determining whether a public school's policy violates the Establishment Clause. *Id.* Justice Breyer stated that a child's perception of a school's endorsement of any religion, or of religion in general, is a very important factor as well. *Id.* Second, the Justice found that the "critical Establishment Clause question" was whether a child could reasonably perceive that Milford endorsed religion if it permitted Good News' activities on its facilities. *Id.* In support, the Justice followed Justice O'Connor's concurrence in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), which stated that the Court must consider whether Good News "so dominate[d] the forum" that the children would perceive endorsement. *Id.* According to the concurrence, the Court should consider such factors as: the time of day that the meetings were held, the age of the attending children, and the nature of the meetings. *Id.*



Third, Justice Breyer noted that the Establishment Clause question in the case could not necessarily be answered considering that the matter came before the Court under a summary judgment standard. *Id.* at 2112 (Breyer, J., concurring). Justice Breyer reasoned that denying summary judgment to Milford did not conclusively leave any “disputed issues of general material fact,” since the nature of a summary judgment motion is to view all the disputed facts in favor of the nonmoving party, in this case, Good News. *Id.* Justice Breyer was particularly concerned that there needed to be more evidence regarding whether or not the schoolchildren would perceive endorsement if Milford permitted Good News’ activities before a true determination of an Establishment Clause violation could be made. *Id.*

The Justice pointed out that the majority used facts not in evidence, and assumed other facts in making its determination of no such perception that: schoolchildren were not permitted to remain outside the classroom after school hours, that more upperclassmen occupy the school after hours than do elementary school children, and that any bystander would be aware of Milford’s religious exclusion policy and suffer just as much from viewpoint discrimination. *Id.* Justice Breyer concluded the concurrence by noting that the parties should be permitted to fill in the big evidentiary gaps in this case. *Id.* at 2112 (Breyer, J., concurring).

Justice Stevens, in dissent, approached the issue of the case from a different angle than did the majority. *Id.* (Stevens, J., dissenting). The Justice posited the real issue was whether a public school can constitutionally create a limited public forum that permits speech about a particular topic from a religious point of view, but denies religious speech that amounts to worship, and denies religious speech that is aimed at proselytizing or inculcating a particular religious belief. *Id.* at 2113 (Stevens, J., dissenting). More broadly, noted the Justice, the case was really about whether a public school could constitutionally limit the scope of the public forum it created. *Id.*

Justice Stevens cited *Widmar* for the notion that a public entity cannot generally exclude even religious worship from a public forum. *Id.* at 2112 (Stevens, J., dissenting). The Justice also cited *Lamb’s Chapel* for the notion that a limited public forum, created to discuss specified topics, may not exclude a speaker who approaches those topics from a religious perspective. *Id.*

But then Justice Stevens cited the Court’s holdings in such cases as *Mergens* that a public entity that has created a limited public forum has “broad discretion” to determine and preserve its boundaries of use, so long as it does not censor speech on an authorized topic given from a religious perspective. *Id.* at 2113 (Stevens, J., dissenting). The dissent believed that this broad discretion permitted Milford to exclude Good News from its facilities, particularly because speech from a religious viewpoint is not the same as speech that proselytizes religion. *Id.*

Justice Stevens thus concluded that Milford may, as a public entity running a

limited public forum, permit discussions on authorized topics, such as the morality and character development of children, from a religious point of view, but that it is not required to permit the use of its forum for the principal purpose of religious worship. *Id.* The Justice noted that Milford could reasonably believe Good News' meetings posed the risk of converting school children to a particular religious faith. *Id.* The Justice cited *Mergens* for the proposition that public education is best left to the control of the state, and that the courts should resolve questions on religious worship with minimal intrusion into the operation of the public schools. *Id.* at 2114 (Stevens, J., dissenting).

