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PAPA DON'T PREACH: *BADGER CATHOLIC V. WALSH* MUDDIES THE LINE BETWEEN CHURCH AND STATE

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INTRODUCTION

Despite a multiplicity of judicial decisions throughout the country, the line between religious and secular influence in education has remained cloudy since the U.S. Supreme Court first addressed the issue.¹ Perhaps because “[t]he task of separating the secular from the religious in education is one of magnitude, intricacy, and delicacy,”² the courts have been cautious to draw hard lines on the government’s interaction with religious institutions.³ In recent years, the ambiguity created by overlapping analysis has stretched to religious use of school facilities and funds.⁴

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¹ John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1869–71 (2003).

² Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 237 (1948) (Jackson, J., concurring).

³ See *id.* at 237–38 (stating that the complexity of religion in education would turn any hard-line standard into a wall “as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded”).

⁴ See Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000) (holding that University tuition can be used to fund activities that advocate

Throughout the nation, groups have targeted religious recognition in the context of governmental operations.⁵ Thus, a court must act with vigilance when deciding whether to afford or deny a specific group rights because the court's decision ultimately may implicate the group's right to expression.⁶ While the words "Separation of Church and State" are not included in the Constitution, this long-standing principle has shaped all levels of government decision-making when religion enters into secular society.⁷ The First Amendment's guarantee of religious autonomy has created a peculiar labyrinth of standards that the government must follow to accord religious groups fair treatment under the law.⁸ While the Church and State are fundamentally separate entities, both must co-exist and inherently influence the community's expectations.⁹

The First Amendment states in part that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁰ While the Constitution prohibits Congress from establishing a national church or taking any religious preference, its broad language has begged many questions that the Supreme Court has aimed to answer.¹¹ As a result, the Court's application of the First

various beliefs); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (holding that the University's refusal to fund a religious newspaper constituted viewpoint discrimination in violation of the First Amendment); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that a university's denial of funding to religious groups using an open forum constituted content discrimination); *Healy v. James*, 408 U.S. 169, 192–93 (1972) (upholding a university's right to exclude First Amendment activities that violate reasonable campus rules or interfere with other student's education).

⁵ See, e.g., *Southworth*, 529 U.S. at 220–21; *Rosenberger*, 515 U.S. at 822–23.

⁶ Witte, *supra* note 1, at 1871–72 (stating that separationism in Supreme Court decisions has abandoned harsh application and avoided metaphors).

⁷ See U.S. CONST. amend. I; Witte, *supra* note 1, at 1871–72.

⁸ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 653–54 (2002); *Rosenberger*, 515 U.S. at 841.

⁹ Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1673–74 (2003).

¹⁰ U.S. CONST. amend. I.

¹¹ See *Rosenberger*, 515 U.S. at 835; *Widmar v. Vincent*, 454 U.S. 263, 263–64 (1981); *Healy v. James*, 408 U.S. 169, 192 (1972).

Amendment to specific instances has resulted in various inconsistencies.¹²

Expectedly, the Court's application of the First Amendment in the context of public education has resulted in significant controversy.¹³ With the proper rearing of our nation's youth fixed as a standard in the public discourse, religion's role in education has found an unsettling lack of direction.¹⁴ Spirited debate has resulted about when and where religious interjection is appropriate in various stages of education.¹⁵ Groups have targeted the use of school buildings and funds for religious purposes, as well as religious expression by practice or speech.¹⁶ The Court's inconsistent decisions have accorded religious institutions an expansion of rights that seemingly cross the "high and impregnable" wall that separates Church and State.¹⁷

Like minority groups, religious institutions are protected by virtue of the reasonableness standard and strict scrutiny.¹⁸ The standard forbids the government from denying religious institutions equal funding or access to a forum where reasonable.¹⁹ Rather than excluding religious institutions from public venues, the Supreme Court has recognized that the First Amendment's Establishment Clause does not trump religious organizations' freedom of expression.²⁰ If the

¹² Compare *Locke v. Davey*, 540 U.S. 712, 725 (2004), with *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488–89 (1986).

¹³ See Laycock, *supra* note 9, at 1667–70.

¹⁴ See Witte, *supra* note 1, at 1904.

¹⁵ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108 (2001); *Rosenberger*, 515 U.S. at 831–32. The Court has created several different categories of State forums, as well as multiple degrees of scrutiny and analysis so that specific cases come down to trivial differences of when and where State and religious interaction can occur. See *Rosenberger*, 515 U.S. at 843.

¹⁶ See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000); *Rosenberger*, 515 U.S. at 287–28.

¹⁷ See *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (stating that Thomas Jefferson's 1802 Letter to the Danbury Baptist Association reasoned that the Establishment Clause required strict separationism).

¹⁸ See *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010).

¹⁹ *Good News Club*, 533 U.S. at 106–07.

²⁰ *Locke v. Davey*, 540 U.S. 712, 724 (2004).

government allowed a secular group access to a public forum, it must grant the same access to a religious group.²¹ Applying the reasonableness standard, the Supreme Court has held that any speech, including religious speech, cannot be discriminated against unless a reasonable interest in creating a limited public forum exists.²²

The Supreme Court has attempted to define the boundaries between religion and public education.²³ Through the adaptation of the *Lemon* test, the Court established an overarching standard, which mandates that schools not discriminate or deny access based on any beliefs absent a reasonable justification.²⁴ This aimed to remove any preference for one viewpoint over another.²⁵ Such viewpoint discrimination would deny all citizens the right to a neutrally-operated government by favoring one group over another.²⁶ The Court has since molded its analysis on public forum cases around the type of discrimination in which the State engages.²⁷

The First Amendment's guarantees of free speech, of free religious exercise, and against establishment have made it nearly impossible for the Court to take any hard stance on religion's role in education.²⁸ While schools have been afforded the ability to create limited forums with specific purposes, they are also hard-pressed to

²¹ See *Rosenberger*, 515 U.S. at 835.

²² *Id.*

²³ See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000); *Rosenberger*, 515 U.S. at 835; *Widmar v. Vincent*, 454 U.S. 263, 263–64 (1981).

²⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that a policy will not offend the Establishment Clause if it passes a three-prong test: (1) The government's action must have a secular legislative purpose; (2) the primary effect of the government's action must not advance or inhibit religion; and (3) it must not foster and result in "an excessive government entanglement with religion").

²⁵ See *Rosenberger*, 515 U.S. at 829 (holding that viewpoint discrimination is an egregious form of content discrimination and that the government must abstain from regulating any speech when the restriction is based on the message or perspective the speaker is expounding).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Carl H. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 401–02.

avoid enforcing regulations on religious groups' various forms of expression.²⁹ Schools may define the purpose and uses of such forums so as not to discriminate, but may not limit the discourse in which its students engage.³⁰ However, these limited forums have created tension when they restrict religious expression.³¹

Moreover, the same analysis is applied to schools when they fund student activities.³² Be it university newspapers, speaker presentations, or events by religious organizations, schools are generally not allowed to deny funding because of a particular viewpoint expressed by those organizations.³³ Such funding is subject to the same limited forum exceptions as other public forums.³⁴ Again, problems arise under the Free Speech, Establishment, and Exercise Clauses when affording religious groups public funds.³⁵

Recent Supreme Court viewpoint discrimination analysis has left federal circuits to question when religious recognition has overstepped its bounds.³⁶ Some circuits have upheld state denial of forums and funds when religious exercises rise to the level of worship.³⁷ Alternatively, other circuits have allowed religious groups access to forums when their meetings include group prayers, religious

²⁹ See *Rosenberger*, 515 U.S. at 843–44.

³⁰ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).

While these forums are still subject to scrutiny under viewpoint discrimination analysis, schools may designate a forum's boundaries so as not to violate the Constitution, federal or state law, or its own rules and regulations. *Id.*

³¹ See generally *Good News Club*, 533 U.S. 98; Witte, *supra* note 1, at 1904.

³² See *Rosenberger*, 515 U.S. at 834–35.

³³ See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 217 (2000); *Rosenberger*, 515 U.S. at 824–25; *Healy v. James*, 408 U.S. 169, 169–70 (1972).

³⁴ See *Rosenberger*, 515 U.S. at 845–46.

³⁵ See *Good News Club*, 533 U.S. at 107.

