

4-20-2011

Worshiping Separation: Worship in Limited Public Forums and the Establishment Clause

William A. Glaser

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Recommended Citation

William A. Glaser *Worshiping Separation: Worship in Limited Public Forums and the Establishment Clause*, 38 Pepp. L. Rev. 4 (2011)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol38/iss4/3>

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I. INTRODUCTION

On Sunday, December 26, 1802, President Thomas Jefferson had a choice. He could either attend afternoon worship services at the Treasury Building, just to the east of the White House,¹ or he could brave the rain and attend morning services at the United States Capitol.² The President chose to go the Capitol as had been his practice for the last year.³ He rode horseback through the rain the 1.2 miles up muddy Pennsylvania Avenue to the Capitol, where he listened to a sermon in the House chamber.⁴ The religious services in the Capitol had begun in 1795, during George Washington's presidency, and they continued weekly until the 1850s.⁵ No one objected or challenged the practice as unconstitutional.

Almost two hundred years later, in August 2002, a federal district court issued a preliminary injunction allowing pastors Robert Hall and Jack Roberts to hold Sunday services in a Bronx, New York, middle school for their small church group called Bronx Household of Faith.⁶ The school district had denied the church group access since 1995 under a policy that allowed school buildings to be used for "social, civic, and recreational meetings" but excluded "religious services" and later "religious worship services."⁷ The Board of Education defended its policy as necessary to

1. The Treasury Building has since been burned and rebuilt, but it remains at about the same location. See United States Department of the Treasury, About History of the Treasury, http://www.treasury.gov/about/history/Pages/edu_history_brochure.aspx#h3 (last visited Jan. 21, 2011).

2. Diary of Manasseh Cutler (Dec. 26, 1802) and Letter from Manasseh Cutler to Joseph Torrey (Jan. 3, 1803), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., at 114, 119 (William Parker Cutler & Julia Perkins Cutler eds., Cincinnati, Robert Clarke & Co. 1888). Massachusetts Representative Manasseh Cutler attended both services and observed the President in the Capitol where "his ardent zeal brought him through the rain and on horseback to the Hall." Letter from Manasseh Cutler to Joseph Torrey, *supra*.

3. Letters from Manasseh Cutler to Joseph Torrey (Jan. 4, 1802 and Jan. 3, 1803), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 66, 119.

4. Diary of Manasseh Cutler (Dec. 26, 1802), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 114, 119; see also *In Pennsylvania Avenue: A Stroll Through Washington's Chief Street*, N.Y. TIMES, Jan. 1, 1893, at 15 ("For years Pennsylvania Avenue was a wide and deep mud hole.").

5. 1 WILHELMUS BOGART BRYAN, A HISTORY OF THE NATIONAL CAPITAL FROM ITS FOUNDATION THROUGH THE PERIOD OF THE ADOPTION OF THE ORGANIC ACT 260 (1914) (citing *Impartial Observer and Washington Advertiser*, June 17, 1795); JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 84 (1998).

6. *Bronx Household of Faith v. Bd. of Educ.*, 226 F. Supp. 2d 401, 427 (S.D.N.Y. 2002).

7. *Bronx Household of Faith v. Bd. of Educ.*, 400 F. Supp. 2d 581, 588, 598 (S.D.N.Y. 2005).

avoid an establishment of religion prohibited by the First Amendment.⁸ One group supporting the board's policy submitted an amicus brief quoting Thomas Jefferson's famous reference to a "wall of separation between church and State."⁹ Ultimately, the district court decided in favor of Bronx Household on the merits, but the case has yet to be resolved on appeal.¹⁰ In its most recent hearing of the case, the Second Circuit failed to produce a majority opinion, but Judge Calabresi argued in a lengthy concurrence that excluding the church group was permissible.¹¹

Bronx Household is only one of the recent cases struggling with whether government officials may exclude religious worship from limited public forums.¹² In *Faith Center Church Evangelistic Ministries v. Glover*, the Ninth Circuit found that "religious services" could be forbidden in a library meeting room because religious worship was a distinct category of speech.¹³ In *Badger Catholic, Inc. v. Walsh*, by contrast, the Seventh Circuit held that a student group could *not* be denied access to a limited public forum simply because the group engaged in "worship, proselytizing, or religious instruction."¹⁴ These decisions lie at the intersection between the Free Speech and Establishment clauses and have significant implications for both.¹⁵

8. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 95 (2d Cir. 2007) (Calabresi, J., concurring).

9. Brief for Ass'n of the Bar of N.Y. as Amicus Curiae Supporting Defendants-Appellants at 13, *Bronx Household*, 492 F.3d 89 (No. 06-0725-cv) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)), 2006 WL 4968857, at *13.

10. *Bronx Household*, 492 F.3d at 91 (remanding to the district court based on ripeness). The Second Circuit heard oral arguments on the merits on October 6, 2009, but it had not issued a decision at the time of this writing.

11. *Id.* at 106 (Calabresi, J., concurring).

12. Older Supreme Court cases use the Latin plural of "forum," which is "fora." See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). More recently, however, the Court has employed the modernized plural, "forums," and this Comment will do so as well. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000); *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1130 (2009).

13. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 903, 915 (9th Cir. 2007).

14. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 777, 782 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011). The forum in *Badger Catholic* was not a building, but a university's program for funding student groups. *Id.*

15. A number of authors have written about *Bronx Household* and *Glover*, but they have focused mostly on free speech considerations rather than the Establishment Clause. See Norman T. Deutsch, *May Religious Worship Be Excluded from a Limited Public Forum? Commentary on the Ninth Circuit Court of Appeals Decision in Faith Center Church Evangelistic Ministries v. Glover*, 31 U. HAW. L. REV. 29 (2008); Richard Esenberg, *Of Speeches and Sermons: Worship in Limited Purpose Public Forums*, 78 MISS. L.J. 453 (2009); Joshua B. Marker, Note, *The Worship Test: Balancing the Religion Clauses in the Limited Public Forum*, 60 HASTINGS L.J. 673 (2009); Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008); John Tyler, Comment, *Is Worship a Unique*

The circuit courts in *Bronx Household* and *Glover* have focused on free speech jurisprudence and have made almost no reference to the Establishment Clause.¹⁶ But these cases have been litigated in the shadow of the Establishment Clause, which can be invoked both to support and to oppose the exclusion of worship.¹⁷ In June 2009, the district court on remand in *Glover* addressed the Establishment Clause issue and reached the opposite disposition than the Ninth Circuit reached above.¹⁸ The district court concluded that to exclude worship from a limited public forum fosters an excessive government entanglement with religion in violation of the Establishment Clause.¹⁹ The Seventh Circuit also addressed the Establishment Clause and concluded that it presented no impediment to giving equal access to religious worship.²⁰ Although there is Supreme Court precedent on point, lower courts have struggled with (or attempted to ignore) three important questions. First, what is “worship”? Second, does the Establishment Clause justify excluding worship from a limited public forum? Third, does an attempt to define worship and exclude it from a limited forum violate the Establishment Clause?

If these questions remain unanswered, courts such as the Ninth Circuit will allow officials to exclude religious groups from public forums that are otherwise open to a wide range of activities. This will not only prevent church groups from using what are often the most available venues for their activities, but it will also require local government actors to make impermissible determinations about religious doctrines and practices. The *Glover* decision and Judge Calabresi’s concurrence in *Bronx Household* have muddied the waters of First Amendment jurisprudence and directly conflict with the Supreme Court’s precedent requiring equal access for religious groups. With the Seventh Circuit’s *Badger Catholic* decision in September 2010, the issue has ripened into a circuit split, a split that will likely require resolution by the Supreme Court.²¹

Subject or a Way of Approaching Many Different Subjects? Two Recent Decisions that Attempt to Answer This Question Set the Second and Ninth Circuits on a Course Toward State Entanglement with Religion, 59 MERCER L. REV. 1319 (2008).

16. See *Bronx Household*, 492 F.3d at 105 n.8 (Calabresi, J., concurring); *Glover*, 480 F.3d at 919 n.20.

17. See *Bronx Household*, 492 F.3d at 95 (Calabresi, J., concurring) (noting that the school board argued that if viewpoint discrimination took place, it was justified to avoid an Establishment Clause violation); *Faith Ctr. Church Evangelistic Ministries v. Glover*, No. 04-03111, 2009 WL 1765974, at *9–10 (N.D. Cal. June 19, 2009) (holding that to exclude worship would constitute an excessive entanglement with religion). Compare *Tebbe*, *supra* note 15, at 1267–68 with *Deutsch*, *supra* note 15, at 55.

18. *Glover*, 2009 WL 1765974, at *9–10.

19. *Id.*

20. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 777–79, 782 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011). This directly conflicts with the Ninth Circuit’s holding in *Glover*, even though the Ninth Circuit did not specifically address the Establishment Clause issue. *Glover*, 480 F.3d at 903, 915.

21. In an earlier phase of the *Bronx Household* litigation, the Second Circuit noted some

Part II of this Comment gives the background of the Supreme Court's jurisprudence regarding religious use of public forums and the Establishment Clause. Part III details the early history of religious worship in Washington, D.C.'s federal buildings. Part IV examines the *Bronx Household, Glover*, and *Badger Catholic* decisions. Part V considers how worship in public forums should be addressed under modern Establishment Clause tests. Part VI concludes.

II. THE INTERSECTION OF THE FREE SPEECH AND ESTABLISHMENT CLAUSES IN SUPREME COURT JURISPRUDENCE

The question of whether worship may be excluded from public buildings requires understanding both the Free Speech and Establishment Clauses of the First Amendment. Because this Comment focuses on the Establishment Clause, it will begin with an overview of the Supreme Court's approach to that Clause. It will then discuss the Court's cases involving religious use of limited public forums.

A. *The Supreme Court's Establishment Clause Tests*

The First Amendment's Establishment Clause says, "Congress shall make no law respecting an establishment of religion . . ." ²² The Establishment Clause did not play a prominent role in the Supreme Court's jurisprudence prior to the 1940s. ²³ Since that time, the Court has developed

"unresolved issues that arise from the recent Supreme Court precedent." *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 355 (2d Cir. 2003). The court asked:

Would we be able to identify a form of religious worship that is divorced from the teaching of moral values? Should we continue to evaluate activities that include religious worship on a case-by-case basis, or should worship no longer be treated as a distinct category of speech? . . .

. . . In all of this process, is there not a danger of excessive entanglement by the state in religion?

Id. The court noted that "[h]ow the Supreme Court answers these difficult questions will no doubt have profound implications for relations between church and state." *Id.*

22. U.S. CONST. amend. I.

23. In 1940, the Court determined for the first time that the First Amendment applied to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."). The Court's holding in *Cantwell* was limited to the Free Exercise Clause, but seven years later the Court held that the Establishment Clause applied to the states. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

In *Everson*, the Court upheld a New Jersey law that allowed government funding of transportation to school, including Catholic parochial schools. *Id.* at 3. The Court said:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws

a handful of tests or principles that it employs in its modern Establishment Clause jurisprudence.

1. The *Lemon* Test

The oldest of these tests is the three-prong *Lemon* test, which requires that “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster ‘an excessive government entanglement with religion.’”²⁴ The *Lemon* test has been heavily criticized by courts and commentators.²⁵ The Supreme Court’s current members are divided over the test, and the Court frequently declines to apply *Lemon* in Establishment Clause cases.²⁶

The first prong of *Lemon* focuses on whether the government “acts with the ostensible and predominant purpose of advancing religion.”²⁷ Ordinarily, courts give deference to the stated purpose of a government

which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”

Id. at 15–16. After *Everson*, the Court began periodically to strike down state laws as contrary to the Establishment Clause. See, e.g., *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948) (finding religious instruction in public schools unconstitutional); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (finding prayer in public school to be a violation of the Establishment Clause); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down direct state aid to nonpublic schools).

24. *Lemon*, 403 U.S. at 612–13 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970) (internal citation omitted)).

25. See Thomas C. Marks, Jr. & Michael Bertolini, *Lemon is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 B.Y.U. J. PUB. L. 1 (1997). Justice Antonin Scalia has been one of *Lemon*’s most pointed critics, and has pointed out its lack of acceptance:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* . . . conspicuously avoided using the supposed “test” but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart (the author of today’s opinion repeatedly), and a sixth has joined an opinion doing so.

Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

26. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319–20 (2000) (Rehnquist, J., dissenting) (citing cases that chose not to apply *Lemon* or said it was not binding); *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (declining explicitly to apply the *Lemon* test).

27. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005).

action, but the Supreme Court applies a more careful scrutiny if it appears that the government is offering a sham purpose to cover a religious motive.²⁸ The purpose prong has a number of problems. First, determining whether the purpose of any legislative body is “secular” or “religious” is inevitably difficult, if not impossible.²⁹ Even if it were not, the test does not account for situations where state officials advocate a neutral policy for religious reasons. More importantly, the purpose prong can easily be used to invalidate laws aimed at promoting religious freedom.³⁰ The First Amendment was not designed to protect citizens from religion, but to protect religion from government interference.³¹ Some laws aimed at protecting the free exercise of religion require a purpose that is not primarily “secular.”³²

The second prong of *Lemon* does not invalidate state action only marginally advancing or inhibiting religion, but focuses on the primary effect of the action.³³ In recent years, the excessive entanglement prong has

28. See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38 (1985) (O'Connor, J., concurring)) (“When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to ‘distinguis[h] a sham secular purpose from a sincere one.’”). This tension between a policy’s stated and actual purpose points to one of the problems with *Lemon*’s first prong. If, on the one hand, courts rely simply on the stated purpose of a government action, the state can avoid a constitutional violation by not stating its religious purpose. See *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting). This would make the purpose prong meaningless. If, on the other hand, courts try to eradicate even hidden motives to advance religion, they would have to strike down many laws that incidentally or directly benefit religion. *Id.* at 108–09.

29. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) (“[I]t is virtually impossible to determine the singular ‘motive’ of a collective legislative body, and this Court has a long tradition of refraining from such inquiries.” (citation omitted)).

30. See *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring) (“It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden.”); Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993) (“Much of the *Lemon* framework seemed to assume that the Establishment Clause imposes a constitutional disability on religion—that it is an ‘anti-religion’ counterweight to the ‘pro-religion’ Free Exercise Clause rather than a protection of religious liberty. The ‘secular purpose’ prong was sometimes read to reflect this erroneous assumption. It misleadingly implied (and many courts thus held) that laws motivated by a desire to promote religious freedom or to accommodate religious practice automatically constitute an establishment of religion.” (footnote omitted)).

31. As the Supreme Court said in *Everson*, “The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (S.C. Ct. App. 1843)).

32. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 129 (1992) [hereinafter McConnell, *Religious Freedom*].

33. See *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 696 (1989) (quoting

been at least partially combined with the effects prong because both inquire into the institution benefited, the aid provided, and the resulting relationship between the government and religion.³⁴ Professor Michael McConnell points out that the effects prong can promote discrimination against religion.³⁵ First, government action frequently benefits a broad range of activities and institutions, both religious and non-religious, but *Lemon* prohibits such action that primarily advances religious groups.³⁶ Second, like the purpose prong, the effects prong does not distinguish between promoting religion and promoting religious freedom.³⁷

The excessive entanglement prong has some value in principle, in that it is aimed at preventing government intrusion into religion.³⁸ Again, however, the excessive entanglement prong can be employed to be at odds with religious freedom. Some government actions ensuring free exercise of religion or equality for religious groups require what could be considered government entanglement with religion.³⁹

Despite deserved criticism, the *Lemon* test remains the most prominent Establishment Clause test. A majority of the Supreme Court has employed *Lemon*'s purpose prong as recently as 2005.⁴⁰ Thus, it is an important starting point for any analysis of the Establishment Clause.

2. The Endorsement or Reasonable Observer Test

The second test is the endorsement test, which stems from Justice

McGowan v. Maryland, 366 U.S. 420, 442 (1961) (“[A] statute primarily having a secular effect does not violate the Establishment Clause merely because it ‘happens to coincide or harmonize with the tenets of some or all religions.’”).

34. *Agonisti v. Felton*, 521 U.S. 203, 232 (1997) (“Thus, it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute’s effect.”). See also *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000) (plurality opinion) (recognizing that *Agonisti* modified the *Lemon* test at least with respect to school aid).

35. McConnell, *Religious Freedom*, *supra* note 32, at 129.

36. *Id.* For example, opening a public school or library for community use, as in *Bronx Household and Glover*, benefits a range of groups and viewpoints.

