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Is Good News No News for Establishment Clause Theory?

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IS *GOOD NEWS* NO NEWS FOR ESTABLISHMENT CLAUSE THEORY?

INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1]

Like much of the Bill of Rights, the First Amendment guarantees freedoms that Americans cherish. Unlike many other amendments, the values safeguarded by the First Amendment sometimes come into conflict.[2] In particular, free exercise of religion and freedom of speech sometimes conflict with freedom from the establishment of religion. These First Amendment freedoms frequently conflict in limited public forums.[3]

In a recent Supreme Court decision, *Good News Club v. Milford Central School*, the Court purported to resolve the conflict among the circuit courts on whether governments can exclude speech from limited public forums due to the religious nature of the speech.[4] The Court's decision raises questions about the traditional rules of forum analysis with respect to religion. This Note will address how the Supreme Court handled First Amendment conflicts historically, how the

1. U.S. CONST. amend. I. The First Amendment applies to the states, and therefore to municipalities that gain their authority from the states, via the Fourteenth Amendment. Section one of the Fourteenth Amendment states:

> No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. For a discussion of the incorporation doctrine, see also Douglas Linder, *The Incorporation Debate*, *at* http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/home.htm (last visited June 9, 2002).

2. For a number of interesting Constitutional questions, see Douglas Linder, *Exploring Constitutional Conflicts*, *at* http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/home.htm (last visited June 9, 2002).

3. *See infra* notes 51-59 and accompanying text (discussing limited public forums). *See also* cases discussed beginning *infra* note 121 and accompanying text.

4. 121 S. Ct. 2093, 2099 (2001). Three circuit court decisions, *Gentala v. Tucson*, 244 F.3d 1065 (9th Cir. 2001), *Campbell v. St. Tammany's School Board*, 206 F.3d 482 (5th Cir. 2000), and *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997), were called into question by the Court's decision in *Good News*.

Supreme Court currently handles such conflicts, and analyzes whether current Establishment Clause theory sufficiently protects those freedoms we value so highly. Simply put, what happens when these First Amendment rights conflict?

Part II examines the dangers of silencing speech,[5] the effect of the type of forum on free speech rights,[6] the dangers of, and tests for, establishment,[7] and the state of the law of exclusion of religion from limited public forums before *Good News*.[8] Part III summarizes the *Good News* case.[9] Part IV explores free speech and Establishment Clause implications raised by the *Good News* decision, particularly with regard to the appellate court cases that prompted the Supreme Court to grant certiorari.[10] Part V suggests what might happen when the Supreme Court is confronted with a case in which it finds that free speech conflicts with the Establishment Clause.[11] Finally, Part VI concludes that although *Good News* was not decided on Establishment Clause grounds, by allowing more religious speech into limited public forums, it will soon drive the Court to decide whether the Establishment Clause can justify viewpoint discrimination in limited public forums.[12]

II. BACKGROUND

This section addresses the state of the law regarding the exclusion of religious speech from limited public forums before the *Good News* decision. In order to do so, the concepts of viewpoint and content discrimination,[13] types of forums and the rules that apply thereto,[14] and the Establishment Clause[15] are discussed. Finally, the cases that prompted the Supreme Court to grant certiorari in *Good News* are summarized.[16]

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5. *See infra* notes 17-28 and accompanying text.
6. *See infra* notes 33-66 and accompanying text.
7. *See infra* notes 75-120 and accompanying text.
8. *See infra* notes 121-245 and accompanying text.
9. *See infra* notes 246-320 and accompanying text.
10. *See infra* notes 321-459 and accompanying text.
11. *See infra* notes 461-483 and accompanying text.
12. *See infra* notes 484-493 and accompanying text.
13. *See infra* notes 17-28 and accompanying text.
14. *See infra* notes 33-66 and accompanying text.
15. *See infra* notes 75-120 and accompanying text.
16. *See infra* notes 179-245 and accompanying text.

A. The Danger of Silencing Speech: Subject Matter and Viewpoint Discrimination

The framers of the Constitution recognized that freedom of speech would protect and promote a democratic form of government.[17] Additionally, freedom of speech fosters self-fulfillment, intellectual development, and a free trade of ideas that allows society to progress toward greater achievements and tolerance.[18] These values are prized so highly by a free society, it is little wonder that freedom of speech is embodied in the very first Amendment.

While some believe that "Congress shall make no law" is absolute,[19] the Supreme Court has held that government may abridge the freedom of speech under some circumstances.[20] Content-neutral restrictions, such as a restriction on the volume at which speech may be broadcast in a neighborhood,[21] are generally less controversial than content-based restrictions.[22] However, even with respect to content-based restrictions, the Supreme Court has identified some types of speech, for instance obscenity or commercial advertising, which may not significantly advance First Amendment values.[23] As such, the Court has tolerated some content-based restrictions on speech.[24]

Content-based restrictions are further divided between restrictions based merely on subject matter and those based on viewpoint. Generally, subject matter restrictions, such as restrictions on commercial

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17. *See* Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 351 (1995) (stating that "[t]he core idea of [the 'democracy'] rationale is that our political community is founded on a commitment to democratic government, and democratic government is possible only when citizens are free to speak their minds on political issues."). *See also* Jason Schlosberg, *Judgement on "Nuremberg": An Analysis of Free Speech and Anti-Abortion Threats Made on the Internet*, 7 B.U.J. SCI. & TECH. L. 52, 56-57 (2001).

18. *See* Sarah Hudleston, *Preserving Free Speech in a Global Courtroom: The Proposed Hague Convention and the First Amendment*, 10 MINN. J. GLOBAL TRADE 403, n.123 (2001); Julien Mailland, *Freedom of Speech, the Internet, and the Costs of Control: the French Example*, 33 N.Y.U. J. INT'L L. & POL. 1179, 1183 (2001); Schlosberg, *supra* note 17, at 56-57 n.28-29.

19. For example, this was Justice Black's position. *See* Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960), *in* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1073 (3d ed., Aspen Law & Business 1996) (noting that, "the decision to provide a constitutional safeguard for . . . free speech . . . involves a balancing of conflicting interests. [But] the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights . . . . Courts have neither the right nor the power [to] make a different evaluation . . . .").

20. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 360 (1976) (holding that the freedom of speech may be abridged "for appropriate reasons"), *in* STONE, *supra* note 19, at 1073.

21. *See* Kovacs v. Cooper, 336 U.S. 77 (1949).

22. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47-50 (1987).

23. *Id.* at 47.

24. *Id.* Specifically, the Court has tolerated restrictions on obscenity, commercial advertising, and false statements of fact, all of which the Court usually holds are only marginally protected by the First Amendment. *Id.*

speech, may be permissible if the restriction is narrowly tailored and is necessary to serve a compelling government interest.[25] While the distinction between viewpoint and subject matter discrimination is not precise,[26] viewpoint discrimination only serves to silence an unpopular or "dangerous" point of view on an otherwise permissible subject.[27] As such, viewpoint discrimination directly conflicts with values underlying the First Amendment. The government may not restrict speech on the basis of viewpoint because to do so would allow the government to skew public debate.[28]

B. Government Speech

Although the government generally cannot restrict private speech based on viewpoint, even if the government subsidizes the private speech,[29] the government can express, and thereby discriminate against, viewpoint when speaking for itself.[30] However, not every message "authorized by a government policy and tak[ing] place on

25. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985). With respect to speech restrictions in limited public forums, the Court should look to whether the distinction is reasonable in light of the purpose served by the forum. *Id.* at 804-06.

26. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 830-31 (1995).

27. *Id.*

28. *Id.* at 894 (Souter, J., dissenting).

29. *See id.* at 834.

30. *Id. See also Gentala*, 244 F.3d at 1072-73.

> [T]he situation here fits into an entirely different mode of First Amendment speech analysis, applicable when the government is in some measure engaged in communicative activity, as it was in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (government as patron), *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (government as editor), and *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (government as policy proponent). In all of those cases, some degree of viewpoint or qualitative selection criteria were permitted because the government was engaged not simply in providing a forum for private speech but in forwarding its own program through the speech of others.

Id. (parallel citations omitted); *See also* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 541-42 (2001) (suggesting that if the public does not care for the government's message, the public could vote the representatives out of office). The Court stated:

> We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances . . . in which the government "used private speakers to transmit specific information pertaining to its own program." As we said in *Rosenberger*, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."

Id. (citations omitted).

government property at [a] government-sponsored . . . [event] . . . is the government's own. [The Court has] held, for example, that an individual's contribution to a government-created forum was not government speech."[31] Furthermore, although the government may express a viewpoint, the Establishment Clause forbids governments from expressing or endorsing a religious message.[32]

C. The Effect of the Type of Forum on First Amendment Freedoms

Although the First Amendment guarantees freedom of speech, freedom to exercise religion, and freedom to assemble, it does not guarantee all citizens unrestricted access to exercise these rights on or through government property.[33] Like a private property owner, the government may lawfully limit the public's use of its property, including private parties' right to speak on government property.[34] The extent to which citizens may "speak on government property is largely dependent on the nature of the forum in which the speech is delivered."[35]

In *Perry Educators' Ass'n. v. Perry Local Educators' Ass'n*,[36] the Supreme Court delineated three forums for speech used in free speech analysis: the traditional public forum, the limited public forum, and the nonpublic forum.[37] Depending on the type of forum, courts

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31. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (citing *Rosenberger*, 515 U.S. 819 (1995)).

32. *Id.* (quoting Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990)).

33. *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981).

34. *See Cornelius*, 473 U.S. at 799-800.

35. Campbell v. St. Tammany's Sch. Bd., 206 F.3d 482, 486 (5th Cir. 2000). As stated in *Cornelius*:

> [T]he conclusion that the solicitation, which occurs in the CFC, is protected speech merely begins our inquiry. Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. Recognizing that the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,' the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.

Cornelius, 473 U.S. at 799-800 (citations omitted).

36. 460 U.S. 37 (1983).

37. *Id.* at 44. *See Cornelius*, 473 U.S. at 802.

apply different standards to determine whether a government may constitutionally exclude a speaker.[38]

1. *Traditional Public Forum*

Traditional public forums, also called open forums, include streets, parks, and other places that "by long tradition . . . have been devoted to assembly and debate."[39] In a traditional public forum, government may restrict speech based on subject matter,[40] but all such restrictions are "subject to the highest scrutiny."[41] In the case of a traditional public forum, restrictions on speech must be both narrowly drawn and necessary to serve a compelling state interest.[42] Restrictions on viewpoint in a traditional public forum, however, are never constitutional.[43]

One example of a traditional public forum is the street corner. In *Schneider v. State*,[44] defendants challenged the constitutionality of ordinances against handing out leaflets on public streets.[45] The restrictions were content-neutral, applying regardless of the leaflet's subject matter.[46] The Court assumed the ordinances were enacted for the legitimate governmental goal of reducing litter;[47] however, it held the ordinances unconstitutional, stating that leaflets handed out on public streets had been the "historical weapons in defense of liberty."[48] The Court noted that pamphlets are the "most effective instruments in the dissemination of opinion"[49] and "streets [are] natural and proper places for the dissemination of information and opinion."[50]

2. *Limited Public Forum*

Limited public forums are "created by government designation of a place or channel of communication for use by the public at large for

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38. *Good News*, 121 S. Ct. at 2099-2100. *See also Perry*, 460 U.S. at 44 (describing three types of fora).

39. *Perry*, 460 U.S. at 45.

40. *See* United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (plurality opinion); *Perry*, 460 U.S. at 46.

41. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).

42. *See id.*; *Perry*, 460 U.S. at 45.

43. *See Rosenberger*, 515 U.S. at 829; *Perry*, 460 U.S. at 45. *See also supra* notes 17-28 and accompanying text (discussing the dangers of silencing speech).

44. 308 U.S. 147 (1939).

45. *Id.* at 153-54.

46. *Id.* at 154-58.

47. *Id.* at 162.

48. *Id.*

49. *Id.* at 164.

50. *Schnieder*, 308 U.S. at 163.

assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[51] In determining whether government intended to create a nontraditional public forum, courts look to government policy and practice.[52] While traditional public forums are exclusively physical forums, such as parks and sidewalks, limited public forums take a variety of forms. In *Rosenberger v. Rector & Visitors of University of Virginia*,[53] the Supreme Court determined that a university's student activities fund was a limited public forum, even while it noted the fund was a forum "more in a metaphysical than in a spatial or geographic sense."[54]

When a state establishes a limited public forum, "the State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics;'"[55] therefore, content discrimination may be

51. *Cornelius*, 473 U.S. at 802. Government action is required to create a nontraditional public forum. *Id.* Inaction is not sufficient. *Id.*

> [T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government. [The Supreme Court] will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will [it] infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.

Id. at 803 (citations omitted).

52. *Id.*

> In *Perry Education Ass'n*, [the Supreme Court] found that the School District's internal mail system was not a public forum. In contrast to the general access policy in *Widmar v. Vincent*, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted. Similarly, the evidence in *Lehman v. City of Shaker Heights* revealed that the city intended to limit access to the advertising spaces on city transit buses. It had done so for 26 years, and its management contract required the managing company to exercise control over the subject matter of the displays. Additionally, the Court found that the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum. In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, [the Court] ha[s] held that military reservations and jailhouse grounds do not constitute public fora.

Id. at 803-04 (citations omitted).

53. 515 U.S. 819 (1995). *See also infra* notes 143-176 and accompanying text (summarizing the *Rosenberger* decision).

54. *Rosenberger*, 515 U.S. at 830. *See also Cornelius*, 473 U.S. at 801, stating that:

> [I]n defining the forum [the Court has] focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, [the Court's] cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.

Id. See also Perry, 460 U.S. at 46-47 (1983) (stating that the relevant forum is the school's internal mail system); Lehman v. City of Shaker Heights, 418 U.S. 298, 300 (1974) (holding that the forum is the advertising spaces on the city buses).

55. *Good News*, 121 S. Ct. 2093, 2100 (2001) (citing *Rosenberger*, 515 U.S. at 829).

permissible if it preserves the purposes of the limited public forum.[56] Nevertheless, restrictions on speech in a limited public forum must not discriminate on the basis of viewpoint and must be reasonable[57] in light of the purpose served by the forum.[58] With respect to religious speech, the Supreme Court has indicated that State interest in avoiding an Establishment Clause violation may justify content discrimination, but whether such an interest might justify viewpoint discrimination is far from clear.[59]

3. *Nonpublic or Closed Forum*

"A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation."[60] "In such a forum, the government may make 'distinctions in access on the basis of subject matter and speaker identity,'" but not on viewpoint.[61]

The internal mail system at a school in *Perry*[62] is an example of a nonpublic forum.[63] The mail system was intended for the communication of school-related matters to school employees.[64] Because by policy or practice, the Perry School District had not opened its mail system for indiscriminate use by the general public, the court held that a public forum had not been created, although the school had allowed "the periodic use of the system by private non-school . . . connected groups."[65] Having found that the mail system was not a public forum,

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56. *See Rosenberger*, 515 U.S. at 829-30.

57. *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 683 (holding that "the restriction 'need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation'") (quoting *Kokinda*, 497 U.S. at 736). The reasonableness inquiry looks to whether the restriction on speech serves a significant government interest "and [is] not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. If the justifications given are facially reasonable, the Court must still determine whether the proffered reasons are mere pretext for viewpoint discrimination. *Cornelius*, 473 U.S. at 797.

58. *See Good News*, 121 S. Ct. at 2100.

59. *See* Widmar v. Vincent, 454 U.S. 263, 271 (1981). *See also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993) (noting the suggestion in *Widmar* but ultimately not finding an Establishment Clause problem). As "[v]iewpoint discrimination is 'an egregious form of content discrimination . . .'" if it is constitutional at all, "[t]he government [would bear] a particularly heavy burden in justifying viewpoint-based restrictions in designated public forums." Church on the Rock v. City of Alburquerque, 84 F.3d 1273, 1279 (10th Cir. 1996) (internal citations omitted).

60. *Bronx Household of Faith*, 127 F.3d at 212 (citing *Perry*, 460 U.S. at 46).

61. *Id.* (citing *Perry*, 460 U.S. at 49). *See Cornelius*, 473 U.S. 806 (favoring prohibition on restriction based on viewpoint).

62. 460 U.S. 37 (1983).

63. *Id.* at 46-47.

64. *Id.* at 47 (stating selective access does not transform government property into a public forum.").

65. *Id.*

"the School District had no 'constitutional obligation per se to let any organization use the school mail boxes.'"[66]

D. Religion as Speech

Regardless of the forum, religious worship and discussion are forms of speech and association protected by the First Amendment.[67] The Supreme Court "has rejected the notion that speech about religion . . . should be treated differently under the First Amendment."[68] Additionally, all members of the Court hold that "religious speech designed to win converts and religious worship by persons already converted" are entitled to protection under the First Amendment, but disagreed as to the extent.[69] Finally, in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court specifically rejected as a defense for religious viewpoint discrimination the fear that opening the forum to a "radical" church "might cause unrest," stating that "[t]here is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the district otherwise opens to discussion on district property."[70]

> Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record, which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. In *Greer v. Spock*, the fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not convert the military base into a public forum.

Id. (citations omitted).

66. *Id.* at 48 (citing Conn. St. Fed'n of Teachers v. Bd. of Educ. Members, 538 F.2d 471, 481 (2d Cir. 1976)).

67. *See Widmar*, 454 U.S. at 269.

68. *Church on the Rock*, 84 F.3d at 1278 (citing *Widmar*, 454 U.S. at 269 n.6).

69. *Id.*

70. *See Lamb's Chapel*, 508 U.S. at 394-96. *See also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (holding an assembly and parade ordinance that varied the fee for the activity based on the content of the speech unconstitutional). The Court in *Forsyth County* stated:

> The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit. Although petitioner agrees that the cost of policing relates to content, it contends that the ordinance is content neutral because it is aimed only at a secondary effect—the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification "has nothing to do with content."

Forsyth County, 505 U.S. at 134. While the argument that the opening of a forum to a "radical" church "might cause unrest" cannot be used to allow viewpoint discrimination, there may be good reason to fear unchecked religious fervor. *Id.* The use of religion by the Nazis in pre-

Although the Supreme Court has recognized that religious speech may be protected, and when religious speech constitutes worship, enjoys the protection of the Free Exercise Clause as well, historically the Court recognized a distinction between religious viewpoint and religious subject matter.[71] This suggests government could place restrictions on limited public forums to allow religious viewpoint but disallow religious subject matter, such as religious worship.[72] The Court has always recognized that this line is difficult to draw;[73] however, where the line is drawn has a great effect on how the Establishment Clause interacts with freedom of speech and freedom of religion in limited public forums.[74]

E. The Establishment Clause and Free Speech and Free Exercise in Limited Public Forums

The Supreme Court has affirmatively recognized that a state's interest in avoiding an Establishment Clause violation may justify content-based discrimination.[75] What is less clear is whether a state's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.[76]

"[T]he Constitution also requires that we keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded.'"[77] In *Lemon v. Kurtzman* (*Lemon I*),[78] the Supreme Court set out a three-part test for determining whether a statute constitutes government establishment of religion.[79] Under the first prong, a statute must have a "secular legislative purpose."[80] Second, the statute's "principal

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World War II Germany, as well as the use of religion by the Taliban in more recent times, are just two examples. However, fears about religion leading toward a totalitarian governmental regime should be largely allayed by protecting the freedom of speech and enforcing the Establishment Clause.

71. *See Rosenberger*, 515 U.S. 819 (1995); *Lamb's Chapel*, 508 U.S. 384 (1993) (both holding that the restrictions in question were invalid because they discriminated against religious viewpoint).

72. *Id.*

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

74. *See infra* notes 392-409 and 461 and accompanying text.

75. *See Good News*, 121 S. Ct. at 2103 (citing *Widmar*, 454 U.S. at 271).

76. *Id.* (citing *Lamb's Chapel*, 508 U.S. at 394-95). The Court in *Good News* did not need to decide the issue because it found that the school district had not raised an Establishment Clause concern. *Id.* See *infra* notes 246-320 and accompanying text (discussing the *Good News* decision).

77. *Santa Fe*, 530 U.S. at 314 (quoting Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

78. 403 U.S. 602 (1971).

