1-1-2015

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Original Citation
Mark W. Cordes, Schools, Worship, and the First Amendment, 48 Suffolk L. Rev. 9 (2015).

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In recent decades, public school buildings have become increasingly important venues for religious worship services.[1] This is an outgrowth of two factors. First, school districts today commonly make their facilities available during non-school hours to a variety of community groups. This partially reflects schools' desire to support local community activity, but in many cases they also have significant financial incentives to charge rent for the space. School district community-use policies are typically open to a range of uses and groups, including religious, thus making the space available to religious groups. Indeed, excluding religious uses from a school-created forum could potentially violate the First Amendment, as reflected in a series of Supreme Court decisions.[2]

Second, churches themselves are often in need of space for worship services. This is particularly true of new, start-up churches, which typically do not have the resources to secure a permanent building. Although many use old storefronts or rent space from existing churches, an increasing number of new churches initially use school facilities.[3]

In many respects, this has been a comfortable arrangement for both schools and churches. School buildings are rarely used on Sunday mornings, and churches can set up and take down any equipment they might need with no interference to school operations. A school building is spacious enough to accommodate large numbers of worshippers, while also providing separate

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1. *See* Cathy Lynn Grossman & Natalie DiBlasio, *'Instant Churches' Convert Public Schools to Worship Spaces*, USA TODAY (July 19, 2011), http://usatoday30.usatoday.com/news/religion/2011-07-18-portable-churches-worship-schools_n.htm, archived at http://perma.cc/97LZ-WJGF. A 2011 research survey by USA Today of the five largest school districts and the five fastest growing school districts in the country showed that all ten districts permitted weekend worship services in their buildings. *See id.* Among the five largest districts, 25% of the schools in the Miami-Dade School Districts had issued permits for weekend services, 7% for the Chicago School District, 7% for the Clark County School District (Las Vegas), 4% for the Los Angeles School District, and 3.5% for the New York School District. *See id*.

2. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831-46 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-95 (1993); Widmar v. Vincent, 454 U.S. 263, 273 (1981).

3. *See* Grossman & DiBlasio, *supra* note 1 (noting survey found 12% of Protestant churches met in schools). Out of 350 churches started by the Acts 29 Network of church plants, 16% met in schools. *Id.*

rooms for nursery care and Sunday school classes. At the same time, cash-strapped school districts appreciate the extra income that rental of the space provides. Allowing religious services in public schools reflects accommodation of religion, a cherished American tradition.[4] It is not surprising, therefore, that an increasing number of new churches use school facilities when they first open.

Nevertheless, the inclusion or exclusion of religious worship services in public schools raises a variety of First Amendment issues. On the one hand, school districts have no obligation to allow churches or any other community group to use their facilities during non-school hours, no matter how pressing the need. Schools are not a traditional forum, and are free to shut their doors to the community.[5] On the other hand, to allow churches, but not others, to use school facilities would clearly violate the Establishment Clause[6] and most likely the Free Speech Clause.[7] This much is clear.

But in the typical situation where schools open their facilities to community groups, the constitutional issue raised by including or excluding religious worship is more nuanced. In particular, does church use of school facilities for religious worship services, which almost all community-use policies allow, violate the Establishment Clause by allowing a core and quintessentially religious activity on school grounds? Conversely, does excluding religious worship because of Establishment Clause sensibilities from an otherwise broad community-use program violate the Free Speech or Free Exercise clauses?

The Supreme Court has not directly addressed these issues. However, the Court has addressed instances where religious speech and activity has been excluded from school-created fora for either student or community groups because of perceived Establishment Clause concerns. In a series of five analogous cases, the Court held that the exclusion of religious speech from a school-created forum violates the Free Speech Clause, and the inclusion of such

4. *See* Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (stating "best of our traditions" encourages accommodating religious needs).

5. *See Lamb's Chapel*, 508 U.S. at 390-91 (holding school property not traditional forum but instead limited forum for designated purposes).

6. The Supreme Court's Establishment Clause jurisprudence is in a state of flux, with the Court applying several different tests depending on the case. *See* Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002) (discussing variety of Supreme Court approaches to Establishment Clause). These approaches include whether a government act results in coercion of a religious practice resulting in government endorsement of religion, whether the government act's purpose is to advance religion, and whether the act is neutral towards religion. *Cf.* Lee v. Weisman, 505 U.S. 577, 580 (1992) (discussing clerical members offering prayer before school graduation against Establishment Clause). Although only allowing churches access to school facilities would not result in coercion of religion, it almost certainly would constitute state endorsement of religion from the perspective of an objective observer and would fail to treat religion neutrally. It might also be seen as designed to advance religion.

7. The Free Speech Clause requires that regulations be content-neutral, prohibiting both favorable and unfavorable treatment based on content. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988); Carey v. Brown, 447 U.S. 455, 462 (1980); Police Dep't of City of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

speech does not violate the Establishment Clause.[8]

It is somewhat surprising, therefore, that in two decisions arising from litigation involving The Bronx Household of Faith (Bronx Household), the Second Circuit Court of Appeals held that exclusion of religious worship services from a community-use forum did not violate the Constitution.[9] In these cases, the court reviewed and upheld a New York School District policy that allowed use of school facilities for various community activities during after-school hours, but specifically prohibited use of schools for religious worship services. Bronx Household challenged the policy, claiming that it discriminated against religious viewpoints and was thus unconstitutional. In litigation stretching back almost two decades, the Second Circuit ultimately held in two decisions that exclusion of religious worship services from an otherwise broad community forum violated neither the Free Speech Clause nor Free Exercise Clause, and was therefore constitutional.[10] In doing so, the court also strongly suggested that to include religious worship services in such a forum would violate the Establishment Clause.

In the first decision, *Bronx Household of Faith v. Board of Education of City of New York* (*Bronx Household IV*), the Second Circuit addressed the free speech issue, concluding that exclusion of worship services did not violate the First Amendment.[11] In doing so, the court characterized the worship exclusion as banning a type of activity, rather than a point of view, such that it was distinguishable from Supreme Court cases and valid.[12] It also stressed that the worship service ban was reasonable in light of the potential Establishment Clause problems posed by permitting worship services on school property. Although the court was careful to state that it was not deciding whether the worship services would in fact violate the Establishment Clause, only that it was reasonable to believe it would, the tone of the opinion strongly suggested that it would likely violate the Establishment Clause.[13] Indeed, in several places the court stated that there was a "strong basis" to believe that allowing worship on public school property would violate the Establishment Clause.[14]

Since the district court and Second Circuit had only addressed the Free

8. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831-46 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-95 (1993); Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990); Widmar v. Vincent, 454 U.S. 263, 273 (1981).

9. *See* Bronx Household of Faith v. Bd. of Educ. (*Bronx Household V*), 750 F.3d 184 (2d Cir. 2014); Bronx Household of Faith v. Bd. of Educ. (*Bronx Household IV*), 650 F.3d 30 (2d Cir. 2011). *The Bronx Household* litigation history is long and complex. *See infra* Part II. The numerical designations for the two cases discussed in this article (IV and V) follow those used by the Second Circuit.