37. *Id.* McConnell points out that advancing religious liberty necessarily advances religion, but that the opposite is not always true. *Id.* Advancing a particular religion can conflict with religious liberty. *Id.* “By failing to distinguish between these two forms of ‘advancement,’ the effects prong of the *Lemon* test interferes with benign government actions to accommodate or facilitate free religious exercise.” *Id.*

38. See McConnell, *Religious Freedom*, *supra* note 32, at 129.

39. Paulsen, *supra* note 30, at 809. Professor McConnell points out that “the practice of religion is frequently intertwined with public life, and consequently that government and religion must interact if religion is even to survive—let alone participate in civil society on a full and equal basis.” McConnell, *Religious Freedom*, *supra* note 32, at 130. Particularly because of the amorphous nature of the term “entanglement,” judges are empowered to invalidate any government action they consider too closely connected with religion.

40. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 861–64 (2005) (applying *Lemon*'s purpose prong).

O'Connor's concurrence in *Lynch v. Donnelly* in 1984.⁴¹ This "test" is not always used independently but is sometimes used merely to analyze *Lemon's* first and second prongs.⁴² The endorsement inquiry focuses on whether a reasonable observer would perceive a government endorsement of religion.⁴³ A majority of the Court applied the test for the first time in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.⁴⁴

Under Justice O'Connor's formulation of the test, the reasonable observer is not based on any individual or group.⁴⁵ Rather, "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears."⁴⁶ In *Pinette*, Justice O'Connor concurred in the Court's judgment that the Ku Klux Klan could display a cross in a public space that was open to all forms of expressive conduct.⁴⁷ She concluded that a reasonable observer, aware that the area surrounding the capitol was open to both secular and religious groups, would not perceive an endorsement of religion.⁴⁸ Justice John Paul Stevens, in his dissent, criticized Justice O'Connor's "ideal human" as a "legal fiction," and he expressed his preference for an ordinary reasonable person standard.⁴⁹ The endorsement

41. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

42. *See id.* at 690 ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.").

43. *See Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

44. *Id.* at 592 (majority opinion) ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."). In *County of Allegheny*, a majority of a very fragmented Court held that the display of a nativity scene on public property violated the Establishment Clause but upheld as constitutional the display of a menorah next to a Christmas tree and a sign saluting liberty. *Id.* at 601–02, 620.

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

46. *Id.* Scholars have criticized this test as unrealistic because it requires the hypothetical observer to know so much. *See* Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 466 (2006) ("[T]he reasonable observer evaluating government purpose will be required to have an unreasonably vast command of issues of law, yet is confined by a more limited command of facts than those to which a court is privy."); Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 FIRST AMEND. L. REV. 139, 162–63 (2006) ("When analyzing the first [*Lemon*] prong, the government's purpose, the fiction of a reasonable observer requires the hypothetical observer to know much more than an actual observer knows.").

47. *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring).

48. *Id.*

49. *Id.* at 800 n.5 (Stevens, J., dissenting).

test's great weakness is that it is unclear what the reasonable observer knows and how the observer would perceive a particular government action.⁵⁰ In fact, this is always a matter of opinion.⁵¹ So, the endorsement test is not really a "test" as much as it is a stand-in for a judge's own opinion.⁵² Nevertheless, the Court or its members continue to invoke the endorsement test.⁵³

3. The Coercion Test

The third test is the coercion test, first employed by the Court in *Lee v. Weisman*.⁵⁴ In *Weisman*, the Court held that nonsectarian prayer at a middle school graduation violated the Establishment Clause.⁵⁵ Writing for the majority, Justice Anthony Kennedy said, "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.'"⁵⁶ Justice Kennedy concluded that there were "subtle coercive pressures" upon students to stand and participate in the prayer because students "had no real alternative . . . to avoid the fact or appearance of participation."⁵⁷ But, although Justice Kennedy relied on coercion in his opinion, Justices Harry Blackmun and David Souter were careful to clarify

50. See Kosse, *supra* note 46, at 163 ("[T]his method will only work if there is agreement regarding what it is the reasonable observer must know. Absent such agreement, a judge must decide between competing theories."); Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 724 ("Part of the difficulty is that the Supreme Court Justices do not, themselves, have a clear understanding of what the test is supposed to accomplish. Nor is there any consensus on the characteristics of an objective observer.").

51. Justice Scalia, writing for the plurality in *Pinette*, implied that the endorsement test, if used at all, should apply only to government expression, not to private expression. *Pinette*, 515 U.S. at 763–64 (plurality opinion). He criticized Justice O'Connor's endorsement test as supplying "no standard whatsoever," pointing to disagreement among the circuit courts, and even among members of the Supreme Court, as to who the reasonable observer should be. *Id.* at 768 n.3.

52. See Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48 [hereinafter McConnell, *Accommodation*] ("Looking to an 'objective observer' cannot substitute for constitutional standard. Such a formulation serves merely to avoid stating what considerations inform the judgment that a statute is constitutional or unconstitutional. If Justice O'Connor's 'objective observer' standard were adopted by the courts, we would know nothing more than that judges will decide cases the way they think they should be decided."). This makes the test at best redundant and at worst deceptive and confusing.

53. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–07 (2000); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) ("The eyes that look to purpose belong to an 'objective observer' . . ."); *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring) ("The adoption of [the reasonable observer test] would thus serve coherence within Establishment Clause law . . .").

54. *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

55. *Id.*

56. *Id.* at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

57. *Id.* at 588.

in their concurrences that coercion was only one type of violation and not sufficient by itself as an Establishment Clause test.⁵⁸

Justice Kennedy's test is difficult to justify and even more difficult to apply. First, to contend that "subtle pressures" to stand during prayer constitute an "establishment of religion" stretches the word "establishment" far beyond its ordinary meaning.⁵⁹ More importantly, the test presents serious problems with the state action doctrine—the longstanding principle that only state actors can violate the constitution.⁶⁰ The First Amendment only prohibits a *law* respecting an establishment of religion. Under Justice Kennedy's version of the coercion test, the government violates the Establishment Clause if it provides the context in which "subtle coercive pressures" occur, even if the pressures are created by private actors.⁶¹

In his dissent in *Lee v. Weisman*, Justice Scalia proposed an alternative test that would require legal coercion backed by a penalty, rather than "psychological coercion."⁶² He said, "[W]hile I have no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion or its exercise,' . . . I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . ."⁶³ Justice Clarence Thomas also

58. *Id.* at 604–06 (Blackmun, J., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient."); *id.* at 619 (Souter, J., concurring) ("[Precedent] simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.")

59. The Oxford English Dictionary gives as one definition of establishment, "[t]he 'establishing' by law (a church, religion, form of worship)." "Establishment," OXFORD ENGLISH DICTIONARY ONLINE. The word used in this sense means "[n]ow usually, the conferring on a particular religious body the position of a state church." *Id.* See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 778 (2002) (defining "establish" as "to make firm or stable . . . to found or base securely . . . to assist, support, or nurture so that stability and continuance are assured . . . to make a national or state institution of (a church)").

60. See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (noting the distinction between state action, subject to scrutiny under the Fourteenth Amendment, and "private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be").

61. See Paulsen, *supra* note 30, at 798–99 ("Contrary to the confused approach of the Weisman majority, it must be made clear that the forbidden coercion is government coercion—state action, not private action—lest the Establishment Clause be perverted into a sword of suppression of private religious expression and evangelism that occurs on public property and lest private expression generally be deprived of constitutional protection whenever it occurs in a forum maintained or sanctioned by the state.")

62. *Lee*, 505 U.S. at 638, 642 (Scalia, J., dissenting). Justice Scalia might not have been proposing a constitutional "test" of legal coercion. He could have simply been acknowledging that legal coercion would constitute an Establishment Clause violation.

63. *Id.* at 642 (citation omitted).

supports a legal coercion test.⁶⁴ A significant benefit of the legal coercion test is that it is relatively easy to apply, as compared with Justice Kennedy's test.⁶⁵

A majority of the Court has never adopted the coercion principle as an independent Establishment Clause test. A majority has, however, applied Justice Kennedy's version in conjunction with other tests.⁶⁶ Thus, the coercion test forms an important element of modern Establishment Clause jurisprudence.

4. Neutrality

Apart from these three tests, the Court has frequently referred to the principle of government neutrality toward religion.⁶⁷ The Court sometimes invokes the neutrality principle in conjunction with other tests and sometimes as an independent test of sorts.⁶⁸ Whether expressed or not, however, the neutrality principle is behind much of today's Establishment Clause jurisprudence.⁶⁹

The neutrality principle arose out of *Everson v. Board of Education*, in which the Court held that neither the state nor federal governments may "pass laws which aid one religion, aid all religions, or prefer one religion over another."⁷⁰ The neutrality required by the Court's modern jurisprudence is not necessarily *strict* neutrality because the First Amendment recognizes that religion requires certain government protections.⁷¹ As Justice O'Connor has observed, "It is difficult to square

64. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 48, 52–54 (Thomas, J., concurring in the judgment) ("The traditional 'establishments of religion' to which the Establishment Clause is addressed necessarily involve actual legal coercion . . .").

65. See Ralph W. Johnson, III, Lee v. Weisman: *Easy Cases Can Make Bad Law Too—The "Direct Coercion" Test Is the Appropriate Establishment Clause Standard*, 2 GEO. MASON INDEP. L. REV. 123, 178 (1993). Ralph Johnson argues that the "direct coercion" standard is beneficial because it focuses "on the actual effects of governmental power and not on mere appearances." *Id.* at 178–79. Furthermore, he argues that it comports best with the Establishment Clause's original purpose. *Id.* at 179.

66. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying *Lemon* and the endorsement prong as well as the coercion test).

67. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) ("[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.").

68. See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (contrasting neutrality with endorsement); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (finding that there is no Establishment Clause violation for neutral policies benefiting religion).

69. See Monte Kuligowski, *Does the Declaration of Independence Pass the Lemon Test?*, 2 DUKE J. CONST. L. & PUB. POL'Y 287, 296 (2007) ("We must therefore remember that all subsequent tests invented and used by the Court (to define establishment) are merely subsets and expressions of the neutrality principle.").

70. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

71. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely

any notion of ‘complete neutrality,’ . . . with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion.”⁷² One difficulty in applying the neutrality principle is that it neither requires strict neutrality nor allows obvious disfavor toward religion.⁷³

Although it is widely accepted as a pillar of Establishment Clause jurisprudence, the neutrality principle rests upon a shaky historical foundation. As observed by Justice William Rehnquist in his dissent in *Wallace v. Jaffree*, none of the members of the First Congress

expressed the slightest indication that they thought the language before them . . . or the evil to be aimed at, would require that the Government be absolutely neutral between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly.⁷⁴

Justice Joseph Story in his *Commentaries* also indicated that the historical understanding of the First Amendment did not require neutrality. He wrote about the First Amendment:

Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would

tolerance, of all religions, and forbids hostility toward any.”); McConnell, *Accommodation*, *supra* note 52, at 9.

72. *Wallace v. Jaffree*, 472 U.S. 38, 82–83 (1985) (O’Connor, J., concurring).

73. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test*, 86 MICH. L. REV. 266, 314 (1987) (“This pervasive commitment to neutrality has not yet generated any clear and convincing account of what neutrality actually entails. It has become increasingly clear, rather, that neutrality is a ‘coat of many colors.’” (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring))).

74. *Wallace*, 472 U.S. at 99 (Rehnquist, J., concurring).

have created universal disapprobation, if not universal indignation.⁷⁵

Thus, the neutrality principle is not well-supported by constitutional history.⁷⁶ It nevertheless remains a lynchpin of modern Establishment Clause jurisprudence.⁷⁷

5. History and Traditions

A final principle or test employed by the Court is the “history and traditions” approach to the Establishment Clause.⁷⁸ This approach looks at whether a practice or policy is “deeply embedded in the history and tradition of this country,” dating back to the time of the Constitution’s adoption.⁷⁹ This specific test has only been employed in one case, but the Court often looks to history when interpreting the First Amendment.⁸⁰

In *Marsh v. Chambers*, the Court found that opening legislative sessions with prayer by paid chaplains did not violate the Establishment Clause.⁸¹ Legislative prayer was “deeply embedded in the history and tradition of this country,” beginning before the adoption of the Constitution.⁸² The Court observed that the First Congress authorized the appointment of paid chaplains only three days before it adopted the final language of the First Amendment.⁸³ Although historical patterns do not justify contemporary violations of constitutional provisions, “historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.”⁸⁴ Thus, the Court found that invoking Divine guidance on a legislature is neither an establishment of religion nor a step toward it, but simply an

75. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868 (Da Capo Press 1970) (1833) (footnote omitted). The Supreme Court, of course, has chosen not to follow this original understanding in many areas of Establishment Clause jurisprudence. See *Wallace*, 472 U.S. at 53 n.37.

76. This is not to say that the historical understanding of the Establishment Clause required *no* neutrality. It is likely that the framers of the First Amendment believed that the government must afford the same protections for speech motivated by irreligion as it did to speech motivated by religion. See McConnell, *Accommodation*, *supra* note 52, at 10.

77. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005).

78. See *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

79. *Id.*

80. This practice in the Establishment Clause area dates back at least to *Everson v. Board of Education*, 330 U.S. 1, 8–15 (1947). It has been employed by a majority or plurality of the Court in cases such as *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Van Orden v. Perry*, 545 U.S. 677 (2005), and has been particularly common fare in concurring and dissenting opinions. See *Wallace*, 472 U.S. 38 (Rehnquist, J., dissenting); *McCreary Cnty.*, 545 U.S. at 886–89 (Scalia, J., dissenting).

81. *Marsh*, 463 U.S. at 786.

82. *Id.*

83. *Id.* at 788. The Court found it highly unlikely that the framers of the Establishment Clause believed the Clause prohibited the practice they had just adopted. *Id.* at 790.

84. *Id.*

acknowledgement of widely held beliefs.⁸⁵

History is particularly applicable in interpreting the Establishment Clause of the First Amendment. As the Court said in *Everson*, whether a law is one respecting an establishment of religion “requires an understanding of the meaning of that language . . . [T]herefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.”⁸⁶ More recently, the Court has said an unbroken practice spanning our national existence “is not something to be lightly cast aside.”⁸⁷

The Court has at times tried to limit *Marsh*'s rationale and the applicability of history in constitutional interpretation.⁸⁸ The Court has said “*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today.”⁸⁹ The Court said historical breaches of religious neutrality do not diminish the force of the First Amendment's requirements.⁹⁰ So the Court has indicated that history is at least not conclusive. But that does not render history irrelevant. History is certainly relevant to interpreting the words “respecting an establishment of religion” in the First Amendment.⁹¹ Historical evidence of period practices, such as legislative prayer, can shed light on the intent of the First Amendment's framers.⁹² Furthermore, the

85. *Id.* at 792.

86. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). Justice Black then spent five pages tracing the history of religious freedom in America and James Madison and Thomas Jefferson's resistance to a state-supported church in Virginia. *Id.* at 8–13. His historical account has been strongly criticized by subsequent scholars. See William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 127–28 (1987) (compiling authors critical of Justice Black's historiography).

87. *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). In *Walz*, the Court found property tax exemptions constitutional for properties of religious organizations “used solely for religious worship.” *Id.* at 666–67. The Court reasoned that tax exemption is not sponsorship, and the exemption creates only a “minimal and remote involvement between church and state and far less than taxation of churches.” *Id.* at 676. The fact that the properties were used solely for religious worship was of no consequence to the Court for Establishment Clause purposes.

88. See *Cnty. of Allegheny v. ACLU Greater Pittsburg Chapter*, 492 U.S. 573, 603 (1989).

89. *Id.* *County of Allegheny* did not, however, overrule *Marsh*, which still stands as good law.

90. *Id.* at 604.

91. See *Everson*, 330 U.S. at 8. Without some reference to the historical context, one might not know that the Establishment Clause was designed to protect the ability of states to maintain established churches. Furthermore, the historical reality of the debate between Federalists and Anti-federalists is an essential backdrop to understanding the entire Bill of Rights.

92. See *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). Although a constitutional jurisprudence could theoretically be developed without reference to the Constitution's adoption and early history, such a course would be exceedingly unwise and out of line with the American tradition. Even if constitutional interpretation must sometimes develop and change with the times, it ought to at least include a real inquiry into the drafters' intent and the meaning they attached to certain provisions.

history of religious worship in early federal buildings is highly relevant to whether worship should be allowed in public buildings today.⁹³

The Court's current Establishment Clause jurisprudence seems to be a selective mixing and matching of all these tests, depending on the nature of the case and which members of the Court gain a majority.⁹⁴ But when the Establishment Clause intersects with free speech, as in *Bronx Household, Glover*, and *Badger Catholic*, the Court has been more consistent and has not allowed state actors to discriminate against religious speech by invoking the Establishment Clause.⁹⁵ In the context of public speech forums, the Court has never held that the Establishment Clause justifies a denial of equal access to religious speech or speakers.⁹⁶

B. Religious Speech in Limited Public Forums

The presence of religious groups and religious speech in public buildings is not a novel issue, but one the Supreme Court has addressed several times. The Court analyzes most restrictions on speech or expressive activity based on the type of "speech forum" in which the speech takes place.⁹⁷ In *Bronx Household, Glover*, and *Badger Catholic*, the courts concluded or assumed that the government property was a limited public forum.⁹⁸ The government creates a limited public forum when it designates

This is especially true when novel questions of law are presented that are not easily answered by established precedent.

