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Banning churches from meeting in New York public schools

Neil J Foster

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Should Christians who do not own their own "church building" be allowed to meet in public schools on a Sunday? Officials in the New York City Board of Education do not think so, and the courts in the United States have supported their decision.

The recent decision of the US Supreme Court to refuse what in Australia would be called "special leave to appeal"[1] leaves in place the decision of the lower court, the US Court of Appeal 2nd Circuit, in *The Bronx Household of Faith v. Board of Education of the City of New York* 650 F 3d 30 (2011) (available here). This 2-1 ruling upholds as valid the decision of the New York City authorities to ban the hiring of public schools on Sundays by churches. Comments suggest at least 60 independent churches will be affected, and have to relocate by February 2012.[2]

How can a decision of this sort, which seems so clearly to discriminate against the churches (when other community groups will be allowed to continue to hire the school rooms for their purposes), be upheld in a country with what seems to be a clear Constitutional right of freedom of religion? The purpose of this note is to explain the reasoning of the majority in the 2nd Circuit decision in light of the complex jurisprudence on the First Amendment, and also to suggest that the dissenting judgment of Walker J was the correct approach. Sadly, with the denial of certiorari by the Supreme Court, this odd decision will be implemented unless (as has been suggested) legislators in New York State succeed in over-turning the City decision.[3]

Constitutional Background

By way of background, it is worth spelling out what the US Constitution says on this issue. The First Amendment[4] provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The first two clauses are of primary interest in the "freedom of religion" context. They are broadly described as the "no establishment" clause, and the "free exercise" clause. But, as we will see, it is actually the third clause, the "free speech" clause, which played a key role in this case.

While these clauses are directed at "Congress" and so *prima facie* only binding on the Federal Government, in its decisions in *Cantwell v Connecticut* 310 US 296 (1940) and *Everson v Board of Education* 330 US 1 (1947) the Supreme

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[1] See *Bronx Household of Faith. v. NY City Board of Ed.,* 2011 WL 4479210 (US) (December 5, 2011.) In US legal terminology, **a "**petition for certiorari" was denied.

[2] See http://www.nytimes.com/2011/12/06/nyregion/in-failure-of-legal-bid-churches-set-to-lose-public-school-space.html and http://thegospelcoalition.org/blogs/tgc/2011/12/08/whats-next-for-new-york-churches/ .

[3] See http://www.christianpost.com/news/bill-to-overturn-nyc-schools-ban-on-worship-enjoys-wide-city-council-support-64465/ . Even if this allows New York churches to keep meeting (and of course it is by no means sure that it will pass), the 2nd Circuit decision will stand as an unfortunate precedent.

[4] Ratified on 15 Dec, 1791.

Court ruled that by virtue of the 14th Amendment, these prohibitions are also binding on the various States.[5]

The *Bronx Household of Faith* case

Without going into all the twists and turns, the decision of the 2nd Circuit notes that this case has been going on for a few years. The church was initially refused permission to meet in a local school under a previous version of the "Standard Operating Procedures" issued by the NY Department of Education. SOP § 5.9 prohibited the use of school property for ''religious services or religious instruction.'' In fact there were a number of schools around the US who were preventing religious groups from using their premises outside school hours for religious purposes. They were doing so in accordance with a line of decisions from the US Supreme Court under the "establishment clause", which effectively held that there should be a "wall of separation" between church and State, and that the government must avoid "excessive entanglement" with religion.

However, in 2001 an important Supreme Court decision, *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), ruled that a school could not exclude from its premises a religious after-hours children's group (while making the premises available to other groups.) Judge Walker, in his dissent in the 2nd Circuit decision, makes the interesting point that this very litigation, initiated by the Bronx church, was one of the factors that led to the Supreme Court hearing the *Good News Club* case (see Walker J, 650 F 3d 30, at 61 n 7, where he adds, tellingly: "It would not have been unreasonable for the Court to have expected that its *Good News Club* decision would end this case as well.")

Following the *Good News Club* decision, then, the Bronx church applied again and was permitted to start meeting in a school. But then the Department of Education issued a revised version of its rules, SOP § 5.11, which now said that school property could not be used for ''religious worship services". One might have thought that this phrase was so close to the one that was rejected as invalid in the *Good News Club* case that it would also be struck down. But in fact the 2nd Circuit by majority (Judges Leval and Calabresi) ruled that the change in wording was significant.

