

Scenario Response

Scenario #8 (The Hypothetical *The Followers v. Madison High School*)

Keith David Reeves

The Scenario

Dr. Nelson is the principal of Madison High School. An honor student in the junior class, Billy Smith, meets with Dr. Nelson to ask permission for a newly organized club to meet during the official club period. By policy, the school has an official club period each Tuesday from noon until 1:00. Student initiated clubs are allowed to meet during this time, provided they have a faculty sponsor and have received the principal's permission to meet as an organized club.

Dr. Nelson asks Billy about the purpose of the club. Billy explains that the club, The Followers, is a religiously motivated group of students who want to get together to read, discuss, and reflect on religious writings. Billy explains that Mr. Grundy, a popular and respected English teacher, has agreed to serve as the faculty sponsor. Billy also explains that the club has created a charter, and that it will abide by the same rules that apply to all other approved clubs.

Dr. Nelson does not approve the request, stating that "religion and schools don't mix."

Billy is upset, and says, "I'm going to tell my parents and the other club members that you won't let us meet, but that you've let other clubs meet that have nothing to do with school. I'll bet my Mom and Dad will get a lawyer."

What are the issues? Who might have the stronger case, Billy or the principal?

Overview

In Scenario #8, we find Madison High School, a public secondary school presumed to be located in the Commonwealth of Virginia, which includes as part of its established practices a regularly scheduled club period, conducted weekly on Tuesdays from 12:00 PM until 1:00 PM.

The regulations at Madison regarding noncurricular student activities prescribe principal's permission and faculty "sponsorship" as required to meet. Noncurricular student groups current actively meet during this time in compliance with these regulations.

In the Scenario, junior Billy Smith meets with Dr. Nelson, the school principal. Billy submits his proposal for The Followers, a religiously-motivated student group which will read, discuss, and reflect on religious writings. (The religion is not specified in the scenario, and it is presumed not to have been specified in the request.) Billy provides Dr. Nelson with a written charter, stating it will abide by rules that apply to all other clubs. It can be inferred from the scenario that the request was issued in writing. The scenario also

states that Billy has secured the volunteer sponsor required, specifically a popular and respected Language Arts instructor named Mr. Grundy.

Dr. Nelson denies the request, stating that “religion and schools don’t mix.”

Point of Law in Dispute

The question of law in this case is whether or not Dr. Nelson’s denial of Billy Smith’s request to assemble his non-curricular student organization at his school, a limited open public forum, constituted a violation of his rights under the First Amendment.

The question was definitively answered “yes” in the Supreme Court’s 2001 decision in *Good News Club v. Milford Central School*.

Jurisprudence Review

What follows is a chronologically-sequenced review of precedent opinion pertinent or ancillary to the point of law in question.

Tinker v. Des Moines (393 U.S. 503 [1969])

This landmark case held that students do have a right to free speech and peaceable protest while attending public schools. The “Armband Case,” this situation involved the school preemptively resolved that students wearing black armbands would be subject to suspension upon refusal to remove them at the request of school officials. The Court held that the rights of the students were violated when they were suspended for wearing the armbands, which constituted free speech and was therefore a protected action under the constitution.

Tinker laid much of the fundamental groundwork for the Congressionally-enacted statute known as the Equal Access Act, which codified the mechanisms by which students may avail themselves of the right to student organization, assembly, and speech in the limited public forum.

Relevance to Scenario #8: Students’ First Amendment rights to free speech are not restrictable by the state, vis-à-vis the school, without a compelling state interest.

Lemon v. Kurtzman (403 U.S. 602 [1971])

Ironically, the Court would have seemed in its unanimous 8-0 decision in *Lemon* to agree with Dr. Nelson’s statement in the Scenario, “Schools and religion don’t mix.”

However, the question is in what ways are schools and religion “mixing.” In the *Lemon* case, the question was about the state effectively subsidizing religious education – a state sanctioning of religion, as it were – and in the Scenario, the question is about the state *permitting or denying* religious practice.

We must take care to differentiate between state sanction and state permission. The state has no choice but to permit the free exercise of religion, and cannot promote one religion over another nor discriminate against one religion as opposed to another.

The precedent set in *Lemon* is not a question of schools and religion “mixing.”

In *Lemon*, the famous three-prong test authored by Chief Justice Warren E. Burger was established thusly:

In order to be constitutional, a statute must have:

1. a “secular legislative purpose,”
2. must effectively neither inhibit nor advance religion, and
3. must not foster an “excessive government entanglement with religion.”

