CON LAW II: SURVEY OF CIVIL LIBERTIES
Day 35: Casebook 1426-37, plus the following case:

GOOD NEWS CLUB v. MILFORD CENTRAL SCHOOL
533 U.S. 98 (2001)

Justice THOMAS delivered the opinion of the Court. . . .

I . . .

N.Y. Educ. Law ?414 (McKinney 2000) enumerates several purposes for which local boards may open their schools to public use. In 1992, respondent Milford Central School . . . enacted a community use policy adopting seven of ?414's purposes for which its building could be used after school. Two of the stated purposes are relevant here. First, district residents may use the school for "instruction in any branch of education, learning or the arts." Second, the school is available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."

Stephen and Darleen Fournier . . . are sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the district, in which they sought permission to hold the Club's weekly afterschool meetings in the school cafeteria. The next month, McGruder formally denied the Fourniers' request on the ground that the proposed use--to have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture,"--was "the equivalent of religious worship." According to McGruder, the community use policy, which prohibits use "by any individual or organization for religious purposes," foreclosed the Club's activities.

In response to a letter submitted by the Club's counsel, Milford's attorney requested information to clarify the nature of the Club's activities. The Club sent a set of materials used or distributed at the meetings and the following description of its meeting:

> The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

. . .

II . . .

[T]he parties have agreed that Milford created a limited public forum when it opened its facilities in 1992 . . .

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 829 (1995). The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, *id.* at 829, and the restriction must be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 806 (1985).

III . . .

In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), we held that a school district violated the Free Speech Clause . . . when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Likewise, in *Rosenberger*, we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum. . . .

Milford interprets its policy to permit discussions of subjects such as child rearing, and of "the development of character and morals from a religious perspective." For example, this policy would allow someone to use Aesop's Fables to teach children moral values. Additionally, a group could sponsor a debate on whether there should be a constitutional amendment to permit prayer in public schools, and the Boy Scouts could meet "to influence a boy's character, development and spiritual growth". In short, any group that "promote[s] the moral and character development of children" is eligible to use the school building.

Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way. Nonetheless, because Milford found the Club's activities to be religious in nature--"the equivalent of religious instruction itself"--it excluded the Club from use of its facilities. . . .

Certainly, one could have characterized the film presentations in *Lamb's Chapel* as a religious use, as the Court of Appeals did. 959 F.2d 381, 388-389

(2d Cir. 1992). And one easily could conclude that the films' purpose to instruct that "`society's slide toward humanism . . . can only be counterbalanced by a loving home where Christian values are instilled from an early age,'" *id.* at 384, was "quintessentially religious," 202 F.3d at 510. . . . Thus, the exclusion of the Good News Club's activities, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination.

Our opinion in *Rosenberger* also is dispositive. . . . Just as the Club emphasizes the role of Christianity in students' morals and character, Wide Awake "`challenge[d] Christians to live, in word and deed, according to the faith they proclaim and . . . encourage[d] students to consider what a personal relationship with Jesus Christ means.'" 515 U.S. at 826. Because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held that the denial of funding was unconstitutional. *Id.* at 831. . . . Given the obvious religious content of Wide Awake, we cannot say that the Club's activities are any more "religious" or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger.*

Despite our holdings in *Lamb's Chapel* and *Rosenberger,* the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school. See 202 F.3d at 510 (the Club "is doing something other than simply teaching moral values"). The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. *Id.* at 509. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious." *Id.* at 510. With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure `moral and character development,'" the exclusion did not constitute viewpoint discrimination. *Id.* at 511.

We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals'

> reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, 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. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.[4]

IV

Milford argues that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities. . . . We disagree.

We have said that a state interest in avoiding an Establishment Clause

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[4] Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. . . . [W]e conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.