Why? The answer is somewhat odd. The oddness can only be explained by the history of interpretation of the First Amendment by the US Supreme Court. To cut a long story short, the key relevant features of the story are these:

- The "non-establishment" clause has received a very expansive reading, in effect (as mentioned before) setting up a very high "wall" prohibiting government entanglement with religion. This has led to decisions forbidding prayer in public schools and at football matches, for example.

[5] The 14th Amendment provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Cantwell* applied the "free exercise" clause to invalidate a State law requiring Jehovah's Witnesses to get a license before preaching; *Everson* applied the "establishment" clause to a State law providing taxpayer funding for student transport to a religious school (although finding by 5-4 that the law in question was valid as it applied to both public and private school students).

- On the other hand, the "free exercise of religion" clause has received a fairly narrow interpretation. In recent years the tendency of the decisions in the Supreme Court have been to hold that, so long as a law is not aimed at a religious group, then any general law will be upheld as valid even if it has a serious impact on believers. *Employment Division v Smith* 494 US 872 (1990) held effectively that any law which is "neutral and generally applicable" will be able to restrict freedom of religion; only if a law directly is *aimed* at a religion will it have to be more strongly justified.
- But the "free speech" clause has received a broad and expansive interpretation. In particular any attempt by government to regulate the *content* of speech is scrutinized very closely and must serve very compelling public purposes. (The strength of the freedom of speech clause can be seen in the decision that upheld the rights of Westboro Baptist church members to picket the funerals of deceased soldiers claiming that their deaths were related to America's views on homosexuality.)[6]

This history explains the somewhat odd fact that the Bronx church, in seeking to argue that the NY Department's banning of church meetings in schools was invalid, did *not* argue that it was invalid because it was a restriction on free exercise of religion. Instead, relying on the historically stronger "free speech" right, it argued that the NY City, once it had created a "limited public forum" where certain community groups could meet to exercise free speech, could not exclude the church from using that forum to exercise their free speech rights.

(In my view the Bronx church were too pessimistic about a "free exercise" argument here. In effect what the NY authorities are doing is *directly* aimed at religion. Indeed, in n 4 on p 58 Judge Walker makes precisely this point:

> Given the plain language of SOP § 5.11, the Board's persistent exclusion of outside organizations seeking to use school facilities for religious purposes, and the Board's repeated statements that SOP § 5.11 is aimed at the practice of religion, it is undisputable that SOP § 5.11 is not neutral. See *Smith*, 494 U.S. at 877–78, 110 S.Ct. 1595. Because SOP § 5.11 specifically burdens religious practices, it must advance a compelling government interest to pass constitutional muster.

It seems a pity that the church did not make this a major part of their argument. On the other hand, most casual observers would have said that their case based on the *Good News Club* was so strong that perhaps it was not worth antagonizing the court by raising yet another argument. Sadly that was not correct.)

So, relying on the free speech rationale given in *Good News Club*, the church failed. The majority of the 2nd Circuit said that by banning the activity of "religious worship", the City was not dealing with the *content* of speech. At p 36 Judge Leval sums up the gist of his judgment:

> The prohibition against using school facilities for the conduct of religious worship services bars a type of activity. It does not discriminate against any point of view.

[6] *Snyder v Phelps* (No 09–751, 2 March 2011).

In the end, this is where the difference between the majority and Judge Walker is to be found. Judge Walker takes the view that the barring of "religious worship" is clearly a discrimination against religious points of view. The majority holds that lots of activities happen under the heading of "worship", and no one viewpoint is being prohibited. I must say that I find Judge Walker's dissent compelling on this point, especially in light of the circumstances of the *Good News Club* case, which were so very similar to these.

The other matter addressed by the 2nd Circuit is whether or not the authorities were justified (since it did amount to *some* burden on freedom of speech) in putting this policy in place, as they said they were doing, on "non-establishment" grounds. The majority held that the issue was, not whether in fact the Department would have been breaching the establishment clause, but whether they could *reasonably believe* that they might. They said that they were.

In evaluating this issue the majority applied the controversial establishment clause decision of *Lemon v Kurtzman* 403 US 602 (1973), which applied a three-fold test: a valid law must

- Have a secular purpose;
- Have a "primary effect" neither advancing nor inhibiting religion;
- Foster no excessive entanglement between church and state.

