RECENT DEVELOPMENTS

JURIS DOCTORES OR DOCTORES DIVINITATIS: *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

Ever since it proclaimed that there is a difference between content-based and viewpoint-based discrimination,[1] the Supreme Court has struggled to explain what that difference actually is. The Court has ruled repeatedly that the Free Speech Clause prohibits a State from restricting a speaker's access to a limited public forum on the basis of his viewpoint,[2] but at the same time it has stipulated that the State may impose restrictions on content so long as they are reasonable in light of the purposes served by the forum.[3] In consequence, the Court must often divine whether the government's decision to prevent a group from gaining access to a limited public forum constitutes content-based or viewpoint-based discrimination—a task made all the more difficult when the group seeking access to a limited public forum brings a host of establishment-clause worries in tow.[4] Recently, in *Good News Club v. Milford Central School*,[5] a divided Court held that a public school that opened its facilities to groups teaching morals and character development engaged in impermissible viewpoint-based discrimination when it refused to allow a Bible club to use its facilities. Although the Court decided the case correctly, it needlessly attempted the Sisyphean task of distinguishing viewpoint-based from content-based discrimination. It could have reached the same ruling using less problematic reasoning.

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1. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

2. *See, e.g., Rosenberger*, 515 U.S. at 829; *Lamb's Chapel*, 508 U.S. at 384; Widmar v. Vincent, 454 U.S. 263 (1981); *cf.* Texas v. Johnson, 491 U.S. 397, 414-415 (1989) (holding that the state's regulation of flag burning was a reasonable restriction on content).

3. *See, e.g.*, Cornelius v. NAACP Legal Defence & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); United States v. Kokinda, 497 U.S. 720 (1990).

4. *See, e.g., Lamb's Chapel*, 508 U.S. at 384; *Rosenberger*, 515 U.S. at 829; *Widmar*, 454 U.S. at 263.

5. 533 U.S. 98 (2001).

In 1992, Milford Central School ("Milford") adopted a policy opening its facilities to public use.[6] According to this policy, district residents could use the school for "instruction in any branch of education, learning or the arts," or for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community."[7] The policy also prohibited use of the school's facilities "by any individual organization for religious purposes."[8]

In September 1996, Milford residents Stephen and Darleen Fournier sought permission from the Milford superintendent to hold meetings of the Good News Club, a private Christian organization, in the school cafeteria.[9] The superintendent, however, denied the Fourniers' application on the grounds that allowing the Club to use the school facilities for singing songs, hearing a Bible lesson and memorizing scripture would violate Milord's policy prohibiting use of the school facilities for religious purposes.[10] A few months later, the Milford Board of Education, upon further reviewing the Club's materials, formally rejected the Club's request.[11]

In March 1997, Ms. Fournier, her daughter, and Good News Club (collectively, "the Club") sued Milford in a United States District Court, alleging pursuant to 42 U.S.C. § 1983 that Milford had violated their free speech rights under the First Amendment and their equal protection rights under the Fourteenth Amendment.[12] In August 1998, the District Court granted Milford's motion for summary judgment, and rejected both the Club's free speech and equal protection claims.[13] The court found[14] that when the school opened its facilities for public use, it created a limited public forum under the forum analysis advanced in *Perry Education Ass'n v. Perry Local Educators' Ass'n.*[15] Applying Perry, the court concluded that any

6. Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147 (N.D.N.Y. 1998).
7. *Id.* at 149.
8. *Id.* at 150
9. *Id.* at 149.
10. *Id.*
11. *Id.*
12. *Id.* at 150.
13. *Id.*
14. *Id.*
15. 460 U.S. 37, 46 (1983); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); *cf.* Cornelius v. NAACP Legal Defence & Educ. Fund, Inc., 473 U.S. 788 (1985) (finding that use of government property is not sufficient

restrictions on the uses to which the forum can be put must be both reasonable and viewpoint neutral.[16] The court went on to point out that, unlike all the organizations that Milford did permit to use its facilities, the Club provided religious instruction and prayer. Thus, concluded the court, Milford was not engaging in viewpoint-based discrimination when it denied the Fourniers' request, but was merely enforcing its policy prohibiting use of its facilities for religious purposes.[17]

Upon appeal, a divided panel of the Second Circuit affirmed.[18] Writing for the majority, Judge Miner agreed with the district court that Milford's refusal to allow the Club to use its facilities did not constitute viewpoint-based discrimination,[19] and also rejected the Club's contention that Milford's policy barring any individual or organization from using its facilities for religious purposes was an unreasonable restriction.[20] Writing in dissent, however, Judge Jacobs found[21] that under the rule of *Lamb's Chapel v. Center Moriches Union Free School District*,[22] Milford had indeed engaged in viewpoint-based discrimination.