There is ongoing debate over the *Lemon* test, but it seems prudent to this scholar that *Lemon* be rigorously upheld, and that matters of constitutional precedent struggle with the application of the three prongs. Indeed, while the first prong is likely more objective than subjective, the latter prong may be perceived as subjective depending on one’s sociopolitical views.

In *Milford*, the application of *Lemon* yields a failure of the constitutionality test. As I cited in my case study, Milford, acting on behalf of the state, in this case passes the first prong of *Lemon*. The purpose of the policy is to uphold the law and protect the interests of the community’s school. One might argue for or against the third prong, but it is moot as Milford failed the second prong of the *Lemon* test.

It is worth noting Justice Sandra Day O’Connor’s contribution to *Lemon* in the form of the so-called “Endorsement Test,” established in 1984 in her opinion in *Lynch v. Donnelly* (465 U.S. 668 [1984]), in which she clarifies the purpose prong (prong number one) of *Lemon* is best tested under the following query:

“*Whether the government intends to convey a message of endorsement or disapproval of religion.*”

This has, on occasion, been folded into *Lemon*, but may if taken on its own merits imply that the government’s intent may have as much to do with constitutionality as actual effect, a position not inconsistent with other court interpretations.

Relevance to Scenario #8: The state must meet three prongs of the *Lemon* test in order to enact legislation where religion is concerned. In Scenario #8, the state fails the second prong of the *Lemon* test.

Widmar v. Vincent (454 U.S. 263, 271 [1981])

In *Widmar*, the University of Missouri at Kansas City had informed an identified and recognized student religious group, “Cornerstone,” that it would henceforth be excluded from meeting based on a regulation crafted in what the University thought was accordance with the requirement of the state to restrict based on the Establishment Clause of both the federal and state constitutions.

The Supreme Court upheld the 8th Circuit Court of Appeals decision siding with the religious group, holding in its dismissal that, in the words of Justice Powell, “religious worship and discussion are forms of speech and association protected by the First Amendment.”

Powell further stated that state restriction of speech must contain a compelling state interest for such a prohibition.

Relevance to Scenario #8: As applies to the Scenario, the state via Dr. Nelson did not demonstrate any such compelling interest; to the contrary the state’s position was summary, dismissive, and devoid of substance. Consequently, *Widmar* would seem to be a supporting position for Billy Smith’s suit.

Federal Equal Access Act (20 USC §4071 et seq. [1984])

In the fall of 1984, the Equal Access Act basically provided, here in the words of Allen E. Daubman, the attorney arguing for the school in *Mergens*, “that a school that has a limited open forum may not deny access to that forum on the basis of political, philosophical, or religious nature of that speech.”

In short, the core of the Equal Access Act, as it pertains to the public school, is straightforward:

If you admit one, you must admit all, but you may admit none.

In oral arguments in *Westside v. Mergens*, Kenneth Starr stated that he believed two “overriding concerns or values” emerged in the Congressional Record during the “overwhelmingly bipartisan effort” to enact the Equal Access Act: the value of fairness and evenhandedness – equality – in the treatment of public secondary school students, and the value of liberty, especially those assured under the First Amendment.

(n.b.: The irony of my quoting Kenneth Starr is not lost upon me.)

Relevance to Scenario #8: By admitting non-curricular student organizations, Madison High School was compelled under the Equal Access Act, an act which was indeed triggered by said action, to admit all non-curricular student organizations, short of an organization that violates or promotes the violation of law and/or the material disruption of the school. (This latter point, if invoked, would have to be seriously compelling.)

Westside v. Mergens (496 U.S. 226 [1990])

One of the great tests of law came *Westside Community Schools v. Mergens*, which put the Federal Equal Access Act to the constitutional test.

The question of law in *Mergens* was similar to that in *Widmar*, which asked if a school, as a state entity, has a right and/or a responsibility under the Establishment Clause to prohibit religious groups' access to the limited open public forum. *Mergens*, if decided in favor of the school, would have effectively rendered the Equal Access Act unconstitutional on the basis of violating the First Amendment.

In an 8-1 decision upholding the Court of Appeals decision in favor of the students, Justice Sandra Day O'Connor wrote the majority opinion that repudiated the school's position. Because *Westside* had permitted other non-curricular organizations, it was prohibited under the Equal Access Act from engaging in the prohibition of other similar groups solely on the basis of religion, which was unconstitutional viewpoint discrimination.

Westside was critical in upholding the constitutionality of the Equal Access Act.

Once again, the parallels to the Scenario are plethora. Madison High School played the role of *Westside* in denying the student group permission to meet despite the clear stipulation that it must do so under the Federal Equal Access Act.

