A Closer Look at Good News v. Milford: What Are the Implications? (Stay Tuned)

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I. INTRODUCTION

When the United States Supreme Court releases an opinion addressing the separation of church and state, the release often triggers exaggerated emotional reactions from both sides of the cultural divide. Good News Club v. Milford Central School1 was no exception. An ultra-separationist lobby, Americans United for Separation of Church and State, immediately predicted that the case would "create a battlefield out of America's elementary schools" and called it a "terrible mistake."2

Meanwhile, several national news outlets only strengthened this reaction by making sure that the holding's dull details did not get in the way of sexy reporting. For instance, ABC News broadly reported that the Supreme Court "ruled [that] religious groups must be allowed to meet in public schools after school hours,"3 vaguely suggesting that the Court's decision in Illinois ex rel. McCollum v. Board of Education4 had been reversed. Similarly, CBS announced that the Court redrew the lines separating church and state in public schools, a statement that implicitly announced that the dissenters in Good News Club were correct.5

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2. Linda Greenhouse, The Supreme Court, Religion and Free Speech; Top Court Gives Religious Clubs Equal Footing in Grade Schools, N.Y. TIMES, June 11, 2001, at 5A.
4. 333 U.S. 203 (1948). In McCollum, the Supreme Court invalidated a released time program of the Champaign, Illinois school board, which permitted outside teachers from religious groups to offer one hour of religious instruction per week during regular school hours. The Court deemed this state sponsored program to breach the "wall between Church and State which [sic] must be kept high and impregnable." Id. at 212. In Good News Club, there was no sponsorship by the state, and the use of the property by private citizens occurred after school hours.
5. CBS News (CBS television broadcast, June 11, 2001). It was not the geography of the ruling in redrawing boundaries, but the enfeebling of a structure that inspired the headline, "Su-
For those who favored the decision, they speculated that it meant future support both for President Bush's faith-based initiatives and for tuition vouchers. However, the decision was surely not as far reaching as either its opponents or its proponents suggested.

In fact, *Good News Club* posed a narrow and straightforward question for the United States Supreme Court: does a public school district violate the Free Speech Clause of the First Amendment when it has a policy barring a private religious group from holding Bible classes for children after school hours, but using school facilities, while the district permits other, non-religious, private groups to use classrooms to teach children about developing character and morality?

From one perspective, we can view the case as simply replaying the earlier case of *Lamb's Chapel v. Center Moriches Union Free School District.* Hence, the Court could focus on the question of whether its earlier decision controlled. From another perspective, however, the explicit religious nature of the teaching in *Good News Club* arguably distinguishes it from *Lamb's Chapel,* thus raising additional issues that the Court needed to resolve.

Six of the nine Justices concluded that the teaching of *Lamb's Chapel* was on point and, therefore, decided that the Milford School Board violated the First Amendment by discriminating on the basis of viewpoint. But the dissenters eroded the unanimity of the Court in *Good News Club* by insisting that more than viewpoint discrimination was at stake. They not only challenged the applicability of the earlier decision, but they also raised issues concerning the nature of religious speech in the First Amendment context. Two of them even took the Milford School Board's defense that the Establishment Clause justified, and indeed required, its policy as a credible proposition.

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7. 508 U.S. 384 (1993). In *Lamb's Chapel,* the Supreme Court held that a school district engaged in unconstitutional viewpoint discrimination when it denied a church group the opportunity to speak and show a film on childrearing and family values when other private groups had been allowed to address those subjects. *Id.* at 397.
On first impression, the issues in Good News Club look clear, familiar, and manageable. However, like most disputes over the separation of church and state that reach the Supreme Court, the simplest questions seem to radiate larger concerns when examined more closely. In light of some of the media coverage, one might wonder whether religious citizens, particularly those who choose to engage in religious worship, represent a group of untouchables whose presence on public school property at any time is suspect. In any event, Good News Club both once again raised penetrating questions about the relationship between religion and the public schools and continued the on-going dialogue regarding the meaning of the Establishment Clause. The modest goal of this article is to scrutinize some of the implications.

In particular, this article will examine: (1) whether Lamb's Chapel should control; (2) whether there is a relevant distinction between religious viewpoint and subject matter; (3) whether a forum open to much of the public may be limited to others; (4) whether the presence of prayer and worship should affect the right of a private organization to access public property; and (5) whether such use of public property violates the Establishment Clause.

II. LAMB'S CHAPEL AS CONTROLLING PRECEDENT

Both Lamb's Chapel and Good News Club were decided under the same New York law and, therefore, posed many similar questions. Under New York law, local school boards in the state may open their facilities for various public uses.\(^\text{10}\) Pursuant to that power, the Milford Central School District (Milford) adopted a community use policy that, among other things, authorized the public to use its buildings after school hours for "instruction in any branch of education, learning or the arts"\(^\text{11}\) and for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community . . . ."\(^\text{12}\) Permitted uses had to be nonexclusive and open to the general public.\(^\text{13}\) The policy also specified that school premises could not be used "by any individual or organization for religious purposes."\(^\text{14}\)

Under this policy, the Boy Scouts, Girl Scouts, and 4-H Club were allowed to use the facilities after school hours. In its interpretation and application of the policy, Milford found no problem with programs designed to develop the character and morals of children. Moreover, un-

\(^{10}\) N.Y. EDUC. LAW § 414 (McKinney 2000).

\(^{11}\) Good News Club, 533 U.S. at 102 (citing App. to Pet. for Cert. D1).

\(^{12}\) Id. at 102.

\(^{13}\) Id.

\(^{14}\) Id. at 103 (citing App. to Pet. For Cert. D2).
doubtedly influenced by the earlier decision in *Lamb’s Chapel*, Milford held that an organization engaged in such activities could make its presentations from a religious viewpoint.\(^{15}\)

In *Lamb’s Chapel*, operating under the same authorizing New York law as in *Good News Club*, Center Moriches Union Free School District (the School District) had a policy similar to Milford’s, which permitted members of the community to use school property outside school hours for certain purposes.\(^{16}\) Moreover, the School District issued a rule stating that the “school premises shall not be used by any group for religious purposes.”\(^{17}\) Under the policy, an evangelical church and its pastor sought to use the facilities to show a film series containing lectures by a well-known Christian author and radio commentator. The presentation intended to discuss the effect that the media were having in undermining moral values and to urge a return to traditional Christian life with values instilled in family members at an early age. The School District denied the church’s application, noting that “[t]his film does appear to be church related and therefore your request must be refused.”\(^{18}\) In a second application by the church, it described the film as a “[f]amily oriented movie—from a Christian perspective.”\(^{19}\) Again, the School District denied the request, citing the same reasons as before. Upholding the School District’s decision, the lower courts in *Lamb’s Chapel* held that, because the School District’s policy had created a limited public forum, it had properly exercised its authority to exclude all uses of school property for religious use.\(^{20}\) In that way, all religions would be treated alike, that is, excluded, and the policy would be viewpoint neutral.

Reversing the judgment of the lower court in *Lamb’s Chapel*, the Supreme Court assumed that the forum was indeed a limited one and accepted the School District’s argument that the practical application of the policy did not exclude all use of the property by religious groups.\(^{21}\) In that regard, the School District pointed to instances in which permission had been given to (1) a New Age religious group known as the “Mind Center,” (2) the Southern Harmonize Gospel singers, and (3) the Salvation Army Youth Band.\(^{22}\) The Supreme Court concluded that, because the School District had created a limited forum allowing presentations on child rearing and family values, it could not then exclude Lamb’s Chapel

\(^{15}\) Id. at 120.


\(^{17}\) Id. (citing App. to Pet. for Cert. 57a).

\(^{18}\) Id. at 389 (citing App. to Pet. for Cert. 84).

\(^{19}\) Id. (citing App. to Pet. for Cert. 91).

\(^{20}\) Id. at 389-90.

