SUPREME COURT OF THE UNITED STATES

No. 99–2036

GOOD NEWS CLUB, ET AL., PETITIONERS *v.*
MILFORD CENTRAL SCHOOL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 11, 2001]

JUSTICE SCALIA, concurring.

I join the Court's opinion but write separately to explain further my views on two issues.

I

First, I join Part IV of the Court's opinion, regarding the Establishment Clause issue, with the understanding that its consideration of coercive pressure, see *ante,* at 14, and perceptions of endorsement, see *ante,* at 14–15, 17–18, "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. As to coercive pressure: Physical coercion is not at issue here; and so-called "peer pressure," if it can even been considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected, see, *e.g., Roberts* v. *United States Jaycees,* 468 U. S. 609, 622 (1984); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460–461 (1958). 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, see, *e.g., Heffron* v. *International Soc. for Krishna Consciousness, Inc.,* 452 U. S. 640, 647 (1981); *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108–109

(1943); *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–310 (1940), not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot.

As to endorsement, I have previously written that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 770 (1995). The same is true of private speech that occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses. In that context, which is this case, "erroneous conclusions [about endorsement] do not count." *Id.,* at 765. See also *Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U. S. 384, 401 (1993) (SCALIA, J., concurring in judgment) ("I would hold, simply and clearly, that giving [a private religious group] nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect").

II

Second, since we have rejected the only reason that respondent gave for excluding the Club's speech from a forum that clearly included it (the forum was opened to any "us[e] pertaining to the welfare of the community," App. to Pet. for Cert. D1), I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination. Lacking *any* legitimate reason for excluding the Club's speech from its forum—"because it's religious" will not do, see, *e.g., Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U. S. 520, 532–533, 546 (1993); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872, 877–878 (1990)—respondent would seem to fail First Amendment scrutiny

regardless of how its action is characterized. Even subject-matter limits must at least be "reasonable in light of the purpose served by the forum," *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985).[1] But I agree, in any event, that respondent did discriminate on the basis of viewpoint.

As I understand it, the point of disagreement between the Court and the dissenters (and the Court of Appeals) with regard to petitioner's Free Speech Clause claim is not whether the Good News Club must be permitted to present religious viewpoints on morals and character in respondent's forum, which has been opened to secular discussions of that subject, see *ante,* at 7–8.[2] The answer to that is established by our decision in *Lamb's Chapel, supra.* The point of disagreement is not even whether *some* of the Club's religious speech fell within the protection of

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[1] In this regard, I should note the inaccuracy of the JUSTICE SOUTER's claim that the reasonableness of the forum limitation is not properly before us, see *post,* at 2–3, and n. 1 (dissenting opinion). Petitioners argued, both in their papers filed in the District Court, Memorandum of Law in Support of Cross-Motion for Summary Judgment in No. 97-CV-0302 (NDNY), pp. 20–22, and in their brief filed on appeal, Brief for Appellants in No. 98–9494 (CA2), pp. 33–35, that respondent's exclusion of them from the forum was unreasonable in light of the purposes served by the forum. Although the District Court did say in passing that the reasonableness of respondent's general restriction on use of its facilities for religious purposes was not challenged, see 21 F. Supp.2d 147, 154 (NDNY 1998), the Court of Appeals apparently decided that the particular reasonableness challenge brought by petitioners had been preserved, because it addressed the argument on the merits, see 202 F. 3d 502, 509 (CA2 2000) ("Taking first the reasonableness criterion, the Club argues that the restriction is unreasonable . . . . This argument is foreclosed by precedent").

[2] Neither does the disagreement center on the mode of the Club's speech– the fact that it sings songs and plays games. Although a forum could perhaps be opened to lectures but not plays, debates but not concerts, respondent has placed no such restrictions on the use of its facilities. See App. N8, N14, N19 (allowing seminars, concerts, and plays).

Lamb's Chapel. It certainly did. See *ante,* at 8; 202 F. 3d 502, 509 (CA2 2000) (the Club's "teachings may involve secular values such as obedience or resisting jealousy").

The disagreement, rather, regards the portions of the Club's meetings that are not "purely" "discussions" of morality and character from a religious viewpoint. The Club, for example, urges children "who already believe in the Lord Jesus as their Savior" to "[s]top and ask God for the strength and the 'want' . . . to obey Him," 21 F. Supp.2d 147, 156 (NDNY 1998) (internal quotation marks omitted), and it invites children who "don't know Jesus as Savior" to "trust the Lord Jesus to be [their] Savior from sin," *ibid.* The dissenters and the Second Circuit say that the presence of such additional speech, because it is purely religious, transforms the Club's meetings into something different in kind from other, nonreligious activities that teach moral and character development. See *post,* at 4–5 (STEVENS, J., dissenting); *post,* at 4–5 (SOUTER, J., dissenting); 202 F. 3d, at 509–511. Therefore, the argument goes, excluding the Club is not viewpoint discrimination. I disagree.