Justice Souter's recitation of the Club's activities is accurate. But in our view, religion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in *Rosenberger*: religion is the viewpoint from which ideas are conveyed. We did not find the *Rosenberger* students' attempt to cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys. . . .

violation "may be characterized as compelling," and therefore may justify content-based discrimination. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest. . . .

The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel*, the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar*, Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*. Thus, Milford's reliance on the Establishment Clause is unavailing.

Milford attempts to distinguish *Lamb's Chapel* and *Widmar* by emphasizing that Milford's policy involves elementary school children. According to Milford, children will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities take place on school grounds, even though they occur during nonschool hours. This argument is unpersuasive.

First, we have held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Rosenberger*, 515 U.S. at 839 (emphasis added). . . . The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.

Second, to the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, *cf. Lee v. Weisman*, the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

Third, whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.

None of the cases discussed by Milford persuades us that our Establishment Clause jurisprudence has gone this far. For example, Milford cites *Lee v. Weisman* for the proposition that "there are heightened concerns with

protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," 505 U.S. at 592. In *Lee*, however, we concluded that attendance at the graduation exercise was obligatory. See also *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (holding the school's policy of permitting prayer at football games unconstitutional where the activity took place during a school-sponsored event and not in a public forum). We did not place independent significance on the fact that the graduation exercise might take place on school premises. *Lee*, 505 U.S. at 583. Here, where the school facilities are being used for a nonschool function and there is no government sponsorship of the Club's activities, *Lee* is inapposite. . . .

Fourth, even if we were to consider the possible misperceptions by schoolchildren in deciding whether Milford's permitting the Club's activities would violate the Establishment Clause, the facts of this case simply do not support Milford's conclusion. . . .

Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. This concern is particularly acute given the reality that Milford's building is not used only for elementary school children. Students, from kindergarten through the 12th grade, all attend school in the same building. . . . [M]embers of the public writ large are permitted in the school after hours pursuant to the community use policy. Any bystander could conceivably be aware of the school's use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement.

We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified 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. There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members. And, we have already found that those rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club. . . .[5] . . .

Justice SCALIA, concurring. . . .

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[5] . . . Although Justice[s] Souter [and Breyer] would prefer that a record be developed on several facts, . . . none of these facts is relevant . . . When a limited public forum is available for use by groups presenting any viewpoint, . . . we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.

I . . .

I join . . . the Court's opinion . . . with the understanding that its consideration of coercive pressure and perceptions of endorsement, "to the extent" that the law makes such factors relevant, is consistent with the belief (which I hold) that in this case that extent is zero. . . . What is at play here is not coercion, but the compulsion of ideas--and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses, not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot. . . .

II . . .

The disagreement . . . regards the portions of the Club's meetings that are not "purely" "discussions" of morality and character from a religious viewpoint. . . .

From no other group does respondent require the sterility of speech that it demands of petitioners. The Boy Scouts could undoubtedly buttress their exhortations to keep "morally straight" and live "clean" lives by giving *reasons* why that is a good idea--because parents want and expect it, because it will make the scouts "better" and "more successful" people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered--because God wants and expects it, because it will make the Club members "saintly" people, and because it emulates Jesus Christ. The Club may not, in other words, independently discuss the religious premise on which its views are based--that God exists and His assistance is necessary to morality. It may not defend the premise, and it absolutely must not seek to persuade the children that the premise is true. The children must, so to say, take it on faith. This is blatant viewpoint discrimination. Just as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God's will are useless if the listeners do not believe that God exists. Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise--and in respondent's facilities every premise but a religious one may be defended. . . .

Justice BREYER, concurring in part.

I agree with the Court's conclusion and join its opinion to the extent that they are consistent with the following three observations. First, the government's "neutrality" in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school's policy violates the Establishment Clause. As this Court previously has indicated, a child's perception that the school has endorsed a particular religion or religion in general may also prove critically important.

Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the Good News Club's activities, could reasonably perceive the school's permission for the club to use its facilities as an endorsement of religion.