³⁶ See *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 780 (7th Cir. 2010); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 492 F.3d 89, 104 (2d Cir. 2007) (Calabresi, J., concurring); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002).

³⁷ See *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), *abrogated on other grounds by* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

speakers, and numerous other religious activities.³⁸ In many instances, what has been found as religious worship or practice in one circuit is interpreted as mere public activity by a religious organization in another.³⁹

Such inconsistencies are exemplified in the recent Seventh Circuit decision, *Badger Catholic, Inc. v. Walsh*.⁴⁰ While the court recognized the University of Wisconsin-Madison's right to create a forum for a limited purpose,⁴¹ the court held that the university had to provide identical funds to both religious groups and other student groups.⁴² In doing so, the Seventh Circuit muddled the line between Church and State in public education beyond what is justified by precedent, the Constitution, or history.⁴³

The Seventh Circuit's decision in *Badger Catholic* departed from its previous decisions and misapplied the standards expressed by the Supreme Court.⁴⁴ Moreover, numerous circuits across the country have heard cases similar to *Badger Catholic* and have reasoned differently.⁴⁵ Plainly, the decision chips away at the wall between Church and State.⁴⁶

³⁸ See *Prince*, 303 F.3d at 1093–94.

³⁹ Compare *Badger Catholic*, 620 F.3d at 781, with *Bronx Household of Faith*, 492 F.3d at 100–01.

⁴⁰ See generally *Badger Catholic*, 620 F.3d 775.

⁴¹ *Id.* at 780–81.

⁴² *Id.* at 779.

⁴³ See Steven K. Green, *Of (Un)equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1119 (2002) (discussing the wall of separation between Church and State as defined by Justice Black and Thomas Jefferson).

⁴⁴ See *Linnemeir v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757, 759–60 (7th Cir. 2001) (academic freedom and states' rights require deference to educational judgment that is not invidious); *Doe v. Small*, 964 F.2d 611, 618 (7th Cir. 1992) (mere compliance with the Establishment Clause is not a compelling state interest that would warrant discrimination against a religious group).

⁴⁵ See *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 492 F.3d 89, 104 (2d Cir. 2007) (Calabresi, J., concurring); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002).

⁴⁶ See *Witte*, *supra* note 1, at 1870–71.

In understanding the direction of the Seventh Circuit's recent divergence,⁴⁷ it is critical to understand judicial precedent as it relates to Church and State and the First Amendment. Understanding the evolution of Supreme Court jurisprudence, along with the purpose of the First Amendment, is markedly important because they highlight the overarching purpose of the Establishment Clause.⁴⁸

Additionally, it is imperative to understand the federal circuits' current interpretations of the relationship between religion and public education, as they highlight how the public in general perceives the Supreme Court.⁴⁹ Coming to this understanding will provide insight into the Seventh Circuit's recent decision in this area of law.⁵⁰

This Comment will examine both the implications and potential shortcomings of the *Badger Catholic* decision.⁵¹ With other circuits broadening religious interaction in public education, the Seventh Circuit's holding in *Badger Catholic* was ultimately decided incorrectly.⁵²

Because the Supreme Court has failed to provide a clear standard for circuits to apply, decisions like *Badger Catholic* represent an opportunity to provide clarity.⁵³ Until viewpoint discrimination is more clearly explained, public funds and facilities remain in a

⁴⁷ See generally *Badger Catholic*, 620 F.3d 775.

⁴⁸ There is constant debate over the exact meaning of the Free Speech, Free Exercise, and Establishment Clauses, stretching as far back as the drafting of the Constitution and the Federalist Papers, which discussed the proper approach American governance should follow. See Witte, *supra* note 1, at 1871. Recent decisions have aimed to carve out an understanding that promotes neutrality of gift and denial in relation to religion. See Green, *supra* note 43, at 1113–14. Generally, the court aims to treat religious institutions in the same manner as it would any other group. *Id.*

⁴⁹ See *Bronx Household of Faith*, 492 F.3d 89, 92–106 (Calabresi, J., concurring).

⁵⁰ See *id.*

⁵¹ See generally *Badger Catholic*, 620 F.3d 775.

⁵² See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 914 (9th Cir. 2007), *abrogated on other grounds by* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002).

⁵³ See generally *Badger Catholic*, 620 F.3d 775.

nebulous state that burdens the Seventh Circuit as well as other circuits across the country.⁵⁴

I. BACKGROUND

A. *What is Separation of Church and State?*

The difficulty in distinguishing between the establishment of religion and facilitating its free exercise may be attributed to the different understandings of what the Constitution confers through the First Amendment.⁵⁵ In many ways, the Free Speech Clause, the Establishment Clause, and the Free Exercise Clause are in constant constraint of and contradiction to each other.⁵⁶ The government is barred from the unequal recognition of religious institutions while simultaneously providing these institutions the same expressive rights that all citizens enjoy.⁵⁷ As such, it is difficult to determine whether the government is merely providing a forum or funding to the citizenry and when it is funding religious activity.⁵⁸

The line dividing Church and State is unclear because the precedent does not follow one coherent path. Whereas a state cannot supplement religious schoolteachers' salaries,⁵⁹ it can provide public transportation for religious school pupils.⁶⁰ The State can loan books

⁵⁴ Laycock, *supra* note 9, at 1669.

⁵⁵ *Id.*

⁵⁶ Indeed, in *Locke v. Davey*, the Court recognized that there is an inherent tension between the Establishment and Free Exercise Clauses of the First Amendment. 540 U.S. 712, 718 (2004). Nevertheless, such tension is relieved as the Court's interpretation allows some "room for play in the joints." *Id.*

⁵⁷ See U.S. CONST. amend. I; *Locke*, 540 U.S. at 718.

⁵⁸ See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring) ("the task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy").

⁵⁹ See *Lemon v. Kurtzman*, 403 U.S. 602, 622–23 (1971) (holding that Pennsylvania's Nonpublic Elementary and Secondary Education Act violated the Establishment Clause when it reimbursed salaries of nonpublic schoolteachers who taught secular material, as well as reimbursed the schools for secular textbooks and instructional materials).

⁶⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16–18 (1947).

to religious schools, but it cannot loan any supplemental material to them.⁶¹ Rather than providing a clear rule, these inconsistencies breed confusion among the nation's courts.⁶² In many ways, the divisions drawn by the Supreme Court were agonizingly trivial.⁶³ Nonetheless, such decisions aimed to discern what separation actually meant in society.⁶⁴

Separationism can be divided into three general categories.⁶⁵ As postulated by Carl H. Esbeck, separationist views can be classified as strict, pluralist, or institutional.⁶⁶ While strict separationists would command a completely secular state, institutional separationists envision a theocentric state just short of a theocracy.⁶⁷ However, what jurisprudence has created is a neutral and pluralistic separation between Church and State.⁶⁸ Justice Black attempted to define exactly what the separation meant to American society, with the government barred from establishing a national church or selectively aiding or preferring one religious group to another.⁶⁹

Nevertheless, Justice Black's view has developed into a fiction in actual practice.⁷⁰ The government has consistently funded various religious institutions without any conflict with the Supreme Court's analysis of the Establishment or Free Exercise Clauses.⁷¹ From providing tax breaks to churches to facilitating religious activity in public buildings, the government has not followed Justice Black's perception of religion's role in government.⁷² As such, the conundrum

⁶¹ *Lemon*, 403 U.S. at 624.

⁶² See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lemon*, 403 U.S. at 624.

⁶³ See *Lemon*, 403 U.S. at 624.

⁶⁴ *Id.*

⁶⁵ See Esbeck, *supra* note 28, at 378–79.

⁶⁶ *Id.*

⁶⁷ *Id.* at 379 (dividing the separation ideologies into strict separationists, who desire a secular state, pluralistic separationists, who desire a neutral state, and institutional separationists, who envision a theocentric state).

⁶⁸ *Id.* at 388.

⁶⁹ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 12–16 (1947).

⁷⁰ Green, *supra* note 43, at 1119–20.

⁷¹ *Id.* at 1120.