Respondent has opened its facilities to any "us[e] pertaining to the welfare of the community, provided that such us[e] shall be nonexclusive and shall be opened to the general public." App. to Pet. for Cert. D1. Shaping the moral and character development of children certainly "pertain[s] to the welfare of the community." Thus, respondent has agreed that groups engaged in the endeavor of developing character may use its forum. The Boy Scouts, for example, may seek "to influence a boy's character, development and spiritual growth," App. N10–N11; cf. *Boy Scouts of America* v. *Dale,* 530 U. S. 640, 649 (2000) ("[T]he general mission of the Boy Scouts is clear: [t]o instill values in young people'" (quoting the Scouts' mission statement)), and a group may use Aesop's Fables to teach moral values, App. N11. When the Club attempted

to teach Biblical-based moral values, however, it was excluded because its activities "d[id] not involve merely a religious perspective on the secular subject of morality" and because "it [was] clear from the conduct of the meetings that the Good News Club goes far beyond merely stating its viewpoint." 202 F. 3d, at 510.

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, see *Boy Scouts of America* v. *Dale, supra, at* 649, 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.

In *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819 (1995), we struck down a similar viewpoint

restriction. There, a private student newspaper sought funding from a student-activity fund on the same basis as its secular counterparts. And though the paper printed such directly religious material as exhortations to belief, see *id.,* at 826 (quoting the paper's self-described mission "'to encourage students to consider what a personal relationship with Jesus Christ means'"); *id.,* at 865 (SOUTER, J., dissenting) ("'The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation'" (quoting the paper)); see also *id.,* at 865–867 (quoting other examples), we held that refusing to provide the funds discriminated on the basis of viewpoint, because the religious speech had been used to "provid[e] . . . a specific premise . . . from which a variety of subjects may be discussed and considered," *id.,* at 831 (opinion of the Court). The right to present a viewpoint based on a religion premise carried with it the right to defend the premise.

The dissenters emphasize that the religious speech used by the Club as the foundation for its views on morals and character is not just any type of religious speech– although they cannot agree exactly what type of religious speech it is. In JUSTICE STEVENS' view, it is speech "aimed principally at proselytizing or inculcating belief in a particular religious faith," *post,* at 1; see also *post,* at 5, n. 3. This does not, to begin with, distinguish *Rosenberger,* which also involved proselytizing speech, as the above quotations show. See also *Rosenberger, supra,* at 844 (referring approvingly to the dissent's description of the paper as a "wor[k] characterized by . . . evangelism"). But in addition, it does not distinguish the Club's activities from those of the other groups using respondent's forum– which have not, as JUSTICE STEVENS suggests, see *post,* at 2–3, been restricted to roundtable "discussions" of moral issues. Those groups may seek to inculcate children with their beliefs, and they may furthermore "recruit others to join

their respective groups," *post,* at 3. The Club must therefore have liberty to do the same, even if, as JUSTICE STEVENS fears without support in the record, see *post,* at 3, its actions may prove (shudder!) divisive. See *Lamb's Chapel,* 508 U. S., at 395 (remarking that worries about "public unrest" caused by "proselytizing" are "difficult to defend as a reason to deny the presentation of a religious point of view"); cf. *Lynch* v. *Donnelly,* 465 U. S. 668, 684–685 (1984) (holding that "political divisiveness" could not invalidate inclusion of crèche in municipal Christmas display); *Cantwell* v. *Connecticut,* 310 U. S., at 310–311.

JUSTICE SOUTER, while agreeing that the Club's religious speech "may be characterized as proselytizing," *post,* at 5, n. 3, thinks that it is even more clearly excludable from respondent's forum because it is essentially "an evangelical service of worship," *post,* at 5. But we have previously rejected the attempt to distinguish worship from other religious speech, saying that "the distinction has [no] intelligible content," and further, no "*relevance*" to the constitutional issue. *Widmar* v. *Vincent,* 454 U. S. 263, 269, n. 6 (1981); see also *Murdock* v. *Pennsylvania,* 319 U. S., at 109 (refusing to distinguish evangelism from worship).[3] Those holdings are surely proved correct today by the dissenters' inability to agree, even between themselves, into which subcategory of religious speech the Club's activities fell. If the distinction did have content, it would be

[3] We *have* drawn a different distinction– between religious speech generally and speech about religion– but only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic. See *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203, 225 (1963) (State schools in their official capacity may not teach religion but may teach about religion). Whatever the rule there, licensing and monitoring private religious speech is an entirely different matter, see, *e.g., Kunz* v. *New York,* 340 U. S. 290, 293–294 (1951), even in a limited public forum where the state has some authority to draw subject-matter distinctions.

beyond the courts' competence to administer. *Widmar* v. *Vincent, supra,* at 269, n. 6; cf. *Lee* v. *Weisman,* 505 U. S. 577, 616–617 (1992) (SOUTER, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology"). And if courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable. See, *e.g., Rosenberger* v. *Rector and Visitors of Univ. of Va., supra,* at 844–845; *Widmar* v. *Vincent, supra,* at 269, n. 6. I will not endorse an approach that suffers such a wondrous diversity of flaws.

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With these words of explanation, I join the opinion of the Court.