Journal of Law and Policy

Volume 12
Issue 1
SCIENCE FOR JUDGES I:
Papers on Toxicology and Epidemiology

Article 10

2003

Religion in New York Public School? God Forbid: Proper Application of the Public Forum Domain

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RELIGION IN NEW YORK PUBLIC SCHOOLS? GOD FORBID: PROPER APPLICATION OF THE PUBLIC FORUM DOCTRINE

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INTRODUCTION

Since 1988, federal courts in New York have struggled with the statutory interpretation and application of New York Education Law section 414 ("section 414"), which authorizes New York public school boards to implement regulations governing the community's use of school facilities.[1] Even though section 414 authorizes the use of public school facilities by community residents, New York school districts have denied religious groups, including a wide spectrum of student groups, community groups, and churches, access to those facilities.[2] Religious groups contend

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[1] N.Y. EDUC. LAW § 414 (enacted 1910; McKinney 2002). *See* language of the statute *infra* note 21 and explanation of the statute *infra* Part I.A.

[2] *Id*. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 105 (2001) (addressing public school's denial of community-based Christian youth organization's request to meet after school hours in school building); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 388-89 (1993) (addressing the school district's denial of church's request to use public school

that free speech rights protected by the First Amendment have been violated.[3] New York school districts contend that they have the authority to regulate private speech.[4] The Second Circuit has supported school districts' policies and practices, holding that section 414 created only a limited public forum from which religious speech could be excluded.[5] Twice, the United States Supreme Court granted certiorari and reversed the Second Circuit's decisions.[6] Nonetheless, New York school districts continue to deny religious groups access to school facilities, which are otherwise open to the community.[7]

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for a film series); Bronx Household of Faith v. Bd. of Educ. of N.Y. and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 346-47 (2d Cir. 2003) (addressing, for the second time, the school board's denial of congregation's application to hold Sunday services in public school); Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 215 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) (addressing the school board's denial of congregation's application to hold Sunday services in public school). Bronx Household of Faith brought the same complaint against the local school board on the ground of the new case law in *Good News Club*. Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401, 411 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003).

[3] *See, e.g.*, *Good News Club*, 533 U.S. at 104; *Lamb's Chapel*, 508 U.S. at 389; Anderson v. Mex. Acad. and Cent. Sch., 186 F. Supp. 2d 193, 195 (N.D.N.Y. 2002); Saratoga Bible Training Inst. v. Schuylerville Cent. Sch. Dist., 18 F. Supp. 2d 178, 182 (N.D.N.Y. 1998).

[4] *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 395; Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998), *aff'd*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001); Liberty Christian Ctr. Inc. v. Bd. of Educ. of the City Sch. Dist. of Watertown, 8 F. Supp. 2d 176, 180 (N.D.N.Y. 1998); Trinity United Methodist Parish v. Bd. of Educ. of the City Sch. Dist. of Newburgh, 907 F. Supp. 707, 712 (S.D.N.Y. 1995). *See* Anderson v. Mex. Acad. and Cent. Sch., 186 F. Supp. 2d 193, 196 (N.D.N.Y. 2002).

[5] Good News Club v. Milford Cent. Sch., 202 F.3d 502, 509 (2d. Cir. 2000), *rev'd*, 533 U.S. 98 (2001); *Bronx Household of Faith*, 127 F.3d 214-15; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 387 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993). *See infra* Part I.B.1 (explaining limited public forum); *see also infra* Part III.B (discussing limited public forum).

[6] *Good News Club*, 533 U.S. at 102; *Lamb's Chapel*, 508 U.S. at 390.

[7] *See, e.g.*, *Bronx Household of Faith*, 226 F. Supp. 2d at 403. A school district denied a local church access to the public school facility for the Sunday worship and meeting after the Supreme Court granted a Christian youth organization access to the public school for the weekly meetings, which

The Supreme Court has recognized that the Constitution's protection of religious speech limits a school board's authority to deny non-student groups' access to public school facilities.[8] Religious speech is fully protected by the First Amendment of the Constitution.[9] The Second Circuit, however, has struggled to reconcile religious groups' freedom of speech in public school facilities with school boards' Establishment Clause claims, which operate to keep religious speech out of public school facilities.[10]

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consisted of singing praise songs, listening to Bible lessons, and memorizing verses of scripture in *Good News Club*. *Id*. (internal citation omitted).

[8] *Lamb's Chapel*, 508 U.S. at 384 (holding that by opening its facilities to other groups discussing family issues and child rearing, the school board created a limited public forum and could not prohibit religious groups discussion of their viewpoint on the subject). *See* Charles J. Russo & Ralph D. Mawdsley, *And the Wall Keeps Tumbling Down: The Supreme Court Upholds Religious Liberty in* Good News Club v. Milford Central School, 157 EDUC. L. REP. 1, 2 (2001) (reviewing the history of the dispute between the Second Circuit and the Supreme Court).

[9] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."). *See Rosenberger*, 515 U.S. at 835 (holding that the University cannot justify discrimination based on viewpoint for groups seeking allocation of funds because of scarcity of resources); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (reviewing precedent which established that private religious speech is "as fully protected under the Free Speech Clause as secular private expression"); *Lamb's Chapel*, 508 U.S. at 395 (holding that the school district's denial of the use of its facilities for a film series sponsored by a church did not violate the Establishment Clause because, under the circumstances, there was little danger that it would appear that the films and the religion expressed within them were endorsed by the school district); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that the university policy of excluding religious groups from the university's open forum policy violated the fundamental principle that a state regulation of speech should be content-neutral when the university failed to justify its exclusions with a compelling state interest). Religious worship and discussion "are forms of speech and association protected by the First Amendment." *Id*. at 269.

[10] *Good News Club*, 202 F.3d 502; *Bronx Household of Faith*, 127 F.3d 207; *Lamb's Chapel*, 959 F.2d 381. *See* Bronx Household of Faith v. Bd. of Educ. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 355 (2d Cir. 2003). While upholding the lower court's decision to grant an injunction

Reconciliation of these principles requires an understanding of the relationship between the Free Speech Clause and the Establishment Clause of the First Amendment.[11] The competing principles manifest where a non-student religious group requests use of public school facilities.[12] The Supreme Court has settled "the question of whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech."[13] In *Good News Club v. Milford Central School*, the Supreme Court ruled that religious speech, including religious worship, should be allowed in a limited public forum.[14] Unfortunately, even after *Good News Club*, the application of free speech doctrine to public forums

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in favor of a local church on the Free Speech Clause ground, the Second Circuit also expressed its hesitation to follow the Supreme Court precedent in the future. *Id*.

[11] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."). *See* Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535 (1995) (examining Establishment Clause decisions and analyzing the defects in courts' analysis of the Establishment Clause and their failure to protect the rights of the religious and nonreligious equally); Ralph D. Mawdsley, *Religious Worship in Public School Facilities: New York's Section 414 and Closing the Gap between Free Speech and the Establishment Clause*, 178 EDUC. L. REP. 19, 32 (2003) (arguing that the refusal to allow the use of school facilities during non-school hours for religious uses when it is permitted for secular purposes cannot be termed anything but hostility towards religion).

[12] *Good News Club*, 202 F.3d 502; *Bronx Household of Faith*, 127 F.3d 207; *Lamb's Chapel*, 959 F.2d 381. *See* Symposium, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 123-24 (2000) [hereinafter McCarthy] (discussing the transformation of Establishment Clause doctrine in controversies over religious speech in school).

[13] *Good News Club*, 533 U.S. at 105. "Limited public forum" is an area of public property that the government has opened for limited purposes of expressive activity. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (defining three types of forums). A few examples of a limited public forum are school facilities used by student clubs after school hours, school facilities used for school board meetings, municipal buildings used for a concert, and school grounds used for community groups bazaar. *Id*. *See infra* text accompanying notes 67-70 (explaining the concept of limited public forums).

[14] *Good News Club*, 533 U.S. at 106-27.

remains unclear.[15] Therefore, it is imperative that the public forum doctrine be clarified to facilitate proper application of section 414 so as to ensure that the free speech rights of religious groups in New York are appropriately protected.

This note examines the application of the public forum doctrine with regard to New York public school districts' policy and practice of opening facilities to the community while excluding religious groups. Part I reviews the Free Speech Clause and the Establishment Clause of the First Amendment. In addition, it examines the statutory interpretations of New York state law and the policy of the New York City Board of Education with regard to the public forum doctrine. Finally, it reviews the Establishment Clause doctrine and argues that the Establishment Clause does not constitute a compelling state interest for the purpose of public forum analysis. Part II examines the major free speech and public forum doctrine cases. Part III reconsiders the public forum and free speech analysis in light of the cases discussed in Part II. Analyzing the application of the public forum doctrine, four recommendations are presented to facilitate resolution of the recurring issue of prohibition of religious groups from New York public schools.

I. STATUTORY INTERPRETATION

New York school districts have interpreted section 414 to justify an exclusion of religious groups from access to public

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[15] John E. Dunsford, *A Closer Look at* Good News v. Milford*: What are the Implications? (Stay Tuned)*, 25 SEATTLE U. L. REV. 577, 607 (2002).

> *Good News Club* repeats and reinforces the earlier teaching of the Supreme Court in *Lamb's Chapel* that when public authorities create a public forum of some nature, it is unconstitutional under the Free Speech Clause of the First Amendment to discriminate on the basis of religious viewpoint. This lesson has not been entirely welcome in some quarters, and its radiating implications have stirred reconsideration of the adequacy of past definitions of public forums, the claims of religious instruction and worship as protected speech interests, and the appropriate reach of the Establishment Clause into the realm of private expressions on public property.

Id.

school facilities.[16] The exclusion is codified in the New York City Board of Education's Community Use Policy.[17] This section interprets section 414 and the New York City School Board's Community Use Policy.[18]

In addition, the New York school districts have also used an Establishment Clause claim to justify their policy of excluding religious groups.[19] This section explores the relationship between the Free Speech Clause and the Establishment Clause with respect to the protection of religious speech in public schools.

A. New York Education Law Section 414 and New York City Board of Education's Community Use Policy

The State of New York authorizes New York public school boards to implement regulations governing the community's use of public school facilities.[20] In particular, section 414 enumerates

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[16] Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998), *aff'd*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001); Liberty Christian Ctr. Inc. v. Bd. of Educ. of the City Sch. Dist. of Watertown, 8 F. Supp. 2d 176, 180 (N.D.N.Y. 1998); Trinity United Methodist Parish v. Bd. of Educ. of the City Sch. Dist. of Newburgh, 907 F. Supp. 707, 712 (S.D.N.Y. 1995). *See* Anderson v. Mex. Acad. and Cent. Sch., 186 F. Supp. 2d 193, 196 (N.D.N.Y. 2002).

[17] Standard Operating Procedures for Schools and FMCs, EDUC. Topic 5 (October 2001, *revised*) [hereinafter *Community Use Policy*].

[18] N.Y. EDUC. LAW § 414 (McKinney 2002); *Community Use Policy*.

[19] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 681 (2d Cir. 1988); Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401, 425 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003).

[20] N.Y. EDUC. LAW § 414 (McKinney 2002). *See infra* note 21 (language of the statute); *see, e.g.*, *Good News Club*, 533 U.S. at 102. New York public schools are traditionally nonpublic forums because they are government property; *see also* 68 AM. JUR. 2d *Schools* § 94 (2003). Thus, they are generally not open for public uses unless the state intends to open the school facilities for purpose of expressive activities. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (stating that "[t]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but

several purposes for which local boards may permit the public to use school facilities outside regular school hours.[21] The statute

only by intentionally opening a nontraditional public forum for public discourse"); Widmar v. Vincent, 454 U.S. 263, 264 (1981) (stating that in order to create a designated public forum, the state must intend to make the property generally available for expressive activity).

[21] N.Y. EDUC. LAW § 414 (McKinney 2002). New York Education Law § 414 provides the trustees or board of education of the district the control and supervision over the school facilities. *Id*.

> Use of schoolhouse and grounds. 1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for of such schoolhouses, grounds or other property, opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this §. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this § and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes: (a) For the purpose of instruction in any branch of education, learning or the arts, (b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries, (c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public, (d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive

provides for non-student groups from the community to use school facilities for various purposes.[22] The statute allows for broad uses such as "instruction in *any* branch of education, *learning* or the arts."[23] The statute's language, that schools may be used for "social, civic and recreational meetings and entertainments and *other* uses pertaining to the *welfare* of the community," suggests a broad legislative intent.[24] Specifically, section 414 does not contain any explicit language denying religious clubs or other religious groups access to public school facilities, nor does it explicitly make the enumerated purposes exclusive.[25] Section 414 also does not specify which groups may take advantage of the opportunity to conduct "social, civic and recreational meetings and entertainments [or] *other* uses pertaining to the *welfare* of the community," nor does it bar certain groups from such uses.[26]

Although the statute gives the Board of Education the discretion to prohibit some uses, this discretion is not without limit: section 414 is bound by the Constitution, which does not allow a categorical exclusion of all religious groups.[27] New York

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> control and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the Untied States and organizations of volunteer firefighters or volunteer ambulance workers . . . (f) For civic forums and community centers . . . .

Id.

[22] *Id*.

[23] § 414.1(a) (emphasis added).

[24] § 414.1(c) (emphasis added).

[25] *See* § 414; *see also supra* note 21 (language of the statute).

[26] N.Y. EDUC. LAW § 414.1 (McKinney 2002) (emphasis added).