⁷² *Id.*

of religious interaction with government is an overwhelming area because it involves contradictions in interpretation, viewpoint, and jurisprudence.⁷³ This problem is only magnified when a court focuses on specific intrusions of religion into government activity.⁷⁴ In recent years, courts have paid special attention to funding and facilitating religious activity.⁷⁵ Regardless of the focus, the separation remains a serpentine wall.⁷⁶

B. The Supreme Court's Stance

Parsing through the U.S. Supreme Court's decisions dealing with religion can be daunting. Perhaps because this is an "extraordinarily sensitive area of constitutional law,"⁷⁷ the Court has struggled to draw hard lines on how religious institutions and government funding should interact.⁷⁸ Nevertheless, the Court's constant refinement of law and its understanding of the First Amendment has provided some shape to the lingering questions.⁷⁹

In examining the government's approach to funding and facilitating religious activity, the Court has adopted an evenhanded approach so as to neither affirm nor deny any religious group's position.⁸⁰ To a degree, the government is forbidden from stopping or limiting religious expression.⁸¹ However, the First Amendment's Establishment Clause negates the government's ability to foster these activities.⁸² Even so, the Court has recognized the division between Church and State as something other than a complete barrier.⁸³

⁷³ *See id.*

⁷⁴ *See generally* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁷⁵ *See Rosenberger*, 515 U.S. at 835.

⁷⁶ *See Witte*, *supra* note 1, at 1869.

⁷⁷ *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

⁷⁸ *See generally Rosenberger*, 515 U.S. 819.

⁷⁹ *See Widmar*, 454 U.S. at 270; *Healy v. James*, 408 U.S. 169, 192–93 (1972).

⁸⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002).

⁸¹ *See id.*

⁸² *See Rosenberger*, 515 U.S. at 835–36.

⁸³ *Everson v. Bd. of Educ.*, 330 U.S. 1, 41–44 (1947).

Because religion is an integral part of American society and values, it shapes how we understand the very question it aims to answer.⁸⁴ In doing so, religion has gained many liberties, which in turn has created a labyrinth of jurisprudence that precludes any possibility of clear guidance for lower courts to follow.⁸⁵

Adding to the complexity of the relationship between Church and State, public education provides a sensitive area where society demands religious independence, yet such independence cannot encroach on religion's involvement in the student's life outside school.⁸⁶ In addressing the ability of religious groups to operate in the public sphere, the Court has concentrated on the State's purpose in enacting its rules.⁸⁷

1. Tests in Development

In addressing the relationship between Church and State, the Court has developed several tests that help to understand exactly what principles the First Amendment aims to protect.⁸⁸ Historically, the Establishment Clause has been analyzed under the three-pronged test developed in *Lemon v. Kurtzman*.⁸⁹ The test requires that government action (1) have a secular purpose; (2) not have the effect of either advancing or inhibiting religion; and (3) not result in government entanglement with religion.⁹⁰ The *Lemon* test has become integral to framing how public education and religious organizations must

⁸⁴ Green, *supra* note 43, at 1118–19.

⁸⁵ *Id.*

⁸⁶ *See generally* *Lemon v. Kurtzman*, 403 U.S. 602 (1971); Witte, *supra* note 1, at 1904.

⁸⁷ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001).

⁸⁸ *See* *Cnty. of Allegheny v. Am. Civil Liberties Union.*, 492 U.S. 573 (1989) (coercion test); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (endorsement test); *Lemon*, 403 U.S. 602 (*Lemon* test); *Everson*, 330 U.S. 1 (neutrality test); Ralph D. Mawdsley & Johan Beckmann, *Religion in Public Schools: An American and South African Perspective*, 204 WEST'S EDUC. L. REP. 445, 454 (2006).

⁸⁹ 403 U.S. at 613.

⁹⁰ *Id.*

coexist.⁹¹

Recent Supreme Court decisions have attempted to guide the federal circuits.⁹² The Court analyzed situations based on whether the government was discriminating against the viewpoint of certain speech, or the content of that speech.⁹³ The Court has held viewpoint discrimination as a more egregious form of content-based discrimination.⁹⁴ Generally, the government is forbidden from denying religious organizations access when the denial is based purely on the propagated message.⁹⁵ Likewise, content discrimination is presumptively unconstitutional due to its focus on the content of what a group is saying.⁹⁶ Though these categories are markedly similar, content discrimination has faced less scrutiny and has been found acceptable in some situations.⁹⁷ Through this analysis, the Court has aimed to prevent discrimination of a particular group based on its views or actions, while allowing the government to set the parameters for the time, place, and manner in which the speech is made.⁹⁸

Additionally, the Court has allowed the government to separate religious and government activity by creating limited public forums.⁹⁹ While open forums require the state to provide full protection and funding for all speech, a government institution that establishes a

⁹¹ See Mawdsley & Beckmann, *supra* note 88, at 455 (“While framed in the context of government financial support for religious schools, the *Lemon* test has been invoked in a wide range of religion cases to both prohibit and permit efforts to accommodate religious beliefs in public schools and permit government support for religious schools.”).

⁹² See *Good News Club*, 533 U.S. 98; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

⁹³ *Good News Club*, 533 U.S. at 108.

⁹⁴ *Rosenberger*, 515 U.S. at 829.

⁹⁵ See *id.*; *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

⁹⁶ See *Widmar v. Vincent*, 454 U.S. 263, 273 (1981).

⁹⁷ See, e.g., *Locke v. Davey*, 540 U.S. 712, 725 (2004).

⁹⁸ See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (the time, place, and manner test is applicable only to speech regulations that are content neutral).

⁹⁹ See *Widmar*, 454 U.S. at 278.

limited forum for a particular purpose may regulate the use of that forum.¹⁰⁰

Whether it is dealing with elementary schools or public universities, the government must tread lightly so as not to overstep its citizens' rights as well as the rights of religious organizations.¹⁰¹

2. Content and Viewpoint Discrimination

In many ways, content and viewpoint discrimination are ambiguous.¹⁰² Discrimination against speech is presumed to be unconstitutional.¹⁰³ Likewise, the First Amendment is breached whenever the government places financial burdens on groups because of the subject matter of their speech.¹⁰⁴ Content discrimination occurs when government intervention is based on a speaker's actions rather than the subject matter of his or her speech.¹⁰⁵ Generally, the content of the speech being expounded cannot be the focus of governmental prejudice.¹⁰⁶ Such regulations explicitly or implicitly presume to regulate the speech because of the substance of the message.¹⁰⁷ Furthermore, the Court has developed the notion of viewpoint discrimination, which constitutes a more egregious form of content discrimination.¹⁰⁸ Viewpoint discrimination violations target the specific ideology behind an opinion that the group or speaker is presenting.¹⁰⁹ Such regulations are imposed because of a disagreement

¹⁰⁰ See *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2975 (2010).

¹⁰¹ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

¹⁰² *Id.* at 828.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 843.

¹⁰⁵ See *Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys.*, 578 F. Supp. 2d 1121, 1137 (W.D. Wis. 2008).

¹⁰⁶ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).

¹⁰⁷ *Roman Catholic Found.*, 578 F. Supp. 2d at 1137.

¹⁰⁸ *Rosenberger*, 515 U.S. at 829.

¹⁰⁹ See *Roman Catholic Found.*, 578 F. Supp. 2d at 1137.

with the particular position that the speaker expounds.¹¹⁰ Thus, content discrimination always occurs when viewpoint discrimination does, but not vice versa.¹¹¹

The Court has examined situations where the government has refused to fund religious groups under a Free Exercise analysis, as well as situations where the government recognized religious groups' rights under the Establishment Clause.¹¹²

In *Lamb's Chapel v. Center Moriches Union Free School District*, a school district provided its facilities to community groups, yet refused a church's request to show religious films.¹¹³ The Court held that because the school district opened its doors to the public, it could not refuse organizations merely because they were religious.¹¹⁴ The school's focus on the subject matter of the speech, rather than on the manner in which it was being expressed, constituted viewpoint discrimination.¹¹⁵ Following *Lamb's Chapel*, the Court attempted to define the differences between viewpoint and content discrimination.¹¹⁶

Just as schools cannot close their doors to religious groups merely because they are religious, they cannot deny them funding where there are secular parallels to the activities that receive funding.¹¹⁷ Whether it is the printing and distribution of newspapers on campus¹¹⁸ or disbursement of federal scholarships to students

¹¹⁰ *Id.*

¹¹¹ *Id.* ("Viewpoint discrimination is thus an especially egregious form of content discrimination in which the government targets not just subject matter, but the particular views taken on subjects by speakers.")

¹¹² Compare *Locke v. Davey*, 540 U.S. 712, 718–19 (2004), with *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001).