79. *Lemon*, 403 U.S. at 612-13.

80. *Id.* at 612.

or primary effect must be one that neither advances nor inhibits religion."[81] Finally, the statute must not foster an "excessive government entanglement with religion."[82]

Although decided in 1971, the *Lemon* test has not been consistently applied by the Court.[83] Furthermore, the test has been criticized by members of the Court, as well as academia, as being too malleable.[84] The *Lemon* test has not been explicitly used by the Court since 1985.[85] Even when the Court purported to apply the *Lemon* test, it looked to specific factors to decide whether a government action violated the Establishment Clause.[86] Most notably, the Court consistently returned to the factors of government neutrality toward religion, government funding of religion, and government endorsement of religion.[87]

1. Neutrality

The Supreme Court has repeatedly stated that "a significant factor in upholding governmental programs against Establishment Clause attack is their *neutrality* towards religion."[88] It has further clarified that

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81. *Id.*

82. *Id.* at 613 (internal citations omitted).

83. *See* Julie F. Mead & Julie K. Underwood, Lemon *Distilled with Four Votes: An Examination of* Mitchell v. Helms *and Its Implications,* 149 ED. LAW REP. 639, 651-52 (2001); Marjorie George, *And Then God Created Kansas? The Evolution/Creationism Debate in America's Public Schools,* 149 U. PA. L. REV. 843, 855-56 (2001).

84. *See* Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting). Justice Scalia cited opinions of Justices Kennedy, Rehnquist, White, and O'Connor, as well as one of his prior opinions, all of which criticized the *Lemon* test. *Id. See also* George, *supra* note 83, at 855 n.73 (citing scholars who suggest the Court should reject *Lemon*). *See also* Tangipahoa Parish Bd. of Educ. v. Freiler, 120 S. Ct. 2706, 2708 (2000) (mem.) (Scalia, J., dissenting) (dissenting from the denial of certiorari because he wanted to "take the opportunity to inter the *Lemon* test once and for all.").

85. *See* STONE, *supra* note 19, at 1547.

86. *See* Mitchell v. Helms, 530 U.S. 793, 836-51 (2000) (O'Connor, J., concurring) (reviewing numerous Establishment Clause cases pointing to factors used in deciding whether the action in question constituted impermissible government establishment of religion).

87. *See id.*; *Rosenberger*, 515 U.S. at 840-43. Additionally, the Court has sometimes hinted that age may be a factor. *But see Good News*, 121 S. Ct. at 2104-05, stating:

> Whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, *cf., e.g., Lee* [*v. Weisman*] at 592; *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) (stating that 'symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice'), we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.

Id.

88. *Good News*, 121 S. Ct. at 2104 (quoting *Rosenberger*, 515 U.S. at 839).

"neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[89]

Although government neutrality toward religion is "an important consideration in Establishment Clause cases,"[90] the Court has never held that it is a dispositive factor.[91] Recently, in *Mitchell v. Helms*,[92] a majority of the Court determined neutrality is not sufficient to uphold government programs against an Establishment Clause attack.[93]

In *Mitchell*, the Court held that a federal program,[94] under which local agencies receiving federal funding lent educational materials to both public and private schools, did not violate the Establishment Clause even though most of the private schools receiving aid in the locality in question were religious.[95] Although the plurality suggested that neutrality alone was sufficient, five Justices in concurrence and dissent agreed that "[n]eutrality . . . is relevant . . . but this neutrality is not alone sufficient to qualify the [government] aid as constitutional."[96]

2. *Funding and Coercion*

Government may not fund religion because such funding may coerce citizens to subsidize religious ideas in which they do not believe.[97] Although the presence or absence of compulsion to attend an event with religious overtones is important to the analysis,[98] "[t]he Establishment Clause prohibits the expenditure of government funds to aid in the establishment of religion even if the only coercion involved is in the collection of taxes to be used for that purpose."[99]

89. *Id.*

90. *Gentala*, 244 F.3d at 1075.

91. *See id.* at 1075-76 (discussing the Court's struggle to determine whether neutrality toward religion alone is sufficient to deem a governmental program constitutional where subsidies are concerned). *See also Mitchell*, 530 U.S. at 839.

92. 530 U.S. 793 (2000).

93. *See Gentala*, 244 F.3d at 1075-76.

94. 20 U.S.C. § 70, VI (2002).

95. *Mitchell*, 530 U.S. at 836.

96. *Id.* at 840 (O'Connor, J., concurring) (internal citations omitted).

97. *Gentala*, 244 F.3d at 1076 n.16 (citing Flast v. Cohen, 392 U.S. 83, 103-04 (1968) and Everson v. Bd. of Educ., 303 U.S. 1, 15-16 (1941)).

98. *See Lee*, 505 U.S. 577 (1992) (holding that prayers led by clergy at public high school graduations violated the Establishment Clause as it coerced students to participate in religious exercises).

99. DeStefano v. Emergency Hous. Group, 247 F.3d 397, 407 (2d Cir. 2001) (citing *Flast*, 392 U.S. at 103). In *DeStefano* a taxpayer alleged that the state's funding of a private alcoholic treatment center that included Alcoholics Anonymous (AA) as part of its services violated the

Government funding may take the form of subsidies or tax exemptions. With respect to subsidies, the Court has noted that, by providing a vehicle for speech, the limited public forum is analogous to government subsidies for speech. As such, the court has applied the same limitations on permissible restrictions developed in *Lamb's Chapel* and *Rosenberger.*[100] However, the Court has made clear that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse."[101] Thus general subsidies of religious activity are impermissible.[102] When the subsidy is not specifically subsidizing religious activity, a fact specific inquiry is necessary to determine whether an objective, informed observer[103] would perceive the subsidy as endorsement.[104]

Unlike general subsidies, tax exemptions provide economic assistance in a "fundamentally different way."[105] Subsidies use "resources exacted from taxpayers as a whole" whereas "exemptions . . . involve no such transfer."[106] "In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches, [while] [i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions."[107]

Although tax exemptions differ from subsidies, they may still violate the Establishment Clause. However, in *Walz v. Tax Commission of New York*,[108] the Court found that the breadth of a property tax

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Establishment Clause. *Id.* Applying the *Lemon* test, the Second Circuit held that the AA programs constituted religion for purpose of the First Amendment, but that mere inclusion of services did not violate the Establishment Clause. *Id.*

100. *See Velazquez*, 531 U.S. at 544-45 (holding that a funding restriction violated the First Amendment because the program in question was designed to facilitate private speech, not to promote a governmental message). *See supra* notes 29-32 and accompanying text (discussing government speech). *See supra* notes 51-59 and accompanying text (discussing rules applicable to limited public forums).

101. *Rosenberger,* 515 U.S. at 844.

102. *See id.*; *Mitchell*, 530 U.S. at 841.

103. A "reasonable person" who is familiar with the program.

104. *See Santa Fe*, 530 U.S. at 308. Funding and endorsement concerns often overlap because government endorsement often also involves money in some form (a funding concern), and government funding is often accompanied by the government stamp of approval (an endorsement concern). However, it is possible to isolate the concerns, although in reality it rarely happens. The government is capable of endorsing without providing a subsidy or exemption from taxation (therefore no funding concern), or funding an activity without the public being aware of the state sponsorship (therefore no endorsement concern).

105. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 690 (1970).

106. *Id.*

107. *Id.* at 691 (quoting Donald Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513, 553 (1968)).

108. 397 U.S. 664 (1970).

exemption scheme, which included educational and charitable groups in addition to religious groups, indicated that the state did not intend to give religious organizations that benefited by the tax exemption special preference.[109] As such, the Court found the tax exemption scheme was neutral with respect to religion.[110]

3. *Endorsement and Coercion*

Government may not endorse one religion over another or religion over nonreligion.[111] An extreme example of government endorsement is when government attempts to coerce citizens to participate in religious exercises. In *Lee v. Weisman*,[112] the Court held that a prayer at a public middle school graduation was "forbidden by the Establishment Clause."[113] Recognizing "the undeniable fact . . . that the school district's supervision and control of a . . . graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction," the Court stated:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."[114]

Simply because a majority of the electorate has approved a religious message does not override endorsement concerns to protect such message from Establishment Clause challenges.[115] In *Santa Fe Independent School District v. Doe*,[116] the Court held a high school policy, which authorized a student election, the winner of which would lead a prayer at school football games, violated the Establishment Clause.[117] Because the school authorized the election and the speech took place on school property at school events, the Court held that the speech was government-endorsed, rather than purely private speech.[118] The Court stated:

109. *Id.* at 689.
110. *Id.*
111. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994).
112. 505 U.S. 577 (1992).
113. *Id.* at 599.
114. *Id.* at 587 (quoting *Lynch*, 465 U.S. at 678).
115. *Santa Fe*, 530 U.S. at 304-05.
116. 530 U.S. 290 (2000).
117. *Id.* at 317.
118. *Id.* at 302-03.

> [S]tudent elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic: To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here.[119]

Although some religious speech may raise significant endorsement concerns, not all religious speech, or even religious worship, in public forums raise such concerns.[120]

F. Exclusion of Religion From Limited Public Forums Before Good News

Even before the *Good News* decision, the Supreme Court had twice addressed the question of religious speech in limited public forums.[121] In *Lamb's Chapel,* decided in 1993, the Court held the exclusion of religious speech from the limited public forum in question was impermissible viewpoint discrimination, and such discrimination was not justified by the government interest in avoiding an Establishment Clause violation.[122]

Following *Lamb's Chapel,* two circuits decided cases finding the exclusion of religious speech from limited public forums constituted impermissible viewpoint discrimination.[123] In contrast, the United States Court of Appeals for the Second Circuit in *Bronx Household* held that

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119. *Id.* at 304 (quoting Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000)). In *Santa Fe,* the Court further stated that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). Notice that government can discriminate against viewpoint when it speaks for itself. *See supra* notes 29-32 and accompanying text. However, majoritarian politics is a concern when government endorses religion.

120. *See, e.g.,* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995). Here, the court held that the Establishment Clause was:

> [N]ot implicated [because of] the presence here of the factors the Court considered determinative in striking down state restrictions on religious content in *Lamb's Chapel* and *Widmar.* The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups. [T]his Court's Establishment Clause jurisprudence [has] consistently upheld neutral government policies that happen to benefit religion.

Id.

121. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

122. *See Lamb's Chapel,* 508 U.S. 384 (1993).

123. *See* Church on the Rock v. Alburquerque, 84 F.3d 1273 (10th Cir. 1996); Good News Club v. Milford Cent. Sch., 28 F.3d 1501 (2d Cir. 2000).

a school district had properly denied a church access to a limited public forum because the proposed purpose, presenting the church's weekly religious services, constituted subject matter rather than viewpoint discrimination.[124]

Several years later, the Supreme Court decided *Rosenberger*, again finding the exclusion of religious speech from the limited public forum in question to constitute impermissible viewpoint discrimination, but reasserting that viewpoint discrimination might be justified in other cases by the government's interest in preventing an Establishment Clause violation.[125] After *Rosenberger*, two more circuits found no viewpoint discrimination or justifiable viewpoint discrimination in the exclusion of religious speech from limited public forums.[126]

The following sections describe the Supreme Court's decisions in *Lamb's Chapel* and *Rosenberger* and the split in the circuits that gave rise to the Supreme Court granting certiorari in *Good News*.

1. *Unconstitutional Exclusion of Religion From Limited Public Forums*

Lamb's Chapel and *Rosenberger* are recent and prominent Supreme Court cases dealing with the exclusion of religious speech from limited public forums.[127] In each, the Supreme Court found the exclusion amounted to unconstitutional viewpoint discrimination.[128]

a. *Lamb's Chapel v. Center Moriches Union Free School District*[129]

Under Section 414 of a New York statute,[130] school boards could adopt regulations to allow community members to use the school for specified purposes while the school was not being used for school purposes.[131] Religious purposes were not included among those specified purposes.[132] Pursuant to Section 414, the school district in *Lamb's Chapel* specified a subset of the purposes enumerated in Section 414

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

125. *See Rosenberger*, 515 U.S. at 845-46.

126. *See* Gentala v. Tucson, 244 F.3d 1065 (9th Cir. 2001); Campbell v. St. Tammany's Sch. Bd., 206 F.3d 482 (5th Cir. 2000).

127. *See Rosenberger*, 515 U.S. at 819; *Lamb's Chapel*, 508 U.S. at 384.

128. *See Rosenberger*, 515 U.S. at 820; *Lamb's Chapel*, 508 U.S. at 394.

129. *Lamb's Chapel*, 508 U.S. 384 (1993).

130. N.Y. EDUC. LAW § 414 (1995). This is the same law at issue in *Good News*. *See infra* notes 246-260 and accompanying text.

131. *Lamb's Chapel*, 508 U.S. at 386.

132. *Id.* at 386. New York precedent had upheld restrictions on the use of school property by bible clubs under Section 414 because, "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414." *Id.* at 386-87 (quoting Trietley v. Bd. of Educ. of Buffalo, 409 N.Y.S.2d 912, 915 (1978)).

for which the school could be used, including social, civic, or recreational uses.[133] Consistent with Section 414 and New York precedent, the rules expressly stated that "[t]he school premises shall not be used by any group for religious purposes."[134]

Lamb's Chapel, a community church, sought to use the school to show a film series discussing families, child rearing, and the importance of instilling Christian family values.[135] The school board twice refused to let Lamb's Chapel use the school, indicating that the refusal was based on the religious content of the films.[136]

The Supreme Court, applying a limited public forum analysis, acknowledged that the school district's refusal to let religious groups use the school could only survive if it was "reasonable in light of the purpose served by the forum and . . . viewpoint neutral."[137] The Court viewed the films not as religious subject matter, but as films about child rearing from a religious perspective.[138] As child rearing was an acceptable subject under the regulation, the Court held restricting access based on the films' religious viewpoint was clearly a violation of the First Amendment.[139]

Citing *Widmar v. Vincent*,[140] the Court dismissed the Establishment Clause as a justification for the viewpoint discrimination in *Lamb's*

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133. *Lamb's Chapel*, 508 U.S. at 387.

134. *Id.*

135. *Lamb's Chapel*, 508 U.S. at 388 n.3.

136. *Id.* at 388-89.

137. *Id.* at 392-93 (quoting *Cornelius*, 473 U.S. at 806).

138. *Id.* at 393-94.

139. *Id.*

> [A]lthough a speaker may be excluded from a 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 special 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 includable subject.

Id. at 394 (quoting *Cornelius*, 473 U.S. at 806).

140. *Widmar* involved an open forum rather than a limited public forum. *Widmar*, 454 U.S. at 263. The forum, the university grounds and facilities, was open to any student groups with the notable exception of groups wishing to use the forum for religious worship or teaching. *Id.* at 265. Because the Court found this limitation did not create a limited public forum, "the Court applied the standard of review for content based exclusions—the need to show a compelling state interest and a regulation narrowly drawn to achieve that end—and found the standard unmet." *See Bronx Household of Faith*, 127 F.3d at 213. The Court, applying the *Lemon* test, further held that the Establishment Clause was not offended by a policy of equal access to all student groups. *Widmar*, 454 U.S. at 271-77.

Justice Stevens's concurrence foreshadowed *Rosenberger*. *Widmar*, 454 U.S. at 277-81 (Stevens, J., concurring). Justice Stevens characterized the restriction as viewpoint discrimination, because the limitation did not apply to philosophy. *Id.* at 281. In his dissent, Justice White proposed that just because religious worship uses speech does not mean such speech is protected by the Free Speech Clause. *Id.* (White, J., dissenting). Justice White believed that to so hold

Chapel because the Court found "no realistic danger that the community would think that the District was endorsing religion . . . and any benefit to religion . . . would have been no more than incidental."[141] The Court also dismissed the proposed justification of excluding religious purposes to prevent public unrest.[142]

b. *Rosenberger v. Rector & Visitors of University of Virginia.*[143]

As in *Lamb's Chapel*, the Court in *Rosenberger* held that the restriction on religion from a limited public forum was a violation of Free Speech rights and that the violation was not excused by the Establishment Clause.[144] The University of Virginia[145] paid the printing costs of numerous and diverse student publications through the Student Activities Fund (SAF).[146] The SAF received its funds from mandatory student fees and distributed those funds on behalf of student groups for the purpose of providing diverse extracurricular activities related to education.[147]

To be eligible to receive funds from the SAF, the SAF required groups to first become Contracted Independent Organizations (CIO).[148] Religious organizations, defined as "organization[s] whose purpose is to practice a devotion to an acknowledged ultimate reality or deity," were not eligible for CIO status.[149] Religious activities, defined to include any activity that "promote[d] or manifest[ed] a partic-

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would leave the Free Exercise Clause without meaning. *Id. See also infra* notes 469-473 and accompanying text.

In *Mergens*, the Court extended *Widmar* to apply to high school students as well as university students. Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

141. *Lamb's Chapel*, 508 U.S. at 395. The Court briefly addressed the *Lemon* test, finding that allowing Lamb's Chapel to use the school was not an establishment of religion under *Lemon*, because "[t]he challenged governmental action had a secular purpose, did not have the principal . . . effect of advancing or inhibiting religion, and did not foster excessive entanglement with religion." *Id. See supra* notes 75-87 and accompanying text and *infra* notes 369-370 and accompanying text (discussing the *Lemon* test).

142. *Lamb's Chapel*, 508 U.S. at 395-96 (stating that "[t]here is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise opens to discussion on District property"). *See also supra* note 70.

143. 515 U.S. 819 (2000).

144. *Id.* at 846

145. The University of Virginia is an instrumentality of Virginia and, therefore, is bound by the First and Fourteenth Amendments.

146. *Rosenberger*, 515 U.S. at 822.

147. *Id.* at 824.

148. *Id.* The University's guidelines recognized eleven categories of CIOs that were eligible for reimbursement by the SAF. *Id.* "[S]tudent news, information, opinion, entertainment, or academic communications media groups" were included. *Id.* (internal citations omitted).

149. *Id.* at 826.

ular belie[f] in or about a deity or an ultimate reality," were not eligible for reimbursement by the SAF.[150] Political activities such as electioneering and lobbying were also prohibited.[151] When a CIO was eligible for reimbursement, payment was made directly to the outside contractors—student groups did not receive any funds directly.[152] The University also executed a standard agreement with eligible student groups that made clear the student groups were independent of the University.[153]

Wide Awake Publications (WAP) was established as a CIO to publish a magazine with "sensitivity to and tolerance of Christian viewpoints."[154] After being given CIO status, WAP sought reimbursement from SAF for printing costs.[155] SAF denied the request on the ground that WAP promoted religion.[156]

i. *Rosenberger* Majority

Analogizing *Lamb's Chapel*, the Court held that the SAF prohibition resulted in viewpoint discrimination.[157] As the Court characterized the SAF prohibition, it would prevent the discussion of much philosophy.[158] The Court dismissed the University's attempt to distinguish this case from *Lamb's Chapel* due to the use of funds rather than facilities.[159]

The Court held that the free speech violation was not justified by the Establishment Clause.[160] Describing the neutrality of government programs as a key factor in determining whether the Establishment Clause has been violated, the Court found that allowing reimburse-

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150. *Rosenberger,* 515 U.S. at 827.

151. *Id.* at 825.

152. *Id.*

153. *Id.* at 824.

154. *Id.* at 826.

155. *Id.* at 827.

156. *Rosenberger*. 515 U.S. at 827.

157. *Id.* at 830-31. Like *Lamb's Chapel*, the group was a qualified organization, except for its religious purpose. *Id.* at 832; *supra* note 139. And as in *Lamb's Chapel*, the proffered rationale for excluding the group's message was the group's religious views. *Rosenberger*, 515 U.S. at 832; *supra* note 139.

158. *Rosenberger*, 515 U.S. at 836-37 (noting that the restriction as applied to WAP "has a vast potential reach" and could include the works of Plato, Descartes, and Marx).

159. *Id.* at 832-35. Although the state has substantial discretion in determining how to allocate scarce resources to accomplish its educational mission, *see id.* at 832-33 (citing *Widmar,* 454 U.S. at 276-77), even if the facilities in *Lamb's Chapel* had been scarce, the Court's decision would have been no different. *Id.* at 835 (stating "the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.").