93. Only the early history of *federal* buildings is relevant because the Establishment Clause was not applied to the states until 1947. See *Everson*, 330 U.S. at 15–16. Worship in state buildings would hardly be surprising in an era when some states still had established churches. See *Engel v. Vitale*, 370 U.S. 421, 427–28 (1962).

94. See *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 859, 867–74 (2005) (citing *Lemon* and employing the "reasonable observer" test); *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (calling the *Lemon* test "not useful" for examining a Ten Commandments monument); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307–10 (2000) (applying *Lemon*, endorsement, and coercion tests). Justice Thomas's observation that the Court's Establishment Clause jurisprudence "is in hopeless disarray" is probably more true now than when he wrote it. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

95. See discussion *infra*, notes 103–39 and accompanying text.

96. The one possible exception is *Locke v. Davey*, 540 U.S. 712 (2004) (upholding a Washington State exclusion of degrees in theology from a public scholarship). But *Davey* was decided on Free Exercise grounds, and it involved a state constitutional prohibition on providing funds for religious or devotional degrees. *Id.* at 716, 719.

97. See *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1132 (2009).

98. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 97–98 (2d Cir. 2007) (Calabresi, J., concurring); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007); *Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys.*, 578 F. Supp. 2d 1121, 1130 (W.D. Wis. 2008), *aff'd sub nom. Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 778, 782 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011). This classification is at the very least questionable. Judge Walker expressed some doubt in his *Bronx Household* dissent as to whether this classification was correct. *Bronx Household*, 492 F.3d at 128 n.7 (Walker, J., dissenting) (referring to the "limited public forum the Board has allegedly created"). One serious problem with the classification is that a limited public forum is generally defined by what it includes, not by what it excludes, and certain

a place or channel of communication for public discussion of certain subjects or for use by certain groups.⁹⁹ In such a forum, the government may impose restrictions based on subject matter or topic as long as the restrictions do not discriminate based on viewpoint and are reasonable in light of the forum's purpose.¹⁰⁰ Viewpoint discrimination takes place when the government regulates speech based on the motivating ideology, opinion, or perspective of the speaker, and this form of discrimination is always impermissible in a public forum.¹⁰¹ Viewpoint-neutral limitations on the content or subject matter of speech are permissible to "preserve[] the purposes of that limited forum," but the restrictions must be reasonable.¹⁰²

In *Widmar v. Vincent*, the Supreme Court held that a state university that opened its facilities generally to student groups could not exclude a group wishing to use the facilities for "religious worship and religious

exclusions are prohibited. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). In *Bronx Household*, state law allowed school districts to open school facilities for "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 nonexclusive and shall be open to the general public." *Bronx Household*, 492 F.3d at 92 (Calabresi, J., concurring). But the modified policy excepted "religious worship services, or otherwise using a school as a house of worship." *Id.* at 94. In *Glover*, the library was open to use by non-profits for "meetings, programs, or activities of educational, cultural or community interest," with the exception of use by schools as regular part of the curriculum and "religious services." *Glover*, 480 F.3d at 902-03. In both cases, the policies used broad language that could indicate that the government was designating a public forum, which can take place when the government "intentionally open[s] a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). See *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 218 (2d Cir. 1997) (Cabranes, J., concurring in part and dissenting in part) (noting that the Supreme Court in *Lamb's Chapel* had hinted that a school might not be able to claim it had created only a limited public forum when it opened its facilities "indiscriminately, except as to a very narrow class of excluded communicative uses"). In a designated public forum, as opposed to a limited public forum, content-based regulations must be justified by a compelling state interest and must be narrowly tailored to achieve that interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). So, if the forum classification in *Bronx Household* and *Glover* were reconsidered, it could change the applicable level of scrutiny. A full analysis, however, is beyond the scope of this Comment.

99. *Cornelius*, 473 U.S. at 802 (citing *Perry Educ. Ass'n*, 460 U.S. at 45, 46 n.7) ("In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."). See also *Sumnum*, 129 S. Ct. at 1132 (2009) ("[A] government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects.").

100. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Sumnum*, 129 S. Ct. at 1132. Restrictions based on subject matter or topic are defined as "content discrimination." *Perry Educ. Ass'n*, 460 U.S. at 59, 61-62.

101. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

102. *Id.* at 829-30.

discussion.”¹⁰³ The student group’s meetings included prayer, hymns, Bible commentary, and discussion of religious views and experiences.¹⁰⁴ The Court said religious worship and discussion were forms of speech protected by the First Amendment.¹⁰⁵ The Court rejected the dissent’s attempt to distinguish between religious worship and religious speech, observing:

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when “singing hymns, reading scripture, and teaching biblical principles,” . . . cease to be “singing, teaching, and reading”—all apparently forms of “speech,” despite their religious subject matter—and become unprotected “worship.”

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.¹⁰⁶

The Court chose instead to apply the “applicable constitutional standards,” which require that content-based speech regulation be justified by a compelling governmental interest.¹⁰⁷

The university argued that complying with the Establishment Clause constitutes a compelling interest.¹⁰⁸ The Court flatly rejected this argument, however, saying that a policy of equal access does not offend the Establishment Clause under the *Lemon* test.¹⁰⁹ An open-forum policy that does not discriminate between religious and non-religious speech has a secular purpose and avoids excessive government entanglement with religion.¹¹⁰ Furthermore, the Court determined that allowing religious groups to share the forum would not have the primary effect of advancing religion.¹¹¹ Any benefits religious groups might receive would be merely

103. *Widmar*, 454 U.S. at 264–65, 267.

104. *Id.* at 265 n.2.

105. *Id.* at 269. Specifically, the Court said, the university “has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment.” *Id.*

106. *Id.* at 269 n.6 (citations omitted).

107. *Id.* at 267, 277.

108. *Id.* at 270–71. And the Court acknowledged that complying with the Constitution could be characterized as a compelling interest. *Id.* at 271.

109. *Id.*

110. *Id.* at 271–72.

111. *Id.* at 272. The issue, the Court noted, was not whether the university could open a religious

incidental to the open forum policy and thus would create no conflict with the Establishment Clause.¹¹²

In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court considered religious access to a public school using the endorsement test.¹¹³ A church group sought access to public school facilities to show a Christian film series about child rearing, and it was denied access under the school district's policy against use for "religious purposes."¹¹⁴ The Court found this exclusion to be viewpoint discrimination in violation of the First Amendment.¹¹⁵ The district argued, however, that allowing its facilities to be used for religious purposes would constitute an establishment of religion.¹¹⁶ The Court said fears of an Establishment Clause violation were "unfounded" because there was "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."¹¹⁷ The Court also briefly observed that religious use of school property would not be an establishment of religion under the *Lemon* test.¹¹⁸

In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Supreme Court determined that a Christian student publication could not be denied funding because of its viewpoint.¹¹⁹ The University denied funding solely because the paper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."¹²⁰ Although the University's student activity fund created "a forum more in a metaphysical than in a spatial or geographical sense," the Court determined that the same principles applied as in an ordinary limited forum.¹²¹ The Fourth Circuit had determined that although the University's withholding of funds had violated the Free Speech Clause, it was justified by the state's compelling interest in

forum, but whether it could exclude groups from an already open forum based on the content of their speech. *Id.* at 273.

112. *Id.* The Court noted that an open forum policy does not "confer any imprimatur of state approval on religious sects or practices" and that the forum was "available to a broad class of nonreligious as well as religious speakers." *Id.* at 274.

113. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).

114. *Id.* at 387-88.

115. *Id.* at 394. This was a different conclusion than in *Widmar*, where the Court had found the exclusion of religious speech to be content-based.

116. *Id.*

117. *Id.* at 395.

118. *Id.* ("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 excessive entanglement with religion.")

119. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995).

120. *Id.* at 823.

121. *Id.* at 830.

avoiding an Establishment Clause violation.¹²² The Supreme Court reversed, observing, “It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises.”¹²³ Similarly, paying the printing costs of a religious publication as part of a neutral policy open to other groups did not conflict with the Establishment Clause.¹²⁴ In fact, the Court said, requiring officials to “scan and interpret student publications to discern their underlying assumptions respecting religious theory and belief” would “risk fostering a bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.”¹²⁵

The Supreme Court again found viewpoint discrimination in *Good News Club v. Milford Central School* when a public school denied a Christian club’s request to use school facilities after hours.¹²⁶ Milford had created a forum for events “pertaining to the welfare of the community,” but chose to exclude the Good News Club because the school considered the club’s activities to be religious instruction.¹²⁷ The Good News Club classes included prayer, songs, Bible reading, and an invitation for children “to trust the Lord Jesus to be your Savior from sin.”¹²⁸ The Second Circuit held that because the club’s activities were “quintessentially religious,” they were not pure “moral and character development,” and therefore to exclude them was not viewpoint discrimination.¹²⁹ The Supreme Court rejected this argument and found it “quite clear that Milford engaged in viewpoint discrimination.”¹³⁰ The Court also rejected Milford’s argument that the club’s activities could be excluded because they constituted “religious worship.”¹³¹ The Court said in a footnote,

122. *Id.* at 838.

123. *Id.* at 842 (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 252 (1990); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981)).

124. *Id.* at 843–44.

125. *Id.* at 845–46.

126. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102, 109 (2001).

127. *Id.* at 108. The Court did not analyze whether Milford created a designated public forum or a limited public forum because the parties had agreed that the district created a limited public forum. *Id.* at 106. The Court therefore “assume[d]” for purposes of the case that it was a limited forum. *Id.* The distinction had little significance anyway, since the Court found that the exclusion constituted viewpoint discrimination, which is impermissible in either type of forum. *Id.*; see *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

128. *Good News Club*, 533 U.S. at 137–38 (Souter, J., dissenting). The majority considered Justice Souter’s recitation of the club’s activities to be “accurate.” *Id.* at 112 n.4 (majority opinion).

129. *Id.* at 111.

130. *Id.* at 109. The Court said, “We disagree 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.” *Id.* at 111.

131. *Id.* at 112 n.4.

Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development.'" In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.¹³²

The Court concluded in the same footnote that what mattered was the substance of the club's activities, not the label attached to them.¹³³

As in *Lamb's Chapel*,¹³⁴ the school district contended that even if its policy were viewpoint discrimination, its interest in avoiding an Establishment Clause violation outweighed the club's interest in equal access.¹³⁵ The Court concluded that the school had "no valid Establishment Clause interest."¹³⁶ Allowing the club to use school property would uphold the principle of neutrality toward religion, and no one in the community would feel coerced into participating in the club's activities.¹³⁷ The Court rejected the argument that impressionable children might perceive an establishment of religion.¹³⁸ It noted that the threat of a perceived endorsement would likely be no greater than that of a perceived hostility toward religion if the club were excluded from the forum.¹³⁹

Despite its inconsistencies in other areas of Establishment Clause jurisprudence, the Court has unequivocally required equal access to religious

132. *Id.* (citations omitted).

133. *Id.* This was in response to Justice Souter, who characterized the club's activities as "an evangelical service of worship." *Id.* at 138 (Souter, J., dissenting).

134. See *supra* note 116 and accompanying text.

135. *Good News Club*, 533 U.S. at 112. The same argument in the alternative was made by the board of education in *Bronx Household*, though the panel did not address it any detail. See *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 95, 105 n.8 (2d Cir. 2007) (Calabresi, J., concurring).

136. *Good News Club*, 533 U.S. at 113. The Court did not merely say that the club's interest outweighed the school's interest in avoiding an establishment, but that the school had no valid interest at all. *Id.*

137. *Id.* at 114–15.

138. *Id.* at 115–19. The Court said:

We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. 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.

Id. at 119.

139. *Id.* at 118.

groups and speakers in public forums, limited or otherwise.¹⁴⁰ It has recognized that the Establishment Clause can sometimes provide a compelling reason for limiting access to a forum.¹⁴¹ But it has also indicated that excluding religion from public forums, even limited public forums, could conflict with the Establishment Clause.¹⁴²

III. HISTORY OF WORSHIP IN PUBLIC BUILDINGS IN THE UNITED STATES

The issue of whether worship should be kept out of public property has only been litigated significantly within the past thirty years.¹⁴³ Using public buildings for religious purposes, however, has a long history in the United States. As explained below,¹⁴⁴ this history is highly relevant to an inquiry into the practice's constitutionality.

America's early history supports the conclusion that allowing religious worship in public buildings does not offend the Establishment Clause. In fact, Congress and the President opened Washington's D.C.'s federal buildings to worship for decades. By the time Congress moved into the United States Capitol in 1800, church services had been taking place in the building for over five years.¹⁴⁵ Reverend George Ralph, Rector of Christ Episcopal Church, began holding public worship in the yet uncompleted Capitol in the middle of June 1795.¹⁴⁶ Thomas Jefferson began regularly attending services in the hall of the House of Representatives in January of 1802, a practice that he continued for the rest of his time in office.¹⁴⁷ One Congressional chaplain, the Reverend William Parkinson, wrote that the President "has never missed but ONE of my meetings at the capitol while in the city."¹⁴⁸ Jefferson attended services in the Capitol on January 3, 1802,

140. *Id.* at 120; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–95 (1993); see *Widmar v. Vincent*, 454 U.S. 263, 267–69 (1981).

141. *Widmar*, 454 U.S. at 271.

142. *Good News Club*, 533 U.S. at 118, 272 n.11.

143. The presence on public property of voluntary worship by private parties was first addressed specifically in *Widmar*, 454 U.S. at 263.

144. See *infra* notes 288–94.

145. FED. ORRERY (Boston), July 2, 1795, at 289. The Boston newspaper reported, "CITY OF WASHINGTON, June 19. It is with much pleasure that we discover the rising consequence of our infant city. Public worship is now regularly administered at the capitol, every [S]unday morning, at 11 o'clock by the [R]everend [M]r. RALPH . . ." *Id.*; see also CARLISLE GAZETTE, July 1, 1795, at 2; NEW HAMPSHIRE GAZETTE (Portsmouth), July 7, 1795, at 2 (both publishing the same piece as the Federal Orrery with different capitalization).

146. BRYAN, *supra* note 5, at 260 (citing IMPARTIAL OBSERVER AND WASHINGTON ADVERTISER, June 17, 1795) ("As early as the middle of June, 1795, public worship was regularly held at the capitol every Sunday morning. Rev. George Ralph, the rector of Christ Episcopal Church, officiated on these occasions." (footnote omitted)).

147. Letters from Manasseh Cutler to Joseph Torrey (Jan. 4, 1802 and Jan. 3, 1803), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 66, 119.

148. *Calumny Refuted*, THE CENTINEL OF FREEDOM (Newark, N.J.), Mar. 8, 1803, at 3 (quoting a letter from Rev. William Parkinson to "his friend in Mifflin county [Pa.]").

only two days after he wrote a letter to the Danbury Baptists in which he employed the now-famous metaphor of a “wall of separation between church and state.”¹⁴⁹

Apparently the third President did not believe the “wall of separation” to be a literal one, as, in addition to attending services at the Capitol, Jefferson also allowed religious worship inside the walls of two executive buildings. During Jefferson’s administration, ministers held church services in both the Treasury Building and the War Office.¹⁵⁰ Neither the legislative nor executive branches had any objections to their buildings being put to religious uses. And even the Supreme Court chamber in the Capitol was used for religious services at times.¹⁵¹

The services conducted in the Capitol included many aspects of what could be considered worship, such as preaching and the singing of psalms.¹⁵² There is no record that the Capitol services included the sacrament of Communion, but those at the Treasury Building and War Office did.¹⁵³ Reverend Manasseh Cutler, a Massachusetts Congressman, referred to the services in both the Capitol and the Treasury as “worship.”¹⁵⁴ Other

149. *Id.* at 66; HUTSON, *supra* note 5, at 93. The Supreme Court has employed this metaphor in interpreting the Establishment Clause to require keeping a “high and impregnable” wall between church and state. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16, 18 (1947).

150. *See* Diary of Manasseh Cutler (Dec. 23, 1804), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 174; THE NATIONAL INTELLIGENCER, AND WASHINGTON ADVERTISER, May 15th, 1801, at 3 (“Permission having been obtained by the vestry of Washington Parish, *Divine Service* will be performed every Sunday afternoon at at [sic] four o’clock, at the new War Office, by revd. Mr. M’Cormick, commencing the ensuing Sabbath.”); *Calumny Refuted*, *supra* note 148, at 3 (quoting a letter from Rev. William Parkinson to “his friend in Mifflin county [Pa.]”) (“I preach on the LORD’S day morning in the capitol, and in the evening at the treasury.”).

151. *See* Diary of Manasseh Cutler (Nov. 11, 1804), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 171 (“At 3, service was attended in the Court Room, and a Mr. Spear . . . preach an excellent sermon . . .”).