¹¹³ 508 U.S. 384, 389–90 (1993).

¹¹⁴ *Id.* at 392.

¹¹⁵ *Id.* at 391.

¹¹⁶ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

¹¹⁷ *Id.*

¹¹⁸ See *id.* at 845–46 (holding that the University's refusal to fund a campus organization's publication, written from a Christian viewpoint, when other publications from other viewpoints were funded violated the Free Speech Clause: "[the University's] course of action was a denial of the right of free speech and

pursing religious training,¹¹⁹ public institutions must maintain a neutral stance on how they conduct their activities.¹²⁰

In *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, the Court held that a publicly-funded law school's anti-discrimination policy could be evenly applied to all groups that it funded, including religious groups.¹²¹ There, a Christian society at the school barred homosexuals from joining the organization.¹²² Because this was in violation of the school's anti-discrimination policy, the law school denied the group funding and access to its facilities.¹²³ The Court found that the school's policy was applicable to all organizations in the school and thus did not single out the religious group.¹²⁴ In fact, the Court noted that because the policy was so inclusive, it was impossible to contend that it was discriminatory against any one group.¹²⁵ When a public university implements regulations on a limited public forum, it can decide the parameters of the content that that forum allows, but views that fit within the parameters cannot be discriminated against.¹²⁶

Contrastingly, in *Locke v. Davey*, a student pursuing a degree in theology was denied a government-funded scholarship and contended that this was discrimination in contravention of the Free Exercise Clause.¹²⁷ The Court disagreed, reasoning that the Free Exercise Clause and the Establishment Clause allow some "play in the joints between them."¹²⁸ While the government could not hinder the student's pursuits, funding his pursuits would amount to providing for

would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires").

¹¹⁹ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

¹²⁰ *Id.* at 649–50.

¹²¹ 130 S. Ct. 2971, 2989 (2010).

¹²² *Id.* at 2979–80.

¹²³ *Id.* at 2989.

¹²⁴ *Id.*

¹²⁵ *Id.* at 2993 ("It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.") (emphasis in original).

¹²⁶ *Id.*

¹²⁷ 540 U.S. 712, 717–18 (2004).

¹²⁸ *Id.* at 718 (internal quotation marks omitted).

religious training.¹²⁹ The school was allowed to participate in its own form of government speech by deciding the limits of what it endorses, and what it does not.¹³⁰ So long as the institution is not evincing hostility towards religion in its actions, it is not required to supply funds or access to religious institutions merely because a secular alternative exists.¹³¹

The directions in *Locke* are not applicable across the board.¹³² In *Zelman v. Simmons-Harris*, taxpayers challenged a scholarship program that funded recipients who attended religious schools.¹³³ The scholarship program aimed to allow parents and students the ability to attend any school of their choice.¹³⁴ The Court held that the scholarship program was not a violation of the Free Exercise Clause because the program was neutral and provided funding to a broad class of citizens.¹³⁵ The fact that the families directed the funding to religious institutions was not unconstitutional.¹³⁶ As the school had created an open forum for its students, it could not discriminate against certain institutions merely because they support religion.¹³⁷ However, the Court's decision faced serious criticism because it appeared as indirect preferential treatment for religion.¹³⁸ By providing funding to parents who chose private religious institutions over public schools, the separation between Church and State became a farce.¹³⁹

The commingling of content and viewpoint discrimination looks to be a mess of precedent.¹⁴⁰ Nevertheless, distinctions in their

¹²⁹ *Id.* at 725.

¹³⁰ *Id.* at 729–30.

¹³¹ *Id.* at 724–25 (the state had a substantial interest in not funding the pursuit of devotional degrees).

¹³² See *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002).

¹³³ *Id.*

¹³⁴ *Id.* at 647.

¹³⁵ *Id.* at 652–53.

¹³⁶ *Id.*

¹³⁷ *Id.* at 652.

¹³⁸ *Id.* at 685 (Stevens, J., dissenting).

¹³⁹ *Id.*

¹⁴⁰ Compare *Locke v. Davey*, 540 U.S. 712, 717–18 (2004), with *Zelman*, 536 U.S. at 648–49.

analysis exist.¹⁴¹ The government “is not required to and does not allow persons to engage in every type of speech”; content discrimination is appropriate when the restrictions are “reasonable in light of the purpose served by the forum.”¹⁴² Conversely, viewpoint discrimination is generally prohibited in open forums as well as limited forums.¹⁴³ While the views of a speaker cannot be the basis of State regulation, the Court has endorsed the idea that universities can focus a forum on a specific, intentional purpose and regulate speech that falls outside that content.¹⁴⁴

3. Open and Limited Forums

In *Lamb’s Chapel*, the Court also addressed the issue of when a government creates a forum.¹⁴⁵ There, a church sued a school district because it was refused access to facilities to show religious films on family values.¹⁴⁶ The Court recognized that the school district was allowed to preserve property under its control and dictate its use.¹⁴⁷ However, because the school district did not intentionally define the limits of the forum, thus creating an open forum, it could not deny the church access because of its religion.¹⁴⁸

In *Good News Club v. Milford Central School*, the Court held that a school conducted viewpoint discrimination because it refused a religious youth club access to its facilities after school hours.¹⁴⁹ The

¹⁴¹ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

¹⁴² *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).

¹⁴³ *Id.* at 107.

¹⁴⁴ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

¹⁴⁵ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 113 S.Ct. 2141, 2144 (1993).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2146.

¹⁴⁸ *Id.* at 2148. Though the Court recognized that there may be a compelling interest in avoiding an Establishment Clause violation, an open access policy to the forum allowed religious use of the property. *Id.*

¹⁴⁹ 533 U.S. 98, 107–08 (2001).

Court rejected the school's argument that granting access would be government endorsement amounting to a violation of the Establishment Clause.¹⁵⁰ On the contrary, permitting the school to deny the religious organization access would be just as threatening to the Constitution as allowing that organization access.¹⁵¹ Critically, the Court viewed the school as an open facility, rather than a limited forum.¹⁵² Just as in *Lamb's Chapel*, a forum open to the public had been created without intentional limits.¹⁵³

Moreover, a forum does not necessarily have to be a physical space; funding can represent a metaphysical forum.¹⁵⁴ In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court held that there was no difference between a public school funding a physical facility and giving students access to its funds to pay for activities.¹⁵⁵ The Court recognized that a university may appropriate public funds to promote particular policies as it wishes, so creating a limited forum.¹⁵⁶ In order to do so, it need only intentionally create the forum and set out its limits and purpose.¹⁵⁷ From that point, the forum is judged as to whether its limits are reasonable in light of its defined purpose.¹⁵⁸

In creating a limited forum, the State must distinguish it from the traditional or open public forum.¹⁵⁹ In that sense, the restrictions that the government imposes on an open forum are placed under greater scrutiny than those imposed on a limited public forum.¹⁶⁰ In limited public forums, the government opens property for use by certain groups and dictates its use.¹⁶¹

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *See id.* at 109; *Lamb's Chapel*, 113 S. Ct. at 2148.

¹⁵⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

¹⁵⁵ *Id.* at 843.

¹⁵⁶ *Id.* at 833.

¹⁵⁷ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

¹⁵⁸ *Id.* at 806.

¹⁵⁹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

¹⁶⁰ *Id.*

¹⁶¹ *Rosenberger*, 515 U.S. at 829–30.

Additionally, there is another division between these two types of forums.¹⁶² While there is the traditional open forum, and the limited public forum, there also exists a designated public forum.¹⁶³ In the case of a designated public forum, the Court uses strict scrutiny to ensure that the government does not unreasonably restrict speech in the nontraditional space.¹⁶⁴ While a traditional open public forum usually uses public spaces like parks and streets, a designated public forum uses spaces that are not typically open to the public.¹⁶⁵

Deciding what type of forum a school creates is critical because it changes the analysis under the neutrality test.¹⁶⁶ If a forum is left open to the public, content and viewpoint discrimination are subject to harsher treatment and the State's restrictions are subject to strict scrutiny.¹⁶⁷ Alternatively, a limited public forum's restrictions need only be viewpoint-neutral and reasonable in light of its purpose.¹⁶⁸ Therefore, knowing whether a university has reasonably restricted a forum is critical when deciding if its actions are constitutional.¹⁶⁹

¹⁶² Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2983 (2010).

