AGE EQUALITY FOR THE ESTABLISHMENT CLAUSE

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ABSTRACT: *When a government creates a limited public forum and specifies a subject matter, all groups speaking on that issue must be accepted. To deny an individual or group the right to equally participate in the limited public forum because of a specific belief that group holds is to violate the right of free speech and to engage in unconstitutional viewpoint discrimination. Concerns about the Establishment Clause, however, have arisen when a religious group's use of a government facility via a limited public forum gives the relevant audience the perception of a government endorsement of religion. In cases involving adult and near-adult audiences, the Supreme Court has ruled that a reasonable person would not perceive a government certification of religion from allowing a religious group equal access. In Good News Club v. Milford Central School, the Court addressed the concern that children seeing a religious group using government facilities, even through a limited public forum, might understand this as a government sanction of that religion. In its decision, the Court ruled that government must maintain a posture of neutrality and eschew viewpoint discrimination, even in cases where children may misperceive government endorsement of religion.*

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The United States Constitution protects the right of free speech and against the establishment of a religion by government. While these two protections seem natural for a society dedicated to liberty of thought and conviction, they come into tension when one uses public resources to exercise religious free speech. This inevitably brews conflict among governments, organizations, and individuals, and the federal courts have been the final arbiter in these issues. One area where the legal system needs coherent and consistent court interpretation is on the treatment of the Establishment Clause as dependent on the age of the audience receiving the religious communication. The Supreme Court has frequently expressed concern that the impressionability and immaturity of youth can be a barrier to perceiving distinctions between free speech and government sponsorship. This conflict is shown clearly in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) in which the Milford School was concerned about the appearance of public school-sponsorship of a Christian club for children. In its decision, the Supreme Court established that a government engaging in viewpoint discrimination while operating a limited public forum is unconstitutional even in cases when otherwise children may mistakenly see government endorsement of religion.

In 2001, the Supreme Court reached a decision on *Good News Club v. Milford Central School*. Milford Central School had opened its school to use by the community weekdays after school for uses such as the teaching of morals.[1] The Good News Club,

1 *Good News Club v. Milford Central School*, 533 U.S. 98, 102 (2001).

a Christian organization for youths between the ages of six and twelve years old, applied to use a room in the school for weekly meetings. The Milford school district superintendent rejected the application after deciding that the meetings were not a "discussion of secular subjects such as...development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself."[2] The Supreme Court, however, ruled against Milford Central School, arguing that the Good News Club was engaging in the development of morals, albeit from a religious perspective.

Since the school had created a limited public forum by opening its facilities to public use, it had the right to limit that forum to specific subjects. The Court ruled in *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819 (1995) that when creating a limited public forum, the government does not need to allow persons to participate in every type of speech, but rather, it may warranted "in reserving [its forum] for certain groups or for the discussion of certain topics."[3] However, as previously established in *Rosenberger* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the government is limited in what it can restrict in a limited public forum.[4] Once it has opened the forum to a particular topic, it cannot restrict the expression of different beliefs within that subject; to do so violates free speech. This is the Court's distinction between acceptable and necessary subject matter discrimination and unconstitutional viewpoint discrimination.

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2 *Good News Club*, 533 U.S. 98, at 104.

3 *Id.* at 106.

4 *Id.* at 109-110.

In *Milford Central School*, the school district argued that even if it were engaging in viewpoint discrimination, such discrimination was necessary to avoid an Establishment Clause violation.[5] The majority rejected that argument. The majority used two similar cases as precedent where the Court did not uphold the Establishment Clause concern as valid. First, in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, the Court ruled that showing a video series produced by the Christian organization, Focus on the Family, in a public school did not violate the Establishment clause because the school property had been used by a number of other private groups, the series was not being shown during school hours, was not supported by the school, and was open to anyone who wished to attend.[6] Because of these factors, no one could reasonably consider the school to be sponsoring the religious views of the group showing the videos. In the second case, *Widmar v. Vincent,* 484 U.S. 263 (1981), the State University of Missouri at Kansas City tried to deny a religious student group from meeting in university facilities. The Court, however, held that the Establishment Clause does not require state universities to limit access to their facilities by religious organizations when a university had already opened its forum to numerous other organizations.[7] Similarly, the public forum provided by Milford Central School was open to other groups, and the Good News Club met after school and was open to all students who wished to

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5 *Id.* at 112.

6 *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 388, 395 (1993).

7 *Widmar v. Vincent,* 454 U.S. 263, 272-274 (1981).

attend, provided they had a parental permission.[8] The main difference between *Good News Club, Widmar,* and *Lamb's Chapel* was the age of the participants.