152. Margaret Bayard Smith, *Reminiscences*, in THE FIRST FORTY YEARS OF WASHINGTON SOCIETY 1, 14 (Gallaird Hunt ed., 1906). According to Margaret Bayard Smith, a regular attendee at Capitol services, the psalm-singing was accompanied for a time by the Marine Band, but the practice was discontinued as a failure. *Id.*

153. *See* Diary of Manasseh Cutler (Dec. 23, 1804), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 174 (“Attended worship at the Treasury. . . . Sacrament. Full assembly. Three tables; service very solemn; nearly four hours.”); Diary of John Quincy Adams (Jan. 29, 1804), in 27 The Diaries of John Quincy Adams: A Digital Collection 65, <http://www.masshist.org/jqadiaries/> (“Attended public service at the War Office—It was the communion day, and the services continued nearly four hours . . .”).

154. Diary of Manasseh Cutler (Dec. 2, 1804), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 172 (“Attended worship at the Capitol!”); Diary of Manasseh Cutler (Dec. 23, 1804), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 174 (“Attended worship at the Treasury.”).

contemporary sources labeled the Capitol meetings “worship” as well.¹⁵⁵

Ministers of all denominations preached in the Capitol building for the fifty-plus years it was used, including Presbyterians, Methodists, Episcopalians, Quakers, Baptists, Swedenborgians, Roman Catholics, and Unitarians.¹⁵⁶ Sermons in the Capitol were often evangelical in tone. The first woman to preach there, Dorothy Ripley, exhorted her audience (which included Thomas Jefferson and Vice President Aaron Burr) that “Christ’s Body was the Bread of Life and His Blood the drink of the righteous.”¹⁵⁷ Another preacher spoke on “perfecting holiness in the fear of the Lord,” with the intent to show “the excellence of religion and the importance of a truly religious character.”¹⁵⁸ Services in the Capitol continued until the 1850s, and then resumed again from 1865 through 1868.¹⁵⁹ During those years, the House of Representatives allowed the First Congregational Church of Washington to use its chambers until it finished its own building.¹⁶⁰ Once area churches established their own buildings, the demand for government buildings apparently died off.

IV. WORSHIP IN A LIMITED PUBLIC FORUM: *BRONX HOUSEHOLD, GLOVER, AND BADGER CATHOLIC*

Although *Good News Club* involved activities that could easily be described as worship, the Supreme Court declined to characterize them as worship or at least as “mere worship.”¹⁶¹ The Court therefore did not address the exact question of whether something labeled as worship could be excluded from a limited public forum. Local governments, and eventually the Ninth Circuit, seized on this omission to disallow worship in public

155. See TRENTON FEDERALIST, June 12, 1809, at 3 (“DIED . . . At Washington, very suddenly on the 4th inst. FRANCIS MALBONE, Esq. Senator of the U. States, from the State of Rhode-Island. He dropped down and instantly expired on his way to attend religious worship at the Capitol.”); CARLISLE GAZETTE, July 1, 1795, at 2 (“Public Worship is now regularly administered at the Capitol”); CONNECTICUT GAZETTE (New London), Dec. 17, 1800, at 2 (printing the reports of Congress) (“Mr. Speaker signified the desire of Mr. Lisle, chaplain of the house, to open the chamber of the representatives for public worship on Sundays—leave was thereupon granted.”).

156. HUTSON, *supra* note 5, at 85. When the House elected a Unitarian chaplain in 1821, an Episcopal minister said the members had “expelled Jesus Christ from the House,” and urged a boycott of the Capitol services. *Id.*

157. *Id.* at 86.

158. Diary of Manasseh Cutler (Feb. 27 1803), in 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D., *supra* note 2, at 118.

159. HUTSON, *supra* note 5, at 84. As Hutson notes, it was during this very period that Congress passed the Fourteenth Amendment, which the Supreme Court later interpreted as applying the Establishment Clause to the states. *Id.*; see *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

160. HUTSON, *supra* note 5, at 84.

161. In fact, the majority pointed out that the Second Circuit in its opinion below had not determined that the activities were worship. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001). Justice Souter, however, believed the club’s activities were “an evangelical service of worship.” *Id.* at 138 (Souter, J., dissenting).

buildings.

A. Bronx Household of Faith v. Board of Education of City of New York

The *Bronx Household* line of cases began in 1994 when Community School District Number Ten in New York City denied Bronx Household of Faith's request to rent space for Sunday morning meetings, which would have involved the "singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies" and a "fellowship meal."¹⁶² New York state law allowed school districts to open school facilities for "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 nonexclusive and shall be open to the general public."¹⁶³ The school district denied the request pursuant to the New York City Board of Education's policy, which prohibited outside organizations from "conducting religious services or religious instruction on school premises after school."¹⁶⁴ In the initial suit, the district court granted the school district's motion for summary judgment,¹⁶⁵ and the Second Circuit affirmed.¹⁶⁶

162. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 92 (2d Cir. 2007).

163. *Id.*

164. *Id.*

165. *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, No. 95 Civ. 5501 (LAP), 1996 WL 700915, at *1 (Dec. 5, 1996).

166. *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10 (Bronx Household I)*, 127 F.3d 207 (2d Cir. 1997). The Second Circuit, through Judge Roger Miner, concluded that the policy was viewpoint neutral and reasonable. *Id.* at 214. The court said,

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.

Id. The court did not explain how "religious services or religious instruction" could be singled out and excluded, even though the schools were generally open to social, civic, and recreational meetings. Nor did it indicate any limits on the ability of a school to pursue a strict separation of church and state, even if not required or permitted by the Constitution. The court's decision emphasized the way in which cases such as *Bronx Household* and *Glover*, though often decided under Free Speech Clause analysis, are often reasoned based on Establishment Clause considerations.

Judge José Cabranes agreed with the majority that the policy was constitutional with respect to "religious services" but thought it was viewpoint discriminatory with respect to religious instruction. *Id.* at 217 (Cabranes, J., concurring in part and dissenting in part). He concluded that

After the Supreme Court's 2001 decision in *Good News Club*, the church again brought suit after being denied a permit.¹⁶⁷ This time the district court granted a preliminary injunction against the school district.¹⁶⁸ A divided panel of the Second Circuit affirmed, finding "no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings"¹⁶⁹

While the preliminary injunction was in effect, the Board of Education modified its policy to prohibit using school buildings for "holding religious worship services, or otherwise using a school as a house of worship."¹⁷⁰ The district court then granted Bronx Household's motions for a permanent injunction and summary judgment, finding the exclusion of the church group to be viewpoint discriminatory.¹⁷¹ On appeal, the Board of Education argued that the exclusion did not constitute viewpoint discrimination, and even if it did, discrimination would be justified to avoid an Establishment

"[u]nlike 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." *Id.* at 221. Judge Cabranes made two significant errors. First, he assumed that religious services are distinct from religious instruction. In reality, however, religious instruction is a core part of many or most religious services, and it is impossible to divorce the two. In this respect, the majority was at least more consistent. He did admit, however, that he was more skeptical than the majority of the government's ability to distinguish "religious worship—or indeed religious instruction" from other forms of speech the school district had allowed. *Id.* at 221. Enforcement of the policy in other cases could, he said, lead to an excessive entanglement with religion. *Id.* Yet despite this problem with the policy, he was not willing to strike it down.

Second, Judge Cabranes assumed that simply because religious services are "by definition religious in nature" and do not "serve as a vehicle for . . . secular viewpoints," they can be permissibly excluded from a forum. *Id.* But, like the majority, he failed to explain how these services are second-class speech simply because they are religious. Essentially, both Judge Cabranes and the majority allowed a school to say, "Our facilities are open to all social, civic, and recreational activities, as long as those activities are not religious." But the Constitution does not allow such discrimination. See *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.").

167. *Bronx Household*, 492 F.3d at 93.

168. *Bronx Household of Faith v. Bd. of Educ.*, 226 F. Supp. 2d 401 (S.D.N.Y. 2002).

169. *Bronx Household of Faith v. Bd. of Educ. (Bronx Household II)*, 331 F.3d 342, 354 (2d Cir. 2003). As to the Establishment Clause defense, the panel majority said, "In light of the Supreme Court's refusal to find a valid Establishment Clause interest in *Good News Club*, and the strong factual similarities between this case and *Good News Club*, the district court's ruling is adequately supported at this stage of the litigation." *Id.* at 356. This was decided by a different panel than that in *Bronx Household I*, with the exception of Judge Miner, who vigorously dissented. *Id.* at 357 (Miner, J., dissenting).

170. *Bronx Household*, 492 F.3d at 94 (Calabresi, J., concurring).

171. *Bronx Household of Faith v. Bd. of Educ.*, 400 F. Supp. 2d 581, 592, 601 (S.D.N.Y. 2005). The district court also held that the policy fostered an excessive entanglement with religion, by requiring school officials to determine what constitutes worship. *Id.* at 598. The court said, "No litmus test can be applied to determine when worship ends and when religious teaching or instruction begins." *Id.*

Clause violation.¹⁷² A divided panel of the Second Circuit vacated the injunction and the grant of summary judgment.¹⁷³ The panel judges wrote three separate opinions in addition to the *per curiam* opinion that vacated the district court's decision.¹⁷⁴

In his concurring opinion, Judge Guido Calabresi argued that excluding worship was a valid content-based restriction rather than viewpoint discrimination.¹⁷⁵ He reasoned that worship is not simply a viewpoint, but is a distinct category of speech that is *sui generis*.¹⁷⁶ He pointed to the footnote in *Good News Club* that said the club's activities were not "mere worship, divorced from any teaching of moral values."¹⁷⁷ Judge Calabresi avoided articulating a definition of worship and relied instead on Bronx Household's own identification of its activities as worship.¹⁷⁸ Because worship is a distinct category of speech, excluding worship is content discrimination, which is permissible as long as it is reasonable in light of the forum's purpose.¹⁷⁹ Judge Calabresi said the Second Circuit was bound by its earlier holding in *Bronx Household I* that the school board's policy was reasonable.¹⁸⁰ And he noted three additional grounds upon which the

172. *Bronx Household*, 492 F.3d at 95 (Calabresi, J., concurring).

173. *Id.* at 106.

174. *Id.* at 91 (*per curiam*).

175. *Id.* at 106 (Calabresi, J., concurring). A permissible content-based restriction would be one that reserves a forum "for certain groups or for the discussion of certain topics," as long as the limitation is reasonable in light of the forum's purpose. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). But the government engages in viewpoint discrimination when it "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

176. *Bronx Household*, 492 F.3d at 100 (Calabresi, J., concurring). *Sui generis* is a Latin term meaning "[o]f its own kind or class; unique or peculiar." BLACK'S LAW DICTIONARY 1475 (8th ed. 2004).

177. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001).

178. *Bronx Household*, 492 F.3d at 101–02 (Calabresi, J., concurring). As noted by Judge Walker, Judge Calabresi only examined Bronx Household's as-applied challenge, and ignored the church's facial challenge to the policy. *Id.* at 130 (Walker, J., dissenting). Addressing the facial challenge would not have allowed Judge Calabresi to rely on the description the church's pastor attached to the church's activities.

179. *Id.* at 104 (Calabresi, J., concurring).

180. *Id.* at 105. Judge Calabresi quoted from the Second Circuit's decision in *Good News Club v. Milford Central School*, 202 F.3d 502, 509 (2000), which in turn quoted *Bronx Household I* for the proposition 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." Judge Calabresi noted that although the Supreme Court had reversed the Second Circuit's holding in *Milford* because the Court found viewpoint discrimination, the Court had not reached whether the exclusion would be reasonable in light of the forum's purposes. *Bronx Household*, 492 F.3d at 105. This is somewhat misleading, however, because viewpoint discrimination is by definition unreasonable because it is unconstitutional. Therefore, the Court in *Good News Club* at least implied that the restriction was unreasonable.

exclusion of Bronx Household could be reasonable.¹⁸¹ First, children may think the services were school-sponsored.¹⁸² Second, community members may feel “marginalized, confused, and shut out” by the use of the school for religious purposes.¹⁸³ And, third, certain denominations would be excluded from the forum because they do not worship on Sunday.¹⁸⁴ Judge Calabresi studiously avoided addressing how the Establishment Clause directly related to the case,¹⁸⁵ but all three of his proposed justifications derive their only possible force from the Establishment Clause.¹⁸⁶

Judge Pierre Leval joined in vacating the injunction on procedural grounds rather than the merits because he did not believe the case was ripe for adjudication.¹⁸⁷ But Judge Leval nevertheless commented on the merits, particularly the Supreme Court’s decision in *Good News Club*:

The Court’s insistence that *Good News Club*’s activities did not constitute “mere worship” seems to indicate that the Court attaches constitutional significance to whether “worship” was involved, and may even suggest, as Judge Calabresi notes, that the Supreme Court will ultimately conclude that worship may be excluded, while

181. *Bronx Household*, 492 F.3d at 105 n.8 (Calabresi, J., concurring).

182. *Id.*

183. *Id.* He said, however, that

[w]e need not resolve here how these complaints would inform an examination of a putative challenge, under the Establishment Clause, to the use of the school as a house of worship. I take note of this concern only as it constitutes an additional reasonable basis for defendants’ *content*-based restriction of worship services given the purposes of this limited forum.

Id. Judge Calabresi thus subtly invokes the Establishment Clause without actually determining whether the Establishment Clause can justify the exclusion of worship.

184. *Id.* Judge Calabresi continued,

We need not decide here whether this lack of neutrality among religions would implicate a potential violation of the Establishment Clause that would be sufficiently overriding as to permit discrimination on the basis of viewpoint. For the question now before us is not *viewpoint* discrimination, but simply the existence of a reasonable justification for *content*-based rules.

Id.

185. *See supra* notes 183 and 184.

186. Perceived sponsorship or support would present no legal or constitutional problem at all, aside from its possible Establishment Clause implications. The second and third grounds could have a small amount of force based on conceptions of fairness and a desire to avoid inequitable treatment. But the danger of “marginalization” would require excluding many kinds of groups, both religious and irreligious, that could not be excluded consistent with Supreme Court precedent. And it is unreasonable to exclude church groups simply because they desire to meet on weekends, just as it would be unreasonable to exclude a Boy Scout troop that happened to choose Saturday as its meeting day. Notably, Judge Calabresi did not mention the potential Establishment Clause problems with *excluding* worship from the forum.

187. *Bronx Household*, 492 F.3d at 123 (Leval, J., concurring). The school board’s revised policy had not yet been enforced against Bronx Household, which was meeting in a school building under a preliminary injunction against enforcement of the prior policy. *Id.* at 107.

associated teaching of moral values may not.¹⁸⁸

Judge Leval also suggested that if Bronx Household were to perform activities such as Communion only for those of a certain faith, “this might well be deemed a violation of the Establishment Clause.”¹⁸⁹

Judge John M. Walker Jr. wrote a dissenting opinion, in which he argued that the school board engaged in impermissible viewpoint discrimination.¹⁹⁰ He criticized Judge Calabresi both for his speech forum analysis and for failing to articulate an objective definition of worship.¹⁹¹ He said Judge Calabresi failed to define the limits of the limited public forum, thereby allowing him to define worship outside the forum’s limits.¹⁹² Judge Walker said,

Of course, because the concept of worship is so ephemeral and inherently subjective, Judge Calabresi is able to indulge his preference that worship be defined not by what it is, but by what it is not. And what worship is not, in his view (and convenient for his purposes), is anything that the Board has already permitted to occur

188. *Id.* at 118.

189. *Id.* at 121–22. This suggestion is legally dubious. A private church group would not offend the Establishment Clause by restricting participation in communion to its members. Under Judge Leval’s proposition, it could just as easily be argued that a labor union must allow all attendees, whether union members or not, to vote. This would clearly fly in the face of the church or union’s associational rights. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”). Bronx Household’s meetings were open to the general public, which is all that the school use policy required. *Bronx Household*, 492 F.3d at 92 (Calabresi, J., concurring).

190. *Bronx Household*, 492 F.3d at 124 (Walker, J., dissenting).

191. *Id.*

192. *Id.* at 128–29. A proper analysis to reach Judge Calabresi’s conclusion would have required first articulating a legal definition of “worship.” It would then require showing that the school board created a forum that was only open to a limited range of civic purposes. If it were open to *all* purposes, it would be a designated public forum, rather than a limited forum, and any restrictions on speech would be subject to strict scrutiny. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009). Next, the analysis would require showing that worship did not fit within the forum’s limited range of purposes. Finally, it would require showing that Bronx Household’s activities fit the legal definition of worship. Only then could the church group properly be excluded as a matter of free speech law (though the exclusion could still violate the Establishment Clause). *See Deutsch, supra* note 15, at 38–43.