The decision in *Lemon* is "controversial" because many Supreme Court Justices have subsequently criticized it. However, it has never been overturned, and according to the majority is the guiding authority in the 2nd Circuit. (See p 40, n 9.)

So the question is, would allowing a church to use a school after hours satisfy those tests? The majority said it would not. In particular they argued that to allow a church to meet in a school would give "the appearance" of government endorsement of the church! For example, at p 42:

> regular, long-term conversion of schools into state-subsidized churches on Sundays would violate the Establishment Clause by reason of public perception of endorsement.[7]

Notice the language used. Simply allowing a church to meet in a school is now characterised as a sort of mystical transformation of the school into a church! Judge Walker correctly debunks these tendentious comments. As he notes at p 61:

> Bronx Household's use of P.S. 15 takes place during non-school hours (actually on a day when there is no school), lacks school sponsorship, occurs in a forum otherwise available for a wide variety of uses, and is open to the public.

As he notes, if the religious activity in the *Good News Club* case, where the activity took place on the same day as the school activities, received approval

[7] In private correspondence Professor Michael Ariens from St Mary's Law School in San Antonio has pointed out to me that the 2nd Circuit here are not even being consistent in applying the *Lemon* test. He notes: "This strikes me as a kind of bait and switch approach by the court. The "endorsement" test is different from the *Lemon* test. Now, some members of the Supreme Court have held that one can "fold in" the endorsement test into the second "prong" of the *Lemon* test, but unless the Second Circuit said it was doing so, it seems it was reaching its conclusion based on a test other than the *Lemon* test."

from the Supreme Court, this case seems even more clearly **not** to be one where there is a serious danger of public misperception.

It is also worth stressing that even if an "endorsement" test is adopted (ie is the State illegitimately "endorsing" religion?), that test, created by Justice O'Connor,[8] focuses on a "reasonable observer" who is quite sophisticated in their knowledge and understanding. So, that reasonable observer would know about the history of the *Good News* case, and the previous efforts to keep religious groups out of any public school (which the Supreme Court has concluded is impermissible viewpoint discrimination under the free speech clause).[9] In the end it is hard to avoid the conclusion that the Second Circuit in *Bronx Household* simply seems intent on clearing the public square of religion, which goes well beyond any reasonable reading of the First Amendment.

These matters are clearly arguable. What is so frustrating is that the US Supreme Court has now refused to be involved in the argument, as the only body that could settle it definitively. Reasons for denial of certiorari are rarely given. They do *not* mean that there is a majority of the Court in favour of the lower court decision.

But what seems clear is that the question must come back to the Supreme Court again in the future. It may even come back to the New York Court of Appeals. In that case Judge Walker's footnote 4 offers a very strong hint to counsel who might wish to argue the claim of another church, to run an explicit "free exercise" argument next time.

There are no direct implications for Australian law here, of course. So far government bodies have been willing to allow churches (like mine, Hunter Bible Church)[10] to rent school premises on the weekend for church meetings. But it may be that the attitude of the New York City authorities will be replicated in time to come in that of bureaucrats in Australia. The "weak" version of a non-establishment clause that we have in s 116 of the Australian Constitution would not really raise the matter as a legal problem. (Here the High Court upheld back in 1981 public funding even of religious schools as not incompatible with the Constitution.)[11] In addition, s 116 itself only binds the Commonwealth, not the States, and it is State policies about renting State-owned schools that is the issue. But Christians may have to deal with the attitudes of public servants, and if some people who live near schools complain about the school supporting churches, these attitudes may lead to similar decisions.

My view as a Christian is that we should pray for continued access to schools to allow gospel ministry to continue, but not be surprised if it tightens up. If it does, the Lord may well have other purposes for his people to meet elsewhere! (See Acts 8:1-4 where the terrible persecution of the church in Jerusalem led to the wider spread of the gospel as believers were scattered.) In that case we, like Christians all over the world since the 1st century, will simply have to follow the example of the Lord Jesus:

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[8] See eg *Board of Education v Mergens* 496 US 226 (1990).

[9] Again, thanks to Professor Ariens for these points.

[10] See http://www.hunterbiblechurch.org/ .

[11] See *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559 (sometimes known as the "DOGS" case, for the organization sponsoring the litigation, "Defence of Government Schools".)

> Therefore let those who suffer according to God's will entrust their souls to a faithful Creator while doing good. (1 Peter 4:19, ESV)

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