¹⁶³ *Id.*

¹⁶⁴ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); *see also* *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 864 (7th Cir. 2008).

¹⁶⁵ *Good News Club*, 533 U.S. at 106. Universities and schools can fall into all three categories, but generally, they fall into either a traditional open forum or a limited public forum. *See id.* These spaces are usually open to and funded by the public. *See id.* However, unless the school sets a purpose for its facilities, they are presumed to be "nonpublic forum[s]"—property that "is not by tradition or design a forum for public communication." *See Choose Life Ill.*, 547 F.3d at 864.

¹⁶⁶ *See Martinez*, 130 S. Ct. at 2983; *Rosenberger*, 515 U.S. at 829–30; *Cornelius*, 473 U.S. at 802.

¹⁶⁷ *Martinez*, 130 S. Ct. at 2983.

¹⁶⁸ *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

¹⁶⁹ *See Choose Life Ill.*, 547 F.3d at 864.

C. Division Among Circuits

Not surprisingly, the lack of specific direction from the Supreme Court has led to varying approaches on how to decide the constitutionality of forum restrictions. While some circuits have been more rigid in their understanding of what an open forum is and when viewpoint discrimination actually occurs, opposing views still linger.

In *Bronx Household of Faith v. Board of Education of the City of New York*, the Second Circuit addressed the State's refusal to permit church use of school facilities for Sunday worship.¹⁷⁰ There, under two concurring opinions, the court vacated the permanent injunction enjoining the school district from enforcing its prohibition against religious use.¹⁷¹ The court decided that the State's restriction on worship was not viewpoint discrimination.¹⁷² Because the purpose of the Bronx Household was specifically for worship, it fell outside the content of the school's purpose and was properly denied.¹⁷³

In the Ninth Circuit case, *Prince v. Jacoby*, a high school student brought an action against a school district because it refused to allow a bible club the same benefits that it does to other clubs.¹⁷⁴ Namely, the club was given different access to school supplies, audio/visual equipment and school vehicles.¹⁷⁵ The court held that the different treatment of the bible club from other school-sanctioned clubs was in violation of the First Amendment under *Widmar*.¹⁷⁶ The school created a limited public forum and *chose* to give benefits to groups; having done so, it could not restrict a group's access to these benefits based on the group's views.¹⁷⁷ The court further held that even if it were not an open forum, the State did not have unlimited power to restrict speech, and any restriction had to be viewpoint-

¹⁷⁰ 492 F.3d 89, 92–93 (2d Cir. 2007).

¹⁷¹ *Id.* at 90–123.

¹⁷² *Id.* at 98–99.

¹⁷³ *Id.* at 100–01.

¹⁷⁴ 303 F.3d 1074, 1077 (9th Cir. 2002).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1091.

¹⁷⁷ *Id.*

neutral and “reasonable in light of the purpose served by the forum.”¹⁷⁸ Because the restriction against the bible club was based purely on its religious viewpoint, the restriction was unconstitutional.¹⁷⁹

In another Ninth Circuit case, *Tucker v. State of California Department of Education*, an employee sued the State for a ban on displays of religious material and religious advocacy by employees.¹⁸⁰ The court there held that such a restriction was unwarranted under the First Amendment.¹⁸¹ Again, the court emphasized that the State had not created a limited forum and could not constitutionally restrict its employees’ speech.¹⁸² Although this particular case involved a state employee and was subject to another type of analysis,¹⁸³ analysis under viewpoint discrimination and open forum precedent was still appropriate.¹⁸⁴ Pursuant to *Widmar* and *Rosenberger*, the court decided that there was no “plausible fear” that the employee’s speech would be attributed to the State and implicate the Establishment Clause.¹⁸⁵ As such, the State’s ban was unconstitutional.¹⁸⁶

While the Ninth Circuit has recognized that religious discrimination in open forums is generally not permissible,¹⁸⁷ it has held prohibitions limiting religious organizations constitutional when

¹⁷⁸ *Id.* The school officially recognized and allowed full access to “groups that engage in any lawful activity which promotes the academic, vocational, personal, or social/civil/cultural growth of students.” *Id.* at 1091–92 (internal quotation marks omitted).

¹⁷⁹ *Id.*

¹⁸⁰ 97 F.3d 1204, 1208 (9th Cir. 1996).

¹⁸¹ *Id.* at 1209–10.

¹⁸² *Id.* at 1209 (“[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse”) (emphasis in original) (internal quotation marks omitted).

¹⁸³ The court decided that *Pickering v. Board of Education*, 391 U.S. 563 (1968), was the controlling analysis for government employee speech. *Tucker*, 97 F.3d at 1210.

¹⁸⁴ *Id.* at 1211.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1213.

¹⁸⁷ *Prince*, 303 F.3d at 1074; *Tucker*, 97 F.3d at 1213.

the State creates a limited public forum.¹⁸⁸ In *Faith Center Church Evangelistic Ministries v. Glover*, the court held that a library constituted a limited public forum because the State intentionally dedicated its property for expressive conduct.¹⁸⁹ The court set out the different levels of scrutiny applicable to open forums, nonpublic forums, and limited public forums.¹⁹⁰ In traditional public forums, like streets and parks, the State can engage in content-based regulations when it is “necessary to serve a compelling state interest and [when it is] narrowly drawn to achieve that end.”¹⁹¹ Regulation in nonpublic forums is less demanding: restrictions need only be reasonable and not enforced against the speaker’s view.¹⁹² The court determined that the library did not fall into either of these categories because the State did not make the meeting room open for indiscriminate use; it excluded use by schools “for instructional purposes as a regular part of the curriculum,” as well as use for religious services.¹⁹³ Nevertheless, pursuant to *Good News Club v. Milford Central School*,¹⁹⁴ there was a distinction between religious activity and mere religious worship devoid of any moral teachings.¹⁹⁵ As such, the court listed various activities, like effective communication of a group’s goals, the discussion of religious books, teaching, praying, singing, and sharing testimonials as permissible. However, pure religious worship is not a viewpoint but a category of content, and can be properly excluded.¹⁹⁶

It is clear from just these few cases discussing the boundaries of limited public forums and its relationship to viewpoint discrimination that the circuits are engaging in complex precedential

¹⁸⁸ See *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 910 (9th Cir. 2007), *abrogated on other grounds by* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

¹⁸⁹ *Id.* at 907.

¹⁹⁰ *Id.* at 907–08.

¹⁹¹ *Id.* at 907 (internal quotation marks omitted).

¹⁹² *Id.* at 907–08.

¹⁹³ *Id.* at 909.

¹⁹⁴ See 533 U.S. 98, 108 (2001).

¹⁹⁵ *Glover*, 480 F.3d at 913–14.

¹⁹⁶ *Id.* at 915.

weaving.¹⁹⁷ What is apparent is that when a State creates a limited public forum, it is within its power to restrict religious activity like worship.¹⁹⁸ While the government must allow some activity “quintessentially religious” in nature, not all religious activity is protected under the doctrines of neutrality.¹⁹⁹

II. THE SEVENTH CIRCUIT

A. *Decisions Before Badger Catholic*

The Seventh Circuit has addressed the issues surrounding the Establishment Clause, religion in public institutions, and the scope of forum creation in various recent cases.²⁰⁰

In one instance, several churches challenged an ordinance that restricted the use of land zoned for commercial and business uses.²⁰¹ The court looked to the motivation for the regulations and determined that the city was not motivated by a disagreement with the churches’ message but rather was concerned with the effective use of land.²⁰² As this was a viewpoint-neutral purpose and a reasonable restriction of the land’s use, the court held that it was constitutional.²⁰³

In *Southworth v. Board of Regents of the University of Wisconsin System*, students challenged the mandatory activity fee that the University imposed on grounds that such a fee amounted to

¹⁹⁷ See *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 492 F.3d 89, 92–93 (2d Cir. 2007); *Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1208 (9th Cir. 1996).

¹⁹⁸ See *Bronx Household of Faith*, 492 F.3d at 101.

¹⁹⁹ See *id.*; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001).

²⁰⁰ *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 864 (7th Cir. 2008); *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 865–66 (7th Cir. 2006); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003); *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 580 (7th Cir. 2002).

²⁰¹ *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 758–59 (7th Cir. 2003).

²⁰² *Id.* at 765.

