

# **An Update on Religious Liberty in the United States: *Good News Club v. Milford Central School***

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## **Introduction**

The United States, unlike Australia and New Zealand, has a long history of litigation involving constitutional provisions safeguarding free speech and religion,<sup>1</sup> especially as they interact in school settings. When such disputes occur, American courts have granted wide discretion to officials in public schools to determine how facilities may be used as long as they do not violate the constitutional rights of users.<sup>2</sup> Even after the Supreme Court upheld the right of student-led religious groups that wish to exercise their free speech rights in school,<sup>3</sup> questions remained about whether similar protection applied to other groups.

For the first time, in *Lamb's Chapel v. Center Moriches Union Free School District*,<sup>4</sup> the Supreme Court recognised that religious speech, a fully protected subset of free speech, could limit a school board's authority to deny access for religious use to a non-student group. Thus, in *Lamb's Chapel* a church was entitled to use a high school auditorium during non-school hours to present a film series on child discipline from a Christian viewpoint. Two years later, in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>5</sup> albeit in higher education, the Court extended 'viewpoint neutrality' to government funding. In *Rosenberger*, the Court ruled that a university policy which paid for the printing of publications by student organisations applied to the journal of a religious organisation that discussed issues from a Christian perspective.

The results of *Lamb's Chapel* and *Rosenberger* notwithstanding, lower courts continued to struggle over viewpoint discrimination. In *Good News/Good Sports Club v. School District of the City of Ladue*,<sup>6</sup> the Eighth Circuit found that a religious club in Missouri had the right to use public school facilities after school since the board permitted other groups, including the Boy Scouts and Girl Scouts, to do so where all of the organisations discussed moral development and a refusal would be viewpoint discrimination. Conversely, in *Good News Club v. Milford Central School*,<sup>7</sup> the Second Circuit denied a Good News Club in New York access to school facilities.<sup>8</sup> The Supreme Court agreed to hear an appeal in *Milford*<sup>9</sup> to resolve this split between the Circuits and, as anticipated,<sup>10</sup> held that the board's refusal to permit a Good News Club to use school facilities during non-instructional time violated its right to free speech.<sup>11</sup> This article reviews the history of the dispute and the opinions of the Justices before discussing *Milford's* significance as the Court continues to dismantle the mythical wall of separation between Church and State<sup>12</sup> in the United States.

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

### **Facts**

The Board of Education of the Milford Central School District (the Board) adopted a 'Community Use of School Facilities Policy' in August 1992. The policy permitted district residents to 'hold social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be non-exclusive and shall be open to the general public' as long as they were not used for religious purposes.<sup>13</sup>

In September 1996 Darleen Fournier submitted a request form to the superintendent seeking permission to permit a Good News Club (the Club)<sup>14</sup> to meet in a school cafeteria, after-school, during non-school hours. The superintendent denied the request in March, 1997 based on his fear that 'the kinds of activities proposed to be engaged in by the Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself'.<sup>15</sup> Yet, the superintendent permitted three other groups, the Boy Scouts, Girl Scouts, and 4-H Club to meet because although they addressed similar topics, they did so from a secular perspective. The superintendent claimed that he was concerned by four elements typically present at Club meetings: an opening prayer that 'thank[ed] and entreat[ed] God for His blessing on the meeting';<sup>16</sup> group singing of the Club's theme song, 'the lyrics of which refer to Jesus Christ and generally 'about ... good news;''<sup>17</sup> teaching a 'moral or value lesson centered around a verse from either the Old or the New Testament';<sup>18</sup> and, telling a Bible story 'that emphasises the same moral value that is represented in the day's memory verse'.<sup>19</sup>

Fournier filed suit in a federal trial court in New York in March 1997 on behalf of the Club primarily alleging violations of its constitutional right to free speech. The court granted a preliminary injunction in April, 1997 that remained in effect until October, 1997 at which time it vacated the injunction and granted the Board's motion for summary judgment.<sup>20</sup> Insofar as the parties agreed that the Board created a limited public forum<sup>21</sup> by permitting community groups, such as the Boy Scouts, Girl Scouts, and the 4-H to use the facilities during non-school hours, the court maintained that school officials had the authority to open facilities for certain purposes and close them for others.