[27] U.S. CONST. amend. I; N.Y. EDUC. LAW § 414 (McKinney 2002). New York public school boards and the Second Circuit have treated all religious groups equally—as they relate to each other—and claim that they comply with the Constitution by excluding all religious groups. *See, e.g.*, Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d. Cir. 2000), *rev'd*, 533 U.S. 98 (2001); Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993); Deeper Life Christian Fellowship v. Bd.

public school districts, however, have made three kinds of arguments from the language of section 414 to justify a bar to religious groups' access to school facilities: (1) Religious purposes are not included in section 414's enumerated list of permitted uses;[28] (2) Subparagraph (d) specifically prohibits use by religious

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of Educ. of N.Y., 852 F.2d 676 (2d Cir. 1988). As this note will argue, however, this categorical exclusion does not satisfy the Constitution. *See* discussion *infra* Part III.D (proposing that New York's Community Use Policy should be struck down as facially unconstitutional because it categorically singles out religious speech from a public forum); *cf.* Christopher P. Coval, Student Symposium, *Good News for Religious Schools and the Freedom of Speech*, 83. B.U. L. REV. 705, 706 (2003) (agreeing with the Supreme Court's interpretation that a "categorical exclusion of religious schools from voucher programs in which private, secular schools are entitled to participate violate[s] the Free Speech Clause" of the Constitution); Rebecca G. Rees, Note, *If We Recant, Would We Qualify?: Exclusion of Religious Providers from State Social Service Voucher Programs*, 56 WASH. & LEE L. REV. 1291, 1338 (1999) (arguing that "[a] categorical exclusion of all religious social service providers from state voucher programs" would convey the message that those providers are collectively "inferior by nature of their religious viewpoint" regardless of the characteristics or contents of their religious viewpoint). Even if school voucher programs constitute limited public forums, such a categorical exclusion of religious schools, "simply because they are religious," violates the Constitution. Coval, *supra*, at 706. If all religious social service providers are collectively excluded from state voucher programs, "when all others are eligible," then it effectively creates a class of outsiders to the program in violation of the Constitution. Rees, *supra*, at 1338.

[28] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (banning a community-based Christian youth organization from holding a weekly meeting on the school facilities on the ground that the New York Education Law § 414 did not list religious purposes for which a school may be used); *Bronx Household of Faith*, 127 F.3d at 215 (prohibiting a church from holding a Sunday worship service and fellowship meeting on the ground that New York Education Law § 414 did not allow religious purposes for which a school may be used); *Deeper Life Christian Fellowship*, 852 F.2d at 678 (denying a church access to school facilities to exhibit a film series portraying family and child-rearing issues for public viewing on the ground that the New York Education Law § 414 did not enumerate religious purposes for which a school may be used); Trietley v. Bd. of Educ. of Buffalo, 65 A.D.2d 1, 5-6 (N.Y. App. Div. 1978) (prohibiting a student Bible club from meeting on school premises on the ground that the New York Education Law § 414 did not include religious purposes in the enumerated purposes for which a school may be used).

groups;[29] and (3) school boards have preserved school facilities as limited public forums available only to non-religious speech by establishing the policy and practice not to ever open the forum to religious groups or to close the forum to religious groups, which used to be available to them.[30]

The only place where section 414 explicitly mentions the term "association or organization of a religious sect or denomination" is under subparagraph (d).[31] Contrary to the school districts' argument, the language of the statute only prohibits religious groups in settings where admission fees are charged; it does not categorically exclude religious meetings.[32] Thus, subparagraph (d) refers to commercial activities, whose proceeds are applied for purposes other than educational or charitable purposes.[33] Subparagraph (d) reflects intent to maintain the integrity of the public forum by preventing profit-seekers from usurping the public forum. If activities or meetings by a religious sect require an admission to cover the overhead cost and/or to make profits, the school board can invoke subparagraph (d) to restrict access.[34] The religious groups and churches that have brought free speech

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[29] *Deeper Life Christian Fellowship*, 852 F.2d at 678. *See* N.Y. EDUC. LAW § 414.1(d) (McKinney 2002).

> For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination . . . .

Id.

[30] *Good News Club*, 533 U.S. at 107 n.2.

[31] N.Y. EDUC. LAW § 414.1(d) (McKinney 2002).

[32] § 414.1.

[33] § 414.1(d). Generally, only those groups that apply the proceeds of their functions to educational or charitable purposes are considered public charities. 26 U.S.C. § 501(c)(3); 26 U.S.C. § 170. *See generally* 51 A.L.R. 2d 1290 (1957) ("One of the distinguishing features of a public charity is that it confers its benefits on the public at large, or some portion thereof, or upon an indefinite class of persons . . . .").

[34] *Id*.

claims, however, do not charge admission fees and, consequently, are not governed by the subparagraph (d).[35]

Pursuant to section 414, the Board of Education instituted a "Community Use Policy," which governs the use of school facilities in its jurisdiction.[36] Each school district within the Board of Education may elect to adopt it.[37] The Community Use Policy has been used as a basis for school districts to deny religious groups use of public school facilities outside regular school

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[35] *See, e.g.*, *Good News Club*, 533 U.S. at 107 n.2; *Deeper Life Christian Fellowship*, 852 F.2d at 678; *Trietley*, 65 A.D.2d at 5-6.

[36] *See* Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 210 (2d Cir. 1997).

[37] *Community Use Policy*. This policy is entitled "Standard Operating Procedures: Topic 5: Regulations Governing the Extended Use of School Facilities" and is also called "Community Use Policy." *Id*.

> Applicants are responsible for adhering to all applicable provisions of this chapter, including the regulations set forth below . . . . 5.2. The use of school facilities must be in accordance with federal law, New York State law, local law and Board of Education policies. 5.3. The primary use of school premises must be for Board of Education programs and activities . . . . 5.5. After Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities. 5.6. In addition to the use described in items 2.11, 5.3. and 5.5, school premises may also be used for the following purposes: 5.6.1. For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations; 5.6.2. For holding social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public; 5.6.3. For polling places for holding primaries, elections and special elections for the registration of voters; 5.6.4. For conducting candidate forums, provided all candidates are invited to participate. Permit applications for such forums must include a written representation that all candidates have been invited to participate. Once approved by the school and the superintendent, the Permit must be submitted to the Office of Community School District Affairs for approval; 5.6.5. For civic forums and community centers in accordance with applicable law; 5.6.6. For recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, nonprofit schools; and 5.6.7. For such other uses as may be authorized by law.

Id.

hours.[38] School boards adopted a list of permitted uses of school facilities, including any kind of meeting related to the welfare of the community.[39] Section 5.11 of the Community Use Policy states:

> [N]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.[40]

The Community Use Policy would exclude from school premises any religiously-motivated group on the basis of the content of their speech.[41] With the Community Use Policy, school boards have created a forum for expressive activities related to learning and welfare of the community, and have defined learning and welfare to exclude activities by religious groups such as religious services and instruction.[42] School districts have attempted to distinguish between "verbal acts of worship and other verbal acts."[43] The Supreme Court, however, noted three difficulties with any attempt to distinguish between protected religious speech and a new class of religious speech activity that constitutes worship: (1) lack of "intelligible content," because activities such as singing religious songs, reading religious doctrines and studying religious principles are all forms of speech and do not "become unprotected

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[38] *See Good News Club*, 202 F.3d 502; Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 1996 WL 700915 (S.D.N.Y. 1996), *aff'd*, 127 F.3d 207 (2d Cir. 1997); *see also Community Use Policy*, *supra* note 37. "No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school." *Id*.

[39] *Bronx Household of Faith*, 1996 WL 700915 at *1.

[40] *Community Use Policy* § 5.11.

[41] Dunsford, *supra* note 15, at 591-92.

[42] *Community Use Policy*, *supra* note 37.

[43] *See* Widmar v. Vincent, 454 U.S. 263, 284-87 (1981) (White, J., dissenting). Justice White's dissent in *Widmar* parallels the school districts' argument distinguishing worship from other forms of speech by religious groups. *Id*.

worship" despite their religious subject matter;[44] (2) lack of judicial expertise to administer the distinction because of diversity of faiths and circumstances; and (3) no purpose for the different treatment "for religious speech designed to win religious converts than for religious worship by persons already converted."[45] Thus, attempts to single out forms of speech constituting worship from other forms of religious speech results in hostility toward religion.[46]

B. First Amendment Rights

The First Amendment of the Constitution of the United States contains two clauses that relate to religious speech in a public

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[44] *Id*. at 270 n.6.

[45] *Id*. *See* Jay Alan Sekulow, James Henderson & John Tuskey, *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1018 (1995) (arguing that the government and public school officials should "treat religious speech" the same as it treats other types of private speech).

[46] Some Supreme Court Justices would agree that New York School Board of Education's Community Use Policy results in hostility rather than neutrality. *E.g.*, Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 845 (1995) (reviewing the university's regulation to deny the right of free speech of student publications containing religious viewpoints, Justice Kennedy's majority opinion stated, "[t]he viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief . . . [and] would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires"); Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248 (1990) (reviewing the school board's prohibition of religious meetings on school premises, Justice O'Connor's majority opinion observed, "if a State refuse[s] to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"); *see also* Dunsford, *supra* note 15, at 592 (pointing out that if taken literally, the New York school district policy "would seem pointedly hostile toward religion"); Russo & Mawdsley, *supra* note 8, at 13 (reflecting on the Supreme Court's response to the Second Circuit in *Good News Club* that "rejected the Second Circuit's suggestion that the principle prohibiting hostility toward religion undergirding the Equal Access Act does not appear to extend to after-school religious groups under the Free Speech and the Establishment Clause").

forum: the Establishment Clause and the Free Speech Clause.[47] The Supreme Court has examined the tension between these clauses and determined they complement each other in protecting individual freedom of religion and speech.[48]

1. Free Speech Clause and Public Forum Doctrine

The First Amendment guarantees every individual the fundamental right to speak and express thoughts and ideas on public property.[49] The government may regulate individuals' free

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[47] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."). Discussion of the Free Exercise Clause is deliberately omitted from this note to focus on the public forum doctrine analysis in light of the Free Speech Clause. Nonetheless, the Free Exercise Clause of the First Amendment is another valid support for the religious speech on the public forum. *See* Paul J. Batista, *Balancing the First Amendment's Establishment and Free Exercise Clauses: A Rebuttal to Alexander & Alexander*, 12 J. LEGAL ASPECTS SPORT 87 (2002) (commenting that the Supreme Court and other federal courts have properly reaffirmed that the First Amendment guarantees and protects students' freedom to engage in religious activities in the public schools); Bila, *supra* note 11, at 1597-98 (discussing the balancing of competing concerns between the Free Exercise and Establishment Clauses of the First Amendment); Recent Development, *Tearing Down the Wall:* Rosenberger v. Rector of the University of Virginia, 19 HARV. J.L. & PUB. POL'Y 587, 594 n.57 (1996) ("The Supreme Court has refused to define the 'centrality' of worship activities in the Free Exercise context because such a definition would entail too great an examination into the tenets of particular religions.").

[48] *Mergens*, 496 U.S. at 250. "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id*. *See* Mawdsley, *supra* note 11, at 33 (stating the gap between the Free Speech Clause and Establishment Clause has been closed by the recognition that religious worship can be protected by the Free Speech Clause in limited public forums).

[49] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). *See, e.g.*, Cohen v. California, 403 U.S. 15, 16-17 (1971) (reversing a California court's conviction based on written words on a jacket protesting the draft on the grounds of free speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (explaining that fear or

speech rights only if it shows "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[50]

Traditionally, a three-prong analysis applies to an alleged violation of the First Amendment right of free speech: (1) whether the speech at issue is protected; (2) whether the forum at issue is a public forum; and (3) whether restrictions imposed upon the speech are appropriate to a particular forum.[51] The three prongs of the free speech analysis have been disputed by religious groups seeking to utilize school district facilities and the New York public school districts that bar such use.[52] Disputes over the second and the third prongs are still unsettled.[53]

To prove a violation of religious groups' free speech rights,

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apprehension of disturbance due to passive expression of opinion by the wearing of armbands "is not enough to overcome the right to freedom of expression"). The free speech right includes non-verbal expression such as wearing black armbands as an anti-war expression and writing certain statements on a jacket. *Id*. *See also* Richard J. Ansson, Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, the Public Forum, and Private Religious Speech*, 8 TEMP. POL. & CIV. RTS. L. REV. 1, 4 (1998) ("Private individuals . . . do have a First Amendment guarantee to speak on government property that has been denoted as a public forum . . . . ").

[50] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (delineating three types of forums and establishing the public forum doctrine). *See* Ansson, *supra* note 49, at 4 (discussing that the First Amendment guarantees private individuals freedom of speech on government property unless the government can show a compelling state interest).

[51] U.S. CONST. amend. I; Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 797-800 (1985); *Perry*, 460 U.S. at 44-45. *See generally* 174 A.L.R. FED. 407 (2001) (discussing the First Amendment principles that analyze the issues of free speech rights on the public school facilities).

[52] *See, e.g.*, Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d. Cir. 2000), *rev'd*, 533 U.S. 98 (2001); Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676 (2d Cir. 1988).

[53] Bronx Household of Faith v. Bd. of Edu. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 355 (2d Cir. 2003).

religious speech must be protected speech.[54] Religious speech is protected speech in a variety of contexts.[55] In resolving the tension between the Establishment Clause and the Free Speech Clause, the Supreme Court declared that discrimination against private religious speech and speakers "demonstrate[s] not neutrality but hostility toward religion."[56] This is so because permitting a private individual's religious speech in a public forum does not constitute governmental endorsement of religion in violation of the First

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[54] *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995) (holding that the state university violated the Free Speech Clause when it denied funds for an organization, which published magazines from a religious editorial viewpoint); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (holding that the state did not violate the Establishment Clause by permitting a private party to display an unattended cross on the ground of the state capitol); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993); Widmar v. Vincent, 454 U.S. 263, 267 (1981). Religious worship and discussion "are forms of speech and association protected by the First Amendment." *Id*. at 269.

[55] *See, e.g.*, Lee v. Iskcon, 505 U.S. 830 (1992) (per curiam) (distribution of religious literature in airport terminals); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (same); Fowler v. Rhode Island, 345 U.S. 67 (1953) (religious speech in a public park); Kunz v. New York, 340 U.S. 290 (1951) (street preaching); Niemotko v. Maryland, 340 U.S. 268 (1951) (same); March v. Alabama, 326 U.S. 501 (1946) (distribution of religious literature in a company town); Jamison v. Texas, 318 U.S. 413 (1943) (distribution of religious literature in public places); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (door-to-door religious canvassing).

