Is Worship a Unique 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

John Tyler
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I. INTRODUCTION

Does exclusion of worship services from a limited public forum constitute discrimination on the basis of viewpoint or subject matter? Is worship a unique subject matter or a way of expressing views on many different subjects? And if worship is a unique subject matter, what expressive activities fall within that category? In other words, what is the legal definition of worship?¹

1. *In Bronx Household of Faith v. Board of Education of New York (Bronx Household II),* 331 F.3d 342 (2d Cir. 2003), the United States Court of Appeals for the Second Circuit presented its own list of questions that the United States Supreme Court’s decision in *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), left unanswered:

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
These are the questions that the United States Supreme Court's seminal decision in Good News Club v. Milford Central School left unanswered. Good News Club was a case from New York that involved a constitutional challenge to the local school board's decision to bar a Bible study group called the Good News Club from meeting on school property after class. The Court held that because (1) the school board had opened school property to activities with the purpose of developing the morals and character of students and (2) the activities of the Good News Club fulfilled this purpose, the club could not be denied access merely because it addressed this subject from a religious viewpoint.

While most of the reasoning the Court offered in support of its holding in Good News Club was straightforward, the Court, in a footnote, made one particularly vague and puzzling statement:

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.

To two courts, the United States Courts of Appeals for the Ninth and the Second Circuit, this passage indicated that the Supreme Court recognized a legal distinction, a sort of dichotomy, between religious worship religious worship on a case-by-case basis, or should worship no longer be treated as a distinct category of speech? How does the distinction drawn in our earlier precedent between worship and other forms of speech from a religious viewpoint relate to the dichotomy suggested in Good News Club between "mere" worship on the one hand and worship that is not divorced from the teaching of moral values on the other?

... [H]ow would the state, without imposing its own views on religion, define which values are morally acceptable and which are not? And, if such a choice is impossible to make, would the state be required to permit the use of public school property by religious sects that preach ideas commonly viewed as hateful? When several religious groups seek to use the same property at the same time, would the state have to choose between them? What criteria would govern that choice? In all of this process, is there not a danger of excessive entanglement by the state in religion?

Bronx Household II, 331 F.3d at 355.

3. Id. at 102-04.
4. Id. at 108-10.
5. Id. at 112 n.4 (emphasis added) (citations omitted) (internal quotation marks omitted) (quoting Good News Club v. Milford Cent. Sch., 202 F.3d 502, 511 (2d Cir. 2000)).
and speech from a religious viewpoint addressed to at least one of a limited public forum's permitted topics.

From this premise that worship is distinguishable from speech addressing a secular topic from a religious perspective, the Ninth Circuit, in *Faith Center Church Evangelistic Ministries v. Glover*, and the Second Circuit, in *Bronx Household of Faith v. Board of Education of New York (Bronx Household III)*, both held that worship is a distinct category of speech that may be excluded from a limited public forum on the basis of subject matter. However, neither court crafted or cited a workable legal definition of this worship category of speech. Instead, both courts relied on the fact that the parties in both cases described their activities as worship. Thus, while future courts may look to these cases as precedent for the proposition that worship is a category of speech that the government may exclude from a limited public forum on the basis of subject matter, they will find that these cases offer little guidance on how to identify what speech falls within this worship category, short of relying on a group's self-description of its activities. In the inevitable case of a group that does not describe its activities as worship, the door is now open for a district court within the Second or Ninth Circuit to conduct a probing, unguided inquiry into the religious activities of private individuals. This presents a real danger of state entanglement in religion.

In addition to the conclusion that worship is legally distinguishable from other religious speech on the basis of subject matter, one other similarity between these two cases is the state officials' shared motive for denying these groups access to the forum. The state officials were concerned that an objective observer of the groups' expressive activities would perceive a state endorsement of religion. In other words, they argued that these content-based speech restrictions were necessary to avoid an Establishment Clause violation under the Endorsement Test approach. Thus, these cases illustrate the purported tension between the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment.

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6. 480 F.3d 891 (9th Cir. 2007).
7. 492 F.3d 89 (2d Cir. 2007) (per curiam).
8. *Id.* at 102 (Calabresi, J., concurring); *Faith Ctr. Church*, 480 F.3d at 918.
9. *Bronx Household III*, 492 F.3d at 101-02 (Calabresi, J., concurring); *Faith Ctr. Church*, 480 F.3d at 918 & n.18.
10. *Bronx Household III*, 492 F.3d at 105 n.8 (Calabresi, J., concurring); *Faith Ctr. Church*, 480 F.3d at 910-11.
11. U.S. CONST. amend. I.
Amendment, as well as the ongoing debate over whether private speech on public property can violate the Establishment Clause.

Section II of this Comment provides an overview of forum analysis, which is crucial to these decisions. This analysis is vital because the category (or, in the Court's language, "fora") a government-owned property falls into determines the sort of speech restrictions the government may impose. For example, the government may impose subject-matter-based restrictions on speech in a limited public forum or nonpublic forum, not in a traditional public forum or designated public forum. Section III describes the Lemon test and looks at different approaches to the Establishment Clause. Section IV examines the battleground for most First Amendment challenges to restrictions on speech in a limited public forum: public schools. The line of cases dealing with religious groups seeking access to public schools best illustrates the methodology of forum analysis and how courts have dealt with the conflict between the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment. Section V analyzes Good News Club, the case representing the culmination of the line of cases addressing the access of religious groups to schools. Section VI covers the recent decisions in Faith Center Church and Bronx Household III that purport to recognize worship as a distinct subject matter. Section VII considers the implications of these two decisions and suggests that the courts should steer away from the course set by these two decisions. Finally, Section VIII presents the conclusions of the analysis.

II. FIRST AMENDMENT FORUM ANALYSIS: THE CLASSIFICATION OF GOVERNMENT-OWNED PROPERTY DETERMINES THE TYPE OF SPEECH RESTRICTIONS THAT THE STATE MAY IMPOSE

The First Amendment's protection of expression from government restriction is not absolute. Certain categories of expressive activity are not protected from government restriction (so long as these restrictions are viewpoint neutral), such as obscenity, fighting words, and incitement. On any government-owned property, expression falling into these categories may be restricted. For expressive activity that does not fall into these categories and that occurs on government-owned property, the level of protection the expressive activity receives

17. See Cohen, 403 U.S. 15; Brandenburg, 395 U.S. 444; Roth, 354 U.S. 476.
depends on the classification of that government-owned property. The Court terms these classes of government-owned property "fora." In both of the cases examined here, the government-owned property involved was classified as a limited public forum. Therefore, an understanding of the nature of a limited public forum is necessary to make sense of the analysis in these cases.

Limited public fora are a subset of designated public fora. In a limited public forum, the government opens a nonpublic forum only to certain groups or certain topics and purposes. The government may

20. Bronx Household of Faith v. Bd. of Educ. of N.Y. (Bronx Household III), 492 F.3d 89, 97-98 (2d Cir. 2007) (Calabresi, J., concurring); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 910 (9th Cir. 2007).
21. In addition to a limited public forum, First Amendment jurisprudence recognizes a number of other public and non-public fora. Cornelius, 473 U.S. at 802. There are two other types of traditional public fora. Id. One is the traditional public forum. Id.

Traditional public fora are places such as streets, parks, and sidewalks that by long tradition have been devoted to assembly and debate. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In a traditional public forum, the government may impose reasonable time, place, and manner restrictions on speech so long as they are content-neutral. Id. To be content-neutral, the restriction must not discriminate on the basis of subject matter or viewpoint. See id. at 49. Any restriction on speech in a traditional public forum that is not content-neutral must be "necessary to serve a compelling state interest." Id. at 45. In other words, a content-based restriction on speech in a traditional public forum is enforceable only if it passes strict scrutiny.

No government action is necessary to establish a traditional public forum. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985). However, another type of public forum, a designated public forum, is established when the government intentionally dedicates government property to expressive activity. Perry Educ. Ass'n, 460 U.S. at 45. Thus, unlike a traditional public forum, a designated public forum cannot be created in the absence of government action. Cornelius, 473 U.S. at 802. However, what the government giveth, the government may take away. Unlike a traditional public forum, the government may convert a designated public forum into a nonpublic forum. Perry Educ. Ass'n, 460 U.S. at 46.

Once the government establishes a designated public forum, any restrictions on expressive activity within the forum must pass the same scrutiny as restrictions on speech in a traditional public forum. Id. This means that only reasonable content-neutral time, place, and manner restrictions, or content-based restrictions that pose strict scrutiny, are constitutional. Id. Nonpublic fora, unlike the various types of public fora, are not by tradition or designation open for the public's expressive activities. Id. In a non-public forum, a restriction on speech must be reasonable but may be content-based. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992). However, even in a nonpublic forum, a speech restriction must be viewpoint neutral. Id.
23. Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001).
restrict certain expression in a limited public forum on the basis of subject matter or topic so long as this content-based restriction is viewpoint neutral and reasonable in light of the purpose of the forum. However, "once the government 'allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."

III. THE ESTABLISHMENT CLAUSE: ONE CLAUSE, MANY TESTS

The Establishment Clause of the First Amendment simply states: "Congress shall make no law respecting an establishment of religion." Efforts to interpret and apply this little phrase have divided the Supreme Court into several camps that each propound different approaches to the Establishment Clause. With the recent additions to the bench, it will be interesting to see which test prevails.

A. Lemon Test

The oldest recognized test, the much-maligned and criticized Lemon test, was announced by Chief Justice Berger in Lemon v. Kurtzman. It is a three-part test that provides: (1) "[T]he statute must have a secular legislative purpose"; (2) "[The statute's] principal or primary effect must be one that neither advances nor inhibits religion"; and (3) "[T]he statute must not foster 'an excessive government entanglement with religion.'" Although still officially a three-part test, as Justice O'Connor observed in Zelman v. Simmons-Harris, the Court has in practice "folded the entanglement inquiry into the primary effect inquiry." Some Supreme Court Justices would like to see this test discarded. Among them, none is more vehement (and vituperative) in expressing disdain for this test than Justice Scalia. In Justice Scalia's view, the test is applied in an arbitrary and unprincipled way. He contends that the Court invokes the test to strike down government practices it does not like.

25. Bronx Household III, 492 F.3d at 97 (Calabresi, J., concurring) (quoting Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991)).
27. For an in depth discussion of the Court's Establishment Clause jurisprudence see Alex Geisinger & Ivan E. Bodensteiner, An Expressive Jurisprudence of the Establishment Clause, 112 PENN ST. L. REV. 77 (2007).
29. Id. at 612-13 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).
31. Id. at 668.
not support but simply ignores the test when it would forbid a government action it does support. In particular, Justice Scalia finds the purpose prong of the test to be illogical and unworkable. As he explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "[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." Despite all the criticism (and even vitriol) at the *Lemon* test over the years, the test survives as the official standard for determining whether a state action violates the Establishment Clause.

**B. Endorsement Test**

While not an official test, the endorsement test has garnered the support of a majority of Supreme Court Justices in a number of decisions. The endorsement test is credited to Justice O'Connor who used it to determine the constitutionality of a display of Christmas symbolic objects in her concurring opinion in *Lynch v. Donnelly*. Justice O'Connor described her test best in *Capitol Square Review & Advisory Board v. Pinette*, a case concerning a private display of religious symbols in a government-owned public forum. In her concurrence in that case, she asserted that under the endorsement test, a private display in a government-owned public forum violates the Establishment Clause if a reasonable observer who is aware of the history and context of the community and forum in which the display appears would perceive a government endorsement of religion. Thus, with this requirement of a highly informed, reasonable person, Justice O'Connor's endorsement test approach sets a high threshold for when

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34. Id. at 558 (Scalia, J., concurring) (citation omitted).
39. Id. at 757-59.
40. Id. at 777, 779-80 (O'Connor, J., concurring).
private expression on government property can violate the Establishment Clause.\textsuperscript{41}

Other Justices embrace a less demanding endorsement test approach. Among them is Justice Stevens, who, in his dissent in \textit{Capitol Square}, said that an Establishment Clause violation exists when a reasonable person—even a person without an awareness of the general history and context of the community in which the display appears—would perceive a government endorsement of religion.\textsuperscript{42} While Justice Stevens's version of the endorsement test sets a higher threshold for an Establishment Clause violation than Justice O'Connor's version, the implication of both these tests is the same: private religious expression in a public forum may violate the Establishment Clause.