Justice Stevens next considered the boundaries of the limited public forum created by Milford. *Id.* Justice Stevens found Milford's not "for religious purposes" limitation to be constitutional, because it did not purport to exclude all speech from a religious viewpoint, just that speech whose principal purpose was to "promote the gospel." *Id.* Justice Stevens reasoned that as long as Milford administered its policy equally among all groups in its forum, its policy would be no less violative of the First Amendment than a school district excluding a group that attempted to inculcate non-belief in God. *Id.*

Justice Stevens concluded that Good News' activities fell within the category of religious speech amounting to religious proselytizing or worship and therefore Milford could exclude it as beyond the scope of its limited public forum, even if the proselytizing speech never actually reached the level of worship. *Id.* The Justice thus affirmed the holding of the court of appeals that Milford did not violate Good News' Free Speech right under the First Amendment. *Id.*

Justice Stevens explained this conclusion as consistent with the holding in *Rosenberger* because Good News' meetings "[were] dominated by religious exhortation," unlike the publication in *Rosenberger* which provided Christian commentary on a range of topics. *Id.* Therefore the dissent found no viewpoint discrimination in this case. *Id.* Justice Stevens concluded the dissent by commenting that the majority should not have decided the Establishment Clause issue when neither the district court, nor the court of appeals, even addressed it. *Id.* at 2115 (Stevens, J., dissenting).

Justice Souter, joined by Justice Ginsburg, dissented on both issues decided by the majority. *Id.* (Souter J., dissenting). Justice Souter believed, in contrast to the majority, that the court of appeals had applied *Lamb's Chapel* to this case, distinguishing it by analogy, though not by name. *Id.* Further, Justice Souter concluded that the Court should not have addressed the applicability of the Establishment Clause to Good News' intended use because neither of the lower courts had addressed that issue. *Id.*

Justice Souter first noted that this case, as *Lamb's Chapel*, presented no question about the reasonability of Milford's criteria for limiting its forum – that is, not to be used for "religious purposes" - because Milford's use of the forum for events pertaining to the welfare of the community justified the limitation. *Id.* The Justice furthered that Good News had never objected to the reasonableness

of this limitation, not even before the district court, and that neither the court of appeals, nor the majority, addressed the issue of reasonableness. *Id.*

According to Justice Souter, the only issue filed by the district court concerned whether Milford used its unchallenged restriction in such a way as to impose a viewpoint-based restriction. *Id.* The dissent agreed with the district court that Good News' activities were not like those of the other groups permitted to use Milford's forum because they did not merely discuss secular issues from a religious perspective, and thus were not entitled to the protection of *Lamb's Chapel*. *Id.* at 2116 (Souter, J., dissenting). Rather, Justice Souter explained, they fit into the category of activities that Milford reasonably limited its forum to exclude under its unchallenged religious use policy, noting that the court of appeals had arrived at the same conclusion. *Id.*

In agreeing with the district court and the court of appeals that the facts in the present case differed markedly from the facts in *Lamb's Chapel*, Justice Souter found that Good News' activities essentially revolved around Bible study and the teachings of Christ. *Id.* Justice Souter posited that the use of songs and games did not cover up the focus of Good News to "lead a child to Christ." *Id.* Upon reviewing lesson plans of the Good News teachers, the Justice concluded that Good News' purpose was not to discuss a secular subject from a religious point of view, as was the case in *Lamb's Chapel*. *Id.* at 2117 (Souter J., dissenting). Rather, the Justice pointed out, Good News clearly intended to use Milford's limited forum for an "evangelical service of worship," a use strictly and not unreasonably prohibited by Milford's policy. *Id.* Justice Souter opined that the majority characterized Good News' activities in generic terms ("teaching of morals and character, from a religious standpoint") in a futile attempt to save them from exclusion. *Id.*

Justice Souter next countered that the majority erred in reviewing Good News' application under the Establishment Clause, when the district court and court of appeals made their respective judgments entirely on the ground that Milford did not violate the Free Speech Clause. *Id.* To support this conclusion, the Justice noted that a trial court usually has more facts at hand with which to develop a record and to determine a difficult issue. *Id.* at 2117-18 (Souter J., dissenting).

Justice Souter believed that deciding the issue of an Establishment Clause violation on summary judgment is inherently unequal because all the facts, disputed and undisputed, are not necessarily known. *Id.* at 2118 (Souter J., dissenting). According to Justice Souter, the Establishment Clause issue should not be decided until a court has before it undisputed facts as to whether Good News conducted its activities at the same time as other school-sponsored and operated extracurricular groups. *Id.* Furthermore, the dissent wanted to see facts showing whether any other community groups used the facilities immediately after school ended, how many students participated in these activities, and whether and to what extent Good News "dominate[d] the forum" in a way to elevate perceptions

of endorsement. *Id.* Justice Souter concluded that the majority was in no position to determine this issue in the absence of these crucial facts not developed in the lower courts. *Id.*

