

SOUTER, J., dissenting

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 SOUTER, with whom JUSTICE GINSBURG joins,
dissenting.

The majority rules on two issues. First, it decides that the Court of Appeals failed to apply the rule in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993), which held that the government may not discriminate on the basis of viewpoint in operating a limited public forum. The majority applies that rule and concludes that Milford violated *Lamb's Chapel* in denying Good News the use of the school. The majority then goes on to determine that it would not violate the Establishment Clause of the First Amendment for the Milford School District to allow the Good News Club to hold its intended gatherings of public school children in Milford's elementary school. The majority is mistaken on both points. The Court of Appeals unmistakably distinguished this case from *Lamb's Chapel*, though not by name, and accordingly affirmed the application of a policy, unchallenged in the District Court, that Milford's public schools may not be used for religious purposes. As for the applicability of the Establishment Clause to the Good News Club's intended use of Milford's school, the majority commits error even in reaching the issue, which was addressed neither by the Court of Appeals nor by the District Court. I respectfully dissent.

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I

Lamb's Chapel, a case that arose (as this one does) from application of N. Y. Educ. Law §414 (McKinney 2000) and local policy implementing it, built on the accepted rule that a government body may designate a public forum subject to a reasonable limitation on the scope of permitted subject matter and activity, so long as the government does not use the forum-defining restrictions to deny expression to a particular viewpoint on subjects open to discussion. Specifically, *Lamb's Chapel* held that the government could not “permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.” 508 U. S., at 393–394.

This case, like *Lamb's Chapel*, properly raises no issue about the reasonableness of Milford's criteria for restricting the scope of its designated public forum. Milford has opened school property for, among other things, “instruction in any branch of education, learning or the arts” and 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.” App. to Pet. for Cert. D1–D3. But Milford has done this subject to the restriction that “[s]chool premises shall not be used . . . for religious purposes.” *Id.*, at D2. As the District Court stated, Good News did “not object to the reasonableness of [Milford]'s policy that prohibits the use of [its] facilities for religious purposes.” *Id.*, at C14.

The sole question before the District Court was, therefore, whether, in refusing to allow Good News's intended use, Milford was misapplying its unchallenged restriction in a way that amounted to imposing a viewpoint-based restriction on what could be said or done by a group entitled to use the forum for an educational, civic, or other permitted purpose. The question was whether Good News

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was being disqualified when it merely sought to use the school property the same way that the Milford Boy and Girl Scouts and the 4–H Club did. The District Court held on the basis of undisputed facts that Good News’s activity was essentially unlike the presentation of views on secular issues from a religious standpoint held to be protected in *Lamb’s Chapel*, see App. to Pet. for Cert. C29–C31, and was instead activity precluded by Milford’s unchallenged policy against religious use, even under the narrowest definition of that term.

The Court of Appeals understood the issue the same way. See 202 F. 3d 502, 508 (CA2 2000) (Good News argues that “to exclude the Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination”); *id.*, at 509 (“The crux of the Good News Club’s argument is that the Milford school’s application of the Community Use Policy to exclude the Club from its facilities is not viewpoint neutral”).¹ The Court of Appeals also realized that the *Lamb’s Chapel* criterion was the appropriate measure: “The activities of the Good News Club do not involve merely a religious perspective on the secular subject of morality.” 202 F. 3d, at 510. Cf. *Lamb’s Chapel*, *supra*, at 393 (district could not exclude “religious standpoint” in discussion on childrearing and family values, an undisputed “use for

¹ The Court of Appeals held that any challenge to the policy’s reasonableness was foreclosed by its own precedent, 202 F. 3d 502, 509 (CA2 2000), a holding the majority leaves untouched, see *ante*, at 7 (“[W]e need not decide whether it is unreasonable in light of the purposes served by the forum”); cf. *ante*, at 7, n. 2 (“Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law”). In any event, the reasonableness of the forum limitation was beyond the scope of the appeal from summary judgment since the District Court had said explicitly that the religious use limitation was not challenged.

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social or civic purposes otherwise permitted” under the use policy).² The appeals court agreed with the District Court that the undisputed facts in this case differ from those in *Lamb’s Chapel*, as night from day. A sampling of those facts shows why both courts were correct.

Good News’s classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that “[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him. . . . If you have received the Lord Jesus as your Saviour from sin, you belong to God’s special group— His family.” App. to Pet. for Cert. C17–C18 (ellipsis in original). The lesson plan instructs the teacher to “lead a child to Christ,” and, when reading a Bible verse, to “[e]mphasize that this verse is from the Bible, God’s Word” and is “important— and true— because God said it.” The lesson further exhorts the teacher to “[b]e sure to give an opportunity for the ‘unsaved’ children in your class to respond to the Gospel” and cautions against “neglect[ing] this responsibility.” *Id.*, at C20.