[56] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248 (1990) (invalidating the public secondary school's Establishment Clause claim when the school denied the students' request to form a Christian club, which would have the same privileges and requirements as other student groups). *See* McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment). *But see Widmar*, 454 U.S. at 285-86 (White, J., dissenting). Justice White, the only dissenter, rejected the majority's free speech analysis by criticizing the majority's proposition that religious worship is like any other protected speech. *Widmar*, 454 U.S. at 285-86. He argued the importance of distinguishing between "verbal acts of worship and other verbal acts" in order to avoid the result that might force the majority to uphold the university's right to "offer a class entitled 'Sunday Mass' . . . indistinguishable from a class entitled 'The History of the Catholic Church.'" *Id*. This argument does not meet the constitutional standard.

Amendment.[57]

The public forum doctrine determines the existence of a right of access to public property for expressive activities and sets standards to evaluate governmental regulations of such activities.[58] The public forum doctrine developed because the First Amendment cannot practically guarantee every individual an absolute right to speak on publicly owned property.[59] In *Perry Education Association v. Perry Local Educators' Association*, the Supreme Court delineated three types of forums: the traditional public forum, the nonpublic forum and the designated public forum.[60] The "quintessential public forum[s]" or traditional public forums are spaces that "by long tradition or by government fiat have been devoted to assembly and debate."[61] In a traditional public forum, the government's ability to restrict expressive activity is extremely limited because the government must show

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[57] *See* Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5-FALL NEXUS 61, 74 (2000) (asserting that public forums, whether traditional or designated, "where numerous private speakers are provided access for expressive activities of all kinds under neutral criteria is the paradigm example of public property where the religious speech of private individuals does not constitute an unconstitutional endorsement of religion").

[58] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 39 (1983). In *Perry*, a rival union brought an action challenging a provision in the collective bargaining agreement between the school district and its union, granting the union exclusive access to teachers' mailboxes and the interschool mail system. *Id*.

[59] Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 799-800 (1985).

[60] *Perry*, 460 U.S. at 44-47. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677-78 (1998) (reaffirming the public forum doctrine stated in *Cornelius* and *Perry*); *Cornelius*, 473 U.S. at 800-02 (reaffirming the three kinds of forums identified in *Perry*). *See generally* 174 A.L.R. FED. 407 (2001) (discussing the three-prong free speech analysis and three different types of forums).

[61] *Perry*, 460 U.S. at 44-45. These include streets and parks that have traditionally been used for the use of the public and for purposes of assembly, communicating ideas, and discussing public questions. *Id*. *See also Cornelius*, 473 U.S. at 800 ("[A] principal purpose of traditional public for[rums] is the free exchange of ideas . . . .").

that the restriction is narrowly drawn to achieve a compelling state interest.[62] The government may regulate the time, place and manner of expression only if the regulations are content-neutral, narrowly tailored to achieve a compelling government interest and provide sufficient alternative means of communication.[63]

Nonpublic forums are spaces which are not, "by tradition or designation," spaces for the general public's expressive activities.[64] In such spaces, the government has broader authority to restrict private individuals' expressive activity because the state is considered a private property owner that controls the forum for its lawfully reserved use.[65] The standard of review in a nonpublic forum is reasonableness and viewpoint neutrality.[66]

A designated public forum is an area of public property that the

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[62] *Perry*, 460 U.S. at 44-45 ("For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."). *See* Carvey v. Brown, 447 U.S. 445, 461-62 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.").

[63] *Perry*, 460 U.S. at 45. *See* Consol. Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-37 (1980) (holding that government could not prohibit inserts which advocated the use of nuclear power for the purpose of protecting the privacy of utility customers); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (concluding that the government failed to show a compelling interest to justify the antipicketing ordinance in front of a school); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940) (concluding that the state statute violated the First Amendment when the statute empowered a state authority "to determine whether the cause [of solicitation] is a religious one" and to grant a permit for solicitation of aid for religious views upon his determination).

[64] *Perry*, 460 U.S. at 46-47 (including the school mailboxes and interschool delivery facilities, which are intended for secure communication with teachers, not for the use by the general public).

[65] *Id*.

[66] *Id*. at 46. "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id*.

government has opened to the public for purposes of expressive activity.[67] "The Constitution forbids a state to enforce certain exclusions in a forum generally open to the public even if it was not required to open the forum in the first place."[68] A public forum that is "created for a limited purpose such as use by certain groups [like students groups] or for the discussion of certain subjects [like school board business]" is a designated forum.[69] Courts have referred to this kind of designated public forum as a "limited" public forum.[70] Whether the state intended to open the premises for expressive activity can be ascertained by examining the policy and practice of the government.[71] A designated public forum is established when the state allows "general access for a class of speakers" rather than "selective access for individual speakers."[72] In designated public forums, similar to traditional public forums,

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[67] *Id*. at 45.

[68] *Id*. *See, e.g*., Widmar v. Vincent, 454 U.S. 263 (1981) (discussing whether a student-run Christian group could use university meeting facilities); City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976) (addressing the issue of non-union representatives using a school board meeting as a forum); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (concerning the use of a municipal theater).

[69] *Perry*, 460 U.S. at 46 n.7. *See* Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). A designated public forum is property that the government has "opened for expressive activity by part or all of the public." *Id*. "[T]he government does not create a [designated] public forum by inaction" nor by permitting access by the public, but only by "intentionally opening a nontraditional public forum for public discourse." *Id*. at 680 (quoting Cornelius v. NAACP Legal Def. and Educ. Fund, Inc. 473 U.S. 788, 802 (1985)). If the government excludes a private speaker who falls within the class to which a designated public forum is made available, its exclusionary action is subject to strict scrutiny. *Id*. at 679. *See also* United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (stressing that government-owned property is not de facto property open to use as a public forum).

[70] *See infra* notes 232-35 and accompanying text; *see also* discussion of a "limited" public forum *infra* Part III.B-C.

[71] *Cornelius*, 473 U.S. at 802.

[72] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998); *Widmar*, 454 U.S. at 264. To create a designated public forum, the state must intend to make the property generally available for expressive activity. *Id*.

strict scrutiny applies.[73] Thus, the power of the state to restrict expressive activity is extremely limited.[74]

2. *Establishment Clause Doctrine*

School districts have defended their policy of excluding religious groups from school facilities by reference to the Establishment Clause.[75] The districts argue that a school would violate the Establishment Clause if it granted a religious group's application to use school facilities because the Establishment Clause requires it to censor religious speech from the school premises.[76] The Supreme Court has, however, consistently rejected

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[73] *Perry*, 460 U.S. at 45-46.

> Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Id. (internal citations omitted).

[74] *Id*.; *Kokinda*, 497 U.S. at 726-27 (per curiam). "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Id*.

[75] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 681 (2d Cir. 1988); Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401, 425 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003).

[76] *E.g.*, *Lamb's Chapel*, 508 U.S. at 394 (discussing that the school district objected to church's use of school "on the ground that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment"); Hsu v. Roslyn Union Free Sch. Dist. 85 F.3d 839, 867 (2d Cir. 1996) (denying to recognize a student religious club by arguing that if there is an internal dispute within a club, then the school would have to mediate the dispute, which would constitute excessive government entanglement with religion); *Deeper Life Christian Fellowship*, 852 F.2d at 681 (contending that granting a religious group access to school facilities "will have the primary effect of advancing religion and will also foster excessive government entanglement with religion"); *Bronx Household of Faith*, 226 F. Supp. 2d at 425 (contending that a religious group's meeting on Sunday would so dominate the

the Establishment Clause defense in free speech and public forum doctrine cases.[77] The school districts, though, continue to claim Establishment Clause defenses.[78]

The relationship between government and religion is controversial.[79] Courts often require governmental neutrality toward religion under the First Amendment; however, "neutrality" is a legal term of art that has never been adequately or practically defined.[80] In the first major Establishment Clause decision, *Everson v. Board of Education*, the Supreme Court reviewed the history of the First Amendment and concluded that the

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school facilities that the students would perceive it as endorsement of a particular religion by the school).

[77] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 105 (2001) (rejecting the Establishment Clause defense); *Lamb's Chapel*, 508 U.S. at 395.

> We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

Id.

[78] *See, e.g.*, *Bronx Household of Faith*, 226 F. Supp. 2d at 425, Anderson v. Mex. Acad. and Cent. Sch., 186 F. Supp. 2d 193, 205-06 (N.D.N.Y. 2002); Saratoga Bible Training Inst. v. Schuylerville Cent. Sch. Dist., 18 F. Supp. 2d 178, 186 (N.D.N.Y. 1998).

[79] McCarthy, *supra* note 12, at 123-24 (determining the governmental relationship with religion has generated substantial controversy in our nation). This may be in part because the Framers' original intent cannot be ascertained. *Id*. at 123.

[80] *See* McCarthy, *supra* note 12, at 123-24 (stating that "neutrality" has never been defined); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 84 (1986) (stating that the Supreme Court has never offered a rigid definition of "neutrality," and in fact, opposing justices have claimed neutrality as the basis for conflicting opinions). *See* cases cited *supra* notes 3-4.

Establishment Clause means:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'[81]

The separation between church and state has been supported by several rationales, including "protecting churches against coercive government authority, protecting government autonomy from

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[81] Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)). *See* ROBERT M. HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION, 128-40 (David Horne, ed., 1962); McCarthy, *supra* note 12, at 126 n.25; James E. M. Craig, Comment, *"In God We Trust," Unless We Are a Public Elementary School: Making a Case for Extending Equal Access To Elementary Education*, 36 IDAHO L. REV. 529, 532 (2000) (stating that it is commonly assumed today that the Constitution requires a 'wall of separation between church and state'). However, it should be noted that this metaphor of "a wall of separation between church and state" is not found in the Constitution but found in a statement made by Thomas Jefferson in 1802 in a letter refusing a Baptist association's request for a day to be established for fasting and prayer in thanksgiving for the nation's welfare. *Id*. This is a simple note written fourteen years after the enactment of the Bill of Rights. *Id*. As a matter of fact, Jefferson did not participate in drafting the Bill of Rights because he was out of the country at the time of drafting. Craig, *supra*, at 532 (citing Wallace v. Jaffree, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting)). Jefferson wrote the note because he did not want to authorize a statewide 'Baptist Association's Day' for all state residents to observe regardless of their religious beliefs. HEALEY, *supra*, at 128-40. His statement cannot reflect the intent of the Framers and the meaning of the Establishment Clause and Free Speech Clause of the First Amendment. *Id*. *See also Wallace*, 472 U.S. at 106-07 (Rehnquist, J., dissenting). Chief Justice Rehnquist criticized the use of the metaphor and said that the wall "is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned." *Id*. at 107

undue sectarian influences, and protecting the independence of both religious and government enterprises."[82]

Establishment Clause doctrine has dramatically shifted from banning religious speech from government forums to barring prohibition against religious speech on school premises.[83] In 1981, in *Widmar v. Vincent*, the Supreme Court found no Establishment Clause violation when it struck down a prohibition on student religious groups' access to a designated public forum at a state university.[84] In 1990, the Court acknowledged "a crucial difference

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[82] McCarthy, *supra* note 12, at 126-27. *See also* John M. Bagyi, Note, Board of Education of Kiryas Joel v. Grumet: *Misconstruing the Status Quo as a Neutral Baseline*, 60 ALB L. REV. 541, 545 (1996) (discussing five trends which attempt to achieve a balance between the Establishment Clause and the Free Exercise Clause: separation, nonendorsement, accommodation, coercion, and neutrality); Bila, *supra* note 11, at 1535-44 (noting that in spite of the goals of the Establishment Clause to limit the intermingling of government and religion, the Supreme Court has been inconsistent in defining the parameters of the Clause); Symposium, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 319 (1996) (emphasizing that the most powerful reason for the separation of government and religion is to prevent religion from invoking the government's coercive power and to prevent the government from being able to coerce any religious act or belief).

[83] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 103 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-97 (1993); *see also* McCarthy, *supra* note 12, at 131. Elementary school districts have attempted to use Establishment Clause defenses. *Good News Club*, 533 U.S. at 100. They claim that the school districts' policy should be upheld to protect the integrity of the Establishment Clause because it involved impressionable children, who might perceive that the school was endorsing the religion when meetings were on school premises and also might feel compelled to attend them. *Id*. at 114-20. However, this claim has been rejected by the Supreme Court, which reasoned that allowing religious groups on school premises ensured neutrality toward religion. *Id*. *See also* Russo & Mawdsley, *supra* note 8, at 13 (agreeing with the Supreme Court's response to the Second Circuit in *Good News Club* that "rejected the Second Circuit's suggestion that the principle prohibiting hostility toward religion undergirding the Equal Access Act does not appear to extend to after-school religious groups under the Free Speech and the Establishment Clause").

[84] Widmar v. Vincent, 454 U.S. 263 (1981) (holding that the university policy of excluding religious groups from the university's open forum policy violated the fundamental principle that state regulation of speech should be

between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[85] Subsequently, the Court found no Establishment Clause violation in allowing a church to have access to a public school.[86] The church was addressing certain topics from religious perspectives, and the activities "would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members."[87] Furthermore, the Supreme Court has rejected the idea that the Constitution requires the government, in a public forum, to permit religious speech but prohibit religious worship in a public forum.[88]

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content-neutral when the university failed to justify its exclusions with a compelling state interest). The Supreme Court concluded that the university had established an open forum and therefore, any restriction of religious speech on campus must be supported by a compelling state interest. *Id*. at 267-70. All members of a registered religious group at a state university brought an action, challenging the university's policy and claiming violation of the First Amendment. *Id*. at 265-66. University facilities were generally available for activities of university student groups. *Id*. at 265. The university, however, adopted a regulation prohibiting the use of university facilities for purposes of religious worship or religious teaching. *Id*. Finding the university to be an established open forum, the Court affirmed the decision of the Court of Appeals for the Eighth Circuit, holding that the university regulation is an unconstitutional content-based discrimination against religious speech and that the Establishment Clause does not justify the discrimination. *Id*. at 277.

[85] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990).