10. *See infra* Part II, Part V.B (discussing litigation history).

11. *See* 650 F.3d at 46-47.

12. *See id.* at 36-37.

13. *See id.* at 40.

14. *See id.* at 40, 51.

Speech and Establishment Clause issues in *Bronx Household IV*, but not whether exclusion of worship services violated the free exercise of religion, the church again sought an injunction against enforcement of the policy—this time on Free Exercise grounds. The district court held that exclusion of worship violated the First Amendment's Free Exercise Clause, and the case returned to the Second Circuit.[15] In *Bronx Household of Faith v. Board of Education of City of New York* (*Bronx Household V*), the Second Circuit again rejected the church's constitutional claim, finding that exclusion of worship services did not violate the Free Exercise Clause.[16]

Despite the rather complicated history of the *Bronx Household* litigation, the bottom line is rather straightforward. The Second Circuit Court of Appeals held that exclusion of religious worship services from a broad forum that allows outside groups to use school facilities does not violate the Free Speech Clause or Free Exercise Clause, and strongly suggested that the inclusion of worship services in the forum would violate the Establishment Clause.[17] Although the Second Circuit was careful to couch its analysis in the particular language of the New York School District community-use policy, as a practical matter, the court's reasoning and analysis relates to almost any public school policy regarding community use of its facilities. As suggested above, the issue is extremely important, as numerous public school districts allow community groups, including churches and other religious groups, to use their facilities during non-school hours.

This article will examine the issue of using public school space for worship, arguing that the Second Circuit was wrong in its Free Speech Clause, Establishment Clause, and Free Exercise Clause analysis.[18] First, the court was incorrect to characterize worship services as conduct rather than speech. Even

15. *See* Bronx Household of Faith v. Bd. of Educ. (*Bronx Household IV.A*), 876 F. Supp. 2d 419, 437 (S.D.N.Y. 2012), *aff'd*, 331 F.3d 342 (2d Cir. 2003). The numerical designation for this case has been adjusted to accommodate the Second Circuit's designations. *See supra* note 9.

16. *See Bronx Household V*, 750 F.3d 184, 190 (2d Cir. 2014).

17. *See infra* Part II.B, Part V.B.

18. A number of articles have addressed the issues raised by the *Bronx Household* cases at earlier stages in the litigation. None of the articles address the Free Exercise issue, and most precede the Second Circuit's final resolution of the Free Speech issue. *See generally* Richard Esenberg, *Of Speeches and Sermons: Worship in Limited Purpose Public Forums*, 78 MISS. L.J. 453 (2009); Christine Kiracofe, *The Constitutional Parameters of Renting Public School Space for Weekend Worship Services: An Analysis of 15+ Years of Case Law in* Bronx Household of Faith v. New York, 287 ED. L. REP. 663 (2013); Hannah N. Burnidge, Comment, *Expelling the Church: An Examination of the Constitutionality of the Second Circuit's Approval of a Public School District's Policy That Excludes Worship Services*, 44 ARIZ. ST. L.J. 1315 (2012); Kevin Fiet, Note & Comment, *The Bronx Household of Faith: Looking at the Unanswered Questions*, 2007 B.Y.U. EDUC. & L. J. 153 (2007); William A. Glaser, Comments, *Worshipping Separation: Worship in Limited Public Forums and the Establishment Clause*, 38 PEPP. L. REV. 1053 (2011); Nicholas Matich, Note, *Forum Domination: Religious Speech in Extremely Limited Public Fora*, 98 VA. L. REV. 1149 (2012); John Tyler, Comment, *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*, 59 MERCER L. REV. 1319 (2008).

if the school-use policy created a limited public forum, worship services are inherently expressive activities. Therefore, under Supreme Court precedent, the exclusion of worship services should be seen as viewpoint discrimination. The fact that religious views can be expressed in other contexts, such as Bible studies, fails to recognize that the means of communication are inherently part of the message. This is particularly true with worship, where the form of communication is an integral and essential aspect of communicating views of faith.

Second, the court was incorrect to state there was a "strong basis" to believe that renting facilities to churches for worship services would violate the Establishment Clause. The Supreme Court's emphasis on neutrality in prior limited forum cases involving religious speech strongly suggests the neutral treatment of worship would mitigate Establishment Clause concerns that might otherwise exist.[19] In particular, any concerns about perceived government endorsement of religion, the primary emphasis of the court in the *Bronx Household* litigation, are eliminated by a neutral treatment of religion.[20]

Third, the Second Circuit was also incorrect in concluding that excluding worship services from the school-use policy would not violate the Free Exercise Clause. This is admittedly a closer issue, because the Supreme Court has indicated that the Free Exercise Clause will tolerate limited disfavorable treatment of religion.[21] Yet a careful reading of precedent suggests it is limited to instances of an extremely strong Establishment Clause concern, which is absent in the *Bronx Household* cases. As such, the Supreme Court's general rule that targeting religion for unfavorable treatment triggers strict scrutiny should govern, making the policy unconstitutional.

Part I of this Article will provide background to the issue of using public school space for religious worship, examining three contexts in which the Supreme Court has examined religion in public schools: release time programs, prayer, and limited public forum cases. Part II will then analyze the Second Circuit's decision in *Bronx Household IV*. Next, part III will discuss whether excluding worship services from a limited public forum in public schools violates the Free Speech Clause. Part IV will then discuss whether permitting worship services in public schools violates the Establishment Clause. Finally, part V will discuss the Second Circuit's decision in *Bronx Household V*, and examine whether exclusion of religious worship from a limited public forum violates the Free Exercise Clause.

19. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839-40 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993).

20. *See Lamb's Chapel*, 508 U.S. at 395 (indicating granting religious access poses "no realistic danger" of endorsing religion); Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (plurality opinion) (granting religious groups equal access to facilities communicates neutrality, rather than endorsement).

21. *See* Locke v. Davey, 540 U.S. 712, 718-19, 725 (2004) (explaining "play in the joints" permits minor burdens on religion if substantial Establishment Clause concern).

I. BACKGROUND: RELIGION AND PUBLIC SCHOOLS

Religion in public schools is one of the most controversial areas in constitutional law, generating strong feelings on both sides of the argument. This section will not attempt to review every issue the Supreme Court has addressed, but will examine three areas of importance: release time programs, prayer in public schools, and religious speech in limited public school forums. The last category, which is most analogous to making public school facilities available for religious worship, will receive special attention, as it raises the dual concerns of free speech and the Establishment Clause.