\(^{21}\) Id. at 392.

\(^{22}\) Id. at 391 n.5.
on the basis that its viewpoint on those subjects had a religious perspective. In other words, the School District was discriminating against a particular point of view.\textsuperscript{23}

Did the decision in \textit{Lamb's Chapel} control the issue in \textit{Good News Club}? Milford and the lower courts did not think so. In the \textit{Good News Club} case, when the club applied for permission to use the classroom facilities after school, the Milford superintendent concluded that the request was actually to use the school property for "the equivalent of religious worship . . . rather than the expression of religious views or values on a secular subject matter."\textsuperscript{24} The superintendent's response may have been induced by the club's application, in which it stated that the proposed use was to have "a fun time of singing songs, hearing Bible lesson[s] and memorizing scripture."\textsuperscript{25} Subsequently, the club's attorney provided Milford with a more detailed description in reply to a request for more information on the club's activities. This information was reported in the majority opinion of the Supreme Court:

The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, \textit{inter alia}, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.\textsuperscript{26}

Other materials submitted by the club to the superintendent included a copy of the "Daily Bread," prayer booklet that the lower court noted "contained stories that refer to the second coming of Christ, accepting the Lord Jesus as the Savior, and believing in the Resurrection and in the descent of the Lord Jesus from Heaven."\textsuperscript{27} Both the superintendent and the lower courts considered this as going beyond the expression of a viewpoint on morality and instead constituted subject matter that was "quintessentially religious."\textsuperscript{28}

In his dissenting opinion, Justice Souter emphasized the religious aspects of the instruction by detailing the content of the teaching.\textsuperscript{29} He notes that the classes began and closed with a prayer, that the children

\begin{itemize}
  \item \textsuperscript{23} Id. at 394.
  \item \textsuperscript{24} \textit{Good News Club v. Milford Cent. Sch.}, 202 F.3d 502, 507 (2d Cir. 2000).
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} \textit{Good News Club v. Milford Cent. Sch.}, 533 U.S. 98, 103 (2001) (citing 202 F.3d at 507).
  \item \textsuperscript{27} \textit{Good News Club}, 202 F.3d at 507.
  \item \textsuperscript{28} Id. at 510.
  \item \textsuperscript{29} \textit{Good News Club}, 533 U.S. at 137–38 (Souter, J., dissenting).
\end{itemize}
are instructed that the Bible tells them how sins can be forgiven by receiving the Lord Jesus Christ, that the lesson plan instructs the teacher to lead a child to Christ, and that it emphasizes that the words of the Bible are true because God said them. The teacher challenges the children to ask God for the strength they need and to place God first in their lives. The "unsaved" are invited to receive Christ as their savior and to believe God's word, raising their hands if they would like to believe in the Savior. The teacher seeks to meet with any unsaved children to show them how they can receive everlasting life.  

In Justice Souter's view, this is not merely discussion of a subject from a particular Christian point of view, but instead represents an evangelical service of worship. On that basis, he believes that the lower courts were correct in distinguishing the case from Lamb's Chapel. Agreeing with the appellate court and district court, Souter asserts that the facts in Good News Club were as different from Lamb's Chapel "as night from day."

To the contrary, Justice Thomas concludes for the majority that the exclusion of the club from the forum "based on its religious nature" is indistinguishable not only from Lamb's Chapel, but also from Rosenberger v. Rectors & Visitors of the University of Virginia. Starting with the premise that the evidence makes it clear that the club taught moral and character development, the Supreme Court's majority opinion maintains that the only reason Milford excluded the club from school property was because it taught those lessons from a religious viewpoint. Justice Thomas pointed out that in Lamb's Chapel, there was a message that was also "quintessentially religious" conveyed in a film in order to build character and moral development. Similarly, in this case, the club tried to build character and moral development through storytelling and prayer, and the difference in methods between the two cases was hardly of any legal consequence.

30. Id. at 137.
31. Id. at 138.
32. Good News Club, 533 U.S. at 137.
33. Id.
35. Good News Club, 533 U.S. at 106. In Rosenberger, Justice Souter similarly found writings in a student-run publication promoting a Christian view of life to be the "preaching of the word" and evangelical in nature. Rosenberger, 515 U.S. at 868 (1995) (Souter, J., dissenting). In that case, student fees subsidized the publication, a major distinguishing point from Good News Club. See id.
36. Id. at 108.
37. Id. at 109.
38. Id. at 109-10.
The majority flatly rejected the appellate court's conclusion that the Club's activities could not qualify as a pure discussion of morals and character under Lamb's Chapel because they included religious instruction and prayer. The lower court had reasoned that the conduct of the meeting went beyond merely stating a viewpoint. The court noted that there was a distinction between "the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer."  

The majority disagreed, arguing that simply because something is "quintessentially religious" or "decidedly religious in nature" does not mean that it "cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." Instead, the majority found an analogy between teaching character and morals through the invocation of teamwork, loyalty, and patriotism and the effort to achieve the same purpose through the invocation of Christianity. In a separate opinion, Justice Scalia echoes the same theme by writing that the club's use of religious teaching to buttress its teaching of morality is only doing what other secular groups do to exhort their charges to follow their idea of morality by giving their pupils reasons to do so and examples to follow.

The question of whether Lamb's Chapel should control opened into a larger question of whether there was any workable distinction that the Court could draw between religious viewpoint and religious subject matter. The majority and the dissenters deeply disagreed about the viability and desirability of such a distinction. The following section will delve into the practicality of such a distinction and whether the distinction has any relevance.

III. THE DISTINCTION BETWEEN RELIGION AS VIEWPOINT AND RELIGION AS SUBJECT MATTER

In its narrowest focus, the difference between the majority and the dissenters in Good News Club came down to whether the club was engaged in speech about morals and character from a religious viewpoint or whether it was engaged in activities representing religious worship and proselytization. In some formulations, the distinction has been phrased as one between religion as viewpoint and religion as subject matter. Accepting for the moment the relevance of this choice of alternatives as cru-

39. See id. at 111.
41. Good News Club, 533 U.S. at 111.
42. Id.
43. Id. at 124.
cial to the legality of the club’s exclusion, it appears that the club engaged in both. Neither party disputes that. The more pertinent questions would be: “Does it matter?” and “Who should classify?”

It did matter to the panel of the Second Circuit, which seemingly worked off the premise that although the club was attempting to inculcate values in the children (such as obeying parents and resisting jealousy), it invalidated the enterprise in the eyes of the law when it introduced a religious “layer” to accomplish that task. Seeking to explain why the presence of the religious “layer” produced this consequence, the lower court only suggested that, because the conduct was “quintessentially religious,” it was now subject matter rather than a viewpoint and, hence, beyond the scope of the limited forum. Apparently the court could not fathom how the aspiration to be “saved” could contribute to moral growth. Paradoxically, in using religion to buttress its viewpoint, the court deemed that the club was sacrificing the latter.

Agreeing with the lower court in his dissent, Justice Souter also relied on what he took to be an unchallenged and legitimate restriction of the forum based on the fact that the policy statement states that “school premises shall not be used . . . for religious purposes.” But this comment begs the question because, even though Milford sought to restrict the forum in its policy statement, the school had opened the forum under the analysis in Lamb’s Chapel to arguably religious purposes by allowing other groups to teach morals and character in the school after school hours.