The Supreme Court has often differentiated between age groups when considering the risk that perceived government sponsorship of religion existed. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court affirmed that elementary students are especially "impressionable" and therefore adherence to the Establishment Clause is even more important.[9] In *Grand Rapids School District v. Ball,* 473 U.S. 373 (1985), the Court ruled that special attention must be given to Establishment Clause considerations involving young children because they are still in their formative years and, accordingly, their beliefs are largely determined by their environment.[10] The Court decided in *Lee v. Weisman*, 505 U.S. 577 (1992) that having a student led prayer at a high school graduation was an Establishment Clause violation.[11] While an adult might be able to ignore the prayer and sit respectfully through it, students in primary and secondary school have a harder time actively dissenting. In *Lee*, the Court went so far as to state that psychological research shows youths have a difficult time resisting peer pressure, especially in when it comes to societal conventions.[12] Following the *Lee* decision, the Court struck down prayer before football games

8 *Good News Club v. Milford Central School*, 533 U.S. 113 (2001).

9 Chelsea Chaffee, *Making a Case for an Age-Sensitive Establishment Clause Test*, 1, BYU Educ. & L.J. 257, 271 (2003).

10 *Lee v. Weisman,* 505 U.S. 577, 609 (1985).

11 Brian Wheeler, *The Pledge of Allegiance in the Classroom and the Court: An Epic Struggle Over the Meaning of the Establishment Clause of the First Amendment,* 2, BYU Educ. & L.J. 281-324, 291 (2008)

12 *Lee v. Wiseman,* 505 U.S. 577, 593 (1992)

in *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000) because of the unacceptable situation it put upon school-age children who possessed beliefs not shared by the majority.[13]

This same reasoning has also been influential in Supreme Court cases on claims of Establishment Clause violations involving older students. In *Board of Education v. Mergens,* 496 U.S. 226 (1990), the Court ruled that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis."[14] With *Tilton v. Richardson*, 403 U.S. 672 (1971) and *Marsh v. Chambers,* 463 U.S. 783 (1983), the Court declared that college students and adults are less vulnerable, more mature, and less susceptible to "religious indoctrination."[15] Even in *Widmar*, it was affirmed that college students "are less impressionable than younger students" and can be expected to understand the school's policy of neutrality.[16] In many of these cases the older age, and expected maturity, of the students was used to bolster the rulings the majority reached, which were that no Establishment Clause abuses were present.

A number of the amicus briefs submitted for *Good News Club* argued the importance of age in deciding what constitutes a breach of the Establishment Clause. They presented psychological research showing young children are less mentally developed and will see any programs conducted in the school as supported

13 *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 305 (2000)

14 *Board of Education v. Mergens,* 496 U.S. 226, 2507 (1990)

15 Chaffee, *supra* note 9 at 272.

16 *Widmar,* 454 U.S. at 274.

by the school.[17] Famed psychologist Jean Piaget found that pre-adolescent youths are incapable of abstract logic, hypothetical reasoning, and independent thinking.[18] Psychologist Eric Erikson found that pre-adolescent children lack "the ability to make distinctions between his views, others' views, and the views of his school."[19] Another psychological study, showing that younger children are more susceptible to peer pressure, sparked worries that children would be pressured to attend the Good News Club and then be socially coerced to become a Christian.[20] This is an intrinsic danger to pre-adolescents.

Despite the young age of the students involved, the Supreme Court did not find an Establishment Clause violation in a 5-3 decision with Justices Thomas, Rehnquist, O'Connor, Scalia, and Kennedy in the majority and Justices Stevens, Souter, and Ginsburg dissenting.[21] Justice Breyer concurred in part but argued in a concurring opinion that "a child's perception that the school has endorsed a particular religion or religion in general may also prove critically important."[22] The majority had five main arguments by which they arrived at their decision. First, the Establishment Clause calls for government programs to be neutral with regards to religion.[23] The majority found that the most neutral policy possible is to treat religious organizations like every other

17 Chaffee, *supra* note 9, at 273.
18 *Id.*
19 *Id.*
20 *Id.* at 274
21 *Good News Club*, 533 U.S. at 101.
22 *Id.* at 128.
23 *Id.* at 114.

group.[24] For a limited public forum, this principle implies allowing a religious group to speak on the same issues with the same opportunity as others.

Secondly, the Court argued that the relevant community is parents, because children could not attend the Club without a signed permission form.[25] This avoided the threat of children being coerced into attending by social pressures.

Third, the Court distinguished the precedents cited in *Milford* for a stricter interpretation of the Establishment Clause from *Milford* itself. In fact, the Supreme Court had never used the presence of young children as a reason to invoke the Establishment Clause and prohibit religious activity at schools after the school day was over.[26] *Lee v. Weisman* involved a mandatory attendance graduation exercise, *Santa Fe Independent School District v. Doe* dealt with a school-run sporting event, and *Edwards v. Aguillard* addressed the impressionability of students in a mandatory class with a state endorsement of a religion.[27] The Establishment Clause concerns in these cases do not apply when the religious teachings are after school with leaders who do not work for the school, and parental permission is required to attend.[28]

The fourth consideration is that even if it is considered important that children could potentially assume a relationship

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24 *Id.* at 114.

25 Barry Hankins, *Is the Supreme Court Hostile to Religion?: Good News Club et al. v. Milford Central School (2001) and Santa Fe v. Doe (2000)*, Journal of Church & State, 681, 684 (2001)

26 *Good News Club*, 533 U.S. at 115.