Third, the Court cannot fully answer the Establishment Clause question this case raises, given its procedural posture. . . . We now hold that the school was not entitled to summary judgment, either in respect to the Free Speech or the Establishment Clause issue. Our holding must mean that, *viewing the disputed facts* (including facts about the children's perceptions) *favorably to the Club* (the nonmoving party), the school has not shown an Establishment Clause violation.

To deny one party's motion for summary judgment, however, is not to grant summary judgment for the other side. . . . [B]oth parties, if they so desire, should have a fair opportunity to fill the evidentiary gap in light of today's opinion.

Justice STEVENS, dissenting. . . .

Speech for "religious purposes" may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view. The film in *Lamb's Chapel* illustrates this category. Second, there is religious speech that amounts to worship, or its equivalent. . . . Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.

A public entity may not generally exclude even religious worship from an open public forum. Similarly, a public entity that creates a limited public forum for the discussion of certain specified topics may not exclude a speaker simply because she approaches those topics from a religious point of view. . . .

The novel question that this case presents . . . is whether a school can . . . create a limited public forum that admits the first type of religious speech without allowing the other two.

Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. . . . Such recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission.

School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk. And, just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship. . . .

Justice SOUTER, with whom Justice GINSBURG joins, dissenting. . . .

I . . .

During the invitation, the teacher "invites" the "unsaved" children "`to trust the Lord Jesus to be your Savior from sin,'" and "`receiv[e] [him] as your Savior from sin.'" . . .

Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion. The majority avoids this reality only by resorting to the bland and general characterization of Good News's activity as "teaching of morals and character, from a religious standpoint." If the majority's statement ignores reality, as it surely does, then today's holding may be understood only in equally generic terms. Otherwise, indeed, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.

II

I also respectfully dissent from the majority's refusal to remand on all other issues, insisting instead on acting as a court of first instance in reviewing Milford's claim that it would violate the Establishment Clause to grant Good News's application. Milford raised this claim to demonstrate a compelling interest for saying no to Good News, even on the erroneous assumption that *Lamb's Chapel's* public forum analysis would otherwise require Milford to say yes. Whereas the District Court and Court of Appeals resolved this case entirely on the ground that Milford's actions did not offend the First Amendment's Speech Clause, the majority now sees fit to rule on the application of the Establishment Clause . . .

I am in no better position than the majority to perform an Establishment Clause analysis in the first instance. . . . I can, however, speak to the doubtful underpinnings of the majority's conclusion. . . .

Milford's actions would offend the Establishment Clause if they carried the message of endorsing religion under the circumstances, as viewed by a reasonable observer. The majority concludes that such an endorsement effect is out of the question in Milford's case, because the context here is "materially indistinguishable" from the facts in *Lamb's Chapel* and *Widmar*. In fact . . .

[w]hat we know about this case looks very little like *Widmar* or *Lamb's Chapel*. The cohort addressed by Good News is not university students with relative maturity, or even high school pupils, but elementary school children as young as six. . . .

Nor is Milford's limited forum anything like the sites for wide-ranging intellectual exchange that were home to the challenged activities in *Widmar* and *Lamb's Chapel*. In *Widmar*, the nature of the university campus and the sheer number of activities offered precluded the reasonable college observer from seeing government endorsement in any one of them, and so did the time and

variety of community use in the *Lamb's Chapel* case.

The timing and format of Good News's gatherings, on the other hand, may well affirmatively suggest the *imprimatur* of officialdom in the minds of the young children. The club is open solely to elementary students (not the entire community, as in *Lamb's Chapel*), only four outside groups have been identified as meeting in the school, and Good News . . . instruction follows immediately on the conclusion of the official school day. . . . In fact, the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school. When meetings were held in a community church, 8 or 10 children attended; after the school became the site, the number went up three-fold.

Even on the summary judgment record, . . . there is a good case that Good News's exercises blur the line between public classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not.