Norman Deutsch points out that the scope of a limited public forum is defined by what it includes, not by what it excludes. *Id.* at 38. But if Judge Calabresi had focused on the broad range of community activities that were included within the school district’s forum, he would have had a difficult time concluding that Bronx Household’s activities were not included. Thus, he improperly defined the forum based on what was excluded—worship. With the question framed in this way, the conclusion was inevitable that worship fell outside the forum’s purposes. But it is unfair to conclude something falls outside a forum without ever defining the forum’s confines.

in the forum. Yet the fact is that none of us, who are judges, are competent to offer a legal definition of religious worship.¹⁹³

Approaching the issue through the lens of the endorsement test, Judge Walker concluded that the Establishment Clause provided no justification for excluding the church meetings.¹⁹⁴ Under all the circumstances, there was no likelihood that an objective observer acquainted with the history of the school use policy or the forum would perceive a preference for religion over non-religion.¹⁹⁵ Nor did the “vagaries of the school calendar” show a preference for religions that worshiped on Sunday.¹⁹⁶ Judge Walker did, however, warn of “entangling the judiciary in religious controversy in violation of the First Amendment.”¹⁹⁷ Judge Calabresi’s failure to objectively define worship left the task to the school board, “thereby likely ensuring that the Board’s entanglement in the process will violate the Establishment Clause.”¹⁹⁸

On remand, the district court issued a permanent injunction against enforcement of the revised policy.¹⁹⁹ This mooted Judge Leval’s procedural objection to reaching the merits. The church appealed the permanent injunction, and the same panel of the Second Circuit heard oral arguments on October 6, 2009.²⁰⁰

B. Faith Center Church Evangelistic Ministries v. Glover

In *Glover*, a library in Contra Costa County, California, denied Faith Center Church access to its facilities for Saturday meetings and worship services after the church used the library meeting room for an afternoon “praise and worship” service.²⁰¹ The meetings usually included “religious speech and religious worship” and “discussing the Bible and other religious books,” as well as “teaching, praying, singing, sharing testimonies, sharing

193. *Bronx Household*, 492 F.3d at 129 (Walker, J., dissenting). Judge Walker noted, “I do not suggest that ‘worship’ is not possible to define—just that it is impossible for a court to define.” *Id.* at 129 n.10. He left room for legislative definitions of worship. *See id.*

194. *Id.* at 131.

195. *Id.* at 131–32.

196. *Id.* at 132 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (focusing on “neutrality and the principle of private choice”) and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 n.9 (2001) (“[W]e would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.”)).

197. *Bronx Household*, 492 F.3d at 131.

198. *Id.* at 124.

199. *Bronx Household of Faith v. Bd. of Educ.*, No. 01CV8598 (S.D.N.Y. Nov. 1, 2007).

200. Approved Calendar for the week October 5 through October 9, United States Court of Appeals for the Second Circuit, <http://www.ca2.uscourts.gov/docs/calendar/oct/oct5.pdf> (last visited Mar. 20, 2010). The court had not yet issued an opinion at the time this Comment was submitted for publication in early 2011.

201. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 904 (9th Cir. 2007).

meals, and discussing social and political issues.”²⁰² The County’s policy said the library meeting room was open for “meetings, programs, or activities of educational, cultural or community interest,” but the policy specifically excluded “religious services.”²⁰³ The church obtained a preliminary injunction from the district court, which found the policy to be viewpoint discriminatory as applied to Faith Center.²⁰⁴

A divided Ninth Circuit panel reversed, holding that excluding the church group’s worship service was a permissible subject matter limitation.²⁰⁵ The court, speaking through Judge Paez, concluded that parts of Faith Center’s meetings were permissible, including “discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues.”²⁰⁶ But it found that the afternoon “worship service” that took place during Faith Center’s first use of the building “exceeded the boundaries of the library’s limited forum.”²⁰⁷ To exclude the worship service was not viewpoint discrimination, the court reasoned, because “[p]ure religious worship . . . is not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter.”²⁰⁸ Therefore, it “is not a viewpoint but a category of discussion within which many different religious perspectives abound.”²⁰⁹ The court cited footnote four of *Good News Club*²¹⁰ and concluded that this case was the kind contemplated by that footnote, in which “pure religious worship was too tenuously associated to the forum’s purpose.”²¹¹

202. *Id.* at 903.

203. *Id.* at 902–03.

204. *Id.* at 905.

205. *Id.* at 911.

206. *Id.* at 914 (insertion in original).

207. *Id.* at 915. The Court failed to address, however, that the library did not simply deny Faith Center’s application for further worship services, but also for further meetings, which were, in the court’s view, within the purposes of the forum. Nor did the majority address how the afternoon “worship services” differed in content from the “praying” and “singing” that went on in the morning meeting.

208. *Id.*

209. *Id.* Judge Paez still characterized worship as a “category of discussion,” apparently recognizing that worship is communicative in nature.

210. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001) (“In any event, we conclude that the Club’s activities do not constitute mere religious worship, divorced from any teaching of moral values.”).

211. *Glover*, 480 F.3d at 915 n.14. In reaching this conclusion, Judge Paez assumed that the Supreme Court in *Good News Club* “implicitly acknowledged that religious worship exceeded the boundaries of the limited public forum.” *Id.* at 915. In fact, it is debatable that the Court implied that at all. The Court rejected the school district’s argument that the Club’s activities were “religious worship” because the Second Circuit had made no such finding. *Good News Club*, 533 U.S. at 112

The court disagreed with Faith Center’s contention that distinguishing worship from other forms of protected speech would violate the Establishment Clause.²¹² It noted the church’s reliance on the Supreme Court’s observation in *Widmar* that distinguishing between the practices of various faiths would “tend inevitably to entangle the State with religion in a manner forbidden by our cases.”²¹³ And Judge Paez admitted, “The distinction to be drawn here is thus much more challenging—one between religious worship and virtually all other forms of religious speech—and one that the government and the courts are not competent to make.”²¹⁴ But the court concluded that Faith Center had already made that distinction by separating its morning meeting from its afternoon “praise and worship” service.²¹⁵ The court said, “The County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did.”²¹⁶ Thus, the court concluded that the library’s exclusion of worship as a distinct category of speech was permissible in order to preserve the purpose of the limited forum.

Judge Tallman dissented from the panel decision.²¹⁷ He pointed to the excessive entanglement problems inherent in distinguishing worship from other religious speech.²¹⁸ He said, “Creative wordplay cannot avoid the reality that worship is intangible, and even what Faith Center itself determines is religious worship may not be worship to another.”²¹⁹ He also argued that excluding religious worship was viewpoint discrimination, based on the faulty assumption that “all religious services, regardless of denomination, do not communicate ideas on topics that are permissible

n.4. Instead, the Court focused on the fact that the Club’s activities, whether religious worship or not, could not be divorced from the teaching of moral values. *Id.* The Court emphasized that it was the *substance* of the activities, not the label, that was of legal significance. *Id.* And the Court found the substance—singing, praying, Bible teaching, and proselytizing—to be “indistinguishable” from *Lamb’s Chapel* and *Rosenberger*. *Id.* Thus, Judge Paez relied on a debatable interpretation of a single piece of dicta, rather than following the Supreme Court’s lead and looking at how the substance of Faith Center’s activities related to the purpose of the forum.

212. *Glover*, 480 F.3d at 916.

213. *Id.* at 917 (quoting *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981)). Judge Paez characterized this observation in *Widmar* as “dicta that was not central to the Court’s holding.” *Id.* at 916. The same could be said, however, of footnote four in *Good News Club*, upon which the Second and Ninth Circuits have been quick to rely.

214. *Id.* at 918.

215. *Id.*

216. *Id.* Judge Paez said the court “need not speculate” about the possibility, raised by the dissent, that there would be excessive government entanglement when the library encountered a future applicant that was less candid than Faith Center. *Id.* at 918 n.18. But this possibility calls the court’s rule into serious question. It is a poor constitutional rule that excludes speakers from a speech forum simply because they identified their activities in a particular way. It would reward duplicity and punish honesty, especially when even honest religious groups do not know what the court considers excludable “worship.”

217. *Id.* at 921 (Tallman, J., dissenting).

218. *Id.* at 921–26.

219. *Id.* at 924.

under the policy, such as moral character.”²²⁰

The Ninth Circuit denied a petition for rehearing en banc, and republished the panel decision with a minor amendment on March 9, 2007.²²¹ Joined by six others, Judge Bybee dissented from the denial of rehearing en banc.²²² The dissenters pointed out that many religions and Christian denominations engage in activities indistinguishable from Faith Center’s, yet they would not call their activities worship.²²³ Judge Bybee said the majority had “jettisoned three decades of equal access jurisprudence, created a constitutionally inferior category of religious speech, and given governments throughout our circuit license to favor certain religions over others.”²²⁴

The Supreme Court denied certiorari.²²⁵ On remand, the district court was bound by the Ninth Circuit’s speech forum analysis but found that the exclusion violated the Establishment Clause because it created an excessive government entanglement with religion.²²⁶ The district court found that “the record demonstrates that if there are questions about whether activities are religious services, rather than other religious activities permitted in the Meeting Room, someone from the County reviews the application to make that determination.”²²⁷ Therefore, the court concluded that “the Religious Use [restriction] fails the third prong of *Lemon*, which requires the Court to examine whether the government conduct results in ‘an excessive government entanglement with religion.’”²²⁸ The court also noted that even the Ninth Circuit panel had admitted that parsing worship and religious speech was a distinction “that the government and the courts are not competent to make.”²²⁹ The district court’s decision was not appealed.

220. *Id.* at 928. He also pointed out that Faith Center, in identifying its activities as religious worship, never claimed that its services were *mere* worship, devoid of any teaching on permissible topics such as moral values. *Id.* at 929. Therefore, even if the Court could properly rely on the church’s self-identification, there was no basis under Supreme Court precedent to exclude it. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001).

221. *Glover*, 480 F.3d at 895 (order denying rehearing en banc).

222. *Id.* (Bybee, J., dissenting from denial of rehearing en banc).

223. *Id.* at 901–02.

224. *Id.* at 902.

225. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 552 U.S. 822, 822 (2007).

226. *Faith Ctr. Church Evangelistic Ministries v. Glover*, No. 04-03111, 2009 WL 1765974, at *7–8 (N.D. Cal. June 19, 2009).

227. *Id.* at *9.

228. *Id.* at *8 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

229. *Id.* at *9 (quoting *Glover*, 480 F.3d at 918 (opinion of Paez, J.)).

C. Badger Catholic, Inc. v. Walsh

Badger Catholic dealt with the University of Wisconsin at Madison's distribution of student fees to student groups.²³⁰ In 2007, the University denied funding to one group, Roman Catholic Foundation (which later changed its name to Badger Catholic), because its activities included "worship, proselytizing, or sectarian religious instruction."²³¹ The district court concluded that the University's student fund system created a metaphysical limited public forum, as in *Rosenberger*, and that the University had engaged in unreasonable content-based discrimination by denying the funds.²³² The court rejected the University's Establishment Clause defense, observing that "a state does not violate the Establishment Clause by affording religion the same access to a public forum that it grants to non-religious groups."²³³

The Seventh Circuit affirmed the district court's decision.²³⁴ Writing for the panel majority, Judge Frank Easterbrook said the University's discrimination, however labeled, was impermissible under *Widmar* and *Rosenberger*.²³⁵ These cases and their progeny established that "underwriting a religious speaker's costs, as part of a neutral program justified by the program's secular benefits, does not violate the Establishment Clause even if the religious speaker uses some of the money for prayer or sectarian instruction."²³⁶ The majority also rejected the University's claim that it could selectively withhold funds even if the Establishment Clause did not require it.²³⁷ Judge Easterbrook observed that there is little distinction between "devotional activity" and "discussion with a religious component" and that the University would be hard pressed to weed out the one without disallowing the other.²³⁸

230. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 776 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

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

232. *Id.* at 1130, 1137.

233. *Id.* at 1131.

234. *Badger Catholic*, 620 F.3d at 779.

235. *Id.* Judge Easterbrook did not decide whether the discrimination was viewpoint or content discrimination, observing that "[t]he Supreme Court is not always clear about the difference" *Id.*

236. *Id.* at 778.

237. *Id.* at 779–82. Judge Easterbrook pointed out that even the Supreme Court's decision in *Christian Legal Society v. Martinez* did not upset the precedent requiring equal access. *Id.* at 781. In *Martinez*, the Court found that the Hastings law school could deny recognition to religious student groups that were not open to all students, regardless of status or belief. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2981–82 (2010). Yet, as Judge Easterbrook observed, the Court in *Martinez* had still recognized that "singl[ing] out religious organizations for disadvantageous treatment" is impermissible. *Badger Catholic*, 620 F.3d at 781 (quoting *Martinez*, 130 S. Ct. at 2987).

238. *Badger Catholic*, 620 F.3d at 781.

Judge Ann Williams dissented, arguing that excluding worship was permissible content discrimination that did not require “a theological debate about what worship means” because the University did not deny money to the “Catholic version of worship,” but to “any group to practice its version of worship.”²³⁹ There is no secular speech equivalent to worship, and therefore “[t]o exclude purely religious activities is a categorical, neutral exclusion.”²⁴⁰ Regarding how to determine what is “purely religious,” the University could rely on groups’ self-identification.²⁴¹ Thus, according to Judge Williams, “when a group self-identifies an act and elevates it as worship, then the University rightly respects that.”²⁴² She conceded that the University could have funded purely religious activities without violating the Establishment Clause, but only if it created an unlimited public forum.²⁴³ Having created a limited public forum, however, the University could choose to fund certain categories of speech based on content.²⁴⁴

The *Badger Catholic* decision created a circuit split with the Ninth Circuit on excluding religious worship from a limited public forum. Although *Glover* deals with public buildings, whereas *Badger Catholic* involves funding, both cases were argued and decided under the same legal rules. The Seventh Circuit, unlike the Ninth, directly confronted the Establishment Clause as a potential justification for a policy of exclusion. But the unstated assumption of the *Glover* majority and of Judge Calabresi in *Bronx Household* is that excluding worship serves the goal of avoiding a real or perceived Establishment Clause violation. Therefore, the circuit split presents the question: what does the Establishment Clause have to say about permitting worship in a limited public forum?

V. WORSHIP IN PUBLIC BUILDINGS AND THE ESTABLISHMENT CLAUSE TESTS

The constitutionality of worship in public buildings can be analyzed under all the Court’s predominant Establishment Clause tests. As mentioned

239. *Id.* at 785 (Williams, J., dissenting).

240. *Id.*

241. *Id.* at 787.

242. *Id.* Judge Williams’s rather surprising conclusion that denying funding shows “respect” for worship may be explained in part by her belief that to equate religious activities with discussion or debate “degrades religion and the practice of religion.” *Id.* at 785 (citing *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 102 (2d Cir. 2007) (Calabresi, J., concurring)). One might still question, however, whether it really shows greater respect for religious worship to deny it funding or access to public buildings.

243. *Id.* at 788.

244. *Id.*

in the Introduction, there are three questions to be answered. The first is what is meant by “worship.” The second is whether the Establishment Clause can justify excluding worship from a limited public forum. The third is whether the Establishment Clause *prohibits* the exclusion of worship from public buildings.

A. What Is “Worship”?

The first step in determining whether worship can be excluded from a limited forum is defining worship. *Webster’s Third New International Dictionary* defines it as “the reverence or veneration tendered a divine being or supernatural power; *also*: an act, process, or instance of expressing such veneration by performing or taking part in religious exercises or ritual.”²⁴⁵ Another definition is “respect, admiration, or devotion for an object of esteem.”²⁴⁶ This is an adequate definition for discussing worship in public forums.²⁴⁷ But it is *not* a sufficient definition to enable judges to determine what is or is not religious worship.²⁴⁸ As discussed below,²⁴⁹ assigning to judges such a task would conflict with the Supreme Court’s precedent and would present more difficult problems of definition.

Richard Esenberg says defining worship as one particular thing is a “fool’s errand.”²⁵⁰ He gives an overview of the Christian understanding of worship and shows that religious worship nearly always *communicates* about the world in a way that fits the requirements of most public forums.²⁵¹ This communicative aspect of worship is significant because the Supreme Court in *Good News Club* relied on the fact that the singing, praying, and Bible teaching also communicated teaching about moral values.²⁵² Esenberg notes

245. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2637 (2002).

246. *Id.*

247. There was no real dispute in either *Bronx Household* or *Glover* that the activities in question were worship. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 101–02 (2d Cir. 2007) (Calabresi, J., concurring); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 918 (9th Cir. 2007). Nor is it unreasonable to conclude that at least some aspects of the singing, prayer, and proselytizing in *Good News Club* were worship. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001). The issues in question are whether judges can parse worship from non-worship and whether worship can be excluded as something “other” than speech that communicates a religious viewpoint.

