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## The Supreme Court 2000 Term--Leading Cases, Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001)

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fining rights in individual and aggregate terms<sup>73</sup> to the practical critique that the Court's "messianic delusions about its ability to perfect the process through judicial intercession" will hamstring legislatures attempting to redraw boundaries following the 2000 census<sup>74</sup> — the virtue of the Court's jurisprudence lay in its willingness to delve candidly into the role that race should play in politics. Indeed, the distinction previously traced by the Court between political intent and predominant racial intent, while marred by the thorny practical problem of proving intent, offers an unambiguous normative view of how race and politics *should* intersect. By contrast, the *Cromartie II* Court seems to have radically reduced the scrutiny applied to legislative districting decisions without offering one whit of discussion of why such a change is preferable.

Since the Court disregarded Justice Frankfurter's aversion to the "political thicket"<sup>75</sup> by hearing an apportionment challenge in *Baker v. Carr*,<sup>76</sup> the judiciary has acted as the central forum for exploring and resolving questions about the democratic process.<sup>77</sup> Every pronouncement that the Court makes in this role evinces a particular understanding of how democracy should work.<sup>78</sup> Against this backdrop, *Cromartie II*'s bow to formalism — effectively jettisoning the debate over the proper role race should play in the redistricting process by rendering *Shaw II* inapplicable whenever two empty conditions are satisfied — is most objectionable. If a majority of the Court wishes to overturn *Shaw II*, it should do so explicitly.

### *E. Establishment Clause*

*Religious Speech.* — After the Supreme Court held in *Widmar v. Vincent*<sup>1</sup> that state universities could not constitutionally deny religious

<sup>73</sup> See, e.g., Gerken, *supra* note 6.

<sup>74</sup> Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 763 (1998).

<sup>75</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

<sup>76</sup> 369 U.S. 186, 209 (1962).

<sup>77</sup> Whether the Court lacks institutional competence in this arena is a separate question. Justice Thomas offered perhaps the seminal exposition of the argument that the Court should extricate itself from the thicket in his concurrence in *Holder v. Hall*, 512 U.S. 874, 891 (1994). See *id.* at 901–02 (“[A]n infinite number of theories of effective suffrage, representation, and the proper apportionment of political power in a representative democracy . . . could be drawn upon to [define how democracy should work]. . . . [S]uch matters of political theory are beyond the ordinary sphere of federal judges. And that is precisely the point.” (citations omitted)).

<sup>78</sup> Cf. Lani Guinier, *The Supreme Court, 1993 Term—Comment: [E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 121–23 (1994) (arguing that Justice Thomas’s declaration in *Holder* that he wished to limit federal intervention in local elections to avoid choosing between competing political theories itself “rests on a particular political theory[:] that political equality is satisfied by the simple condition of universal suffrage”).

<sup>1</sup> 454 U.S. 263 (1981).

groups access to facilities generally available to student groups,<sup>2</sup> a number of school districts authored access policies that were designed to create “limited public forums.”<sup>3</sup> These policies delineated the categories of activities for which school property could be used, and indicated that religious activities were not among them.<sup>4</sup> In *Lamb’s Chapel v. Center Moriches Union Free School District*,<sup>5</sup> however, the Supreme Court struck a blow to the notion that school districts could employ the limited public forum approach to exclude religious activities from their facilities. There, a unanimous Court held that once a school district had allowed access to its facilities for discussions relating to family issues and child rearing, its exclusion of a group seeking to discuss such issues from a religious standpoint violated that group’s free speech rights.<sup>6</sup> Last Term, in *Good News Club v. Milford Central School*,<sup>7</sup> the Court went further, holding that once a school has opened its doors to activities relating to character development, even the prohibition of activities that involve religious instruction amounts to viewpoint discrimination.<sup>8</sup> The Court’s *Good News* decision indicates that the limited public forum doctrine has essentially run its course as a rationale for a school’s exclusion of religious activities from its facilities, and demonstrates the need for a more fact-intensive, context-specific endorsement test to determine when the Establishment Clause justifies such exclusions.