[86] *Good News Club*, 533 U.S. at 105; *Lamb's Chapel*, 508 U.S. at 395. *See* J. Kevin Jenkins, *Equal Access to Public School Facilities by Religious and Other Non-Curricular Groups*, 170 ED. LAW. REP. 439, 455 (2002) (noting that the Establishment Clause defense is unavailing in "use of facilities" cases before the Court).

[87] *Lamb's Chapel*, 508 U.S. at 395.

[88] *Widmar*, 454 U.S. at 269 n.6. The Supreme Court summarized the invalidity of the school district's argument in *Capitol Square Review Board v. Pinnette*: "[I]ndeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a Free Speech Clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship" (citations omitted). Capitol

II. PUBLIC FORUM DOCTRINE

The Supreme Court and the Second Circuit have reconciled their differences with respect to the public forum doctrine analysis.[89] Nonetheless, understanding the differences is instructive. This section presents examples of the different approaches to the question of whether religious speech is permissible on school premises. The Second Circuit created a new category of speech by treating religious groups collectively regardless of the subject matter of their speech.[90] In its examination of the Second Circuit's analysis, the Supreme Court rebuked the appellate court for allowing the school district to limit speech in a way it determined was a violation of religious groups' freedom of speech.[91]

A. Deeper Life Christian Fellowship v. Board of Education of the City of New York

In 1988, the Second Circuit decided its first free speech and public forum case, *Deeper Life Christian Fellowship v. Board of Education of the City of New York*.[92] The Deeper Life Christian Fellowship ("Deeper Life"), a Christian church, was granted a permit to use an elementary school building in District 27 in Queens on four consecutive Sundays.[93] When Deeper Life applied for renewal of its permit, the school board denied the application

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Square Review Board v. Pinnette, 515 U.S. 753, 760 (1995) (citing *Widmar*, 454 U.S. at 269 n.6). *See supra* Part I.B.2 (explaining the Establishment Clause).

[89] Bronx Household of Faith v. Bd. of Educ. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 357 (2d Cir. 2003).

[90] *See supra* note 27 and accompanying text; *see also* discussion *infra* Part III.D.

[91] *See infra* text accompanying note 176.

[92] 852 F.2d 676 (2d Cir. 1988). Deeper Life Christian Fellowship, plaintiff and appellee, is a nonprofit corporation and a Christian church in Richmond Hill, New York within the public school district overseen by defendant and appellant, District 27 Community School Board. *Id*. at 677. *See supra* Part I.A.1 (discussing the standards of review).

[93] *Deeper Life Christian Fellowship*, 852 F.2d at 677.

on the ground that the Deeper Life's activities, which included worship services, children's church services and a Sunday school at the public school, violated New York State Education Law section 414, especially subparagraph (d).[94] Deeper Life brought a claim against the school board alleging that the school board's denial was an unconstitutional prohibition of free speech.[95] Relying on *Widmar v. Vincent*, the district court granted a preliminary injunction in favor of Deeper Life.[96]

On appeal, the Second Circuit affirmed the injunction, but with erroneous reasoning.[97] Unlike *Widmar*, the Second Circuit's holding was not because the school facility was a public forum and the school district's prohibition was an unconstitutional violation of Deeper Life's free speech right.[98] Rather, its decision was solely because the school district had previously allowed Deeper Life and other religious organizations to use school facilities.[99] Notwithstanding the history of permitting the use of school facilities by religious organizations, the Second Circuit would have

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[94] *Id*. at 678-79; N.Y. EDUC. LAW § 414. *See supra* Part I.A (discussing that subparagraph (d) refers to commercial activities, regardless of the nature of the hosting organization, whose proceeds are applied to serve the purposes other than educational or charitable purposes).

[95] *Deeper Life Christian Fellowship*, 852 F.2d at 679.

[96] *Id*. The *Widmar* Court found that a state university had established an open forum when it made its facilities generally available for expressive activities. *Widmar*, 454 U.S. at 267-70. The Court held that the university's policy to ban a type of expressive activity, i.e., religious worship or religious teaching, did not satisfy a constitutional requirement of a strict scrutiny standard. *Id*. Thus, the Court upheld the lower court's decision that the university's restriction constituted an unconstitutional discrimination against religious speech and that no Establishment Clause defense justified the restriction. *Id*. at 277. *See supra* note 84 (describing further the holding of *Widmar*).

[97] *Deeper Life Christian Fellowship*, 852 F.2d at 679. *See* Brief of the Amici Curiae the Northstar Legal Center and Bronx Household of Faith in Support of Petitioners at 8, Good News Club v. Mildford Cent. Sch., 533 U.S. 98 (2001) (No. 99-2036); Brief of Liberty Counsel as Amicus Curiae in Support of Petitioner at 18-19, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (No. 99-2036).

[98] *Deeper Life Christian Fellowship*, 852 F.2d at 680-81.

[99] *Id*.

otherwise easily reversed the injunction.[100]

The Second Circuit determined that *Widmar* did not control because public elementary schools did not possess forum characteristics similar to a state university, even though the school district created the forum generally open to district residents for expressive activities.[101] Instead, the court found that section 414 created a limited forum and concluded that the state could exclude Deeper Life's religious instruction, worship, and fundraising activities without strict scrutiny of the exclusion of private speech.[102] The court further stated that "property remains a nonpublic forum as to all unspecified uses . . . and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster."[103] Examining the activities of Deeper Life, the court determined that the church's activities were not for the welfare of the community but for the church's own benefit.[104] Finding the church's activities too self-benefiting to constitute "other uses pertaining to the welfare of the community" under

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[100] *Id*. at 680.

[101] *Id*. at 679. *See supra* note 84 (describing further the holding of *Widmar*). The Second Circuit found that the intended users of the public forum created on the public elementary school facilities were limited to the citizens residing within a school district whereas the intended users of the public forum created on the university facilities were a general community. *Deeper Life Christian Fellowship*, 852 F.2d at 679. The Second Circuit found *Widmar* irrelevant with a minimal distinction that public elementary schools have less broad users than state universities. *Id*.

[102] *Id*. at 680-81.

[103] *Id*. at 679-80. This statement has been explicitly criticized by the Supreme Court. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993). *See infra* Part III.C (discussing the improper standard created by the Second Circuit).

[104] *Deeper Life Christian Fellowship*, 852 F.2d at 680 (referring to activities such as increasing membership and raising money to renovate the church building). *Contra* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 105 (2001) (finding that a community-based Christian youth organization's meetings which consisted of singing praise songs, listening to Bible lessons and memorizing verses of scripture, pertain to the welfare of the community); *infra* note 180 and accompanying text.

section 414, it concluded that the activities were unprotected speech and undeserving of constitutional protection on the school premises.[105]

B. Lamb's Chapel v. Center Moriches Union Free School District

In 1988, Lamb's Chapel, an evangelical Christian church, applied to the Center Moriches Union Free School District Board to use the high school auditorium for an evening for each of five weeks to show a film series.[106] The film series portrayed family values and child rearing from a Christian perspective.[107] The school district denied the application on the ground that allowing the use of school facilities for such purposes would violate section 414 and Rule No. 7 of the School District's Rules and Regulations for Community Use of School Facilities ("Rule No. 7").[108] In 1990, Lamb's Chapel brought an action against the school district for declaratory and injunctive relief, claiming the denial of the permit to show the film series violated the church's free speech right.[109] The district court denied the plaintiff's request for a preliminary injunction and Lamb's Chapel appealed to the Second

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[105] *Deeper Life Christian Fellowship*, 852 F.2d at 680.

[106] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 770 F. Supp. 91, 92 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993).

[107] *Id*. at 92 n.1.

[108] *Id*. at 93-94.

> Rule No. 7 provides that [t]he school premises shall not be used by any group for religious purposes. The Rules and Regulations further provide that groups requesting to use the school facilities must be composed predominantly of residents and/or students from the school community, although an exception is made for outside not-for-profit organizations, but only if the applicant demonstrates that there is a benefit to the school community.

RULE NO. 7, *cited in*, *Lamb's Chapel*, 770 F. Supp. at 93 n.3 (citation omitted). *See also* statute cited *supra* note 21 and accompanying text Part I.A.

[109] *Lamb's Chapel*, 770 F. Supp. at 92.

Circuit.[110] The appeal was withdrawn and the case was returned to the district court to reconsider in light of *Board of Education of the Westside Community Schools v. Mergens*.[111]

The district court held that the facilities were properly barred to the plaintiffs since the intended use was not required under the New York Education Law and the school district's own local rule.[112] It also found no constitutional free speech right for religious groups on the school premises since similar speech had not been permitted there in the past.[113] Analyzing *Mergens*, the district court factually distinguished Lamb's Chapel's case on the ground that the *Mergens* decision did not mandate the school district to "open its forum to [religious] use in the face of a policy, practice and in New York a state legislative enactment which specifically prohibits such use."[114] The district court determined that the school was a limited public forum because the school district—pursuant to state law and the district's Rule No. 7, forbidding use "by any group for religious purposes"—did not permit groups similar to Lamb's Chapel to use school facilities.[115] The district court found in fact that the school district had always

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[110] *Id*.

[111] *Id*. (explaining that the case was returned at the suggestion of the Staff Counsel for the Second Circuit for final disposition). *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990). In *Mergens*, a group of high school students were denied permission to establish a Christian club that meets on school premises after hours by the school board. It asserted that the club would violate the Establishment Clause. *Id*. The students alleged that refusal to permit their club to meet at school violated the Equal Access Act, which prohibits public schools receiving federal assistance and that maintain a "limited open forum" from denying "equal access" to students who want to meet "within the forum" on the basis of "religious, political, philosophical, or their content" of the speech at such meetings. *Id*. In reversing the district court's judgment for the school board, the Court of Appeals held that "the Act applied to forbid discrimination against respondents' proposed club on the basis of its religious content, and that the Act did not violate the Establishment Clause." *Id*. The Supreme Court affirmed the decision. *Id*. at 247, 258.

[112] *Lamb's Chapel*, 770 F. Supp. at 98.

[113] *Id*.

[114] *Id*. at 96.

[115] *Id*. at 99.

prohibited religious activities.[116]

On appeal, the Second Circuit affirmed the district court's decision.[117] It held that there was no First Amendment violation in the school district's denial of access because section 414 did not authorize the school district to permit religious uses of the school facilities.[118] The Second Circuit found the list in section 414 exclusive and that religious use is "nowhere permitted in [the] enumeration."[119] Thus, the Second Circuit concluded that the school district's Rule No. 7 forbidding the use "by any group for religious purposes," complied with state law.[120]

Finding that school facilities were limited forums not open to religious uses by policy or practice, the Second Circuit applied the public forum doctrine to examine the constitutionality of the exclusion.[121] Although the Second Circuit recognized that the strict scrutiny standard applicable to a traditional public forum applied to both "limited" and "designated" public forums, it followed *Deeper Life*'s more lenient standard in a limited public forum, which merely requires that the restriction based on subject matter or the speaker's identity be reasonable for unspecified uses.[122] When the appellants challenged the use of the more lenient standard as an improper interpretation of Supreme Court precedent, the Second Circuit referred to its own precedents, *Deeper Life* and *Travis v. Owego-Apalachin School District*, without reference to Supreme Court precedent, to bar the challenge.[123]

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[116] *Id*. at 98. This fact was found even though the Lamb's Chapel presented a list of religious organizations that had used the school facilities. *Id*. at 94 n.4.

[117] *Lamb's Chapel*, 959 F.2d at 389.

[118] *Id*. at 387-89.

[119] *Id*. at 386-87.

[120] *Id*.

[121] *Id*. at 388.

[122] *Id*. at 387 (citing Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 679-80 (2d Cir. 1988)).

[123] *Lamb's Chapel*, 959 F.2d at 387. *See* Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991). In *Travis*, the Second Circuit held that "[i]n a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Id*. at

The Second Circuit found that none of the prior uses of the school facilities were religious when Lamb's Chapel pointed out that the school allowed other organizations, such as the Salvation Army Youth Band, a "New Age" religious group known as the "Mind Center", the Southern Harmonize Gospel Singers, and Hampton Council of Churches' Billy Taylor Concert to use the same space.[124] It stated that a program with an occasional use of religious terms or religious figures would not have religious purposes whereas a program with religious themes or a religious context would.[125]

The Supreme Court reversed the Second Circuit's decision and held that the Free Speech Clause was violated when the church was denied access to a school facility to publicly show a film series involving contemporary family and child-rearing issues.[126] The Supreme Court stated, "There is no question that the district, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated."[127] On the other hand, the Court recognized that since the school district opened school facilities for two of the purposes under the state law, there was "considerable force" in the argument that the district

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692. The Second Circuit dismissed the contention that its decisions were incompatible with Supreme Court precedent as "baseless." *Lamb's Chapel*, 959 F.2d at 388.

[124] *Lamb's Chapel*, 959 F.2d at 388.

[125] *Id*.

[126] *Lamb's Chapel*, 508 U.S. at 389-94.

[127] *Id*. at 390-91 (citing Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 800 (1985)); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 129-30 (1981) (finding that a federal statute which prohibited unstamped mailable matter from being deposited in a mailbox was not a First Amendment issue because the prohibition was not regarding the content of the matter in the mailbox); Greer v. Spock, 424 U.S. 828, 836 (1976) (holding that there is no right in the Constitution to speak publicly or distribute leaflets on a military reservation); Adderley v. Florida, 385 U.S. 39, 47 (1966) (holding that students' rights of freedom of speech, press, assembly, and petition were not violated when, after several warnings, they were arrested for blocking the jail driveway while protesting prior arrests and city segregation policies).

should be "subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks."[128] Applying the principle that the First Amendment prohibits governmental regulation of speech to suppress some viewpoints or ideas, the Court disagreed with the Second Circuit's analysis that "the total ban on using district property for religious purposes could survive a First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral."[129] Instead, the Court found that the film series exhibition dealt with a subject matter that was permissible under the school policy, and "its exhibition was denied access solely because the series dealt with the subject from a religious standpoint."[130]

C. Rosenberger v. Rector and Visitors of the University of Virginia

In 1995, the Supreme Court granted *certiorari* to deal with a challenge to a university's denial of funding to an on-campus organization.[131] The University of Virginia had initiated a program to support students' extracurricular campus activities.[132] According to university guidelines, student groups could apply for financial support if their activities were not religious.[133] The guidelines

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[128] *Lamb's Chapel*, 508 U.S. at 391.