Justice Souter seems to ignore this conundrum by simply declaring that the club is not only discussing a subject from a Christian point of view, but is also engaging in an evangelical service of worship seeking to convert children. Unfortunately, this does not answer the question of why the addition of religious trappings means the club’s presentation conveys any less of a viewpoint on character and morals. As the majority opinion points out, even assuming that the Court interprets state law to require a local school board to exclude purely religious purposes from

44. Good News Club, 202 F.3d at 509.
45. Id. See id. at 510.
46. Id. “Accordingly, the Milford School’s decision to exclude the Good News Club from its facilities was based on content not viewpoint.” Id. at 511.
47. Good News Club, 533 U.S. at 135 (Souter, J., dissenting).
48. Id. at 138 (Souter, J., dissenting). In fairness to Justice Souter, we must recall that he is postulating that the permission for the Good News Club to hold its meeting may violate the Establishment Clause.
49. Id. at 110–12. The majority comments that the court of appeals did not determine that the club’s activities constituted religious worship. Id. at 112 n.4. “In any event,” the majority continues, “we conclude that the Club’s activities do not constitute mere religious worship, divorced from any teaching of moral values.” Id.
the forum, an exclusion based on religious perspective nevertheless "constitutes unconstitutional viewpoint discrimination."\(^5^0\)

Reflecting the analysis of the panel of the court of appeals, the approach of the Souter dissent apparently rests on the judgment that religious beliefs or activities, once they reach a certain threshold, can no longer be viewpoints or perspectives on the teaching of morals or character. Relying on a prior decision,\(^5^1\) the Second Circuit had spelled out this view when it stated that it "is not difficult for school authorities to make the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious materials through religious instruction and prayer."\(^5^2\) The lower court thus isolated morality as a secular subject from the matter of religious instruction, the latter presumably apart and beyond the cognizance of the civil order. Neither the Second Circuit nor Justice Souter seemed to think it was possible for some people to derive their morality from the substance of their religious convictions and to be motivated in this endeavor by religious activities such as prayer. Circuit Judge Jacobs, dissenting in the lower court, put the matter nicely:

The distinction [between content discrimination and viewpoint discrimination] is especially slippery where the viewpoint in question is religious, in part because the sectarian religious perspective will tend to look to the deity for answers to moral questions. The idea that moral values take their shape and force from God seems to me to be a viewpoint for the consideration of moral questions.\(^5^3\)

An *amicus curiae* brief filed with the Supreme Court by twenty theologians and religious scholars (theologians' brief) reviews a range of spiritual beliefs and makes the same point by challenging the premise that an easily identifiable distinction exists between "religious instruc-

\(^5^0\) *Id.* at 112.


\(^5^3\) *Id.* at 514 (Jacobs, J., dissenting). In Judge Jacob's opinion, "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." *Id.* at 512. Commenting on this distinction in *Rosenberger*, the Supreme Court (Kennedy, J., writing) states the following:

[Discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought.]

tion” and “religious perspective.” The theologians’ brief notes that faith groups vary significantly on their opinions of the underlying question, and the effort to apply and administer such a distinction would embroil the Court in controversial judgments regarding the meaning and application of religious doctrine. To compound the difficulty, when a court calls an activity “worship,” it is often using that term based on the group’s own characterization.

Additionally, the theologians’ brief points out that scholars have hotly contested the relation between “God’s will” and “the good” since philosophy and theology began to interact and contends that the Second Circuit unknowingly took a position on this question by assuming that “morality is derived from sources other than religion.” However, this assumption is the very point in dispute. Whatever we may say on behalf of the validity of this assumption, it does not represent the outlook of many theological traditions in our society, including those of the Hebrew Bible, Post-Biblical Judaism, Islamic Sources, the Pauline Epistles, Protestant Sources, or Roman Catholicism, the traditions that the theologians’ brief lists and discusses.

The notion that religious and moral instruction are different “subjects” and that we may readily distinguish them is contrary to what many religious leaders experience and teach. The religious traditions mentioned in the brief often take the opposite view of the matter and maintain that religious and moral instruction are either a unified whole or are so deeply intertwined as to be inseparable. Hence, the theologians and scholars argue that the Second Circuit itself had ironically committed viewpoint discrimination when it adopted one view over another respecting the relation between “God’s will” and “the good.”

Justice Stevens, who wrote a separate dissenting opinion, chose a different approach to the problem. While ultimately relying, as Justices Souter and Ginsberg did, on the validity of Milford’s limitation of the forum, Stevens separated the “religious purposes” mentioned in the policy statement into three possible types of religious speech. He stipulates that some religious speech is “simply speech about a particular topic

56. Brief for Theologians, supra note 54, at 8.
57. Id. at 13-26.
58. Id. at 9.
59. Good News Club, 533 U.S. at 130.
60. Id.
from a religious point of view"; 61 that some religious speech amounts to worship "or its equivalent"; 62 and that some religious speech proselytizes by nature or inculcates belief in a particular faith. 63 While the First Amendment potentially protects all of these forms of speech against action by the state, Stevens believes that public school authorities may create a limited forum on school property in which they exclude the second and third types of religious speech by private organizations. 64 In the present instance, proselytizing speech becomes the center of his analysis. 65

Stevens compares the Good News Club and its proselytizing meetings to a political organization trying to recruit members. 66 He concludes that Milford may exclude these kinds of meetings because "[s]uch recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the schools' educational mission." 67 However, there are some obvious weakness in this analysis, not the least of which is that state education law permits a school district to allow the use of school property "for holding political meetings." 68 Moreover, what Justice Stevens labels proselytization amounts to the religious and moral training of young children whose parents approved their children's presence and participation. Thus, any recruitment of "new" members is by dispensation of their mothers and/or fathers. 59 Finally, Stevens seems to equate proselytizing with the inculcation of belief although the two activities are not necessarily identical.

61. Id. The example given is the film on child rearing in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 397 (1993).
63. Good News Club, 533 U.S. at 130. Justice Stevens believes that this category of religious speech falls between the other two.
64. Id. at 133.
65. Id. at 132. Justice Scalia twists the dissenters for being unable to agree on what category of religious speech the club's activities represent, pointing out that Justice Souter describes them as an evangelical service of worship. Id. at 125–26. (Scalia, J., concurring).
66. Id. at 131.
67. Id. at 131–32. This sentiment is reminiscent of Justice Stevens' concurrence in Board of Education v. Grumet, 512 U.S. 687, 711 (1994) (Stevens, J., concurring), in which he deplored the possibility that children of the strict Satmar Hasidic sect of Judaism might be shielded from contacts with the "different ways" of others, increasing the likelihood that they would remain faithful adherents of their parents' faith. In Grumet, involving the creation of a special school district to accommodate members of the sect, Justice Stevens noted that there was a "strong public interest in promoting diversity and understanding in the public schools." Id. In Good News Club, however, the state was not responsible for any of the after school teaching or the composition of the private groups doing it.
68. N.Y. EDUC. LAW § 414, 1(e) (McKinney 2001). This section prohibits meetings sponsored by political organizations "unless authorized by a vote of a district meeting held as provided by law of, in cities by the board of education thereof." Id.
69. Good News Club, 533 U.S. at 115.
Nevertheless, Justice Stevens candidly and directly dissects the elements of the issue before him, serving to expose the ambiguity of the policy limiting the forum and the resulting subjectivity of its application. He acknowledges that while the policy statement bars groups from using school premises for religious purposes, the school board did not intend to exclude all speech from a religious point of view.\textsuperscript{70} In that regard, Justice Stevens points out that testimony established that the superintendent of the Milford School District was willing to permit individuals to teach Creationism while contemporaneously interpreting the policy to exclude any speech that promoted the Gospels.\textsuperscript{71} The more that Stevens describes the fine points of the policy,\textsuperscript{72} the more apparent it becomes that the school officials had elastic and potentially boundless discretion to decide just how much religion was acceptable and how much was too much.

If for no other reason, the standards that the dissenters implicitly suggest to distinguish between religious perspective and religious content are unacceptable because they would inevitably entangle the law in a determination of the permissible dosage of religious inspiration allotted to private individuals who teach morals and character to children. However, rather than raising the troublesome question of whether religious speech has religion as its subject or merely a religious viewpoint, many of the religious-speech-in-public-schools cases actually turn on a related (and no less problematic) question of what type of forum the school represents.