Therefore, the government may be justified in imposing content-based restrictions on private religious speech in a public forum to prevent a violation of the Establishment Clause. As this Comment discusses below, under a version of Justice Scalia's and Justice Thomas's coercion test,\textsuperscript{43} private religious expression in a government-owned public forum, no matter how it is perceived by observers, will never violate the Establishment Clause. Therefore, under the coercion test, the government is never justified in imposing content-based restrictions on private religious speech in a public forum.

\section*{C. Coercion Test}

Unlike the \textit{Lemon} and endorsement tests, the coercion test has never garnered the support of a majority of the Supreme Court. Nevertheless, a number of Justices do adhere to the coercion test, so examination of this test is worthwhile. The two major versions of the coercion test consider whether the government "coerces" a person to engage in a religious activity. Both agree that direct compulsion to engage in a religious activity backed by the force of law violates the Establishment Clause. Where they differ is on whether subtle, psychological coercion amounts to a violation of the Establishment Clause.\textsuperscript{44}

Under Justice Kennedy's version, sometimes called the psychological coercion test, coercion that comes in the more subtle form of public or

\begin{itemize}
\item \textsuperscript{41} See William P. Marshall, "We Know It When We See It" The Supreme Court Establishment, 59 S. CAL. L. REV. 495 (1986). Marshall observes that under Justice O'Connor's endorsement test approach, "Establishment is no more than what the Justices perceive it to be" because "perception is not susceptible to definitive or objective interpretation." \textit{Id.} at 537.
\item \textsuperscript{42} \textit{Capitol Square}, 515 U.S. at 800 n.5 (Stevens, J., dissenting).
\item \textsuperscript{43} See \textit{Lee v. Weisman}, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).
\item \textsuperscript{44} See \textit{id.} at 593 (majority opinion); \textit{Id.} at 640 (Scalia, J., dissenting).
\end{itemize}
peer pressure may be enough to violate the Establishment Clause. Indeed, he found this to be the case in *Lee v. Weisman*, where the court held that a graduation prayer that was incorporated, under the direction of the principal, into an official public school graduation ceremony violated the Establishment Clause because of the pressure it placed upon students attending the school-sanctioned event to engage in this religious activity. Justice Scalia's version of the coercion test, which he described in his dissent in *Lee* (joined by Chief Justice Rehnquist and Justices Thomas, and White), says that only government compulsion to engage in a religious activity backed by "force of law and threat of penalty" constitutes a violation of the Establishment Clause.

Despite this important difference between these two versions of the coercion test, they share one thing in common: non-compelled private religious speech in a government-owned public forum never violates the Establishment Clause. Thus, under the coercion test, a person would never need to worry that his private religious speech in a public forum might be perceived as government speech and, therefore, be subject to content-based restriction. Justice Thomas is generally believed to favor the coercion test because he joined Justice Scalia's in his dissent in *Lee*, which is perhaps the clearest articulation of Justice Scalia's version of the coercion test. However, when he wrote for the majority in *Good News Club v. Milford Central School*, Justice Thomas used the endorsement test as well as...

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45. *Id.* at 593 (majority opinion).
47. *Id.* at 581, 597. Justice Kennedy took great pains to emphasize that the speech at issue in *Lee* was not private religious speech.
   A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the state .... The principal chose the religious participant, here a rabbi, and that choice is attributable to the state ....
   .... Principal lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian.
48. *Id.* at 640 (Scalia, J., dissenting) (emphasis omitted).
49. For more on how the coercion test may provide better protection to private religious speech on government-owned property, see Antony Barone Kolenc, "Mr. Scalia's Neighborhood": A Home For Minority Religions?, 81 ST. JOHN'S L. REV. 819 (2007); Jason E. Manning, Comment, Good News Club v. Milford Central School: Viewpoint Discrimination or Endorsement of Religion?, 78 NOTRE DAME L. REV. 833, 883 (2003) ("Under the coercion test, if the speaker is private, and if the state treats the religious speaker neutrally, then the Establishment Clause is not implicated.").
the coercion test to analyze the Establishment Clause issue.\footnote{52} Does this suggest that Justice Thomas supports the endorsement test rather than the coercion test? Or did he employ the endorsement test simply because he knew it would garner a majority? My guess is the latter.

IV. A BATTLEGROUND IN THE CONFLICT BETWEEN THE FREE SPEECH AND ESTABLISHMENT CLAUSES: RELIGIOUS GROUP'S ACCESS TO PUBLIC SCHOOL FACILITIES

For several decades religious groups have sought access to school facilities. The efforts of these groups to obtain access have placed school boards in the difficult position of trying to respect the free speech rights of these groups while avoiding a violation of the Establishment Clause of the First Amendment.\footnote{53} In a line of cases, the Supreme Court has sought to supply school boards and lower courts with some guidance on how to navigate between these two constitutional concerns.

The first significant case to address the issue of government restriction of religious groups' access to school facilities was \textit{Widmar v. Vincent}.\footnote{54} In \textit{Widmar} the Board of Curators for the University of Missouri at Kansas City (the "University") decided to prohibit Cornerstone, a religious group, from using campus classrooms and the student center for meetings pursuant to a school regulation that provided: "No University buildings or grounds . . . may be used for purposes of religious worship or religious teaching by either student or nonstudent groups."\footnote{55} The University's decision was upheld by the district court, but later reversed by the court of appeals.\footnote{56} The Supreme Court affirmed the court of appeals decision and declared the University's policy to be unconstitutional.\footnote{57}

In reaching its decision, the Court first ascertained the type of forum involved.\footnote{58} The Court stated that the University's policy of opening classrooms and other facilities for use by student groups had created a public forum by designation.\footnote{59} In managing this public forum, the University could only regulate speech on the basis of content if "its regulation [was] necessary to serve a compelling state interest and . . .

\begin{itemize}
\item \textbf{52.} \textit{Id.} at 113-19.
\item \textbf{53.} U.S. CONST. amend. I.
\item \textbf{54.} 454 U.S. 263 (1981).
\item \textbf{55.} \textit{Id.} at 265 (internal quotation marks omitted).
\item \textbf{56.} \textit{Id.} at 266-67.
\item \textbf{57.} \textit{Id.} at 266.
\item \textbf{58.} \textit{Id.} at 267-69.
\item \textbf{59.} \textit{Id.} at 267.
\end{itemize}
narrowly drawn to achieve that end.\textsuperscript{60} In other words, to avoid invalidation, the University's content-based regulation had to overcome strict scrutiny.

The University argued that the compelling state interest that made the exclusion of Cornerstone necessary was the avoidance of an Establishment Clause violation.\textsuperscript{61} The Court agreed but, applying the \textit{Lemon} test, held that permitting the Cornerstone student group to use campus facilities for its meetings and worship services would not violate the Establishment Clause.\textsuperscript{62} In reaching this conclusion, the Court agreed with the district court and the court of appeals that the first and third prongs of the test were easily met because "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion." The controversy, therefore, lay with the second prong of the test, which asks whether allowing religious groups access to the public forum would have the primary effect of advancing religion.\textsuperscript{63}

The Court determined that opening the public forum to all forms of discourse, including Cornerstone's religious meetings and worship services, would not have the primary effect of advancing religion.\textsuperscript{64} To reach this conclusion, the Court stated that two factors were especially relevant.\textsuperscript{65} First, the Court noted that "an open forum in a public university does not confer any imprimatur of a state approval on religious sects or practices." The Court observed that university students are young adults who, unlike more impressionable younger students, could "appreciate that the University's policy [was] one of neutrality toward religion" and were unlikely to draw an inference of University support for Cornerstone's message merely from the fact that the group met on campus.\textsuperscript{66} Second, the Court determined it to be significant that more than 100 religious and nonreligious student organizations used campus facilities for meetings.\textsuperscript{67} With so many different groups meeting, it was unlikely that religious groups would

\begin{itemize}
\item 60. Id. at 270.
\item 61. Id. at 270-71.
\item 62. Id. at 271-73. For a discussion of the \textit{Lemon} test see \textit{supra} notes 28-35 and accompanying text.
\item 63. Id. at 271-72 (footnotes omitted).
\item 64. Id. at 272.
\item 65. Id. at 273.
\item 66. Id. at 274-75.
\item 67. Id. at 274.
\item 68. Id. at 274 n.14.
\item 69. Id. at 274-75.
\end{itemize}
come to dominate the forum; therefore, the primary effect of opening the forum would not be the advancement of religion.\textsuperscript{70}

The lone dissenter in \textit{Widmar} was Justice White, who argued that the Court should, as the University attempted to do, recognize a distinction between discussion about religious beliefs and verbal acts of worship.\textsuperscript{71} This distinction, if recognized, would have rendered the University policy constitutional.\textsuperscript{72} Justice White countered the majority's contention that such a distinction cannot be made by pointing out that the Court had already made content-based distinctions in Establishment Clause cases in other areas.\textsuperscript{73}

For instance, in \textit{Stone v. Graham},\textsuperscript{74} the Court struck down a law requiring the posting of the Ten Commandments on classroom walls.\textsuperscript{75} In \textit{Stone} the Court based its decision on the religious content of the Ten Commandments.\textsuperscript{76} Similarly, the Court's decisions in school prayer cases are based on a content-based distinction between the verbal act of worship and other types of speech.\textsuperscript{77} Lastly, in \textit{Torcaso v. Watkins},\textsuperscript{78} the Court struck down a state requirement that a person seeking state employment declare a belief in God.\textsuperscript{79} The Court in \textit{Torcaso} found a violation of the Free Exercise Clause based on the content of the speech at issue.\textsuperscript{80} According to Justice White, in these cases the Court made the sort of content-based distinctions that the majority in \textit{Widmar} claimed were not possible for a court to make.\textsuperscript{81} Justice White forcefully contended that if the majority was correct in stating that no distinction could be made between speech discussing religious belief and worship, then "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Id. at} 283-84 & 284 nn.1-2 (White, J., dissenting).
\item \textsuperscript{72} \textit{Id. at} 286.
\item \textsuperscript{73} \textit{Id. at} 284-85.
\item \textsuperscript{74} 449 U.S. 39 (1980).
\item \textsuperscript{75} \textit{Id. at} 41.
\item \textsuperscript{76} \textit{Widmar}, 454 U.S. at 285 (White, J., dissenting) ("That case necessarily presumed that the State could not ignore the religious content of the written message, nor was it permitted to treat that content as it would, or must, treat, other-secular-messages under the First Amendment's protection of speech.").
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} 367 U.S. 488 (1961).
\item \textsuperscript{79} \textit{Id. at} 495.
\item \textsuperscript{80} \textit{Widmar}, 454 U.S. at 285 (White, J., dissenting) ("[I]t was the content of the speech that brought the case within the scope of the Free Exercise Clause.").
\item \textsuperscript{81} \textit{Id. at} 285-86.
\item \textsuperscript{82} \textit{Id. at} 284.
Justice Powell responded to Justice White’s arguments in his majority opinion in *Widmar*.*83* He offered three reasons explaining why speech acts that constitute worship could not be distinguished from speech about religion.*84* First, he argued that the distinction between discussion of religious beliefs and worship has no “intelligible content.”*85* As Justice Powell explained, “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.’”*86* Second, even if the Court could draw a line, Justice Powell doubted that the judiciary would be competent to administer it.*87* Justice Powell explained that courts would have “to inquire into the significance of words and practices to different religious faiths,” and that such an inquiry “would tend inevitably to entangle the State with religion in a manner forbidden by [previous Supreme Court] cases.”*88* Third, Justice Powell argued that Justice White failed to establish the relevance of the distinction between religious speech acts and speech about religion.*89* According to Justice Powell, Justice White “gave no reason why the Establishment Clause . . . would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted.”*90*

After the Court in *Widmar* resolved the question of whether a public forum on a university campus could impose a content-based restriction on religious speech and exclude religious student groups, the question remained whether the *Widmar* holding would extend to secondary schools. In *Board of Education of Westside Community Schools v. Mergens,* the Court answered in the affirmative.*91*

The first part of Justice O’Connor’s plurality opinion in *Mergens* involved a statutory analysis of the Equal Access Act (the “Act”)*93* which the Court acknowledged basically codified the holding in *Widmar* and applied it to secondary public schools that receive federal fund-

83. Id. at 269 n.6 (majority opinion).
84. Id.
85. Id.
86. Id. (citation omitted) (quoting *Widmar*, 454 U.S. at 283 (White, J., dissenting)).
87. Id.
88. Id.
89. Id.
90. Id. (citation omitted).
91. 496 U.S. 226 (1990) (plurality opinion).
92. Id. at 235-36.
Essentially, the Act mandated that schools which received federal funding and maintained a limited public forum could not deny access to students who wished to use the forum on the basis of the content of their speech. The question was whether the obligations that the Act imposed on secondary schools constituted an Establishment Clause violation because the Act forced schools to allow religion-oriented student groups to meet despite the possibility that such meetings might be perceived by other students as an endorsement by the school of these groups particular religious beliefs. The Court held that the Act did not violate the Establishment Clause.