The Supreme Court granted certiorari and in a 5-4 decision[23] reversed the Second Circuit's ruling. Justice Thomas, writing for the majority, held that not only did Milford violate the Club's free speech rights, but also that had it allowed the Club access to school facilities, it would not have violated the Establishment Clause of the First Amendment.[24] First, Justice Thomas argued that because the Club taught morals and character development, albeit from a religious perspective, Milford's attempt to exclude the Club from using school facilities constituted viewpoint-based discrimination.[25] In this respect, according to Justice Thomas, the case was

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without a public use of the property); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

16. *Good News Club*, 21 F. Supp. 2d at 153.

17. *Id.* at 160.

18. Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d Cir. 2000).

19. *Id.* at 510.

20. *Id.* at 509.

21. *Id.* at 512.

22. 508 U.S. 384 (1993).

23. 533 U.S. 98 (2001). Rehnquist, C.J., Kennedy, J. and O'Connor, J. joined Justice Thomas' opinion.

24. *Id.* at 2097.

25. *Id.* at 2100.

indistinguishable from *Lamb's Chapel* and *Rosenberger v. Rector and Visitors of Univ. of Va.*,[26] in which the Court had ruled that a public educational institution had violated a religious group's free speech rights by refusing to extend it the same privileges as non-religious but otherwise similar groups.[27]

Second, Justice Thomas found[28] that the Court had already rejected establishment-clause defenses similar to Milford's in *Lamb's Chapel* and *Widmar v. Vincent*.[29] There was no realistic danger, according to Justice Thomas, that the relevant community would perceive Milford to be endorsing religion,[30] and, furthermore, given that the Club was merely asking to be treated neutrally with respect to its religion, it would be difficult to show that granting its request would violate the Establishment Clause.[31] Finally, Justice Thomas argued that the impressionability of children did not bear any relevance to the establishment-clause issue in this case, and, even if it did, would not have supported Milford's establishment-clause defense.[32]

Concurring with Justice Thomas's opinion, Justice Scalia agreed that Milford would not have violated the Establishment Clause had it granted the Club's request to use its facilities.[33] The possibility that students might pressure each other to participate in the Club's activities would not affect the majority's establishment-clause ruling, he argued, because peer pressure is protected by the freedom of association guaranteed by the First Amendment.[34] In addition, religious expression that is purely private and that occurs in a public forum open to all on equal terms cannot violate the Establishment Clause.[35] Finally, Justice Scalia offered an additional argument for rejecting the contention that the Club's religious activities could be distinguished from its teaching of morals and character development: if one is to teach morality from a religious

26. *Rosenberger*, 515 U.S. at 819.
27. *Good News Club*, 121 S. Ct. at 2100-01.
28. *Id.* at 2103.
29. Widmar v. Vincent, 454 U.S. 263, 270-71 (1981).
30. *Good News Club*, 121 S. Ct. at 2104.
31. *Id.*
32. *Id.*
33. *Id.* at 2107.
34. *Id.*
35. *Id.* at 2107-08.

perspective, Justice Scalia reasoned, one must also explain what that religious perspective is and why it is true; otherwise, the force of one's moral teachings is lost. The Club's quintessentially religious activities, therefore, were essential to its instruction in morals.[36]

Justice Breyer concurred in part with the majority,[37] but offered three observations. First, neutrality with respect to religion is only one factor in determining whether the State violates the Establishment Clause.[38] Second, children's impressionability may indeed be relevant in deciding an establishment-clause issue.[39] Finally, Justice Breyer argued, the Court should not have even made an establishment-clause ruling given that none had been made by any of the lower courts. None of the parties, Justice Breyer pointed out, had had a chance to discover facts relevant to any establishment-clause issue, and thus the majority ignored the possibility that there may have arisen a disputed issue of material fact.[40] Justice Breyer concluded by accusing the majority of pointing to facts and interpretations that were not in evidence.[41]