248. Judge Walker correctly noted that worship is not incapable of definition, but rather it is impossible for a *court* to define it. *Bronx Household*, 492 F.3d at 129 n.10 (Walker, J., dissenting). Although a court can theoretically define anything it wishes, there are certain concepts that are beyond the cognizance of the legal system. Judges are poorly equipped to define and judicially recognize concepts such as love, beauty, or worship, because these are philosophical and theological concepts, rather than legal ones. Even the Supreme Court has recognized that worship is a concept that is not “within the judicial competence to administer.” *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981).

249. *Infra* notes 313–26.

250. Esenberg, *supra* note 15, at 499.

251. *Id.* at 496–500.

252. *Good News Club*, 533 U.S. at 112 n.4.

that “it is difficult to know where mere religious perspectives on secular subjects end and worship with secular implications begins.”²⁵³ It is not so much that worship is indefinable, but that worship is almost impossible to distinguish from religious speech, which must be permitted access to a limited public forum.²⁵⁴ But for purposes of this Comment, I will define worship as reverence or veneration directed toward an object of esteem or divine being. With this definition in mind, the next question is whether the Establishment Clause requires or justifies the exclusion of worship from public buildings.

B. Do Establishment Clause Concerns Justify the Exclusion of Worship?

It could be argued that the Establishment Clause *requires* the exclusion of worship from a limited public forum, but the more common view among courts and scholars is that excluding worship is permitted, not required.²⁵⁵ Some scholars have suggested that excluding worship can be justified in terms of anti-establishment concerns.²⁵⁶ That is, state actors might be allowed to exclude religious worship as a prophylactic measure in order to avoid even approaching an Establishment Clause violation.²⁵⁷ But government measures to comply with the Establishment Clause cannot infringe on individuals’ freedom of speech.²⁵⁸ Thus, excluding religious

253. Esenberg, *supra* note 15, at 506.

254. *Id.*

255. See Tebbe, *supra* note 15, at 1267 (“[T]he state generally ought to be allowed considerable latitude to exclude religious activities and actors from its support, at least as a constitutional matter.”); Marker, *supra* note 15, at 674 (“In no way does this Note argue that a limited public forum must restrict worship.”); see also *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 95, 105 n.8 (2d Cir. 2007) (Calabresi, J., concurring) (“[D]efendants’ desire to avoid seeming to favor some religions is a reasonable ground for limiting this forum only to speech that does not include the category ‘worship.’”).

256. See Tebbe, *supra* note 15, at 1267–68. The circuit courts have studiously avoided the Establishment Clause issues, even though the school district in *Bronx Household* argued that avoiding an Establishment Clause violation justified the exclusion. See *Bronx Household*, 492 F.3d at 95, 105 n.8 (Calabresi, J., concurring); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 919 n.20 (9th Cir. 2007). And the Establishment Clause is in fact the only potentially legitimate justification for exclusion. As noted by dissenting Judge Walker in *Bronx Household*, the only two explanations for the School Board’s actions were “a mistaken belief that such exclusion is necessary to comply with the Establishment Clause or due to some hostility to religious groups.” *Bronx Household*, 492 F.3d at 123 n.2 (Walker, J., dissenting).

257. See Tebbe, *supra* note 15, at 1268 (“The government may exclude religion in order to pursue a stricter vision of antiestablishment than the First Amendment requires, at least within certain limits.”).

258. See *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981) (“The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.”). In a limited public forum, as here, the speech restriction must not discriminate on the basis of viewpoint and must be “reasonable in light of the purpose to be

worship from a limited public forum lies right in the area of tension between the Free Speech and Establishment Clauses of the First Amendment.²⁵⁹

The Supreme Court has indicated that compliance with the Establishment Clause may be a sufficiently compelling interest to justify *content*-based speech restrictions.²⁶⁰ And the Ninth Circuit held that excluding worship is a content-based distinction that is not viewpoint discriminatory.²⁶¹ But even if this is correct, the exclusion still must be *required* by the Establishment Clause in order to constitute a compelling interest.²⁶² Thus, it is important to determine if the presence of religious worship in public forums offends the Establishment Clause under any of the approaches the Court has employed.

1. The *Lemon* Test

Applying the *Lemon* test, it is difficult to argue that allowing worship in public buildings causes any serious tension with the Establishment Clause. A policy of equal access seems to promote the secular purpose of allowing community groups to use public forums.²⁶³ Although it is conceivable that in rare situations creating a designated or limited forum could have a non-secular purpose, in the vast majority of cases an equal access policy can only have a predominantly secular purpose.²⁶⁴

As to *Lemon*'s second prong, a policy that permits worship, along with a wide range of other activities, would only marginally advance religion. Although the religious groups would clearly benefit from such a policy, its

served by the forum." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 471 U.S. 788, 806 (1985)).

259. And the Supreme Court has always erred on the side of protecting free speech, particularly in cases where there is a weak Establishment Clause argument. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Widmar*, 454 U.S. at 272–73; *Good News Club*, 533 U.S. at 113.

260. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995). The Court in *Good News Club* did not decide whether an Establishment Clause violation would justify viewpoint discrimination. *Good News Club*, 533 U.S. at 113. It was enough that there was no Establishment Clause interest in denying equal access to a religious group for after-school programs. *Id.*

261. *Glover*, 480 F.3d at 915. This conclusion is tenuous at best and may conflict with the Court's holdings in *Lamb's Chapel* and *Good News Club*. See Deutsch, *supra* note 15, at 45–51.

262. See *Pinette*, 515 U.S. at 761–62.

263. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").

264. It is conceivable, for example, that officials of a small town could open up a public building to general community uses with the actual intention of assisting a church group, knowing well that no other community groups would step forward and avail themselves of the forum. But such a situation is highly unlikely. Most government actors would be well aware that opening a forum for a wide range of uses would in fact attract a wide range of users, secular and religious. It would thus be difficult for a government actor to open up such a forum with a predominantly religious purpose.

primary effect would not be to advance religion.²⁶⁵ As the Court observed in *Pinette*:

We find it peculiar to say that government ‘promotes’ or ‘favors’ a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.²⁶⁶

Allowing religious groups to use a forum for worship on the same footing that other groups are allowed to use it for other purposes cannot be mistaken as anything but neutral.²⁶⁷

Finally, equal access would not lead to excessive entanglement. Government officials would not be forced to “inquire into the significance of words and practices to different religious faiths.”²⁶⁸ On the contrary, it would not require any parsing of religious beliefs or involvement with religion at all. Schools and libraries would only need to verify that religious groups’ use of the facilities fit within the broad categories of uses “pertaining to the welfare of the community” or of “cultural or community

265. If one characterized the policy at an extremely specific level—such as “allowing churches to worship in public buildings”—one might conclude that the policy had the primary effect of advancing religion. But to do so would be to blatantly disregard the larger character of the forum.

266. *Pinette*, 515 U.S. at 763–64.

267. See *Rosenberger*, 515 U.S. at 839. It is important to remember that the Establishment Clause only applies to state action, not to the actions of individuals. See *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (“It is true, however, that under Minnesota’s arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children. . . . Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no ‘imprimatur of State approval,’ can be deemed to have been conferred on any particular religion generally.” (citation omitted)). In *Glover* and *Bronx Household*, the only state action was opening the public buildings for a wide range of public expression. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 90–91 (2d Cir. 2007) (describing the New York City school board policy allowing use of school facilities for “social, civic, [or] recreational meetings, . . . and other uses pertaining to the welfare of the community” (alteration in original)); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 902 (9th Cir. 2007) (describing the policy of the Contra Costa County library “to encourage the use of library meeting rooms for educational, cultural and community related meetings, programs and activities”). Likewise, in *Badger Catholic*, the only state action was providing funding to all student groups. *Roman Catholic Found, UW-Madison, Inc. v. Regents of the Univ. of Wis. Sys.*, 578 F. Supp. 2d 1121, 1125 (W.D. Wis. 2008) (describing the challenged state action as the failure to sponsor worship activities from the university’s fund for student activities). The worship services involved in those cases were neither suggested nor encouraged by state actors. Instead, they were initiated and conducted entirely by private individuals who were using the forum pursuant to an open-access policy.

268. *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981).

interest.”²⁶⁹ Government actors need not entangle themselves with religious worship any more than they do with Boy Scout or union meetings.

Furthermore, it is difficult to argue that religious *worship* presents any more problems under the *Lemon* test than religious *speech*, which the Supreme Court has consistently held must be permitted in limited public forums.²⁷⁰ Religious worship, however it might be defined, is no more religious than prayer, singing Christian songs and hymns, Bible reading and commentary, discussion of religious views and experiences, and invitations to trust Jesus Christ as Savior, all of which the Supreme Court has said must be permitted in public buildings.²⁷¹

2. The Endorsement or Reasonable Observer Test

The endorsement test provides the best rationale for excluding worship because some might perceive an endorsement of worship if officials allow it in a public forum.²⁷² For purposes of this test, however, the reasonable observer “must be deemed aware of the history and context of the community and forum.”²⁷³ The reasonable observer in *Bronx Household* and *Glover* would be aware of the neutral policy of equal access for both religious and non-religious groups.²⁷⁴ The Supreme Court has made clear that “any risk” of perceived endorsement should not “counsel in favor of excluding . . . religious activity.”²⁷⁵ So, although *some* observer might perceive a state endorsement of religion, a reasonable and informed observer would recognize that the policy promotes neutrality toward religion.²⁷⁶

269. See *Bronx Household*, 492 F.3d at 92 (Calabresi, J., concurring); *Faith Ctr. Evangelistic Ministries v. Glover*, 480 F.3d 891, 902 (9th Cir. 2007).

270. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108–09 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993); *Widmar*, 454 U.S. at 277. The Court in *Widmar* never specifically addressed the nature of the forum created by the university, but it did not challenge the district court’s characterization of the forum as a limited public forum. *Id.* at 272.

271. *Good News Club*, 533 U.S. at 137–38 (Souter, J., dissenting); *Widmar*, 454 U.S. at 265 n.2.

272. One student comment criticizing the *Glover* decision concedes that allowing worship in public forums would fail the endorsement test. Tyler, *supra* note 15, at 1367–69. His conclusion, however, is not based on a proper understanding of the endorsement test and the concomitant principle of government neutrality, which is not offended by an equal access policy.

273. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in the judgment).

274. *Id.* at 782 (“The reasonable observer would recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers . . .”).

275. *Good News Club*, 533 U.S. at 119; see *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O’Connor, J., concurring) (“Nearly any government action could be overturned as a violation of the Establishment Clause if a ‘heckler’s veto’ sufficed to show that its message was one of endorsement.”).

276. Neutrality is an important aspect of the Establishment Clause inquiry. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (“[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards

Additionally, as observed above,²⁷⁷ it is unlikely that a reasonable observer would perceive a greater endorsement of religion in “worship” than he would in the activities involved in *Widmar* and *Good News Club*.²⁷⁸ From the endorsement test perspective, it is also very difficult to distinguish between speech that involves a religious perspective on a secular topic, on the one hand, and religious worship, on the other.²⁷⁹ A reasonable observer would probably perceive just as much religious content in a sermon from the Bible as he would in the singing of Christian songs or participation in Communion. Thus, any Establishment Clause concerns under this test are slight at best, and they are certainly no greater than those that would result from excluding worship.²⁸⁰

3. The Coercion Test

The coercion test would not provide a good justification for excluding worship because allowing worship in a public building would not coerce anyone into religious behavior.²⁸¹ Under the legal coercion test posited by Scalia and Thomas, there would not even be a colorable claim of coercion.²⁸² And even under Justice Kennedy’s more expansive psychological coercion test, there must be sufficient “subtle coercive

religion.”).

277. See *supra* notes 270–72 and accompanying text.

278. See *Good News Club*, 533 U.S. at 137–38 (Souter, J., dissenting) (“Good News’s classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that ‘[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him. . . . If you have received the Lord Jesus as your Saviour from sin, you belong to God’s special group—His family.’” (alterations in original)); *Widmar v. Vincent*, 454 U.S. 263, 265 n.2 (1981) (“A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious view and experiences.”).

279. To exclude the former would clearly constitute viewpoint discrimination. See *Good News Club*, 533 U.S. at 111 (“We disagree 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.”).

280. See *id.* at 114 (“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.”).

281. See *id.* at 115 (“Here, where the school facilities are being used for a non school function and there is no government sponsorship of the Club’s activities, *Lee* is inapposite.”).

282. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) (“The kind of coercion implicated by the Religion Clauses is that accomplished ‘by force of law and threat of penalty.’ Peer pressure, unpleasant as it may be, is not coercion.” (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting))); *Lee*, 505 U.S. at 642 (Scalia, J., dissenting) (“I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . .”). Peer pressure cannot constitute coercion under the Scalia and Thomas test because there is no state action or legal coercion.

pressures” for an Establishment Clause violation.²⁸³

The Supreme Court employed its most expansive view of the coercion test in *Santa Fe Independent School District v. Doe*, in which it held that student-led prayer at a high school football game violated the Establishment Clause.²⁸⁴ But the Court relied on the fact that the school had adopted a policy allowing students to choose whether to have prayer at football games.²⁸⁵ The Court made clear that the Establishment Clause does not “impose a prohibition on all religious activity in our public schools.”²⁸⁶ Allowing equal access to religious groups during non-school hours is clearly distinguishable from allowing school-sponsored prayer during school activities. No form of the coercion test could be stretched to say that non-religious people or members of other religions would feel coerced into participating in weekend worship services in schools or libraries.²⁸⁷ Therefore, the coercion test does not provide a compelling justification for excluding worship from limited public forums.

4. History and Traditions

The practice of holding religious services in federal buildings does not go quite as far back as the practice of appointing legislative chaplains, which began in 1789,²⁸⁸ but it does date back to 1795.²⁸⁹ This was six years after the First Amendment was proposed and less than four years after it was ratified.²⁹⁰ History shows that Thomas Jefferson and members of the Fourth Congress not only did not oppose using public buildings for Sunday worship, but actually authorized and encouraged it. The views of the Fourth Congress can be relied upon to reflect the original understanding of the First

283. *Lee*, 505 U.S. at 588.

284. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). The Court said, “Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.” *Id.* at 312.

285. *Id.* at 296–98, 310, 313.

286. *Id.* at 313. Furthermore, “nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.” *Id.*

287. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 100 (2001) (“The Court rejects Milford’s attempt to distinguish those cases by emphasizing that its policy involves elementary school children who will perceive that the school is endorsing the Club and will feel coerced to participate because the Club’s activities take place on school grounds, even though they occur during nonschool hours.”).

288. See *Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983).

289. See *supra* note 146.

290. The First Amendment was adopted by Congress on September 25, 1789 and ratified on December 15, 1791. See *Marsh*, 463 U.S. at 788; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1482 (S.D. Fla. 1989), *rev’d on other grounds*, 508 U.S. 520 (1993). Church services began meeting in the unfinished Capitol building no later than June 1795. See FED. ORRERY, *supra* note 145, at 289.

Amendment because a number of the members were drafters of that Amendment. Of the 148 members of the Fourth Congress in 1795, thirty had been members of the First Congress, which drafted the Bill of Rights.²⁹¹ It should be no great surprise that a Congress willing to authorize paid chaplains, as the First Congress was, would also allow religious services in public buildings.²⁹² The Establishment Clause concerns raised by opening the Capitol or executive buildings to ecumenical church services were certainly no greater than those raised by paying Congressional chaplains.²⁹³ Therefore, under a “history and traditions” test like that applied in *Marsh*, religious worship in public buildings does not offend the Establishment Clause. This is particularly true in cases such as *Bronx Household* and *Glover*, where the worship is taking place as part of a policy of equal access to a forum.²⁹⁴

C. *Is Excluding Worship Permissible Under the Establishment Clause?*

The next question is whether excluding religious worship from a public forum violates the Establishment Clause. The District Court in *Glover* concluded that it does, but the issue is not one that has been thoroughly examined.²⁹⁵ Parties usually invoke the Establishment Clause against alleged preferential treatment of religion, and they rely on it much less often

291. See *Biographical Directory of the United States Congress 1774–2005*, GPO ACCESS, 43–46, 51–53 (Jan 3, 2005), http://clerk.house.gov/art_history/house_history/index.html (last visited Mar. 20, 2010). Of the thirty-two members of the Senate in 1795, eleven had been in the First Congress, nine as senators and two as representatives. *Id.* Nineteen of the original members remained in the House in 1795. *Id.*

292. The members of the First Congress were very interested in religious observance. Directly after President Washington’s inauguration on April 30, 1789, the entirety of the House and Senate, as well as the President and Vice President, went to St. Paul’s Chapel for “divine service.” 1 ANNALS OF CONG. 29 (1789) (Joseph Gales ed., 1834). Both houses had adopted a resolution that said, “Resolved, That after the oath shall have been administered to the President, he, attended by the Vice President and members of the Senate, and House of Representatives, proceed to St. Paul’s Chapel, to hear divine service.” *Id.* at 25.