In 1992, the Milford Central School District (Milford) adopted a “Community Use Policy” governing the usage of its school facilities by district residents.<sup>9</sup> This policy, adopted pursuant to section 414 of the New York Education Law,<sup>10</sup> stated that district residents could use the Milford school building for social, civic, and recreational meetings, en-

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<sup>2</sup> See *id.* at 277.

<sup>3</sup> When the state establishes a limited public forum, in contrast to a traditional or open public forum, it may exclude speech from that forum as long as that restriction is reasonable and viewpoint neutral. See, e.g., *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>4</sup> See, e.g., *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1369 (3d Cir. 1990) (stating that in 1988, defendant school district had adopted guidelines that granted access only “to those organizations, groups, and activities which are compatible with the mission and function of the school system” and prohibited the use of school facilities for religious services or the distribution of religious literature); *Wallace v. Washoe County Sch. Dist.*, 818 F. Supp. 1346, 1350 (D. Nev. 1991) (stating that from 1982 to 1986, defendant school district had adopted a policy whereby “[c]ommunity groups shall be permitted and encouraged to use school facilities for worthwhile purposes provided that . . . the use thereof is not for a religious purpose” (alteration in original) (quoting Washoe County School District Administrative Regulation 1330) (internal quotation marks omitted)).

<sup>5</sup> 508 U.S. 384 (1993).

<sup>6</sup> *Id.* at 396–97.

<sup>7</sup> 121 S. Ct. 2093 (2001).

<sup>8</sup> *Id.* at 2101, 2107.

<sup>9</sup> *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 504 (2d Cir. 2000).

<sup>10</sup> N.Y. EDUC. LAW § 414 (McKinney 2000).

tainment events, and other uses relating to the welfare of the community, as long as such uses were nonexclusive and open to the general public.<sup>11</sup> The policy further stated that "school premises shall not be used by any individual or organization for religious purposes."<sup>12</sup>

On September 22, 1996, the organizers and instructors of the Good News Club (Club), an organization overseen and supported by the Child Evangelism Fellowship, formally requested permission to use the Milford school cafeteria from 3:00 p.m. to 4:00 p.m. to hold its weekly meetings.<sup>13</sup> These meetings are attended by children ranging in age from six to twelve,<sup>14</sup> and consist of an opening prayer, the singing of Christian songs, the recital of biblical verses, a discussion of a Bible reading, and a closing prayer.<sup>15</sup> During each meeting, the instructor "challenges" the "saved" children to "[s]top and ask God for the strength and the want . . . to obey Him," while encouraging "unsaved" children to accept Jesus as their savior.<sup>16</sup>

The Milford superintendent denied the Club's application.<sup>17</sup> The Club, Darleen Fournier (a Club instructor), and her seven-year-old daughter Andrea Fournier filed suit in the Northern District of New York under both 42 U.S.C. § 1983 (for violations of their free speech and equal protection rights) and the Religious Freedom Restoration Act of 1993 (RFRA).<sup>18</sup> They successfully moved for a preliminary injunction against Milford's ban.<sup>19</sup> The district court, however, vacated the injunction and granted Milford's motion for summary judgment.<sup>20</sup> Noting the parties' stipulation that Milford was operating a limited public forum,<sup>21</sup> the court stated that the crucial question was whether the Club's meetings fell within the scope of activities allowed in that forum.<sup>22</sup> The court concluded that they did not, finding that the Club

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<sup>11</sup> *Good News*, 202 F.3d at 504.

<sup>12</sup> *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147, 150 (N.D.N.Y. 1998).

<sup>13</sup> *Id.* at 149.

<sup>14</sup> *Good News*, 202 F.3d at 504.

<sup>15</sup> *Good News*, 21 F. Supp. 2d at 154.

<sup>16</sup> *Id.* at 156 (alterations in original) (quoting Def. Ex. 8) (internal quotation marks omitted).

<sup>17</sup> The superintendent explained that he viewed the Club's proposed activities as "the equivalent of religious worship, . . . rather than the expression of religious views or values on a secular subject." *Id.* at 152 (alteration in original) (quoting Letter from Robert McGruder, Interim Superintendent, Milford School District (October 3, 1996)) (internal quotation marks omitted). In making this statement, the superintendent was distinguishing the Club's activities from the type of activity at issue in *Lamb's Chapel*. See *id.*

<sup>18</sup> *Id.* at 150.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 161.