Writing in dissent, Justice Stevens argued that, contrary to the majority's opinion, one could indeed distinguish between purely religious activities and instruction in morals from a religious perspective.[42] Justice Stevens enumerated three categories of religious speech: speech from a religious point of view, worship, and proselytizing.[43] In a limited public forum, he continued, the State could not exclude the first type, but it could reasonably exclude the latter two in order to preserve the purposes of the forum.[44] Milford, for example, may have had an interest in excluding divisive activities like proselytizing.[45] Finally, although Justice Stevens conceded that the case was "close," he concluded that the Club's activities crossed the line

36. *Id.* at 2109.
37. *Id.* at 2111.
38. *Id.*
39. *Id.*
40. *Id.* at 2111-12.
41. *Id.* at 2112.
42. *See id.*
43. *Id.*
44. *Id.* at 2113-14.
45. *Id.* at 2113.

from mere moral instruction to religious proselytizing.[46]

Justice Souter also dissented, arguing, first, that Milford did not violate the Free Speech Clause,[47] second, that the Court ought not to have decided the establishment-clause question,[48] and, third, that the Court's reasoning on the establishment-clause question was, in any case, misguided.[49] Asserting that the Club did not object to the reasonableness of Milford's policy prohibiting use of its facilities for religious purposes,[50] Justice Souter argued that the Club did not merely teach morals and character development, but led "an evangelical service of worship calling children to commit themselves in an act of Christian conversion," and thus did seek to use the school facilities for religious purposes.[51] Justice Souter then iterated Justice Steven's point that, as a court of review, the Supreme Court should have remanded the case to a trial court before holding the Milford had no interest in avoiding an establishment-clause violation.[52] Finally, Justice Souter argued that the impressionability of children, the relatively small number of groups that used the school facilities, and the propinquity of the Club's meetings to the end of the school day all suggested that the Club may well have caused the school's students to view Milford as endorsing religion.[53]

Although the majority in Good News Club was correct to rule in the Club's favor, it made imperfect use of the Court's previous decisions. As all the Justices agreed, if a government creates a limited public forum, it may restrict the uses to which the forum may be put, but only if the government does not discriminate on the basis of viewpoint[54] and its restrictions are reasonable in light of the forum's purpose.[55] Rather than determine first that Milford had engaged in viewpoint-based discrimination and then decline to inquire into whether

46. *Id.* at 2114.
47. *Id.* at 2115-17.
48. *Id.* at 2117.
49. *Id.* at 2118.
50. *Id.* at 2115. The Second Circuit, however, had indeed ruled that Milford's policy was reasonable. *Good News Club*, 202 F.3d at 509.
51. *Good News Club*, 121 S.Ct. at 2117.
52. *Id.*
53. *Id.* at 2019-20.
54. *Cornelius*, 473 U.S. at 806.
55. *Id.*

Milford's restrictions were reasonable, the Court should have determined first that Milford's restrictions were unreasonable and then declined to inquire into whether Milford had engaged in viewpoint-based discrimination. As it stands, the majority's reasoning is only as strong as the distinction between content-based and viewpoint-based discrimination is tenable, which, as it turns out, is not very. Furthermore, there is a sound argument that Milford's policy was unreasonable, as Justice Souter—perhaps unwittingly—suggests in his dissent. Had the Court concluded that it was unreasonable for a school that creates a limited public forum to exclude religious activities, it would not only have reached the right outcome, but left its decision on more solid ground.

Good News Club illustrates that the Court's distinction between content-based and viewpoint-based discrimination is quite problematic. By the majority's reasoning, it is difficult to see how any religious group could be excluded under Milford's community use policy. Imagine, for example, that an Orthodox priest asked permission to use the school's facilities in order to perform a "character-development mass," and explained that, according to his theology, a necessary and sufficient condition of all character development is participation in the mass. By the majority's reasoning, if Milford refused to allow him to perform mass in school facilities, it would be violating his free speech rights, for it would be preventing him from teaching character development from his perspective. If, however, a priest cannot be prevented from performing a mass, then it is difficult to see how any religious activity can be excluded at all.[56] The majority's opinion, although it does nothing to call into question Milford's policy of excluding religious activities in school facilities, denudes it of any possible application. Had the majority simply concluded that the policy was unreasonable, its opinion would have had the same practical effect.