293. In fact, under any of the common modern Establishment Clause tests (other than the “deeply embedded in traditions” test of *Marsh*), paid chaplains would be a much more serious threat of establishment than a policy of equal or even preferential access to public buildings for religious groups.

294. A policy of equal access does not show any preference for religious over non-religious uses of the forum. This comports with the Supreme Court’s modern approach to the Establishment Clause. See discussion *supra* notes 96–139 and accompanying text. But, in fact, the modern notion of disestablishment “neutrality” would have been foreign to the framers of the First Amendment. See discussion *supra* notes 74–76.

295. *Faith Ctr. Church Evangelistic Ministries v. Glover*, No. 04-03111, 2009 WL 1765974, at *8–10 (N.D. Cal. June 19, 2009). Even the district court only devoted two pages of the opinion to the discussion.

in cases of hostility toward religion.²⁹⁶ The Supreme Court has indicated that certain Establishment Clause principles—specifically excessive entanglement, endorsement, and neutrality—can be applied to disapproval of religion.²⁹⁷ Some lower courts, such as the Ninth Circuit, have explicitly applied the *Lemon* test to such cases.

1. The *Lemon* Test

The Supreme Court has never employed the *Lemon* test to strike down a policy hostile toward religion.²⁹⁸ Nevertheless, the Supreme Court indicated as long ago as *Everson* that the Establishment Clause might prohibit certain actions hostile toward religion.²⁹⁹ The Ninth Circuit has concluded that “[a]lthough the *Lemon* test is perhaps most frequently used in cases involving government allegedly giving *preference* to a religion, the *Lemon* test accommodates the analysis of a claim brought under a hostility to religion theory as well.”³⁰⁰ Other than the Ninth Circuit, the federal circuits have infrequently applied the *Lemon* test to disapproval of religion.³⁰¹ The

296. See *id.* at *8; see also *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 567 F.3d 595, 599 (9th Cir. 2009) (opinion of Paez, J.), *reh’g en banc granted*, 586 F.3d 1166 (Nov. 5, 2009) (“Although the courts have not often had occasion to determine whether government action effects a *disapproval* of religion, as opposed to an endorsement, the Establishment Clause’s neutrality mandate applies here with equal force.”).

Claims of hostility toward religion are usually brought under the Free Exercise Clause. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (finding that the “Free Exercise Clause is dispositive” in analysis of an alleged attempt to disfavor religion).

297. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981).

298. Andrew Cogar has suggested that the Supreme Court has foreclosed the use of the *Lemon* test for hostility claims. Andrew R. Cogar, Comment, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W. VA. L. REV. 279, 307 (2002). He cites to the Supreme Court’s decision in *Larson v. Valente*, in which the Court said, “the *Lemon v. Kurtzman* ‘tests’ are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions.” *Larson v. Valente*, 456 U.S. 228, 252 (1982) (citation omitted). But Cogar renders this quotation misleading by removing the original emphasis. Cogar, *supra*, at 306. The *Larson* Court did not say the *Lemon* test was not designed for claims of religious discrimination, but rather that it was not designed for claims of discrimination among various religions. *Id.* Therefore, *Larson* does not foreclose the application of the *Lemon* test to cases of hostility toward religion. Still, Cogar’s broader conclusion that *Lemon* is ill-suited for such claims is correct.

299. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to *or to remain away* from church against his will or force him to profess a belief *or disbelief* in any religion. *No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.*” (emphasis added)). Although the *Everson* Court may have been relying in part on the Free Exercise Clause for these propositions, it spoke in terms of the Establishment Clause.

300. *Am. Family Ass’n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1121 (9th Cir. 2002).

301. See, e.g., *Stratechuck v. Bd. of Educ.*, 587 F.3d 597 (3d Cir. 2009); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009); *O’Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Bishop v. Aronov*, 926 F.2d 1066 (11th

Ninth Circuit, however, has applied *Lemon* in this context a number of times and consistently engaged in the most extensive analysis.³⁰² Therefore, the Ninth Circuit provides the best starting point in applying *Lemon* to hostility claims.

In *Nurre v. Whitehead*, for example, a panel of the Ninth Circuit applied the *Lemon* test to a high school's denial of permission to play an instrumental version of "Ave Maria" at a high school graduation ceremony.³⁰³ Plaintiff, one of the graduating members of the wind ensemble, brought suit claiming that the school had violated the Free Speech and Establishment clauses.³⁰⁴ The divided Ninth Circuit panel concluded that the school's decision was viewpoint neutral and consistent with the purposes of the forum.³⁰⁵ The court then applied the *Lemon* test, and found that the school's decision had a secular purpose and did not have the primary effect of inhibiting religion because it was "to avoid conflict with the Establishment Clause."³⁰⁶ It did not lead to excessive entanglement, the court reasoned, because the school merely conducted a one-time review of the songs.³⁰⁷

The Ninth Circuit cases using *Lemon* in hostility claims are not particularly helpful because none of them have found an Establishment Clause violation.³⁰⁸ It is still unclear in the Ninth Circuit what is sufficient

Cir. 1991); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990); *Smith v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 827 F.2d 684 (11th Cir. 1987); *Phan v. Virginia*, 806 F.2d 516 (4th Cir. 1986). All of these cases rejected the plaintiffs' claims of Establishment Clause violations.

302. *See, e.g., Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009); *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 567 F.3d 595, 599 (9th Cir. 2009), *aff'd on reh'g en banc*, 624 F.3d 1043 (2010); *Vasquez v. Los Angeles*, 487 F.3d 1246, 1255 (9th Cir. 2007); *Am. Family Ass'n*, 277 F.3d at 1121; *Vernon v. City of L.A.*, 27 F.3d 1385, 1396 (9th Cir. 1994). In all of these cases, the circuit panels found all the *Lemon* prongs satisfied.

303. *Nurre*, 580 F.3d at 1090. Based on the plaintiff's contention, the court assumed, without deciding, that the graduation ceremony was a limited public forum. *Id.* at 1094.

304. *Id.* at 1091. The graduating members of the wind ensemble were allowed every year to choose a piece to perform at graduation. *Id.* After they were denied permission to perform "Ave Maria," they were forced to choose another "purely secular" song. *Id.*

305. *Id.* at 1095 n.6. In his dissent, Judge Milan Smith argued that the restriction was not reasonable in light of the purpose of the forum, because it restricted the students' secular artistic expression. *Id.* at 1100–01 (Milan Smith, J., dissenting).

306. *Id.* at 1096, 1097 (majority opinion). Under the effects prong, the court applied the reasonable observer test. *Id.* at 1097.

307. *Id.* at 1097–98.

308. *See id.*; *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 567 F.3d 595, 599 (9th Cir. 2009), *aff'd on reh'g en banc*, 624 F.3d 1043 (2010) (finding that resolution by the city and county's board of supervisors opposing a Vatican directive did not conflict with *Lemon*); *Vasquez v. Los Angeles*, 487 F.3d 1246, 1255–58 (9th Cir. 2007) (holding that removal of a cross from the city's seal passed *Lemon* test); *Am. Family Ass'n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1121–23 (9th Cir. 2002) (finding no Establishment Clause violation under *Lemon* when the

to constitute an Establishment Clause violation based on hostility.³⁰⁹ These cases also point to the difficulty of applying Establishment Clause tests in the context of hostility toward religion.³¹⁰ At least with respect to the first two prongs of *Lemon*, the reasoning can quickly become circular. That is, it can be said that excluding religion has the secular purpose of avoiding an Establishment Clause violation and has a neutral primary effect because it ensures compliance with the Establishment Clause.³¹¹ Applied this way, as they were in *Nurre*, the first two prongs of the *Lemon* test become meaningless.³¹²

Unlike the first two *Lemon* prongs, the excessive entanglement prong has at least some application when religion is excluded from a forum. In *Widmar*, the Supreme Court rejected the argument in Justice White's dissent that "religious worship" is not speech protected by the Free Speech Clause.³¹³ The Court said,

Merely to draw the distinction [between religious worship and religious speech] would require the university—and ultimately the

city and county's board of supervisors publicly condemned an advertising campaign by Christian groups); *Vernon v. City of L.A.*, 27 F.3d 1385, 1396–1401 (9th Cir. 1994) (finding investigation into police chief's religious beliefs permissible under *Lemon*).

309. Thus, the district court's decision in *Glover* could not rely on any specific Ninth Circuit holding, but the decision was not appealed. *Faith Ctr. Church Evangelistic Ministries v. Glover*, No. 04-03111, 2009 WL 1765974, at *8–10 (N.D. Cal. June 19, 2009).

310. Part of the reason for the difficulty in applying *Lemon* in this context is that the Establishment Clause was not designed to take the place of the Free Speech and Free Exercise clauses. Another reason is that courts do not always clarify which clause they are using. For example, the Ninth Circuit first applied the Establishment Clause to disapproval of religion in *Vernon v. City of Los Angeles*, concluding that "[t]he government neutrality required under the Establishment Clause is thus violated as much by government disapproval of religion as it is by government approval of religion." *Vernon*, 27 F.3d at 1396. But the court relied for its "disapproval" language on a Supreme Court case dealing with the Free Exercise Clause. The Ninth Circuit said, "We initially observe that although the federal Establishment Clause cases for the most part have addressed governmental efforts to *benefit* religion or particular religions, it is clear that 'the First Amendment forbids an official purpose to *disapprove* of a particular religion or of religion in general.'" *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)). *Church of the Lukumi*, however, dealt specifically with the Free Exercise Clause. The Supreme Court in that case went on to say,

These [Establishment Clause] cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here.

Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

Church of the Lukumi Babalu Aye, 508 U.S. at 532. Thus, the line of cases following *Vernon* began with a misapplication of Supreme Court precedent. The Ninth Circuit would have been more correct to cite *Widmar* for the proposition that at least the third prong of *Lemon* could apply in hostility claims. See *infra* notes 313–27 and accompanying text.

311. See *Nurre*, 580 F.3d at 1096–97.

312. The endorsement test can be applied to religious hostility claims with much more facility. See discussion *infra* notes 327–37 and accompanying text.

313. *Widmar*, 454 U.S. at 269 n.6.

courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.³¹⁴

As noted above,³¹⁵ the Ninth Circuit and Judge Calabresi relied on the church groups' self-identification of their activities as worship in an attempt to avoid problems of excessive entanglement.³¹⁶ But future courts attempting to distinguish between worship and non-worship are unlikely to have such candid parties.³¹⁷ Courts, as well as local government officials, will thus inevitably be placed in the position of deciding which discrete activities of religious groups constitute worship.³¹⁸ This would require people of different religious faiths or of no religion at all to determine whether particular religious practices, such as singing, prayer, communion, and liturgical readings, are “worship.”³¹⁹ Even if the courts were able to

314. *Id.* Notably, *Widmar* included facts very similar to those in *Bronx Household*, *Glover*, and *Badger Catholic*. The district court in *Badger Catholic* also noted the difficulty of drawing such distinctions. *Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys.*, 578 F. Supp. 2d 1121, 1132 (W.D. Wis. 2008) (“[I]t is sometimes difficult to distinguish between speech from a religious viewpoint and worship, proselytizing or sectarian instruction. Religious speech sometimes proselytizes, and elements of worship sometimes pervade religious discussions.”).

315. *See supra* notes 178 and 216.

316. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 101–02 (2d Cir. 2007) (Calabresi, J., concurring); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 918 (9th Cir. 2007).

317. *See Glover*, 480 F.3d at 924 (Tallman, J., dissenting) (“[T]his flawed analysis blithely ignores other similarly situated religious groups that may not make such a nice admission to the County in their applications to use the room.”). In her dissent in *Badger Catholic*, Judge Williams went even further than the Ninth Circuit majority and suggested that it would be fine if religious groups were disingenuous. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 787 (7th Cir. 2010) (Williams, J., dissenting), *cert. denied*, 131 S. Ct. 1604 (2011). She approvingly noted that “[t]he University even acknowledges that *Badger Catholic* could describe *Catholic Mass* as ‘Catholic perspectives on the world,’ and that would probably be funded because the University does not test or push the group when it self-defines an activity.” *Id.* However, it is a poor legal rule that gives an incentive to lie. Furthermore, if government officials *did* decide to challenge a group’s self-identification (hardly an unlikely circumstance), a court would be forced to determine whether or not the activity was properly excluded from the forum.

318. Even the court in *Glover* based its ruling on the assumption that the church groups *correctly* defined their own activities. It is unlikely, for example, that the lower courts would have found the showing of Christian films about parenting impermissible (a result that would be directly contrary to *Lamb’s Chapel*), even if the group had labeled the activity “worship.”

319. As noted by Judge Bybee, different religious groups would be treated differently under any definition of worship. *Glover*, 480 F.3d at 901 (Bybee, J., dissenting from denial of rehearing en banc). Under the majority’s test, he said,

Evangelical and Unitarian groups should generally be granted access: Moral teaching is integral to their services, as are fellowship, singing, and other distinctly non-worship activities. Liturgically oriented denominations such as Episcopalians and Catholics will find themselves subject to greater burdens: The worship elements of their services are more distinct and easily severable from the non-worship elements, and they have more

create a legal definition of worship, there would still be potential for administrative entanglement.³²⁰ The line between religious speech and worship, however defined, is very thin.

Even more thin is the line between religious speech and “mere religious worship, divorced from any teaching of moral values.”³²¹ Although Judge Calabresi in *Bronx Household* relied heavily on the fourth footnote in *Good News Club*, which said that the club’s activities did not constitute “mere religious worship,” he never addressed the second phrase, “divorced from any teaching of moral values.”³²² Judge Paez did address this second element and concluded that the Court in *Good News Club* meant that worship *per se* exceeded the boundaries of the forum, not that worship can ever be fully divorced from moral instruction.³²³ Even accepting Judge Paez’s formulation of this distinction—the line between “pure worship” and the “forum’s purpose”—it is very difficult to make.³²⁴ Determining whether worship has too tenuous a connection to “educational, cultural, or community interest” would require not only a clear definition of worship but also a very detailed scrutiny of those practices labeled as worship.³²⁵

services (such as the Daily Office in the Catholic tradition) that can be characterized in their entirety as “mere worship.”

Id. Adding in faiths other than Christianity simply compounds the problem. As Judge Easterbrook observed in *Badger Catholic*, “Quakers view communal silence as religious devotion, and a discussion leading to consensus as a religious exercise. Adherents to Islam and Buddhism deny that there is any divide between religion and daily life; they see elements of worship in everything a person does.” *Badger Catholic*, 620 F.3d at 781.

320. The D.C. Circuit found that making a distinction between Pope John Paul II delivering a sermon and presiding over Mass would be an impermissible entanglement. *See O’Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979). The court said that making such a distinction was “an impossible task in an age where many and various beliefs meet the constitutional definition of religion.” *Id.* (citing LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (1978)).

321. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 n.4 (2001).

322. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 100–06 (2d Cir. 2007) (Calabresi, J., concurring).

323. *Glover*, 480 F.3d at 915 n.14 (“It is difficult to imagine moreover that religious worship could ever truly be divorced from moral instruction or character development. That is not what the majority in *Good News Club* meant when it wrote: ‘we conclude that the Club’s activities do not constitute mere religious worship, divorced from any teaching of moral values.’ That statement must be taken in its proper context. The defendant district opened the forum in part for the moral and character development of children. As here, pure religious worship was too tenuously associated to the forum’s purpose.” (citation omitted)).

324. Judge Paez did not attempt to draw the distinction himself. He said, “Although religious worship is an important institution in any community, we disagree that anything remotely community-related must therefore be granted access to the Antioch Library meeting room.” *Id.* at 915.

325. *Glover*, 480 F.3d at 895. In his concurrence in *Good News Club*, Justice Scalia pointed out 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.” *Good News Club*, 533 U.S. at 126 n.3 (Scalia, J., concurring) (citing *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). In *Schempp*, the Court drew a distinction between Bible reading at the beginning of the school day and “study of the Bible or of religion, when presented objectively as part of a secular program of education.” *Schempp*, 374 U.S.

Moreover, this scrutiny into “the significance of words and practices to different religious faiths” is what the Supreme Court has firmly rejected.³²⁶ Thus, the district courts in *Glover* and *Bronx Household* were correct, as a matter of Supreme Court precedent, that excluding worship from a public forum violates the excessive entanglement prong of *Lemon*.

2. The Endorsement Test and the Principle of Neutrality

The Supreme Court has also suggested that the endorsement test can cut both ways. In *Good News Club*, the Court said, “[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.”³²⁷ The converse of endorsement is disapproval or hostility, which is contrary to the well-recognized First Amendment principle of government neutrality toward religion.³²⁸ As the Supreme Court has observed, “[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.”³²⁹ Even if courts were somehow able to draw a legitimate legal distinction between worship and other forms of religious speech, there is no reasoned way to exclude worship without leaving room for discrimination against religion.³³⁰

It could be argued that the reasonable observer would see a difference between religious worship and religious speech and would thus find no hostility toward religion if the government disallowed worship in a limited

at 225. But as Justice Scalia noted, this is very different than monitoring private religious speech. *Good News Club*, 533 U.S. at 127 (Scalia, J., concurring).