To reach this holding, the Court, with Justice O'Connor writing for a plurality of four Justices, applied the Lemon test, as the majority had in Widmar. Also, like in Widmar, the plurality held that the Act's policy of nondiscrimination toward the political, philosophical, or religious content of the speech easily satisfied both the secular purpose and entanglement prongs of the three-prong Lemon test. The secular purpose prong was met despite the possible religious motive of some of the legislators who supported the Act because what ultimately matters is the legislative purpose of the statute. The clear legislative purpose of the Act, as the plurality saw it, was to grant equal access to those who wished to engage in secular and religious speech, which is an "undeniably secular" purpose. As for the entanglement prong, the provisions in the Act that prohibited faculty members who served as monitors of the groups from participating in the student-initiated religious meetings and the provisions that prohibited school sponsorship of any religious meetings were held to be adequate measures for preventing state entanglement with religion.

Thus, the issue, as in Widmar, lay with the primary effect prong of the Lemon test. To distinguish Widmar, the school board emphasized the differences between the circumstances in this case and those in Widmar. The school board argued that unlike the university setting in Widmar, where enrollment was voluntary and religious meetings at

94. Mergens, 496 U.S. at 234-35.
95. Id. at 235-38.
96. Id. at 247-48.
97. Id. at 253.
98. Id. at 248-53.
99. Id. at 248-49, 252-53.
100. Id. at 249.
101. Id.
102. Id. at 253.
103. Id. at 249-52.
104. Id. at 249.
issue were not sponsored by the school, the "student religious meetings" in this case were "held under school aegis" in a public secondary school where enrollment and attendance were compulsory under state law. Invoking the Endorsement Test, the school board contended that these circumstances would lead "an objective observer in the position of a secondary school student [to] perceive official school support for such religious meetings." The plurality disagreed with the school board for three reasons. First, it reasoned that secondary school students were mature enough to understand that by allowing student groups to meet to discuss religion, the school did not endorse the speech and religious views of these groups. Justice O'Connor asserted, "The proposition that schools do not endorse everything they fail to censor is not complicated," and it was as easy for high school students to understand as it was for the college students in Widmar, who were only a few years older. Second, the provisions in the Act that limited participation by school officials in the meetings of student-initiated groups sufficiently reduced the likelihood that other school students might perceive the school as endorsing a particular religion. The plurality acknowledged that permitting these religious student groups to meet might exert peer pressure on other students to participate, but the plurality did not think that the students would ever perceive this peer pressure as a state endorsement of religion or state coercion to participate in religious activity. Third, the plurality noted that the "broad spectrum" of student-initiated clubs and the fact that students at the school were free to create additional student clubs mitigated any chance that students would perceive an official endorsement of a particular religion. Thus, applying the Endorsement Test, the plurality held that because no reasonable person would perceive the after school meetings of student-initiated groups as a state endorsement of religion, there was no compelling reason to prohibit these meetings. Writing for the plurality, Justice O'Connor said that, in short, "We think the logic of Widmar applies with equal force to the Equal Access Act."
Justice Kennedy, joined by Justice Scalia, wrote a concurring opinion, to explain why he could not “join all that [was] said” in Justice O’Connor’s Establishment Clause analysis of the Equal Access Act. In this separate opinion, Justice Kennedy explained that he used a different approach than Justice O’Connor and the three justices who joined her analysis. While Justice O’Connor considered whether the Act might lead a reasonable student to perceive a school endorsement of religion, Justice Kennedy argued that the Court instead needed only to apply two principles.

The first principle was that the government may not give direct benefits to a religious faith. Justice Kennedy determined, as did the plurality, that all benefits to a religious faith were incidental and not direct. Therefore, the Act did not give direct benefits to a religious faith. The second principle was that the government may not coerce a student to participate in a religious activity. Because the Act did not compel any student to participate in or attend any of these student-initiated meetings, the government could not be said to have coerced any student to participate in religious activity. Therefore, the Act did not violate the Establishment Clause because it did not directly benefit a religious faith or allow schools to coerce students to participate in religious activity.

Justice Marshall wrote a concurring opinion that was joined by Justice Brennan to highlight what he felt were the salient differences between Widmar and this case and to emphasize what steps the school must take to avoid an Establishment Clause violation. To Justice Marshall, one crucial difference was that unlike the university in Widmar that took “concrete steps to ensure” that it would not be identified with student organizations, Westside High School promoted its student organizations as vital components in its mission to develop citizenship. Such promotion, Justice Marshall argued, increased the

115. Id. at 258-59 (Kennedy, J., concurring).
116. Id. at 258.
117. Id. at 260.
118. Id.
119. Id.
120. Id. at 260.
121. Id.
122. Id. at 261.
123. Id. at 260-62.
124. Id. at 262-63 (Marshall, J., concurring).
125. Id. at 266-67.
likelihood that a reasonable student would perceive the school as endorsing a religion.\textsuperscript{126}

Another important difference Justice Marshall discerned between the educational institutions at issue in \textit{Widmar} and this case was the number of ideological clubs.\textsuperscript{127} In \textit{Widmar} the university had a wide range of ideological and advocacy-oriented clubs.\textsuperscript{128} This broad diversity minimized any chance that students would perceive the school as endorsing any one club's activities over another.\textsuperscript{129} In \textit{Mergens} however, the school had only one ideological and advocacy-oriented club.\textsuperscript{130} Because the school had this one religious club, but no other political or ideological organizations, the risk that students might perceive the school as endorsing this club's objectives and viewpoint was high.\textsuperscript{131}

To avoid the perception of endorsement, Justice Marshall recommended that the school take steps beyond those that the Act required to make clear that the school did not endorse the views of the club.\textsuperscript{132} He suggested that the school should "entirely discontinue encouraging student participation in clubs."\textsuperscript{133} Or, if the school refused to withdraw its general endorsement of student organizations, then it should "affirmatively disclaim any endorsement of the Christian club."\textsuperscript{134}

While \textit{Widmar} and \textit{Mergens} dealt with the access of religion-oriented student organizations to a public school's limited public forum, \textit{Lamb's Chapel v. Center Moriches Union Free School District}\textsuperscript{135} concerned the access of an outside religious organization to a public school's limited public forum.\textsuperscript{136} Because this case involved an outside religious organization using public school facilities, it may be the Supreme Court case that is most factually similar to \textit{Bronx Household of Faith v. Board of Education of New York}.\textsuperscript{137} In \textit{Lamb's Chapel}, an evangelical church, Lamb's Chapel sought access to public school property during nonschool hours to present a film series dealing with family and child-rearing

\begin{itemize}
  \item \textsuperscript{126} \textit{Id.} at 267.
  \item \textsuperscript{127} \textit{Id.} at 268.
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.} at 269-70.
  \item \textsuperscript{133} \textit{Id.} at 270.
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} 508 U.S. 384 (1993).
  \item \textsuperscript{136} \textit{Id.} at 387.
  \item \textsuperscript{137} 492 F.3d 89 (2d Cir. 2007). This case is discussed \textit{infra} notes 302-69 and accompanying text.
\end{itemize}
issues from a Christian perspective. Lamb's Chapel's request for access was denied by the school district, which cited its own rule that provided that "school premises shall not be used by any group for religious purposes."  

The Court held that the School District's decision discriminated against Lamb's Chapel on the basis of viewpoint and violated the Free Speech Clause of the First Amendment. To reach this conclusion, the Court, as it did in Widmar and Mergens, first ascertained the category of forum involved. The Court assumed for the sake of argument that the school was a limited public forum. Quoting Cornelius v. NAACP Legal Defense & Education Fund, the Court reasoned that the District could exclude from the forum a group that "wished[d] to address a topic not encompassed within the purpose of the forum," but that it would "violate[] the First Amendment [if] it denie[d] access to a speaker solely to suppress the point of view [it] espouses on an otherwise includible subject." Among the includible subjects in this forum were family and child-rearing issues. Because Lamb's Chapel wished to conduct a presentation on these topics, the Court held that under the First Amendment, Lamb's Chapel could not be excluded on the basis of its Christian viewpoint.

The Court also addressed the school district's argument that its decision to deny the church access was justified by the school district's interest in avoiding an Establishment Clause violation. The Court held that, as in Widmar, there was no realistic danger that the community would perceive the school district as endorsing a particular religion, that any benefit to the Church would be no more than incidental, and that application of the Lemon test revealed that "posited fears of an Establishment Clause violation [were] unfounded."

138. 508 U.S. at 387-88.
139. Id. at 387, 388-89 (internal quotation marks omitted).
140. Id. at 393-94; U.S. CONST. amend. I.
141. Lamb's Chapel, 508 U.S. at 390-92.
142. Id. at 391-92. The lower courts had both determined that the school was a limited public forum. Id. at 390. The Court said that Lamb's Chapel's argument to the contrary had "considerable force," but declined to rule on the question because the answer was irrelevant to its holding. Id. at 391-92.
144. Lamb's Chapel, 508 U.S. at 394 (quoting Cornelius, 473 U.S. at 806).
145. Id. at 393-94.
146. Id. at 394.
147. Id. at 394-95.
148. Id. at 395.
As in *Mergens*, Justices Kennedy and Scalia concurred in the judgment but not in the analysis. 149 Once again, Justice Kennedy and Justice Scalia, who was joined by Justice Thomas, rejected the endorsement test and called for adoption of the coercion test. 150 Moreover, Justice Scalia wrote a concurrence that was joined by Justice Thomas that called for a rejection of both the *Lemon* test and the endorsement test, and it called for those tests to be replaced with the simple principle that permitting all viewpoints access to a forum for private religious expressive activity can never signify state "embrace of a particular religious sect" and, therefore, can never constitute a violation of the Establishment Clause. 151

Thus, the Court in *Widmar* held that in a designated public forum on a public university campus, the government could not discriminate against a group with a religious viewpoint. The Court in *Mergens* extended this holding to students in a public secondary school. Then in *Lamb's Chapel*, the Court held that outside groups could not be denied access to a public school's limited public forum on the basis of their religious viewpoint. So the stage was set for *Good News Club v. Milford Central School*, 152 a case in which a group of elementary school students sought access to classrooms during nonschool hours for Bible studies directed by adult group leaders who were not part of the school faculty. 153

V. THE CULMINATION OF SUPREME COURT JURISPRUDENCE ON RELIGIOUS GROUP'S ACCESS TO SCHOOL FACILITIES: *GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL*

*Good News Club v. Milford Central School* 154 concerned a New York statute that allowed use of public school facilities after hours for, among other things, meetings that addressed the subject of morals and character development. 155 Pursuant to this statute, two nonfaculty adults who were the local sponsors of the Good News Club sought permission to hold the club's weekly after-school meetings in the school cafeteria. 156 Their request, however, was denied on the ground that the club's activities were the equivalent of religious worship, and

149. *Id.* at 397 (Kennedy, J., concurring); 508 U.S. 384, 397-401 (Scalia, J., concurring).
150. *Id.* at 397 (Kennedy, J., concurring); 508 U.S. 384, 397-401 (Scalia, J., concurring).
151. *Id.* at 397-401 (Scalia, J., concurring).
153. *Id.* at 103.
155. N.Y. EDUC. LAW § 414 (McKinney 2000); *Good News Club*, 533 U.S. at 102, 104.
156. *Good News Club*, 533 U.S. at 103.
according to one of the school's community use policies, school facilities could not be used for religious purposes.\textsuperscript{157} The club's activities included singing songs, hearing Bible lessons, memorizing scripture, inviting the unsaved children to accept Christ as their savior, and imploring the saved children to obey Jesus and spread his message.\textsuperscript{158} The Milford Board of Education argued that because religious worship was not among the uses of school property that the statute permitted, the board could legally prohibit the club from meeting on school property.\textsuperscript{159}

The sponsors of the club and others filed an action in district court challenging the board's decision as a violation of their free speech rights under the First and Fourteenth Amendments.\textsuperscript{160} The board's motion for summary judgment was granted by the district court and affirmed by the United States Court of Appeals for the Second Circuit.\textsuperscript{161} The Second Circuit held that the club's expressive activities were subject matter of a "quintessentially religious" nature that fell "outside the bounds of pure moral and character development" and that the school's policy was a reasonable subject matter restriction in light of the forum's purposes.\textsuperscript{162}

The United States Supreme Court reversed the court of appeals judgment and remanded the case for further proceedings.\textsuperscript{163} In a majority opinion written by Justice Thomas, the Court held that the denial of the club's application to use school premises for its meetings constituted viewpoint discrimination that violated the club's free speech rights under the First Amendment.\textsuperscript{164} To reach this decision, the Court first had to identify the type of forum at issue.\textsuperscript{165} This was easily accomplished because both sides agreed that the school property was a limited public forum.\textsuperscript{166} Within its limited public forum, the school board could restrict speech to certain topics so long as the topic restriction was "reasonable in light of the purpose served by the

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.} at 103 (majority opinion), 123 (Scalia, J., concurring).