Conversely, it is difficult to see how, under Justice Souter's reasoning, there could be any religious viewpoint Milford

56. Justice Souter alludes to this very worry when he writes that this case could stand for "the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque." *Good News Club*, 121 S. Ct. at 2117. Whether this would be the wrong outcome, however, remains to be seen.

would ever be obliged to allow. Justice Souter characterizes the Club's meetings as "an evangelical service of worship calling children to commit themselves in an act of Christian conversion."[57] Very few even vaguely religious activities, however, could not be described in like terms.[58] Had the group's leaders done nothing more than ask students to have faith in some divine power, they would be calling students to commit to an act of some kind of conversion; had they done nothing more than declare that God is good, then they would be engaging in some kind of religious worship.[59] Any religious element, no matter how anodyne, would thus render an activity excludable under Justice Souter's analysis. His opinion, although it does not directly contradict the rule that a State may not discriminate on the basis of viewpoint, interprets it so as to protect all viewpoints but religious ones.

It is understandable that both the majority's opinion and Justice Souter's end up in an extreme position, for it is quite difficult to find a tenable middle ground between requiring that all religious activities be allowed and excluding all religious viewpoints. Justice Stevens alone among his fellow justices attempts to map out a middle ground position, but his attempt fails. According to his analysis, although the State may have an interest in excluding religious worship and proselytizing from a limited public forum, the Free Speech Clause prohibits it from excluding speech from a religious viewpoint.[60] Imagine, however, that a Roman Catholic delivered a talk in a limited public forum entitled, "Moral Character from a Roman Catholic Point of View." If he went on to argue that everyone should strive to have moral character and that participation in the sacraments of the Roman Catholic

57. *Id.*

58. Indeed, the Court's own Establishment Clause cases suggest that even the most banal activities can be characterized as religious. *See, e.g.*, County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, (1989) (holding that Christmas crèche on government property violated the Establishment clause). As long as Justice Souter is unwilling to overturn such cases, he is hoist by his own Establishment Clause petard: for he is committed to the untenable position that, because displays such as crèches are religious, they are not entitled to Free Speech Clause protection in limited public fora.

59. *Cf.* Warner v. Orange County Dep't of Prob., 115 F.3d 1068 (2d Cir. 1997), reaff'd after remand, 173 F.3d 120 (2d Cir.), cert. denied, 528 U.S. 1003 (1999) (holding that the Alcoholics Anonymous 12-step program is a religious activity).

60. *Good News Club*, 121 S. Ct. at 2112-13.

is the only way to do it, there can be no doubt that his talk would constitute an attempt to convert listeners to Roman Catholicism, and would be taken as such. Justice Stevens's three categories of religious speech—worship, proselytizing, and speech from a religious perspective—bleed into one another at the very outset.[61]

The reason that none of the Justices could find a principled distinction between viewpoint-based and content-based discrimination against religion is that, in order to determine whether to characterize speech as having a religious purpose or as merely from a religious point of view, one must decide what religion *is* in the first place.[62] Religion, however, if it is anything at all, is an expression of man's relationship to the divine;[63] and, more importantly, *only* religion is an expression of man's relationship to the divine.[64] Hence, if Justice Souter or any other government agent is to define what is and is not "quintessentially religious," he must apply his own particular religious understanding, which is not necessarily shared by religious communities to which he does not belong.[65] In other words, in the very act of determining what is and is not viewpoint-based discrimination, a public official must necessarily engage in viewpoint-based discrimination himself. As Southern poet and critic Allen Tate put it, "[r]eligion is not

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61. *Cf.* Murdock v. Pennsylvania, 319 U.S., at 109, 63 S.Ct. 870 (extending the same constitutional protection to evangelism and worship).

62. The Supreme Court has traditionally treated the question of what is and is not religion with great delicacy, and has only decided on the basis of a subjective test of "sincere belief." *See, e.g.* Frazee v. Illinois Dept. of Employment Sec. 489 U.S. 829, 833 (1989) (holding that the denial of unemployment benefits to a dismissed employee who refused to work on Sunday as a result of his "sincere" religious beliefs violated the First Amendment); Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987) (applying the same standard to religious converts). Souter's confidence that he knows more about religion than the religious do represents a break with this tradition.

63. *Cf.* FRIEDRICH SCHLEIERMACHER, ON RELIGION: ADDRESSES IN RESPONSE TO ITS CULTURED CRITICS 103 (Terrence N. Tire trans., John Knox Press 1969) ("[R]eligion is the sensibility and taste for the infinite.").