160. *Rosenberger*, 515 U.S. at 845-46.

ment of WAP's costs would be neutral with respect to religion.[161] The Court dismissed funding concerns by distinguishing the student activity fee from a tax.[162] Finally, the Court noted that endorsement was not a concern because the University had made clear that the student newspapers did not represent the University's views.[163]

ii. *Rosenberger* Dissent

Unlike *Lamb's Chapel*, which had no dissenting opinions, in *Rosenberger*, Justice David H. Souter was joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer in dissent.[164] Characterizing WAP's activities as preaching,[165] the dissent argued that the Establishment Clause required the University to refuse to support WAP's religious activities.[166] The dissent further faulted the majority for concluding that the student activity fee was not a tax.[167] According to the dissent, through these mischaracterizations, the Court attempted to "circumvent the clear bar to direct governmental aid to religion."[168]

The dissent pointed out that neutrality of government programs toward religion is not enough to avoid a violation of the Establishment Clause.[169] "[T]he Court must identify some further element in the funding scheme that does demonstrate its permissibility. For one reason or another, the Court's chosen element appears to be the fact that . . . [the] funds are sent to the printer chosen by WAP, rather than to WAP itself."[170] According to the dissent, this did not create a true "third party standing between the government and the ultimate relig-

161. *Id.* at 839-40 (finding that any benefit to religion would be incidental and there was no suggestion that the University created the scheme to advance religion).

162. *Id.* at 840-41.

163. *Id.* at 841-42.

164. *Id.* at 863-99.

165. *Id.* at 865-68. Justice Souter described the first issue:

> [T]he editor-in-chief announces Wide Awake's mission in a letter to the readership signed, "Love in Christ": it is "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." The masthead of every issue bears St. Paul's exhortation, that "[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed." Romans 13:11. Each issue of Wide Awake contained in the record makes good on the editor's promise and echoes the Apostle's call to accept salvation . . . .

Rosenberger, 515 U.S. at 866-67 (select citations omitted).

166. *Id.* at 864.

167. *Id.* at 873-76.

168. *Id.* at 864.

169. *Id.* at 877-86.

170. *Id.* at 866.

ious beneficiary."[171] As the Court acknowledged, "if the State pays the church's bills it is subsidizing it."[172] Noting that the "common factual thread running through *Widmar*, *Mergens*, and *Lamb's Chapel* is that government institutions "created a limited public forum . . . but sought to exclude speakers with religious messages," the dissent distinguished *Rosenberger* saying, "[t]here is no traditional street corner printing provided by the government on equal terms to all comers."[173]

The dissent also disagreed that the SAF regulation resulted in viewpoint discrimination.[174] The SAF regulation applied not only to Christian advocacy, but also to any religion, as well as agnostics and atheists.[175] Pointing out that the University may fund a private publication about racism without skewing the debate about religion, the dissent wondered where the Court's momentum in ignoring the difference between viewpoint and content discrimination would lead.[176]

2. *Split in Appellate Courts Before* Good News

The Supreme Court granted certiorari in *Good News* to resolve a conflict among the circuits on the question of whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech.[177] *Good News/Good Sports* and *Church on the Rock* fall on what would ultimately be the winning side of the conflict, whereas *Good News* was not good news for *Bronx Household, Campbell,* and *Gentala*, which have been called into question by the Supreme Court's decision.[178]

a. The Winners After *Good News*

Good News/Good Sports and *Church on the Rock* were both left intact by *Good News*. Interestingly, they were both decided before the Court's decision in *Rosenberger* and thus had less direction from the Court than two of the cases that *Good News* called into question.

171. *Rosenberger*, 515 U.S. at 866.

172. *Id.* at 887 n.10.

173. *Id.* at 888-89.

174. *Id.* at 894-95.

175. *Id.* at 895-96.

176. *Id.* at 898-99 (stating that "the Court's reasoning requires a university that funds private publications about any primarily nonreligious topic also to fund publications primarily espousing adherence to or rejection of religion.").

177. *Good News*, 121 S. Ct. at 2099.

178. *Id.*; Gentala v. City of Tucson, 244 F.3d 1065 (9th Cir. 2001); Campbell v. St. Tammany Sch. Bd., 206 F.3d 482 (5th Cir. 2000); Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207 (2nd Cir. 1997); Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996); Good News/Good Sports Club v. Sch. Dist. of City of Ladue, 28 F.3d 1501 (8th Cir. 1994).

i. *Good News/Good Sports Club v. School District of Ladue*[179]

The Ladue School District's 1986 Use Policy allowed the local Good News Club to use school facilities immediately after the school day.[180] Because parents complained about the religious content of the Good News Clubs meetings, the school district of Ladue changed its policy (Amended Use Policy) to allow only scouts and athletic groups to use its facilities between 3 p.m. and 6 p.m. on school days, and also prohibited scouts from engaging in any religious speech during those hours.[181] Because the United States Court of Appeals for the Eighth Circuit found that both the club and scout meetings' subject matter was morals, the Eighth Circuit held that the Amended Use Policy resulted in viewpoint discrimination.[182]

The court further held that the viewpoint discrimination was not justified by the compelling governmental interest of avoiding an Establishment Clause violation.[183] The School District argued that the new policy constitutionally excluded religious uses if the old policy violated the Establishment Clause by allowing religious uses.[184] Accepting this as true, the court applied the *Lemon* test to the old policy.[185] The court determined that under *Lemon* there was no government establishment of religion.[186]

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179. 28 F.3d 1501 (8th Cir. 1994).

180. *Id.* at 1502-03.

> The Club is a community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values. Club advertisements state that the Club is not sponsored by the School District. Parent volunteers run the Club meetings. The Club is open to junior high school students regardless of their race, creed, denomination, or sex. The Club does require, however, parental consent before a student may attend a meeting. Club activities include skits, singing (including Christian songs), role playing, Bible reading, prayer, and speeches by community role models. The Club is religious, but non- denominational).

Id.

181. *Id.* at 1503. The policy stated that:

> Permission for use of school facilities after instructional time ends on school days will be granted to Community Groups: (1) for use of District's athletic facilities, provided that the use is limited exclusively to athletic activities; and (2) for meetings of Scouts (Girl, Boy, Cub, Tiger Cub, and Brownies), provided that such meetings shall be limited exclusively to the scout program and shall not include any speech or activity involving religion or religious beliefs.

Id. The Scouts were exempted due to the School District's "long-standing tradition of cooperation with scout programs." *Id.*

182. *Good News/Good Sports Club*, 28 F.3d at 1503.

183. *Id.* at 1510.

184. *Id.* at 1508.

185. *Id.* Although neither party had cited or applied the *Lemon* test, the court did not feel it necessary to remand on this issue. *Id.* at 1508 n.14.

186. *Id.* at 1510. In determining that the effect of the policy did not advance religion, the court followed the Seventh Circuit in *Hedges v. Wauconda*, 9 F.3d 1295, 1298-1300 (7th Cir.

In dissent, Judge Bright asserted that the majority "ignor[ed] [district court] Judge Filippine's careful and detailed findings of fact, misconstru[ed] the factual record made in this case and thereafter attempt[ed] to apply the precedent of *Lamb's Chapel v. Center Moriches School District* to reach its conclusion."[187] Judge Bright found that preventing strife may be a reasonable concern.[188] He further found that the club and scouts were not so similar as to create viewpoint discrimination by disallowing the club when scouts were allowed.[189] Finally, Bright attacked the majority's "somewhat theoretical view that, to avoid unconstitutional endorsement, schools must simply state to their students that the school does not endorse all that it permits."[190]

1993), which extended *Mergens* by concluding junior high school students are also mature enough to distinguish government speech and private speech. *See supra* note 140 and *infra* notes 275 and 474 (discussing *Mergens*).

187. *Good News/Good Sports Club*, 28 F.3d at 1511 (citations omitted). The Club initially met in parents' homes, then met for three years at the junior high school under the name Good News. *Id.* at 1512. "The term 'Bible' first appeared on the Club's permit application for the 1991- 92 school year, thus clearly denoting the organization as a religious club." *Id.* Soon after, "two parents complained of alleged recruitment of their children by the Club." *Id.* The Amended Use Policy resulted. *Id.* Judge Bright noted that while classes end at 3 p.m., the Board considered the end of the school day 6 p.m. when all school-sponsored activities end. *Id.* After this time and on non-school days, the facilities are open to all community groups. *Good News/Good Sports Club*, 28 F.3d at 1512.

188. *Id.* at 1516.

> While the Board had not received a request for access from any "hate" group, it concluded reasonably that permitting the Club to use the Junior High School immediately after the school day would open the door to all parent-sponsored religious groups for children, including those whose speech most people would consider morally bankrupt . . . . Hate speech is frequently cloaked in the garb of religion;

Id.

189. *Id.* at 1517-19. Judge Bright asserted "[t]hat both the Club and the Scouts may be concerned with moral development does not make their activities necessarily similar." *Id.* at 1517. In support of this assertion, Judge Bright referred to the evidence from the trial, stating that:

> Scouts are primarily a secular organization engaging in secular activities. The purpose of Scout meetings is for the young persons involved to have fun, to support the ideals of Scouting, education, and reinforcement of moral values . . . . The Club, by contrast, was initiated to teach the young members Christian values. Each parent who testified at trial testified to the importance of the religious aspect of the Club and that a purpose of the Club was to pass along Christian faith and morality to the student members of the Club. A typical Club meeting consists of an opening prayer, snack, activity, Bible lesson, and closing prayer. Plaintiff Chris Hirt testified in his deposition that he liked the Club because it gave him an opportunity to relate to Christian friends and that it was important to keep the Club going *so that others might become Christian.*

Id. at 1517-18 (emphasis in original).

190. *Good News/Good Sports Club*, 28 F.3d at 1519 n.7. The majority stated that "[i]f pupils do not comprehend so simple a lesson, then one wonders whether the . . . schools can teach anything at all." *Id.* (quoting *Hedges*, 9 F.3d at 1300). Judge Bright asserted that:

> [The majority's] statement neglects two important facts: first, with many of our public schools struggling to teach basic literacy and math skills, it is hard to imagine schools

ii. *Church on the Rock v. Albuquerque*[191]

In *Church on the Rock*, senior centers owned by the city permitted nonmember groups[192] to use the centers for activities if the subject matter was "of interest to senior citizens."[193] However, in accordance with the Older American Act,[194] the city policy prohibited the use of senior centers "for sectarian instruction or as a place for religious worship."[195] A local pastor, over the age of fifty-five, requested permission to use one of the senior centers to show a film entitled and recounting the life of Jesus.[196] Just before the end of the film, a narrator "invite[d] viewers to adopt the Christian religion and to join him in a short prayer."[197] The pastor also requested permission to pass out large print New Testaments at the end of the film.[198] The city denied permission on the ground that the senior centers may not be used for religious worship.[199]

> devoting much time to explicating the psychology of governmental endorsement; second, the 'lesson' to be taught is far from simple, as reflected in our current jurisprudence of fine, sometimes imperceptible, Establishment Clause distinctions.

Id. at 1519 n.7.

191. 84 F.3d 1273 (10th Cir. 1996).

192. *Id.* at 1276. The only membership requirement was being either at least fifty-five years old, or married to a member. *Id.*

193. *Id.* at 1277.

> The range of subjects that qualify as being 'of interest to senior citizens' is quite broad. The Senior Centers' activities catalogs list many of the programs that meet this requirement . . . . The catalogs also include a number of classes and presentations in which religion or religious matters are the primary focus: Bible as Literature, Myths and Stories About the Millennium, Theosophy, and A Passover Commemoration (an oratorio).

Id. at 1277.

194. *Id.*

> The Older Americans Act provides federal funding to the states for multipurpose senior centers, but requires, as a condition for receiving such funding, that the "facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship." 42 U.S.C.A. § 3027(a)(14)(A)(iv). In keeping with this directive, Senior Center personnel screen programs for sectarian instruction or religious worship before allowing them at the Senior Centers. Senior Center employees also monitor presentations for religious content by sitting in on classes and entertaining objections from Senior Center members who call attention to expression falling into one of these forbidden categories. When Senior Center employees determine that presentations are too religious in nature, they intervene to stop the presentations. There are no official criteria or written standards to assist them in deciding whether or not expression constitutes "sectarian instruction" or "religious worship."

Church on the Rock, 84 F.3d at 1277.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

The United States Court of Appeals for the Tenth Circuit found that the city had created a limited public forum in that it had limited those who could enjoy the forum through the membership requirement and had also limited the subject matter through the requirement that it must be "of interest to senior citizens."[200] However, the court noted that the subject matter that could be presented in the forum was extremely broad.[201] Citing *Lamb's Chapel*, the Tenth Circuit held that the city policy of excluding use "for sectarian instruction or as a place for religious worship," constituted viewpoint discrimination.[202]

The city asserted that the prohibition was necessary to avoid violating the Establishment Clause.[203] Relying on neutrality, the court ruled that the restriction was unconstitutional, stating that "[w]here the state does not sponsor the religious expression, the expression is made on government property that has been opened to the public for speech purposes, and permission is obtained through the same appli-

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200. *Church on the Rock*, 84 F.3d at 1278.

201. *Id.*

202. *Id.* at 1279. The majority explained its holding of viewpoint discrimination:

> The film *Jesus* dealt with subject matter similar to that, which would be included in a class on the Bible as literature. The film ran afoul of City policy, however, by advocating the adoption of the Christian faith. In contrast, a film about Jesus' life that ended on a skeptical note and urged agnosticism or atheism would not have contravened the City's policy. Because "[t]he prohibited perspective, not the general subject matter" triggered the decision to bar the private expression, the City's policy is properly analyzed as a viewpoint-based restriction on speech. Moreover, even if the City had not previously opened the Senior Centers to presentations on religious subjects, its policy would still amount to viewpoint discrimination. Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. Instruction becomes "sectarian" when it manifests a preference for a set of religious beliefs. Because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion. Therefore, we conclude that the City's policy constitutes viewpoint discrimination.

Id. (citations omitted).

203. *Id.* at 1280. The City also asserted:

> [I]ts policy [was] necessary to remain in compliance with the Older Americans Act. To that end, the policy mirrors the language of the Older Americans Act, which requires as a condition for receiving federal funding assurances that a "facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship." 42 U.S.C. §3027(a)(14)(A)(iv). The Tenth Circuit responded that: the fact that the City's policy is designed to conform with federal statutory requirements, however, does not shelter it from constitutional scrutiny. A city or state's desire for federal funds is not a compelling government interest. Thus, compliance with the Older Americans Act does not justify this viewpoint-based restriction on expression. In the context presented here, no government entity may permissibly control the viewpoint being expressed.

Id. (citations omitted).

cation process and on the same terms as secular groups, there is no violation of the Establishment Clause."[204]

b. Decisions Called into Question by *Good News*

The Supreme Court's decision in *Good News* called *Bronx Household, Campbell,* and *Gentala* into question. *Bronx Household* and *Campbell* both held that the exclusion of religion from limited public forums amounted only to content discrimination and, as such, was permissible as a reasonable restriction to preserve the purpose of the forums.[205] The *Gentala* court, on the other hand, found viewpoint discrimination in the exclusion of the religious speech from the limited public forum, but held that such exclusion was justified by the city's interest in avoiding an Establishment Clause violation.[206]

i. *Bronx Household of Faith v. Community School District No. 10*[207]

In *Bronx Household*, the community school district's policy prohibited the use of school facilities after the school day for "religious services or instruction." The policy, however, explicitly permitted the use of those facilities "for the purposes of discussing religious material or material which contains a religious viewpoint."[208] In accordance with the policy, the district denied Bronx Household's request to use the school's gymnasium for weekly religious services.[209]

204. *Church on the Rock*, 84 F.3d at 1280 (citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 754 (1995)).

205. *Campbell*, 206 F.3d at 487; *Bronx Household of Faith*, 127 F.3d at 215.

206. Gentala v. City of Tucson, 244 F.3d 1065 (9th Cir. 2001).

207. 127 F.3d 207 (2d Cir. 1997).

208. *Id.* at 212-13. The Second Circuit, overruled by the Supreme Court in *Lamb's Chapel*, was careful to distinguish *Lamb's Chapel*, stating:

> [P]resumably, the showing of the film series described in *Lamb's Chapel* is permissible under the rules governing District # 10. What is not permitted under SOP 5.9 is the use of school premises for worship or religious instruction, and it is important to note that the parties have agreed that District # 10 never has rented school property for that purpose. This limitation is characteristic of a limited forum, for it represents the exercise of the power to restrict a public forum to certain speakers and to certain subjects. It would seem to go without saying that certain types of speech may be prohibited in public schools, even after school hours. M.S. 206B simply is not a place that has been devoted to general, unrestricted public assembly by long tradition or by policy or practice. *Cf. Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1378-79, 1382 (3d Cir. 1990) (permitting indiscriminate access to high school facility created open forum so as to allow use of facility after school hours for religious speech and worship). It is not an open public forum as that term has been defined by the Supreme Court.

Id. at 213.

209. *Id.* at 211. The church admitted that its proposed use is specifically prohibited by the policy. *Id.* at 215. The church's pastor stated that "the Church proposed to conduct 'church

The United States Court of Appeals for the Second Circuit found that the policy preserved the distinction between permissible subject matter discrimination and impermissible viewpoint discrimination made in *Lamb's Chapel* and reiterated in *Rosenberger* "by prohibiting religious worship and religious instruction by outside groups, a prohibition that state authorities consider necessary to preserve the purposes of the limited public school forum, and by specifically permitting religious viewpoint speech in relation to matters for which the public school forum is open."[210]

The *Bronx Household* court specifically addressed both reasonableness and viewpoint neutrality, having been "faulted in *Lamb's Chapel* for 'utter[ing] not a word in support of [our] reasonableness holding.'"[211] The court found the regulation reasonable and further found the regulation "specifically permits any and all speech from a religious viewpoint."[212]

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worship services,' which he described as 'includ[ing] hymn singing, communion, Bible reading, Bible preaching and teaching.'" *Id.*

210. *Bronx Household of Faith*, 127 F.3d at 213. The *Bronx Household* Court attempted to distinguish *Church on the Rock* because there, the senior center had allowed other religious presentations, although it attempted to prevent religious instruction or worship. See *supra* notes 191-204 and accompanying text for a summary of *Church on the Rock*. Here, the forum had never allowed any religious presentations. *Bronx Household of Faith*, 127 F.3d at 211. The *Bronx Household* Court disagreed with the Tenth Circuit that the senior center would have to allow religious instruction even if other religious subjects had not been presented at the center. *Id.* at 214. After the decision in *Good News*, it is apparent that the Supreme Court agreed with the Tenth Circuit. *See infra* notes 246-320 and 380-422 and accompanying text.

211. *Bronx Household of Faith*, 127 F.3d at 214 (citing *Lamb's Chapel*, 508 U.S. at 398 n.6). With respect to reasonableness, the Second Circuit laundry listed why it found the restriction reasonable:

> We think that it is reasonable in this case for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship. We think that it is reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church. We think that it is reasonable for these authorities to consider the effect upon the minds of middle school children of designating their school as a church. And we think that it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises for regular church services. Education, after all, is a particularly important state function, and the use of school premises is properly a matter of particular state concern. Finally, it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school in New York City.

Id.

212. *Id.* at 214-15.

> The purposes for which the schools in District # 10 have been opened to outside organizations encompass a wide variety of civic and social uses, and any speech conducted in connection with those uses may be bottomed on a religious viewpoint . . . [T]he question is whether a distinction can be drawn between [worship and religious instruction] and other forms of speech from a religious viewpoint that District # 10 has elected to allow in the limited forum of a public middle school. We think it can. What SOP 5.9 is

The *Bronx Household* court further indicated that the board of education did not need to justify its denial with the Establishment Clause because the limitation was "both reasonable in light of the permitted after-school uses of the forum and viewpoint neutral as well."[213]

The church also alleged that the policy violated the Free Exercise Clause by excluding religious services and instruction from its limited public forum.[214] The court's response was that the members of the church were "free to practice their religion, albeit in a [separate] location . . . . 'The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.' That right has not been taken from members of the church."[215]

Judge Cabranes dissented with respect to the exclusion of religious instruction, believing it "discriminates on the basis of viewpoint by allowing private groups to conduct after-school instruction on a wide array of topics only from a secular perspective" and therefore, violates the Free Speech Clause.[216] He further noted that such discrimination was not required by the Establishment Clause.[217] Judge Cabranes agreed, however, with the majority that the exclusion of religious ser-

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> intended to do seems clear: it is intended to prohibit outside groups from using school premises after school for "religious services or religious instruction" while permitting such groups to use school premises for "discussing religious material or material which contains a religious viewpoint or for distributing such material." In adopting this language, it appears that the New York City Board of Education has attempted meticulously to comply with the teaching of *Lamb's Chapel.*

Id. (citation omitted).