\textsuperscript{159} \textit{Id.} at 103-04.

\textsuperscript{160} U.S. CONST. amend. I, XIV; \textit{Good News Club}, 533 U.S. at 104.

\textsuperscript{161} \textit{Good News Club}, 533 U.S. at 104-05.

\textsuperscript{162} \textit{Id.} at 105 (internal quotation marks omitted) (quoting \textit{Good News Club v. Milford Cent. Sch.}, 202 F.3d 502, 510, 511 (2d Cir. 2000)).

\textsuperscript{163} \textit{Id.} at 120.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.} at 106.

\textsuperscript{166} \textit{Id.}
However, the Supreme Court's First Amendment jurisprudence makes clear that the school board may not discriminate on the basis of viewpoint. Thus, once the school board opened the forum for discussion of a topic or, in other words, to speech with content that pertains to a certain topic, it had to permit speech from all viewpoints pertaining to that topic.

After identifying the type of forum, the issue was whether the school board's decision of the school was content-based or viewpoint discrimination. The Court held that the subject matter addressed in the club's meetings pertained to one of the topics that the school board had opened the forum to, namely, morals and character development. Because the subject matter of the Club's speech fell within one of the listed topics, the Court determined that the decision to exclude the Club did not constitute topic discrimination but rather constituted viewpoint discrimination. Specifically, the Court held that the school board discriminated against the club's religious viewpoint on the topic of moral and character development. Prohibiting the club to meet only because it had a religious viewpoint on the topic, the Court held, was unconstitutional.

Because the Court held that the board's decision to deny meeting space to the club constituted viewpoint discrimination, the Court never addressed the reasonableness of any content-based discrimination in light of the purposes of the school's forum. The Court's decision not to address this issue would be important in Faith Center Church Evangelistic Ministries v. Glover and Bronx Household of Faith v. Board of Education of New York (Bronx Household III). In both cases, the courts of appeals determined that worship was a unique subject.

Once worship was found to be a distinct subject, these courts could then analyze whether the subject matter-based exclusion of

167.  Id. at 106-07 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)).
168.  Id. at 106.
169.  Id. at 107.
170.  Id. at 108.
171.  Id. at 109-10.
172.  Id. at 111-12.
173.  Id. at 112.
174.  Id. at 107.
175.  480 F.3d 891 (9th Cir. 2007).
176.  492 F.3d 89 (2d Cir. 2007).
177.  Bronx Household, 492 F.3d at 102 (Calabresi, J., concurring); Faith Ctr. Church, 480 F.3d at 918.
worship from the limited public forum was reasonable in light of the purposes of the forum.

Perhaps most important to the courts of appeals reasoning in Faith Center Church and Bronx Household was the language in footnote four of the majority opinion in Good News Club in which the Court stated, "[W]e conclude that the Club's activities do not constitute mere religious worship divorced from any teaching of moral values."\textsuperscript{178} To some of the judges in the Second and Ninth Circuits, this language suggests that worship lies in a separate speech category.\textsuperscript{179} In other words, the implication of this language, according to these judges, is that the First Amendment prevents the government from discriminating against speech because the speech conveys a religious viewpoint on one of the limited public forum's permitted topics; however, the government may, under the First Amendment, restrict religious speech that is in itself worship, so long as this restriction is reasonable in light of the purposes of the forum.

The Court in Good News Club also addressed the board's argument that its policy was necessary to avoid an Establishment Clause violation.\textsuperscript{180} In analyzing the Establishment Clause issue, the Court applied elements of both the coercion test and the endorsement test.\textsuperscript{181} Applying the coercion test, the Court noted that students were not obligated to attend the club's meetings and that the meetings did not receive any sponsorship or direction from the school.\textsuperscript{182} Furthermore, parental permission was required, thus placing a barrier to any coercive pressure to attend the club's meetings.\textsuperscript{183} Applying the endorsement test, the Court noted that the group meetings were never led by faculty members and occurred after school hours in a resource room shared with the high school and middle school, rather than in an elementary school classroom.\textsuperscript{184} Together, these facts minimized the possibility of a reasonable student perceiving school endorsement of the club's activities. The Court acknowledged that there was some risk a student might perceive the school as endorsing the club's religious activities; however, there were countervailing free speech and free exercise constitutional concerns that outweighed this risk.\textsuperscript{185}

\textsuperscript{178} Good News Club, 533 U.S. at 112 n.4.
\textsuperscript{179} Bronx Household, 492 F.3d at 102 (Calabresi, J., concurring); Faith Ctr. Church, 480 F.3d at 918.
\textsuperscript{180} Good News Club, 533 U.S. at 112-13.
\textsuperscript{181} Id. at 115, 117-18.
\textsuperscript{182} Id. at 115.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 117-18.
\textsuperscript{185} Id. at 119.
Justice Scalia concurred in both the judgment and the majority opinion but wrote separately to further explain his views on the Establishment Clause and Free Speech Clause issues addressed in this case. First, on the Establishment Clause issue, Justice Scalia expressed his view that if the government entity that controls a limited public forum gives nondiscriminatory access to the forum, then there can be no Establishment Clause violation because such a neutral position toward religion cannot "signify state or local embrace of a particular religious sect." Justice Scalia's view departs from the position taken by the majority, that government neutrality toward religion is but one "significant factor in upholding governmental programs in the face of [an] Establishment Clause attack." To Justice Scalia this fact is dispositive; if the government permits all viewpoints access to a public forum, then an Establishment Clause violation is impossible.

As for the Free Speech Clause issues, Justice Scalia observed that much of the religious speech the dissent found objectionable was a discussion of the religious premises that serve as the foundation for the club's viewpoint on morality and character development. Justice Scalia pointed out that a speaker's expression of his viewpoint on a topic has only limited value if the speaker is not also free to explain and defend the premise of his viewpoint on a topic. Furthermore, no other group that also used this forum for discussions on this topic was prohibited by the school board from discussing the premise or reasons for its viewpoint, so why should the school board prohibit the Good News club from discussing the premise for its viewpoint merely because that premise is religious? Justice Scalia contended that to impose this restriction on only the club and on none of the other student organizations would violate the First Amendment requirement of viewpoint neutrality.

Also, Justice Scalia attacked the dissent's efforts to defend the school board's decision as content discrimination rather than viewpoint discrimination. According to Justice Scalia, in the dissent's view,
the school board could prohibit speech with content that had more than an embedded religious viewpoint but was itself worship.\textsuperscript{195} Justice Scalia skewered the whole notion that the Court could make this sort of content-based distinction.\textsuperscript{196} The main reason for his rejection of the dissent’s approach was that it would require the Court to develop a legal definition of worship.\textsuperscript{197} Justice Scalia asserted that crafting a definition of worship was “beyond the courts’ competence.”\textsuperscript{198}

In contrast to Justice Scalia, who agreed with the judgment but disagreed with how the majority arrived at the judgment through application of the endorsement test, Justice Breyer wrote separately to express agreement with the majority’s endorsement test approach to the Establishment Clause question, which considered the government’s neutrality with respect to religion as just one relevant, though weighty, factor in determining whether the school’s policy violated the Establishment Clause.\textsuperscript{199} However, unlike the majority, Breyer did not believe that, given the procedural posture of the Court, it could resolve the Establishment Clause issue.\textsuperscript{200} As he explained, the case was before the Court on appeal from the district court’s grant of summary judgment in favor of the school board.\textsuperscript{201} Therefore, the Court’s decision to reverse the district court’s grant of summary judgment should have sent the case back to the lower court for development of the factual record on the issue of an Establishment Clause violation, specifically on the question of whether a child participating in the Good News Club’s activities could reasonably perceive the school’s permission for the club to use its facilities as an endorsement of religion.\textsuperscript{202} To answer this question, Justice Breyer said the district court should have been allowed to consider other specific facts like the time of day, the age of the children, and the nature of the meetings.\textsuperscript{203} In Justice Breyer’s view, only after presentation of these facts could the Court resolve the issue.\textsuperscript{204}

Justice Stevens, in his dissent, called for the Court to group speech for religious purposes into three categories.\textsuperscript{205} The first category would be

\textsuperscript{195} Id.
\textsuperscript{196} Id. at 126-27.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 127.
\textsuperscript{199} Id. at 127 (Breyer, J., concurring).
\textsuperscript{200} Id. at 128-29.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 129-30.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 130 (Stevens, J., dissenting).
‘religious speech that is simply speech about a particular topic from a religious point of view.’ So long as speech in this category addresses one of the limited forum’s authorized topics, the government may not restrict it. The second category would be ‘religious speech that amounts to worship, or its equivalent.’ The third category would be religious speech ‘aimed principally at proselytizing or inculcating belief in a particular religious faith.’ Justice Stevens argued that the government could restrict speech in the latter two categories under its authority to control access to a limited public forum on the basis of subject matter ‘so long as the distinctions drawn are reasonable in light of the purpose served by the forum.’

According to Justice Stevens, the speech at issue in Lamb’s Chapel v. Center Moriches Union Free School District, which the majority cited in support of its holding fell squarely into the first category, speech about a particular topic from a religious point of view. Because the subject matter of Lamb’s Chapel’s speech fell within one of the limited public forum’s list of authorized topics, the speech could not be restricted because such a restriction would be based solely on viewpoint. In contrast, the religious speech in this case, Justice Stevens contended, arguably fell within the second category, religious speech that amounts to worship, and it also quite clearly fell within the third category, religious speech aimed at proselytizing a belief in a particular religious faith. Because the speech at issue in this case fell in a different category than the speech at issue in Lamb’s Chapel, the holding in Lamb’s Chapel should not have controlled this case.

The last dissenting opinion was penned by Justice Souter. Like Justice Breyer, Justice Souter contended that the majority should never have ruled on the Establishment Clause issue because the lower courts, which upheld the school board’s policy on the grounds that it did not violate the Free Speech Clause of the First Amendment, never reached this issue. However, unlike Justice Breyer, Justice Souter did not

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206. Id.
207. Id.
208. Id.
209. Id.
210. Id. at 131 (quoting Cornelius, 473 U.S. at 806).
212. Good News Club, 533 U.S. at 107-110.
213. Id. at 130 (Stevens, J., dissenting).
214. Id.
215. Id. at 132-34.
216. Id.
217. Id. at 139-40 (Souter, J., dissenting).
concur with the majority's decision to reverse the lower court's ruling that the school board's policy constituted a viewpoint-based restriction on speech. Like Justice Stevens, Justice Souter viewed the school board's policy, which provides "school premises shall not be used . . . for religious purposes," as a reasonable viewpoint neutral-restriction on the scope of permitted subject matter and activities in the designated public forum. In determining that the subject matter and activities of the club's meetings fell beyond the scope of the forum's authorized topics, Justice Souter stated, "It is beyond question that [the club] intended to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion." Moreover, in an eerily prescient statement, Justice Souter warned that as a result of the Court's decision, "any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.