64. *Cf.* KARL BARTH, THE EPISTLE TO THE ROMANS 240 (Edwyn C. Hoskyns trans., Oxford University Press 1933) ("[G]race is that which lies on the other side, and no bridge leads to it").

65. *Cf.* Lee v. Weisman, 505 U.S. 577, 616-17 (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").

properly a discussion of anything," and a discussion of religion by an ordinary layman "is an act of violence, a betrayal of the religious essence undertaken for [religion's] own good."[66]

Justice Souter, for example, falls into his own trap when he states that, at the very least, anything that calls participants "to commit themselves in an act of Christian conversion" must be an example of speech with a religious purpose.[67] Here he unwittingly adopts a controversial Arminian soteriology, which has it that Christian faith can be attained through an act of free will,[68] as opposed to the Calvinist dogma that Christian faith is the unearned gift of God.[69] Thus, according to Justice Souter, Arminians can be properly excluded from a limited public forum, but Calvinists—who would not call anyone to commit themselves in an act of Christian conversion—cannot. If welcoming Calvinists but excluding Arminians is not viewpoint-based discrimination, it is difficult to see whether any restrictions at all would be viewpoint discriminatory.

The majority's holding, in sum, rests on an untenable distinction. Justice Thomas's reasoning, which would prevent Milford from excluding any religious activities whatsoever, is no more or less reasonable than Justice Souter's, which would allow Milford to exclude any religious speech whatsoever. Indeed, Justice Souter's has one important advantage over Justice Thomas's: whereas its argument is perfectly compatible with the assumption that Milford's policy of excluding religious activities is reasonable, Thomas's is not. For if the policy *were* reasonable, then there would be at least *some* possible occasions when it would be permissible for Milford to

66. ALLEN TATE, *Religion and the Old South*, ESSAYS OF FOUR DECADES 558 (The Swallow Press Inc. 1968) (1959). There are grounds for declaring that Justice Souter's betrayal in this case is undertaken not even for religion's own good but for its detriment.

67. *Good News Club*, 121 S. Ct. at 2117.

68. *See* JACOBIS ARMINIUS, THE WORKS OF JAMES ARMINIUS (James Nichols et. al. trans., Longman et. al. 1825); *see also* PELAGIUS, *On the Christian Life*, THE LETTERS OF PELAGIUS AND HIS FOLLOWERS 113 (B.R. Rees trans., The Boydell Press 1991) ("The Christian is one who is able to make the following claim with justification: I have harmed no man, I have lived righteously with all").

69. *See* JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 253 (William B. Eerdmans Publishing Co. 1975) ("Faith is a great and singular gift of God by which we are made children of God"); *see also* MARTIN LUTHER, *Defense and Explanation of the All the Articles*, in 32 LUTHER'S WORKS 92 (Helmut T Lehman ed., Muhlenberg Press 1958) ("[S]ince the fall of Adam, or after actual sin, free will exists only in name, and when it does what it can it commits sin").

exclude a religious group. As we have seen, however, no such occasions could exist. Although the majority declined to visit the question of whether Milford's restrictions were reasonable, it nevertheless happens that if the policy were reasonable, the majority's reasoning would be sunk.

Let us then examine the question of whether Milford's policy of excluding use of its facilities for religious purposes was reasonable. The Court, faced with both a Free Speech claim from the Club and an establishment-clause excuse from Milford, could have ruled in one of three ways. It could have concluded that allowing the Club to use the school's facilities is:

1. demanded by the Free Speech Clause, and would not violate the Establishment Clause; or
2. not demanded by the Free Speech Clause, and would not violate of the Establishment Clause; or
3. not demanded by the Free Speech Clause, but would violate the Establishment Clause.[70]

The majority, of course, opted for the first conclusion, whereas Justice Souter opted for the third. No dissenting justice, however, felt comfortable saying that Milford did not violate the Free Speech Clause but would not have been obliged by the Establishment Clause to exclude the Club. This is not surprising, for if there is no obligation under the Establishment Clause to exclude the Club, then it is difficult to see what other reasonable grounds to exclude religious activities could exist.

Justice Stevens, in another context, hints at what those grounds might be. Religious activities, he suggests, may prove "divisive," which may undermine the school's educational mission. This justification fails, however, to explain why religious activities, alone among other kinds of activities, such as ballet classes, are so divisive as to undermine the mission of the school.[71] A public official who only excluded religious

70. A fourth possibility--that allowing the Club to use the school's facilities is demanded by the Free Speech Clause, but would violate the Establishment Clause--would run afoul of the principle that a constitution ought not to be read as inconsistent with itself.