IV. RELIGION AND THE CHOICE OF FORUM

Central to \textit{Good News Club} is the government's specification of the forum. While the Supreme Court has addressed the right of private access to public property in a series of cases and endeavored to lay down the broad lines of differentiation from one forum to another, how to apply these categories to specific situations is often in dispute. In part, these disputes are stimulated by shifting terminology when defining the types. For purposes of the present analysis, we will use the guidelines that the Supreme Court set out in \textit{Perry Education Ass'n v. Perry Local Educators' Ass'n}\textsuperscript{73} as markers. Generally speaking, there are the following three types of forum: (1) the public or traditional forum, deemed to be open to expressive activity for all forms of assembly or debate; (2) the

\textsuperscript{70} \textit{Id.} at 132.  
\textsuperscript{71} \textit{Id.} at 132–33.  
\textsuperscript{72} \textit{Id.} After conceding that "[t]his case is undoubtedly close," \textit{id.}, Justice Stevens speaks of being persuaded that the school district can exclude the proselytizing speech even if it does not represent worship. \textit{Id.} at 133–34.  
\textsuperscript{73} 460 U.S. 37 (1983).
designated or limited forum, opened by the government for certain types of expressive activity or assembly; and (3) the nonpublic forum, which the state reserves for its own functions and purposes with respect to communications by outsiders.  

A. Shifting Definitions

Despite the apparent clarity at each level, specifying the nature of the forum becomes elusive. For example, we often equate the public forum with state property where we traditionally accept that everyone is free to express an opinion (think Hyde Park). Yet the range of participation may be limited to those who are students at a state university, and the forum may still be characterized as public.  

More perplexing is the line of demarcation between designated and nonpublic fora. In Perry, the Supreme Court described a designated forum as one that is not traditional and that the state has opened to the public for expressive activity while the Court also refers in a footnote to a public forum as one “created for a limited purpose” such as use by certain groups (for example, the members of student groups in Widmar v. Vincent). This suggests that, by merely designating it as such, the State can craft a “limited forum” although, to the extent that the forum is open, there cannot be any exclusion based on content unless there is a compelling state interest and a restriction narrowly drawn to serve that purpose. The third category, the non-public forum—not a traditional or designated one—is found where the State reserves property for its own purposes. Nevertheless, the State in that instance may grant access to others on the basis of subject matter and speaker identity as long as the distinctions that the State draws are reasonable in light of the purpose that the forum serves.

Evidently, there is a definitional overlap here between a designated forum, which may be limited, and a nonpublic forum, which the government may enlarge by granting access to it. The limited public forum may be considered a subset of the designated one or an outgrowth of the nonpublic. Not only that, but also the legal criteria for measuring a forum’s validity may hinge on how it is characterized. In a designated forum, the state may not exclude groups from participating because of speech content without first demonstrating a compelling state interest.

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74. Id. at 45–46. Once a forum is opened, the state may enforce reasonable time, place, and manner regulations. Id. at 46.
76. Perry, 460 U.S. at 45.
77. Id. at 46 n.7. For example, student groups or school board members.
while it may restrict access to a nonpublic forum if it acts reasonably and in a viewpoint neutral manner.\textsuperscript{80}

\textbf{B. A Limited Public Forum}

In \textit{Good News Club}, the Supreme Court accepted the agreement of the parties that Milford had created a limited public forum.\textsuperscript{81} Concerning such a forum, the state may impose limitations only if they are "reasonable and viewpoint neutral."\textsuperscript{82} Once the parties established the character of the forum, it would seem to follow that, since the district opened its property after school hours to organizations such as the Boy Scouts for teaching morality and character to children, a religious organization also had a claim under the First Amendment to pursue a similar purpose for other children from its own viewpoint.

The resistance of both the dissenting Justices and the Second Circuit to such a conclusion is surprising and appears to derive from the unarticulated premise that the accompanying religious exercises of such an organization is intolerable on public property, particularly school property, even for consenting adults and their progeny. Apart from the dissenters' efforts to distinguish the case from \textit{Lamb's Chapel}, they also rely on how Milford restricted the forum in its community use policy to the effect that the "premises shall not be used by any individual or organization for religious purposes."\textsuperscript{83}

Justice Stevens believed both that Milford was reasonable in closing the forum to religious proselytizing and that the exclusion was done in an evenhanded manner so as not to constitute viewpoint discrimination.\textsuperscript{84} Justice Souter relied on the fact that, in the district court, the club had not challenged the reasonableness of the policy prohibiting religious use.\textsuperscript{85} In his judgment, both proselytizing and worship fall within that prohibition.\textsuperscript{86}

On the subject of forum, certain propositions with respect to Milford’s control of its property are not in doubt and help narrow the area of uncertainty. Milford unquestionably had the authority under New York

\textsuperscript{80} Perry, 460 U.S. at 45.
\textsuperscript{83} Good News Club, 533 U.S. at 135–36 (Souter, J., dissenting); see id. at 132 (Stevens, J., dissenting).
\textsuperscript{84} Id. at 133.
\textsuperscript{85} Id. at 135 (Souter, J., dissenting). However, Justice Scalia maintained that the reasonableness of the forum limitation was before the Supreme Court because the appellate court had addressed the argument of reasonableness on the merits. Id. at 122 n.1 (Scalia, J., concurring).
\textsuperscript{86} Id. at 126 n.3.
law to determine the uses to which the property in its custody might be put. In other words, Milford was not required to permit any member of the public to enter school property for any purpose other than the educational functions assigned to the district. Originally, then, the school could be considered a nonpublic forum.

C. Interpretation of the New York Statute

Although the school was originally a nonpublic forum, the New York statute provided that outsiders could use it for some ten different purposes other than the educational functions performed by the school. In this list of permitted purposes, there are only two references to religion. Paragraph 1(d) of section 414 reads:

For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer . . . firefighters or volunteer ambulance workers.

Paragraph 1(j) of section 414 reads: "For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed."

When Milford's School Board adopted a community use policy pursuant to this statute, it incorporated a number of the permitted purposes. These purposes set very broad limits for the forum the district was creating. In effect, they permitted any kind of meeting pertaining to the welfare of the community.

However, as noted above, in both Good News Club and Lamb's Chapel, the school district included a statement in its community use policy that no group should use school premises for religious purposes. The message that that restriction conveys is both broad and potentially ambiguous. Taken literally, the policy would disqualify any group of

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87. See N.Y. EDUC. LAW § 414 (McKinney 2001).
88. Id.
89. N.Y. EDUC. LAW § 414, 1(d).
90. N.Y. EDUC. LAW § 414, 1(j). This raises a nice question: presuming that the state permits a non-profit school to use the property for a graduation, can the state then condition the use on rejection of religious expression?
citizens seeking to come onto the property from being motivated by religion for their speech activity, whatever its nature. In effect, such a reading would seem pointedly hostile toward religion, treating such activity as a pariah to social intercourse. In separatist terms, the exclusion would be fundamental, posting a "keep out" sign for those whose social lifestyle in any way reflected religious manifestations.

On the other hand, if authorities allow for the presence of a religious component, it evidences an ambiguity in the interpretation of the phrase "religious purposes." That is what happened in Lamb's Chapel when the school began opening the forum for use by such groups as gospel singers, a new age organization, and the Salvation Army Youth Band.\(^2\) It is also what happened in Good News Club when Milford allowed access to the Boy Scouts, who met to teach character development and spiritual growth. Such ambiguity undermines a school district's ability to apply the policy objectively.

A more fundamental question is whether Milford (or even the New York Legislature) can exclude speech based on its religious nature from accessing school property even though the facilities are otherwise open to expressive activity. In its opinion in Good News Club, the Supreme Court identified a number of cases in which this type of issue has surfaced in various contexts recently, evidencing some conflict in the decisions among the circuits.\(^3\)

In answering the question of whether a state that opens a limited public forum may then exclude religion as improper subject matter, it may be instructive to trace the development of New York law prior to Good News Club.