As for the Establishment Clause issue, Justice Souter bemoaned the majority's refusal to remand the issue for further proceedings. He argued that the record was too scant for the Court to resolve the issue. In Justice Souter's view, there were enough facts to suggest that a reasonable person could perceive an endorsement of religion so that a grant of summary judgment was inappropriate. Nevertheless, because the majority ruled on the Establishment Clause issue, Justice Souter reluctantly offered his analysis based on the meager record before the Court.

In his analysis, Justice Souter applied the endorsement test and asked whether the school board's actions under these circumstances would lead a reasonable observer to perceive the school as endorsing a religion. Unlike the majority, which, Justice Souter described, "conclud[ed] that such an endorsement effect [was] out of the question . . . because the context here [was] 'materially indistinguishable' from the facts in Lamb's Chapel and Widmar," Justice Souter saw the context as distinguishable enough to make the issue of whether a reasonable observer would

218.  Id. at 134-39.
219.  Id. at 135-37 (alteration in original) (internal quotation marks omitted).
220.  Id. at 138.
221.  Id. at 906-07.
223.  Faith Ctr. Church, 480 F.3d at 906-07.
224.  Id. at 907-10.
225.  Id. at 910.
226.  Id. (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
perceive government endorsement of religion at least disputable. In contrast to the university students in Widmar v. Vincent, the students at Milford were far more young and impressionable and, therefore, not as capable of appreciating the school's policy of neutrality toward religion. Furthermore, unlike in Widmar, where so many different religious and nonreligious student groups used the forum at issue that a "reasonable college observer" could not see "government endorsement in any one" of the groups, the record showed that at the school in this case, only four outside groups met in the school, and just one, the Good News Club, met immediately after the end of the school day. In fact, the Club's meetings followed the end of regular school activities so closely that its members had to wait for the room to clear before beginning their activities. In Justice Souter's opinion, given the age of the students, the small number of groups meeting regularly in the forum, and the "temporal and physical continuity" of the clubs' meetings, there was a very real possibility that a reasonable observer would perceive the school as endorsing the club's activities—a possibility that deserved further exploration and analysis by the trial court.

VI. DID GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL ESTABLISH A DICHOTOMY BETWEEN WORSHIP AND SPEECH ADDRESSING A SECULAR TOPIC FROM A RELIGIOUS PERSPECTIVE? THE SECOND AND NINTH CIRCUITS ANSWER: "YES!"

A. The Court of Appeals for the Ninth Circuit: Faith Center Church Evangelistic Ministries v. Glover

In Faith Center Church Evangelistic Ministries v. Glover, Contra Costa County (the "County") made its public library meeting rooms available to the public for "educational, cultural[,] and community related meetings, programs[,] and activities." This access was subject to a number of mostly content-neutral time, place, and manner restrictions such as an application form and a use fee if the meeting was not open to the general public. However, one restriction was

228. Id. at 141-45.
231. Id. at 143-44.
232. Id. at 144.
233. Id. at 144-45.
234. 480 F.3d 891 (9th Cir. 2007).
235. Id. at 902.
236. Id. at 902-03.
Faith Center Church Evangelistic Ministries ("Faith Center") sought and received approval to use a library meeting room to host two events in May and July 2004. The May event included a morning "Wordshop" where attendees received instruction on how to "pray fervent, effectual Prayers that God hears and answers," and an afternoon "Praise and Worship" service that featured a sermon by the group's pastor, Dr. Hattie Mae Hopkins, as well as prayer and songs of praise. The County decided that the afternoon session violated its "Religious Use" policy, informed Faith Center representatives that they were no longer permitted to "use the meeting room for religious activities," and removed Faith Center's July event from the calendar.

In response to the County's actions, Pastor Hopkins and Faith Center brought a suit against the County in the United States District Court for the Northern District of California. Faith Center claimed that the County's decision to deny it access to the library's meeting rooms for its "Praise and Worship" meeting was viewpoint discrimination that violated its First Amendment right to free speech. To remedy this claimed violation of its First Amendment right, Faith Center sought an injunction to enjoin the County from prohibiting the "Praise and Worship" meeting. Because a court cannot issue a permanent injunction until after a full trial, Faith Center moved for a preliminary injunction to enjoin the County from barring its access to the meeting rooms until after a full resolution of the case. The district court granted the preliminary injunction upon finding that Faith Center's First Amendment challenge was likely to succeed on the merits. The County appealed the grant of the preliminary injunction to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the district court's decision to grant the preliminary injunction and remanded the case. A majority of the court did not view the County's policy as viewpoint discriminatory but
rather as a subject matter limitation that was reasonable in light of the purpose of the limited forum.\textsuperscript{247} To reach this conclusion, the court engaged in a four-step analysis. In the first step, the court determined whether Faith Center's religious services constituted speech that was subject to First Amendment protection.\textsuperscript{248} Under the authority of \textit{Widmar v. Vincent},\textsuperscript{249} the court determined that Faith Center engaged in protected speech.\textsuperscript{250} In the second step, the court determined the type of forum involved.\textsuperscript{251} The court held that the library meeting rooms were nonpublic fora that the County had intentionally opened for the discussion of certain topics and were, therefore, limited public fora.\textsuperscript{252} As limited public fora, the government could impose restrictions on access so long as they were viewpoint neutral and "reasonable in light of the purpose served by the forum."\textsuperscript{253}

In the third step, the court determined whether the limitations on expressive activity were reasonable for preserving the limited public forum for the purposes for which it was dedicated.\textsuperscript{254} The County's stated purpose in opening these meeting rooms was to provide a place for "meetings, programs, or activities of educational, cultural[,] or community interest."\textsuperscript{255} To preserve these meeting rooms for that purpose, the County did not allow schools to regularly use the meeting rooms for fear they would be converted into classrooms, nor did the County allow religious groups to conduct services there for fear that the meeting rooms might be converted into houses of worship.\textsuperscript{256} Not only did the County believe that these restrictions would prevent the conversion of meeting rooms into classrooms and houses of worship, the County also believed that these restrictions would help to ensure that the library remained "a sanctuary for reading, writing, and quiet contemplation."\textsuperscript{257} The County feared that religious services, in

\textsuperscript{247} Id. at 918.
\textsuperscript{248} Id. at 906-07.
\textsuperscript{249} 454 U.S. 263 (1981).
\textsuperscript{250} Faith Ctr. Church, 480 F.3d at 906-07.
\textsuperscript{251} Id. at 907-10.
\textsuperscript{252} Id. at 910.
\textsuperscript{253} Id. (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
\textsuperscript{254} Id. at 910-11.
\textsuperscript{255} Id. at 908 (internal quotation marks omitted).
\textsuperscript{256} Id. at 910.
\textsuperscript{257} Id. at 911. The dissent argued that content-neutral time, place, and manner restrictions could ensure that the library remained a place for quiet contemplation and reading:

[The County would be able to enforce reasonable time, place, and manner restrictions, applicable to all groups using the meeting room, in order to maintain]
particular, could stir controversy and create a distraction, thus detracting from the library's interest in remaining "'a place dedicated to quiet, to knowledge, and to beauty.'" The court concluded that these restrictions were reasonable in light of the purposes served by the library meeting room.

In the fourth step, the court assessed whether the County's policy was viewpoint discriminatory, which would be presumed impermissible, or subject matter-discriminatory, which would be permissible if reasonable in light of the purposes of the limited public forum. Unlike the district court, which found the library policy viewpoint discriminatory, the court of appeals concluded that the County's policy prohibiting the use of the meeting rooms for religious purposes was a viewpoint-neutral subject matter restriction that was reasonable in light of the purpose served by the forum.

In reaching this last conclusion, the court of appeals addressed two arguments advanced by Faith Center. Faith Center's first argument was that the "prohibition on religious worship services [was] impermissible viewpoint discrimination because 'prayer, praise and worship' [was] an educational, cultural, and community-related activity that ha[d] been suppressed due to Faith Center's religious perspective." Faith Center's second argument was that the court could not draw a "judicially enforceable distinction" between Faith Center's religious worship and other religious speech permitted in the forum and that an attempt to do so would "entangle the government with religion in a manner forbidden by the Establishment Clause."

Addressing the first argument, the court of appeals noted that in both United States Supreme Court cases cited by Faith Center, *Lamb's Chapel v. Center Moriches Union Free School District* and *Good News Club v. Milford Central School*, the groups did not seek access

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the academic atmosphere of the remaining library space . . . . Certainly the County could place a reasonable restriction on the number of times any group may use the meeting room within a one or two month span, thus alleviating the County's fear that the library meeting room will become a permanent house of worship.

*Id.* at 931 (Tallman, J., dissenting) (citation omitted).

258. *Id.* at 909, 911 (majority opinion) (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966)).

259. *Id.* at 911.

260. *Id.*

261. *Id.* at 911, 915.

262. *Id.* at 911-12.

263. *Id.* at 912.


to the limited forum to conduct worship services but rather to engage in activities and discussion from a religious perspective on the same subject matter as secular groups who already had access to the forum. Moreover, the court of appeals noted that in Good News Club, the Court considered whether that religion oriented club's activities constituted a worship service. Not only did the Court reject that characterization of the club's activities, but it also regarded the distinction between discussion of an authorized topic from a religious perspective and worship as relevant, which the court of appeals believed was indicated by the footnote in the Good News Club opinion that stated, "[W]e conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values." The court of appeals argued this language suggested that if the Court had found the club's activities to constitute worship, then the Court would have held that the club's activities "exceeded the boundaries of [the] forum," making a prohibition of the club's meetings a permissible subject matter restriction rather than an impermissible viewpoint-based restriction.

The court of appeals noted with approval that the County's application of its meeting room policy showed that the county recognized this distinction between religious worship and discussion of an authorized topic from a religious perspective. The County did not prohibit Faith Center from carrying on its "Wordshop" meeting in which participants discussed how to communicate effectively with God. The County recognized this speech as addressing the authorized subject matter of "communication" and, therefore, did not attempt to prohibit it. Likewise, the County never tried to restrict other Faith Center activities that served the forum's purpose, such as discussions about the Bible and various social and political issues.

As for Faith Center's second argument—that religious worship cannot be distinguished from other forms of religious speech—the court of appeals held that not only could religious worship be distinguished from other forms of religious speech, but also Faith Center had indeed drawn the distinction itself when it separated the "Wordshop" meeting from the "Praise and Worship" meeting. Thus, Faith Center seemed to
contradict itself. While Faith Center seemed to easily distinguish praise and worship from other religious speech in the titles for its meetings and in various flyers and other statements, it nevertheless contended, relying on Justice Powell's opinion in *Widmar*, that the distinction between religious worship and speech on a topic from a religious viewpoint had no "intelligible content." The court of appeals observed that Justice Powell's statement appeared "[i]n dicta that was not central to the Court's holding." Moreover, the court of appeals noted, in an argument reminiscent of Justice White's dissenting opinion in *Widmar*, that the Supreme Court, in cases concerning government speech, often draws such distinctions, so the distinction should not become impossible to draw when private speech is concerned.

In the end, the court of appeals held that excluding religious worship from the limited forum was a reasonable subject matter restriction in light of the purposes served by the forum and that religious worship was distinguishable from other forms of religious speech. Having reached these conclusions, the court of appeals reversed the district court's grant of a preliminary injunction and remanded the case. The district court, on remand, was to craft a new injunction that would allow the County to prohibit religious worship but enjoin the County from restricting religious speech pertaining to the limited public forum's range of authorized topics.