213. *Id.* at 216. *See infra* notes 374-422 and accompanying text.

214. *Bronx Household of Faith*, 127 F.3d at 216.

215. *Id.* at 216 (citing Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990)).

216. *Id.* at 217.

> Where secular viewpoints on a subject are concerned, the District's policy allows private groups not only to discuss the subject, but to instruct others from their secular perspective without hindrance by public authorities. Where religious viewpoints on the same subject are detected, private groups may "discuss" but they may not "instruct." Far from properly treading the delicate line between discrimination based on subject matter or content and discrimination based on viewpoint, as the majority contends, the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination.

Id. at 220 (citations omitted).

217. *Id.*

> As in *Lamb's Chapel* and *Rosenberger*, moreover, the District's preference for secular instruction over religious instruction cannot be justified by an Establishment Clause defense. The ban on instruction from a religious perspective, far from being required by the Establishment Clause, if anything offends "the very neutrality the Establishment Clause requires." There is nothing in the record to suggest that by allowing religious instruction to take place after school hours on an equal basis with other forms of instruction the District would or could "willfully foster[ ] or encourage[ ] any mistaken

vices from the limited public forum was reasonable and viewpoint neutral.[218]

ii. *Campbell v. St. Tammany's School Board*[219]

In *Campbell*, the school district policy allowed outside groups to use school facilities after school hours for "civic, recreational and entertainment purposes" if such activities were open to the public and pertained to the "welfare of the public."[220] The policy permitted the use of school facilities for "discussions of religious material or material containing a religious viewpoint," but specifically excluded uses involving "religious services or religious instruction."[221]

Sally Campbell and the Louisiana Christian Coalition requested, and were denied, use of school facilities for a "prayer meeting."[222] The United States Court of Appeals for the Fifth Circuit first determined whether the policy had created a limited public forum.[223] While noting that the policy contained very few restrictions, the court nonetheless determined that the policy had not created an open forum.[224] Finding that the school district had created a limited public

> impression" that the organizations conducting after-school religious instruction actually speak for the District.

Id. at 220-21 (citations omitted).

218. *Bronx Household of Faith*, 127 F.3d at 217.

> Unlike religious "instruction," there is no real secular analogue to religious "services," such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism . . . . Because "services" are by definition religious in nature, it does not appear that they could ordinarily be understood to serve as a vehicle for both religious and secular viewpoints.

Id. at 221. However, Judge Cabrenes questioned "government's ability to draw distinctions between religious worship" and speech from a religious viewpoint. *Id.*

219. 206 F.3d 482 (5th Cir. 2000). *Campbell* has been remanded in light of *Good News*. *Campbell* relied heavily on *Bronx Household*, which was also called into question by *Good News*. See *supra* notes 207-218 and accompanying text for a summary of *Bronx Household*.

220. *Campbell*, 206 F.3d at 484.

221. *Id.* The policy also specifically excluded partisan political activity and for-profit fundraising. *Id.* at 484-85.

222. *Id.* at 484. In her application, Campbell described the purpose of the prayer meeting: "to worship the Lord in prayer and music . . . to discuss family and political issues, pray about those issues, and seek to engage in religious and Biblical instruction with regard to those issues." *Id.*

223. *Id.* at 486.

224. *Campbell*, 206 F.3d at 486-87. The court specifically compared the number of uses prohibited by this policy with the number of uses prohibited by the policy in *Bronx Household*, finding that:

> [T]he District's policy restricts more types of uses than the use policy held not to have created a public forum in *Bronx Household*. The policy's restrictions indicate that the school's purposes in allowing some public use have not reached the point at which any use-save targeted religious activities-is allowed. We are thus persuaded that the restrictions are minimally sufficient to maintain the school buildings' status as a non-public forum.

forum, the court analyzed whether the policy was reasonable and viewpoint neutral.[225] Distinguishing *Lamb's Chapel*, and relying heavily on *Bronx Household*, the Fifth Circuit upheld the restriction on religious services as viewpoint neutral.[226] Although the court recognized the reasonableness requirement, the court did not address whether the restriction was reasonably related to the purpose of the forum.[227]

Id. at 486-87.

225. *Id.* The Fifth Circuit disagreed with the district court, which held that the policy was unconstitutionally vague. *Id.* at 484.

> The district court concluded that there was no intelligible way of determining when speech involving religious material or with a religious viewpoint, permitted by the policy, crossed over into religious instruction, forbidden by the policy. The court also noted that there was no definition of "religious worship" provided in the policy.

Id. The Fifth Circuit responded that:

> [A]s applied to Campbell's request, which includes verbatim some of the prohibited terms, the policy is not even arguably vague. The group planned to "worship the Lord in prayer and music" and "engage in religious and Biblical instruction." There can be no doubt that these activities are included within the policy's disallowed uses . . . . As a facial challenge, we fail to see how the terms "religious instruction" and "religious worship" would provoke confusion amounting to unconstitutional vagueness. There is a clear core meaning. The terms have a common meaning such that people can use them without particular difficulty. While the language might be subject to ambiguity at the margins—for example, the line between instruction and discussion may blur at the edges—that effect is no more than the limits of language stretched by the active imagination of hypothesized application. To the point, we are not persuaded of uncertainty sufficiently chilling of speech to find the policy to be substantially overbroad.

Id. at 485.

226. *Campbell*, 206 F.3d at 487.

> In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, the exclusion of a meeting on a subject permitted by a school district was unconstitutional because it was disallowed only because of the speaker's religious viewpoint. This does not mean that any ban on religious activities amounts to viewpoint discrimination. Religion may be either a perspective on a topic such as marriage or may be a substantive activity in itself. In the latter case, the government's exclusion of the activity is discrimination based on content, not viewpoint.
>
> The *Bronx Household* court held that religious services and religious instruction are activities that may be excluded as content-based discrimination. We agree with this approach, finding that religious services and instruction are not simply approaches to a topic, but activities whose primary purpose is to teach and experience the subject of religion. These are activities distinct from a topical discussion, a social gathering, or a political meeting. The District has excluded such religious activities but does not forbid speakers on general topics with a religious perspective—a distinction that viewpoint neutrality permits.

Id. (citations omitted). The Fifth Circuit further noted that just because the District had allowed the use of school premises for a church banquet and gospel choir did not mean that the District had opened the facility for religious uses, stating that "[w]hile these groups may have had religious affiliations, the events involved no religious instruction and were not prayer meetings." *Id.*

227. *Id.*

iii. *Gentala v. Tucson*[228]

The City of Tucson allowed all groups to use the city bandshell.[229] Additionally, groups could apply to use civic events funds to pay for the use of city equipment during an event at the bandshell.[230] The fund was derived from general tax revenue.[231] To use the fund, the event had to be nonprofit and celebrate historical, cultural, or ethnic heritage.[232] The applicant was required to show, among other criteria, whether the event would generate broad community appeal and participation.[233] The city required organizations that received support to advertise the support from the city and, during the event, credit the city for helping to sponsor the event.[234] The city denied requests for the events directly supporting religious organizations, although the events were not necessarily religious in character.[235] However, the city supported events sponsored by religious-affiliated organizations when the events did not benefit the groups themselves, as well as events with religious themes sponsored by secular organizations.[236]

In the spring of 1997, the Prayer Committee received a permit to use the city bandshell for a National Day of Prayer led by local pastors.[237] During the National Day of Prayer, contributions were to be collected to pay for that and future events.[238] The organizers, includ-

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228. 244 F.3d 1065 (9th Cir. 2001). *Gentala* has been remanded in light of *Good News*.

229. *Gentala*, 244 F.3d at 1068.

230. *Id.* When support was approved by the city, no payment was provided directly to sponsors. *Id.* at 1069. Transfers were made within city departments. *Id.*

231. *Id.*

232. *Id.* at 1068-69. Specifically, the fund was established to support events that:

> celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues . . . [;] generate broad community appeal and participation[;] instill civic pride in the City, state, or nation[;] contribute to tourism[;] or are identified as unique community events.

Gentala, 244 F.3d at 1068.

233. *Id.* at 1069.

234. *Id.*

235. *Id.* at 1070.

> The Fund declined to support several fundraisers for Christian schools, including the San Xavier Mission School's pageant celebrating "the heritage of the Old Pueblo," the Santa Cruz Church and school's "Fiesta de Familia," the St. John the Evangelist School's annual Fiesta, and the St. Peter & Paul School's "Fun Days."

Id. at 1070 n.6. *Cf.* Campbell, 206 F.3d 482 (holding that application of regulation in question allowed a church banquet fund-raiser to use the forum). *See supra* note 226.

236. *Gentala*, 244 F.3d at 1070. "For example, the City provided Fund support to a fishing clinic for disabled children sponsored by the Aid Association for Lutherans." *Id.* at n.7

237. *Id.* at 1067. In its application, the Prayer Committee described the National Day of Prayer as "a time of prayer and worship." *Id.* Although the event was open to the public, the Prayer Committee required its members to pledge to Christian beliefs. *Id.*

238. *Id.*

ing the Gentalas, applied for civic events funds to pay for the use of city equipment and related services, indicating in the application that the event was in the historical category.[239] The Civic Events Subcommittee denied the request on the grounds that the event was "in direct support of religious organization."[240]

Alleging that the exclusion from the fund of events in direct support of religious organizations violated the Free Speech and Free Exercise Clauses of the First Amendment, the Gentalas filed suit.[241] Citing *Rosenberger*, the district court denied the Gentalas' motions for an injunction, recognizing that although the First Amendment's speech protection extends to religious speech, the Establishment Clause in this case justified the exclusion of religious speech.[242]

The United States Court of Appeals for the Ninth Circuit's review began with the proposition that if the city's Establishment Clause justification was valid, then the exclusion of religious speech in a forum otherwise dedicated to community activity was also valid.[243] The Ninth Circuit affirmed the district court's decision, holding that the denial of funds, here the equivalent to the denial of the use of a limited public forum, was justified by Establishment Clause considerations, citing significant factual differences from *Rosenberger*.[244] The

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239. *Gentala*, 244 F.3d at 1070.

240. *Id.*

241. *Id.* The Gentalas first sought review by the City Council, which concluded the denial was proper because it "would violate the separation of church and state for the City to sponsor any event directly supporting a religious group." *Id.*

242. *Id.* at 1071.

243. *Id.* at 1074.

244. *Gentala*, 244 F.3d at 1074-80. With respect to funding concerns, here the fund is derived from general tax revenue, whereas in *Rosenberger* the fund was derived from student fees. *See supra* text accompanying note 146. In this case, the prohibition applied only to events directly supporting religious organizations, whereas in *Rosenberger* the prohibition was applied to deny funding for a student newspaper with religious viewpoint. *See supra* notes 157-163 and accompanying text. The funds here would be used to sponsor a participatory religious service, so funding would be "tantamount to the State pay[ing] a church's bills." *Gentala*, 244 F.3d at 1078 (citations omitted). The Supreme Court had previously suggested that government discretion "greatly exacerbates the significance of tax-based derivation of the funding." *Id.* (citing *Mitchell*, 530 U.S. at 809-14). The city's funding was also explicitly discretionary and the purpose was to increase tourism and promote the city. *See supra* note 232. In *Rosenberger*, the purpose of the funds was to promote diversity of ideas. *Rosenberger*, 515 U.S. at 821. Finally, the Prayer Committee planned to use this meeting to collect funds to sponsor future prayer meetings, whereas in *Rosenberger*, no fund raising was involved so the effect of the University sponsored funds were exhausted on a per publication basis. *Compare Rosenberger*, 515 U.S. at 830-31, *with Gentala*, 244 F.3d at 1067. The court recognized that providing equipment and services for this event was different than providing basic, essential services to all citizens, such as police and fire. *Gentala*, 244 F.3d at 1082.

With respect to city endorsement, the subsidy in *Gentala* would include "on-site, observable presence of city employees" and equipment. *Id.* at 1079. The court held that the "subjective

court found in this case public funding and government endorsement considerations overwhelmed neutrality considerations and furthermore, the denial of such funds was not a violation of Free Speech or Free Exercise Clauses as the prayer committee meeting took place as planned.[245]

III. SUBJECT OPINION: *GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL*[246]

In *Good News*, the Supreme Court purported to resolve a circuit split regarding whether the religious nature of the speech can justify the exclusion of such speech from a limited public forum.[247] The Court claimed to address two issues.[248] The first issue was whether by excluding the Good News Club from using school facilities, Milford Central School violated the club's free speech rights.[249] And second, if Milford did violate the First Amendment, did Milford's concern that granting the club access would violate the Establishment Clause justify the violation?[250] Despite finding that the local school board had not yet raised a valid Establishment Clause concern, the Supreme Court held that the exclusion of the Good News Club from the limited public forum amounted to unconstitutional viewpoint discrimination.[251]

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funding criteria" contributed to "an informed observer's impression" that "City affirmatively endorse[d]" the activity. *Id.* The city's policy and application form made clear that the city intended to endorse some events, and the event organizer must call attention to city's support in advertising and during the event itself. *Id.* at 1068-69. The court noted that even requiring the "City to hide its true relationship to the event would not alter that relationship, but, instead, would only mislead the public," and furthermore, the court noted that it does not have authority to restructure the city's program. *Id.* at 1080.

245. *Id.* at 1078, 1082. There was no showing that Free Exercise has been burdened by the operation of the Civic Event program. *Gentala*, 244 F.3d at 1082. The event took place in the city bandshell and was well attended. *Id.*

246. 121 S. Ct. 2093 (2001).

247. *Id.* at 2099.

248. *Id.* at 2097.

249. *Id.*

250. *Id.* *See infra* notes 423-454 and accompanying text.

251. *Good News*, 121 S. Ct. at 2107.

A. *Facts*

Under New York law,[252] school districts may adopt regulations to

252. N.Y. EDUC. LAW § 414 (2002).

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 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 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 section . . . . 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 . . . .

(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 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 United States and organizations of volunteer firefighters or volunteer ambulance workers . . . .

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school . . . .

(j) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

allow for the use of school facilities for non-school functions.[253] Pursuant to Section 414, the District Board of Education for Milford Central School enacted a community use policy, which included many of Section 414's enumerated uses, including item (a) "instruction in any branch of education, learning or the arts" and item (c) "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."[254] The community use policy further provided that "[s]chool premises shall not be used by any individual or organization for religious purposes. Those individuals and/or organizations wishing to use school facilities and/or grounds under this policy shall indicate . . . that any intended use of school premises is in accordance with this policy."[255]

The Fourniers, sponsors of the local Good News Club,[256] submitted an application to use Milford Central School for the club's weekly af-

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> The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.
> 2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d) and (h) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

Id.

253. *Good News*, 121 S. Ct. at 2097-98.

254. *Id.* at 2098. Milford's "Community Use of School Facilities Policy," adopted on August 26, 1992, is nearly identical to § 414. *See* Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 150 (N.D.N.Y. 1998). Section 414 created a limited public forum by specifying certain uses. *See supra* note 252. Religious worship was not among these uses. *Id.* Milford's policy, while adopting many of the uses enumerated in § 414, is unlike § 414 in that it specifically excludes religious purposes. *Good News*, 21 F. Supp. 2d at 150.

255. *Good News*, 202 F.3d at 504.

256. The club is a nationwide, private Christian organization for children ages six through twelve. *Good News*, 21 F. Supp. 2d at 149. The club's "stated purpose [was] to instruct children in family values and morals from a Christian perspective." *Id.* The club's purpose, as stated on the application for use of school cafeteria, was "hearing a bible lesson and memorizing scripture." *Id.*

> A typical Club meeting include[d] an opening prayer, singing of Christian songs, memorization and recital of Biblical verses and scripture for which the children receive prizes, a discussion based on a Bible reading, and a closing prayer. Indeed, plaintiffs['] own description of the Club's activities [was] characteristic of a classroom-type setting with formal instruction: The Club open[ed] its session with Ms. Fournier taking attendance. As she call[ed] a child's name, if the child recite[d] a Bible verse the child receive[d] a treat. After attendance, the Club [sang] songs. Next Club members engage[d] in games that involve[d], *inter alia*, learning Bible verses. Ms. Fournier then relate[d] a Bible story and explain[ed] how it applies to Club members' lives. The Club close[d] with prayer. Finally, Ms. Fournier distribute[d] treats and the Bible verses for memorization.

ter school meetings.[257] On the application, the Fourniers described the activity of the club as "a fun time of singing songs, hearing a Bible lesson and memorizing scripture."[258] Because the school superintendent found out that the Fourniers' proposed use was equivalent to religious worship and the community use policy specifically prohibited the use of school premises for religious purposes, he denied the Fourniers' request.[259] The Fourniers filed suit.[260]

B. *The District Court Opinion*[261]

In March 1997, the Good News Club and the Fourniers filed an action against Milford in the United States District Court for the Northern District of New York alleging that Milford's denial of the Good New Club's application violated its free speech rights under the First Amendment.[262] The district court granted the club a preliminary injunction to permit the club's use of school facilities.[263] In August 1998, the district court vacated the preliminary injunction and granted

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Id. at 154.

257. *Good News*, 121 S. Ct. at 2098.

258. *Id.*

259. *Id.* In response to a request for "materials to further clarify the nature of the instruction and activities that would take place at a Club meeting," the Club submitted a description of the Club's activities. *Good News*, 202 F.3d at 507; *see also supra* note 256.

> [T]he Good News's counsel forwarded a set of materials used or distributed by the Club. Among the materials submitted were a Good News invitation printed on an index card, a parental permission slip, a sample puzzle, and a copy of the "Daily Bread." This issue of the Daily Bread contained stories that refer to the second coming of Christ, accepting the Lord Jesus as the Savior, and believing in the Resurrection and in the descent of the Lord Jesus from Heaven. After a review of the materials, [the superintendent] and counsel determined that "the kinds of activities proposed to be engaged in by the Good News [a]re not 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.

Good News, 202 F.3d. at 507.

260. *Good News*, 121 S. Ct. at 2098.

261. *Good News*, 21 F. Supp. 2d at 147.

262. *Id.* at 150. The Good News and the Fourniers also alleged that Milford's denial of their application violated their Fourteenth Amendment Equal Protection rights and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq* (1993). *Id.* Prior to the district court's decision, the Supreme Court declared RFRA unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Good News*, 21 F. Supp. 2d at 150 n.4. With respect to the Fourniers' equal protection claim, the district court held that the school board had made a permissible distinction between clubs in disallowing the Good News. *Id.* at 161. Although the Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike," *id.* at 161 (quoting Reed v. Reed, 404 U.S. 71, 75-76 (1971)), the district court found that the clubs' "purpose and subject matter are substantially dissimilar in nature," because Good News' religious purpose "places the Club in a different genre than the Boy Scouts, Girl Scouts, and 4-H Club." *Good News*, 21 F. Supp. 2d at 161. On appeal, Good News abandoned the Equal Protection claim as well as the RFRA claim. *Good News*, 202 F.3d at 508 n.7.

263. *Good News*, 21 F. Supp. 2d at 149.