<sup>21</sup> *Id.* at 153.

<sup>22</sup> See *id.* at 154. The court did not consider the plaintiffs' RFRA claim, because the Supreme Court had already declared RFRA unconstitutional. *Id.* at 150 n.4.

was not simply offering a religious perspective on a secular subject matter, but dealing directly with a religious subject matter.<sup>23</sup>

The Second Circuit affirmed.<sup>24</sup> Writing for the majority, Judge Miner<sup>25</sup> found that the Club was “doing something other than simply teaching moral values . . . . [It was] focused on teaching children how to cultivate their relationship with God through Jesus Christ.”<sup>26</sup> The court also appealed to Second Circuit precedent upholding the constitutionality of school districts’ exclusions of groups engaging in religious worship and instruction.<sup>27</sup> Judge Jacobs dissented, arguing that the Club’s speech could be characterized as “the teach[ing of] morals from a religious perspective,” and that under *Lamb’s Chapel*, Milford’s exclusion of the Club amounted to viewpoint discrimination.<sup>28</sup>

The Supreme Court reversed and remanded.<sup>29</sup> Writing for the majority, Justice Thomas<sup>30</sup> stated that the case presented two questions: whether Milford had violated the Club’s free speech rights when it denied the Club access, and whether the Establishment Clause justified such a violation.<sup>31</sup> He argued that it was “quite clear that Milford engaged in viewpoint discrimination.”<sup>32</sup> He explained that Milford had opened its limited public forum to any group that “promote[s] the moral and character development of the children.”<sup>33</sup> He rejected the notion that the Club’s activities constituted “mere religious worship, divorced from any teaching of moral values,”<sup>34</sup> finding instead that the Club was “teach[ing] moral lessons from a Christian perspective through live storytelling and prayer.”<sup>35</sup> Accordingly, this case was “materially indistinguishable” from *Lamb’s Chapel*.<sup>36</sup>

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<sup>23</sup> *Id.* at 160.

<sup>24</sup> *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 511 (2d Cir. 2000).

<sup>25</sup> Judge Parker joined Judge Miner’s opinion.

<sup>26</sup> *Good News*, 202 F.3d at 510.

<sup>27</sup> See *id.* (referring to *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997), and *Full Gospel Tabernacle v. Community School District 27*, 979 F. Supp. 214 (S.D.N.Y. 1997), *aff’d*, 164 F.3d 829 (2d Cir. 1999)).

<sup>28</sup> *Id.* at 515 (Jacobs, J., dissenting) (alteration in original) (quoting *Good News*, 202 F.3d at 508) (internal quotation marks omitted).

<sup>29</sup> *Good News*, 121 S. Ct. at 2107.

<sup>30</sup> Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy joined Justice Thomas. Justice Breyer joined Justice Thomas in part.

<sup>31</sup> *Good News*, 121 S. Ct. at 2107.

<sup>32</sup> *Id.* at 2101.

<sup>33</sup> *Id.* (alteration in original) (quoting Brief for Appellee at 6, *Good News*, 202 F.3d 502 (2000) (No. 98-9494)) (internal quotation marks omitted).

<sup>34</sup> *Id.* at 2103 n.4.

<sup>35</sup> *Id.* at 2101.

<sup>36</sup> *Id.* at 2103 n.4. Similarly, Justice Thomas argued that the Court’s holding in *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), dictated a finding in favor of the Club. *Good News*, 121 S. Ct. at 2102. In *Rosenberger*, the Court held that a state university’s denial of funding to a club whose publication contained a Christian viewpoint was unconstitu-