A. Release Time Programs

The Supreme Court's introduction to the issue of religion in public schools occurred in two early cases involving "release time" programs, where students are released from public schools for private religious instruction. The first case, *McCollum v. Board of Education*,[22] involved a program in which some public school children were released from their classes to attend religious instruction classes of their chosen faith in classrooms at the school.[23] The program was voluntary and students were only released with the approval of their parents. The religious classes were taught by private teachers of the relevant faith who did not receive any compensation from the state. Students who did not participate in the program were sent to special rooms for secular studies.[24]

The Court held that the program violated the Establishment Clause, describing it as a program that uses tax-supported public schools "to aid religious groups to spread their faith."[25] In reaching this conclusion, the Court stressed several factors—in particular, the close cooperation between the school district and religious authorities in promoting religious education, as well as the use of school property for religious instruction. The Court not only noted that the "tax-supported public school system" was used to spread religious doctrine, but also that the state provided religion "an invaluable aid in that it help[ed] to provide pupils for their religious classes through use of the state's compulsory [education] machinery."[26]

Four years later, the Court again reviewed a release time program in *Zorach v. Clauson*,[27] but this time found the program constitutional. Although similar in many respects to the program rejected in *McCollum*, the program in *Zorach* permitted schools to release students during the school day to attend religious

22. 333 U.S. 203 (1948).
23. *Id.* at 208-09.
24. *Id.*
25. *Id.* at 210.
26. *See McCollum*, 333 U.S. at 210, 212.
27. 343 U.S. 306 (1952).

instruction at private, off-campus sites.[28] The Court found this distinction crucial, stating that in *McCollum*, the use of the classrooms involved the force of the schools to promote religious instruction.[29] In contrast, the Court in *Zorach* said the schools merely accommodated "their schedules to a program of outside religious instruction."[30]

Significantly, the Court in *Zorach* stressed the importance of accommodating religious practice. In an often-quoted passage the Court stated:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would . . . show a callous indifference to religious groups.[31]

Zorach reflects a very expansive understanding of how government generally, and public schools in particular, can accommodate religious activity. True, the distinction between *Zorach* and *McCollum* turned on the use of public school property to propagate religious doctrine, which the Court found unconstitutional. This distinction must be understood, however, in the context of the case, which involved the use of school classrooms during the school day for religious instruction to public school students, albeit with voluntary instruction.[32] Further, it was not part of a broad community policy, but instead designed only to assist religious groups. The Court characterized religious services held in public school facilities as essentially co-opting the public school system to provide students for religious instruction.[33] That is a far cry from the use of school facilities on Sunday mornings, which is far removed from class time and devoid of any cooperation of school officials to facilitate attending the service. The broader and more meaningful message of the two cases, and especially *Zorach*, is that government accommodation of religious exercise is constitutional.[34]

B. School Prayer Cases

There are few issues more controversial than prayer in public schools, and

28. *See id*. at 308, 315 (drawing distinction from *McCollum*).
29. *Id*. at 315.
30. *Id*.
31. *Zorach*, 343 U.S. at 313-14.
32. *See* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).
33. *See id.* at 210-12.
34. *See* Zorach v. Clauson, 343 U.S. 306, 313-15 (1952) (permitting release time program).

the Supreme Court has vigilantly monitored this practice. Indeed, in all five major cases in this area the Court has held prayer in public schools unconstitutional.[35] However, a close reading of these cases, together with the public forum cases discussed in the next subsection, indicates that the problem is not prayer in school itself, but rather government-promoted prayers. Indeed, while the Court has been quick to strike down any state-promoted religious practice in school, it has frequently noted that student-initiated prayer is permitted, and at times, constitutionally protected.[36]

The Court first held school-mandated prayer to be unconstitutional in two landmark decisions in the early 1960s, *Engel v. Vitale* and *Abington School District v. Schempp*. In the first case, *Engel*, the Court reviewed a school board policy requiring that the following prayer be said aloud by each class at the start of the school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[37] The school district itself had adopted this practice upon the recommendation of the New York State Board of Regents.[38] The required prayer recitation was challenged as unconstitutional by parents who alleged that use of an official state prayer violated their family's religious beliefs.[39]

In finding that this practice violated the Establishment Clause, the Court primarily focused on the fact that students were required to recite a government-composed prayer.[40] The Court noted that, at a minimum, the Establishment Clause means "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[41] In reaching this conclusion, the Court discussed in-depth how the "practice of establishing governmentally composed prayers for religious services was one of the reasons" early colonists left England.[42] Thus, according to the Court, the primary problem was not the potential coercion of students, which would likely occur, but rather that government had no right "to control, support or influence the kinds of prayer the American people can say."[43]

35. *See generally* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

36. *See Santa Fe*, 530 U.S. at 302 (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion)) (permitting student-initiated prayer at football game).

37. *Engel*, 370 U.S. at 422 (detailing prayer requirement).

38. *Id*. at 422-23.

39. *Id.* at 423 (explaining constitutional challenge).

40. *See id.* at 424 (holding requirement violates Establishment Clause).

41. Engel v. Vitale, 370 U.S. 421, 425 (1962).

42. *Id*. The Court discussed the early colonists' experience with the Book of Common Prayer, in which the British government imposed the form and content of prayer to be used in the Church of England. *Id.* This created enormous conflicts, as various religious groups sought to influence the composition of the book to advance their own religious beliefs. *Id*. at 425-27 (detailing historical context).

43. *Id*. at 429. The Court also rejected the argument that prohibiting school prayer demonstrated

One year later, in *Schempp*, the Court again examined the issue of religious practices in public schools, this time involving daily Bible readings and a recitation of the Lord's Prayer in classrooms.[44] As in *Engel*, the Court held that these practices violated the Establishment Clause.[45] The Court began its analysis by stating that the First Amendment requires that government be neutral toward religion.[46] The Court then stated a two-fold test for withstanding an Establishment Clause challenge: first, the government action must have a secular purpose; and second, the government act must have "a primary effect that neither advances nor inhibits religion."[47] Noting that school-sponsored Bible readings and prayers are inherently religious acts, the Court found that the school districts were actively promoting religion in violation of the Establishment Clause.[48]

Taken together, *Engel* and *Schempp* established that school-sponsored prayer in public schools violates the Establishment Clause. Although both decisions were sensitive to the problem of coercion, neither decision was predicated on that basis.[49] Rather, it was government involvement in promulgating official prayers, and therefore religious views, that violated the Establishment Clause. At the heart of both decisions was the concern that government itself had no business composing or sanctioning official prayers, and that the Religion Clauses were designed to end government control of religion.[50] Thus, whatever else the Establishment Clause might mean, it clearly prohibited the state from trying to influence how children prayed.

Although far-reaching in some respects, the precise facts of *Engel* and *Schempp* concerned the rather extreme practice of state-sponsored and prescribed prayer in school on a daily basis.[51] Beginning with *Wallace v.*

animosity towards religion. *Id*. at 433-34. The Court responded that the contrary was true; it was precisely because prayer and religion are so important that we have the Religion Clauses, guaranteeing that people "could pray when they pleased to the God of their faith in the language they chose." *Id*. at 434-35. The First Amendment was therefore not designed to eliminate or hamper religion, but to end governmental control of it, leaving people free to pursue religion as they chose. *Id.* at 435.