71. Had the Court found Milford's policy to be unreasonable, it would not have been the first time that it invalidated a statute that conveyed public benefits to all except those of certain persuasions. *See* Speiser v. Randall, 357 U.S. 513 (1958)

activities among all those undertaken for the public welfare would be acting on the theory that religion is a uniquely destructive activity; his only motive for excluding religion, in other words, would be pure animus against religion.[72] At the very least, such a public official would be negating the principle that the First Amendment leaves the State neutral with respect to religion.[73]

A final conceivable ground upon which to exclude religion, on the assumption that the Establishment Clause does not require that it be excluded, would be that religion, alone among other activities undertaken for the purposes of educating or advancing the community welfare, is in fact inimical to those purposes. In other words, Milford's policy, if it were not imposed in order to avoid an establishment-clause violation, enforces a judgment by the school that religion, alone among all other activities, retards education and is inimical to the public welfare. Once again, however, if this were Milford's rationale, its only motive for excluding religion would then be an impermissible animus against it.

In sum, implicit in Justice Souter's dissent is the fear that if the Establishment Clause does not *require* Milford to exclude religious activities, then the Free Speech clause must *prohibit* Milford from excluding religious activities. There can be no middle ground, for a state does not act reasonable when it excludes religion on the theory that it is uniquely destructive. Indeed, Milford's policy is arguable unreasonable on its face, for if use of the school's facilities "by any individual or

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(holding that a state may not require veterans to sign a loyalty declaration as a condition of receiving a tax exemption).

72. The Court has never overturned the rule that the State may not act out of hostility to religion. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984); *cf.* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (invalidating a local ordinance that does nothing other than specifically target a group's religious practices); Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990) (holding that any law that prohibits an action solely because of its religious character is invalid under the Free Exercise Clause).

73. *See* Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position not of hostility to religion but of neutrality"); *cf. Rosenberger*, 515 U.S. at 839; *see also* Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion"); Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 248 (1990)(plurality opinion)(upholding a state practice when the "message is one of neutrality rather than endorsement").

organization for religious purposes" is not permitted, then no child would be able to say grace in the school cafeteria.[74] The majority, therefore, in order to vindicate the Club's claims, should have concluded that excluding religious activities from Milford's facilities was not reasonable in light of the purposes of the forum, rather than argue that excluding religious activities constitutes impermissible viewpoint-based discrimination. Such a ruling would have had the same practical effect as the actual one, and would have left the rights of Good News Club and other religious groups with stronger legal defenses.

Some might object that, had the majority found that Milford's policy excluding religion was unreasonable, it would for the first time have found that the Constitution demands a place for religion in the public square. This objection is, first of all, misguided, for all such a ruling would imply is that religion has as much a right to a place to the public square as any other human perspective.[75] More importantly, however, there would be nothing alarming (and a great deal that would be salutary) in demanding that religion have a place in the public square. As Abraham Kuyper once wrote, "[N]o political scheme has ever become dominant which was not founded in a specific religious or anti-religious conception."[76] To exclude religion from the public square is therefore not to be religiously neutral, but, if anything, to impose a secular faith on the nation. Happily, however, a constitution that guarantees the free exercise of religion cannot have been founded on such an anti-religious conception.[77] Were the Court to require that religion have a place in the public square, it would be upholding, not betraying, our constitutional traditions.

Austin W. Bramwell

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74. *See* Employment Div. Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) ("[T]he First Amendment obviously excludes all 'governmental regulation of religious beliefs as such'") (quoting *Sherbert*, 374 U.S. at 402).

75. *But see* WILLMOORE KENDALL, *Conservatism and the "Open Society,"* THE CONSERVATIVE AFFIRMATION IN AMERICA 100-20 (Gateway Books 1986) (arguing that an all-questions-are-open-questions society is to be avoided, not encouraged).

76. ABRAHAM KUYPER, CHRISTIANITY: A TOTAL WORLD AND LIFE SYSTEM 45 (Gilliland Press 1999) (1931).

77. *See* R.J. RUSHDOONY, THE NATURE OF THE AMERICAN SYSTEM 45-66 (Craig Press 1965).