Justice Thomas then rejected Milford's contention that the Club's presence would violate the Establishment Clause.<sup>37</sup> He noted that the Club was seeking "nothing more than to be treated neutrally and given access to speak about the same topics as are other groups."<sup>38</sup> He then attacked the notion that the Club's presence among elementary school students posed a special risk of coercion, given that the parents would decide whether their children attended Club meetings.<sup>39</sup> Finally, he moved to the endorsement inquiry. He questioned whether the students would likely misperceive school endorsement of the Club's activities, given that the Club meetings differed in appearance from elementary school classes.<sup>40</sup> He reasoned that even if some students were to misperceive endorsement, "we cannot say [that this] danger . . . 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."<sup>41</sup> He concluded that the Court should not enforce a "modified heckler's veto," whereby a religious activity could be prohibited merely "on the basis of what the youngest members of the audience might misperceive."<sup>42</sup>

Justice Scalia concurred. Agreeing that Milford had committed viewpoint discrimination, he disagreed that the Club's inclusion of "purely religious" speech transformed its meetings into "something different in kind from other, nonreligious activities that teach moral and character development."<sup>43</sup> He noted the Court's inability to agree on which category of religious speech the Club's activities fell into, arguing that such distinctions lack content and administrability.<sup>44</sup> Justice Scalia also rejected Milford's Establishment Clause argument, stating that the Club's presence posed no risk of coercion or endorsement.<sup>45</sup>

Justice Breyer concurred and joined in part of the Court's opinion. He stated that the Court's reversal of summary judgment should mean only that "*viewing the disputed facts* (including facts about the chil-

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tional viewpoint discrimination, in light of the university's practice of making funds generally available for extracurricular activities. *Rosenberger*, 515 U.S. at 828-37.

<sup>37</sup> *Good News*, 121 S. Ct. at 2103. As a preliminary matter, Justice Thomas noted that although the Court had previously determined that a state interest in avoiding an Establishment Clause violation could justify content-based discrimination, the Court had yet to rule on whether such an interest could also justify viewpoint-based discrimination. He explained, however, that since Milford had "no valid Establishment Clause interest" in the first place, the Court did not need to reach that issue. *Id.*

<sup>38</sup> *Id.* at 2104.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2106.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2109 (Scalia, J., concurring).

<sup>44</sup> *Id.* at 2110-11.

<sup>45</sup> *Id.* at 2107-08.

dren's perceptions) *favorably to the Club* (the nonmoving party), the school has not shown an Establishment Clause violation."<sup>46</sup> Justice Breyer argued that Milford still might be able to set forth evidence indicating an Establishment Clause violation, given the Court's previous statements regarding the importance of children's perceptions. The critical question, he reasoned, might well be "whether a child, participating in the Good News Club's activities, could reasonably perceive the school's permission for the [C]lub to use its facilities as an endorsement of religion."<sup>47</sup> He thus suggested that the Court should only have reversed Milford's summary judgment victory, rather than effectively granting summary judgment to the Club.<sup>48</sup>

Justice Stevens dissented, arguing that Milford had not committed viewpoint discrimination by denying access to the Club.<sup>49</sup> He stated that speech for "religious purposes" encompasses three different categories: speech that addresses a particular topic from a religious point of view (as in *Lamb's Chapel*); speech that is the equivalent of religious worship; and speech "that is aimed principally at proselytizing or inculcating belief in a particular religious faith."<sup>50</sup> This case, he explained, presented the question whether a school district could create a limited public forum allowing the *Lamb's Chapel* type of religious speech, but excluding the latter two categories, without committing viewpoint discrimination.<sup>51</sup> Arguing that such action should be permissible, he stated that a significant difference exists between *Lamb's Chapel*-type speech and religious proselytizing, just as a significant difference exists between meetings to discuss political issues and meetings "whose principal purpose is to recruit new members to join a political organization."<sup>52</sup> He concluded that the Club's activities constituted proselytizing, and thus fell outside of Milford's limited public forum.<sup>53</sup>

Justice Souter also dissented.<sup>54</sup> First, he stated that Milford had not engaged in viewpoint discrimination. He discussed at length the Club's typical meetings, and concluded that they constituted an "evangelical service of worship," rather than the discussion of a subject from a Christian point of view.<sup>55</sup> He suggested that the majority's "bland and general characterization of Good News's activity as 'teaching of

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<sup>46</sup> *Id.* at 2112 (Breyer, J., concurring).