²⁰³ *Id.*

support for views to which they objected.²⁰⁴ The court held that the fee was reasonable and that the fund constituted a metaphysical limited public forum.²⁰⁵ Even so, the court held that the student government that defined the parameters of the forum was not entitled to unbridled discretion.²⁰⁶ Instead, it had to develop specific and concrete standards guiding its funding decision.²⁰⁷ So while the court recognized that the University could create a limited forum that could discriminate against certain content, these limits would have to be spelled out specifically.²⁰⁸

The court also examined the application of neutrality in *Christian Legal Society v. Walker*.²⁰⁹ There, a student organization sued a public law school after it was derecognized for excluding homosexuals from its organization's voting membership, citing that it was entitled to free speech and free exercise of religion.²¹⁰ The school had a nondiscrimination policy that was concededly viewpoint-neutral; however, the court questioned whether it was applied in a viewpoint-neutral way.²¹¹ Although the court noted that denying recognition to a student organization is a significant infringement, it still found that the group showed a likelihood of success on its claim that the school unconstitutionally derecognized it.²¹² In doing so, the court recognized that a student organization could be restrictive if found to be a limited public forum.²¹³ Here, the court was concerned with the student's expressive rights.²¹⁴ Even with a viewpoint-neutral stance, it is

²⁰⁴ 307 F.3d at 570–71.

²⁰⁵ *Id.* at 580.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 453 F.3d 853, 865–66 (2006).

²¹⁰ *Id.*

²¹¹ *Id.* at 866.

²¹² *Id.* at 867.

²¹³ *Id.* at 866.

²¹⁴ *Id.* at 867 (the policy would significantly affect the organization's ability to express its disapproval of homosexuality).

possible for a university to improperly restrict the activities of its students.²¹⁵

Likewise, *Doe v. Small* addressed the use of public spaces by religious groups.²¹⁶ There, action was sought to enjoin the display of a religious painting in a park.²¹⁷ The injunction ordered by the district court that forbade the painting was held overly broad.²¹⁸ The Seventh Circuit determined that the park, as a public forum, must accept religious speech.²¹⁹ By limiting expression, the State does not act neutrally, but is hostile towards the religious groups' viewpoint.²²⁰ The court instructed that any restriction placed on the open forum must be narrowly tailored.²²¹

In *Choose Life Illinois v. White*, the court addressed the definition of public forums.²²² An anti-abortion group sought to compel the State to issue "Choose Life" license plates.²²³ After deciding that license plates did not constitute government speech,²²⁴ the court held that they were a limited public forum.²²⁵ Because the plates had not been open for general public discourse, the court concluded that the State had not intentionally opened the nontraditional forum for public use.²²⁶ In the end, the court concluded

²¹⁵ *See id.*

²¹⁶ 964 F.2d 611 (7th Cir. 1992).

²¹⁷ *Id.* at 612–13.

²¹⁸ *Id.* at 621.

²¹⁹ *Id.* at 619.

²²⁰ *Id.*

²²¹ *Id.* at 621 ("The district court's order was not narrowly tailored because it sought to eliminate the display of the paintings 'by any party' instead of limiting it to the 'evil' of the City's alleged endorsement of the painting alone.").

²²² 547 F.3d 853, 864 (7th Cir. 2008).

²²³ *Id.*

²²⁴ *Id.* at 863 ("Messages on specialty license plates cannot be characterized as the government's speech. Like many states, Illinois invites private civic and charitable organizations to place their messages on specialty license plates. The plates serve as 'mobile billboards' for the organizations and like-minded vehicle owners to promote their causes and also are a lucrative source of funds.").

²²⁵ *Id.* at 864–65 (declining to qualify license plates as an open or designated forum).

²²⁶ *Id.* at 864.

that the government was allowed to restrict this area based on the content of the message.²²⁷ As it had restricted all license plate designs that addressed abortion, rather than targeting only the pro-life view, the government was engaging in content discrimination.²²⁸ The court held this restriction reasonable in light of the plates' purpose, especially since the State evinced no hostility towards any particular view.²²⁹

Additionally, in *Linnemeir v. Board of Trustees of Purdue University*, students sought to enjoin a play that a university was presenting because it evinced anti-Christian beliefs.²³⁰ Though the court recognized that a university policy promoting a particular belief would violate the First Amendment, merely allowing students to choose a play and display it did not amount to endorsement.²³¹ The court stated that just as a classroom is not a public forum, neither is a university theater.²³² Moreover, it recognized the need for academic freedom:

If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself.²³³

The court urged that educational deference and deference to State's rights are required so long as the action is not invidious.²³⁴ Again, the court recognized the rights that universities have in defining and funding their actions.²³⁵ This decision was criticized, as there was no

²²⁷ *Id.* at 865.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ 260 F.3d 757, 758–59 (7th Cir. 2001).

²³¹ *Id.* at 759–60.

²³² *Id.* at 760.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

evidence that the University allowed other theater groups to use its stage, and its choice of one ideology and denial of others constituted viewpoint discrimination.²³⁶

These cases demonstrate the breadth of application that the court has made in viewpoint discrimination and limited forum cases. When the State acts against a religious group, or any group for that matter, it must be motivated by something other than the group's views.²³⁷ Moreover, when it creates a limited forum, it needs to specify the limits of that forum, so it is readily identifiable which content is not allowed.²³⁸ It is also important to recognize that the mere existence of a viewpoint-neutral policy does not mean that its application will also be viewpoint-neutral.²³⁹

B. Badger Catholic

Decided in 2010, *Badger Catholic, Inc. v. Walsh* involved a religious group at the University of Wisconsin and its attempt to gain funding for its activities.²⁴⁰ The school collects nearly \$400 from each of its students in order to provide for a variety of non-instructional student services and programs.²⁴¹ These funds are made available to qualifying student organizations, which include those that engage in “expressive activities, concerts, some athletic activities, and recreational activities.”²⁴² Additionally, the fund's purpose was to “provide a source of funds to ensure that students have the means to engage in *dynamic discussions of philosophical, religious, scientific, social, and political subjects* in their extracurricular campus life

²³⁶ *Id.* at 767 (Coffey, J., dissenting).

²³⁷ *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003).

²³⁸ *See Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 580 (7th Cir. 2002).

²³⁹ *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 865–66 (7th Cir. 2006).

²⁴⁰ *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 776–77 (7th Cir. 2010).

²⁴¹ *Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys.*, 578 F. Supp. 2d 1121, 1126 (W.D. Wis. 2008).

²⁴² *Id.*

outside the lecture hall.”²⁴³ In order to gain access to these funds, student organizations must meet criteria primarily set by the student government.²⁴⁴ Moreover, the University stated that the forum was developed to foster “dialogue, or discussion, or debate.”²⁴⁵

In 2005, the University of Wisconsin Roman Catholic Foundation (RCF) began to seek reimbursement from the school’s fund.²⁴⁶ Though the school expressed concerns about RCF’s eligibility,²⁴⁷ it eventually approved the group as a registered student organization.²⁴⁸ In achieving eligibility, RCF submitted to student control and agreed not to seek funding for “masses, weddings, funerals, or other sacramental acts requiring the direct control of ordained clergy.”²⁴⁹

Although by 2007, RCF was allowed to seek funding, the University did not fund RCF’s activities in their entirety.²⁵⁰ Specifically, the University concluded that it could not reimburse four of RCF’s expenditures because they were for worship, proselytizing, or sectarian religious instruction.²⁵¹ RCF provided a mentoring program with spiritual directors for spiritual mentoring,²⁵² a training institute for the organization’s leaders to gain perspective on how to talk about prayer, worship, and the Catholic faith,²⁵³ a drum shield

²⁴³ *Id.* (emphasis added).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1134 (internal quotation marks omitted).

²⁴⁶ *Id.* at 1127.

²⁴⁷ *Id.* The RCF was not a recognized student organization originally. While it later met the criteria under the student government’s mandates, it initially struggled as it had members who were not University students. *Id.* Moreover, it was not controlled by students but by the St. Paul’s Catholic Center and various religious officials, including a pastor and bishop. *Id.* The organization was also in violation because it did not allow non-Catholics to participate in its meetings. *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² The spiritual mentors included nuns and priests who would talk to the students about anything they wanted to talk about for a half-hour. *Id.* at 1127–28.