44. *See* 374 U.S. 203, 205-07 (1963) (considering whether religious exercise in public schools violates First Amendment). *Schempp* involved two consolidated cases, both involving opening exercises in public schools that included daily readings from the Bible and recitation of the Lord's Prayer. *See id.* at 207, 211. Selected students who chose which passage to read performed Bible readings over a school intercom, while the Lord's Prayer was said over the intercom and in unison by students in their classrooms. *See id.* at 207. As in *Engel*, participation was voluntary. *See id*. at 205-08.

45. *See id*. at 222 (describing history and cases associated with Establishment Clause).

46. *See id*. at 215 (stating religious freedom requires "absolute equality before the law").

47. *Id*. at 222. These requirements later became the first two prongs of the tripartite test established for resolving Establishment Clause issues. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

48. *See Schempp*, 374 U.S. at 223 (concluding requirement of religious exercise in public school violates First Amendment).

49. *See* Engel v. Vitale, 370 U.S. 421, 430-31 (1962) (suggesting free exercise violation requires showing coercion, but Establishment Clause violated by establishing official religion).

50. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963); *Engel*, 370 U.S. at 425.

51. *See Schempp*, 374 U.S. at 207; *Engel*, 370 U.S. at 422.

Jaffree, decided almost twenty-five years after *Engel* and *Schempp*, the Court began to address school prayer in more nuanced contexts.[52] In *Wallace*, the Court reviewed an Alabama statute that required a minute of silence in public elementary and secondary schools for the purpose of "meditation or voluntary prayer."[53] The statute in question was the second of three Alabama statutes relating to school prayer discussed by the Court.[54] The statute at issue was similar to an earlier statute, which had referred only to "meditation" and did not mention prayer.[55] Conversely, a third statute provided for teacher-led prayer, which the Supreme Court had already declared unconstitutional.[56] It was only the statute providing for "meditation and voluntary prayer" that was before the Court.[57]

In many respects, the statute in *Wallace* avoided some of the most serious concerns voiced by the Court in *Engel* and *Schempp*. Most notably, no prayer or Bible reading was prescribed, and thus any prayer that might occur was completely of a student's own choosing.[58] Moreover, since no content was provided for prayer, there was no endorsement of an official religious view, a significant concern in *Schempp*.[59] Finally, although coercion was not the focus of the earlier decisions, it was not even a consideration in *Wallace*, as it would not be possible to know how each student used the minute of silence.

Despite these distinctions, the Court held that the statute violated the Establishment Clause, stating that the statute lacked a secular purpose and was clearly designed to promote school prayer.[60] The Court indicated that a statute might be partially motivated by religion and still be constitutional, but gave two reasons why this was not the case here.[61] First, the legislative record itself clearly indicated that the sole purpose of the bill was to promote prayer; the bill's sponsor stated in the legislative record that the bill was an "'effort to return voluntary prayer' to the public schools."[62] Second, the Court noted that

52. 472 U.S. 38 (1985).

53. *See id.* at 40. The challenged statute stated:

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.1 (1984) (repealed 1998).

54. *See Wallace*, 472 U.S. at 41.

55. *See id.*; *see also* ALA. CODE § 16-1-20 (2014).

56. *See Wallace*, 472 U.S. at 41; *see also* ALA. CODE § 16-1-20.2 (2014).

57. *See Wallace*, 472 U.S. at 41-42.

58. *See* Wallace v. Jaffree, 472 U.S. 38, 72 (1985) (distinguishing *Engel* and *Schempp*).

59. *See id.*

60. *See id.* at 56 (evaluating secular purpose).

61. *See id*. at 56.

62. *Wallace*, 472 U.S. at 57 (citation omitted). The bill's sponsor also confirmed this in testimony before the district court, where he said his only purpose in sponsoring the bill was to return prayer to the public

since the prior statute already protected a student's right to engage in prayer during the moment of silence at the start of the day, the added phrase, "or voluntary prayer," conveyed a message of state endorsement of prayer activities.[63] As such, it was unconstitutional.

Wallace, therefore, made clear that the state could not promote school prayer, even when it left the content entirely up to individual students.[64] It is important to emphasize, however, that *Wallace* did not declare all moment of silence statutes unconstitutional, but only those clearly designed for no other purpose than to promote prayer.[65] Indeed, the Court strongly suggested that the earlier Alabama statute, which required a daily moment of silence for meditation, was constitutional even though students might use that time to pray.[66] This view was stated in concurring opinions by Justices Powell and O'Connor, who both explicitly stated that moment of silence statutes are constitutional, even if some students use the time to pray.[67] Any prayer that occurs in such a situation results from a student's own choice, not the school's choice.

The central concern that emerged in *Wallace*, as in *Engel* and *Schempp*, is not prayer in school per se, but rather government-promoted prayer. This same concern is central in two recent school prayer cases, *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*. In *Lee* the Court reviewed a school district policy that permitted school principals to invite clergy to offer prayers at middle and high school ceremonies.[68] Pursuant to that policy, the principal at a middle school invited a rabbi to pray at a graduation ceremony.[69] The principal gave the rabbi a pamphlet containing guidelines for the prayers, explaining that the prayers should be nonsectarian.[70] The parent of a graduating student challenged inclusion of the prayers as violating the Establishment Clause.[71]

The Supreme Court, in a 5-4 decision, held that inclusion of state-controlled prayers at middle or high school graduations violated the Establishment Clause.[72] Although there was some disagreement among the majority justices

schools. *Id*. at 57-58.

63. *Id*. at 59.

64. *See* Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985) (holding school prayer in *Wallace* violated First Amendment).

65. *See id.*

66. *See id.* at 59. In distinguishing the first statute from the one it struck down, the Court said that an "intent to return prayer to the public schools is, of course, quite different from . . . voluntary prayer during an appropriate moment of silence." *Id.* The prior statute protected this right. *See id.* at 59.

67. *See id.* at 67-73 (O'Connor, J., concurring) (reasoning in-school moments of silence constitutional); *id*. at 62 (Powell, J., concurring) (explaining constitutionality of moments of silence).

68. 505 U.S. 577, 580-82 (1992).

69. *See id.*

70. *See id.*

71. *See id.* at 581-84 (describing facts leading to issue before Court).