<sup>47</sup> *Id.* at 2111.

<sup>48</sup> *Id.* at 2112.

<sup>49</sup> *See id.* at 2114 (Stevens, J., dissenting).

<sup>50</sup> *Id.* at 2112.

<sup>51</sup> *See id.* at 2113.

<sup>52</sup> *Id.*

<sup>53</sup> *See id.* at 2114. Justice Stevens also criticized the majority's decision to "reach out" and decide the Establishment Clause issue. *Id.* at 2114-15.

<sup>54</sup> Justice Ginsburg joined Justice Souter's dissent.

<sup>55</sup> *Id.* at 2117 (Souter, J., dissenting).

morals and character, from a religious standpoint” indicated that it was “ignor[ing] reality”; otherwise, “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.”<sup>56</sup> Justice Souter then criticized the majority for not remanding the Establishment Clause issue,<sup>57</sup> and indicated his disagreement with the merits of the majority’s Establishment Clause analysis. In his view, the “particular impressionability” of elementary schoolchildren, as well as the timing and format of the Club’s meetings, suggested that the Club’s presence might prompt children to perceive endorsement.<sup>58</sup>

When *Widmar* was first decided, its emphasis on the state university’s “open access” policy<sup>59</sup> seemed to leave room for the possibility that school districts could render *Widmar* inapplicable by narrowly defining the boundaries of their access policies.<sup>60</sup> The Court’s *Lamb’s Chapel* and *Good News* decisions, however, have illustrated the difficulties of using the limited public forum doctrine as a basis for excluding religious activities from schools with community access policies. *Good News* makes clear that once a school district has adopted an access policy permitting any sort of activity related to character development, religious clubs need only frame their activities in such terms to fall within the district’s limited public forum. Moreover, even activities consisting of straightforward religious worship would seem to fall within the scope of such limited forums, as long as their organizers can assert that the meetings relate to the teaching of moral values — an entirely predictable and reasonable claim. The majority noted that “the Club’s activities do not constitute mere religious worship, divorced from any teaching of moral values,”<sup>61</sup> but given the moral overtones often present in worship, it is unlikely that many instances of religious worship would meet this definition. Within the realm of the limited public forum doctrine, then, the “proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque” seems quite *unremarkable*.<sup>62</sup> If the criterion

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<sup>56</sup> *Id.* (quoting *Good News*, 121 S. Ct. at 2101).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2118–20.

<sup>59</sup> *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981) (stating that because the state university “had created a forum generally open for use by student groups,” any content-based exclusions must satisfy strict scrutiny).

<sup>60</sup> See *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 45–48 (1983) (stating that the open character of the university’s forum in *Widmar* rendered it “bound by the same standards as apply in a traditional public forum,” but that when a limited public forum has been created, “the constitutional right of access would . . . extend only to other entities of similar character”).

<sup>61</sup> *Good News*, 121 S. Ct. at 2103 n.4.

<sup>62</sup> See *id.* at 2117 (Souter, J., dissenting). Indeed, *Widmar* itself suggested that judges neither can nor should distinguish between worship and other forms of religious speech. See *Widmar*,



for entry is a relationship between the speech and character development, religious worship should be on the same footing as Bible clubs and other types of religious activities.

The nature of the religious speech at issue does, however, remain relevant to an Establishment Clause analysis, the second line of inquiry invoked in *Good News*. Indeed, in the wake of the Court's *Good News* ruling, the only remaining rationale for excluding any religious activities from school districts with community access policies such as Milford's — aside from activities that explicitly dissociate themselves from the teaching of moral values — is the potential of those activities to violate the Establishment Clause. This shift toward the Establishment Clause makes sense. The limited public forum doctrine rests on the ability to categorize various types of speech, a profoundly difficult inquiry in the context of religion. Indeed, forcing judges to place religious speech into predetermined categories, such as "religious perspectives on secular topics" and "religious instruction," requires them to act as theologians, engaging in abstract inquiries into the very nature of religion itself.<sup>63</sup> The Establishment Clause inquiry, by contrast, looks at each instance of religious speech on its own terms, thus providing a more effective analytical method for assessing which religious activities should be excluded from school facilities.