²⁵³ These meetings included a variety of activities including masses, prayer, and worship services. *Id.* at 1128.

used in praise and worship bands, and the cost of a Rosary instructional pamphlet that told students how to pray the Rosary.²⁵⁴ By the time the case reached the court, the University had also denied RCF funding for a summer training camp that trained the organization's leaders and included several masses, communal prayers, and worship programs.²⁵⁵ Moreover, the University denied funding for a program that brought nuns from Italy to Madison to meet with the group's students to advise them on their "path in the world" and determine whether they should "be a priest, or religious, or . . . married."²⁵⁶ While the school did not fund these activities, it still funded the majority of RCF's actions, including large and small group discussion, education and service offerings, theater and choral activities, and welcoming activities.²⁵⁷

The district court determined that the fund that the University created constituted a nonphysical forum under *Rosenberger* and stated that such a forum was required to distribute reimbursements on a viewpoint-neutral basis.²⁵⁸ Likening the case to *Rosenberger*, the court referred to the University of Virginia's rejected argument that the publications primarily promoted or manifested a particular belief in or about a deity or an ultimate reality.²⁵⁹ Just as that was considered a limited public forum, so too was the University of Wisconsin's fund.²⁶⁰ The court concluded that the University was entitled to adopt reasonable content-based restrictions on the limited forum, but that its current denials were too broad.²⁶¹ The court noted that merely labeling types of speech as dialogue or worship was not dispositive of whether the regulations were constitutional.²⁶² Instead, the University would have to explain its choices in funding and needed to analyze the

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1129–30.

²⁵⁹ *Id.* at 1130; *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822–30.

²⁶⁰ *Roman Catholic Found.*, 578 F. Supp. 2d at 1130.

²⁶¹ *Id.* at 1133–34.

²⁶² *Id.*

specific content of each disputed activity, rather than rely on highly abstract labels.²⁶³

In *Badger Catholic, Inc. v. Walsh*, the Court of Appeals for the Seventh Circuit affirmed the district court's decision.²⁶⁴ The court rejected the argument that funding prayer, proselytizing, or religious instruction would violate the Establishment Clause.²⁶⁵ Instead, it held that because the University had decided that nonreligious counseling groups were within the forum's scope, it could not exclude religious groups offering prayer as a means of counseling.²⁶⁶ Furthermore, the court did not agree that the University was allowed to make this decision, whether or not the Establishment Clause required it.²⁶⁷ Relying on *Locke*, the court stressed that the State's program should not evince hostility towards religion.²⁶⁸ Though *Locke* noted that schools could speak through their decisions about which programs to support, such as having a department on philosophy but not theology, the court held that the forum created by the University of Wisconsin was not to propagate its own message, but to provide its students the ability to speak.²⁶⁹ The court concluded that the University cannot shape Badger Catholic's message by selectively funding speech of which it approves, and not funding views of which it disapproved.²⁷⁰ Because the University created a public forum, it had to accept all comers within the forum's scope.²⁷¹

²⁶³ *Id.* at 1134–35.

²⁶⁴ 620 F.3d 775 (7th Cir. 2010).

²⁶⁵ *Id.* at 778.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 779.

²⁶⁸ *Id.* at 780; see *Locke v. Davey*, 540 U.S. 712, 724–25 (2004).

²⁶⁹ *Badger Catholic*, 620 F.3d at 780. The court noted that this seemed like an overly formalistic distinction. *Id.* Nevertheless, it qualified its holding because the University of Wisconsin had previously told the Supreme Court that it would establish neutral rules and not shut out any perspectives. *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

III. ANALYSIS

A. *Overarching Problem*

Religion in public education is much like Pandora's box, unleashing an area of the law that lends itself to excessive complication and entanglement.²⁷² Regardless of the standard or test applied by the courts, religion has faced a burden unlike any other institution in American democracy.²⁷³ Focusing specifically on content and viewpoint discrimination, courts have struggled to apply these seemingly straightforward tests.²⁷⁴ In one instance, a court may find that the government is acting constitutionally, while another court may find activity of nearly the same nature unconstitutional.²⁷⁵ Thus, different circuits have reached markedly different results.²⁷⁶

The Seventh Circuit's holding, which determined what public universities must fund, is perilous.²⁷⁷ In an attempt to make the situation clearer for government institutions, *Badger Catholic* unnecessarily integrates Church and State.²⁷⁸ Ironically, the goal that

²⁷² See Witte, *supra* note 1, at 1904.

²⁷³ See Esbeck, *supra* note 28, at 371–72.

²⁷⁴ See *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 492 F.3d 89, 99–100 (2d Cir. 2007) (finding a violation of the Establishment Clause where a church was permitted to use school facilities for Sunday service); *Prince v. Jacoby*, 303 F.3d 1074, 1092–93 (9th Cir. 2002) (requiring a school to give bible club access to facilities even though it conducted religious speech); *Linnemeir v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757, 759–60 (7th Cir. 2001) (finding no First Amendment violation where a public university presented a student play that evinced anti-Christian beliefs).

²⁷⁵ Compare *Bronx Household of Faith*, 492 F.3d at 100, with *Prince*, 303 F.3d at 1093.

²⁷⁶ See *Bronx Household of Faith*, 492 F.3d at 99–100; *Prince*, 303 F.3d at 1092–93; *Linnemeir*, 260 F.3d at 759–60.

²⁷⁷ See *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782–83 (7th Cir. 2010) (Williams, J., dissenting); *Green*, *supra* note 43, at 1118–19.

²⁷⁸ See *Badger Catholic, Inc.*, 620 F.3d at 789 (Williams, J., dissenting).

the Seventh Circuit hoped to achieve may end up working towards an opposite end.²⁷⁹

The problem stems from the constant battle between the Establishment Clause and the Free Exercise Clause.²⁸⁰ The tests developed to handle the varying issues under each clause fail to address the true complexity of the problem—resulting in the Supreme Court’s inability to come to a clear answer.²⁸¹ Decisions like *Badger Catholic* exemplify the inherent problem that American jurisprudence has created for itself.²⁸² Whether with respect to funding or facilitating in some manner, analyzing religion’s role in education under independent tests developed for specific clauses of the First Amendment belittles the magnitude of the situation.²⁸³

The Seventh Circuit’s decision in *Badger Catholic* placed an unnecessary burden on the State and forced the government as well as students to implicitly endorse various religious activities, regardless of their own ideology.²⁸⁴ By concluding that the forum in *Badger Catholic* was an open forum, the Seventh Circuit missed the direction of the law and misinterpreted the purpose of viewpoint discrimination analysis.²⁸⁵ What the University created was a forum for a specific purpose and with concrete limitations.²⁸⁶ These limitations were

²⁷⁹ See *id.* at 781 (the court aimed to define parameters that would enforce neutrality towards religion).

²⁸⁰ See Green, *supra* note 43, at 1126–27.

²⁸¹ See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

²⁸² See Green, *supra* note 43, at 1132 (“[E]venhanded neutrality is incomplete as a constitutional doctrine because it fails to account for the other important values that inform the religion clauses, such as protecting religious liberty and autonomy, ensuring religious (and secular) equality, alleviating religious dissension, and protecting the legitimacy and integrity of both government and religion. A focus on neutrality, however, discounts these values of liberty, equality, diffusion, and government integrity.”).

²⁸³ *Id.* at 1131–32.

²⁸⁴ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001).

²⁸⁵ See *Badger Catholic*, 620 F.3d at 781; Green, *supra* note 43, at 1135–36.

²⁸⁶ *Badger Catholic*, 620 F.3d at 783 (Williams, J., dissenting).

publicly available and reasonable in light of the forum's purpose and the tenets of the Constitution.²⁸⁷

Plainly, the Seventh Circuit's decision failed to recognize that public institutions have the ability to stop some activity and are required in some instances to limit religious speech so that religion receives no preferential treatment from the State.²⁸⁸ There is a specific distinction between the state providing equal access to all groups regardless of their views and the funding and propagating of religious worship and activity.²⁸⁹ While the former is necessarily protected under the First Amendment, the latter represents an unreasonable encroachment.²⁹⁰

In looking at where to go from here, the Seventh Circuit must understand the true movement of its own law as well as how the Establishment Clause was meant to affect religion.²⁹¹ What has occurred here is but a tremor of what may come if other circuits follow the same route.²⁹²

B. *Badger Catholic Detailed*

The Seventh Circuit failed to recognize the University of Wisconsin's prerogative to create a limited forum and restrict access to that forum based on the content of activities.²⁹³ Specifically, the University created the forum to foster discussion of philosophical, religious, scientific, social, and political subjects.²⁹⁴ Moreover, it fully

²⁸⁷ *Id.*

²⁸⁸ *See* Healy v. James, 408 U.S. 169, 192–93 (1972).