In Judge Karlton's concurrence, he asserted that, despite the Supreme Court's reluctance to do so, the structure of the First Amendment compels the Ninth Circuit to distinguish religious speech from secular speech. He stated that the division of the First Amendment into distinct clauses made it clear that religious speech was "categorically different than secular speech and is subject to analysis under the Establishment and Free Exercise Clause[s] without regard to the jurisprudence of free speech." As for the oft-heard argument that an intelligible distinction cannot be drawn between religious speech and speech from a religious viewpoint, Judge Karlton responded

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275. *Id.* at 917.
276. *Id.* at 916.
277. *Id.* at 917.
278. *Id.* at 918.
279. *Id.* at 919.
280. *Id.* at 918-19.
281. *Id.* at 919 (Karlton, J., concurring).
282. *Id.*
It may be that the majority of the Supreme Court really has doubt about the ability to distinguish between religious practice and secular speech. If so, they need only leave their chambers, go out in the street and ask the first person they meet whether in the instant case the conduct is religious in character. It is simply untenable to insist that there is no difference between a prayer and political speech. To coin a phrase, one can only pray for the court's enlightenment. In his dissenting opinion, Judge Tallman contended that the County had not excluded Faith Center from the limited forum on the basis of subject matter but rather on the basis of viewpoint. Moreover, he determined there were many flaws in the majority's reasoning that led the majority to the conclusion that Faith Center's expressive activities were distinguishable on the basis of subject matter from the forum's permitted activities.

As Judge Tallman saw it, the chief flaw in the majority's reasoning was its assertion that the court could draw a line between religious worship and other religious speech. Unlike the majority, Judge Tallman did not believe the judiciary could distinguish between speech on a secular topic from a religious perspective and religious worship. Furthermore, he pointed out that despite the majority's bold claim that such a distinction was both possible to make and necessary, the court in this case never actually distinguished worship from speech on a secular topic from a religious viewpoint. Instead, in Judge Tallman's view, the court took the easy way out and relied on the fact that a flyer issued by Faith Center proclaimed its meeting to be a service of worship. However, Judge Tallman raised the possibility that in the wake of this decision, future groups might be more coy about their purposes, making it harder for the court to distinguish worship from speech on a secular topic from a religious viewpoint. The majority's opinion, Judge Tallman noted, never addressed this possibility.

283. Id. at 920.
284. Id. at 921 (Tallman, J., dissenting).
285. Id.
286. Id.
287. Id. at 922 ("[W]orship cannot logically be parsed from all other forms of religious expression in the way the County intends.").
288. Id. at 924.
289. Id. at 922.
290. Id. ("The next religious group wishing to intermingle worship activities, admonished as to the consequences of such advertising, may not be so explicit about its meeting itinerary, or may simply call its worship activities religious 'proselytizing,' an acceptable form of speech under the policy according to the court.").
291. Id.
Even if the court could draw a distinction between worship and other religious speech, Judge Tallman argued that any attempt to “parse religious worship from other religious speech” would lead to the entanglement problems that the Establishment Clause seeks to avoid.292 The government, looking at the innumerable forms of religious service, would have to determine which words or acts constitute worship.293 Such an inquiry would entangle the government in the religious practices of citizens “in a manner that violates the First Amendment.”294

Assuming a distinction could be drawn between religious worship and other religious speech, Judge Tallman argued that the County’s policy was nonetheless facially invalid because it did not provide a County librarian with the “proper guidelines” for determining when permitted religious speech crossed the line into prohibited religious worship.295 Instead, the policy left this determination almost completely to the discretion of a county official.296 As Judge Tallman observed, under the County’s policy, “[T]he power to decide the definition of a religious service lies squarely in the lap of government officials, and that is the crux of the problem.”297

Finally, Judge Tallman asserted that one last flaw in the majority’s reasoning was its presumption that religious worship is a category of speech with distinct content that “contains no particular viewpoint on otherwise permissible secular topics.”298 Judge Tallman argued that, on the contrary, exploration of secular topics, like community and moral character, pervades religious worship.299 If Faith Center’s worship services addressed these permissible subjects, then exclusion of this speech could not be characterized as anything other than viewpoint discrimination.300 According to Judge Tallman, the way that Faith Center expresses its viewpoint, through prayer and sermon rather than lecture and discussion, seemed to be the true basis for the County’s decision to exclude Faith Center from the forum, not the subject matter that its meetings addressed.301

292. Id. at 924.
293. Id. at 925.
294. Id.
295. Id. at 925-26.
296. Id. at 926.
297. Id.
298. Id. at 926-27.
299. Id. at 927-28.
300. Id.
301. Id. at 928.

In 1994 Bronx Household of Faith ("Bronx Household") began a long legal battle with the Board of Education of the City of New York ("the Board") and Community School District No. 10 (the "School District") over access to Anne Cross Mersereau Middle School for Sunday morning meetings. The Board originally denied Bronx Household a permit for the use of school property citing Standard Operating Procedure ("SOP") section 5.9, a policy of the Board that barred outside organizations from conducting "religious services or religious instruction on school premises after school." Bronx Household brought suit against the Board to challenge its decision to deny Bronx Household a permit. This case, Bronx Household of Faith v. Community School District No. 10, which later became known as Bronx Household I, reached the United States Court of Appeals for the Second Circuit where the court upheld the district court's decision in favor of the Board and the School District. The court of appeals determined that Bronx Household's religious worship services were distinctly different from discussion of secular topics from a religious perspective and that this distinction was based on subject matter rather than viewpoint. Having determined that the government could make a subject matter distinction between worship and other speech, the court next analyzed whether this exclusion was reasonable in light of the purposes of the forum. The court held that excluding Bronx Household's religious worship services from the forum was reasonable in light of the purpose of the limited public forum.

Then, in 2001 the Supreme Court decided Good News Club, and Bronx Household subsequently reapplied for a permit. Once again, the
Board denied Bronx Household a permit.311 Bronx Household brought a new action against the Board, and its new challenge to the School District's permit denial and to SOP section 5.11 (numbered SOP section 5.09 in *Bronx Household I*)—which guided the Board's decision—was successful.312 The court found that in both *Bronx Household I* and *Good News Club*, the limited public forums were opened to discussions on the topic of moral values, and the activities of Bronx Household were indistinguishable from those in *Good News Club*.313 Therefore, the court held that the School District's denial of Bronx Household's application for a permit constituted viewpoint discrimination, and the court issued a preliminary injunction to enjoin the School District from denying Bronx Household's request to rent space in the school.314 The court's opinion, however, emphasized that its ruling was "confined to the district court's finding that the activities plaintiffs have proposed for their Sunday meetings are not simply religious worship, divorced from any teaching of moral values or other activities permitted in the forum."315 This language sounded a warning that if Bronx Household's activities were found in the future to be worship not addressing any of the forum's permissible topics, the School District could exclude Bronx Household from the forum.

The decisions in *Good News Club* and *Bronx Household II* opened New York City public school facilities to religious groups.316 To many churches and religious groups in New York, in a city with a paucity of adequate meeting spaces and high property values, renting an unused classroom in one of the city's public schools was an appealing solution.317 As the New York Times reported, two dozen churches and religious groups began to meet regularly in the city's public schools.318 The presence of these religious groups began to concern parents, neighbors, and city administrators who feared that having a school

311. *Id.*
313. *Bronx Household III*, 492 F.3d at 93 (Calabresi, J., concurring); *Bronx Household II*, 331 F.3d at 354.
314. *Bronx Household III*, 492 F.3d at 93 (Calabresi, J., concurring); *Bronx Household II*, 331 F.3d at 357.
315. *Bronx Household II*, 331 F.3d at 354.
317. *Id.*
318. *Id.*
identified with a particular church could confuse young children.\textsuperscript{319} One incident of particular concern to parents and city administrators occurred at a school in Battery Park City, where members of a church that held weekly services in the school helped subsidize the PTA's back-to-school party and handed out balloons with crosses on them.\textsuperscript{320} This incident seemed to be the fulfillment of Justice Souter's prediction in his \textit{Good News Club} dissent that the result of the Supreme Court's decision in that case would be the conversion of public schools into houses of worship.\textsuperscript{321}

Motivated by this concern that the activities of religious groups using school facilities could cause young children to associate these schools with the particular religious groups that used school facilities, the Board modified SOP section 5.11 in its operating manual to provide, "No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship."\textsuperscript{322} Bronx Household challenged this policy revision and asked the court to convert its preliminary injunction into a permanent injunction.\textsuperscript{323} The district court, which concluded that this new policy was viewpoint discriminatory, granted Bronx Household's motion for summary judgment and permanently enjoined the Board from excluding Bronx Household from school premises.\textsuperscript{324}

On appeal to the Second Circuit, a three-judge panel took three different approaches.\textsuperscript{325} In Judge Calabresi's opinion, the Board's exclusion of Bronx Household's worship services was a viewpoint-neutral subject matter-based restriction that was reasonable in light of the purposes of the limited public forum; therefore, he concluded that the district court's permanent injunction and grant of summary judgment should be reversed.\textsuperscript{326} In Judge Leval's opinion, the issue was not yet ripe for adjudication and therefore, the district court's decision should be

\begin{footnotes}
\item 319. \textit{Id.} "We are concerned about having public schools used by religious congregations as houses of worship,' said Lisa Grumet, a senior lawyer in the city's corporation counsel's office, who added that the city believes the practice violates the traditional separation of church and state." \textit{Id.}
\item 320. \textit{Id.}
\item 321. See \textit{Good News Club}, 533 U.S. at 139 (Souter, J., dissenting).
\item 322. \textit{Bronx Household III}, 492 F.3d at 94 (Calabresi, J., concurring) (internal quotation marks omitted).
\item 323. \textit{Id.} at 95.
\item 324. \textit{Id.} For a good discussion of this case, see Kevin Fiet, Note, \textit{The Bronx Household of Faith: Looking at the Unanswered Questions}, 2007 BYU EDUC. \& L.J. 153 (2007).
\item 325. \textit{Bronx Household III}, 492 F.3d at 90-91 (per curiam).
\item 326. \textit{Id.} at 106 (Calabresi, J., concurring).
\end{footnotes}
Finally, Judge Walker concluded that the Board's exclusion was viewpoint discriminatory, just as the district court found, and therefore, he determined that the district court's decision should be affirmed.228 Due to the positions taken by the judges, there were neither enough votes to reverse nor affirm the district court's decision. Thus, the district court's decision was vacated and remanded for further development.229

Leaving aside Judge Leval's opinion addressing the ripeness of this case for adjudication, the debate between Judge Calabresi and Judge Walker offers fascinating insight into the opposing views on the questions of whether the court can make a subject matter-based distinction between worship and speech on a topic from a religious perspective.230 Judge Calabresi, in reaching his decision, engaged in an analysis similar to the Ninth Circuit's analysis in Faith Center Church. First, Judge Calabresi identified the type of forum involved.231 In previous cases involving the parties, the court had identified the forum as a limited public forum, and because no material change in facts required any reconsideration of these holdings, Judge Calabresi determined that the school was a limited public forum.232 As a limited public forum, the Board could discriminate on the basis of subject matter in order to preserve the purposes of the limited forum, but it could not discriminate on the basis of viewpoint.233

Having identified the forum involved and recognizing that the nature of the forum affected the constitutionality of any speech restrictions, Judge Calabresi analyzed how the Supreme Court had distinguished

327. Id. at 123 (Leval, J., concurring).
328. Id. at 123-24 (Walker, J., dissenting).
329. Id. at 91 (per curiam).
330. Id. at 106-23 (Calabresi, J., concurring). Judge Leval helds that this case was not ripe for adjudication. Id. at 123 (Leval, J., concurring). He argued that until the city invoked the new SOP section 5.11 to deny Bronx Household a permit, the court should refrain from passing judgment on the constitutionality of the new rule. Id. at 115-16. Judge Calebresi acknowledged that the ripeness question was "a close one" because some parts of the record indicated that the modification had been merely proposed, while other parts of the record indicated that the Board had already adopted the modification. Id. at 95 n.2 (Calabresi, J., concurring). In the end, however, Judge Calabresi concluded that this dispute was ripe for two reasons. Id. First, he noted that the trial court's conclusion was that the new SOP section 5.11 was adopted and that this finding should not be overturned unless it was clearly erroneous. Id. Second, he asserted that the preliminary injunction in place hampered the Board's ability to enforce the new SOP section 5.11 and created the sort of direct legal effect that is necessary to ripen a dispute. Id.
331. Id. at 97-98 (Calabresi, J., concurring).
332. Id.
333. Id. at 97.
Judge Calabresi observed that in *Lamb's Chapel* and *Good News Club*, the Court determined that the groups the government was trying to exclude from the forum wished to engage in speech addressing permissible subject matter from a religious viewpoint. In neither case did the Court conclude that the groups seeking access wished to engage in religious worship or other speech with no pertinence to the topics for which the limited public forums involved were created. Moreover, like the Ninth Circuit noted in *Faith Center Church*, Judge Calabresi observed that a footnote in the majority opinion in *Good News Club* suggested the outcome of that case would have been different if the Court had determined the group was conducting a service of worship rather than engaging in a discussion about permissible subject matter from a religious viewpoint.