The Second Circuit, by a two-to-one margin, affirmed in favour of the Board.<sup>22</sup> Just as at trial, the parties agreed that the Board created a limited public forum. The Second Circuit rejected the Club's position that the Board acted unreasonably in denying its request for access and that the use of school policy was not applied in a viewpoint neutral manner. The court conceded that distinguishing between secular subjects that are addressed from a religious viewpoint and the discussion of religious material through religious instruction and prayer involves the difficult matter of drawing lines. Yet, the court decided that since school officials determined that Club activities involved religious instruction and prayer, they were free to deny it access.

The dissenting judge wrote that the use policy violated the Club's right to free speech as the court inappropriately sought to distinguish religious viewpoints and religious subject matter on speech involving morals and character. The judge also asserted that religious activity does not

necessarily translate a religious viewpoint into religious subject matter since, depending on one's point of view, a discussion of morals and character from purely secular viewpoints can often appear to be secular while a consideration of the same issues from a religious viewpoint can often appear to be religious. Again disappointed at the outcome, the Club sought further review. The Supreme Court agreed to hear an appeal in *Milford*<sup>23</sup> to resolve a split between the Circuits.

## Supreme Court

### Majority Opinion

The Supreme Court, in a six-to-three opinion written by Justice Thomas,<sup>24</sup> reversed in favour of the Club and held that the Board had violated the club's right to free speech by refusing to permit it to meet at school facilities during non-instructional time. The Court reasoned that fears of an Establishment Clause violation did not justify such a restriction. Justice Thomas began the Court's analysis by noting that since the parties agreed that the Board created a limited open forum when it made its facilities available to community groups, the Court would not have to resolve this thorny issue. In creating a limited open forum, Thomas believed that while the Board did not have to permit all forms of speech, it could not engage in viewpoint discrimination based on the content of the Club's speech.

In discussing whether the Board engaged in impermissible viewpoint discrimination, Justice Thomas looked for guidance from two of the Court's earlier cases involving religious speech. He wrote that just as in *Lamb's Chapel*, the Club sought to address a subject, the teaching of morals and character, that was otherwise permitted for other groups such as the Boy Scouts. Similarly, in *Rosenberger v. Rector and Visitors of the University of Virginia*, Thomas explained that a university violated the Free Speech Clause when officials refused to fund a student publication because it addressed issues from a religious perspective. Thomas rebuked the Second Circuit in declaring that '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'.<sup>25</sup>

Thomas next rejected the Board's claim that even if it had engaged in viewpoint discrimination, it did so based on its concern that it not violate the Establishment Clause. Relying on *Widmar v. Vincent*,<sup>26</sup> wherein the Court observed that a university would not have violated the Establishment Clause by permitting a religious group to use its facilities and *Lamb's Chapel*, he indicated that it was unclear whether the Board's interest in avoiding an Establishment Clause violation would have justified such viewpoint discrimination. Even so, Justice Thomas found it unnecessary to address this issue because he did not believe that the Board had a valid Establishment Clause interest in preventing the meetings from taking place.

Justice Thomas rebuffed the Board's attempt to distinguish its situation from *Lamb's Chapel* and *Widmar* on the basis that the policy applied to elementary school children who might have perceived that it endorsed religious activity in which they were coerced to participate. In so doing, he enumerated five reasons rejecting the Board's fears of an Establishment Clause violation. First, he stated that allowing the Club to meet at school would ensure, rather than threaten,

neutrality toward religion because it merely sought to be treated neutrally and given the same access to facilities as the other groups that dealt with the same topic. Second, he remarked that the Board's fear of coercion was misplaced because insofar as parents chose whether their children would attend the meetings, and had to submit a signed form granting their permission, the adults, rather than the students, should have been the focus of the Board's concern. Third, Justice Thomas wrote that regardless of any earlier comments that it may have made about the impressionability of children in the context of a discussion of the Establishment Clause,<sup>27</sup> the Court never foreclosed private religious conduct during non-instructional hours simply because it took place on school grounds while elementary school children may be present.