The New York statute does not expressly mention the use of public property for religious purposes (except on those occasions where admission charges are to be paid for the benefit of a religious denomination or, more recently, at commencements).\(^4\) In 1979, however, an intermediate state court concluded that under section 414 of the New York statute, the board of education had no statutory authority to allow groups to use

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\(^3\) Good News Club v. Milford Cent. Sch., 533 U.S. 98, 105 (2001) (citing Gentala v. Tucson, 244 F.3d 1065 (9th Cir. 2001) (funding for special event services would violate); Campbell v. St. Tammany's Sch. Bd., 206 F.3d 482 (5th Cir. 2000) (holding that a prayer meeting could be excluded); Bronx Household of Faith v. Cnty. Sch. Dist. No. 10, 127 F.3d 207, 217 (2d Cir. 1997) (holding that use for church service could be prohibited); Church on the Rock v. Albuquerque, 84 F.3d 1273 (10th Cir. 1996) (holding that a senior center had to allow a religious film); Good News/Good Sports Club v. Sch. Dist. of Ladue, 28 F.3d 1501 (8th Cir. 1994) (holding that the School District had to provide access in a case dealing with the same Good News group)).

\(^4\) N.Y. EDUC. LAW § 414 1(d), 1(j) (McKinney 2001).
school property for religious purposes before or after the class day.\textsuperscript{95} The court relied on the fact that the only purposes permitted under the statute were nonreligious in nature.\textsuperscript{96} In that case, the board denied a student Bible club permission to meet on school property before or after classes because it had a religious purpose.\textsuperscript{97}

This state court interpretation of the New York law was later adopted by the Second Circuit in a case where a church had requested a permit to hold worship services and instruction in the public school on Sunday morning while its own facilities were being renovated.\textsuperscript{98} At this stage, the church argued that since a limited public forum had been created, religious organizations were entitled to access under the broad purposes described in the statement of community use that the board of education issued. But the court of appeals responded as follows:

Nor are the activities of the Deeper Life church really similar to those purposes enumerated in section 414, as appellee argues. The subdivisions of the statute and the Commissioner's decisions . . . interpreting those provisions demonstrate . . . that access to the school property is permitted only where its serves the interests of the public in general, rather than that of sectarian groups. Appellee argues that because its services are open and widely advertised to the general public, this meets the requirements of section 414. It seems clear, however, that the church's activities are primarily for its own benefit, that is, to increase its membership and raise the funds to pay for its renovations. And while appellee argues that it should come under section 414(1)(a)'s provision that opens the schools "[f]or the purpose of instruction in any branch of education, learning or the arts," the thrust of the statute is to promote general knowledge, rather than to provide a forum for proselytizing or indoctrinating the public in a particular group's beliefs.\textsuperscript{99}

In effect, the Second Circuit was saying that there is no public interest in permitting religious groups to operate because they are dedicated to their own narrow parochial interests, a point that no doubt might also be made, if one were inclined to make it, about virtually every non-religious groups.

\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id. This was before the passage of the Equal Access Act. See 20 U.S.C. § 4071 (1994).
\textsuperscript{99} Deeper Life, 852 F.2d at 680.
In reaching its decision in the Lamb's Chapel case, the Second Circuit relied on its precedents and found that New York had created a limited public forum that excluded religious uses. The court rejected the argument that the school board was not viewpoint-neutral when it denied the church the opportunity to show a religious film.\(^\text{100}\) It concluded that the State had imposed a blanket exclusion on religiously oriented speech and that the board of education had not made any exceptions to that policy.\(^\text{101}\) Thus, according to the Second Circuit, the test of whether there was any viewpoint discrimination turned on whether the property had been opened to religious purposes in the past.\(^\text{102}\) Once it found that there were no prior religious uses, the court upheld the board of education's decision.\(^\text{103}\)

Subsequently, in Bronx Household of Faith, the Second Circuit upheld a school district's decision to reject a request by an evangelical Christian church to rent a public school gymnasium for conducting church worship each Sunday.\(^\text{104}\) The community use policy of the district stated:

No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which [sic] contains a religious viewpoint or for distributing such material is permissible.\(^\text{105}\)

This distinction between religious services and religious instruction on one hand and the discussion of religious materials or material containing a religious viewpoint on the other is similar to the distinction that the lower court brought into play when it decided the Good News Club case.\(^\text{106}\)

This sequence of cases tracking how doctrine has evolved in the Second Circuit reveals the prevailing principle that, in a limited public forum, a viewpoint on a subject open for discussion cannot be excluded even if it is religious in nature.

But there still remains unsettled issues regarding whether, for purposes of defining the parameters of a forum, the state may exclude

\(^{100}\) Lamb's Chapel v. Ctr. Morichos Union Free Sch. Dist., 959 F.2d 381, 389 (2d Cir. 1992).

\(^{101}\) Id. at 388.

\(^{102}\) See id.

\(^{103}\) Id. at 389.


\(^{105}\) Id. at 210.

religious services or religious instruction standing alone, that is, independent of any discussion of a secular subject. In that regard, we should note that Justice Thomas in Good News Club made it clear that, on the facts, the club's activities did not constitute "religious worship, divorced from any teaching of moral values."^107

V. DOES PRAYER OR WORSHIP BY A PRIVATE GROUP DIMINISH ITS RIGHT OF EQUAL ACCESS TO PUBLIC PROPERTY?

Religious worship itself is considered to be a form of speech. That issue was raised before the Supreme Court when a state university attempted to bar a student organization from using its campus meeting rooms because the student organization desired to use them for religious worship and discussion.\(^{108}\) In his dissent, Justice White contended that the Free Speech Clause does not cover religious worship.\(^{109}\) However, the Court expressly ruled that both religious worship and religious discussion are "forms of speech and association protected by the First Amendment."\(^{110}\) Explaining its conclusion, the Supreme Court maintained that any attempt to distinguish religious appeals or instructions (such as singing hymns, reading scripture, or teaching the Bible) from other forms of speech consisting of worship would be unintelligible.\(^{111}\) Even if it were intelligible, the effort to draw that line would be beyond judicial competence, in effect calling for courts to determine what represents worship for different groups and congregations. Judges would have to inquire about and make judgments concerning the significance that should be attributed to the various words and practices of religious faiths.\(^{112}\)

In a recent case, Campbell v. St. Tammany's School Board,\(^{113}\) the Court directly addressed the subject of religious worship in a limited public forum and remanded to the Fifth Circuit for reconsideration fol-


\(^{109}\) Id. at 285 (White, J., dissenting). In arguing that the speech used in religious worship is not protected by the Free Speech Clause, Justice White relies on precedents in which the state had made the speech its own or somehow was sponsoring it. E.g., Stone v. Graham, 449 U.S. 39 (1980) (regarding posting a copy of the Ten Commandments in a classroom); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (concerning prayer in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (concerning prayer in public schools); Torasco v. Watkins, 367 U.S. 488 (1961) (concerning declaration of belief in God as a condition of employment by the state). But the worship in question in the present instance is the speech of private entities.

\(^{110}\) Widmar, 454 U.S. at 269.

\(^{111}\) Id. at 269 n.6. According to the Court, the unintelligibility derives from the absence of any guides to indicate when "singing hymns, reading scripture, and teaching biblical principles" would cease to be singing, reading, and teaching protected by the Free Speech Clause. Id.

\(^{112}\) Id. at 269–70 n.4.