Curiously, the argument on the part of the school was that the denial was made solely on the basis of the organization not having a sponsor. The court rejected that argument. (Justice O'Connor was quite clear in refuting Allen E. Daubman's oral arguments.)

Once again, the court demonstrates that the minutia of a situation may be discussed locally, but that the constitutionality of a situation is predicated upon the larger issues. Justice Kennedy, in oral arguments with the attorney, asked about the test of what constitutes a curricular versus a non-curricular organization. Mr. Daubman stated that he felt it was a factual determination. Justice White pressed Mr. Daubman to clarify that.

Mr. Daubman stated that the legislative history contained many instances of a "broad discretion granted to school officials." In response to Chief Justice Rehnquist, Mr. Daubman stated that he was in fact arguing that the Equal Access Act held that *Mergens* did not, in fact, have a limited open forum, as it only allowed curricular and cocurricular clubs, and did not allow noncurricular clubs. The court did not, ultimately, concur.

Justice Scalia went further to attack the notion of the sponsor argument.

The school held that the state required a faculty sponsor for all student groups, and since the Act essentially disallowed the school from having a "faculty sponsor" for student-initiated groups because of Establishment Clause concerns, that it did not have to comply

with the act. Mr. Daubman went so far as to suggest that by virtue of a school equipping a group with a sponsor that the school was therefore “faculty-izing” the group, and making it officially sponsored, and therefore not noncurricular.

Justice Scalia rejected that argument.

Indeed, this smacks of Richard Nixon’s statement that something is not illegal if the President does it. Were the school to say that by virtue of a teacher serving as a sponsor that the organization was, therefore, curricular in nature as it was “faculty sponsored” and therefore “school sponsored,” the school would – as Chief Justice Rehnquist pointed out and as Mr. Daubman conceded – have the ability to wholly circumvent the Equal Access Act.

The Court did not allow schools such latitude in its opinion, and much more carefully categorized “curricular” versus “noncurricular.” It also held that a school’s desire to avoid entanglement by desiring to restrict “adversarial points of view” is not sufficient grounds to violate the Equal Access Act.

Lee v. Weisman (505 U.S. 577 [1992])

Weisman was a bit of a surprise decision, being the first school prayer case heard by the Rehnquist court. The opinion further upheld that the school must be *absolutely* neutral in its actions on behalf of the state, to the point that the school cannot invite clergy to lead invocations at ceremonies such as graduation.

In a 5-4 decision, the Court held that though participation in graduation prayer may be voluntary that the official scheduling and sanction of the prayer as a part of the ceremony was tantamount to coercion. Justice Kennedy authored the “Coercion Test”

Text: *“As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions ... recognize ... that prayer exercises in public schools carry a particular risk of indirect coercion. ... What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”*

The Coercion Test helps in many ways to provide a framework for the third prong of the *Lemon* test. There is certainly “entanglement” when the state coerces its citizens to behave (or believe) a certain way.

While *Weisman* may not directly apply to the Scenario, it furthered the idea of absolute neutrality as a central tenet in state conduct regarding religion.

Capitol Square Review and Advisory Board v. Pinette (515 U.S. 753 [1995])

The idea of the Supreme Court agreeing with the KKK is unique, to say the least, but that's precisely what happened in *Capitol Square*. The "analysis of a reasonable observer," as cited by attorney Michael J. Renner, was the cornerstone of this case which involved a cross being placed in front of the Ohio State Capitol building.

The case differs from *Lee v. Weisman*, as Justice Kennedy stated in oral argument exchange with Mr. Renner, as in *Lee* the perception was that the state was advocating religion, and that the graduation setting was not a public forum.

In this case, the perception is not that the state has an advocating stance, and the setting most certainly is a public forum.

Benson A. Wolman, attorney advocating for *Pinette*, advocated that fully closing a traditional public forum, even if applied universally and without specific regard, regardless of motive, would be unconstitutional in that "time, place, and manner restrictions" must be reasonable, and that a carte blanche restriction of all speech in said forum would violate that reasonableness requirement.

Relevance to Scenario #8: Mr. Wolman articulated a position with which the Court ultimately agreed: "...the Establishment Clause and the Free Exercise Clause are co-guarantors of religious liberty. It was not ... designed to be hostile to religious expression."

Rosenberger v. University of Virginia (515 U.S. 819 [1995])

This second prong of the *Lemon* test is effectively upheld in *Rosenberger's* 5-4 opinion, which held that the University of Virginia's denial of a religious student publication the right to the same material provisions granted a secular student publication amounted to viewpoint discrimination. In this case, the state had an obligation to remain wholly neutral as to the conduct of religious versus secular organizations, and did not.