Fourth, Justice Thomas conceded that even if the Court were to consider the misperceptions of children about whether the Board's permitting the meetings to take place violated the Establishment Clause, the facts of the case simply did not support its position. Among the factors that Justice Thomas considered were that children were not permitted to remain in school once the class day was over, the meetings were in a combined high school resource room and middle school special education classroom rather than in an elementary school room,<sup>28</sup> and children ranged in age from six-to-twelve, well beyond the span in a normal classroom setting. Fifth, Thomas explained that even had the Court inquired into the minds of children, it was unclear whether their misperceptions of the meetings as endorsement of religion were any greater than their perception of hostility to religion if the Club were not permitted to use school facilities. Justice Thomas concluded that since the Court did not foresee any risk of the Board's violating the Establishment Clause by permitting the Club to meet in school, there was no reason to depart from *Lamb's Chapel* and *Widmar* and so reversed in favour of the Club.

#### **Justice Breyer's Concurrence**

Justice Breyer agreed with the Court that the meetings could take place on school grounds but concurred because he did not fully agree with its rationale.<sup>29</sup> He was concerned not only that students might have perceived that school officials endorsed religion by permitting the meetings but also that the lower courts failed to examine the Establishment Clause question sufficiently.

#### **Justice Scalia's Concurrence**

Justice Scalia joined the opinion of the Court but authored a separate concurrence to clarify his position.<sup>30</sup> First, he disagreed with the Court's discussion of coercive pressure and perceptions of endorsement since they had no impact in *Milford*. Second, he expounded his views on the nature of viewpoint discrimination.

#### **Justice Stevens' Dissent**

Justice Stevens concede that while 'this case is undoubtedly close',<sup>31</sup> he had no choice but to dissent. He did so based on his belief that since the Board created a limited forum inviting the public to use its facilities for educational and recreational purposes, it could exclude the Club because it engaged in proselytising religious speech that did not rise to the level of worship.

### **Justice Souter's Dissent**

Justice Souter, joined by Justice Ginsberg, dissented primarily because insofar as the Club meetings were heavily devotional, they should not have been permitted at school.<sup>32</sup> He also argued that since neither he, nor the majority, had a full understanding of the facts, the Court should have returned the dispute to the lower courts for a ruling on the merits of whether the Club was engaged in inappropriate religious use of public school facilities.

### **Discussion**

In *Milford* a divided Court continues to support freedom of speech, albeit in a religious context, consistent with *Lamb's Chapel* and *Rosenberger*. Further, the Court demonstrated its ongoing unwillingness to permit viewpoint discrimination to exclude religious speech in schools especially when an activity is neither school sponsored nor part of a school day.

As the dispute made its way to the Supreme Court, *Milford* caused the Second Circuit to be caught on the horns of its own dilemma in attempting to distinguish the Boy Scouts, Girl Scouts, and 4-H Club from the Good News Club. If one accepts that the Scouts present moral development from a totally secular point of view, then the Second Circuit ran the risk of excluding a religious perspective altogether. Conversely, if, one follows the Second Circuit's perspective that the Scouts' purpose was acceptable because it presented only a diluted religious message,<sup>33</sup> the Club was denied access because it was too religious. The first dilemma, arguably, is the very viewpoint discrimination invalidated in *Lamb's Chapel*, while the second places school officials in the untenable position of determining how much of a religious message is acceptable. The Court refused to fall into a similar trap and held that since any board that creates a limited open forum cannot exclude religious speech from its facilities, it may have to open its doors to a wide array of religious, and other, groups. Countless other groups that have not been using school facilities may now seek access to schools.<sup>34</sup>

A recent dispute involving free speech from Florida illustrates the slippery slope that the courts, and public school boards, are on once they start judging groups based on the moral content of their meetings and/ or messages. In *Boy Scouts of America v. Till*,<sup>35</sup> a federal trial court granted the Scouts' motion for a preliminary injunction to rent or lease space in a school's limited open forum. A board sought to deny the Scouts access for allegedly violating its anti-discrimination policy in light of *Boy Scouts of America v. Dale*<sup>36</sup> wherein the Supreme Court upheld the Scouts' right to exclude scout masters who are gay. The court ruled that insofar as the Scouts demonstrated the substantial likelihood of success on the merits, they were entitled to an injunction permitting them to continue to use school facilities.<sup>37</sup> It will be worth keeping an eye on developments in *Till* to see whether it will return to court for a judgment on the merits.