72. *See Lee*, 505 U.S. at 586-87.

over the scope of Establishment Clause prohibitions on prayer in public schools, all emphasized state sponsorship of prayer as the central focus of their reasoning. Justice Kennedy's majority opinion struck down the challenged prayer under a coercion standard, stating that in the context of a graduation ceremony, a state-controlled prayer constituted an indirect, but substantial coercion of religious exercise.[73] In reaching this conclusion, Kennedy used a two-step analysis. First, he established that the prayer must be attributed to the state, explaining the pervasive and substantial state involvement in this case.[74] In particular, he focused on how the principal, an agent of the state, decided that a prayer should be offered, chose who would deliver the prayer, and attempted to control the content of the prayer by offering guidelines.[75] Second, Kennedy discussed how state-sponsored prayer is unconstitutional in the context of a graduation ceremony because impressionable middle school students would feel coerced to participate.[76]

Four other justices joined Kennedy's opinion, agreeing that the coercive effect of the graduation prayer violated the Establishment Clause, but Justices Blackmun's and Souter's concurring opinions emphasized that coercion was a sufficient but not a necessary condition for an Establishment Clause violation.[77] They explained that state endorsement of religion, even without coercion, is enough to violate the Establishment Clause. Additionally, they argued that such an endorsement existed in *Lee*, stressing, as did Justice Kennedy, the state's integral involvement with the prayers in question.[78] Indeed, Justice Souter suggested that there would be no state endorsement if a student speaker, selected by secular criteria, had individually chosen to deliver a religious

73. *See id*. at 589-92 (explaining reasoning for finding coercion).

74. *See* Lee v. Weisman, 505 U.S. 577, 586-88 (1992) (highlighting state's role in policy encouraging public school prayer).

75. *See id*. at 587-88 (detailing principal's major role in organizing prayer at graduation ceremony).

76. *See id*. at 594-95 (addressing intrusion of religious exercise where skipping graduation not realistic option). Kennedy began by stressing the heightened concerns that subtle coercive pressure creates in elementary and secondary schools. *Id.* at 591-92. He then stated that the government's extensive involvement and control of the ceremony put substantial pressure on students to engage in actions that they themselves might understand as participation. *Id.* Although this pressure was indirect, because no one was required to stand or otherwise be involved, it was nevertheless real and substantial. *Id*. at 593. He also rejected the argument that there was no coercion because graduation ceremonies are not compulsory, noting the important role they play in society and determining they can hardly be considered voluntary in the normal sense of the word. *Id*. at 595.

77. *See id*. at 604 (Blackmun, J., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient."); *id*. at 619 (Souter, J., concurring) ("[The Court's precedents] simply cannot . . . support the position that a showing of coercion is necessary to a successful Establishment Clause claim.").

78. *See Lee*, 505 U.S. at 604 (Blackmun, J., concurring) (using language suggesting state actively participated in prayer). Justice Blackmun stated: "it is not enough that the government restrain from compelling religious practices: [it] must not engage in them either." *Id.* Justice Souter also emphasized the state's active involvement when discussing endorsement concerns. *Id*. at 629-30 (Souter, J., concurring) ("[T]he government's sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion….").

message.[79]

Thus, as in the earlier cases, the unconstitutionality of the prayer in *Lee* was predicated on the state's substantial promotion of the religious activity. This central concern was again affirmed in *Santa Fe*, the Court's most recent school prayer decision. In this case, the Court reviewed a school district policy that had students vote on whether to have prayer at home football games and, if so, to select the student who would deliver the prayer.[80] The policy was an apparent effort to avoid the Supreme Court's concerns about state-directed prayer in *Lee* by shifting the decision of whether to pray, and who would pray, over to the students. Nevertheless, the Court held the policy unconstitutional, finding it suffered from the same defects as found in *Lee*.[81] First, despite letting students vote on whether to pray, the Court explained that the policy as a whole clearly promoted school prayer with the State's imprint on it.[82] Second, the state-promoted prayer resulted in coercion of those attending football games and was therefore unconstitutional.[83]

These five decisions striking down various state-promoted prayer in public schools demonstrate the Court's continuing vigilance in monitoring religious exercise in public schools. Each of the decisions, however, turned on the state's own involvement in promoting the prayer in question, and not prayer as such.[84] Indeed, in these decisions the Court was careful to affirm the right of students to pray on their own on school property, which is permitted and at times even protected.[85] For example, in *Santa Fe*, the Court noted a crucial distinction between voluntary student prayer and state-sponsored prayer.[86] While the latter is prohibited by the Establishment Clause, the former is

79. *Id*. at 630 n.8 (Souter, J., concurring) (describing example of delivery of religious message difficult to attribute to state endorsement).

80. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 US. 290, 297 (2000) (describing voting process for selecting students to deliver prayer).

81. *See id*. at 302 (holding prayer in *Santa Fe* unconstitutional). The Court began its analysis by stating that "our analysis is properly guided by the principles that we endorsed in *Lee*." *Id*. The next two sections of the Court's analysis closely tracked the two-part coercion test established in *Lee*. *See id*. at 302-10.

82. *See id*. at 306-09 (holding practice promotes prayer).

83. *See id.* at 309-12 (determining coercion).

84. *See supra* notes 35-83 and accompanying text (discussing school prayer cases).

85. *See Santa Fe*, 530 U.S. at 302; Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion).

86. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (quoting *Mergens*, 496 U.S. at 250 (O'Connor, J., plurality)) (distinguishing voluntary student prayer and state-sponsored prayer). The *Santa Fe* Court agreed with the *Mergens* plurality statement that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 302 (quoting *Mergens*, 496 U.S. at 250). At the end of its coercion analysis, the Court in *Santa Fe* again stressed this fundamental distinction, stating: "Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday [sic]. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Id*. at 313.

permitted and often protected under the Free Speech Clause.[87] This distinction is central to the limited public forum cases in the following section involving religious speech.

As the next section will show, the analysis is much different when schools create a public forum for private speech. Unlike the school prayer cases, here the religious expression comes from private, rather than government sources. Not only has the Court consistently held that it violates free speech to exclude religious speech from such fora, but that inclusion of religious speech on a neutral basis equal to other speech content is permitted under the Establishment Clause.[88]

C. The Public Forum Cases

In a series of five cases stretching back three decades, the Supreme Court has addressed the issue of religion, including worship-like activities, in the context of a school-created public forum.[89] All five cases share the same basic fact pattern. Each involved a public school, ranging from an elementary school to a four-year university. In each case, the school decided to create what could be viewed as a forum for speech purposes. In three of the cases, the forum was only for the students, while in the two other cases, the forum was for community groups similar to those in the *Bronx Household* litigation. In each case, however, the school denied access to religious speech because of perceived Establishment Clause problems. In all five cases, the Supreme Court said that denying access to a group because of the religious content of its speech violated the Free Speech Clause, and granting equal access to religious speech eliminated any Establishment Clause problems that might otherwise exist.

In the first of these cases, *Widmar v. Vincent*, the Court held that a public university could not prohibit a religious student group that wanted to use space on campus for prayer and worship-like activities from using campus facilities when the use of such facilities was extended to nonreligious student groups.[90] The Court specifically recognized prayer and worship as forms of speech protected by the First Amendment, stating that the university "has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are

87. *See id*. at 302.

88. *See infra* Part I.C (discussing public forum cases).

89. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831-46 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-95 (1993); *Mergens*, 496 U.S. at 253; Widmar v. Vincent, 454 U.S. 263, 273 (1981). For a discussion of these cases and how they relate to the issue of worship in public places, especially with regard to the free speech issue, see Esenberg, *supra* note 18, at 460-73; Burnidge, *supra* note 18, at 1331-34.