There is no denying, however, that the Establishment Clause inquiry is laden with its own complexities — in particular, the challenge of selecting and defining the appropriate standard for a violation. In its five opinions, the *Good News* Court invoked the endorsement test,<sup>64</sup> the neutrality test,<sup>65</sup> and the coercion test<sup>66</sup> in assessing whether the Club's presence violated the Establishment Clause. The endorsement test emerged as the dominant test, with the majority, Justice Breyer, and Justice Souter all devoting the bulk of their Establishment Clause

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454 U.S. at 269 n.6 (stating that distinctions between religious worship and other types of religious speech lack content, administrability, and relevance).

<sup>63</sup> See, e.g., *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 512 (2d Cir. 2000) (Jacobs, J., dissenting) (stating that "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters"); *id.* at 515 (noting that whether morality is "a subject that is secular by nature" is dependent "on one's point of view"); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 221 (2d Cir. 1997) (Cabrane, J., concurring in part and dissenting in part) (expressing skepticism of "the government's ability to draw distinctions between religious worship — or indeed religious instruction — and other forms of speech from a religious viewpoint that District # 10 has elected to allow," because "the very act of making such classifications may deeply — and unconstitutionally — entangle public officials in essentially theological determinations").

<sup>64</sup> *Good News*, 121 S. Ct. at 2104–06; *id.* at 2107–08 (Scalia, J., concurring); *id.* at 2111–12 (Breyer, J., concurring in part); *id.* at 2118–20 (Souter, J., dissenting).

<sup>65</sup> *Good News*, 121 S. Ct. at 2104.

<sup>66</sup> *Id.* at 2107 (Scalia, J., concurring).

discussions to this inquiry. The majority's application of the endorsement test, however, lacked the appropriate level of vigor.

As previously articulated by Justice O'Connor, the endorsement test has two key components. First, it is equally sensitive to government actions that would make either religious nonadherents or adherents feel isolated from the larger political community.<sup>67</sup> Second, in measuring whether messages of endorsement or disapproval of religion are being sent, it does not focus on the actual impressions of individual community members. Rather, it focuses on the perception of a hypothetical "reasonable observer"<sup>68</sup> in that community, to create a "collective standard to gauge the objective meaning of the [government's] statement in the community."<sup>69</sup> The endorsement test thus includes both objective and subjective elements: it is objective insofar as it does not focus on the impressions of specific individuals and subjective in that perception is the standard for Establishment Clause violations.

The majority's conclusory application of the endorsement test distorted both of these elements. It attempted a fact-specific inquiry into whether the Club's presence would lead Milford students to form an impression of endorsement, only to abandon that inquiry a mere paragraph later.<sup>70</sup> Justice Thomas explained that "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," and then promptly resolved the issue to avoid the latter danger.<sup>71</sup> Given that the endorsement test values both types of perceptions equally, the Court should have remanded the case for further factfinding on this issue. Instead, the Court found that the endorsement test favored the Club through two questionable moves.

First, in describing the adherent's impression of hostility as a "perception" and the nonadherent's impression of religious endorsement as a "misperception,"<sup>72</sup> the Court implied that the latter was less legiti-

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<sup>67</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 688 (O'Connor, J., concurring) (stating that the Establishment Clause is infringed by "government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message").

<sup>68</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

<sup>69</sup> *Id.* at 779 (alteration in original) (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)) (internal quotation marks omitted).

<sup>70</sup> *Good News*, 121 S. Ct. at 2106.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (stating that "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," and that "[w]e decline to employ Establishment Clause

mate than the former. This divergence in wording assumed its conclusion. Although the Court had already found that the exclusion of the Club constituted viewpoint discrimination, such that it would have been legitimate to perceive a violation of the Club's *free speech* rights,<sup>73</sup> the Court was ostensibly still in the process of considering whether the Establishment Clause justified that discrimination. Had the Court decided that the Establishment Clause did justify the club's exclusion, any perception that this prohibition signified a "hostility toward the religious viewpoint" would have been as much of a misperception as the counter-impression that the Club's presence signified endorsement of religion. A decision to exclude the Club would have resulted from concern about making nonadherents feel like outsiders in their school community, not from antipathy toward religion. Thus, the Court's implication ran afoul of the endorsement test's requirement that the perceptions of adherents and nonadherents be treated equally.