[129] *Id*. at 393. *See* City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (affirming the general principle that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"). "[T]here are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so illegitimate that they would immediately invalidate the rule." *Id*.

[130] *Lamb's Chapel*, 508 U.S. at 394.

[131] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 823 (1995).

[132] *Id*. at 823-24. The program included two methods: (1) by allowing any group with Contracted Independent Organization ("CIO") status, which comprises the majority of its membership with students and follows certain procedural rules, access to the university facilities and (2) by permitting some CIO groups to apply for funds from the Student Activities Fund ("SAF"). *Id*.

[133] *Id*. at 825. Prohibited activities include "religious activities,

defined religious activities "as any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'"[134]

Petitioner Rosenberger formed an organization, Wide Awake Productions ("WAP"), whose purpose was publishing "a magazine of philosophical and religious expression, facilitat[ing] discussion foster[ing] an atmosphere of sensitivity to and tolerance of Christian viewpoints and provid[ing] a unifying focus for Christians of multicultural backgrounds."[135] WAP obtained status as a student group and requested funds to cover its publication's printing costs.[136] The university denied the application on the ground that the WAP publication fit its definition of religious activities.[137] WAP filed a suit claiming that the university's refusal to fund the publication was based solely on the religious editorial viewpoint, and that the refusal violated WAP's freedom of speech.[138]

The district court held for the university on the ground that the university's Establishment Clause concern over WAP's activities sufficiently justified the denial of funding support.[139] On appeal, the Fourth Circuit affirmed the district court's decision.[140] Despite the finding that the university guidelines were content-based speech discrimination against WAP, the Fourth Circuit still held that the Establishment Clause concern was a compelling state

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philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses." *Id*.

[134] *Id*. at 825 (citation omitted).

[135] *Rosenberger*, 515 U.S. at 825-26 (citation omitted). In its first few publications, WAP featured articles and stories about racism, homosexuality, crisis pregnancy, stress, eating disorder, Christian missionary work, music reviews, and interviews with professors. *Id*.

[136] *Id*. at 826-27.

[137] *Id*. at 827.

[138] *Id*.

[139] *Id*. at 827-28.

[140] *Id*. at 828.

interest to justify the discrimination.[141]

The Supreme Court held that the denial of funds was a violation of free speech.[142] The Court recognized two dangers in the university's regulation of private speech: it effectively authorized the state to examine the content of publications and resulted in the chilling of individual speech.[143] The Supreme Court noted the distinction between "content discrimination, which may be permissible if it preserves the purposes of [a] limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[144] The Court recognized that the state is prohibited from exercising viewpoint discrimination in a limited public forum and that viewpoint discrimination is "an egregious form of content discrimination."[145] Therefore, the government must refrain from regulating speech when it cites the specific ideology or perspective of the speaker as justification for the regulation.[146] Notwithstanding the university's argument that the guidelines for determining a group's eligibility for funding were not based on viewpoint, but on content, the Court concluded that

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[141] *Rosenberger*, 515 U.S. at 828.

[142] *Id*. at 835-37.

[143] *Id*. at 834.

[144] *Id*. at 829-30. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-43 (1994) (distinguishing content-based discrimination, which favors or disfavors speech depending on the subject matter of the speech expressed therein, from content-neutral discrimination, which regulate speech regardless of the subject matter); City of Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (explaining the First Amendment precedent as forbidding the government from favoring some viewpoints or ideas about a permissible subject matter at the expense of others, absent a significant and legitimate state interest).

[145] *Rosenberger*, 515 U.S. at 828-31. *See Turner*, 512 U.S. at 641-43; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (holding that the city ordinance, banning display of symbols including burning cross was facially invalid under the First Amendment); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Although SAF is a metaphysical forum rather than a physical forum, the Court found that it is governed by the same principle as a limited public forum. *Rosenberger*, 515 U.S. at 830.

[146] *Rosenberger*, 515 U.S. at 828-34.

the university excluded "religion not as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[147] The Court also emphasized that even though the state is not required to subsidize an individual's exercise of free speech, the state must maintain a viewpoint-neutral position.[148]

D. Good News Club v. Milford Central School

In 1996, the Good News Club ("Club"), a community-based Christian youth organization, applied to use the Milford Central School facilities to hold weekly meetings.[149] The meetings consisted of singing praise songs, listening to Bible lessons and memorizing verses of scripture.[150] Finding that the proposed use by

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[147] *Id*. at 830-31. SAF denied WAP's request for the funding because the publication "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." *Id*. at 827 (citation omitted).

[148] *Id*. at 834. The Court noted that a university has authority to make academic judgments when allocating resources. *Id*. at 833. This is because the speaker is the state itself. *Id*. The state, however, may not regulate content when the speaker is a private individual. *Id*. at 834.

[149] Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998), *aff'd*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001).

[150] *Id*. at 154. Milford requested information from the club to clarify the nature of the Club's activities. Good News Club v. Milford Cent. Sch., 202 F.3d 502, 507 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001). The Club sent a set of materials used and distributed at the meetings with the following description of its activities attached:

> The Club opens its session with Ms. Fourier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next[,] Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

Id. From the given materials, McGruder and Milford's attorney concluded that the kinds of activities proposed by the Good News Club could not be characterized as "a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." *Id*.

the Club was "the equivalent of religious worship . . . rather than the expression of religious views or values on a secular subject matter," the Milford school board denied the Club's request based on its "Community Use School Facilities Policy" ("Community Use Policy").[151] In 1997, the Club brought a claim against the school district alleging that Milford's denial of its application violated the Club's free speech rights.[152]

In April 1997, the district court granted a preliminary injunction, allowing the Club to hold its weekly meetings in the school during after-school hours.[153] However, in October 1998, the district court vacated the injunction and granted Milford Central School's motion for summary judgment.[154] The district court upheld the school district's denial on the ground that the subject matter of the Club's activities "is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under the District's use policies."[155] Explicit in the district court's judgment are the notions that state law allows public use of school facilities only for specifically enumerated purposes, and that religious activities, including religious worship, instruction and fundraising, are not permitted purposes.[156] The district court also concluded that the

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[151] *Good News Club*, 21 F. Supp. 2d at 149 n.3. The Community Use Policy states "school facilities may be used by district residents for holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public." *Id*. at 150. The district court concluded it to be "consistent with all applicable state law." *Id*. *See Community Use Policy*, *supra* note 37; *supra* Part I.A.; *infra* Part III.D (discussing unconstitutionality of *Community Use Policy*).

[152] *Good News Club*, 21 F. Supp. 2d at 150. *See* 42 U.S.C. § 1983 (2003).

[153] *Good News Club*, 21 F. Supp. 2d at 150.

[154] *Id*. at 161.

[155] *Id*. at 154.

[156] *Id*. at 158. The district court found that the state law "evidences the intent of the legislature to create a limited public forum in its public schools by permitting use of public school buildings by the general public for specific purposes." *Id*. at 152. The district court further concluded that "Notably, religious worship, instruction, and fundraising is not among these enumerated purposes." *Id*. *See also* N.Y. EDUC. LAW § 414 (McKinney 2002); *supra* Part

school district complied with the requirements of section 414 of the Education law in adopting the Community Use Policy.[157]

Both parties agreed that the Milford Central School was a limited public forum.[158] The district court properly defined the forum and the applicable strict scrutiny standard.[159] Nevertheless, the standard the court actually applied was a rational basis standard.[160] The district court recognized that the school is open to various community groups, such as Boy Scouts, Girl Scouts, and the 4-H Club.[161] However, it found that these groups' activities were a different type of secular subject matter than that of the Club, and thus concluded that the school district's denial of access based on the general subject matter was reasonable.[162] After

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I.A (discussing New York Education Law § 414).

[157] Good News Club, 21 F. Supp. 2d at 152, 154.

[158] *Id*. at 153.

[159] *Id*. "Limited public forums are 'created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.'" *Id*. (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 802 (1985)). "When a state opens a forum to the general public, the state is "bound by the same standards as apply in a traditional public forum." *Id*. (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)). "Accordingly, while the First Amendment permits reasonable time, place, and manner regulations, it forbids the state to enforce content-based exclusions unless narrowly drawn to serve a compelling state interest." *Id*. (quoting Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (1991)).

[160] *Good News Club*, 21 F. Supp. 2d at 153-54. "[C]ontent-based limitations are permissible to the extent that they preserve the purposes of the limited forum and are viewpoint neutral." *Id*. at 153. This is not the standard of review delineated in *Perry* that requires the state restriction on private speech in a limited (or designated) public forum to be reasonable in its "time, place, and manner" for content-neutral restrictions or to prove a compelling state interest for content-based restrictions. *See supra* Part I.B.1 for the public forum analysis and the proper standard of review.

[161] *Good News Club*, 21 F. Supp. 2d at 158-59.

[162] *Id*. at 158-60.

> The Boy Scouts is designed to provide "effective character, citizenship, and personal fitness training" for children . . . . While the Boy Scouts teach reverence and a duty to God, it is only a part of its overall

scrutinizing the content of the Club's speech, the court distinguished *Lamb's Chapel* on the ground that "Good News is a religious youth organization whose proposed use [of the facility] deals specifically with religious subject matter—and not, as plaintiffs contend, merely a religious perspective on secular subject matter."[163]

In 2000, a divided panel of the Second Circuit affirmed the district court's decision.[164] First, the court held that Milford Central School's prohibition on religious instruction in its facilities was not unreasonable because it would be proper for Milford to avoid its identification with a particular religion.[165] Second, it held that Milford's exclusion of the Club was constitutional subject discrimination.[166] The court found that the Club's activities were unprotected speech and that "for those who seek to speak on a topic or in a manner not contemplated by the public entity in opening the limited public forum 'there is no fundamental right of freedom of speech.'"[167] After considering the Club's activities, the court held that the exclusion was not viewpoint discrimination because the "quintessentially religious" subject matter of the Club's activities fell outside of the limited purpose of the forum and the Club's activities did not constitute purely moral and character development.[168]

> purpose which is the personal growth and development of leadership skills . . . . The purpose of the Girl Scouts "is to inspire girls with the highest ideals of character, conduct, patriotism, and service [so] that they may become happy and resourceful citizens." . . . The Girl Scouts are "based on ethical values . . . ." The 4-H Club is a youth organization whose purpose is to "enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults."

Id.

[163] *Id*. at 160. The *Lamb's Chapel* Court determined that a religious film series could not be barred from school. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 389-94 (1993).

[164] *Good News Club*, 202 F.3d 502.

[165] *Id*. at 510-11.

[166] *Id*. at 508-11.

[167] *Id*. at 510, 514 (citing Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 217 (2d Cir. 1997)).

[168] *Good News Club*, 202 F.3d at 510-11.

In dissent, Judge Jacobs criticized the majority's application of the standard of review for regulations that restrict speech in a limited public forum.[169] He expressed his view that "when the subject matter is moral and character, it is quixotic to attempt to draw a distinction between religious viewpoints and religious subject matters."[170] Referring to *Rosenberger*, Judge Jacobs emphasized that the distinction between subject matter and viewpoint, especially where a religious viewpoint is in question, is delicate and dangerous partly because of the reference to a deity for answers to moral questions.[171] He stated that the moral values shaped by a deity constitute a viewpoint even if answers to moral questions are expressed in religious terms and moral values expressed in religious activities.[172] He noted that the Supreme Court has refused to create a separate speech category solely for religious speech but has recognized religious perspective as a viewpoint over a wide range of subject matters.[173]

The Supreme Court held that Milford's restriction violated the Club's free speech rights, and that Milford's Establishment Clause argument did not justify that violation.[174] The Supreme Court criticized the Second Circuit's divergence from Supreme Court

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[169] *Id*. at 512-15 (Jacobs, J., dissenting).

[170] *Id*.

[171] *Id*. at 514.

[172] *Id*. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). "[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one." *Id*. at 830-31.

[173] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390-92 (1993); Good News/Good Sports Club v. Sch. Dist. of City of Ladue, 28 F.3d 1501, 1506-07 (8th Cir. 1994) (following the Supreme Court precedent which rejects a separate speech category for religious speeches and instead recognizes religious perspectives as one of numerous viewpoints on a variety of secular matters).

[174] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001). In 2001, the Supreme Court decided a landmark free speech and public forum doctrine case. *The Bronx Household of Faith v. The Board of Education of the City of New York*, N.Y.L.J. July 1, 2002, at 36. *See supra* Part I.B (discussing the Establishment Clause).

jurisprudence:

> We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel*, despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn.[175]

Applying *Lamb's Chapel*, the Court first found that the school district's exclusion of the Club constituted viewpoint discrimination with respect to the Club's speech and thus violated the Free Speech Clause.[176] The Court found the activities of Lamb's Chapel and those of the Club indistinguishable, with only an inconsequential difference in mode of speech and concluded that both activities employ a religious viewpoint to teach morals and character.[177] Because the school district in *Good News Club* opened its facilities to any "us[e] pertaining to the welfare of the community," the Court found that the Club's activities met the purpose of the limited public forum.[178] The Court further found

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[175] *Good News Club*, 533 U.S. at 109 n.3. On the other hand, Judge Jacobs of the Court of Appeals for the Second Circuit was correct when he concluded that the school's restriction constituted viewpoint discrimination under *Lamb's Chapel*. *Good News Club*, 202 F.3d at 511-14 (Jacobs, J., dissenting).

[176] *Good News Club*, 533 U.S. at 109. The Court began its analysis based on the premise that the school is a limited public forum. *Id*.

[177] *Id*. at 109-10; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 388-89 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993). The Lamb's Chapel delivered moral lessons through films and a lecture series whereas the Good News Club did so through a live storytelling and prayer. *Id*. *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc. 473 U.S. 788, 806 (1985).

[178] *Good News Club*, 533 U.S. at 108-09.