27 *Id.* at 115-116.

28 *Id.* at 117.

exists between religion and government, the Good News Club's usage of the Milford Central School facilities still did not violate the Establishment Clause. Young students should be capable of distinguishing the difference between the Club and an official class. This is made obvious by the fact that they needed to get written permission from their parents to attend the meeting.[29] Also, the meetings were not held in an elementary classroom, were not led by a teacher, and had ages ranging from six to twelve present.[30] All of these factors make clear, even to a young child, the difference between an official class and one of the Club's meetings.

The final issue weighing against employing the Establishment Clause against the religious group was the risk of misperception in the opposite direction. If the Good News Club is not allowed equal access to the facilities, individuals might interpret this as school-sanctioned hostility towards the Club. This effect would not be limited to elementary students, but would apply to all students and community members who become informed of the rejection. In *Rosenberger v. Rector and Visitors of Univ. of Va.*, the Court established that government viewpoint discrimination can cause the "chilling of individual thought and expression" by stifling creative exchange.[31] In summary, the majority decided that religious free speech cannot be restricted because of "what the youngest members of the audience might misperceive."[32]

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29 James Kozlowski, *Bible Youth Group Excluded from School Open for Community Use*, 8, Parks & Recreation, 36, 38 (2001)

30 *Id.* at 45

31 *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 835-836 (1995)

32 *Good News Club*, 533 U.S. at 119.

Despite their strong arguments that differences in age should not impact Establishment Clause jurisprudence, the majority was still careful to argue that even if age does play a role in what is constitutionally allowable, it did not matter in this case. Justice Souter's dissenting opinion attacked this decision by the majority by arguing that the core components for the decisions in *Lamb's Chapel* and *Widmar* were not present.[33] The *Widmar* case involved college students at a university which had a significant number of groups that met on campus.[34] In *Lamb's Chapel*, the religious video shown was open to anyone and was geared especially for adults. Also, the school in that case had been used by numerous other private groups.[35] Clearly, the age difference between the students affected in *Good News Club* and the other two cases is a significant because six to twelve year olds are not be able to comprehend concepts like religious neutrality the same way an older individual would. Furthermore, only four total outside groups were using the Milford Central School at the time, which lends the appearance of school-favor to the Good News simply because they were the one of the only groups using the facility.[36] Also, the Club began its meetings immediately after school ends. This near-seamless flow from the classes to the meeting might prevent young students from discerning the break from school activities to the religious meeting.

After the decision, several critiques of the majority opinion

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33 *Id.* at 141

34 *Id.*

35 Rob Boston, *Evangelism, Public Schools and the Supreme Court*, 1, Journal of Church & State 54, 42 (2001)

36 *Id. at 144.*

emerged as well. The determination that parents were the audience of importance came under criticism because the Club was attempting to interact with children and not parents.[37] Critics assert that the real audience was the student body, all of whom could have seen the Good News Club's presence as an endorsement from the school.[38] Similarly, the majority's argument that students can be inoculated from misperceptions regarding the attitude of the school towards the religion by requiring permission slips is undermined by the fact that some school-sponsored activities such as field trips also require permission slips.[39]

Both sides of the debate presented reasonable arguments to marshal to their viewpoints regarding whether the allowing the Good News Club access to the limited public forum would cause misperceptions of government establishment of religion. The time that the Club met, the very young age of some of the students, and the lack of other groups meeting at the school all will factor into children's perspectives. However, the necessity of parental permission, the fact that it is not run by teachers, and the fact that it has multiple grade levels makes it likely that many students would be able to see the difference between school and the Club. Parental involvement, necessitated by the permission slip requirement, allows parents to be discerning on behalf of their child. While a permission slip does not automatically mean that students will no longer see any school endorsement of the activity, it does significantly diminish the threat of children being peer-pressured into

37 *Id. at* 277.

38 Chaffee, *supra* note 9, at 278.

39 *Id.*

going. Instead of hiding children from things which might appear confusing, it involves parents and an opportunity for the child to understand the world better.

Although some six-year-old students may not understand the school's policy of neutrality towards an organization, that is not a constitutionally sufficient reason to deny the organization's right to have a voice. The rule of law, not perceptions, must be maintained. In *Good News Club*, the majority found that prohibiting access to the Club could create a perception of government hostility towards religion and that the Establishment Clause calls for treating religious organizations neutrally. Overzealous legal attempts to protect children from fallaciously ascertaining government support for religion can actually do greater harm. If *perceptions* of the government's attitude towards religion become the basis for Establishment Clause jurisprudence, even if only in cases involving youths, there will be no objective standard to adjudicate free exercise disputes. Furthermore, freedom of speech and the free exercise of religion are among America's most cherished rights and should not be held hostage to the potential misunderstandings of society's most immature members. As Justice Thomas wrote in the majority opinion, it would become a "heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."[40] For these reasons, the Court ruled that government must maintain a posture of neutrality and eschew viewpoint discrimination.

40 *Good News Club*, 533 U.S. at 119.