\(^{113}\) 206 F.3d 482 (5th Cir. 2000).
lowing the decision in Good News Club. In Campbell, Sally Campbell and the Louisiana Christian Coalition sought to use public school facilities after hours for a prayer meeting. The group declared that the object of the meeting was to "worship the Lord in prayer and music . . . to discuss family and political issues, pray about those issues, and seek to engage in religious and Biblical instruction with regard to those issues." The school district in question had a policy of permitting groups to use the facilities for, among other things, civic, recreational, and entertainment purposes that were open to the public and pertained to the "welfare of the public." However, the policy expressly excluded partisan political activity, for-profit fund raising, or "religious services or religious instruction." A panel of the Fifth Circuit recognized that the choice between finding that the forum was a designated public forum and finding that it was a nonpublic one would be crucial in deciding the legality of the restrictions. Since there were at least a few other prohibitions in the policy on other types of speech uses (partisan political meetings, for-profit fund raising), the court concluded the district policy was not a public forum. The court felt that the school district had met the requisite standards for allowing limited public access: the "limits must reasonably relate to the purposes of the forum and may discriminate only on the basis of content, not viewpoint." In the court's view, the ban on religious activities discriminated based on content, that is, the subject of religion, not viewpoint, that is, a religious perspective on a subject. Hence, it was not unconstitutional in a non-public forum. Expanding on this view, the court found that "religious services and instruction are not simply approaches to a topic, but activities whose primary purpose is to teach and experi-

115. Campbell, 206 F.3d at 484.
116. Id.
117. Id. The school district did permit discussion of religious materials or material containing a religious viewpoint, which led the district court to find that the policy was unconstitutionally vague. According to the district court, there was no way of telling when speech involving a religious viewpoint crossed over into the forbidden religious instruction or worship. However, the court of appeals found that the core meaning of the terms defining the exclusion was clear. While there might be ambiguity and blurring in drawing the line between instruction and discussion, "that effect is no more than the limits of language stretched by the active imagination of hypothesized application." Id.
118. Id. at 487. Since there were few limitations on use, the court conceded that the policy "skates close to establishing a designated public forum through indiscriminate use," id. at 486, but ultimately found that the restrictions "are minimally sufficient to maintain the school buildings' status as a non-public forum." Id. at 487.
119. Id. at 487 (citing Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)).
ence the subject of religion. These are activities distinct from a topical discussion, a social gathering, or a political meeting.120

A split court denied a petition to the Fifth Circuit for rehearing.121 In a per curiam opinion, the majority reaffirmed the view that the forum was a limited public one, "reserved for recreational and civic activities."122 The policy itself stated that it was creating a "limited public forum" and had expressly excluded partisan political activity, for-profit fund raising, and "religious services or religious instruction."123 The opinion pointed out that a contrary decision might diminish the opportunity for freedom of speech because the school board would have to consider closing its doors to all applications who wished to use the facilities after school hours. If the school district could exclude partisan political activity, the majority reasoned that the district could also restrict religious services.124 According to the per curiam opinion, St. Tammany's policy was rational because the district wanted to avoid the perception that it favored either some political parties or some religions over others.125

However, a group of five judges in the Fifth Circuit dissented from the denial of hearing en banc.126 Considering the large number and wide range of organizations that the district allowed to use the facilities, as well as the standards it had announced in creating the forum, the dissenters argued that the forum was generally open to the public even though limited. Thus, a content based exclusion of religion was "censorship pure and simple."127 Beyond that, even if the forum was non-public, excluding religion was unreasonable in light of the broad standards measuring the scope of the forum. In that context, prohibiting religion could be nothing more than viewpoint discrimination.128

Both Campbell and Good News Club failed to resolve the testing question of whether it is unconstitutional for a governmental body to exclude religious worship or religious instruction standing alone from a forum that it has opened to a variety of uses by other groups.129 Whether it is labeled a limited public forum, a designated forum, or a nonpublic forum may be largely a matter of semantics, allowing a court to pick the

120. Id.
122. Id. at 940.
123. Id. at 941.
124. Id. at 942.
125. Id. at 943.
126. Id. at 945 (Jones, J., dissenting).
127. Id. at 947 (Jones, J., dissenting) (citing Grace Bible Fellowship v. Maine Sch. Admin. Dist. No. 5, 941 F.2d 45, 47 (1st Cir. 1991)).
128. Id. at 949 (Jones, J., dissenting).
label that will produce the desired result. What is important is whether
speech limitations are imposed on some groups prohibiting their access
to a forum that is generally open to others and whether the basis for
those limitations are reasonable and content neutral. In the words of
the Supreme Court, "government may not prohibit others from assem-
bling or speaking on the basis of what they intend to say.

Unless the Supreme Court reconceptualizes the subject of fora cre-
ated on public property, the only thing that remains clear is that the
forum in each of the school cases is not a traditional one such as a park or
a street. The problem of these cases appears only when the state itself
begins to design or designate the scope of the forum, another way of say-
ing that it undertakes to decide what groups will be allowed access to it.
If the designation takes the form of narrow exceptions to what would
otherwise be a nonpublic forum, a measure is at hand to determine if the
limitations are appropriate: the standard of whether a restriction is neces-
sary to preserve the purpose of the forum. This is a workable standard.
For example, if the public school should sponsor an after school program
designed to acquaint young people with driver education and safety
rules, the choice of the subject matter and the identity of the speakers
would be appropriately left within the tight control of the school authori-
ties to achieve the ends they have in mind. In a sense, these subject
matters and speakers are approved by the school in order to implement
its own speech, that is, the program that the school is trying to promote.

The difficulties begin to mount when we introduce the slippery
concept of a "limited public forum." One may assume that the ipse
dixit of a public authority that writes a use policy that includes some
groups and excludes others, is not conclusive on its legality. While
the public authority may be entitled to some discretion in drawing up
the bounds of the forum, it surely cannot act arbitrarily or unreasona-

130. See Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 96 (1972).
131. Id.
132. An incisive critique of the public forum concept may be found in Rosemary C. Salo-
mone, Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from Lamb's Chapel,
24 N.M. L. REV. 1 (1994). An argument for the reformation of the forum doctrine is found in
the concurring opinion of Justice Kennedy (joined by three other Justices) in International Society
of the doctrine of public forum is Robert C. Post, Between Governance and Management: The His-
tory and Theory of the Public Forum, 34 UCLA L. REV. 1713 (1987). See also Daniel A. Farber &
John E. Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First
that are imposed if a First Amendment claim is made by members of the public seeking access.

It may be helpful to more sharply focus the discussion on the circumstances under review in the *Campbell* case. In *Campbell*, the school board opened the facilities before and after school hours to outside groups to use for a wide range of civic and recreational purposes and "other uses pertaining to the welfare of the community."\(^{134}\) Whether or not the exclusion of religious worship and religious instruction can be defended against the claim of viewpoint discrimination under the *Lamb's Chapel* approach may be debated, but in any event, the public authority is still bound to justify the subject exclusions as reasonable and necessary in light of the purpose that the forum it created serves.\(^ {135}\)

Presumably, opening the school facilities outside the school day does not impede the school district from performing its function of educating its students. Having decided that the facilities should be made available for outside uses "pertaining to the welfare of the community," the public authority is hard pressed to show that, in order to preserve that purpose, it is necessary to exclude groups intending to engage in religious worship or instruction. What is the purpose of the forum during hours before or after the school day other than to accommodate meetings and speech exchanges of members of the public?\(^ {136}\) Why is it any of the school's business if members of a group consider their specific exchanges to be worship?

In a recent post-*Good News Club* decision, *DeBoer v. Village of Oak Park*,\(^ {137}\) the Seventh Circuit dealt with the question of where religious uses stand in comparison to other, more general uses. While not involving the use of public school property, the court found that it represented viewpoint discrimination to exclude a prayer meeting from using the village hall because it was not a "civic program."\(^ {138}\)

The event in question was an observance of the National Day of

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\(^{134}\) *Campbell v. St. Tammany's Sch. Bd.*, 231 F.3d 937, 940 (5th Cir. 2000).