> In short, any group that "promotes the moral and character development of children" is eligible to use the school building [under Milford's policy]. Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it

that the Club's activities are not "any more 'religious' or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger*."[179] Agreeing with Judge Jacobs' dissent, the Court pointed out that for the purposes of the Free Speech Clause, there is "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism" by other groups such as the Boys Scouts.[180]

The school district argued that even if its restriction constituted viewpoint discrimination, the Establishment Clause compelled the school district to exclude religious instruction and justified content-based discrimination.[181] The Court, however, found that the school had no valid Establishment Clause interest.[182] That is, the Establishment Clause cannot be used to justify exclusion of religious groups from public school facilities.[183] The Court

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does so in a nonsecular way.

Id. at 108 (citation omitted). Justice Scalia in his concurring opinion asserted that shaping the character development of children "pertains to the welfare of the community." *Id*. at 124 (Scalia, J., concurring).

[179] *Id*. at 110. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); *supra* note 135 (discussing the details of the publication of Wide Awake).

[180] *Id*. at 111. *See Good News Club*, 202 F.3d at 512-15 (Jacobs, J., dissenting). The Supreme Court further pointed out that "[i]t is apparent that the unstated principle of the Court of Appeals' [for the Second Circuit] reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues." *See Good News Club*, 533 U.S. at 111.

[181] *Good News Club*, 533 U.S. at 112-13.

[182] *Id*. at 113.

> [Here, plaintiff's] Establishment Clause defense fares no better. As in *Lamb's Chapel*, the Club's meetings were held after school hours, not sponsored by the school, and open to any students who obtained parental consent, not just to Club members. As in *Widmar*, Milford made it forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* or *Widmar*. Thus, Milford's reliance on the Establishment Clause is unavailing.

Id.

[183] *Id*. *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226,

concluded that allowing the Club access "to speak on school grounds would ensure neutrality, not threaten it" because "[t]he Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups."[184]

In a concurring opinion, Justice Scalia agreed that the school district engaged in viewpoint discrimination.[185] He further noted, though, that how the exclusion was characterized was not important because whether the discrimination was based on the speech's viewpoint or subject matter, exclusion of speech only "because it's religious" fails to meet First Amendment scrutiny.[186] Comparing the Supreme Court's and Second Circuit's free speech analyses, Justice Scalia pointed out that the courts' disagreement was not "whether the Good News Club must be permitted to

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250 (1990) (holding that public schools could not ban meetings of student religious clubs and that equal access cases should be decided on the basis of freedom of speech, not the Establishment Clause that the Second Circuit persistently has used); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that equal access cases should be decided on the basis of freedom of speech, not the Establishment Clause); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) (holding that a Maryland statute authorizing aid in the form of an annual subsidy to colleges affiliated with the Roman Catholic Church did not violate the Establishment Clause when the colleges were not "pervasively sectarian" and the aid extended only to the "secular side"); Hunt v. McNair, 413 U.S. 734 (1973) (holding that a South Carolina statute authorizing a proposed financing transaction involving the issuing of revenue bonds benefiting a Baptist-controlled college did not violate the Establishment Clause since the purpose of the statute was secular, did not have the effect of advancing or inhibiting religion and did not foster an entanglement with religion); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding that two of five amendments to the New York Education and Tax Laws violated the Establishment Clause on the basis that the propriety of a legislature's purpose may not immunize from further scrutiny a law that either has a primary effect that advances religion or fosters further church-state entanglements).

[184] *Good News Club*, 533 U.S. at 114.

[185] *Id*. at 122 (Scalia, J., concurring).

[186] *Id*. *See* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 806 (1985). Even subject-matter discrimination must at least be "reasonable in light of the purpose served by the forum." *Id*., *cited in Good News Club*, 533 U.S. at 122 (Scalia, J., concurring).

present religious viewpoints on morals and character" in a limited public forum nor "whether *some* of the Club's religious speech fell within the protection of *Lamb's Chapel*."[187] The disagreement, rather, focused on the part of the Club's activities "that are not 'purely' 'discussions' of morality and character from a religious viewpoint."[188] Justice Scalia explained that the Court had invalidated a similar viewpoint restriction where a school district allowed the Boy Scouts to support their teaching of morally upright and clean lives by offering good reasons to do so.[189] Here, on the other hand, the Club was not allowed to offer good reasons to foster morally upright clean lives, where its reasons were God's will and desire, becoming a righteous person or imitating Jesus Christ.[190] Noticing the inability of the Justices to categorize the activities of the Club, Justice Scalia reiterated that the Supreme Court has "previously rejected the attempt to distinguish worship from other religious speech, saying that 'the distinction has [no] intelligible content,' and further, no '*relevance*' to the constitutional issue."[191] He noted, in conclusion, that even if the

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[187] *Good News Club*, 533 U.S. at 122 (Scalia, J. concurring). This is because the answer to both of these questions must be yes. *Id*.

[188] *Id*. at 123-24 (Scalia, J., concurring). Those reasons were the parents' will and desire, becoming a more successful person or imitation of admired past Scouts. *Id*. These activities are that the Club encourages the participating Christian children to pray to God for the strength and the desire to obey Him, and the participating non-Christian children to believe that the Lord Jesus is their Savior. Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 156 (N.D.N.Y. 1998), *aff'd*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001).

[189] *Good News Club*, 533 U.S. at 124 (Scalia, J., concurring).

[190] *Id*.

[191] *Id*. at 126. *See* Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981) (rejecting the dissent's attempt to distinguish between protected and unprotected religious speech because the distinction is unintelligible, irrelevant and likely beyond judicial competence to draw); Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943) (refusing to distinguish evangelism from worship). It is important to note the inability to categorize the activities of the Good News Club. This inability reflects problems in allowing characterization of speech to be used to exclude speech. For example, Justice Stevens categorized the activities of the Good News Club as speech "aimed principally at proselytizing or inculcating belief in a particular religious faith," and Justice Souter called the activities of Good News Club "essentially an evangelical service of worship." *Good News*

federal judiciary were competent in making determinations about theological activities, it would still require state monitoring of private religious speech with a degree of pervasiveness that the Court has previously found unacceptable.[192]

E. Bronx Household I *and* II

In 1995, the Bronx Household of Faith ("Bronx Household"), an evangelical Christian church, brought a Free Speech Clause action ("*Bronx Household I*") challenging a school district's denial of its application to rent space in the public school for meetings including religious worship.[193] The school district argued that the restriction was permissible discrimination pursuant to its Community Use Policy and section 414.[194] The district court denied the Bronx Household's motion for summary judgment and held that the school district's regulation was reasonable, in light of the legitimate state concern to "preserv[e] and prioritiz[e] access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities."[195]

On appeal, the Second Circuit affirmed the district court's decision.[196] Finding the school a limited public forum, the Second Circuit held that it was reasonable for a state, by its policy and practice, to exclude a church from school facilities to "avoid the identification of a middle school with a particular church."[197] Analyzing *Lamb's Chapel* and *Widmar*, the Second Circuit conceded that worship, "the ultimate in speech from a religious viewpoint", as well as religious instruction, are protected speech,

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Club, 533 U.S. at 125-27.

[192] *Good News Club*, 533 U.S. at 127. *See, e.g.*, Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 844-45 (1995); *Widmar*, 454 U.S. at 269 n.6.

[193] Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 1996 WL 700915 *1 (S.D.N.Y. 1996), *aff'd*, 127 F.3d 207 (2d Cir. 1997).

[194] *Id*. *See supra* Part I.A (language of the policy and the state law).

[195] *Bronx Household of Faith*, 1996 WL 700915, at *6.

[196] Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

[197] *Id*. at 214.

which cannot be prohibited in an open forum.[198] Nonetheless, it found that the Bronx Household's speech could be distinguished from other forms of speech from a religious perspective and therefore, could be prohibited because the school district had never permitted access for the purpose of worship and religious instruction.[199] In 1998, the Supreme Court denied certiorari.[200]

In 2001, the Bronx Household reapplied to rent the middle school in light of *Good News Club*.[201] After the school district denied the application, the Bronx Household filed a suit ("*Bronx Household II*") with the same complaint as *Bronx Household I*, claiming that the *Good News Club* decision, in effect, reversed the Second Circuit's decision in *Bronx Household I*.[202] The district court granted a permanent injunction for the Bronx Household and ordered the defendant school district to allow the Bronx Household to use the public school auditorium for religious worship.[203] Reviewing *Bronx Household I* and *Good News Club*, the district court held that plaintiffs met their burden for the grant of a preliminary injunction.[204] It found that *Good News Club* controlled

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[198] *Id*. at 214-15.

[199] *Id*.

[200] Bronx Household of Faith v. Bd. of Educ. of N.Y., 523 U.S. 1074 (1998).

[201] Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401, 409 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003). *See supra* Part II.D (discussing *Good News Club*).

[202] *Bronx Household of Faith*, 226 F. Supp. 2d at 411.

[203] *Id*. at 401.

[204] *Id*. Plaintiffs demonstrated that they would suffer irreparable harm because exclusion from school facilities deprived them of free speech rights; demonstrated substantial likelihood of success on the claim that the school district's denial of access to school facilities for religious worship violated their free speech rights; defendants lacked a compelling state interest to exclude plaintiffs from the school; and established substantial likelihood of success on the merits of their claim that the school district's policy violated the Establishment Clause. *Id*. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 105 (2001); *Bronx Household of Faith*, 127 F.3d 207. A preliminary injunction is granted if the party seeking the relief establishes two elements: the party seeking relief will suffer "irreparable harm" and the party seeking relief is likely to succeed on the merits to make them a fair ground for sufficiently

because the school constituted a limited public forum.[205] It concluded that the Bronx Household had a substantial likelihood of success on its free speech claim because its activities did not constitute "mere religious worship" and addressed the same subject matter as activities previously permitted in the forum.[206] The court also concluded that even if the activities were labeled worship and addressed a different subject, a distinction could not be made between viewpoint and content discrimination when the subject matter includes prayer, morals, character, the welfare of the community, and worship.[207] Furthermore, even if a distinction could be made, the state should still not dissect speech for the purpose of restricting such speech.[208]

On appeal, the Second Circuit affirmed the district court's decision, acknowledging that there was no basis to distinguish the activities in *Good News Club* from the activities of the Bronx Household.[209] It found that there was a substantial likelihood for the Bronx Household to successfully show that the school district's exclusion policy was an unconstitutional violation of the Bronx Household's free speech rights.[210] Yet, it avoided the issues of whether a meaningful distinction could be made between worship and other kinds of religious speech since agreement with the district court's determination would invalidate its own precedents.[211] In addition, it did not explicitly reject the school

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serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tips decidedly in the favor of the party seeking relief. *See* Daily v. New York City Hous. Auth., 221 F. Supp. 2d 390 (E.D.N.Y. 2002); Lark v. Lacy, 43 F. Supp. 2d 449 (S.D.N.Y. 1999), *vacated by* 87 F. Supp. 2d 251 (S.D.N.Y. 2000).

[205] *Bronx Household of Faith*, 226 F. Supp. 2d at 413.

[206] *Id*.

[207] *Id*.

[208] *Id*. at 423-25. "The [Supreme] Court specifically held that, in its assumed limited public forum, Milford could not prohibit activities that, while "quintessentially religious," were not "mere religious worship, divorced from any teaching of moral values." *Good News Club*, 533 U.S. at 111-12 & n.4.

[209] *Bronx Household of Faith*, 331 F.3d at 354.

[210] *Id*.

[211] *Id*. at 355. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993); Travis v. Owego-

board's Establishment Clause argument.[212]

III. ANALYSIS

The Second Circuit recognized that regulation of speech in both a designated public forum and a limited public forum are subject to the same standard of review applied in a traditional public forum—strict scrutiny.[213] Despite this holding, the court has applied a more lenient standard of review to a limited public forum.[214] In both *Lamb's Chapel* and *Good News Club*, in which the Supreme Court reversed Second Circuit decisions, the Supreme Court still allowed the more lenient standard of review for a nonpublic forum to be applied to a limited public forum.[215] The Supreme Court's vagueness leads to a categorization of the school districts' exclusionary policy and practice that distinguishes between unconstitutional viewpoint discrimination and possibly, constitutional content discrimination.[216] There is no principled

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Apalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676 (2d Cir. 1988).

[212] *Bronx Household of Faith*, 331 F.3d at 356.

[213] Good News Club v. Milford Cent. Sch., 202 F.3d 502, 510 (2d Cir. 2000); *Lamb's Chapel*, 959 F.2d at 387; Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 153-54 (N.D.N.Y. 1998).

[214] *Compare Good News Club*, 202 F.3d 502; *Bronx Household of Faith*, 127 F.3d 207, *Lamb's Chapel*, 959 F.2d 381, *and Deeper Life Christian Fellowship*, 852 F.2d 676, *with* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001), Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995), Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), *and* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788 (1985). The Supreme Court also utilized the same forum analysis as in *Perry*. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-47 (1983).

[215] *See Good News Club*, 533 U.S. 98; *Lamb's Chapel*, 508 U.S. 384. *See* Ronnie J. Fischer, Comment, *"What's in a Name?": An Attempt to Resolve the "Analytic Ambiguity" of the Designated and Limited Public Fora*, 107 DICK. L. REV. 639, 668-70 (2003) (identifying that the Second Circuit found the limited public forum under the umbrella of designated public forum but applied both strict scrutiny and rational basis standards of review depending on the speaker's class).

[216] *See Good News Club*, 533 U.S. at 122 (Scalia, J., concurring); *Good*

basis, however, upon which to ascertain this distinction in analyzing the state's exclusionary policy and practice of regulating private speech.[217] The Supreme Court, unfortunately, allowed the categorization of exclusionary policy and practice for religious speech, whose distinction between subject matter and viewpoint is too thin to determine by employing the analysis of viewpoint discrimination separate from content discrimination.[218] As a result, New York school boards' exclusion of religious groups from school premises may continue to be tested under the improper standard of review. Moreover, the school boards may continue to use the improper standard, which is applicable only to a nonpublic forum, to exclude certain private speech on the ground that the Establishment Clause provides a reasonable state interest to "avoid the identification of a [public] school with a particular [religion]."[219] Thus, the following approaches are recommended to resolve the recurring unconstitutional prohibition of religious groups from New York public schools.