Milford's motion for summary judgment finding that the club's "subject matter is decidedly religious in nature and not merely a discussion of secular matters from a religious perspective."[264]

The district court held that Milford's policy was consistent with Section 414 and citing *Lamb's Chapel*,[265] the court stated that Milford's policy "recognize[d] that it may properly exclude clubs with a religious purpose provided such exclusion is reasonable and viewpoint neutral."[266] Having found that Milford's exclusion of Good News was viewpoint neutral, the district court did not consider whether Milford's exclusion of the Good News Club from the school was necessary to prevent an Establishment Clause violation.[267]

C. *The Appellate Court*[268]

A divided panel of the United States Court of Appeals for the Second Circuit affirmed the district court's judgment.[269] The club attacked both the reasonableness of the restriction and the determination that the restriction was viewpoint neutral.[270] With respect to reasonableness, Milford's stated purpose for the restriction was to "ensur[e] that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it

264. *Id.* at 154. Both plaintiffs and defendants moved for summary judgment. *Id.* at 149. Summary judgment is appropriate if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A genuine issue of material fact exists if, given the evidence, a reasonable jury could rule in favor of the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). On a motion for summary judgment, the court must view all available facts and reasonable inferences in favor of the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Here the parties agreed that the community use policy created a limited public forum. *Good News*, 21 F. Supp. 2d at 153. Therefore, the Good News meetings could have been validly excluded on the basis of content, but not on the basis of viewpoint. Because Good News did not dispute that Milford may prohibit the use of school facilities for religious purposes, the only question on summary judgment was whether Good News proposed use constituted religious purposes or merely secular activities from a religious viewpoint. *Id.* at 158. Good News claimed its purpose was moral development of youth from a religious viewpoint, and was therefore the same type of activity as Scouts, but with a different viewpoint. *Id.* at 154. Finding that the nature of Good News activities was religious, not secular, the court found that Milford had not allowed its facilitates to be used for other religious purposes. *Id.* at 158-60. It therefore found valid content discrimination in the limited public forum. *Id.* at 160.

265. *Lamb's Chapel*, 508 U.S. at 393.

266. *Good News*, 21 F. Supp. 2d at 161. The parties agreed that the community use policy created a limited public forum. *Id.* at 153.

267. *Id.* at 160. *See also Lamb's Chapel*, 508 U.S. at 394-95 (suggesting that preventing state establishment of religion may justify a free speech violation).

268. 202 F.3d 502 (2d Cir. 2000).

269. *Id.* at 511.

270. *Id.* at 509.

advances the beliefs of a particular religion or group thereof."[271] The club argued that the restriction was unreasonable because children were unlikely to confuse use of the school with the school's, and thereby the state's, endorsement of the club's activities.[272]

The Second Circuit rejected this argument based on its precedent, *Bronx Household*,[273] in which the court held that "it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises."[274] Because the students of Milford Central School were "young and impressionable" and "[t]he activities of the [c]lub clearly and intentionally communicate[d] Christian beliefs by teaching and by prayer," the court found Milford's desire to avoid communicating to "students of other faiths that they were less welcome than students who adhere to the [c]lub's teachings" was reasonable.[275]

With respect to viewpoint neutrality, the Second Circuit agreed with the district court that the Good News Club's activities were not merely teaching morals from a religious perspective.[276] The Good News Club relied on the Eighth Circuit's holding in *Good News/Good*

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271. *Id.*

272. *Id.*

273. *See supra* notes 207-218 and accompanying text (summarizing the Second Circuit's opinion in *Bronx Household*).

274. *Good News*, 202 F.3d at 509 (citing *Bronx Household of Faith*, 127 F.3d at 214). In *Bronx Household*, the court further stated that "it is reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church." *Bronx Household of Faith*, 127 F.3d at 214.

275. *Good News*, 202 F.3d at 509. *Compare Good News*, 202 F.3d at 509 (students aged six through twelve) *with Widmar*, 454 U.S. at 271 (college aged students) *and Mergens*, 496 U.S. at 231 (high school students).

276. *Good News*, 202 F.3d at 510.

> The Club meetings offer children the opportunity to pray with adults, to recite biblical verse, and to declare themselves "saved." The Club argues that these practices are necessary because its viewpoint is that a relationship with God is necessary to make moral values meaningful. Even accepting that this precept is a viewpoint on morality and not a religious principle, it is clear from the conduct of the meetings that the Good News goes far beyond merely stating its viewpoint. The Club is focused on teaching children how to cultivate their relationship with God through Jesus Christ. Under even the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious.

Id. The Second Circuit also agreed with the district court that Good News's attempt to analogize itself with Scouts was unsuccessful, stating that:

> [W]hile the Boy Scouts teach reverence and a duty to God generally, this teaching is incidental to the main purpose of the organization, which is personal growth and development of leadership skills. Moreover, there is nothing in the record to indicate that the Boy Scouts require any particular means of demonstrating reverence and duty to God. Similarly, the Girl Scouts vow to "try . . . [t]o serve God and [their] country."

Id. at 511.

Sports Club v. School District of Ladue.[277] The Second Circuit dismissed the Eighth Circuit's conclusion that excluding the *Good News/ Good Sports Club* from school facilities amounted to viewpoint discrimination because the Eighth Circuit "apparently took for granted that the Good News/Good Sports Club's activities amounted only to speaking on moral and character development."[278]

Judge Jacobs dissented from the Second Circuit's holding, arguing that with respect to morals and character, it is impossible to distinguish between religious viewpoint and religious subject matter.[279] The Fourniers argued that the subject matter of morality presented from a Christian perspective necessarily encompassed religious activities, including prayer.[280] Therefore, they argued that requiring them to omit such religious activities to gain access to the limited public forum precluded them from expressing their viewpoint, which amounted to a violation of the First Amendment.[281] Indicating that the secular subject matter of morals and character did not change their nature when the viewpoint was religious, Judge Jacobs criticized the majority for concluding that because the "[c]lub's moral vision entails religious activity," the subject matter was religious.[282] Because he believed it was impossible to decide whether the club's activities had religious content or viewpoint, Judge Jacobs concluded that the court should have "err[ed] on the side of free speech."[283]

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277. 28 F.3d 1501 (8th Cir. 1994). *See also supra* notes 179-191 and accompanying text.

278. *Good News*, 202 F.3d at 511.

279. *Id.* at 511-15. Jacobs pointed to the club's statement that the morals and values it teaches are "senseless without Christ," stating:

> [T]he distinction is especially slippery where the viewpoint in question is religious, in part because the sectarian religious perspective will tend to look to the deity for answers to moral questions. The idea that moral values take their shape and force from God seems to me to be a viewpoint for the consideration of moral questions. True, religious answers to questions about morals and character tend to be couched in overtly religious terms and to implicate religious devotions, but that is because the sectarian viewpoint is an expression of religious insight, confidence or faith—not because the religious viewpoint is a change of subject . . . . Although the religious viewpoint thus has the tendency to overwhelm the secularity of a subject matter, this transformative, goal-directed tendency of religious viewpoints does not justify a preference for other viewpoints.

Id. at 514.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Good News*, 202 F.3d at 515.

D. *Supreme Court's Decision in* Good News Club v. Milford Central School[284]

The Supreme Court held the Good News Club's free speech rights were violated and that this violation could not be justified by the Establishment Clause because the Court found that the city failed to raise a valid Establishment Clause claim.[285]

Because the parties agreed that the forum was a limited public forum, the Court applied the rules developed in *Rosenberger*, *Lamb's Chapel*, and *Cornelius*.[286] The Court determined that the activity here was indistinguishable from *Lamb's Chapel* and *Rosenberger* because, according to the Court, the club sought to address a subject, the teaching of morals and character, which was otherwise permitted under the rule, from a religious standpoint.[287] The Court declared that the club's speech was not "religious worship, divorced from any teaching of moral values," but rather the teaching of moral values from a religious viewpoint.[288]

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284. 121 S. Ct. 2093 (2001).

285. *Id.* at 2097, 2103.

286. *Id.* at 2100. Specifically, the Court stated the limited public forum analysis as follows:

> When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be "reasonable in light of the purpose served by the forum.

Id. (citations omitted).

287. *Id.* at 2101. The Court indicated that the only difference between *Lamb's Chapel* and *Good News* is that the club's activities involved live storytelling, whereas the activity in *Lamb's Chapel* consisted of showing a film. *Id.* Likewise, the Court indicated that the Club's activities were not any more religious than the student publication in *Rosenberger*. *Good News*, 202 F.3d at 2101-02.

288. *Id.* at 2102.

> Despite our holdings in *Lamb's Chapel* and *Rosenberger*, the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school. The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious." With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure 'moral and character development,'" the exclusion did not constitute viewpoint discrimination.

Id. Citing Judge Jacobs's dissent, the Court:

> [D]isagree[d] that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other

Finding that Milford had not raised a valid Establishment Clause claim, the Court did not address whether the Establishment Clause might outweigh the club's interest in gaining equal access to the school's facilities.[289] Defining the relevant community as the parents rather than the school children, the Court found no realistic danger that the community would think the government was endorsing religion or any particular creed.[290] As in *Lamb's Chapel*, the activity was not held during school hours, was not sponsored by the school, and attendance was not limited on the basis of religious beliefs.[291]

1. Justice Scalia's Concurrence

In his concurrence, Justice Antonin Scalia stated that he did not believe that religious worship in a limited public forum would violate the Establishment Clause if it was purely private expression.[292] Because he characterized Good News' speech in this case as purely private expression, he agreed with the majority's result.[293] Additionally, Justice Scalia concurred with the majority that the regulation in ques-

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> associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' 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. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion.

Id.

289. *Id.* at 2107. The Court rejected the Establishment Clause defense in *Lamb's Chapel* and *Widmar* as well. *See supra* notes 129-142 and accompanying text. In *Good News*, the case was only at summary judgment stage in the proceedings. *Good News*, 121 S. Ct. at 2099; *see supra* note 264.

290. *Good News*, 121 S. Ct. at 2104 (Scalia, J., concurring). With respect to the impressionability of young children, the Court noted that it had never held that private religious activities must be barred from school facilitates during nonschool hours due to the fact that elementary school children may be present. *Id.* at 2104-05. Moreover, the Court found it unlikely that children would believe the school endorses this activity. *Id.* at 2106. The Court specifically noted that the time of day, directly after school, was not relevant, and "consistent with *Lamb's Chapel* and *Widmar*, the school could not deny equal access to the Club for any time that is generally available for public use." *Id.* at 2103.

291. *Id.*

292. *Id.* at 2107-08.

293. *Good News*, 121 S. Ct. at 2108 (Scalia, J., concurring). Justice Scalia also found no coercion:

> Physical coercion is not at issue here; and so-called "peer pressure," if it can even be considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected. What is at play here is not coercion, but the compulsion of ideas—and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses, not banned by the Establishment Clause.

Id. at 2107 (citations omitted) (emphasis in original).

tion discriminated against religious viewpoint.[294] Furthermore, Justice Scalia indicated that even if Good News' speech were religious worship, such speech would still not be excludable from the limited public forum.[295]

> [W]e have 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. Those holdings are surely proved correct today by the dissenters' inability to agree, even between themselves, into which subcategory of religious speech the Club's activities fell. If the distinction did have content, it would be beyond the courts' competence to administer. And if courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable. I will not endorse an approach that suffers such a wondrous diversity of flaws.[296]

2. *Justice Breyer's Concurrence*

Justice Breyer, in his concurrence, joined the Court's opinion "to the extent that [it is] consistent with the following three observations."[297] First, government neutrality with respect to religion is only one factor considered in determining whether an Establishment Clause violation occurred.[298] When the activity involves children, a child's perception that a public school endorses religion is also a factor, one that may "prove critically important."[299] Second, in this case, "the critical Establishment Clause question here may prove to be whether a child, participating in the Good News Club's activities, could reasonably perceive the school's permission for the club to use its facilities as an endorsement of religion."[300] Finally, as the issue

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294. *Id.* at 2108. Justice Scalia noted that Milford did not require sterility of speech from any other groups but Good News. *Id.* at 2109. He characterized the regulation as "blatant viewpoint discrimination," because the Club cannot say why children should be good and moral ("because God wants and expects it") whereas other groups like the Boy Scouts can say children should be moral, "because parents . . . expect it, [or] because it will make the scouts 'better' and 'more successful people' . . . ." *Id.*

295. *Id.* at 2110.

296. *Good News*, 121 S. Ct. at 2110-11 (Scalia, J., concurring) (citations omitted, italics as in original). Justice Scalia noted, however, that the Court has "drawn a different distinction—between religious speech generally and speech about religion—but only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic." *Id.* at 2111.

297. *Id.* at 2111 (Breyer, J., concurring).

298. *Id.*

299. *Id.*

300. *Id.* Although not explicitly referenced, Justice Breyer applied the "effect" leg of the *Lemon* test:

presented to the Court was only whether Milford was entitled to summary judgment, "the Court cannot fully answer the Establishment Clause question this case raises, given the procedural posture."[301]

3. *Justice Stevens's Dissent*

In his dissent, Justice Stevens noted that the public may use Milford's facilities for educational and recreational purposes, but religious purposes were expressly excluded.[302] Justice Stevens, however, divided speech for religious purposes into three categories.[303] First, Justice Stevens recognized that some religious speech is speech about a particular topic from a religious point of view, as in *Lamb's Chapel.*[304] This type of speech may not be constitutionally excluded from a limited public forum.[305] Second, Justice Stevens indicated that some religious speech amounts to worship, as in *Widmar.*[306] This second category of speech, according to Justice Stevens, should be excluded from limited public forums.[307] Finally, he recognized an "intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith."[308] Under this framework, Justice Stevens described the question in Good News as whether the school could "create a limited public forum that admits

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> The time of day, the age of the children, the nature of the meetings, and other specific circumstances are relevant in helping to determine whether, in fact, the Club "so dominate[s]" the "forum" that, in the children's minds, "a formal policy of equal access is transformed into a demonstration of approval."

Good News, 121 S. Ct. at 2111 (Breyer, J., concurring) (citations omitted).

301. *Id.* at 2111-12. Justice Breyer explained, as the Court did not, that:

> To deny one party's motion for summary judgment, however, is not to grant summary judgment for the other side. There may be disputed "genuine issue[s]" of "material fact," particularly about how a reasonable child participant would understand the school's role. Indeed, the Court itself points to facts not in evidence, identifies facts in evidence, which may, depending on other facts not in evidence, be of legal significance, and makes assumptions about other facts. The Court's invocation of what is missing from the record and its assumptions about what is present in the record only confirm that both parties, if they so desire, should have a fair opportunity to fill the evidentiary gap in light of today's opinion.

Id. at 2112 (citations omitted).

302. *Id.* (Stevens, J., dissenting).

303. *Id.*

304. *Id.*

305. *Good News*, 121 S. Ct. at 2112 (Stevens, J., dissenting).

306. *Id. See supra* note 295 and accompanying text (discussing Justice Scalia's indication of some difficulty in monitoring what is and is not worship).

307. *Good News*, 121 S. Ct. at 2112-14 (Stevens, J., dissenting).

308. *Id.* at 2112.

the first type of religious speech without allowing the other two."[309] Justice Stevens concluded that it could.[310]

Justice Stevens identified the purpose of excluding religion here as only to exclude religious speech that inculcates, rather than viewpoint discrimination.[311] As Good News' activities fell into the third category of religious speech, they may constitutionally be excluded from the limited public forum.[312] However, Justice Stevens noted that even if he agreed with the majority with respect to the type of exclusion (viewpoint or content), he would not decide whether Milford raised a valid Establishment Clause claim because this issue was not addressed in the lower courts.[313]

4. *Justice Souter's Dissent*

Justice Souter, with whom Justice Ginsburg joined, also dissented, pointing out that the Good News Club did not challenge Milford's restriction against using the school for religious purposes, only the application of the policy, claiming that it resulted in viewpoint discrimination.[314] Justice Souter agreed with the Appellate Court's distinction of *Good News* from *Lamb's Chapel*, finding that the Good News Club

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309. *Id.* at 2113.

310. *Id.* at 2112-13. Obviously, Justice Stevens did not find it impossible to distinguish between religious viewpoint and religious subject matter. *See id.* at 2112-14 n.2 (quoting Buirkle v. Hanover Ins. Cos., 832 F. Supp. 469, 483 (D. Mass.1993) (stating that "[a] perceptive observer sees a material difference between the light of day and the dark of night, and knows that difference to be a reality even though the two are separated not by a bright line but by a zone of twilight."). More specific to this analysis, Justice Stevens indicated that:

> [D]istinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. If a school decides to authorize after school discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups—for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan—to hold meetings, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not. Such recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission. School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk. And, just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship.

Id. at 2113.

311. *Good News*, 121 S. Ct. at 2114 (Stevens, J., dissenting).

312. *Id.*

313. *Id.* at 2114-15.

314. *Id.* at 2115-16 (Souter, J., dissenting).

intended to conduct religious worship, not merely to discuss a secular subject from a religious viewpoint.[315] He indicated that the majority avoided this conclusion only by over-generalizing the activity in question, concluding that "[i]f the majority's statement ignores reality, then today's holding may only be understood in equally generic terms. Otherwise this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church."[316]

Finally, Justice Souter asserted that the Court was wrong to act as a court of first instance in reviewing Milford's Establishment Clause claim.[317] Emphasizing that Milford's policy would violate the Establishment Clause if a reasonable observer would view it as an endorsement of religion, Justice Souter recognized that facts presented to this Court were insufficient to make a determination.[318] However, he stated that "[w]hat we know about this case looks very little like *Widmar* or *Lamb's Chapel*."[319] Finally, Justice Souter disagreed that the relevant inquiry in this case was a reasonable parent's perception, believing instead that the focus should be on the children's perception of state-endorsed religion.[320]

IV. Analysis: The Establishment Clause and Limited Public Forums after *Good News*

First Amendment rights are most likely to conflict in limited public forums.[321] There are probably few conflicts between First Amendment rights outside the limited public forum because private exercises of free speech or free religion are not likely to be confused with government establishment of religion in a traditional public forum or a private forum. When private speech takes place in a private forum, Establishment Clause concerns are not raised as the government has no involvement. Generally, freedom of speech protects the right to say whatever one wants in a private forum, as well as in a traditional public forum.[322] Freedom of religion protects the right to practice whatever religion one wants in private, as well as in traditional public

315. *Id.* at 2116.
316. *Id.* at 2116-17.
317. *Good News*, 121 S. Ct. at 2117-18 (Souter, J., dissenting).
318. *Id.* at 2118-19.
319. *Id.*
320. *Id.* at 2119 n.4.
321. *See supra* notes 51-59 and accompanying text (discussing limited public forums).
322. *See supra* notes 19-24 and accompanying text (discussing permissible restrictions on speech in traditional public forums).

forums.[323] However, when private speech takes place in limited public forums, citizens may question whether and to what extent the government endorses such speech by allowing the use of the forum. When the government endorses or funds private religious speech, Establishment Clause concerns are raised.[324]

Although the Court in *Good News* held that the school district had not raised a valid Establishment Clause claim,[325] the Court's decision potentially has great effect on Establishment Clause theory. Given *Good News*, can the government successfully justify viewpoint discrimination in a limited public forum if it believes such discrimination is necessary to comply with the Establishment Clause, or will the Court always fail to find a valid Establishment Clause claim to avoid having to confront the question of whether Establishment Clause values trump free speech and free exercise values? In *Widmar, Lamb's Chapel*, and *Rosenberger*, the Court stated, but did not decide, that Establishment Clause concerns may overcome the prohibition on viewpoint discrimination.[326] Is the Court backing away from this proposition?

A. *Raising a Valid Establishment Clause Claim–The Test*

In *Good News*, as in *Lamb's Chapel* and *Rosenberger*, the Court held that Establishment Clause concerns did not justify viewpoint discrimination.[327] However, in each case, the Court found that the government had failed to "raise a valid Establishment Clause claim."[328]

Although *Gentala* was remanded in light of *Good News*, it was decided on Establishment Clause grounds, rather than viewpoint-subject matter discrimination grounds.[329] In *Gentala*, the United States Court of Appeals for the Ninth Circuit suggested, but did not decide, that

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323. As with freedom of speech, there may be very limited situations where other concerns override the freedom. *See, e.g.*, Employment Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990) (holding that Oregon could deny unemployment compensation when employee was fired for ceremonial ingestion of peyote, because such ingestion was not protected by the free exercise clause).

324. *See supra* notes 29-32 and accompanying text (discussing government speech) and notes 97-120 and accompanying text (discussing the funding and endorsement factors in the analysis of Establishment Clause violations).

325. *Good News*, 121 S. Ct. at 2103.

326. *See supra* note 59 and accompanying text.

327. Good News v. Milford Central Sch., 121 S. Ct. 2093 (2001); Rosenberger Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

328. *See supra* notes 127-176, 246-260, and 285-320 (discussing *Lamb's Chapel, Rosenberger*, and *Good News*).