Of course, if a school board chooses to, it may create a closed forum and would not have to open its doors to non-school, community groups with a religious focus such as the Good News Clubs. However, since adopting the draconian solution of creating a closed forum would exclude many worthy groups, such as the ones that were peripherally involved in *Milford* as well as possibly the National Honor Society,<sup>38</sup> such an approach may be akin to 'throwing the baby out with the bath water'. Consequently, since community groups contribute a great deal to the life of a

school, and its children, educational leaders would be wise to think twice about closing their doors in order to exclude a club or organisation based on the religious content of its speech.

The efforts of school boards to excise religious uses while permitting secular ones raises the fundamental question whether such decision-making represents hostility toward religion. In *Milford* the Court clearly reiterated its long-standing position that it does not permit this kind of hostility.<sup>39</sup> For example, in *Board of Education of Westside Community Schools v. Mergens*,<sup>40</sup> wherein the Court upheld the constitutionality of the Equal Access Act (EAA),<sup>41</sup> Justice O'Connor's majority opinion took a broad swipe at a board's prohibition of in-school religious meetings by observing that 'if a State refuse[s] to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion'.<sup>42</sup>

If refusing to provide equal access to religious groups during school hours can represent hostility, it can be argued that hostility would seem to be an even more plausible claim when the access sought is after school hours. Avoiding hostility was particularly an issue in *Milford* since parents had to provide signed permission before their children could participate, the multi-age grouping of students, and the fact that pupils who were not participating in an after-school activity typically left the building at the end of the day. Even though the EAA provides only a statutory right for student-initiated, non-curriculum related groups meeting during non-instructional time, *Milford* makes it clear that the principle that religious groups should have the same access rights as non-religious groups seems sound.

*Milford* had an almost immediate impact on access issues. A week to the day after *Milford*, the Court vacated and remanded a case from the Fifth Circuit over whether a prayer group could use public school facilities for a meeting. In *Campbell v. St. Tammany Parish School Board*,<sup>43</sup> the Fifth Circuit decided that a school board had not created a limited open forum even though it permitted school buildings to be used for civic and recreational meetings as well as entertainment and other uses but prohibited partisan political activity, for-profit fund-raising, and religious services. As in *Till*, it will be interesting to observe whether the board in *Tammany*, and for that matter, *Milford*, change their use policies.

The *Milford* Court rejected the Second Circuit's suggestion that the principle prohibiting hostility toward religion undergirding the EAA does not appear to extend to after-school religious groups under the Free Speech and the Establishment Clause. Had the Court upheld the Second Circuit's analysis, it would have created an anomaly. The anomaly would have been that while school officials could have been considered hostile to religion if they refused to treat student religious groups the same as other non-curricular related student groups during non-instructional time as in *Mergens*, they might not have been considered hostile to religion by refusing a religious-oriented community group to use school premises after school when other non-religious community groups are permitted such use as in *Milford*.

The Court rejected the Second Circuit's argument that such a distinction was warranted because of student impressionability. According to the Court, the issue is not whether one religious group is being preferred over another simply because no other religious group had applied for use of school facilities, but whether school officials can prefer one approach to moral development over another. The Court clearly rejected the Second Circuit's reliance on the impressionability of

children as misplaced and as failing to track a general judicial repudiation of this argument where a religious use has a secular counterpart.<sup>44</sup> As the majority indicated, had it affirmed *Milford*, students could just as easily have been left with the impression that only secular approaches to moral development have school endorsement or sponsorship.