News Club, 202 F.3d at 512-13 (Jacobs, J., dissenting).

[217] *See* Mawdsley, *supra* note 11, at 27.

> At the very least, Good News Club has blurred the distinction in Lamb's Chapel between subject matter on one hand and viewpoint discrimination on the other; to the furtherest extent, the two concepts have merged. If viewpoints have been expanded to encompass any subject presented by any community group allowed access to public school facilities, then the two concepts, one could argue, represent a distinction without a difference.

Id.

[218] *See Good News Club*, 533 U.S. at 122 (Scalia, J., concurring); *Good News Club*, 202 F.3d at 512-13 (Jacobs, J., dissenting). *See also* Mawdsley, *supra* note 11, at 27.

[219] *Bronx Household of Faith*, 127 F.3d at 214. *See* Bronx Household of Faith v. Bd. of Educ. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 356 (2d Cir. 2003) (adding that although the Supreme Court found no Establishment Clause concern in *Good News Club* to justify the school district's exclusionary policy and practice, a school district may still find a justifying Establishment Clause interest to exclude a religious organization from the school facilities open to the general public if its activities can be distinguished from *Good News Club* or *Bronx Household II*).

A. New York Education Law Section 414 Creates a Designated Public Forum in New York Public Schools

The federal courts in New York have consistently held that section 414 creates a limited forum, allowing for the specific exclusion of religious groups, and have consistently rejected the claim that it was the state's intent to create a designated public forum.[220] Although in *Lamb's Chapel* and *Good News Club* the Supreme Court found the lower courts' holdings on the nature of the forum problematic, it did not reverse the lower courts' holdings because the nature of the forum issue was not contested in the Supreme Court.[221]

New York state law creates a designated public forum in New York public schools.[222] Pursuant to the public forum doctrine, a nonpublic forum such as a public school becomes a designated public forum when "school authorities have 'by policy or practice' opened those facilities for 'indiscriminate use by the general public' . . . or by some segment of the public, such as student organizations."[223] Section 414 explicitly provides that community residents may use public school facilities for "social, civic and recreational meetings, entertainment events and other uses pertaining to the welfare of the community."[224] The statute also permits community groups to use public school facilities for instruction in any branch of education or learning, or as space for

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[220] *See, e.g.*, *Bronx Household of Faith*, 127 F.2d at 212-14; *Lamb's Chapel*, 959 F.2d at 381.

[221] *Lamb's Chapel*, 508 U.S. at 391. The Supreme Court found the petitioner Lamb's Chapel's argument to have "considerable force" that the district should be "subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks." *Id*. However, the Supreme Court stated that it did not have to decide on the issue. *Id*.

[222] Brief of the Amici Curiae the Northstar Legal Center and Bronx Household of Faith in Support of Petitioners at 4, Good News Club v. Mildford Cent. Sch., 533 U.S. 98 (2001) (No. 99-2036). *See supra* Part I.A (discussing New York state statute).

[223] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)). *See supra* Part I.B.1 (explaining the public forum doctrine).

[224] N.Y. EDUC. LAW § 414 (McKinney 2002).

political meetings, civic forums and community centers.[225] Subsections (a) and (c) of section 414 were adopted to intentionally create public forums in school facilities.[226] Contrary to the Second Circuit's conclusion, the statutory language creates a forum *broadly available to the community*.[227]

The Second Circuit generally supported its conclusion that section 414 creates only a limited forum with two arguments.[228] First, the statute does not explicitly include "religious speech" in its enumerated purposes.[229] Second, the school districts' policy explicitly excludes "religious service and instruction."[230] These arguments conflict with Supreme Court precedent, which concluded that a public university had created a public forum, where the exclusion of religious worship would constitute unconstitutional content-based discrimination of private speech.[231]

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[225] *Id*.

[226] This is reflected in the language of Community Use Policy. *Community Use Policy*, *supra* note 37. *See supra* Part I.A (discussing Community Use Policy).

[227] Good News Club v. Milford Cent. Sch., 202 F.3d 502, 508 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001); Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 215 (2d Cir. 1997); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 680 (2d Cir. 1988).

[228] *Good News Club*, 202 F.3d at 508; *Bronx Household of Faith*, 127 F.3d at 215; *Deeper Life Christian Fellowship*, 858 F.2d at 680.

[229] N.Y. EDUC. LAW § 414 (McKinney 2002).

[230] *Id*.

[231] Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a public university had created a public forum for students by a policy that allowed "political, cultural, educational, social and recreational events"). *See also* Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980). The policy set forth in *Widmar* is similar to the language of section 414 of New York Education Law. N.Y. EDUC. LAW § 414.1(c)-(d), (f) (McKinney 2002); *Widmar*, 454 U.S. at 277. Other circuits have followed the Supreme Court ruling in *Widmar* that similar policies create public forums, not limited forums. The First Circuit held that the school district's policy to open its facilities for meetings by youth groups, community, civic, and service organizations, government agencies, educational programs and cultural events create a public forum and thus the exclusion of a church is "censorship" and an "elementary violation" of the First Amendment. Grace Bible Fellowship v. Me. Sch. Admin. Dist. No. 5, 941 F.2d 45, 48 (1st Cir. 1991). The Third Circuit held that the school district's policy to permit

The only distinction between a designated public forum and a limited public forum is the scope of the purpose for which the forum is open to the public.[232] If the purpose is to open the forum for the expressive activity of the "general public," a designated public forum is created.[233] If the purpose is to open the forum for the expressive activity of a specific group, such as student groups, or for the expressive activity of a specific subject matter, such as recreational sports, a limited public forum is created.[234] Similarly, when the school district adopts the language of the statute to open the forum for the expressive activities of "social, civic and recreational meetings, entertainments, and *other uses* pertaining to *the welfare of the community*," then a designated public forum has been created.[235] The statutory language does not limit the purpose of the forum to a specific group, nor to a specific subject matter.[236] In fact, religious teachings that are not divorced from morals and good character *are* related to the welfare of the community.[237] The

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meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions creates a public forum and prohibiting community groups from using the public forum "for religious services, instruction and/or religious activities" is unconstitutional. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1372-73, 1378-79 (3rd Cir. 1990). The Fourth Circuit held that the school district's policy to permit meetings by cultural, civic and educational groups as well as political organizations, create a public forum, and thus, it struck down the requirement that churches pay more to use the school facilities. Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 704 (4th Cir. 1994). The Fifth Circuit held that the public library's policy meetings of a "civic, cultural or educational character" creates a public forum and thus exclusion of a woman's prayer group was unconstitutional. Concerned Women for America v. Lafayette County and Oxford, Miss. Pub. Library, 883 F.2d 32, 34 (5th Cir. 1989).

[232] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983). *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985); *see also* general discussion of the public forum doctrine *supra* Part I.B.1; *supra* text accompanying note 70.

[233] *Cornelius*, 473 U.S. at 802.

[234] *Perry*, 460 U.S. at 46 n.7.

[235] N.Y. EDUC. LAW § 414.1(c) (McKinney 2002) (emphasis added).

[236] N.Y. EDUC. LAW § 414 (McKinney 2002).

[237] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 110-11 (2001). *See* Good News Club v. Milford Cent. Sch., 202 F.3d 502, 512 (Jacobs, J.,

Supreme Court and the District Court for the Southern District of New York have recognized, for example, that the activities of the Good News Club and the Bronx Household pertain to the welfare of the community.[238]

Even if section 414 creates a limited public forum, it still does not create a "religious-use free" limited public forum.[239] In the face

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dissenting). "In my view, when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." *Id*. For example, the activities of the Bronx Household included:

> The Sunday morning meeting [which] is the indispensable integration point for our church. *It provides the theological framework to engage in activities that benefit the welfare of the community*. Those who attend the Sunday morning meetings are taught to love their neighbors as themselves, to defend the weak and disenfranchised, and to help the poor regardless of their particular beliefs. It is a venue where people can come to talk about their particular problems and needs. Over the years we have helped people with basic needs such as food, clothing, and rent. We have also provided, by means of counseling, friendship and encouragement, help for people to get out of the multi-generational welfare cycle, to lead productive lives, to leave a life of crime and/or drugs to become responsible citizens, and to counsel people whose personal finances are out of control. In one recent case we helped an individual who was about to get evicted. Church members helped him budget his income in order to meet his primary expenses, get rid of his excessive credit card debt and pay off overdue taxes. He now has a savings account of almost $1000.00. It is through the Sunday meeting where we directly or indirectly learn of these situations and where we can converse with the individuals involved in order to monitor the progress of the issue to be resolved . . . . In years past, the church meeting was a very important place for Cambodian Refugees to come in order for us to get to know them so that we could help them with food, clothing and to help them get acclimated to American society. Most of them were Buddhists.

Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401, 410 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003) (citing First Affidavit of Robert Hall, sworn to on Dec. 13, 2001, at 3-4, 7-9).

[238] *Good News Club*, 533 U.S. at 110-11; *Bronx Household of Faith*, 226 F. Supp. 2d at 422-24.

[239] Brief for Petitioners at 22, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (No. 91-2024).

of the broad statutory language, the Second Circuit has held that the exclusion of one type of speech from a forum generally open to the public transforms the forum into a limited public forum.[240] According to the Supreme Court's forum jurisprudence, however, a public forum is created when the government has opened a space to the public for purposes of expressive activity and designated that space for a limited purpose.[241] The Supreme Court's forum jurisprudence does not imply that a limited forum is created when a single type of speech is excluded from the general uses available in the forum.

Pursuant to section 414, the purposes for which a forum is open can be limited, but the users within those limited purposes cannot be limited.[242] Under the policy of opening a forum to student groups, the school district cannot select which student groups should be permitted to use the facilities.[243] When a school district opens its forum to the public for the limited purpose of expressive activity "pertaining to the welfare of the community," there is a requirement that "[such] uses shall be non-exclusive."[244] This

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[240] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 387 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676 (2d Cir. 1988). In *Lamb's Chapel*, the Second Circuit held that the Center Moriches Union Free School was free to create a "limited public forum from which religious uses would be excluded." *Lamb's Chapel*, 959 F.2d at 387. *See* Brief of the Amici Curiae the Northstar Legal Center and Bronx Household of Faith in Support of Petitioners at 8, Good News Club v. Mildford Cent. Sch., 533 U.S. 98 (2001) (No. 99-2036).

[241] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 & n.7 (1983).

[242] *See* N.Y. EDUC. LAW § 414.1(c) (McKinney 2002) ("For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses *shall be non-exclusive* and shall be open to the general public") (emphasis added). The plain language of the statute requires the uses within the purpose of the forum to be non-exclusive. *Id*.

[243] The forum should be open to all student groups and the school district cannot use the policy as a disguise to deny, for example, a Jewish student group access to school facilities because it identifies the Jewish student group as a religious group rather than a student group.

[244] N.Y. EDUC. LAW § 414.1(c) (McKinney 2002).

requirement applies whether the forum is called a designated public forum or a limited public forum.[245] Therefore, when the activities of religious groups pertain to the welfare of the community, the school district cannot use section 414 and its policy as a disguise to deny their access on the basis of their religious conviction or viewpoint.[246] Contrary to the Second Circuit's holding, there is no special subcategory of a "religious-use free" public forum.[247]

Administration of a "religious-use free" forum would require school officials and judges to screen private speech to determine how much of that speech has religious components to be excluded from the definition of "any uses pertaining to the welfare of the community."[248] Such discretion would require the kind of state monitoring of private religious speech that the Supreme Court has found unacceptable because the school district would be required to evaluate private speech, "discern [its] underlying assumptions respecting religious theory and belief" and make a determination whether that private speech is permissible discussion of religious material.[249] To avoid such subjective monitoring, the school districts must concede that section 414 creates a designated public forum. They should also discontinue policies giving rise to a mutated forum that allows school facilities to be used exclusively for kinds of speech the school districts selectively consider to be

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[245] *Id*.

[246] N.Y. EDUC. LAW § 414 (McKinney 2002). *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003).

[247] Brief for Petitioners at 22, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (No. 91-2024).

[248] N.Y. EDUC. LAW § 414.1(c) (McKinney 2002). *See, e.g.*, *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring) (citation omitted).

[249] *Good News Club*, 533 U.S. at 127. *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 844-45 (1995); Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981). Such broad discretion undoubtedly creates a risk of impermissible discrimination amongst religious groups as well as between religious and non-religious groups. Justice Scalia, in his concurring opinion in *Good News Club*, pointed out this exact problem when he noted that the federal judiciary was not competent to make determinations about religious components of expressive activities. *Good News Club*, 533 U.S. at 127.

furthering the welfare of the community.

B. Limited Forum Must Be Redefined

In public forum doctrine, "limited public forum" and "designated public forum" are synonymous.[250] A public forum that is "created for a limited purpose such as use by certain groups [like students groups in *Widmar*] or for the discussion of certain subjects [like school board business]" is a designated forum, sometimes referred to as a limited public forum.[251] The only practical difference between a designated public forum and a limited public forum is the scope of the purposes for which the forum is open to the public.[252]

Public forum doctrine does not recognize a separate category of limited public forum.[253] Yet, courts often cite a footnote in *Perry* for the proposition that a limited public forum exists as a

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[250] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983). *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[251] *Perry*, 460 U.S. at 46 n.7.

[252] *Cf.* Fischer, *supra* note 215, at 639-74 (claiming that often the outcome of a public forum doctrine case depends on the name of the public forum). Fischer's claim corresponds to the solutions that this note recommends. The reason why "limited public forum" must be redefined is that the name means as much in the public forum doctrine analysis as Fischer argues. This note suggests, however, that it does not matter what the forum is called when the definition and the standard of review are misapplied among the courts and the experts.