While Good News’s program utilizes songs and games, the heart of the meeting is the “challenge” and “invitation,” which are repeated at various times throughout the lesson. During the challenge, “saved” children who “already believe in the Lord Jesus as their Savior” are challenged to “‘stop and ask God for the strength and the ‘want’ . . . to obey Him.’” *Ibid.* They are instructed that

“[i]f you know Jesus as your Savior, you need to place God first in your life. And if you don’t know Jesus as

²It is true, as the majority notes, *ante*, at 8, n. 3, that the Court of Appeals did not cite *Lamb’s Chapel* by name. But it followed it in substance, and it did cite an earlier opinion written by the author of the panel opinion here, *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F. 3d 207 (CA2 1997), which discussed *Lamb’s Chapel* at length.

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Savior and if you would like to, then we will— we will pray with you separately, individually. . . . And the challenge would be, those of you who know Jesus as Savior, you can rely on God’s strength to obey Him.”

Ibid.

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.’” *Id.*, at C21. The children are then instructed that

“[i]f you believe what God’s Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God’s Word how you can receive His everlasting life.” *Ibid.*

It is beyond question that 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.³ The

³The majority rejects Milford’s contention that Good News’s activities fall outside the purview of the limited forum because they constitute “religious worship” on the ground that the Court of Appeals made no such determination regarding the character of the club’s program, see *ante*, at 11, n. 4. This distinction is merely semantic, in light of the Court of Appeals’s conclusion that “[i]t is difficult to see how the Club’s activities differ materially from the ‘religious worship’ described” in other case law, 202 F. 3d, at 510, and the record below.

JUSTICE STEVENS distinguishes between proselytizing and worship, *ante*, at 1 (dissenting opinion), and distinguishes each from discussion reflecting a religious point of view. I agree with JUSTICE STEVENS that Good News’s activities may be characterized as proselytizing and

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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.” See *ante*, at 9. 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, in derogation of this Court’s proper role as a court of review. *E.g.*, *National Collegiate Athletic Assn. v. Smith*, 525 U. S. 459, 470 (1999) (“[W]e do not decide in the first instance issues not decided below”).

The Court’s usual insistence on resisting temptations to convert itself into a trial court and on remaining a court of

therefore as outside the purpose of Milford’s limited forum, *ante*, at 5. Like the Court of Appeals, I also believe Good News’s meetings have elements of worship that put the club’s activities further afield of Milford’s limited forum policy, the legitimacy of which was unchallenged in the summary judgment proceeding.

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review is not any mere procedural nicety, and my objection to turning us into a district court here does not hinge on a preference for immutable procedural rules. Respect for our role as a reviewing court rests, rather, on recognizing that this Court can often learn a good deal from considering how a district court and a court of appeals have worked their way through a difficult issue. It rests on recognizing that an issue as first conceived may come to be seen differently as a case moves through trial and appeal; we are most likely to contribute something of value if we act with the benefit of whatever refinement may come in the course of litigation. And our customary refusal to become a trial court reflects the simple fact that this Court cannot develop a record as well as a trial court can. If I were a trial judge, for example, I would balk at deciding on summary judgment whether an Establishment Clause violation would occur here without having statements of undisputed facts or uncontradicted affidavits showing, for example, whether Good News conducts its instruction at the same time as school-sponsored extracurricular and athletic activities conducted by school staff and volunteers, see Brief for Respondent 6; whether any other community groups use school facilities immediately after classes end and how many students participate in those groups; and the extent to which Good News, with 28 students in its membership, may “dominate the forum” in a way that heightens the perception of official endorsement, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 851 (1995) (O’CONNOR, J., concurring); see also *Widmar v. Vincent*, 454 U. S. 263, 274 (1981). We will never know these facts.

Of course, I am in no better position than the majority to perform an Establishment Clause analysis in the first instance. Like the majority, I lack the benefit that development in the District Court and Court of Appeals might provide, and like the majority I cannot say for sure how

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complete the record may be. I can, however, speak to the doubtful underpinnings of the majority's conclusion.

This Court has accepted the independent obligation to obey the Establishment Clause as sufficiently compelling to satisfy strict scrutiny under the First Amendment. See *id.*, at 271 (“[T]he interest of the [government] in complying with its constitutional obligations may be characterized as compelling”); *Lamb’s Chapel*, 508 U. S., at 394. 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. See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 777 (1995) (O’CONNOR, J., concurring). 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*. *Ante*, at 13. In fact, the majority is in no position to say that, for the principal grounds on which we based our Establishment Clause holdings in those cases are clearly absent here.