That is, the state could neither "inhibit nor advance" religion, and in the case of *Rosenberger* it engaged in inhibition of religion, a constitutional violation.

Justice Kennedy, writing for the majority, stated this plainly: "[n]eutrality is a significant factor in upholding governmental programs in the face of Establishment Clause attack."

This effectively upholds the second prong of the *Lemon* test, requiring that the state refrain from either locking the door nor holding it open when religion is concerned. The state must simply ensure that the door is there and available for anyone who wishes to use it.

Relevance to Scenario #8: In the Scenario, Dr. Nelson effectively held the door shut,

which fails the second prong of the *Lemon* test and is tantamount to the University of Virginia's actions in *Rosenberger*, insofar as the school's involvement with a religious organization is concerned, though the facts of the case certainly differ.

Good News Club v. Milford Central School (533 U.S. 90 [2001])

The parallels are so obvious as to cause this scholar to assume that Scenario #8 was simply a "reskinning" of the conditions in *Milford*. Dr. Nelson in the Scenario plays the role of Dr. Robert McGruder, the Interim Superintendent at the Milford schools during the mid and late 1990's. Billy Smith plays the role of Andrea Fournier, a student at Milford who was a member of the Good News Club. The Good News Club effectively mirrors The Followers from the Scenario.

As I cited in my Case Study, the Court held in *Milford* that that the Milford Central School had violated the rights granted to the Good News Club under the Free Speech Clause of the First Amendment by excluding the Club from an established Limited Public Forum on the basis of religion.

As I further cited, the Court held that because Milford had opened its Limited Public Forum to organizations engaged in "the development of character and morals," that it was compelled under constitutional convention to allow *all* organizations engaged in "the development of character and morals." It held that the Good News Club's express purpose was precisely that: "the development of character and morals."

In the Scenario, Dr. Nelson, on behalf of the school and therefore effectively taking state action, has violated Billy Smith's constitutional rights as protected by the First Amendment, specifically at least inclusive of the Free Speech Clause, and possibly inclusive of the Establishment Clause, though the Courts have been less clear on the latter point.

More specifically, Dr. Nelson has violated the provisions of the Federal Equal Access Act as it applies to Madison High School's Limited Open Forum. Madison very clearly has established a Limited Open Forum inclusive of noncurricular organizations. Madison, through its Principal, has also explicitly indicated the criterion for rejection was the basis of religiosity of the group, which constitutes unconstitutional viewpoint discrimination.

The Scenario asks if Billy or the principal has the stronger case.

In point of fact, Billy is the only one who *has* a case; Billy's right to assemble his student group if compliant with established and equitable requirements is constitutionally protected Free Speech in the Limited Open Forum.

It would likely be unnecessary for the litigator to even bring up *Westside v. Mergens*, *Lemon v. Kurtzman*, or *Rosenberger v. University of Virginia* because those cases were all cited as precedent in the overarching decision enacted by *Good News v. Milford*.

The Likely Outcome

Returning to the Scenario, this is a decided issue, as detailed in the extensive case review I submitted regarding *Good News Club v. Milford Central School*, and consequently were the parents to sue, I would imagine that there would never be a *Smith v. Madison High School* or *The Followers v. Madison High School* because the case would be settled before the first gavel. The school attorney in this case would have to be extraordinarily ignorant not to recognize this as a clear constitutional violation and order Dr. Nelson to reverse his position forthwith.

Moreover, I would imagine in this case that Dr. Nelson would be potentially subject to disciplinary action given the fundamental if not rudimentary importance of this tenet where school student management is concerned. A statement like “religion and schools don’t mix” is a subjective, opinion-based statement that does not reflect a thorough understanding of the principles at work where the Federal Equal Access Act is concerned.

Personal Viewpoint

Alan Shepherd, the title character in the film “The American President,” delivers a line that has forever resonated with me:

"You want free speech? Let's see you acknowledge a man whose words make your blood boil who is standing center stage advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours. The symbol of your country cannot just be a flag. The symbol also has to be one of its citizens exercising his right to burn that flag in protest. Now show me that, defend that, celebrate that in your classrooms. Then you can stand up and sing about the land of the free."

If I am to be entitled to invoke the power of the constitution to protect minority populations from persecution, to protect controversial or unpopular organizations and movements from vocal opposition by an entitlement-driven majority, then I must be prepared to accept *legal parity* under those same auspices.

If I want the constitution to protect me, I must accept that it will protect you with equal vigor. That parity of liberty is a core value of American legal ethics, in my view, and consequently the school, arguably our most important institution for the advancement of each generation of the citizenry to ever-improved conditions under the constitution, must practice with great diligence that very value.