329. *Gentala*, 244 F.3d at 1082. *See also supra* notes 228-245 (summarizing the *Gentala* decision).

the restriction in question discriminated against viewpoint.[330] However, the court held that even if the restriction discriminated against viewpoint the city's Establishment Clause concerns justified the restriction.[331] As a result of the remand, the district court is likely to decide, and the Ninth Circuit is likely to confirm, that the restriction does indeed discriminate against viewpoint. However, there is no reason to believe that the Ninth Circuit will decide any differently on the Establishment Clause issue. As such, the Gentalas might soon be petitioning for certiorari to the Supreme Court on the question of whether the Establishment Clause can justify viewpoint discrimination in a limited public forum.

The Gentalas will not be alone. In light of *Good News*, more lower court decisions are likely to be decided on Establishment Clause grounds. The *Good News* decision showed even more clearly than *Lamb's Chapel* the level of preaching that the Court is willing to label religious viewpoint rather than subject matter. Consequently, more regulations prohibiting religious worship or instruction will be tested on Establishment Clause grounds rather than subject matter-viewpoint discrimination grounds. And those litigants unsuccessful in the circuit courts will file petitions for certiorari asking the Court to decide whether the Establishment Clause can justify viewpoint discrimination. If the Court ever decides whether the Establishment Clause can justify viewpoint discrimination, that decision may be coming soon. A necessary precursor to such a decision is that the Supreme Court finds that the government has raised a valid Establishment Clause claim. As such, the question of what constitutes a valid Establishment Clause claim in the eyes of the Court is of the utmost importance.

1. Factors

Although the city in *Lamb's Chapel* offered the Establishment Clause as justification for its restriction on speech, the Court quickly dismissed the claim.[332] The Court referred to the *Lemon* test without really applying its three parts.[333] The Court spent only slightly more effort in analogizing the restricted speech in *Widmar* to that in

330. *Gentala*, 244 F.3d at 1073.

331. *Id.* at 1073-74, 1082.

332. *Lamb's Chapel*, 508 U.S. at 395. *See also* Timothy K. Hall, *Constitutional Conflict: The Establishment Clause Meets the Free Speech Clause in* Lamb's Chapel v. Center Moriches Union Free School District, 45 MERCER L. REV. 875, 878 (1994); Joanne Kuhns, Board of Education of Kiryas Joel Village School District v. Grumet: *The Supreme Court Shall Make No Law Defining An Establishment of Religion*, 22 PEPP. L. REV. 1599, 1657 n.386 (1995).

333. See *Lamb's Chapel*, 508 U.S. at 395, where the Court noted that:

Lamb's Chapel, mentioning concerns both about perceived government endorsement and benefits to religion.[334]

In contrast to *Lamb's Chapel*, the Court examined the Establishment Clause defense more thoroughly in *Rosenberger*.[335] There the Court described the neutrality of government programs as a key factor in determining whether the Establishment Clause had been violated.[336] The Court especially noted that because the program was neutral with respect to religion, the student assessment that funded the program was "a far cry from a general public assessment designed and effected to provide financial support for a church."[337]

Additionally, the *Rosenberger* Court examined government endorsement of religion, concluding that by allowing Wide Awake Publications (WAP) to participate in the program, "'the government has not fostered or encouraged' any mistaken impression that the student newspapers speak for the University."[338] Moreover, the Court touched on funding concerns in attempting to distinguish the facts in *Rosenberger* from a neutral program where "the government [was] making direct money payments to an institution or group that is engaged in religious activity," reinforcing the notion that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse."[339]

Like *Rosenberger*, the Court in *Good News* more thoroughly examined the factors that might support an Establishment Clause de-

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> [A]s in *Widmar*, permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*: The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.

Id. (citations omitted).

334. *Id.*

> 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.

335. *Rosenberger*, 515 U.S. at 840-44.

336. *Id.* at 839.

337. *Id.* at 841.

338. *Id.* (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995)).

339. *Rosenberger*, 515 U.S. at 842, 844.

fense.[340] Although the Court quickly analogized the restricted activity to the activities in *Lamb's Chapel* and *Widmar* to dismiss Milford's Establishment Clause defense,[341] the Court thereafter explicitly discussed neutrality, coercion, and endorsement in support of its decision.[342] Funding was not at issue in *Good News*.

a. Neutrality

As in *Rosenberger*, the *Good News* Court began its analysis by recognizing neutrality as a "significant factor in upholding governmental programs in the face of [an] Establishment Clause attack."[343] Because the Court had determined that the subject matter of the Good News Club's speech was morality taught from a religious viewpoint, the Court found that the club sought "nothing more than to be treated neutrally and given access to speak about the same topics as are other groups."[344]

Although the Court has never found neutrality to be the determinative factor in its Establishment Clause analysis, it has labeled neutrality a "key factor" in *Rosenberger* and a "significant factor" in *Good News*.[345] Additionally, in *Good News*, the Court stated that because "allowing the club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."[346] Because the Court in *Good News* found the coercion and endorsement concerns insignificant and there was no funding concern, the weight of neutrality in comparison to the other factors remains to be seen.

b. Coercion and Endorsement

Having found the program neutral, and stating that Milford "faces an uphill battle" to show the Establishment Clause required the

340. *Good News*, 121 S. Ct. at 2103-07.

341. *Id.* at 2103.

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

Id.

342. *Id.* at 2104-07.

343. *Id.* at 2104.

344. *Id.*

345. *See supra* note 334 and accompanying text.

346. *Good News*, 121 S. Ct. at 2104.

school district to exclude the Good News Club from its limited public forum, the Court dismissed the factors of coercion and endorsement with ease.[347] With respect to coercion,[348] the Court stated that "to the extent we consider whether the community would feel coercive pressure to engage in the [c]lub's activities, the relevant community would be the parents, not the elementary school children,"[349] because the Good News Club required parental permission for children to attend.[350]

Although such a statement may too readily dismiss the effect on school children,[351] the statement is more disturbing because of the phrase "to the extent that we consider." The phrase suggests that the Court will not necessarily consider coercion; however, coercion was the key factor in *Lee*.[352] In fact, the Court distinguished *Lee* from the facts in *Good News* because in *Lee*, the Court found attendance at graduation obligatory.[353] It is hard to imagine that the Court will not consider coercion as a factor in the Establishment Clause analysis when the coercive pressure to attend is as great as in *Lee*. The doubt the *Good News* Court places on the use of coercion as a factor in Establishment Clause analysis is probably unintended.[354] Therefore, although the Court found the coercive pressure in *Good News* to be insignificant, the Court's Establishment Clause analysis does still entail coercion as a factor.

With respect to endorsement,[355] although the Court reluctantly recognized that school children might view the use of the school as the school's endorsement of religion, it did not consider this danger as being "any greater than the danger that they would perceive a hostility toward the religious viewpoint if the club were excluded from the

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347. *Id.* at 2104-07.

348. *See supra* notes 97-120 and accompanying text (discussing coercion in Establishment Clause analysis prior to *Good News*).

349. *Good News*, 121 S. Ct. at 2104 (citations omitted).

350. *Id.*

351. *See* James L. Underwood, *Applying the* Good News *Decision in a Manner that Maintains the Separation of Church and State in Our Schools*, 47 VILL. L. REV 281, 282 (2002) (noting that "as soon as the opinion was issued, alarm bells were rung by those concerned that schools would be turned into religious battlegrounds and small children would be subjected to hard-sell, intimidating evangelism.").

352. *See supra* notes 112-114 and accompanying text.

353. *Good News*, 121 S. Ct. at 2104.

354. *But see id.* at 2107 (Scalia, J., concurring) (asserting that only physical coercion, not peer pressure, counts toward the Establishment Clause analysis).

355. *See supra* notes 111-120 and accompanying text (discussing endorsement in Establishment Clause analysis prior to *Good News*).

public forum."[356] Unlike the majority, Justice Breyer in concurrence, who would not have decided the Establishment Clause question at this summary judgement stage in the litigation, stated that "a child's perception that the school has endorsed a particular religion or religion in general may also prove critically important."[357] Thus a clear majority of the Court confirmed that perceived endorsement was a factor in an Establishment Clause claim, although individual justices reached different results in applying this factor.[358]

c. Funding

As noted, funding was absent from the Supreme Court's analysis in *Good News*.[359] The only funding involved would have been for maintenance of the facility. The Court had earlier dismissed such a funding claim in *Rosenberger* stating that "[i]f the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar, Mergens*, and *Lamb's Chapel* would have to be overruled."[360]

The Court has not yet found a strong enough funding concern in a limited public forum to hold that such funding constituted an Establishment Clause violation. Although the Court has repeatedly stated that government may not pay a church's bill,[361] it has not yet made clear what this means. At one end of the spectrum, Establishment Clause jurisprudence has made clear that government may provide basic services such as police and fire department services to religious

356. *Good News*, 121 S. Ct. at 2106. With respect to school children's perceived endorsement, the *Good News* Court referred to applying the Establishment Clause here as a "heckler's veto," further emphasizing its concern with protecting free speech:

> We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive. There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members. And, we have already found that those rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club.

Id. (citations omitted).

357. *Id.* at 2111 (Breyer, J., concurring). On the other hand, Justice Scalia believes that there is never government endorsement of a message delivered in a limited public forum. *See supra* notes 292-295 and accompanying text.

358. *See supra* notes 356-357 and *infra* notes 358-365 and accompanying text.

359. *See supra* notes 97-110 and accompanying text (discussing funding in Establishment Clause analysis prior to *Good News*).

360. *Rosenberger*, 515 U.S. at 843.

361. *See, e.g., id.* at 844.

organizations.[362] Additionally, government may also extend property tax credits to such organizations.[363]

The funding in *Rosenberger* seems to be approaching the other end of the spectrum. The level of funding in *Lamb's Chapel* and *Good News* was slight, as the only government expenditure was for the maintenance of government facilities necessary as a result of the additional use of the forum.[364] The Court also dismissed the funding concern in *Rosenberger* where the student fee was used for WAP's printing costs, stressing that the reimbursement for printing costs was provided on a religion-neutral basis.[365] The *Rosenberger* Court recognized that the State paying for a church's bills would constitute government endorsement of religion.[366] However, the University had certified WAP as a CIO, thus classifying it as something other than a religious organization.[367] Additionally, the Court held that the publication constituted religious viewpoint rather than religious subject matter.[368] As the *Rosenberger* Court found both religious viewpoint and a secular organization, the Court easily concluded that the program in question did not amount to paying a church's bill.

2. Lemon *Test*

However else the *Good News* decision may affect Establishment Clause jurisprudence, it may be seen as putting another nail in *Lemon's* coffin. In holding that Milford had not raised a valid Establishment Clause concern, the *Lemon* test was as notably absent from the *Good News* Court's analysis as it was from the *Rosenberger* Court's. Of course, the standing of *Lemon* does not matter if the Court in fact applied other factors even when it explicitly referenced *Lemon*,[369] but *Lemon's* repeated absence from the Supreme Court's Establishment Clause analysis suggests that *Lemon* has been left by the wayside.

Perhaps even more telling of the status of the *Lemon* test is that in his concurrence in *Good News*, Justice Breyer applied the effects leg of *Lemon*, but referenced not *Lemon*, but *Ball*, which cited *Lemon*:

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362. *See* Walz v. Tax Comm'n of City of New York, 397 U.S. 664, at 671 (1970).

363. *Id.* at 673-74.

364. *Good News*, 121 S. Ct. at 2098; *Lamb's Chapel*, 508 U.S. at 387.

365. *Rosenberger*, 515 U.S. at 842-44.

366. *Id.* at 844.

367. *Id.* at 823-26.

368. *See supra* notes 143-176 and accompanying text (discussing the *Rosenberger* decision).

369. *See, e.g., supra* notes 78-87 and accompanying text (discussing the Court's inconsistent use of the *Lemon* test, particularly in *Lamb's Chapel*).

> Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the Good News Club's activities, could reasonably perceive the school's permission for the club to use its facilities as an endorsement of religion. "[A]n important concern of the effects test is whether . . . the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[370]

Additionally, in this formulation and in Justice Breyer's application, the effects test sounds much like the endorsement factor that the Court has more consistently applied.

3. *Justice Scalia's Test/Interpretation*

Although Justice Scalia has seemingly been successful in junking *Lemon*, he did not seem to be able to find any buyers for his Establishment Clause test. In *Lamb's Chapel*, Justice Scalia ended his concurrence with the statement, "I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect."[371] This statement seemed to suggest that government may embrace religion, as long as it does not endorse one religion over another. Justice Scalia's peculiar views on government endorsement of religion are asserted more strongly in *Good News* where he stated,

> As to endorsement, I have previously written that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." The same is true of private speech that occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses. In that context, which is this case, "erroneous conclusions [about endorsement] do not count."[372]

Obviously, Justice Scalia's view is more extreme than the Court's as he would disregard any consideration of perceived endorsement in limited public forums.[373] As such, Justice Scalia's definition of purely private speech does not depend on whether a reasonable viewer may perceive the speech as government-endorsed, but he makes no effort to clarify how else to judge what is purely private speech. In any case,

370. *Good News*, 121 S. Ct. at 2111 (Breyer, J., concurring) (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

371. *Lamb's Chapel*, 508 U.S. at 401.

372. *Good News*, 121 S. Ct. at 2107-08 (citations omitted, brackets in original).

373. *See supra* notes 355-358 and accompanying text.

as protective as the Court is of speech, Justice Scalia's proposed test is even more protective. However, it is not clear whether his disregard of Establishment Clause concerns stems merely from a desire to protect speech or to also protect religion as he faulted the dissenters for trying to distinguish between acceptable and excludable religious speech in limited public forums.

B. *Limiting Speech in a Limited Public Forum After* Good News

With the *Good News* decision, as with *Lamb's Chapel* and *Rosenberger*, the Court was clearly trying to avoid limiting speech. Bans on broad categories of religious speech not only chill speech but also may discriminate based on viewpoint and against religion. In a limited public forum, any restriction on speech must be reasonable in relation to the purpose of the forum and must not discriminate on the basis of viewpoint.[374]

1. *Reasonableness of the Restriction*

Reasonableness is a fairly low threshold, especially if the best fit is not necessary.[375] The Court in *Good News* did not even find it necessary to review the reasonableness justifications.[376] The Court's lack of review is especially telling of the value of the reasonableness criterion because in *Lamb's Chapel*, the Supreme Court faulted the Second Circuit for not addressing the reasonableness of the regulation.[377] Having been reprimanded in *Lamb's Chapel*, the Second Circuit made a laundry list of reasonableness justifications in *Bronx Household* and referred to this same list in its *Good News* decision.[378] The laundry

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374. *See supra* notes 51-59 and accompanying text (discussing restrictions on speech in limited public forums).

375. *See supra* note 57 and accompanying text.

376. *Good News*, 121 S. Ct. at 2100.

377. *See supra* note 211 and accompanying text.

378. *See supra* note 211 (discussing the *Bronx Household* court laundry list). In its *Good News* decision the Second Circuit stated that:

> [T]he Club argues that the restriction is unreasonable because Milford's articulated purpose for the restriction—"ensuring that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof"— is unpersuasive. It argues that there is little risk that children would confuse the Club's use of school facilities with the school's endorsement of the religious teachings. This argument is foreclosed by precedent. In *Bronx Household of Faith*, we stated that "it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises." Furthermore, "it is reasonable for state legislators and school authorities to avoid the identification of a . . . school with a particular church." Although we made this pronouncement in the context of an organization requesting to conduct church services in a school, we believe it is equally applicable to the case now

list passed the Court's inspection without comment, making the creation of such a list appear to be an exercise in futility. Unless the laundry list met some criterion the Court has not seen fit to specify, only the most poorly written opinions could not pass such a threshold.

Although the *Good News* Court did not need to review both reasonableness and viewpoint discrimination to hold the regulation invalid, it seems unlikely that the Court intended to reserve the review of the reasonableness of justifications. The Court did not make any reference to the reasonableness justifications, whereas when the Court reserves review of an issue or assumes a statement's truth without deciding, the Court has made a practice of explicitly stating its intention.[379] The low threshold of reasonableness review, coupled with the Court's absence of comments, suggests that the Court will only attack reasonableness when no showing has been made.

2. *Viewpoint Discrimination*

Unlike reasonableness, the Court closely reviews whether a restriction discriminates on the basis of viewpoint. This is clear from the Court's opinions in *Lamb's Chapel*, *Rosenberger*, and *Good News*.[380] In each case, accepting the Court's characterization of the speech in question, the regulation resulted in viewpoint discrimination.

The facts in *Lamb's Chapel* did seem to suggest that the subject matter of the film was child rearing.[381] The limited public forum had already hosted similar subject matter.[382] Therefore, the exclusion of the film clearly constituted viewpoint discrimination because the only basis for excluding the film was the religious viewpoint from which the

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> before us. The Club argues that it is not a "particular church," but rather a nondenominational Christian organization. This difference, however, is immaterial. The activities of the Club clearly and intentionally communicate Christian beliefs by teaching and by prayer, and we think it eminently reasonable that the Milford school would not want to communicate to students of other faiths that they were less welcome than students who adhere to the Club's teachings. This is especially so in view of the fact that those who attend the school are young and impressionable.

Good News, 202 F.3d at 509. The Supreme Court does address the impressionability of school children but only with regard to the validity of the city's Establishment Clause concerns, not with regard to the reasonableness of the regulation. *See supra* notes 87 and 290 and accompanying text.

379. *See, e.g.*, Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 122 S. Ct. 934, 938 (2002); Toyota Motor Mfg. v. Williams, 122 S. Ct. 681, 689 (2002); Nevada v. Hicks, 121 S. Ct. 2304, 2312 (2001) (referencing Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 162 (1980)); Kyllo v. United States, 121 S. Ct. 2038, 2043 (2001).

380. *See supra* notes 129-163 and 284-291 and accompanying text.

381. *See supra* notes 129-142 and accompanying text.

382. *See supra* notes 130-143 and accompanying text.

acceptable subject matter of child rearing was presented. The Court unanimously agreed on this point.[383]

The subject matter of the publication in *Rosenberger* was somewhat less clear. Although a majority of the Court accepted that the publication merely presented Christian viewpoints, four dissenters believed that the subject matter was clearly preaching.[384] Interestingly, under University rules, CIO status, and thus the opportunity for reimbursement, could not be granted to a religious organization.[385] Because WAP had already been granted CIO status, the University had already conceded that the purpose of WAP was something other than "practic[ing] a devotion to an ultimate . . . deity."[386] As such, the University may have had an uphill battle in its argument that the purpose of WAP's publication was something other than preaching. Nonetheless, four members of the Court strongly believed this was the case.[387]

WAP stated that its mission was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."[388] If the subject matter of such a publication could be characterized as something other than preaching or religious instruction, it would seem to be at the far end of the subject matter-viewpoint continuum.

However, the pendulum in *Good News* seems to have swung even farther toward defining speech restrictions as viewpoint rather than subject matter. While WAP's publication might have conceivably discussed secular subject matter from a religious viewpoint, the Good News Club's activity is surely religious worship and instruction.[389]

The majority in *Good News*, as in *Rosenberger*, glossed over the facts to conclude that the restriction constituted viewpoint discrimination. Additionally, the majorities in each case seemed to suggest that there is no distinction between viewpoint and subject matter discrimination with respect to religion. As such, it becomes more difficult or impossible to exclude religious instruction or worship from many limited public forums. If a limited public forum allows classes, it must

383. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

384. Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995).

385. *See supra* notes 143-163 and accompanying text.

386. *Rosenberger*, 515 U.S. at 828.

387. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

388. *See supra* note 165.

389. *See supra* note 256. For a discussion of how the Court came to conclude that the subject matter was morals presented from a religious viewpoint see *infra* notes 410-422 and accompanying text.

also allow religious classes. If it allows clubs focusing on the moral development of youth, it must also allow Good News Clubs, despite the explicit religious worship included in their programs.[390]

The dissent recognized that the *Good News* Court was only able to characterize Good News' activity as "teaching of morals and character, from a religious standpoint" through the use of "generic terms." The use of generic terms evidences the Court's reluctance to decide at what point religious content becomes religious viewpoint. By shifting toward religious viewpoint, rather than religious content, the Court increases the government's burden when it tries to exclude religious worship and instruction from limited public forums. Both the overgeneralization of the facts and the Court's apparent refusal to draw a line between religious viewpoint and religious content suggest that the Court is providing more protection to speech, and here, religious speech in particular.[391]

a. Too Hard to Draw the Line?