Second, the Court gave an unwarrantedly narrow reading of the endorsement test's requirement that the perception of endorsement be measured not by actual individuals, but by a hypothetical reasonable observer. The Court argued that it would not subject the Club to a "heckler's veto" based on what it seemed to view as the idiosyncratic impressions of children. Yet the Court had previously suggested in dicta that the average age of the community in question can appropriately play a role in the endorsement analysis,<sup>74</sup> and it should have heeded its own suggestion here. Although "[a]ny bystander could conceivably [have been] aware of the school's use policy,"<sup>75</sup> the young schoolchildren in the district were the individuals actually attending or

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jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what members of the audience might *misperceive*" (emphasis added)). It is true that the majority did not always refer to the potential perception of endorsement as a "misperception." *Id.* (stating that "[a]ny bystander . . . could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement," and that "[w]e cannot operate . . . under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity"). That the majority used the term at all, however, indicates the conclusory perspective with which it approached the inquiry.

<sup>73</sup> See *id.* at 2107 (noting that "we have already found that [the free speech] rights [of the Club and its members] have been violated, not merely perceived to have been violated, by the school's actions toward the Club").

<sup>74</sup> See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J.) (stating that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis"); *Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985) (stating that the endorsement inquiry "must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years"); *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.").

<sup>75</sup> *Good News*, 121 S. Ct. at 2106.

being invited to the Club's meetings, and thus their perceptions were critical. As such, it would have been consistent with the endorsement test to take into account the particular nature of the community at issue, and to adjust the prototypical "reasonable observer" appropriately.<sup>76</sup> It is entirely logical that under the endorsement test's community-focused standard, the same activity could constitute an Establishment Clause violation in an elementary school, but not in a secondary school or university.

Now that the limited public forum doctrine has largely run its course as a means of keeping religious activities out of public school facilities, the level of vigor with which the Establishment Clause is applied will be increasingly critical. Although the limited public forum doctrine cannot provide a coherent rationale for the exclusion of religious activities from public school facilities, the endorsement test can provide a logical approach: rather than stepping into the shoes of moral philosophers, judges should instead put themselves in the shoes of "reasonable" students of the age in question, an inquiry that can be aided by various sources of objective evidence. Depending on the students' ages, the time and place at which the religious speech occurs, and other concrete factors, courts' approaches to the question may well vary from case to case.<sup>77</sup> Such a fact-specific approach, however, represents a more intellectually coherent way of evaluating this complex issue than attempting to draw elusive distinctions between categories of religious speech or viewing children's impressions of endorsement as mere "misperceptions" that do not pose a real danger to the principles underlying the Establishment Clause.

### *F. Freedom of Speech and Expression*

1. *Publication of Illegally Obtained Information.* — Can the media be punished for publishing truth? Not only has the Supreme Court long shied away from answering what has fairly been called media law's "ultimate question,"<sup>1</sup> but it has repeatedly hinted that it never

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<sup>76</sup> Despite the majority's suggestion, *see id.*, such an adjustment does not depart from Justice O'Connor's statement that the hypothetical reasonable observer should be presumed aware of the "history and context of the community and forum in which the religious display appears." *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment). Rather, what constitutes a "reasonable" level of awareness should itself be viewed as a variable factor that depends on the age of the community.

<sup>77</sup> *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (stating that "[e]very government practice must be judged in its own unique circumstances to determine whether it constitutes an endorsement or disapproval of religion"); *Spacco v. Bridgewater Sch. Dep't*, 722 F. Supp. 834, 840 (D. Mass. 1989) (explaining that whether government conduct impermissibly sends a message of endorsement "depends significantly upon its context. Thus, each case must be determined upon its unique facts" (citation omitted)).

<sup>1</sup> *Fla. Star v. B.J.F.*, 491 U.S. 524, 532 (1989).