90. 454 U.S. at 277.

forms of speech and association protected by the First Amendment."[91] Their exclusion, therefore, violated the Free Speech Clause. The Court also rejected the argument that the Establishment Clause prohibited the use of campus facilities by religious groups, noting that permitting equal access to such groups did not confer the state's imprimatur.[92] Thus, as long as the forum had a secular purpose, providing equal access to religious groups did not violate the Establishment Clause; in fact, the Free Speech Clause mandated such access.[93]

In the next case, *Board of Education v. Mergens*, a high school permitted about thirty student clubs to meet on campus, but denied permission to a Bible study club because school officials believed recognizing a religious group would violate the Establishment Clause.[94] The students sued under the Equal Access Act, a federal statute that in effect extended the protections of *Widmar* to high school campuses.[95] The Act states that once a school creates a forum for student clubs, it cannot exclude a group because of its content.[96] The Supreme Court held for the students, finding that exclusion of the Bible study club violated the Equal Access Act, and that permitting the group to meet as part of a broader forum of student groups did not violate the Establishment Clause.[97]

The Court analyzed the students' speech rights under the Equal Access Act, such that the majority did not directly address constitutional free speech rights.[98] As a practical matter, however, the case had strong constitutional overtones, in part because the clear purpose of the Act was to extend to high school students the same rights the Court recognized for college students in *Widmar*.[99] Justice Marshall made this point in a concurring opinion, stating that the Equal Access Act simply codified what was already constitutionally required under the Free Speech Clause.[100] Justice O'Connor's plurality opinion also strongly hinted at the free speech overtones of the case.[101]

91. *Id*. at 269.

92. *See id*. at 274. The Court also noted that since over 100 student groups participated in the university's open forum, the forum's primary effect was not to advance religion absent a showing that religious groups would dominate the forum. *Id*. at 274-75.

93. *See id*. at 278 (allowing religious student group to convene on school property).

94. *See* 496 U.S. 226, 231-33 (1990) (reviewing facts relevant to issue).

95. *See id.* at 231 (discussing determination of whether school act violates Equal Access Act); *see also* 20 U.S.C. § 4071(a)-(b) (2012).

96. 20 U.S.C. § 4071(a) (prohibiting discrimination against speech because of religious, political, or philosophical content).

97. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 234 (1990) (affirming decision of Court of Appeals).

98. *See id*. at 235-36.

99. *See id.*

100. *See id.* at 262 (Marshall, J., concurring).

101. *See Mergens*, 496 U.S. at 250 (plurality opinion) (commenting on Establishment, Free Speech and Free Exercise clauses). "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id*.

In regard to the second issue, whether granting equal access to a Bible study club in a public school violated the Establishment Clause, the Court made clear what was suggested in *Widmar*: the neutral treatment of religion in a public forum, including public schools, does not violate the Establishment Clause.[102] No single opinion commanded a majority of the Court on this issue, but a focus on neutral treatment of religion satisfying the Establishment Clause ran through the various opinions.[103] Justice O'Connor's four-member plurality opinion stressed that the basic message of the Act was "one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[104] Justices Scalia and Kennedy, though not applying Justice O'Connor's endorsement analysis, nevertheless agreed that the neutral treatment of religion, in which religious speech is treated the same as other speech, satisfies the Establishment Clause.[105] Taken as a whole, *Mergens* confirmed and sharpened the *Widmar* analysis: religious speech must be provided equal access to speech forums, and such neutral treatment of religion does not violate the Establishment Clause.[106]

The Court applied the same analysis three years later in *Lamb's Chapel v. Center Moriches Union Free School District.* There, the Court again held that excluding religious speech from a limited public forum violated the Free Speech Clause, and granting access to the forum did not violate the Establishment Clause.[107] In this case, a school district policy permitted use of school facilities for various community groups, but specifically excluded religious use on the grounds that it would violate the Establishment Clause.[108] A church requested to use a school building to show a film series on child-rearing, which would have been a permissible use of the building except for the religious perspective on the subject.[109] For that reason, the school denied the request and the church sued.[110] As it had in the earlier cases, the Court held that excluding the church from a school-created speech forum violated the Free Speech Clause, and granting access to the church on equal grounds to other groups did not violate the Establishment Clause.[111]

102. *See id.* at 253 (finding no violation of Establishment Clause).

103. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 248, 251 (1990); *id*. at 260-66 (Kennedy, J., concurring); *id*. at 264, 266, 270 (Marshall, J., concurring).

104. *Id.* at 248 (plurality opinion).

105. *See id.* at 260 (Kennedy, J., concurring).

106. *See generally id.* (requiring equal access for religious speech and holding practice does not violate Establishment Clause).

107. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993) (describing holding permitted church group access under given circumstances).

108. *See id*. at 387, 395 (explaining school district practice).

109. *See id.* at 387.

110. *See id*. at 386-89 (describing events leading to suit).

111. *See Lamb's Chapel*, 508 U.S. at 395 (holding violation of Free Speech Clause and no violation of

The Court began its analysis with the free speech issue, assuming without deciding that the school's policy only created a limited public forum, which requires viewpoint but not subject-matter neutrality.[112] Even with this assumption about the policy, the Court said the school district's exclusion of the church constituted viewpoint discrimination and was unconstitutional.[113] The Court noted that the school policy permitted use of their facilities to show films or give talks on child-rearing in general, and therefore the policy only prohibited religious viewpoints on the subject.[114] The fact that the policy prohibited all religious viewpoints on the topic did not make it any less egregious. The Court also noted that, like in *Widmar* and *Mergens*, permitting the church to use school facilities on the same terms as other groups did not violate the Establishment Clause.[115] As it had in *Widmar*, the Court stated that under the circumstances of the case there was "no realistic danger that the community would think that the District was endorsing religion or any [other] particular creed, and any benefit to religion or to the Church would have been no more than incidental."[116]

In the final two cases, *Rosenberger v. Rector & Visitors of University of Virginia* and *Good News Club v. Milford Central School*, the Court again addressed the exclusion of religious speech from a state-created forum in what might be viewed as particularly sensitive Establishment Clause contexts. In *Rosenberger*, the University of Virginia provided funding for certain student publications, but specifically prohibited funding for religious groups, stating that direct financial support for religion violated the Establishment Clause.[117] The Court found the exclusion of religious speech unconstitutional, as the university violated the public forum requirement that permits only content-neutral restrictions.[118] Indeed, as in *Lamb's Chapel*, the Court characterized the denial of funds as viewpoint discrimination, since it precluded the religious perspective on a number of topics that student publications might discuss.[119]

Establishment Clause).

112. *See id.* at 391-93. The Court stated that the church's argument that the school district had created a designated public forum "ha[d] considerable force" because of the wide variety of groups that used the school facilities. *Id*. at 391. This would have precluded even subject-matter restrictions unless they were "justified by a compelling state interest and [were] narrowly drawn." *Id*. The Court declined to decide that issue, however, since the school district policy failed even the less rigorous standard for limited public fora. *See id*. at 391-93.

113. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (disallowing prohibition on church screening child-rearing video).

114. *See id*. at 393-94 (holding district engaged in viewpoint discrimination).

115. *See id*. (holding Establishment Clause not violated).

116. *Id*. at 395.

117. *See* 515 U.S. 819, 824-25 (1995) (explaining university guidelines for publication).

118. *See id*. at 830 (holding publications created public forum where only content-neutral restrictions appropriate).

119. See *id*. at 831-32 (discussing viewpoint discrimination). The Court stated

> We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper

As such, the policy violated the Free Speech Clause.[120]

After concluding that denying funding violated free speech, the Court addressed whether funding religious publications on the same basis as other groups violated the Establishment Clause. Unlike the prior cases, which involved access to school facilities, the Establishment Clause issue in *Rosenberger*—funding for a blatantly religious message—created distinct issues.[121] As emphasized by the dissent, financial support of religion was one of the principal concerns giving rise to the Establishment Clause.[122] Despite that concern, the Court once again held that providing funding to religious publications would not violate the Establishment Clause, once again stressing the neutrality of such a scheme.[123] The Court began its discussion by stating, "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."[124] On this basis the Court held that including religious publications in the funding program would be constitutional, since it would simply be treating religion neutrally, not preferentially.[125]

The final and most recent case involving the exclusion of religious speech from a school-created public forum is *Good News Club v. Milford Central School*. In this case, a school district adopted rules permitting schools to open their facilities to various community groups, similar to *Lamb's Chapel*.[126] Pursuant to the policy, a local "Good News Club," a Christian organization for

> way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

Id. at 831.

120. *See id*. at 820 (holding guideline obstructs Free Speech Clause).

121. *See Rosenberger*, 515 U.S. at 868 (Souter, J., dissenting).

122. *See id*. "Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money." *Id*.

123. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 840 (1995).

124. *Id*. at 839.

125. *See id*. at 840 (explaining program as neutral towards religion). The Court also stated that the program's neutrality helped distinguish it from the Founders' concerns about taxes to support churches. Whereas the Founders wanted to prevent taxes imposed "for the sole and exclusive purpose of establishing and supporting specific sects," the program at issue involved student fees that supported a broad range of ideas and thought, only some of which might potentially be religious. *See id*. at 840-41 (distinguishing student fee programs from taxes levied solely for religious purposes).

126. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102-03 (2001) (explaining criteria for building use). School district regulations identified several purposes for which local schools could be open to public use, including "instruction in any branch of education, learning or the arts," and for "social, civic and recreational meetings and entertainment events." *Id*. at 102.

young children, sought permission to use an elementary school building after school for meetings.[127] A typical meeting would include learning and reciting Bible verses, singing songs (presumably Christian), hearing a Bible story, and closing with a prayer.[128] Although the school policy permitted other groups, such as the Boy Scouts, to use the building, the school refused permission for the Good News Club to meet because of the religious nature of the meetings.[129]

As in the previous cases, the Supreme Court held that excluding the religious group from a school-created forum violated the Free Speech Clause, and permitting the group to use the building on the same terms as other groups would not violate the Establishment Clause.[130] The Court began its free speech analysis by recognizing that the school had created a limited public forum, which required that speech restrictions be viewpoint neutral and reasonable.[131] Relying on its previous analysis in *Lamb's Chapel* and *Rosenberger*, the Court concluded that excluding religious groups from the forum constituted unconstitutional viewpoint discrimination.[132] The Court stated that under the school-use guidelines it was clear that any group that "promote[s] the moral and character development of children," such as the Boy Scouts, was permitted to use school facilities.[133] Since the Good News Club was seeking to address a subject permitted under these guidelines from a religious perspective, the Court deemed its exclusion unconstitutional viewpoint discrimination.[134]

The Court then addressed the Establishment Clause issue and concluded, as it had in previous cases, that permitting the Good News Club to meet on the same terms as other groups would not violate the Establishment Clause.[135] As in previous cases such as *Lamb's Chapel* and *Widmar*, the Court emphasized the importance of neutrality in analyzing Establishment Clause issues, and that permitting the Club to meet on school property "would ensure neutrality, not threaten it."[136]

These five limited public fora decisions—*Widmar*, *Mergens*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club*—reflect two basic principles. First, excluding religious viewpoints from a school-created public forum violates the Free Speech Clause. The Court consistently characterized the exclusion of religious speech as viewpoint discrimination, because such exclusion prohibits religious perspectives on various topics otherwise

127. *See id.* at 103.
128. *See id*.
129. *See id.* at 103-04, 108.
130. *See Good News Club*, 533 U.S. at 102.
131. *See id.* at 106-07 (describing Court's analysis of limits on state power to restrict speech).
132. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (explaining court analysis for attempted exclusion).
133. *Id.* at 108 (alteration in original).
134. *See id.* at 111-12.
135. *See id.* at 114 (holding no violation of Establishment Clause in permitting religious group meeting).
136. *Good News Club*, 533 U.S. at 114.

discussed. This characterization is quite important, as these decisions transformed potentially acceptable subject matter restrictions (religion), into unconstitutional viewpoint restrictions.

Second, in all five cases the Court held that allowing religious speech in a school-created forum does not violate the Establishment Clause.[137] In doing so, it largely, though not completely, applied a neutrality analysis, stating that the neutral treatment of religion mitigated any Establishment Clause concerns. Indeed, these five cases reflect symmetry of sorts, as the same neutrality required by the Free Speech Clause suffices for any concerns under the Establishment Clause. As part of this, the Court also suggested that the neutral treatment of religion mitigated any potential perception of state endorsement of religion.

The next section of the article will examine the Second Circuit's 2011 decision, designated *Bronx Household IV*, upholding a school board's policy prohibiting use of public schools for religious worship.[138] This decision stated that the exclusion of religious worship from the board-created speech forum did not violate the Free Speech Clause, and that there was a "strong basis" for the school board to believe that inclusion of religious worship would violate the Establishment Clause.