If the Supreme Court's decision hinged, at least in part, on the determination that the activities of the Good News Club did not constitute "'mere religious worship, divorced from any teaching of moral values,'" the question then remained: What is "mere religious worship"? Judge Calabresi phrased the question: "Is [worship] an approach to or a way of considering an otherwise permitted subject of discussion, or is it a unique subject?" Judge Calabresi answered that worship is a unique subject and that Bronx Household used religious worship not as a way to approach subjects within the scope of the forum's permitted topics, but "expressly for worship in itself."

In reaching this conclusion, Judge Calabresi, like the Ninth Circuit in *Faith Center Church*, observed that the party challenging its exclusion from the forum had described its own activities as religious worship. In fact, Bronx Household not only described its activities as religious worship but also took pains to distinguish its activities from those of other groups in the forum. The head of the Bronx Household congregation, Pastor Hall, distributed an article that said, unlike the other groups in the forum, "'the church [i]s a covenant community" and

334. *Id.* at 99.
335. *Id.* at 99-100.
336. *Id.*
337. 480 F.3d at 915 n.14.
338. 533 U.S. at 112 n.4.
339. *Bronx Household III*, 492 F.3d at 100 (Calabresi, J., concurring).
340. *Id.* at 101 (emphasis added) (quoting *Good News Club*, 533 U.S. at 112 n.4).
341. *Id.* at 100.
342. *Id.* at 101.
343. *Id.*
344. *Id.* at 101-02.
is "not a group of people who have a common interest in the same way that stamp collecting and coin collecting bring people together." Pastor Hall explained that while Boy Scouts might have rituals, Bronx Household "engage[d] in the teaching and preaching of the word of God" and administered the "sacraments of baptism and the Lord's [S]upper." Like the Ninth Circuit in Faith Center Church, Judge Calabresi based his decision on the challengers' own description of their activities as religious worship and did not attempt to fashion a definition of worship that might be applied to a group in the future that did not choose to describe its activities as worship.

Having determined that Bronx Household's activities were within the "worship" category of speech, Judge Calabresi next assessed whether this viewpoint-neutral, subject matter-based restriction was reasonable. To decide this issue, Judge Calabresi looked to the Second Circuit's decision in Bronx Household I. He stated that in Bronx Household I, the Second Circuit held that the old version of SOP section 5.11 was viewpoint-neutral and that the subject matter-based restriction was reasonable. Furthermore, Judge Calabresi explained, the Supreme Court in Good News Club reversed the Second Circuit's decision in Bronx Household I because it concluded, in direct contrast to the Second Circuit's determination, that section 5.11 was in fact viewpoint discriminatory. The Court never reached the issue of whether a viewpoint-neutral subject matter-based exclusion of religious worship from the forum would be constitutional. Because the decision in Good News Club did not affect the Second Circuit's holding that a viewpoint-neutral subject matter-based restriction on worship is constitutional, Judge Calabresi argued that the court of appeals remained bound by it. Therefore, because the new section 5.11 was viewpoint neutral, Judge Calabresi argued that the court was bound by Bronx Household I and concluded that the restriction was reasonable in light of the purposes of the limited public forum.

Judge Walker, in his dissenting opinion, argued that one glaring flaw in Judge Calabresi's analysis was his focus on comparing the expressive
activity of other groups in the forum to the expressive activity of Bronx Household.355 According to Judge Walker, Judge Calebresi merely looked at the expressive activities of other groups who were granted access to the forum and concluded that because none of those groups engaged in religious worship, worship was not a permitted subject matter.356 Instead of comparing the expressive activity already permitted in the forum to that proposed by Bronx Household, Judge Walker contended that the court should compare the purposes of Bronx Household’s activity to the purposes of the activities allowed in the forum.357 Under that approach, Judge Walker determined the school’s purpose in creating the limited public forum was to “foster a community in their geographic vicinity in ways that will inure to [the school’s] benefit.”358 Judge Walker contended that Bronx Household’s expressive activities aligned with this purpose, because “Bronx Household’s essential purpose is the development of a community of believers, which has as its anticipated result increased community support for the school.”359 Because Judge Walker determined that the purpose of Bronx Household’s expressive activities fit within the purposes for which the Board created the limited public forum, he asserted that any effort to exclude Bronx Household should trigger “more searching scrutiny” of the Board’s motives.360

In addition, Judge Walker disagreed with Judge Calabresi’s conclusion that the court of appeals was bound by its determination in Bronx Household I that the school created a limited public forum.361 Justice Walker argued that “the character of a forum is defined by its uses and the uses to which it is put change over time.”362 Only if the character of the forum remained unchanged would the court be bound by the decision in Bronx Household I.363 Whether the character of the forum was unchanged could only have been determined through a factual inquiry, but such an inquiry was never conducted.364 Therefore, Justice Walker argued that the case should have been remanded for a

355. Id. at 124 (Walker, J., dissenting).
356. Id.
357. Id.
358. Id. at 126.
359. Id.
360. Id.
361. Id. at 128.
362. Id.
363. Id.
364. Id.
factual inquiry into the current character of the forum in order to ascertain whether it remained a limited public forum.365

Most of all, Judge Walker adamantly disagreed with the proposition in Judge Calabresi's opinion that a judge could define worship.366 In Judge Walker's opinion, judges are not "competent to offer a legal definition of religious worship."367 Judge Walker noted that even if a judge could define worship, Judge Calabresi never defined it.368 Judge Calabresi's decision to place Bronx Household's expressive activities in the worship category was based mostly on the admission by the group's pastor that Bronx Household intended to conduct worship services.369 According to Judge Walker, Judge Calabresi's decision left unanswered the question of what the court should do in the future with groups that are not ready to "'make [the] nice admission' that they wish to engage in 'worship.'"370

VII. ANALYSIS AND CRITIQUE: THE COURSE SET BY THE DECISIONS IN FAITH CENTER CHURCH AND BRONX HOUSEHOLD III WILL LEAD TO STATE ENTANGLEMENT WITH RELIGION

In Good News Club v. Milford Central School371 the United States Supreme Court held that once the government has established a limited public forum for the discussion of a range of topics, it may not exclude a group that addresses these topics from a religious point of view.372 This rule worked well in Good News Club because, although the group engaged in certain activities that many persons (among them Justice Souter) might consider to be religious worship, the substance of the

365. Id.
366. Id. at 129.
367. Id.
368. Id.
369. Id. at 130.
370. Id. (brackets in original) (quoting Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1219 (9th Cir. 2006)). Justice Walker, like the dissenting opinion in Faith Center Church, also argued that a legal definition of worship would lead to government entanglement in religion and give too much discretion to state officials: [A]ny attempt to define worship places Judge Calabresi upon the horns of a dilemma. Either he clarifies the meaning of "worship," and risks entangling the judiciary in religious controversy in violation of the First Amendment, or he delegates the task of flouting the Establishment Clause to the Board, which will no doubt have to "interpret religious doctrine or defer to the interpretations of religious officials" in order to keep worship, and worship alone, out of its schools. Id. at 131 (Walker J., dissenting) (quoting Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 427 (2d Cir. 2002)).
372. Id. at 111-12.
group's activities pertained to one of the forum's permitted topics.\textsuperscript{373} However, the question remains whether the government can exclude a group whose expressive activities "constitute mere religious worship divorced from any" discussion related to the limited forum's permitted topics.\textsuperscript{374}

Both the Second Circuit, in \textit{Bronx Household of Faith v. Board of Education of New York (Bronx Household III)},\textsuperscript{375} and the Ninth Circuit, in \textit{Faith Center Church Evangelistic Ministries v. Glover}\textsuperscript{376} have answered that such a group may be excluded.\textsuperscript{377} Moreover, in an effort to comply with the Supreme Court's clear stricture that the government may not discriminate on the basis of viewpoint, these two courts have held that this exclusion was based on the subject matter of the speech, not on viewpoint.\textsuperscript{378} Thus, both the Second and Ninth Circuits held that a subject matter distinction may be drawn between worship and speech addressing a secular topic from a religious perspective.\textsuperscript{379}

Yet, while both courts held that such a distinction was legally relevant and determined that the government could exclude these groups from the limited public forum because their activities were religious worship, neither the court in \textit{Faith Center Church} nor the court in \textit{Bronx Household III} announced a test for determining whether a speech activity is worship or speech addressing a secular topic from a religious perspective. Instead, both courts relied on statements or documents in which the groups labeled their own activities as worship.\textsuperscript{380} Therefore, these cases only provide guidance for future cases in which the parties conveniently label their own activities as worship. For those parities that do not provide such convenient labels or admissions, these decisions offer little useful guidance.

The decisions in \textit{Faith Center Church} and \textit{Bronx Household III} possibly represent a halfway step. Now that worship is recognized in the Second and Ninth Circuits as a distinguishable subject matter, the

\textsuperscript{373} Id. at 112 n.4.
\textsuperscript{374} Id.
\textsuperscript{375} 492 F.3d 89 (2d Cir. 2007).
\textsuperscript{376} 480 F.3d 891 (9th Cir. 2007).
\textsuperscript{377} Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 914-15 (9th Cir. 2007); Bronx Household III, 492 F.3d at 98 (Calabresi, J., concurring).
\textsuperscript{378} Faith Ctr. Church, 480 F.3d at 910; Bronx Household III, 492 F.3d at 102-03 (Calabresi, J., concurring).
\textsuperscript{379} Faith Ctr. Church, 480 F.3d at 910; Bronx Household III, 492 F.3d at 102-03 (Calabresi, J., concurring).
\textsuperscript{380} Faith Ctr. Church, 480 F.3d at 916; Bronx Household III, 492 F.3d at 103 (Calabresi, J., concurring).
stage is set for a case that will force these courts to establish a legal definition of worship. One concept is clear: the case will have to be one where the group involved does not label its own activities as worship, thus forcing the court to ascertain from the facts presented whether the expressive activities at issue were worship. Otherwise, the courts will likely fall back on their decisions in these two cases and avoid articulating a definition.

With this last step looming for these courts, the question is: "What is worship?" As mentioned above, the Second and Ninth Circuits never articulated a legal definition of worship, but those courts did give a few hints about what a legal definition of worship will look like. Unfortunately, these hints also suggested that the two Circuits were heading off in conflicting directions so that the definition of worship in the Ninth Circuit will be different from the Second Circuit. For example, in Faith Center Church the Ninth Circuit held that a policy excluding only religious worship was viewpoint-neutral.\(^\text{381}\) By contrast, in Bronx Household III the Second Circuit held that a policy excluding only religious worship was viewpoint discriminatory.\(^\text{382}\) The Second Circuit determined, however, that the state could exclude all worship, both religious and secular, from the forum.\(^\text{383}\) Such an exclusionary policy would be viewpoint-neutral because it would envelop all perspectives on the subject of worship.\(^\text{384}\) This holding, however, begs the question: "What is secular worship?" The court spent some time musing on whether secular worship even exists.\(^\text{385}\) In the end, the court concluded that secular worship does exist, but it did not define the term.\(^\text{386}\)

Another difference is that the Ninth Circuit, unlike the Second Circuit, conceded that it could not define religious worship.\(^\text{387}\) In the words of the court: "The distinction to be drawn here is thus much more

\(\text{381.} \) Faith Ctr. Church, 480 F.3d at 918.
\(\text{382.} \) Bronx Household III, 492 F.3d at 92 (Calabresi, J., concurring).
\(\text{383.} \) Id. at 104.
\(\text{384.} \) Id.
\(\text{385.} \) Id.
\(\text{386.} \) Id.
\(\text{387.} \) Faith Ctr. Church, 480 F.3d at 918.