Justice Souter pointed out that the Establishment Clause cases recognized the particular impressionability of school children, thus calling for a heightened level of protection for them in the school forum. *Id.* at 2119 (Souter J., dissenting). The Justice reasoned that the facts of this case differ drastically enough from those in *Lamb's Chapel* and *Widmar* to warrant a different conclusion. *Id.* Particularly, the Justice noted, Good News' activities involved children as young as six, and only as old as twelve, well below the ages considered mature enough to withstand perceptions of endorsement in *Widmar*. *Id.* The Justice further pointed out that the focus of the "effects test" under the Establishment Clause is an objective one: whether a school child would reasonably believe that his/her school was endorsing religion or a particular creed by the school's allowance or denial of particular activities. *Id.* Thus, the Justice concluded, it was not relevant under the test that no individual Milford student was shown as confused while Good News was meeting at the school. *Id.*

In further distinguishing the present case from *Lamb's Chapel* and *Widmar*, Justice Souter found that Milford's limited forum did not involve the same level of "intellectual exchange." *Id.* As the Justice explained, the university campus in *Widmar* offered a much larger number of activities, thus negating the possibility that a reasonable college student would perceive that its government-sponsored school endorsed any particular activity. *Id.* Similarly, the Justice furthered, the film being shown in the evening to the general public, but specifically aimed at adult viewers, negated the same possibility in *Lamb's Chapel*. *Id.*

In contrast, Justice Souter reasoned, the time of Good News' meetings and the generally religiously-focused format posed a much more significant threat of perceptions of endorsement to young children. *Id.* at 2120 (Souter J., dissenting). Justice Souter cited the record in the case to show that Good News was open only to children ages six to twelve, that only four other outside groups met in the school after school hours, that Good News' meetings followed immediately upon the conclusion of the school day, and that the meetings took place immediately next to third and fourth-grade classrooms. *Id.* In fact, Justice Souter posited, Good News intended to have its meetings occur on the heels of the school day in the same school building so that attendance would be higher. *Id.*

Justice Souter reasoned that even without the benefit of a completely-developed record in this case, the facts that were at least thought to be known showed that Good News' activities "blur[red] the line between public classroom instruction and private religious indoctrination." *Id.* Thus, the dissent concluded, it was highly likely that a reasonable elementary school child would perceive Milford as endorsing Good News' religious focus and teachings. *Id.* The Justice thus held the majority's conclusion of no valid Establishment Clause

claim for Milford as simply unsupported. *Id.*

#### ANALYSIS

The majority's conclusion seems inherently just, and its reasoning well-qualified and supported. Yet it suffers from enough infirmities to give this author doubt as to whether anything was truly resolved in this case. One cannot escape the feeling that the Court seemed determined to find viewpoint discrimination on the part of Milford, almost grasping at straws to achieve this. *Id.* at 2100. The dissents in this case deftly point out that the procedural posture of this case – the fact that it was determined on a summary judgment standard – prevents it from having a well-developed and thought-out record. While the majority is quick to analogize this case with *Lamb's Chapel* and *Rosenberger*, this case may not turn out to be so “indistinguishable” as more evidence is collected and more facts become known.

Following Justice Souter's lead, one really needs to know more about the nature of Good News' meetings and Milford's community use policy: Had any other groups been excluded by Milford because they were “religious in nature,” would Milford really have objected if the meetings commenced even one-half hour later, do Milford students recite the Pledge of Allegiance in class, or perform any other seemingly nonreligious activities that have potentially religious undertones? These are but a few of the crucial questions that must be asked in order to determine whether Milford engaged in viewpoint discrimination and whether it had a valid claim for student perceptions of endorsement. The Court determined these issues superficially in the absence of such information.

Though this author really would like to agree with the Court's holding in this matter, one cannot escape the feeling that the facts may not be as supportive as the majority holds. The lower courts never developed a record nor a line of authority on this matter, nor did they even address the Establishment Clause issue, as the dissent reminds us. While it is not wholly unusual, nor always undesirable, for a reviewing court to address and decide an issue not addressed in the lower courts, one shudders to think that a reviewing court with the authority and breadth of the United States Supreme Court would attempt to do so on assumptions and potentially sketchy facts.

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