## Conclusion

As reflected in *Milford*, once community groups are permitted to use school facilities, school boards may have a difficult time erecting a ‘Wall of separation’ to justify the exclusion of groups simply because they do not like the content of their messages. Even so, as American Courts will undoubtedly continue to struggle with the parameters of free speech in schools, especially when religion is involved, law makers and educational leaders in Australia and New Zealand may want to join their American colleagues in monitoring the situation in the United States for further developments.

## Keywords

Freedom of religion; US Bill of Rights; human rights of children; separation of Church & State.

## Endnotes

1. The relevant passage in the First Amendment to the United States Constitution reads that: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ... ‘ While the Constitution of Australia at section 116 acknowledges that ‘The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of religion ... ‘ it does not address freedom of speech. The fact that New Zealand lacks a written constitution in one single document complicates matters there.
2. *See, e.g., Searcey v. Crim*, 888 F.2d 1314 (11th Cir. 1987) (holding that a board’s refusal to permit peace organisations to present career opportunities on school bulletin boards, in guidance offices, and at career days was not a reasonable limitation of their free speech right of access).
3. *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990).
4. 508 U.S. 384 (1993).
5. 515 U.S. 819 (1995).
6. 28 F.3d 1501 (8th Cir. 1994) *rehearing and suggestion for rehearing en banc denied*.
7. 21 F. Supp.2d 147 (N.D.N.Y. 1998) (hereinafter, in notes, *Milford I*), *aff’d* 202 F.3d 502 (2d Cir. 2000) (hereinafter, in notes, *Milford II*).
8. *See Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997) (affirming that a board’s refusal to permit a church to conduct regular religious meetings in a middle school auditorium during non-school hours was not viewpoint discrimination even though other social and community groups could use it since the policy prohibiting religious services was reasonable and viewpoint neutral).
9. *cert. granted*, 121 S. Ct. 296 (2000).

10. Ralph D. Mawdsley & Charles J. Russo (2001). 'Religious Groups and the Use of Public School Facilities: An Ongoing Controversy'. *School Business Affairs*, Vol. 67, No. 2, 45-50.
11. 121 S. Ct. 2093 (2001) (hereinafter, in notes, *Milford III*).
12. The metaphor of the 'wall of separation' comes from Thomas Jefferson's letter of January 1, 1802 to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 WRITINGS OF THOMAS JEFFERSON 281 (Andrew A., ed. 1903). Jefferson wrote:  
 Believing with you that religion is a matter which lies solely between man and his God ... I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof', thus building a wall of separation between church and state.  
 The Court first used this expression in *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (upholding a federal polygamy statute in the face of a Free Exercise Clause challenge).
13. *Milford I*, *supra* note -7 at 150.
14. A Good News Club is affiliated with Child Evangelism Fellowship, a missionary organisation which states that its purpose is 'to instruct children in moral values from a Christian perspective'. *Milford II*, *supra* note 7 at 504. Child Evangelism Fellowship operates in 142 countries and has 4,622 Good News Clubs that meet on school property in the United States. Linda Greenhouse, *Top Court Gives Religious Clubs Equal Footing in Grade Schools*, New York Times, June 12, 2001, at A-1.
15. *Milford I*, *supra* note 7 at 150.
16. *Milford II*, *supra* note 7 at 504. Stephen Fournier, husband of Darleen Fournier and pastor of Milford Center Community Bible Church, the teacher for the Good News Club, was not a party to the suit.
17. *Id.* at 505. The Club takes its name from 'the good news of Christ's Gospel' and the good news 'that salvation is available through Jesus Christ'. *Id.* at 504.
18. *Id.* at 505. The memory verse distinguishes between 'those children who are 'saved' and those who are 'unsaved'.' *Id.*
19. *Id.* at 505-506.
20. *Milford I*, *supra*, note 7.
21. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (holding that a school district's internal mail delivery system was a nonpublic forum even though it was used by community groups such as the Boy Scouts and Girl Scouts), the Supreme Court explained that a forum can be public, limited (or designated), or nonpublic (or closed). A street or park is a public forum. *Id.* at 45. A limited forum, as at issue in *Milford*, is one 'which the state has opened for use by the public as a place for expressive activity ... even though it was not required to create the forum in the first place'. *Id.* A nonpublic forum is one, such as a public school classroom, that the government has not turned over to public communications. *Id.* at 48.
22. *Milford II*, *supra* note 7.
23. *cert. granted*, 121 S. Ct. 296 (2000).
24. Justice Thomas was joined in full by Chief Justice Rehnquist, Justices O'Connor, Scalia, and Kennedy. Justice Breyer joined in part. Justice Scalia filed a concurring opinion. Justices Stevens and Souter, joined by Justice Ginsburg, filed dissenting opinions.
25. *Milford III*, *supra* note 11 at 2102.