With *Good News,* the line between religious content and religious viewpoint seems to have moved, resulting in no difference between the two.[392] Is the Court giving up?

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390. *Good News*, 121 S. Ct. at 2115-17 (Breyer, J., concurring; Souter, J., dissenting) (indicating that the holding of *Good News* could be read much more narrowly). *See supra* note 301 and accompanying text. Because the action was for summary judgement, these Justices suggested a narrow holding that in this case reasonable minds could differ as to whether there was content or viewpoint discrimination. *Good News*, 121 S. Ct. at 2115-17. Justice Souter's suggestion may have been somewhat wistful, recognizing that this was clearly not the majority's intent. *Id.* at 2117 (Souter, J., dissenting) (stating that, "[t]he majority avoids this reality only by resorting to the bland and general characterization of Good News's activity as 'teaching of morals and character, from a religious standpoint.' If the majority's statement ignores reality, as it surely does, then it may be understood only in equally generic terms.") (citations omitted).

391. As the reasonableness/viewpoint-neutral test was a speech test in the first place, the test presumably already placed the proper amount of restriction on speech. Apparently, the Court has found the test is too restrictive of religion. Of course, if the Court's point is that allowing religious subject matter into a limited public forum only matters if that religious subject matter raises an Establishment Clause concern, that point is well taken. However, it denies the typical limited public forum rule of reasonableness and viewpoint neutrality. If this was the Court's point, then wasn't the proper analysis to overrule the restriction on reasonableness grounds, i.e. the exclusion of religious subject matter is not reasonable? The Court's blurring of religious viewpoint and religious subject matter seems to allow a wider spectrum of religious subject matter than necessary if the restriction had been overruled on reasonableness grounds. Perhaps, as Justice Souter suggested in his dissent, the majority intended "this case [to] stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque." *Good News*, 121 S. Ct. at 2117 (Souter, J., dissenting).

392. *See supra* notes 380-391 and accompanying text. Strangely enough, there are only three dissenters in *Good News*, where there were four in *Rosenberger.* However, Justice Breyer, who dissented in *Rosenberger*, concurred in *Good News* only because he viewed the issue as whether Milford was entitled to summary judgement. *See supra* notes 297-301 and accompanying text.

The majority in *Good News* characterized the subject of the Good News meetings as the teaching of morals from a religious viewpoint.[393] The dissents looked more closely at the activities that went into this endeavor: group prayer, rewards for learning and reciting scripture, and the encouragement of professing a belief in God.[394]

The majority of the Court declared the club's speech was not "religious worship, divorced from any teaching of moral values," but rather the teaching of moral values from a religious viewpoint.[395] This conclusion suggests that religious worship, in order to be considered subject matter rather than viewpoint, must be completely divorced from any permissible subject matter. This in turn suggests that the majority largely agreed with Justice Scalia in that there is little difference between subject and viewpoint discrimination with respect to religion.[396]

The Court, finding the line hard to draw or nonexistent, chose to err on the side of free speech. Ideologically, it is hard to argue with this choice. Practically, however, the difficulty with the majority's position is twofold. First, the Court is in the business of line drawing.[397] Justice Stevens, in dissent, proposed a scheme with which to draw the line between viewpoint and content with respect to religious speech.[398] Second, in refusing to draw a line between religious viewpoint and religious worship, in its effort to protect both speech and religion, the Court moves dangerously toward the establishment of religion.

Did the Supreme Court shift the line between religious viewpoint and religious subject matter because of a belief that government and lower courts have had too much trouble distinguishing between viewpoint and content discrimination with respect to religion, sometimes to the harm of religion or speech? While protecting free speech and free religion is a noble goal, the Court in *Good News* nearly forecloses further development of common law by suggesting that religious viewpoint and religious content are so intertwined as to be inseparable.

Even though *Good News* could be confined to a narrow holding that summary judgement for Milford was not yet appropriate, it seems

Therefore, the sides can still properly be viewed as 5-4, with Justices Souter, Stevens, Ginsburg, and Breyer disagreeing with the majority with respect to whether the restriction in question constitutes viewpoint discrimination, and whether such discrimination might be justified by the Establishment Clause.

393. *See supra* notes 284-291 and accompanying text.

394. *See supra* notes 302-320 and accompanying text.

395. *See supra* note 288 and accompanying text.

396. *Good News*, 202 F.3d at 2110 (Scalia, J., concurring).

397. *See Rosenberger*, 515 U.S. at 847.

398. *See supra* notes 302-313 and accompanying text.

to suggest much more.[399] The Court's broader holding, that religious worship must be completely divorced from permissible subject matter to be permissibly excluded from a limited public forum, is premature in two respects. First, the Court's role is to let lower courts fully develop issues. Here, the issue of the distinction between religious viewpoint and religious subject matter is still quite young. Lower courts are still trying to decipher the meanings of *Lamb's Chapel* and *Rosenberger.* Secondly, the issue in *Good News* itself was not yet fully developed due to the stage in the proceedings.[400] The question of whether there was any difference between content and viewpoint with respect to religion had not yet arisen, only the question of whether reasonable minds could differ as to whether Good News' activities were religious inculcation, rather than the teaching of morals from a religious viewpoint.

In his dissent, Justice Stevens did not appear to have any trouble drawing the line that the majority thought impossible or wrong to draw.[401] Far from giving up on distinguishing between permissible religious viewpoint and impermissible religious speech in a limited public forum, Justice Stevens favorably cited *Campbell* stating that "[u]nder the Supreme Court's jurisprudence, a government entity such as a school board has the opportunity to open its facilities to activity protected by the First Amendment, without inviting political or religious activities presented in a form that would disserve its efforts to maintain neutrality."[402]

Justice Stevens then provided courts with the tools to do so, dividing speech for religious purposes into three categories.[403] First, Justice Stevens categorized religious speech that consists of speech about a particular topic from a religious point of view, indicating that such speech may not be constitutionally excluded from a limited public forum.[404] Second, he identified that religious speech amounts to worship, which he indicated should be excluded from limited public forums.[405] Finally, he recognized an "intermediate category that is aimed principally at proselytizing or inculcating belief in a particular

399. *See supra* note 390 and accompanying text.

400. *See supra* note 390 and accompanying text.

401. *See supra* notes 302-313 and accompanying text. *See also supra* notes 164-176 (outlining the *Rosenberger* dissent's argument that there is a difference between religious viewpoint and religious content).

402. *Good News*, 121 S. Ct. at 2113 (Stevens, J., dissenting).

403. *Id.* at 2112. *See also supra* notes 302-313 and accompanying text.

404. *Good News*, 121 S. Ct. at 2112 (Stevens, J., dissenting).

405. *Id.*

religious faith."[406] Justice Stevens concluded that government can constitutionally "create a limited public forum that admits the first type of religious speech without allowing the other two."[407]

Of course, drawing a line presumes that discriminating against religious content may be acceptable. Justice Scalia asserted that such discrimination is not acceptable.[408] However, as stated above, if the exclusion of content is not acceptable, the Court could hold the restriction unconstitutional under the reasonableness prong of the limited public forum analysis.[409] As reasonableness has historically been a low threshold, this will require the Court to inquire more closely into the reasonableness of governmental regulations of speech than ever before.

b. Overgeneralization

In *Good News*, as in *Rosenberger*, the majority and dissent characterized the speech in question much differently.[410] As the dissents pointed out in *Rosenberger* and *Good News*, the majority's overgeneralization of the facts allowed them to analogize speech that not only encouraged religious worship, but actually constituted religious worship, with secular speech.[411] Naturally, such a gloss over the facts led to the majority's conclusion of viewpoint discrimination.

The Good News Club's meetings only became indistinguishable from the speech in *Lamb's Chapel* and *Rosenberger* because the Court characterized it as something other than merely religious worship.[412] Unlike the Supreme Court majority opinion, the appellate court found the Good News Club's speech consisted of much more than moral and character instruction because of the traditional trappings of religious worship that were, according to the Fourniers, necessarily associated with the club.[413] Although the majority of the Supreme Court, and Judge Jacobs who dissented from the Second Circuit's decision, disagreed, distinguishing the instruction scout meetings from the religious instruction and worship that take place during Good News meetings is no overwhelming task. The Second Circuit simply explained why Good News' attempt to analogize itself with scouts was, or should have been, unsuccessful:

406. *Id.*
407. *Id.* at 2113.
408. *See supra* notes 292-296 and accompanying text.
409. *See supra* notes 375-380 and accompanying text.
410. *See supra* notes 143-176, 246-320 and accompanying text.
411. *See supra* notes 143-176, 246-320 and accompanying text.
412. *See supra* note 288 and accompanying text.
413. *See supra* notes 280-283, 288 and accompanying text.

> While the Boy Scouts teach reverence and a duty to God generally, this teaching is incidental to the main purpose of the organization, which is personal growth and development of leadership skills. Moreover, there is nothing in the record to indicate that the Boy Scouts require any particular means of demonstrating reverence and duty to God. Similarly, the Girl Scouts vow to 'try . . . [t]o serve God and [their] country.'[414]

Although the majority of the Supreme Court in *Good News* glibly glossed over the facts, the dissent in the appellate decision, which the majority of the Supreme Court decision favorably cites, did not. Judge Jacobs' explanation, perhaps unintentionally, makes the difference between religious viewpoint and religious content in this case all the more clear:

> [t]he Fourniers argue that presentation of Christian morality entails religious activities such as prayer, that their (religious) viewpoint on the "secular" topic of morality cannot be expressed and promoted without these religious activities, and that forcing them to do so would prevent them from expressing their point of view, in violation of the First Amendment.[415]

Judge Jacobs pointed to the club's statement that the morals and values the Good News Club taught would be "senseless without Christ," leading Judge Jacobs to announce that "[t]he distinction is especially slippery where the viewpoint in question is religious, in part because the sectarian religious perspective will tend to look to the deity for answers to moral questions."[416] Judge Jacobs, however, failed to consider that just because the club insisted that "these morals or these values are senseless without Christ," did not mean prayer was necessary to get this point across.[417] It simply meant that references to Christ are necessary. Just as these references may be necessary, they were clearly allowable as similar references to "God" were already present in scouts.

Judge Jacobs, however, chose not to see that references to Christ or God do not need to be the equivalent of prayer. Ignoring this simple solution, Judge Jacobs instead concluded that "[a]lthough the religious viewpoint thus has the tendency to overwhelm the secularity of a subject matter, this transformative, goal-directed tendency of religious viewpoints does not justify a preference for other viewpoints."[418] This statement once again appears to ignore the obvious: the Club's goal was in fact preaching as opposed to moral development. Having ac-

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414. *Good News*, 202 F.3d at 511 (brackets in original).
415. *Id.* at 514.
416. *Id.*
417. *Id.*
418. *Id.*

cepted that the subject matter is morals, Judge Jacobs further accepted the argument that, in order to teach their particular brand of morals, they must provide religious instruction and prayer.[419]

Finally, Judge Jacobs concluded that if it is impossible to decide whether the club's activities are religious content or religious viewpoint, the court should err in favor of free speech.[420] It is hard to argue with erring in favor of free speech; however, this necessity is not as clear when the Establishment Clause is concerned. Additionally, such an argument should be made while deciding whether the Establishment Clause should prevent the speech in question from taking place in the limited public forum,[421] rather than while deciding whether the restriction constitutes viewpoint or content discrimination. However, the Supreme Court apparently adopted Judge Jacobs' position.[422]

C. Gentala *Remanded*

Like *Campbell*, *Gentala* has been remanded in light of *Good News*.[423] Unlike *Campbell*, the court in *Gentala* held that the restriction on religious speech was justified by the Establishment Clause grounds, whereas the court in *Campbell* did not reach the Establishment Clause question because it held that the restriction on religious speech did not amount to viewpoint discrimination.[424] The Court purported to grant certiorari in *Good News* to resolve the "conflict among the circuits on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech."[425] Because it cited *Gentala* as one of the conflicting cases, the Court would seem to have agreed to decide whether the Establishment Clause can justify the exclusion of religious speech from limited public forums. However, because the Court found that Milford had not raised a valid Establishment Clause claim, the Court did not reach that question.

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419. *Id.*

420. *Good News*, 202 F.2d at 515.

421. *See infra* notes 469-473 and accompanying text.

422. *See supra* notes 280-291, 389-391, and 410-422 and accompanying text.

423. Gentala v. City of Tucson, 244 F.3d 1065 (9th Cir. 2000), remanded in light of *Good News*, 122 S. Ct. 340; Campbell v. St. Tammany's Sch. Bd., 206 F.3d 482 (5th Cir. 2000), remanded in light of *Good News*.

424. *Compare supra* notes 219-227 and accompanying text *with* notes 228-245 and accompanying text.

425. *Good News*, 121 S. Ct. at 2099.

The Court subsequently remanded *Gentala* in light of its *Good News* decision.[426] The remand is curious because the Court did not decide whether a government's concern with violating the Establishment Clause can justify viewpoint discrimination in a limited public forum.

1. Remanded for Re-Assessment of the Establishment Clause Claim

At least one commentator, James Underwood, has asserted that the Supreme Court remanded *Gentala* because "the *Good News Club* decision requires examination of fees charged for use of public facilities to ensure that there is no discrimination against religious organizations."[427] Underwood recognized that the appellate court decided *Gentala* on Establishment Clause grounds, rather than on the ground that there was no viewpoint discrimination.[428]

If the appellate court had decided *Gentala* on the grounds that the restriction did not amount to viewpoint discrimination, then the remand would simply require a reassessment of this determination. If the restriction amounted to viewpoint discrimination, it is well established that government funding is a means of discrimination and cannot be withheld to silence religious viewpoint.[429] However, because the decision was based on Establishment Clause grounds, Underwood's suggestion that the Court remanded *Gentala* because of the city's refusal to subsidize religious viewpoint must mean that the differential funding should effect the appellate court's Establishment Clause analysis. More precisely, Underwood interpreted the remand to mean that the appellate court must determine whether the lack of funding for this religious viewpoint is a greater Establishment Clause violation than the perceived endorsement of the speech by the government.

The Court's intent in remanding *Gentala* is not clear to this author. Underwood may well have interpreted the remand correctly. The Court, however, did not appear to modify the Establishment Clause analysis from the *Rosenberger* decision.[430] Additionally, funding was not a concern in *Good News*.[431] The Court simply did not give the

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426. *Gentala,* 122 S. Ct. 340.

427. James L. Underwood, *Applying the* Good News *Decision in a Manner that Maintains the Separation of Church and State in Our Schools*, 47 VILL. L. REV 281, 294 n.90 (2002).

428. *Id.*

429. *See supra* note 159.

430. *See supra* notes 327-368 and accompanying text.

431. *See supra* notes 359-368 and accompanying text.

Gentala court more guidance to make its determination whether the Establishment Clause demands or condemns funding in that case.

Additionally, the Court reserved the question of whether the Establishment Clause might justify excluding speech from a limited public forum.[432] In *Gentala*, the funding is the metaphysical limited public forum. If *Gentala* has been remanded for consideration of whether funding violated the Establishment Clause, the remand suggests that *Good News* spoke more directly to the Establishment Clause than it appeared to. It also turns the *Gentala* decision on its head, in that rather than being required to deny funding under the Establishment Clause, the city may be required to provide funding under the Establishment Clause so as not to disadvantage religion.

2. *Remanded for a Clear Holding That the Viewpoint Discrimination was Justified by the Establishment Clause?*

Alternatively, the Court may have remanded *Gentala* so the lower court would clearly hold that the denial of funding constituted viewpoint discrimination. If the Ninth Circuit's Establishment Clause analysis remained unchanged, the result would be that the court would find viewpoint discrimination was justified by the Establishment Clause.

In *Gentala*, the city asserted that the speech was government speech.[433] Because government can discriminate against its own speech based on viewpoint,[434] the city asserted that the denial of funding to the Gentalas would be constitutional, even if such denial constituted viewpoint discrimination. On the other hand, the Gentalas asserted that the speech was private speech in a limited public forum; therefore, the city could not discriminate based on viewpoint.[435]

The court did not decide into which category the speech fell.[436] Rather, it skipped the categorization of the speech because it found

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432. *Good News*, 121 S. Ct. at 2103.

433. *Gentala*, 244 F.3d at 1072-73.

434. *See supra* notes 29-32 and accompanying text.

435. *Gentala*, 244 F.3d at 1072.

> The Gentalas' basic submission in this case is that the City's categorical exclusion of events "in direct support of religious organizations" from Fund support impermissibly infringes on the free speech rights of religious organizations such as the Prayer Committee, based on their religious point of view. The parties have therefore, quite understandably, argued vigorously about the free speech aspects, drawing upon different strains of First Amendment doctrine concerning the role of government in supporting communicative activity.

Id.

436. *Id.* at 1073-74.

that in either case the Establishment Clause prohibited the city from funding the religious speech in question.[437]

> Were we required to select among the mutually exclusive Free Speech Clause paradigms the parties propound-each leading under currently prevailing First Amendment doctrine to a different result concerning the City's authority to exclude speakers from a government-provided subsidy because they are engaged in a prayer service-the choice would be a difficult one. It is a choice we need not make, however, in order to resolve this case. For, even assuming that the Gentalas have the better of the battle of the paradigms, that conclusion would not end the inquiry. Rather, as the Supreme Court and this court have indicated repeatedly, the government may decline to subsidize private religious speech when doing so would violate the Establishment Clause, or, put another way, avoiding a violation of the Establishment Clause is a sufficiently compelling reason to justify government's exclusion of certain private speech in a forum otherwise dedicated to communicative activity. We therefore agree with the district court that if the City's Establishment Clause justification for the Civic Events Fund's religious exclusion is valid, then the exclusion is valid as well. It is to the Establishment Clause inquiry, therefore, that we now direct our attention.[438]

It is not at all obvious that, if forced, the Court would decide that the speech constituted private speech in a limited public forum rather than government speech.[439] The court's Establishment Clause analy-

437. *Id.*

438. *Id.* (citations omitted).

439. *See id.* at 1073.

> Each of these opposing characterizations of the City's role in developing and expending its Civic Events Fund has some considerations in its favor. On the one hand, the City in this case, like the university in *Rosenberger*, is administering a fund providing in-kind services for a wide range of speakers. A large majority of speakers who meet the applicable Civic Events criteria were in fact funded during the period for which there is evidence in the record, so the very strong element of qualitative governmental selectivity involved in cases such as *Finley* (concerning the administration of the National Endowment for the Arts) or *Forbes* (concerning the editorial discretion necessary in making journalistic decisions) is not present here. On the other hand, the criteria for funding here are more selective than in *Rosenberger*, albeit not as selective and discretionary as in *Finley* and *Forbes*. That most projects are funded may evidence only self-selectivity by event organizers aware of the applicable criteria or, more probably, the availability of sufficient funds for the period in question, a circumstance that may not always prevail. Additionally, the City's policy goals here are not, one might conclude, similar to those of the university in *Rosenberger*; while the university was concerned with assuring a vigorous interchange of ideas among students as part of the educational process, the City is concerned with providing for its citizens and tourists events of certain kinds that the City believes enhance Tucson's ambiance as an attractive place to live and visit. Because that is the goal, the City affirmatively identifies itself as the sponsor of funded events, placing its imprimatur on the events in a manner somewhat like the editor of an anthology does, while the university in *Rosenberger* did quite the opposite.

sis, however, assumed that the speech was private speech in a limited public forum.[440] The assumption is evident in the court's statement that "the considerations . . . do become pertinent to our Establishment Clause analysis, for they are informative in determining the degree to which the city's fund program constitutes an endorsement of the private speech involved."[441]

Despite the court's assumption that the speech was private speech, the court may not decide that the restriction constituted viewpoint discrimination. It may find, instead, that the speech constituted government speech or that the funding mechanism was viewpoint neutral, despite the *Good News* holding.