²⁸⁹ Green, *supra* note 43, at 1131–32.

²⁹⁰ *Id.*

²⁹¹ *See* Christian Legal Soc'y v. Walker, 453 F.3d 853, 865–66 (7th Cir. 2006); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003); Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 580 (7th Cir. 2002).

²⁹² *See* Green, *supra* note 43, at 1135–36.

²⁹³ *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2990 (2010).

²⁹⁴ Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys., 578 F. Supp. 2d 1121, 1126 (W.D. Wis. 2008).

funded dialogue and debate on these topics.²⁹⁵ What it did not fund was any form of worship, proselytizing, or religious instruction.²⁹⁶ All student organizations could access this fund so long as they stayed within these limits.²⁹⁷ In doing so, the University created a specific limited forum.²⁹⁸

However, the court stretched the tenets of neutrality to demolish the barriers that the University created.²⁹⁹ By requiring the school to reimburse Badger Catholic on the same basis that it reimburses other groups, the court missed the mark.³⁰⁰ While facially, this approach appears viewpoint-neutral, it degraded what these activities actually were.³⁰¹ The court seemed to see no difference between students mentoring students and students seeking advice from nuns and priests.³⁰² However, there is a significant difference.³⁰³ While one is a discussion and dialogue about various social problems at a school, the other is religious instruction.³⁰⁴ It is not far-fetched that nuns and priests will be giving particular religious instruction that cannot be rivaled by a secular counterpart.³⁰⁵ By its very nature,

²⁹⁵ *Id.* at 1134.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 1126.

²⁹⁸ *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

²⁹⁹ *See* Green, *supra* note 43, at 1131–32.

³⁰⁰ *See* Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2990 (2010); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

³⁰¹ *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 785 (7th Cir. 2010) (Williams, J., dissenting).

³⁰² *See id.* at 779 (majority opinion).

³⁰³ *Id.* at 785 (Williams, J., dissenting) (“If religion, and the practice of one’s religion, can be described as merely dialog or debate from a religious perspective, what work does the Free Exercise [C]lause of the First Amendment do?”); *see also* Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 102 (2d Cir. 2007) (Calabresi, J., concurring) (“Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false.”).

³⁰⁴ *See Rosenberger*, 515 U.S. at 831 (“Religion . . . provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”).

³⁰⁵ *Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys.*, 578 F.Supp.2d 1121, 1127–28 (W.D. Wis. 2008).

religious mentoring is on a level fundamentally different from student dialogue.³⁰⁶ It represents a spiritual experience.³⁰⁷ There is no comparison between the two, and trying to draw congruence only denigrates the value of religion.³⁰⁸

All of the activity for which the University rejected funding follows this same analysis.³⁰⁹ A training institute for the organization's leaders that conducts mass, prayer, and worship sessions is not equivalent to a normal organization's leadership training.³¹⁰ The same applies to the summer training camp that it conducted.³¹¹ These are exercises in religious devotion and proselytizing, not mere training.³¹²

Moreover, the pamphlets that Badger Catholic distributes differ significantly from the newspapers discussed in *Rosenberger*.³¹³ While the newspapers were intended to give religious perspective and advice on current topics, Badger Catholic's pamphlets were instructions on worship.³¹⁴ It instructed members on the rosary and how to pray it.³¹⁵ This is markedly different from evincing a religious perspective.³¹⁶

That the University funded all but 9% of Badger Catholic's activities also lends some insight into how specific its limitations actually were.³¹⁷ The six activities that it did not fund plainly did not

³⁰⁶ See *Rosenberger*, 515 U.S. at 831.

³⁰⁷ See *Bronx Household of Faith*, 492 F.3d at 102.

³⁰⁸ *Id.*

³⁰⁹ See *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010).

³¹⁰ *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 785 (7th Cir. 2010) (Williams, J., dissenting).

³¹¹ *Id.*

³¹² See *Green*, *supra* note 43, at 1120–21.

³¹³ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 826–27 (1995).

³¹⁴ Compare *Rosenberger*, 515 U.S. at 827, with *Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys.*, 578 F. Supp. 2d 1121, 1128 (W.D. Wis. 2008).

³¹⁵ *Roman Catholic Found.*, 578 F.Supp.2d at 1128.

³¹⁶ See *Rosenberger*, 515 U.S. at 827.

³¹⁷ *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 783 (7th Cir. 2010) (Williams, J., dissenting).

further the forum's goals.³¹⁸ This was reasonable content discrimination.³¹⁹ By forbidding worship, proselytizing, or religious instruction, the University did not target religious views generally or Catholicism specifically.³²⁰ Instead, it forbade actions.³²¹ Presumably, any group that might seek reimbursement under these categories would be rejected.³²² The court attempted to liken Badger Catholic's activities to secular counterparts and missed the point of these activities.³²³

The court also incorrectly assumed that worship and proselytizing are automatically religious.³²⁴ It is just as likely that a student group could form to worship and proselytize for a sports team or a pop star.³²⁵ These are categories of conduct, not religious views.³²⁶ The separation is only magnified by the unrivaled equivalency that religion creates for itself.³²⁷ That mass, prayer, and worship are typically religious and hold no secular equal does not mean that the actions amount to a viewpoint.³²⁸ Instead, it demonstrates the specificity that the University has created in its forum.³²⁹ Mentoring programs are not the equivalent of religious

³¹⁸ *Id.*

³¹⁹ See *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010); *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981).

³²⁰ See *Martinez*, 130 S. Ct. at 2990.

³²¹ See *id.*

³²² *Badger Catholic*, 620 F.3d at 785 (Williams, J., dissenting).

³²³ See *id.* at 777–78 (majority opinion).

³²⁴ See *id.* at 778–79.

³²⁵ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001).

³²⁶ *Id.*

³²⁷ See *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 492 F.3d 89, 102 (2d Cir. 2007) (Calabresi, J., concurring).

³²⁸ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 826–27 (1995).

³²⁹ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

mentoring because the latter incorporates a specific level of worship and prayer outside the scope of the forum's purpose.³³⁰

Finally, the court ignored the academic deference that it had previously exercised and the well-respected notion that the State can preserve property under its control so long as the self-created barriers are reasonable and viewpoint-neutral.³³¹ With scarce resources available, the University is allowed to decide which projects and conduct it wishes to fund.³³² It must merely block access to the limited forum reasonably and without regard to viewpoint.³³³ The University is allowed to make hard decisions about its funding.³³⁴ As such, the Seventh Circuit's decision in *Badger Catholic* was wrong.³³⁵

CONCLUSION

The Court of Appeals for the Seventh Circuit had the chance to protect the separation of church and state in *Badger Catholic v. Walsh*, but instead misapplied the neutrality test and created further ambiguity. Perhaps because the court misunderstood the facts of the case or misinterpreted precedent, the University of Wisconsin is unnecessarily required to fund religious activity that it never aimed to. Rather than creating a more level playing field for participation by all student organizations, the court mishandled *Badger Catholic v. Walsh* and disregarded the high level of separation that the First Amendment demands. Moreover, by equating secular tasks with quintessential religious actions, the decision partakes in blanket assumptions about

³³⁰ *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 783 (7th Cir. 2010) (Williams, J., dissenting); see *Bronx Household of Faith*, 492 F.3d at 102 (Calabresi, J., concurring).

³³¹ See *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2983 (2010).

³³² *Martinez*, 130 S. Ct. at 2998; see also *Badger Catholic*, 620 F.3d at 786–87 (7th Cir. 2010) (Williams, J., dissenting).

³³³ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

³³⁴ See *Martinez*, 130 S. Ct. at 2998; see also *Badger Catholic*, 620 F.3d at 786–87 (7th Cir. 2010) (Williams, J., dissenting).

³³⁵ See *id.*

religious activity. Rather than clarifying the discussion of religious funding in public education, the court's decision merely adds to the serpentine wall of separation.