\(^{136}\) A portion of the policy of a Maine school district reflects the following approach: "School facilities are community assets, and their utility should be maximized to the extent consistent with the mission and function of the schools. . . . The School District plays an important role as a positive social force in promoting community cohesiveness and stability, and policies governing use should reflect that role." *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991). Under this policy, the court held that that school district could not refuse to lease facilities to a religious organization that planned to offer a free Christmas dinner to the public at which an evangelical message was to be delivered by a minister. *Id.*

\(^{137}\) 267 F.3d 558 (7th Cir. 2001).

\(^{138}\) *Id.* at 568.
Prayer, which featured recitation of Biblical commentary, singing of hymns, and prayers. The Village's policy was to permit groups to use the hall for civic programs or activities that benefit the public as a whole. The Village concluded that the program did not qualify as a "civic" event, which it defined as dealing with a citizen's relation to government. 139 That position was upheld by the district court, which decided that a program of prayer and worship was "inherently non-civic in content." 140 In reversing the lower court, the Seventh Circuit disagreed that the prayer service was not a "civic program or activity," writing that:

A prayer service regarding civic issues is certainly distinct from other types of discussion about civic matters informed by a religious perspective. However, that difference in form and tone does not alter the reality that worship and prayer directed toward the betterment of government and the enlightenment of civil leaders are methods of expressing a religious viewpoint about civic subject matter. 141

Nevertheless, the court drew a line between a prayer service for a national prayer day and the use of the hall for "worship services held as part of a faith's regular religious regimen and bearing no relationship to a specific civic purpose." 142 There would, of course, be a serious problem under the Establishment Clause if the Village Hall entered into an arrangement to become the permanent site of a church's weekly worship, particularly if we assume that the option of permanency of scheduled use was not available to all other outside groups. Conceding the legitimacy of that concern, we should not lightly assume, even if viewpoint discrimination is not alleged, that a worship service does not come within the boundaries of a forum described by such phrases as "welfare of the public." Moreover, the proposition that religious worship on its face is not a "civic program or activity" is problematic. The Village's reliance on a dictionary definition of "civic" as meaning "of, relating to, or belonging to a city, a citizen, or citizenship" is defensible, 143 but it neglects a traditional and broader understanding of "civic" as reflected in Webster's Third New International Dictionary: "1: inherent in or owing or accruing to the individual citizen: attendant on citizenship . . . 2: forming a component

139. Id. at 574. There were six different criteria set forth in the use policy of the village. Id. at 561.
140. Id. at 567.
141. Id. at 569.
142. Id. at 570 n.11.
143. Id. at 567 n.7.
of or connected with the functioning, integration, and development of a civilized community (as a town or city) involving the common public activities and interests of the body of citizens . . ."\(^{144}\) Under the latter definition, there is no apparent reason that a communal worship service could not be considered a civic event.

VI. EQUAL ACCESS AND THE ESTABLISHMENT CLAUSE

One of Milford's defenses in Good News Club was a claim that the school would violate the Establishment Clause of the First Amendment if it granted the club's application to use school facilities.\(^{145}\) A majority of the Court thought so little of this claim that it rejected it on the record\(^{146}\) although Milford had prevailed in the lower court on a motion for summary judgment based on a holding that there had been no viewpoint discrimination under the Free Speech Clause of the First Amendment. Hence, the lower courts had never adjudicated the Establishment Clause issue.\(^{147}\) Four Justices disagreed with the majority's disposition of the Establishment Clause concern, believing that there might be material facts that the parties still needed to litigate before a court could make a judgment in that regard.\(^{148}\)

Whatever the merits of the policy arguments regarding a ruling on a constitutional question "not addressed by either the District Court or the Court of Appeals,"\(^{149}\) it is hard to deny that the facts on record before the Supreme Court offer meager support for a genuine establishment issue. The policy statement for the community use of the building after school hours authorized "instruction in any branch


\(^{146}\) Id. at 119-20 n.9.

\(^{147}\) Id.

\(^{148}\) See id. at 127 (Breyer, J., concurring); see also id. at 130 (Stevens, J., dissenting); id. at 134 (Souter, J., dissenting). Since there was no serious exchange between the Justices over the establishment issue, existing differences of opinion between factions of the Court remained in place. Justice Breyer, in concurring with the majority, took time to point out that he was continuing to insist that government neutrality by itself did not conclusively resolve the establishment issue. See id. at 127. This was in reaction to the opinion of four Justices in Capital Square, maintaining that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." Capital Square Review v. Pinette, 515 U.S. 753, 770 (1995). This formulation notably omits the endorsement test, which remains uncertain in application as evidenced by the differences of opinion among its supporters regarding the standards that govern it. An example of these differences can be found in the debate between Justice Stevens, see id. at 797, and Justice O'Connor, see id. at 772.

of education."

The club's meetings were not sponsored by the school and were open to any student with parental consent. Finally, the teachers were not state employees, but private individuals. Once we recognize that the state was only involved with its preliminary decision to open the premises for a variety of community uses when school was not in session, the claim that there was an attempt "respecting an establishment of religion" rings hollow. The majority ruled that the doctrine as developed in the earlier cases of Lamb's Chapel and Widmar conclusively confirm that there is no establishment problem in the case.

On the other hand, the Justices who argued to remand the case to litigate Milford's claim that allowing the club to meet would breach the Establishment Clause primarily relied on two points: (1) that the age of the children required special vigilance, and (2) a wide ranging speculation about how other facts, if they were assumed to be present, might affect the claim of establishment.

The first point relates to the impressionability of young school children in the lower grades, who supposedly might come to believe that the state was giving its imprimatur to the religious teaching that they were receiving in the classroom even though the teaching came after class hours and from people who were private citizens and not public school teachers. Any such anxiety, the Court found, is misplaced for a number of reasons. First, even young children would understand the difference between the established school hours with their public school teachers and the gatherings under the supervision of adults who are friends of their parents. Indeed, given the precocity of children in an age of television, it is not unimaginable that at least some would understand that, if they are being taught religion, the state could not be the agent for such a message. Beyond that, considering that endorsement is the legal standard being measured, it is ludicrous to assume that children of tender years could meet the criteria that have come to be associated with that test.

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151. Id. at 114-15.
152. U.S. CONST. amend. I.
153. Good News Club, 533 U.S. at 119. In Widmar, Justice Stevens, on a developed record, thought that the university's fear of violating the Establishment Clause was groundless because there was no basis to think that it was sponsoring any particular religion, and student participation was entirely voluntary. Widmar v. Vincent, 454 U.S. 263, 280 (1981) (Stevens, J., concurring).
154. Good News Club, 533 U.S. at 141 (Souter, J., dissenting).
155. Id. at 113-14.
156. Id. at 115. As its proponent, Justice O'Connor has stated that the endorsement analysis requires "careful and often difficult line-drawing and is highly content specific." County of
Finally, the children are hardly the appropriate group by which to gauge perceptions of constitutional significance inasmuch as they are the dependents and wards of their parents, who made the decision to have them attend the classes. As the majority opinion notes, parents themselves would not be "confused about whether the school was endorsing religion." It is interesting to note that Justice O'Connor, the proponent of the Court's endorsement analysis, voted with the majority and did not express any concern about alleged messages of endorsement.

In their analysis, the dissenters undertake to mention some of the following facts that they think might be of significance in assessing an Establishment Clause violation: the possibility that young children (some of them perhaps upperclassmen) or bystanders may be loitering outside the classroom following the regular school day; the presence of school sponsored extracurricular activities under the direction of school staff; the use or nonuse of facilities by other community groups immediately after class; and "domination" of the forum by the Good News students. The dissenters are also bothered by the fact that the Good News classes began immediately at the conclusion of the official school day, although Milford itself never objected in the lower courts to the club's use of that time slot. The dissenters seem to consider the fact that the club might find it convenient for its own purposes to hold the meetings right after school dismissal as reason enough to question the constitutionality of the school making that accommodation.