In *Widmar*, we held that the Establishment Clause did not bar a religious student group from using a public university’s meeting space for worship as well as discussion. As for the reasonable observers who might perceive government endorsement of religion, we pointed out that the forum was used by university students, who “are, of course, young adults,” and, as such, “are less impressionable than younger students and should be able to appreciate that the University’s policy is one of neutrality toward religion.” 454 U. S., at 274, n. 14. To the same effect, we remarked that the “large number of groups meeting on campus” negated “any reasonable inference of University support from the mere fact of a campus meeting place.” *Ibid.* Not only was the forum “available to a broad class of nonreligious as well as religious speakers,” but there were, in fact, over 100 recognized student groups at the Univer-

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sity, and an “absence of empirical evidence that religious groups [would] dominate [the University’s] open forum.” *Id.*, at 274–275; see also *id.*, at 274 (“The provision of benefits to so broad a spectrum of groups is an important index of secular effect”). And if all that had not been enough to show that the university-student use would probably create no impression of religious endorsement, we pointed out that the university in that case had issued a student handbook with the explicit disclaimer that “the University’s name will not be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members.” *Id.*, at 274, n. 14.

Lamb’s Chapel involved an evening film series on child-rearing open to the general public (and, given the subject matter, directed at an adult audience). See 508 U. S., at 387, 395. There, school property “had repeatedly been used by a wide variety of private organizations,” and we could say with some assurance that “[u]nder these circumstances . . . there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed” *Id.*, at 395.

What 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.⁴ The Establishment Clause cases have

⁴It is certainly correct that parents are required to give permission for their children to attend Good News’s classes, see *ante*, at 14, (as parents are often required to do for a host of official school extracurricular activities), and correct that those parents would likely not be confused as to the sponsorship of Good News’s classes. But the proper focus of concern in assessing effects includes the elementary school pupils who are invited to meetings, Lodging, Exh. X2, who see peers heading into classrooms for religious instruction as other classes end, and who are addressed by the “challenge” and “invitation.”

The fact that there may be no evidence in the record that individual

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consistently recognized the particular impressionability of schoolchildren, see *Edwards v. Aguillard*, 482 U. S. 578, 583–584 (1987), and the special protection required for those in the elementary grades in the school forum, see *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 620, n. 69 (1989). We have held the difference between college students and grade school pupils to be a “distinction [that] warrants a difference in constitutional results,” *Edwards v. Aguillard*, *supra*, at 584, n. 5 (internal quotation marks and citation omitted).

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*. See also *Rosenberger*, 515 U. S., at 850, 836–837. 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. See also *Rosenberger*, 515 U. S., at 850 (“Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical”); *id.*, at 836–837, 850 (emphasizing the array of university-funded magazines containing “widely divergent viewpoints” and the fact that believers in Christian evan-

 students were confused during the time the Good News Club met on school premises pursuant to the District Court’s preliminary injunction is immaterial, cf. Brief for Petitioners 38. As JUSTICE O’CONNOR explained in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753 (1995), the endorsement test does not focus “on the actual perception of individual observers, who naturally have differing degrees of knowledge,” but on “the perspective of a hypothetical observer.” *Id.*, at 779–780 (opinion concurring in part and concurring in judgment).

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gelism competed on equal footing in the University forum with aficionados of “Plato, Spinoza, and Descartes,” as well as “Karl Marx, Bertrand Russell, and Jean-Paul Sartre”); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U. S. 226, 252 (1990) (plurality opinion) (“To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion”).

The timing and format of Good News’s gatherings, on the other hand, may well affirmatively suggest the *impri-matur* 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 is, seemingly, the only one whose instruction follows immediately on the conclusion of the official school day. See Brief for National School Boards Association et al. as *Amici Curiae* 6. Although school is out at 2:56 p.m., Good News apparently requested use of the school beginning at 2:30 on Tuesdays “during the school year,” so that instruction could begin promptly at 3:00, see Lodging, Exh. W-1, at which time children who are compelled by law to attend school surely remain in the building. Good News’s religious meeting follows regular school activities so closely that the Good News instructor must wait to begin until “the room is clear,” and “people are out of the room,” App. P29, before starting proceedings in the classroom located next to the regular third- and fourth-grade rooms, *id.*, at N12. 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. *Id.*, at P12; Lodging, Exh. AA2.

Even on the summary judgment record, then, a record

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lacking whatever supplementation the trial process might have led to, and devoid of such insight as the trial and appellate judges might have contributed in addressing the Establishment Clause, we can say this: 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. Thus, the facts we know (or think we know) point away from the majority's conclusion, and while the consolation may be that nothing really gets resolved when the judicial process is so truncated, that is not much to recommend today's result.