[253] *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992). A designated public forum is property that the government has opened for expressive activity by part or all of the public. *Id*. If the government excludes a private speaker who falls within the class to which a designated public forum is made available, its exclusionary action is subject to strict scrutiny. *Id*. "[T]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." *Id*. at 680. *See* United States v. Kokinda, 497 U.S. 720, 726-27 (1990); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); *see also supra* Part I.B.1 (discussing the public forum doctrine).

separate category.[254] This footnote does not define a limited public forum, though; rather, it gives an example of the narrow purposes for which a designated public forum could be created.[255] In the end, whether New York public schools are called designated or limited public forums is insignificant as long as strict scrutiny review is applied.[256]

The Second Circuit has maintained that as long as the government creates a limited public forum, any restrictions placed on speech are presumed content-neutral and will "pass the constitutional muster" as long as they are reasonable.[257] This

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[254] *Perry*, 460 U.S. at 46 n.7. "A public forum may be created for a limited purpose such as use by certain groups, *e.g.*, (student groups), or for the discussion of certain subjects, *e.g.*, (school board business)." *Id*. (citation omitted).

[255] *Id*. at 45-46. The Court defined forums as that which "the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Id*. (citation omitted). The first reference to limited public forum is found in *Deeper Life Christian Fellowship*, which notes that "[u]nder the limited public forum analysis, property remains a nonpublic forum as to all unspecified uses." Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 679 (2d Cir. 1988) (citing Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 802 (1985) and *Perry*, 460 U.S. at 48). However, the authority for this proposition explained that the government could elect to return a forum to a nonpublic status since the "government is not required to indefinitely retain the open character of the facilities." *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 48).

[256] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 122 (2001) (Scalia, J., concurring). Justice Scalia noted:

> [S]ince we have rejected the only reason that respondent gave for excluding the Club's speech from a forum that clearly included [such speech] (the forum was opened to any "use pertaining to the welfare of the community"), I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination. Lacking *any* legitimate reason for excluding the Club's speech from its forum–"because it's religious" will not do, respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized.

Id. (alteration in original).

[257] *E.g*., *Deeper Life Christian Fellowship*, 852 F.2d at 679.

reasoning ultimately stops the free speech analysis at the point of determining the kind of speech allowed in a forum without reaching the question of whether the restriction is justified to suppress private speech. The Second Circuit did not insist on the same reasoning in *Bronx Household II*.[258] In *Bronx Household II*, the Second Circuit conceded to the Supreme Court's free speech analysis in *Good News Club*, which reversed the judgment and the reasoning of the Second Circuit.[259] The Second Circuit, however, "decline[d] to review the trial court's further determinations that, after the *Good News Club*, religious worship cannot be treated as an inherently distinct type of activity" and left room for future disputes of free speech analysis.[260] This is an important determination that the Second Circuit must make for the third-prong of the free speech analysis in the future.[261] Thus, as long as the name, limited forum, does not automatically lead to deficiency in free speech analysis, particularly for the third prong, its use is not objectionable.[262]

C. The "Reasonable and Viewpoint Neutral" Standard Should Apply to Nonpublic Forums only

The state is subject to strict scrutiny when regulating private speech in traditional and designated public forums.[263] The state may regulate the time, place and manner of private speech so long as the regulations "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[264] The state must show a

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[258] Bronx Household of Faith v. Bd. of Edu. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 351-54 (2d Cir. 2003).

[259] *Id*.

[260] *Id*. at 355.

[261] *See supra* text accompanying note 52.

[262] *See* discussion *supra* Part I.B.1. "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[263] *Perry*, 460 U.S. at 45-46.

[264] *Id*. at 45.

compelling interest to regulate private speech based on its content.[265]

Although the Second Circuit recognized that the traditional public forum standard applies to both "limited" or "designated" public forums, it distorted the standard applied in the limited public forum.[266] The Second Circuit held that a limited public forum may "remain non-public except as to specified uses . . . , and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster."[267] This holding is contrary to the standard set forth by the Supreme Court in *Perry*.[268] In *Lamb's Chapel*, the Supreme Court explicitly criticized the Second Circuit's position.[269] The Second Circuit applied the "reasonable and viewpoint neutral" standard again in *Bronx Household I*, even though the same state law and district policy in question in *Lamb's Chapel* governed the school district.[270] The Second Circuit applied the same standard yet again in *Good News Club*, finding no fundamental right of free speech "for those who seek to speak on a topic or in a manner not contemplated by" the school district.[271] Moreover, the school districts have utilized this lenient standard to justify their exclusionary policies on the ground that exclusion of unlisted content such as religious instruction is reasonable to preserve the intended purposes of the forum, where the purpose of

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[265] *Id*.

[266] Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 679-80 (2d Cir. 1988). *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 387 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993).

[267] *Deeper Life Christian Fellowship*, 852 F.2d at 679-80. *See, e.g.*, *Lamb's Chapel*, 959 F.2d at 387.

[268] *See supra* notes 68-74 and accompanying text.

[269] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993). The Supreme Court disagreed with the Second Circuit, which "appeared to recognize that the total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral." *Id*.

[270] Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 214 (2d Cir. 1997).

[271] Good News Club v. Milford Cent. Sch., 202 F.3d 502, 510 (2d Cir. 2000).

the forum is to exclude religious instruction.[272] They have also argued that the exclusionary policy is a reasonable, if not compelling, means to comply with the Establishment Clause.[273]

The distortion of the standard of review for a limited public forum started in *Deeper Life Christian Fellowship*.[274] The Second Circuit supported its conclusion that the reasonable and viewpoint neutral standard applies by citing the portion of the *Cornelius v. NAACP Legal Defense and Educational Fund, Inc*. decision where the Supreme Court was discussing the standard for "*nonpublic* forum."[275] The Supreme Court, however, is clear that the

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[272] *See supra* Part I.B.2 (discussing school district's arguments).

[273] The government continues to argue that it has a strong interest to comply with the Establishment Clause to justify the exclusionary policy even though the Supreme Court has consistently struck down the Establishment Clause argument in free speech cases. *See supra* Part I.B.2.

[274] Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 680 (2d Cir. 1988). *See supra* text accompanying note 105.

[275] Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985). The *Cornelius* Court held that the Combined Federal Campaign, a charity drive aimed at federal employees, to voluntary, tax-exempt, nonprofit charitable agencies that provide direct health and welfare services to individuals or their families, is a nonpublic forum and applied a more lenient "reasonableness" test to decide whether the exclusion was constitutional. *Id*. at 805-06. Citing *Perry*, the Court affirmed its previous holding that the reasonable test should only be applied to nonpublic forum because controlling the access to a nonpublic forum, based on subject matter and the speaker's identity is constitutional so long as the distinctions are reasonable in light of the purpose of the policy and are viewpoint neutral. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 49 (1983), *cited in Cornelius*, 473 U.S. at 806. "Implicit in the concept of the *nonpublic forum* is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Id*. (emphasis added). The language of the *Cornelius* Court is noteworthy because it is the exact language that the Second Circuit has used to support its rationale for the standard of review for *a limited public forum*. *Cornelius*, 473 U.S. at 806.

> Control over access to a *nonpublic forum* can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a

"reasonable and viewpoint neutral" standard applies only to *nonpublic* forums because private speech in a *public* forum, whether limited, designated or traditional, is protected from governmental regulation unless a compelling state interest outweighs the free speech interest.[276] Referring to designated and limited forums, the *Perry* Court announced that "[a]lthough a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."[277] Unless the Second Circuit holds that the reasonable and viewpoint neutral standard applies only to nonpublic forums, unconstitutional state regulation of private speech may continue to occur in school districts.

One of the arguments school districts have made to justify their exclusionary practice is that state law allows it.[278] The public forum doctrine, however, provides that when it makes its facilities available for expressive activities, the government may not selectively exclude users solely on the basis of the religious content of their speech.[279] In spite of this, the Second Circuit has upheld the argument that state law allows exclusion of religious instruction.[280] Thus, restriction on access to school facilities is

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> nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. (emphasis added) (citations omitted).

[276] *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 800 (1985); *Perry*, 460 U.S. at 46.

[277] *Perry*, 460 U.S. at 46.

[278] *See supra* notes 28-30 and accompanying text.

[279] Widmar v. Vincent, 454 U.S. 263 (1981).

[280] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 386-89 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 679-81 (2d Cir. 1988). Although it has affirmed the lower court's decision granting a local church access to a public school for religious worship in *Bronx Household II*, the Second Circuit ruled on the First Amendment analysis and failed to rule on the

facilitated by the lower federal courts' refusal to strictly scrutinize school district policy and practice.

New York state law gives school boards the authority to adopt a policy to create public forums, but this authority is not without limit.[281] School boards are still bound by the Constitution when they attempt to regulate private speech.[282] Until courts apply the heightened scrutiny standard, school districts are able to implement policy and practice that selectively violate religious groups' free speech rights.

D. The Community Use Policy Should Be Struck Down As Facially Unconstitutional

New York's Community Use Policy is facially unconstitutional and should be struck down because it violates the First Amendment rights of religious groups by singling out religious speech from a public forum.[283] The Community Use Policy draws a constitutionally flawed distinction between religious discussion, which it permits, and religious services and instruction, which it prohibits.[284] The distinction stated in the Community Use Policy has resulted in decisions that have ultimately been reversed by the

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state law argument. Bronx Household of Faith v. Bd. of Edu. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342 (2003).

[281] N.Y. EDUC. LAW § 414 (McKinney 2002).

[282] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) ("Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Mildford that purely religious purposes can be excluded under state law.").

[283] Standard Operating Procedures for Schools and FMCs, EDUC. Topic 5 (October 2001, *revised*). *See* language of the policy *supra* note 37.

[284] *Community Use Policy* § 5.11.

> [N]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Id.

Supreme Court.[285] The distinction has also forced the courts to dissect the nature of religious groups' speech.[286] Although the Supreme Court held the school district's exclusion policy against religious groups to be unconstitutional, New York school districts continue to rely on the Community Use Policy to violate religious groups' free speech rights.[287] For example, the Second Circuit in *Bronx Household I* allowed the school district to make a distinction to permit discussion of religious material and prohibit religious instruction.[288] However, the district court in *Bronx Household II* properly struck down such practice because "the government may not, consistent with the First Amendment, engage in dissecting speech to determine whether it constitutes worship."[289] Thus, the Second Circuit should strike down the facially unconstitutional Community Use Policy and stop the school districts' effort to single out private religious speech.[290]

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[285] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[286] In *Lamb's Chapel*, the Second Circuit drew a distinction between religious references in Lamb's Chapel's film about family issues, on the one hand, and a number of other uses that are arguably at least equally religious, on the other. Thus, the court below concluded: a Salvation Army Band concert, complete with invocation and rendition of "Jericho Revisited" and "God Bless America," was not religious; a Gospel Music Concert, replete with religious songs and hymns, was not religious; and a lecture series on parapsychology, Kundalini (a Far Eastern concept), and spiritual growth, was not religious. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 388 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 736 F. Supp. 1247, 1252-53 (E.D.N.Y. 1990), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993). *See* Ross Paine Masler, *Tolling the Final Bell: Will Public School Doors Remain Open to the First Amendment?*, 14 MISS. C. L. REV. 55, 64 n.54 (1993).

[287] *Good News Club*, 533 U.S. at 119; *Lamb's Chapel*, 508 U.S. at 395.

[288] Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 215 (2d Cir. 1997). *See* Mawdsley, *supra* note 11, at 28.

[289] Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401, 423 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003) (holding consistently with the Supreme Court precedent).

[290] There are a few cases in which the Second Circuit discussed the Community Use Policy. *See, e.g.*, Bronx Household of Faith v. Bd. of Educ. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 359 (2d Cir.

CONCLUSION

Remarkable changes have taken place in the New York district court between *Deeper Life Christian Fellowship* and *Bronx Household II*. In *Bronx Household II*, the Southern District of New York recognized that religious worship is not a separate speech category, distinction between viewpoint discrimination and content discrimination is unattainable, and dissecting private speech for the purpose of restriction is unconstitutional.[291] This is an accurate analysis of the Free Speech Clause and the public forum doctrine and a correction of the distorted application of the doctrine. This is also a proper recognition of how section 414 should be applied within the constitutional boundaries. Section 414 provides the

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2003) (Miner, J. dissenting); *Bronx Household of Faith*, 127 F.3d at 216. They show that the Second Circuit is uncertain whether the Community Use Policy is unconstitutional. In *Bronx Household I*, the majority concluded that the Community Use Policy "[did] not bar any particular religious practice" and "[did] not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion." *Bronx Household of Faith*, 127 F.3d at 216. The Second Circuit discussed the Community Use Policy again in the dissenting opinion in *Bronx Household II*. *Bronx Household of Faith*, 331 F.3d at 359 (Miner, J. dissenting). The dissent, who wrote the majority opinion in *Bronx Household I*, argued that section 414 manifested "the clear policy of the State of New York to bar religious activities from the public schools to the greatest extent possible" and the Community Use Policy, especially § 5.11, "conform[ed] to the purposes and intent" of the section 414. *Id*. This is a misinterpretation of the Supreme Court precedent where such exclusion must be interpreted narrowly to avoid a violation of the First Amendment. *See Good News Club*, 533 U.S. at 109. The dissent in *Bronx Household II* misses the point that the Constitution is the supreme law of the land and every state must exercise its authority within the Constitutional limitation. *Cf*. Mawdsley, *supra* note 11, at 27 (offering analogous arguments for section 414, "Without having to declare these state provisions unconstitutional as violations of free speech, courts simply could determine that the federal constitution preempts state law and the state provisions do not apply where school districts have created limited public forums").

[291] *Bronx Household of Faith*, 226 F. Supp. 2d at 418. The Supreme Court specifically held that, in its assumed limited public forum, Milford could not prohibit activities that, while "quintessentially religious," were not "mere religious worship, divorced from any teaching of moral values." *Good News Club*, 533 U.S. at 111-12 & n.4.

school boards the control and supervision over school facilities so that school facilities may continue to benefit the students and the community residents after school hours. It does not, however, provide the school boards unlimited power to discriminate against people with any religious views or to suppress the kinds of speech that they do not approve. Only when courts reshape the application of public forum doctrine and school boards recognize the constitutional limitation on their authority to regulate speech will the chilling effect on private speech stop in New York public school forums.