326. *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). As the Court observed in *Rosenberger*, a policy requiring public officials to scrutinize publications “to discern their underlying philosophic assumptions respecting religious theory and belief” would “risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

327. *Good News Club*, 533 U.S. at 118.

328. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (“[T]he message is one of neutrality rather than endorsement . . .”).

329. *Id.*

330. *See id.* Nelson Tebbe recognizes that “[a] basic constitutional principle prevents official action that raises an unmistakable inference of distaste for religion, unconnected to any legitimate justification for excising religious groups or entities from funding programs.” Tebbe, *supra* note 15, at 1329. Tebbe attempts to deal with this problem by drawing the definition of animus toward religion very narrowly to include only cases “where there is a glaring mismatch between the nature of the exclusion and the nature of the program.” *Id.* at 1331. Simply redrawing the definition of animus, however, is small comfort for those whose expressive rights are limited. Even Tebbe admits that “excluding religious expression is particularly difficult when the government is otherwise promoting a range of private speech.” *Id.* at 1318.

public forum.³³¹ However, the reasonable observer would have to be particularly well-informed to know how to define worship as distinct from religious speech, considering that neither the Ninth Circuit nor Judge Calabresi provided a definition.³³² Furthermore, a reasonable observer would likely wonder how the government could justify excluding the worship activities of religious groups when it allows non-religious groups to conduct their activities unhindered. A policy of equal access on the other hand, sends a message of “approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion.”³³³

Even if the endorsement test does not require a strict policy of equal access to limited public forums, it at least leaves the question in equipoise.³³⁴ The test provides at least equally good reasoning for equal access as for exclusion.³³⁵ In such a situation, the question ought to be decided in favor of religious liberty and freedom of speech.³³⁶ No matter what distinctions courts try to draw between worship and other forms of speech, worship is still speech protected by the First Amendment.³³⁷ Furthermore, the Supreme Court has recognized that the Constitution requires accommodation of religion, not merely a position of strict separation or neutrality.³³⁸ Accommodation is served by an even-handed policy of equal access.³³⁹

331. See Tebbe, *supra* note 15, at 1310 (“Worship might be viewed by citizens as dissimilar to other expression . . .”).

332. Richard Esenberg points out that while worship might be “higher octane religion,” a reasonable observer is presumed to know that religious perspectives on secular topics are permitted in public forums. Esenberg, *supra* note 15, at 512–13. Thus, a reasonable observer would likely conclude that worship was akin to the prayer, singing, and calls to religious commitment present in *Widmar* and *Good News Club* and was therefore permissible.

333. *O’Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979). The D.C. Circuit also observed that “[a] central aspect of our pluralist society is its religious diversity. This pluralism reflects the very purpose of the Establishment Clause. And this pluralism is nurtured by the precept of equal access to a public facility generally open to the public.” *Id.* at 934–35.

334. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001).

335. See *id.*

336. See *id.* at 119 (“We decline to employ Establishment Clause jurisprudence using a modified heckler’s veto. . . . 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.”).

337. See *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (“[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment.”). Even the Ninth Circuit recognized this fact in *Glover*. See *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007) (“We conclude that Faith Center engaged in protected speech when its participants met in Antioch Library for prayer, praise, and worship.”).

338. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”). America’s early history supports this principle of accommodation, as detailed *supra* in notes 145–60.

339. As the Court observed in *Rosenberger*, “We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad

Thus, the considerations raised by the endorsement test weigh against excluding religious worship from public forums.

3. The Coercion Test

The coercion test is largely irrelevant to *excluding* religious worship from a limited forum. Under Justice Kennedy's version of the test, there is perhaps a colorable argument to be made that prohibiting or discouraging worship has "subtle coercive pressures" on those who wish to participate in religious worship.³⁴⁰ For example, in the context of school prayer it could be argued that students, as a result of school action, may feel psychological pressure *not* to pray silently or individually. So the coercion test might be applied to more general claims of government hostility to religion.³⁴¹ But in the context of prohibiting worship in a forum, there is no legally tenable way to determine who bears the effect of these pressures, and the psychological coercion test is inapplicable. The converse of Thomas and Scalia's legal coercion test is not an Establishment Clause test at all, but the Free Exercise Clause.³⁴² Therefore, under a strict legal coercion test, excluding religion would be analyzed under the Free Speech and Free Exercise clauses.³⁴³

4. A Textual or Historical Approach to the Establishment Clause

As a textual and historical matter, the Establishment Clause does not apply to the situations in *Bronx Household*, *Faith Center*, and *Badger Catholic*. As written, the First Amendment only prevents Congress from

and diverse." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

340. See *Lee v. Weisman*, 505 U.S. 577, 588 (1992). The context, however, is quite different from that considered by Justice Kennedy in *Weisman*.

341. This is not, of course, to say that it would be advisable. The psychological coercion test has little or no foundation in the text of the Constitution, and it therefore should not be expanded and applied to other contexts.

342. See *Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) ("[A] violation of the Free Exercise Clause is predicated on coercion . . ."). Somewhat ironically, however, Justice Scalia authored the Court's opinion in *Smith*, which made the Free Exercise Clause inapplicable to neutral laws of general applicability that only incidentally burden religious exercise. See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879–82 (1990), *superceded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Thus, it is unclear what forms of coercion "by force of law and threat of penalty," *Lee v. Weisman*, 505 U.S. at 640 (Scalia, J., *dissenting*) (*emphasis omitted*), Justice Scalia would consider to run afoul of the Free Exercise Clause.

343. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) (Scalia, J., *concurring*) ("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." (*citations omitted*)).

creating or interfering with religious establishments.³⁴⁴ In fact, contrary to how the Supreme Court applies it today, the First Amendment was designed to protect state establishments.³⁴⁵ Thus, the First Amendment could only have applied to the narrow question of whether Congress could allow religious services in federal buildings.³⁴⁶ And even this is speculative at best because the framers likely did not have use of public buildings in mind when writing the Establishment Clause. They would not have imagined that Congress would exercise its enumerated powers to legislate with respect to religious services in federal buildings.³⁴⁷ Therefore, just as the Establishment Clause does not justify excluding worship from public buildings, it probably does not grant a right to use a public forum for religious worship.³⁴⁸

344. The Supreme Court incorporated the Establishment Clause against the states in *Everson v. Board of Education*, 330 U.S. 1 (1947), even though the First Amendment itself uses the word “Congress.” U.S. CONST. amend. I. Various scholars have pointed out that incorporation of the Establishment Clause is a logical impossibility because its very purpose was to protect state establishments. See Porth & George, *supra* note 86, at 138–39; Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 631 (2006) (“Because the original meaning only recognizes a jurisdictional boundary that protects state authority, it cannot logically be incorporated to apply against state governments.”); GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 95 (1987) (observing that incorporating the Establishment Clause “would be like trying to apply the Tenth Amendment to the states”).

345. See Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 *LOY. L.A. L. REV.* 27, 42 (1998) (“Far from prohibiting the establishment of religions by the individual states, the ‘Establishment Clause’ protected [state] establishments. More precisely, the Clause protected the authority of the states to establish religions against federal efforts to disestablish state churches, or to set up a competing national establishment.”). Professor George explains that this is why the amendment uses the words “respecting an establishment of religion” rather than simply “establishing a religion.” *Id.* at 42–43. The Amendment not only prohibited a federal establishment, but also prohibited Congress from interfering with the existing establishments in the states. *Id.*

346. The original understanding was certainly that the government *could* allow religious services. See *supra* notes 145–60 and accompanying text.

347. By its wording, the First Amendment does not apply to actions of the executive branch, such as Jefferson’s administration opening the Treasury or War Office buildings to public worship. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). Congress does have the power to “exercise exclusive Legislation” over the district designated as the seat of government, U.S. CONST. art. I, § 8, cl. 17, so Congress could theoretically exercise that power in a way that violated the Establishment Clause. But it is improbable, based on the larger purpose of the First Amendment, that those who wrote and ratified it thought it had any application to the use of federal buildings for worship services.

348. This is not because the framers of the First Amendment were unconcerned about religion, but because they saw the Establishment and Free Exercise Clauses as serving a very limited purpose—protecting the states from incursions by the federal government. As James Madison explained to the House of Representatives when first introducing a proposed bill of rights, “It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.” 1 *ANNALS OF CONG.* 449 (1789) (Joseph Gales ed., 1834).

Furthermore, the Establishment Clause was never intended to operate on its own, but rather in conjunction with the Free Exercise Clause (and to a much lesser extent, the Free Speech Clause). See *Everson*, 330 U.S. at 15 (speaking of the “interrelation of these complementary clauses”). In

But it is abundantly clear from history that the First Amendment's framers saw no Establishment Clause problem with the presence of worship in public buildings.³⁴⁹ It is equally clear that they considered religion something that could (and should) be promoted.³⁵⁰ Therefore, under a textual or originalist approach, failure to give religious worship equal access to public buildings is perhaps not unconstitutional *per se*, but it is certainly inconsistent with the views of those in the founding period. The United States was founded upon principles of religious liberty and freedom from government censorship, but the Ninth Circuit has come dangerously close to trampling on those principles.³⁵¹

D. What Are the Implications if State Actors Are Allowed to Exclude Worship?

Allowing local governments to exclude worship from public buildings will have important consequences. First, it will have a serious impact on churches and religious groups. These groups will either have to give up using public buildings altogether or only use them for their less worshipful activities. In order to avoid violating bans on religious worship, they will either have to be disingenuous in labeling their activities or be extremely careful to avoid conducting activities such as prayer, singing, and preaching in ways that seem "worshipful."³⁵² Furthermore, church groups will be prevented from presenting a religious perspective on topics that fall within the purpose of a limited public forum.³⁵³ Such viewpoint discrimination is

recent years, the Supreme Court has said that the Establishment and Free Exercises Clauses "are frequently in tension." *Locke v. Davey*, 540 U.S. 712, 718 (2004) (citing *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)). At the same time, the Court has said there is "room for play in the joints" between them, meaning that some state actions are permitted by the Establishment Clause but not required by the Free Exercise Clause. *Id.* at 718–19.

This tension is a result of the Court's modern doctrinal tests and was neither intended nor anticipated by the First Amendment's framers. See *McConnell, Accommodation*, *supra* note 52, at 6. The framers did not consider the concepts of free exercise and non-establishment (at the federal level) to be in conflict; rather, they were both necessary for the preservation of religious liberty. *Id.* The importance of the Free Exercise Clause to this discussion is that it provides further evidence that the First Amendment's framers were concerned about promoting and protecting religious practices.

349. See *supra* text accompanying notes 145–60.

350. See *STORY*, *supra* note 75, at 728–31; see also *supra* text accompanying notes 145–60.

351. See *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 932 (9th Cir. 2007) (Tallman, J., dissenting) ("Just as the government's endorsement of one particular religion would run counter to the principles upon which this nation was founded, a County librarian's attempt to define what constitutes religious worship and what does not also violates these principles. Squelching a viewpoint based solely on the non-obtrusive manner in which it is spoken impermissibly silences speech and exhibits a prejudice against religion that the First Amendment does not tolerate.")

352. See *id.* at 924 (Tallman, J., dissenting).

353. See *Deutsch*, *supra* note 15, at 56. ("Faith Center sought to bring a religious perspective to

precisely the evil that the Court attempted to prevent in *Lamb's Chapel* and *Good News Club*.³⁵⁴

Second, allowing the exclusion of worship will lead to a more confused and confusing jurisprudence. Judges and local administrators will be forced to parse seemingly indistinguishable religious practices in order to determine what constitutes worship.³⁵⁵ Apart from the religious entanglement problems detailed above, this lack of clarity will lead to increased litigation.³⁵⁶ Churches will be forced to resort to the courts to vindicate aspects of their free speech rights that will likely be violated by overzealous local governments. And local governments will be in the difficult position of trying to establish clear standards to exclude “worship” without excluding constitutionally protected speech.³⁵⁷ In fact, there is no way to draw constitutionally tenable distinctions between worship and permissible religious speech.

Third, the Ninth Circuit’s holding will allow state actors to discriminate against religious groups in general or specific religious groups in particular.³⁵⁸ There is no principled way to establish and maintain a policy

otherwise permissible subjects even if it did involve religious worship. The County excluded it from doing so because of disagreement with, and hostility towards, religious worship in the forum. The County also impermissibly took it upon itself to decide what religious speech is deserving of expression.”).

354. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111–12 (2001) (“[W]e reaffirm our holdings in *Lamb’s Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.”).

355. See *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 129–31 (2d Cir. 2007) (Walker, J., dissenting).

356. One student comment has proposed a “test” to determine the constitutionality of restrictions on religious use of a limited public forum. Marker, *supra* note 15, at 692. This test would involve reviewing a local official’s decision of whether an activity was or was not worship by an abuse of discretion standard. *Id.* at 692–93. According to Marker, “[a]n abuse of discretion standard will encourage discussion and negotiation between the parties. This will limit the entanglement between the courts and religious groups, as the courts will only have to intervene in the extreme cases.” *Id.* at 693. But, in fact, such a “test” would have exactly the opposite effect. An abuse of discretion standard, by definition, requires judicial review. If local officials had no clear definition of worship, every determination would have to be litigated to make sure that the officials did not engage in viewpoint discrimination or exclude permissible speech. A policy of equal access, by contrast, would free both local officials and the courts from making difficult determinations about what constitutes worship.

357. Even Nelson Tebbe, who attempts to create a framework that would justify excluding worship, recognizes that “the prospect of excluding religious expression is particularly difficult when the government is otherwise promoting a range of private speech.” Tebbe, *supra* note 15, at 1318. In fact, Tebbe admits that to remove evenhanded state support from worship “necessarily constitutes viewpoint discrimination.” *Id.* at 1311. His solution to this problem is to posit that “excluding worship performs a unique social function, protecting antiestablishment values in an inimitable way.” *Id.* at 1312. But the Supreme Court has rejected the argument that the Establishment Clause justifies viewpoint discrimination in cases of worship. *Good News Club*, 533 U.S. at 114–19.

358. The practices of varying faiths may seem more or less worshipful, depending on one’s perspective. See *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 901 (9th Cir. 2007) (Bybee, J., dissenting from denial of rehearing en banc).

of unequal access for worship that does not also discriminate against religious groups and practices.³⁵⁹ The issue of excluding religion or religious worship raises an important question: why try to exclude religion at all? The Supreme Court has repeatedly rejected the idea that the Establishment Clause requires or even justifies this exclusion.³⁶⁰ And the Court has indicated that protecting religious speech is a core concern of the Free Speech Clause.³⁶¹ Because there is no constitutionally sound justification for excluding worship, it will likely be motivated either by a poor understanding of the Establishment Clause or animus toward religion.³⁶² To vest in low-level government actors the discretion to exclude worship is inconsistent with the First Amendment and poses the danger of subjecting religious exercise to impermissible censorship.³⁶³

VI. CONCLUSION

When Thomas Jefferson began attending Christian services in the United States Capitol in January 1802, he could hardly have imagined that two hundred years later courts would struggle to determine if worship must be, or at least may be, prohibited in public buildings. The jurisprudential debate is certainly surprising in light of the Supreme Court's strong precedent supporting equal access to limited public forums. But more than just surprising, the Ninth Circuit's conclusion is harmful. If state actors are allowed to exclude religious groups from public buildings because they engage in "worship," churches will either have to conceal the actual nature

359. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990).

360. See *Widmar v. Vincent*, 454 U.S. 263, 270–71 (1981); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–95 (1993); *Good News Club*, 533 U.S. at 112, 119.

361. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). The *Pinette* Court said:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing or even acts of worship.

Id. (citations omitted) (citing *Heffron v. Int'l Soc'y For Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (proselytizing) and *Widmar*, 454 U.S. at 269 n.6 (worship)).

362. See *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 123 n.2 (2d Cir. 2007) (Walker, J., dissenting).

363. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) ("The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.").

of their activities or be driven out of public gathering places. Courts will be required to define and identify worship—a task that is beyond judicial competence and will impermissibly entangle the courts with religion. Government actors will be allowed to discriminate against religious groups in ways inconsistent with the First Amendment and the historical practice of our nation. Because the Ninth Circuit has reached a constitutionally dubious conclusion leading to a split with the Seventh Circuit, this question will require resolution by the Supreme Court. The resolution ought to be one that promotes equality between religious and non-religious groups. Only equal access will promote the core purposes of the First Amendment—freedom of speech and religious liberty.

William A. Glaser*

* J.D. Candidate, Pepperdine University, 2011. B.A. in History, Patrick Henry College, 2008, *summa cum laude*. I would like to thank my wife, Natalie, for her support and encouragement, as well as her feedback on this article.