The questions generated by the dissenters project a view of the Establishment Clause that goes beyond the accepted restrictions imposed on public schools to prevent them from promoting religion as part of the educational function that they perform. Rather, the strong implication of these questions is that the school authorities are under an obligation to guard the physical facilities from any religious con-

158. Id. at 140 (Souter, J., dissenting).
159. Id. Justice Souter notes that the club requested to use the school at 2:30 P.M. although school was not out until 2:56 P.M. Id. at 144 (Souter, J., dissenting). The apparent reason for the request was to be able to start the meeting promptly at 3:00 P.M. Id.
160. Id. at 114 n.5.
161. See id. at 144 (Souter, J., dissenting). There does not seem to be any dispute that, assuming it acted in a neutral manner, the school could close the forum to all outside organizations for a period of time following the last class.
tamination after school hours by any expressions or activities of private visitors to the premises.\textsuperscript{162} Attributing the role of a sentinel to the public schools to monitor and repel any manifestations of religion on public property conflicts with the community use policy that the schools adopted, which declares that the property is open for a wide range of uses.\textsuperscript{163} Once the class hours are over, the public school authorities are simply custodians of the facilities.\textsuperscript{164} The speech in question is private speech, not that of the government, and the state presumably has no mandate to censor it.

In the final analysis, the dogged resistance of the dissenters to the prospect of any religious groups having equal access to the premises after school hours is a corollary of their inability to appreciate that the policy of community access is totally distinguishable from school-sponsored prayer.\textsuperscript{165} This lack of comprehension is reflected in the dissenting comment of Justice Souter that the decision in \textit{Good News}

\textsuperscript{162} In situations where state activity may be mistaken for endorsing a religious message of a private group, Justice O'Connor argues that the Establishment Clause may impose "affirmative obligations" on a state to avoid that perception. \textit{See Capitol Square Review v. Pinette}, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). In that respect, she maintains that "[t]he Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism . . . ." \textit{Id.} However, in that case, just as she apparently did in \textit{Good News Club}, Justice O'Connor agreed that, considering all the facts of the case, when the Ku Klux Klan displayed a cross on a public square, it conveyed a message of neutrality rather than endorsement. \textit{See id.} at 772. In being ostentatiously skittish about the presence of religion on the property where nothing indicates endorsement in an open forum, the state runs the risk of conveying hostility toward religion in violation of the Establishment Clause.

\textsuperscript{163} Such an approach also seems inconsistent with the sentiments that President William J. Clinton expressed in a memorandum on "Religious Expression in Public Schools," which he issued on July 12, 1995. In declaring that the First Amendment does not convert the public schools into "religious free zones," President Clinton decried the fact that "some school officials, teachers and parents have assumed that religious expression of any type is either inappropriate, or forbidden altogether, in public schools." Other portions of the statement may indirectly have relevance to the \textit{Good News Club} situation:

\textit{Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting . . . . Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises.}

Memorandum for the U.S. Secretary of Education and the U.S. Attorney General, Subject: Religious Expression in Public Schools, July 12, 1995. With respect to the subject of graduation prayer and baccalaureates, the statement reads, in part: "If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services." \textit{Id.} The 1995 guidelines, with changes not relevant here, were reissued by the Department of Education on May 30, 1998.

\textsuperscript{164} \textit{Good News Club}, 533 U.S. at 113.

\textsuperscript{165} This point is driven home in the Brief of Douglas Laycock as Amicus Curiae in Support of Petitioner at 7, \textit{Good News Club}, 533 U.S. 101 (2001) (No. 99-2036) [hereinafter Laycock Brief]: "Government's duty is to protect both religious and secular speech and to remain neutral between the two. In places where government permits expression of a diverse range of views, it has neither the duty nor the authority to exclude religious speakers." \textit{Id.} at 6–7.
Club must stand for "the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque." However, there is nothing remarkable about the proposition that, under an equal access policy to public buildings, those citizens deciding to meet for prayers or worship are not precluded from exactly the same consideration for access given to other "civic" groups using the facilities. While the terms under which the access is allowed may be specified, they presumably must be uniform for all, and surely they cannot be limited by a condition relating to the religious identification of the user.

There are, to be sure, other considerations to take into account. If the government undertakes to sponsor a prayer event of a private individual or group or provides money to help finance it (neither element was present in Good News Club), a violation of the Establishment Clause is arguable. Even under those circumstances, however, it is vital for courts to consider whether other non-religious organizations are treated in an affirmative fashion now being denied to an applicant because of religious identification. If equal access to government resources is the controlling standard, the existence of state sponsorship or even state funding may not be disqualifying.

Recently, in Gentala v. City of Tucson, the Ninth Circuit pursued the question of whether state funding is determinative. Gentala was remanded for reconsideration in light of Good News Club. The City of Tucson has a civic events fund, which provides support for certain events proposed by private groups to be held in the public park. The events eligible for the minor financial help through the fund (representing in the case at hand the amount of $340) must "celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues . . . []; generate broad community appeal and participation[;] instill civic pride in the City, state, or nation[;] contribute to tourism[;] or are identified as unique community events." But the policy of the city will not consider support for "events held in direct support of religious organizations."

166. Good News Club, 533 U.S. at 139 (Souter, J., dissenting).
167. Laycock Brief, supra note 165, at 6. For example, there might be a limit on the number of times that any group might use the property in a given span of time.
168. For example, the Court held that the use of state funds to pay the tuition of a visually handicapped person preparing for a career as a minister at a Christian college does not violate the Establishment Clause. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).
169. 244 F.3d 1065 (9th Cir. 2001).
170. Id. at 1068.
171. Id. (alterations and omission in original).
172. Id. at 1069.
Plaintiffs in the case were representatives of a prayer committee seeking to observe the National Day of Prayer proclaimed by Congress annually. 173

In upholding the City's denial of the application of the prayer committee, the Ninth Circuit bypassed issues of forum and viewpoint discrimination by invoking the principle that avoiding an Establishment Clause violation is a sufficient reason to deny access even if there is viewpoint discrimination. 174 In finding that the city was justified in believing that approving the applications of the prayer committee would violate the Establishment Clause, the court of appeals relied on the fact that there would be tax funding of a religious organization in addition to an endorsement of religion by the city. 175 Both of these grounds for finding establishment violations are eminently arguable and strongly disputed among the Justices on the Supreme Court.

In many respects, Gentala is comparable to Rosenberger, 176 where student activity fees were used to pay a third party contractor for the printing costs of proselytizing religious literature published by a student organization, one of a number of subsidized groups under a university program. The Supreme Court in a 5-4 split found that the program was not unconstitutionally subsidizing religion, but in Gentala the Ninth Circuit distinguished Rosenberger in a detailed review of the facts in both cases.

The remand to reconsider Gentala in the light of Good News Club makes it likely that, whatever action is taken, the deep divisions on the Court regarding the application of the Establishment Clause will remain. Although it will be interesting to see how they are resolved, that is a story for a different day.

VII. CONCLUSIONS

Local school boards in state operated or public schools have authority over substantial assets in the form of educational facilities that are sometimes idle with respect to public educational obligations and that might profitably be used for other community purposes. Officials adopt policies setting forth the purposes for which these facilities might be utilized by private groups. Sensitive to the difficulties of satisfying the general public as far as the no-establishment mandate of

173. See id. at 1067–68.
174. See id. at 1080. This goes further than the Supreme Court was willing to go in Good News Club, where Justice Thomas wrote that it was not clear if avoiding an Establishment Clause violation would justify viewpoint discrimination. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112–13 (2001).
175. Gentala, 244 F.3d at 1081.
the First Amendment is concerned, the public school authorities often hope to minimize controversy by broadly prohibiting the use of these facilities for religious purposes. This effectively denies equal access to public property by referring to the religious persuasion of some individuals and organizations.

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