26. 454 U.S. 263 (1981). In light of compulsory attendance laws and greater control over minor students, *Widmar's* rationale arguably did not apply in K-12 schools.
27. The Court's concerns over the impressionability of children and fears of coercion emerged in *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down school sponsored prayer at a public middle school graduation ceremony).
28. The trial court, *Milford I*, *supra* note 7 at 149 spoke of the cafeteria while the Supreme Court, *Milford III*, *supra* note 11 at 2106 mentions these combined facilities. The Court did not address or clarify this apparent inconsistency.
29. *Milford II*, *supra* note 11 at 2111 (Breyer, J., concurring).
30. *Id.* at 2107 (Scalia, J., concurring).
31. *Id.* at 2112, 2114 (Stevens, J., dissenting).
32. *Id.* at 2115 (Souter, J., dissenting).
33. *Milford III*, *supra* note -- at 511 ('while the boy scouts teach reverence and a duty to God generally, this teaching is incidental to the main purpose of the organisation...')
34. The courts have upheld the right of clubs involving students who are gay and lesbian to meet in schools under the auspices of the Equal Access Act. *See Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp.2d.1135 (C.D. Cal. 2000); *East High Gay/Straight Alliance v. Board of Educ.*, 81 F. Supp.2d 1166 (D. Utah 1999), 81 F. Supp.2d 1199 (D. Utah 1999); *East High Sch. Prism Club v. Seidel*, 95 F. Supp.2d 1239 (D. Utah 2000).
35. 136 F. Supp. 2d 1295 (S.D. Fla. 2001).
36. 530 U.S. 640 (2000).
37. In light cases such as *Till*, *supra* note 35 and *Dale, id.*, it will be interesting to observe how school boards may respond to impressionability concerning the access of scout groups to district facilities when those groups prohibit homosexual members.
38. *See East High Gay/Straight Alliance v. Board of Educ.*, 81 F. Supp.2d 1166, 1173 (D. Utah 1999) (where the group prevailed on its Equal Access Act claim at least in part based on its pointing out that 'non-curricular student groups' such as the Future Homemakers of America, Future Business Leaders of America, National Honor Society, and Odyssey of the Mind were granted access to school facilities during non-instructional hours).
39. *See e.g., Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (in permitting a public school board to dismiss students early to attend religious classes, the Court observed that:  
 'the First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly'.)  
*See also, Rosenberger*, *supra* note 5 at 845:  
 'The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires'.
40. 496 U.S. 226 (1990).

41. 20 U.S.C. §§ 4071-4074.
42. *Mergens*, *supra* note 5 at 248.
43. 231 F.3d 937 (5th Cir. 2001), *cert. granted, earlier judgment vacated and remanded*, 121 S. Ct. 2518 (2001).
44. *See, e.g., Lamb's Chapel*, *supra* note 4 at 395 (in dispelling Establishment Clause concerns, the Court used reasoning that seems equally applicable to *Milford*. 'The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members'.). *But see Lee v. Weisman*, *supra* note 27 (although the Court prohibited school sponsored graduation prayers due to fears of coercive social pressure on students, a simpler reading of *Lee* is that prayer, as a religious exercise, has no secular counterpart).