If on remand the district court once again reaches the Establishment Clause question, it will undoubtedly decide once again that the Establishment Clause justifies the restriction.[442] As noted above, the Supreme Court has not directly modified the Establishment Clause analysis.[443] Its modification is indirect, in that by potentially broadening the category of religious viewpoint, more cases will reach the question of the Establishment Clause.[444] Perhaps this is the Supreme Court's intent in remanding *Gentala*, forcing a direct clash of the free speech value of no viewpoint discrimination with the Establishment Clause value of no government endorsement of religion.

D. *Setting Up the Test*

The Ninth Circuit avoided deciding whether the Establishment Clause justified unconstitutional viewpoint discrimination by skipping the issue of viewpoint discrimination and assessing the Establishment Clause defense alone.[445] The Supreme Court seems to require the court to first decide whether the restriction constituted viewpoint discrimination.[446] How much should the phrasing of the test impact the result?

The courts in *Bronx Household, Campbell,* and *Gentala* all found that the government's interest in not violating the Establishment Clause outweighed individual free speech or free religion interest; whereas the courts in *Good Sports* and *Church on the Rock* found no

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Gentala, 244 F.3d at 1073 (citations omitted).

440. *Id.* at 1073-74.

441. *Id.* at 1074 n.14.

442. *See supra* notes 244, 327-368 and accompanying text.

443. *See supra* notes 327-368 and accompanying text.

444. *See supra* notes 380-391 and accompanying text.

445. *See supra* notes 433-444 and accompanying text.

446. *See supra* notes 433-444 and accompanying text.

Establishment Clause violation at all.[447] Likewise, in *Good News* the Court clearly stated that the school district had not made a valid Establishment Clause claim.[448] Although *Good News* was still only at the summary judgment stage, and thus may yet make out a valid Establishment Clause claim, the Court seemed to have orchestrated the facts and the issues to be able to make this finding.[449] Was the Court taking refuge in this finding to avoid having to finally determine whether the Establishment Clause trumps the Free Speech and Free Exercise Clauses?

Although the Court held that the school district had not yet raised a valid Establishment Clause concern, the Court was not reluctant in finding unconstitutional viewpoint discrimination.[450] Not only does the Court's decision in *Good News* change the theory of viewpoint discrimination, at least with respect to religious speech,[451] but labeling the restriction on religious speech as unconstitutional viewpoint discrimination suggests the Court is setting up a very high burden for the government when it raises a valid Establishment Clause claim.[452] Not all viewpoint discrimination is unconstitutional. For example, the government may discriminate on the basis of viewpoint when it speaks for itself.[453] Additionally, the Court had previously suggested in *Rosenberger* that viewpoint discrimination might be appropriate in a limited public forum if it is necessary to prevent an Establishment Clause violation.[454] There was no suggestion that such viewpoint discrimination would be unconstitutional and yet necessary to avoid a greater constitutional violation of violating the Establishment Clause. Rather, *Rosenberger* seemed to indicate that when the proper case came, the test would be the Court's traditional balancing test: Is the private interest in free speech/free religion outweighed given the facts of that case by

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447. *See supra* notes 177-245 and accompanying text.

448. *See supra* notes 289-291 and accompanying text.

449. *See supra* notes 410-422 and accompanying text.

450. *See supra* notes 286-288, 389-391 and accompanying text.

451. *See supra* notes 389-391 and accompanying text.

452. In *Good News*, although the Court purported not to decide whether an Establishment Clause claim can justify viewpoint discrimination, its labeling the viewpoint discrimination as unconstitutional places the burden quite high. *Good News* was decided at the summary judgement stage. The effect of the Court's decision is to overturn the summary judgement ruling in favor of the city, not to grant summary judgement for the club. Yet the Court's terminology suggested it has already decided that the Establishment Clause cannot justify the restriction on speech.

453. *See supra* notes 29-32 and accompanying text.

454. *See supra* note 59 and accompanying text.

the governmental interest in avoiding a possible Establishment Clause violation?[455]

Could viewpoint discrimination be constitutional if it were necessary to prevent an Establishment Clause violation? Is a constitutional violation ever curable? The Court sets up a greater conflict between freedom of speech or freedom of religion and the Establishment Clause than necessary.[456] Because the *Good News* Court set up a no-win situation, the only safety was in avoiding the issue.

Unlike the Supreme Court, the Ninth Circuit in *Gentala* found no free speech violation.[457] The differences in the holdings may be attributable in part to the ways the courts set up the problem. Unlike the Supreme Court, which began with the premise that unconstitutional viewpoint discrimination might be excused because of Establishment Clause concerns,[458] the Ninth Circuit set up the problem as first deciding whether the Establishment Clause justification was valid, and if it was then concluding the exclusion from the limited public forum was valid, avoiding the issue, and label, of unconstitutional viewpoint discrimination.[459]

V. Impact: The Establishment Clause and Free Speech at Odds

Despite the official separation of church and state, religion has never been completely absent from our federal government.[460] Some

455. *See supra* notes 157-163 and accompanying text. *See also infra* notes 469-473 and accompanying text.

456. *See supra* notes 445-455 and accompanying text.

457. *See supra* notes 228-245 and accompanying text.

458. *See supra* note 250 and accompanying text.

459. In holding that the city's Establishment Clause concern justified the viewpoint discrimination, the Ninth Circuit stated:

> We agree with Tucson that although the Establishment Clause remains a "blurred, indistinct and variable barrier" to government support for religious activity, "the circumstances of [the] particular relationship," between Tucson and recipients of Civic Events Fund support is such that Tucson was correct in concluding that the requested funding would have fallen on the Establishment Clause side of that "serpentine" wall. Tucson's decision to refuse Civic Events Fund support to the prayer service's organizers therefore did not run afoul of another First Amendment proscription, against abridging freedom of speech.

Gentala, 244 F.3d. at 1067 (citations omitted).

460. *See, e.g., Gentala*, 244 F.3d at 1067 n.1 (discussing the National Day of Prayer). The Ninth Circuit stated that:

> It is worth noting at the outset that this case does not concern the constitutionality of the Congressionally-established National Day of Prayer. Congress first proclaimed such an annual "day" in 1952, as it has issued innumerable other resolutions proclaiming national "days." It does not appear that there is any federal government funding or support for any National Day of Prayer events; the National Day of Prayer Task Force

obvious examples include our currency, imprinted with "in God we trust," the reference to God in the Pledge of Allegiance, and Christmas, which is recognized as a federal holiday. The *Good News* decision further blurs the line separating church and state by moving the line between subject matter and viewpoint discrimination with respect to religion.[461] This, in turn, will present more opportunities for courts to decide whether and when the Establishment Clause might silence religious viewpoint in a limited public forum.[462]

For example, *Gentala* was already decided on Establishment Clause grounds and is likely to be decided the same way again.[463] The Supreme Court's remand suggests that the denial of funding to the Gentalas constitutes viewpoint discrimination.[464] Under the Establishment Clause, the denial of funding may be necessary to prevent a Establishment Clause violation.[465] Therefore, the denial of funding may be found unconstitutional under a Free Speech analysis,[466] but required under an Establishment Clause analysis. In *Gentala,* if the

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> that promotes participation in the event is a private, nonprofit organization. Nor is the National Day of Prayer in any respect sectarian (although its very point is to favor religion over nonreligion). The original congressional resolution, the 1988 amendment fixing the first Thursday in May as the National Day of Prayer, and the Task Force all stress that the Day is meant as an opportunity for all Americans who wish to do so to pray according to their own faith, not to promote any particular religion or form of religious observance.

Id. (citations omitted) (parenthesis in original). *See generally* Theresa V. Gorski, Kendrick *and Beyond: Re-establishing Establishment Clause Limits on Government Aid to Religious Social Welfare Organizations*, 23 COLUM. J.L. & SOC. PROBS. 171 (1990) (discussing government aid to religious organizations that perform social services).

461. Underwood, *supra* note 351, at 287.

> The direct impact of the Good News case is to blur the line separating church and state. An indirect effect, probably unintended by the Court, could be to furnish an argument fortifying the line of separation between church and state against pressure to further its eradication. When the political tom-toms are beating their loudest, claiming that religion has been banned from the public schools, and when in a dazzling display of post hoc, ergo propter hoc reasoning everything from sun spots to crab grass is blamed on its absence, and school-sponsored religious observances are advocated as a curative, we can now say: 'What ban? We've got equal access.' Equal access can lead to student and parental choice rather than the pressure of official observances.

Id. (footnotes omitted).

462. After *Good News*, if governments wish to keep groups that practice religious indoctrination, such as the Good News, out of their limited public forums, they will need to draft their regulations creating those limited public forums more carefully. Avoiding discriminating against religious viewpoint, opening a limited public forum to a wide variety of community activities, and prohibiting groups which practice religious indoctrination from using the limited public forum will be tantamount to walking a tight rope.

463. *See supra* notes 423-444 and accompanying text.

464. *See supra* notes 423-444 and accompanying text.

465. *See supra* notes 423-444 and accompanying text.

466. *See supra* notes 421-459 and accompanying text.

speech takes place in a limited public forum, rather than being government speech, and if the Court grants certiorari, how will the Court ultimately decide?

By finding that the restriction in *Good News* constituted viewpoint discrimination, the Court invariably allows more religious speech into limited public forums. This in turn may force the development of limited public forum Establishment Clause arguments. Although *Rosenberger* purported not to decide whether the Establishment Clause could justify viewpoint discrimination, the Court stated that there is no Establishment Clause violation "in honoring duties under the Free Speech Clause." This strongly suggests that in a case like *Gentala*, where religious speech was restricted to prevent an Establishment Clause violation due to perceived government endorsement of religion, simply showing a valid Establishment Clause concern in restricting the speech may be insufficient to save the restriction.

Censorship is clearly not the answer because silencing religious speech is as much of an Establishment Clause violation as sanctioning religious speech.[467] Other options that have been suggested to avoid violating the Establishment Clause when religious speech is expressed in limited public forums include balancing the restriction in question against the perceived government endorsement and issuing a disclaimer.[468]

A. *First Principles-Balancing*

In his dissent in *Widmar*, Justice Byron R. White suggested that the Court should return to first principles because of "the difficulty in reconciling the various interests expressed in the Religion Clauses."[469]

> This requires an assessment of the burden on respondents' ability freely to exercise their religious beliefs and practices and of the State's interest in enforcing its regulation. Respondents complain that compliance with the regulation would require them to meet 'about a block and a half' from campus under conditions less comfortable than those previously available on campus. I view this burden on free exercise as minimal. Because the burden is minimal, the State need do no more than demonstrate that the regulation furthers some permissible state end. The State's interest in avoiding claims that it is financing or otherwise supporting religious worship—in maintaining a definitive separation between church and State—is such an end . . . I believe the interest of the state is suffi-

467. *See infra* note 479 and accompanying text.

468. *See infra* notes 469-482 and accompanying text.

469. *Widmar*, 454 U.S. at 288 (White, J., dissenting).

ciently strong to justify the imposition of the minimal burden on respondents' ability freely to exercise their religious beliefs.[470]

Justice White's return to first principles sounds much like the Court's traditional balancing test. If the Court were to adopt a balancing test, the Ninth Circuit's *Gentala* decision is likely to survive. The burden on the speech was minimal, as the activity took place as planned at only slightly more cost to the speakers than if the city had provided some reimbursement of costs.[471] However, if the Gentalas had not had the necessary funds, the activity may not have taken place, resulting in a chilling effect. The Court has been reluctant to chill speech, especially religious speech whose silencing also implicates the Free Exercise Clause.[472] This reluctance suggests that if the choice in a balancing test is to silence religious speech or risk perceived government endorsement of such speech, free speech concerns will prevail over Establishment Clause concerns.[473] Perhaps then, disclaimer is the answer.

B. *Disclaimer*

Several cases and scholars have suggested that a disclaimer can expel the perceived government endorsement of the religious message.[474] Would a disclaimer be enough or even acceptable? A

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470. *Id.* at 288-89.

471. *See supra* notes 228-245 and accompanying text.

472. *See supra* notes 67-74 and accompanying text (discussing religion as speech); notes 129-142 and accompanying text (discussing *Lamb's Chapel*); notes 143-176 and accompanying text (discussing *Rosenberger*); notes 246-320 and accompanying text (discussing *Good News*).

473. *See supra* notes 420-422 and accompanying text.

474. *See* Underwood, *supra* note 351, at 294 n.89 (noting suggestions in *Widmar*, 454 U.S. at 274 n.14, and *Mergens*, 496 U.S. at 251, which indicate that the Court may approve of disclaimers to prevent "erroneous impressions of state sponsorship."). Underwood also suggested that schools could limit perceived endorsement by making the time for the limited public forum later in the day rather than immediately after dismissal, or by providing a wide choice of activities so that religious activity is not the exclusive choice at any time.

> The key point is that the *Good News Club* opinion requires equal access rather than meeting every demand a religious organization may make of a school system. The gravamen of Milford's violation was 'exclusion of the Club from use of the school.' Granting access, however, does not mean guaranteeing the Club a pool of students from which to recruit its members, so long as it is given the same opportunity to attract members as other organizations. The Court concluded that granting access to the Club immediately after classes would not violate the Establishment Clause. This, however, is not the same as saying the Club has to be given access at that time. The time given to the Club must be on a par with that given to other organizations. It could not be given a time that creates artificial barriers for those who wish to attend or that places the Club at a competitive disadvantage with other organizations. It is well established that a government agency creating an open or limited public forum may impose reasonable time, place and manner restrictions that are content neutral. The Court in *Good News Club* noted that the record did not show that the school had offered an alternate time

disclaimer would have the benefit of silencing less speech, but may not completely dispel the Establishment Clause concern that government may be supporting religion. This would be especially true when funding is concerned. A sign stating that the government does not endorse the Gentalas' message would hardly alleviate a separationist's alarm at knowing that the government provided funds to allow the Gentalas to conduct a prayer session.[475]

Moreover, the disclaimer may be perceived as discriminating against religious speech. The disclaimer may initially appear to allow government to be neutral with respect to religion in terms of providing funds or facilities for all speech without regard to possible religious content, thus avoiding the Establishment Clause violation of preventing the free exercise of religion. However, if the religious message is the only message singled out for the special treatment, a reasonable observer is likely to perceive that the message has a special stigma attached to it. Thus, the selective disclaimer may not be as neutral in practice as in theory.

Although encouraging the use of disclaimers, commentator James Underwood recognized their limitations. With respect to the use of schools as limited public forums, Underwood suggested that "[t]he school also could deter misconceptions of state sponsorship by issuing a disclaimer. Such disclaimers, however, must be scrupulously neutral with no hint of favoring or punishing any particular organization or type of organization."[476] In practice, creating such a disclaimer may be difficult or impossible.

Underwood further suggested that "any aura of state financial sponsorship can be avoided by charging a reasonable fee that is directly geared to the cost of providing the facilities to outside users, uniform

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> to the Club, and that '[i]n any event, consistent with *Lamb's Chapel* and Widmar, the school could not deny equal access to the Club for any time that is generally available for public use.' This statement implies that the school, even if it has opened its facilities to the public, could declare certain times, such as immediately after the close of classes, when the school would not be available to outsiders so long as the rule is applied even handedly. This statement also implies that if this scheduling is done, reasonable alternative times should be afforded on a non-discriminatory basis. This, however, does not mean a time at which a pool of students is ready and waiting, so long as no other group is given such an advantageous time. Thus, the school could create a temporal cordon sanitaire at which no meetings conducted by outside groups are permitted, but such groups are given reasonable alternate times. This would avoid outside groups taking advantage of the pool of students created by the compulsory school attendance laws and negate any impression that the clubs are part of the state-sponsored curriculum.

See Underwood, *supra* note 351 at 291-93 (footnotes omitted).

475. *See supra* note 104 (stating that although funding and endorsement concerns overlap, such an overlap is not necessary).

476. *See* Underwood, *supra* note 351, at 294.

to all such users, and not designed to deter use of the facilities."[477] While this may solve the perceived endorsement problem in most limited public forums, it will be inadequate in a scenario similar to *Gentala* where the limited public forum in question consisted only of city funding.

Finally, using a disclaimer raises its own Establishment Clause concern through what may be viewed as excessive government involvement with religion and censorship.[478] After all, the Establishment Clause calls for government to stay out of religion as well as for religion to stay out of government. As recognized in *Rosenberger*,

> [I]deas . . . would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being . . . . As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.[479]

While it is clear that censorship is not the answer, a disclaimer is difficult because it may entail government entanglement with religion. Government would have to preview the speech in question to determine whether it would disclaim involvement. Additionally, a disclaimer may send a message of governmental disapproval.[480] Finally, a disclaimer only alleviates the Establishment Clause endorsement concern; it does nothing to alleviate the funding concern.

The inadequacy of the disclaimer, however, depends on the program itself. Perhaps, if the funding in *Gentala* created a limited public forum rather than government speech,[481] it created a forum where it would be impossible to avoid either unconstitutionally discriminating against religion or unconstitutionally directly funding a religious message. The restrictions on the forum were of the city's creation. The answer to the conundrum of religious speech in limited public forums may be that the burden should lie with the government to ensure that the forum created is capable of conforming to constitutional bounds. As one commentator, Leslie Jacobs, noted,

> [E]ven applying the Establishment Clause endorsement precedents leads to the conclusion that the government almost always has the ability to structure its forum—either by initial design or disclaimer—to avoid reasonable misapprehensions of endorsement.

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477. *Id.*

478. *Rosenberger*, 515 U.S. at 844-45.

479. *Id.*

480. *See supra* notes 475-476 and accompanying text.

481. *See supra* notes 433-437 and accompanying text.

That it chooses not to do so should not provide authority for the government to discriminate among subsidized speakers.[482]

VI. Conclusion

The Court seems to require limited public forums to allow religious indoctrination whenever those forums allow general or moral instruction.[483] Therefore, the Court will soon be faced with the question of whether preaching is to be allowed in limited public forums.[484] The Court has failed to state whether viewpoint discrimination can be justified.[485] However, by labeling religious indoctrination as viewpoint rather than subject matter, the Court will soon be asked to make that determination by weighing the constitutional values of free speech against no establishment.

It would have been a simple matter to label the religious instruction in *Good News* religious content, which could then have easily been siphoned out of a limited public forum. By labeling it as unconstitutional viewpoint discrimination, the Court gives insight into its likely holding when the question arises as to whether religious worship can be excluded from a limited public forum.[486]

Not only did the *Good News* Court avoid finding a First Amendment conflict by identifying the issues as it did,[487] the majority's gloss over the facts allowed the Court to brush over any potential Establishment Clause violation.[488] Deciding whether a government program violates the Establishment Clause involves close attention to details,[489] however, the *Good News* Court glibly swept any details with respect to the activities of the club under the table.[490]

It might sound natural for the Court to suggest that religious worship cannot be excluded from a limited public forum that allows instruction. The suggestion that a limited public forum must also double as a church is quite disturbing.[491] Now that the Supreme Court has held that the restriction against religious indoctrination in a limited

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482. Leslie Gielow Jacobs, *The Public Sensibilities Forum,* 95 Nw. U. L. Rev. 1357, 1399 (2001). *See also* Brief for Petitioners, Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001) (No. 99-2036) (recognizing that a restriction on subject matter could be twisted to silence disfavored speech).

483. *See supra* notes 389-422 and accompanying text.

484. *See supra* notes 423-445 and accompanying text.

485. *See supra* notes 51-59 and accompanying text.

486. *See supra* notes 445-459 and accompanying text.

487. *See supra* notes 410-422 and accompanying text.

488. *See supra* notes 302-320 and accompanying text.

489. *See Gentala,* 244 F.3d at 1068 (stating "the devil is . . . emphatically in the details.").

490. *See supra* notes 410-422 and accompanying text.

491. *See supra* notes 207-218 and accompanying text.

public forum that allows the teaching of morals amounted to unconstitutional viewpoint discrimination, will the Establishment Clause prevent a limited public forum from being used for religious worship? Since the Supreme Court has never decided this issue, it will have to be developed by the circuit courts.[492] So the *Good News* decision, while considerably blurring the already blurry distinction between religious viewpoint and religious subject matter,[493] is simultaneously forcing the Establishment Clause issue to a head.

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492. *See supra* notes 460-468 and accompanying text.

493. *See supra* notes 380-422 and accompanying text.

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