If . . . we treat worship as something that can also be secular, then the Board's exclusion of religious (as against secular) worship is clearly invalid. But the second part of the Board's regulation, which bars use of the school as a house of worship, nevertheless remains in force. For it excludes religious and secular worship alike. Assuming arguendo, therefore, that secular worship exists, that provision does not distinguish between religious and secular approaches, but instead bars the whole category. Accordingly, it constitutes content rather than viewpoint discrimination.

\(\text{Id.} \) (citation omitted) (internal quotation marks omitted).
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. Instead, the court admitted that to determine whether speech is religious worship, the court would rely entirely on the label that the speaker puts on his or her own words. This is the implication of the following language from the court's opinion:

That distinction, however, was already made by Faith Center itself when it separated its afternoon religious worship service from its morning activities . . . . The County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did.

. . . . . Religious worship services can be distinguished from other forms of religious speech by the adherents themselves.

By contrast, the Second Circuit, though it took the easier route and relied on the label Bronx Household put on its own speech activities, never foreclosed the possibility that worship could be found even in cases where the party does not supply such a convenient admission. Remarkably, although about four pages of this opinion fell under the heading “The Category of Worship Services,” nowhere in this section was any legal definition of this category cited or announced. The closest the opinion comes to defining worship and answering the question posed in the opinion itself, “What is worship?” is found in this brief statement: “Worship is adoration.” The word “adoration” is defined as: “the act of paying honor, as to a divine being; worship” or “the act of admiring strongly” or “the act of worship.” Thus, the Second Circuit’s “answer” still begs the question.

As these courts head off on this course, another question should be asked: Do we really want to go there? More precisely, will this sort of inquiry entangle the government in the religious practices of citizens in a way that offends both the Free Exercise and Establishment Clauses? As the dissenters in Faith Center Church and Bronx Household III argued passionately, with support from the language in a number of Supreme Court opinions, a legal definition of worship invites an

388. Id.
389. Id.
390. Id. (emphasis added) (footnotes omitted).
391. Bronx Household III, 492 F.3d at 100 (Calabresi, J., concurring).
392. Id. at 103.
394. U.S. CONST. amend. I.
intrusion into the religious practices of citizens that would surely be unconstitutional. To illustrate, consider the distinction Justice Stevens proposed between speech from a religious viewpoint and proselytizing religious speech in his dissent in Good News Club. If the Court were to recognize this distinction, a school could create a policy for after-school meetings in classrooms that prohibited proselytizing. Imagine then that the school later barred a Christian group from using the classrooms for meetings based on allegations that religious proselytizing was taking place at these meetings. The Christian group then challenges this denial of access and takes this case to trial. At trial, the attorneys for the school must establish that proselytizing occurred at these meetings, so the attorneys call members of the group to the stand. The attorneys for the school pepper them with such questions as: Did you ask those who came to the meetings to receive Christ as their savior? Did you ask them to pray with you? Did you encourage them to be baptized? These questions pry into the viewpoints of the speaker and interfere with the right of both the conveyor of the message and the receiver to exercise their religious faiths. As the Court noted in Widmar v. Vincent, "Merely to draw the distinction [between religious worship and speech addressing a secular topic from a religious perspective] would require . . . the courts [I] to inquire into the significance of words and practices to different religious faiths . . . . Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." Therefore, a proceeding like the hypothetical one above that inquires into the religious significance of particular speech would surely violate the Free Speech and Free Exercise Clauses.

As mentioned above, these cases seem to represent a halfway step. The Supreme Court recognized worship as a distinct category of speech but declined to offer a legal definition. Because the Ninth and Second Circuits only went halfway, the risk that the courts under their purview will become entangled with religion is only heightened. Without a definition of worship to guide them, district courts are left to develop their own definitions of the category on a case-by-case basis. Some courts are sure to be more cavalier than others. I am almost certain that some of the less sensitive and prudent district courts will conduct inquiries that penetrate so deeply into the intimate details of religious practice that an Establishment Clause violation seems unavoidable.

Not only do these decisions increase the risk of state entanglement with religion, but what may be worse is that these decisions leave state

395. 533 U.S. at 131-32.
397. Id. at 270.
officials and residents in these jurisdictions uncertain about what particular expressive activities may be excluded. While state officials in these jurisdictions know they can exclude worship from the forum on the basis of subject matter, without a definition of worship these cases offer little guidance on how to identify speech activities that fall within that category. Until courts provide a definition, state officials will first have to decide whether particular speech falls into the worship category; exclude that speech; and then hope, after costly and time-consuming litigation, that a court will confirm the constitutional validity of their decision. Meanwhile, free speech will be chilled as individuals refrain from certain expressive activities for fear that a court might categorize these expressions as worship and permanently exclude them from a forum. Until the Second and Ninth Circuit Courts of Appeal craft a clear, workable standard, both state officials and citizens should steel themselves for another court battle.

While I do not believe that a workable legal definition of worship can ever be established, I do believe that in a limited public forum the government ought to be able to control what subject matter may be addressed. As the Supreme Court asserted in *Lamb's Chapel v. Center Moriches Union Free School District*, 398 "There is no question that the [state], like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." 399 So how can the government prevent the conversion of a limited public forum into a church, synagogue or mosque without a legal definition of worship?

Rather than ask whether the expressive activity is worship, the government could instead ask whether the speech relates to the forum's permitted topics. To use the example above, if the topic of the forum was “Free Trade in the Americas,” rather than asking whether a hymn the attendees sang or a sacrament the attendees partook in related to the topic of worship, the government instead should ask how those expressive activities relate to the topic of “Free Trade in the Americas.” If the activities do not relate to the permitted categories, then the speech is excluded without any further inquiry into which category, among the infinite range of non-permitted categories, the speech belongs. When the government creates a limited public forum, it should only be expected to define the topics that may be addressed within that forum. The government should not be expected to define the infinite number of topics for which the forum was not opened.

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399. *Id.* at 390.
The other implication of this rule is that if the speech—including religious worship—relates to one of the forum's topics, then that speech may not be excluded. This means that for forums opened to the discussion of topics that religious worship generally addresses, it may be impossible to exclude religious worship. For instance, in Good News Club, the forum was opened to "morals and character development." In much of religious worship, the aim is to develop morals and character. Because private religious worship serves this purpose, it may not be excluded. Similarly, in Bronx Household III, the forum was opened for the purpose of developing community. There is little doubt that the worship services that Bronx Household conducted developed a sense of community among those who attended. Indeed, developing community has long been a function of religious worship across nearly all sects, and because Bronx Household's speech activities served the forum's purpose, there was no viewpoint neutral way of excluding Bronx Household from the forum. Perhaps the best advice to any government considering whether to create a limited public forum but wishing to exclude religious worship is to create a forum for a purpose that religious worship does not serve. If the government does create a forum for a purpose that is fulfilled by religious worship, any attempt to exclude religious worship will constitute viewpoint discrimination.

400. See, e.g., Good News Club, 533 U.S. at 111. "[W]hen the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." Id. at 111 (brackets in original) (quoting Good News Club v. Milford Cent. Sch., 202 F.3d 502, 512 (2d Cir. 2000) (Jacobs, J., dissenting)).

401. Id. at 108.

402. Judge Tallman, in his Faith Center Church dissent, made a similar observation: Singing a religious song may very well be akin to singing about morality according to religious tenets. Praying is usually speech containing praise to a higher being, but may also contain personal characterizations of one's own life, wishes, hopes, or concerns. Pastor Hopkins's sermon is the clearest example of religious speech which expresses a viewpoint on otherwise permissible secular topics. One can imagine the variety of subject matter that could be included in a sermon-money, family, love, or avoiding drugs and alcohol to name a few. The list is endless.

Instead, the opinion categorizes all of Faith Center's worship activities into one neat box and then calls it impermissible speech. Yet it never examines the nature of that speech.

403. Bronx Household III, 492 F.3d at 126 (Walker, J., dissenting).

404. Judge Tallman in his dissent in Faith Center Church largely shares my view: "Common sense dictates that religious worship can include exploration of secular topics from a religious point of view, as Faith Center's meeting demonstrates. Enforcing the exclusion is therefore viewpoint discrimination and Faith Center has made a clear showing of probable success on the merits of its claim." 480 F.3d at 927 (Tallman, J., dissenting).
One potential problem with my approach is that if people engage in religious worship in a limited public forum, there is no doubt a risk that a reasonable observer might perceive state endorsement of a particular religion. Under the endorsement test, private religious worship speech on government-owned property that may be perceived by a reasonable observer with an awareness of the history and context of the forum as state endorsement violates the establishment clause. So, with the approach I advocate, the question of how the government is to prevent an Establishment Clause violation if private religious speech activities cannot be distinguished from other speech activities remains. The answer is that adoption of my approach must coincide with adoption of the coercion test. As mentioned above, under the coercion test, private religious speech in a public forum that is open to all religious speech activities cannot violate the Establishment Clause. Instead, only state coercion of an individual to engage in a religious activity violates the Establishment Clause. Therefore, under the coercion test, one of the primary justifications offered by the government for the speech restrictions at issue in both Faith Center Church and Bronx Household III—that is, avoidance of an Establishment Clause violation—would lose all force. The private religious speech of both these groups simply would not pose any risk of an Establishment Clause violation.

Note that the private religious speech of Faith Center and Bronx Household would not violate the Establishment Clause under either Justice Kennedy's or Justice Scalia's version of the endorsement test. Certainly Justice Scalia's version of the test is easily met because no one is being compelled under the force of law to attend the Faith Center or Bronx Household meetings. But even under Justice Kennedy's psychological coercion test, there does not appear to be any risk that these groups' activities will violate the Establishment Clause because attendance is truly voluntary, and the speech that occurs at these meetings is not under the direction or control of the government like the Rabbi's prayer in Lee v. Weisman. Therefore, because either version of the coercion test would protect the speech at issue in Bronx Household III or Faith Center Church, it is unnecessary to advocate for one test over the other in this Comment.

VIII. CONCLUSION: THE SUPREME COURT MUST ACT TO CORRECT THE NINTH AND SECOND CIRCUITS

These two cases illustrate the many issues that the United States Supreme Court's decision in Good News Club v. Milford Central School left unanswered. Foremost among them, the decision in Good News Club did not resolve the issue of whether worship is a subject matter or an expression of viewpoint on an array of subject matter. Because Supreme Court precedent is clear that in a limited public forum the government may restrict speech on the basis of subject matter but not on viewpoint, to government officials who control access to these forums, resolution of this issue is crucial. These officials need to know whether their policies directed at restricting religious activities discriminate on the basis of subject matter (and are therefore constitutionally valid) or if their policies discriminate on the basis of viewpoint and thus violate enumerated constitutional rights in the Free Speech and Free Exercise Clause of the First Amendment.

Moreover, the lower courts need guidance. Under the current state of the law in these circuits, worship is recognized as a distinct category of speech that may be restricted on the basis of subject matter, but the boundaries of this category remain undefined. Without clearly defined boundaries for the category, it will be the the lower courts's job to draw the lines in the cases before them. To accomplish this task, these courts will probe into the speech activities of individuals in order to ascertain whether particular speech falls into the worship category. The danger of state entanglement in religion is not only apparent but also very distressing. Equally distressing is the chilling effect that this uncertainty may have on expressive activity in limited public forums as individuals refrain from particular speech for fear that they might stray across the undefined line between speech on a secular topic from a religious viewpoint and speech categorized as worship.

Because the motive most often cited by government officials for restricting access to a limited public forum is prevention of an Establishment Clause violation, an equally important issue for the Supreme Court to resolve is whether the endorsement test or the coercion test should prevail as the approach to analyzing an Establishment Clause challenge. Under the endorsement test, where private speech on government-owned property can violate the Establishment Clause, the government will need more authority to control private speech than it will need under the

407. U.S. Const. amend. I.
coercion test, where private speech on government-owned property can never violate the Establishment Clause. In the last several years, the Court has been split between Justices favoring the endorsement test and Justices favoring the coercion test. With the departures and arrivals to the bench, which test will prevail in the future remains an open question.

With two of the most populous circuits reaching the conclusion, based on vague language in a footnote, that worship is a legally distinguishable subject matter, the Supreme Court must act now to end this confusion before government officials infringe any further on the free exercise and free speech rights of individuals. Whether worship is a subject matter or an expression of a viewpoint is a question that deserves much more than a footnote.

John Tyler
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