II. *BRONX HOUSEHOLD IV*

A. Facts and Procedural History

The *Bronx Household* litigation began in 1994 when Bronx Household, a Christian church, and its pastors, applied to use space in a public middle school in the Bronx for church services on Sunday mornings.[139] New York state law permits public school districts to make their facilities available to outside community groups for "social, civic, and recreational meetings and entertainments" as long as the uses are open to the general public.[140] Pursuant to that law, the New York City Board of Education (Board) developed a forum policy governing after-hours use of school facilities.[141] Although the policy permitted meetings to discuss "religious material or material which contains a religious viewpoint," it specifically prohibited outside groups from "conduct[ing] religious services or religious instruction on school premises after school."[142]

Bronx Household's application described its services as including "'singing

137. *See supra* notes 89-134 and accompanying text.
138. *See infra* Part II (analyzing *Bronx Household* decisions).
139. *Bronx Household IV*, 650 F.3d 30, 32-33 (2d. Cir. 2011) (describing origins of suit).
140. *Id.* at 33.
141. *See id.* (discussing New York state law regarding after-hours school use).
142. *Id*. at 33 n.2.

of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, [and] sharing of testimonies,' followed by a 'fellowship meal.'"[143] The Board denied the application because it fell within the prohibition of religious services.[144] The church then sued, arguing that the denial of its application was unconstitutional viewpoint discrimination.[145]

The Board initially prevailed before both the district court and the Second Circuit, as both courts held that exclusion of religious worship and instruction did not violate the church's free speech rights.[146] After the Supreme Court's decision in *Good News Club*, however, the church reapplied for permission to use the school, and once more, the school denied the church's request.[147] When the church sued again, the district court granted a preliminary injunction, citing the Supreme Court's decision in *Good News Club*.[148] As a result, the Second Circuit affirmed the preliminary injunction.[149]

While cross-motions for summary judgment on a permanent injunction were pending, the Board informed the district court that it had revised its policy and requested that the court decide the motions under the new policy.[150] Though quite similar to the initial policy, the new text prohibited use of school property for "religious worship services, or otherwise . . . as a house of worship," but no longer prohibited use for "religious instruction."[151] Even though the Board had not yet applied the new policy to the church, the district court found the issue justiciable—as the most recent application denial was under the old policy—held for the church, and granted a permanent injunction.[152] A divided Second Circuit decision remanded the case back to the district court.[153]

143. *Bronx Household IV*, 650 F.3d at 33 (alteration in original).

144. *See id.*

145. *See Bronx Household IV*, 650 F.3d 30, 33 (2d Cir. 2011).

146. *See* Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, No. 95 Civ. 5501 (LAP), 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996), *aff'd*, 127 F.3d 207 (2d Cir. 1997); Bronx Household of Faith v. Cmty. Sch. Dist., 127 F.3d 207, 216 (2d Cir. 1997) (*Bronx Household I*) (holding church's free exercise rights not violated or infringed by religious exclusions).

147. *See* Bronx Household of Faith v. Bd. of Educ. (*Bronx Household I.A*), 226 F. Supp. 2d 401, 409-11 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

148. *See Bronx Household I.A*, 226 F. Supp. 2d at 427.

149. *See* Bronx Household of Faith v. Bd. of Educ. (*Bronx Household II*), 331 F.3d 342, 346 (2d Cir. 2003).

150. *See Bronx Household IV*, 650 F.3d 30, 34 (2d Cir. 2011).

151. *Id.* at 34-35, n.4.

152. *See* Bronx Household of Faith v. Bd. of Educ., 400 F. Supp. 2d 581, 588, 601 (S.D.N.Y. 2005), *vacated per curiam*, 492 F.3d 89 (2d Cir. 2007).

153. *See* Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89, 91 (2d Cir. 2007) (*Bronx Household III*) (per curiam). The Second Circuit panel was deeply divided. *Id.* Two of the judges agreed with the district court and believed that the issue was justiciable notwithstanding the church's application under the old policy, but disagreed on whether denial of the church's application violated the First Amendment. *See id.* at 92-106 (Calabresi, J., concurring) (stating exclusion policy qualifies as viewpoint neutral and therefore constitutional); *id*. at 123-32 (Walker, J., dissenting) (stating exclusion policy constituted unconstitutional viewpoint

Under the new policy, the church once again applied for a permit, which the Board denied.[154] The district court again granted summary judgment in favor of the church, permanently enjoining enforcement of the Board policy prohibiting religious worship services on public school policy.[155] The case then went before the Second Circuit for a decision on the merits in light of the Supreme Court's decision in *Good News Club*.

B. Court's Analysis

The Second Circuit began its discussion of the free speech issue by stating that the Board's policy permitting use of school facilities created a limited public forum.[156] As such, any restrictions on speech must be viewpoint neutral and reasonable. At the same time, however, the state may engage in subject-matter restrictions.[157]

The court noted that the policy in question prohibited two types of activities: "religious worship services" and "otherwise using a school as a house of worship."[158] Although the Board did not specify which of the two was the basis of its rejection, the court assumed that it was based on the first—"religious worship services"—because the church's application said it would use the school for "Christian worship services."[159] Therefore, the court limited its analysis to the validity of the first prohibition against "religious worship services" as applied to the Bronx Household. The court expressly declined to address the validity of the "house of worship" provision.[160] The court expressly explained that it was not deciding whether a school could lawfully exclude "worship" on its property.[161]

The court then proceeded to the heart of its free speech analysis, characterizing the prohibition on using school facilities for "religious worship services" as a ban on a type of activity or event, not as a restriction on any view. The court stated:

discrimination). The third judge said the issue was not yet ripe for adjudication because the Board denied the church's application under the old, not the current policy. *See id.* at 106-23 (Leval, J., concurring). Therefore, in a short per curiam opinion, the court vacated the permanent injunction and "remand[ed] the action to the district court for all purposes." *Id*. at 91 (per curiam).

154. *See Bronx Household IV*, 650 F.3d at 34-35 (discussing procedural history).

155. *See* Bronx Household of Faith v. Bd. of Educ., No. 01 Civ. 8598 LAP, 2007 WL 7946842 (S.D.N.Y. Nov. 2, 2007), *rev'd*, 650 F.3d 30 (2d Cir. 2011).

156. *Bronx Household IV*, 650 F.3d at 36.

157. *See id*. The Supreme Court has held that speech restrictions in a limited public forum must be viewpoint neutral and reasonable. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993).

158. *Bronx Household of Faith IV*, 650 F.3d at 34-35.

159. *Id.* at 36.

160. *Id*.

161. *Bronx Household IV*, 650 F.3d 30, 36 n.6 (2d Cir. 2011).

> The conduct of services is the performance of an event or activity. While the conduct of religious services undoubtedly *includes* expressions of a religious point of view, it is not the expression of that point of view that is prohibited by the rule. Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded.[162]

Thus, according to the court, the first prong of the policy banned the event of "religious worship service" and not necessarily any of the components (singing, prayer, preaching, etc.) that typically makes up a worship service.[163] The court further stated that the "religious worship services" clause did not even prohibit "worship"—a separate issue the court was not addressing.[164] Rather, the "religious worship services" clause only banned a particular type of event, which the courts described as "a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion."[165]

The court then drew a distinction "between excluding the *conduct of an event or activity* that includes expression of a point of view, and excluding the *expression* of that point of view."[166] As an example, the court explained that events "such as martial arts matches, livestock shows, and horseback riding" could be excluded from the forum, even though participants and spectators, in participating in and viewing the events, express their love of the activity.[167] The court reasoned that a worship service, also an event, can be excluded notwithstanding the viewpoints included as long as individuals can still express those viewpoints in some other capacity.

As a result, the majority concluded that the prohibition on the event of a "religious worship service" was viewpoint neutral, because people can still express the views included in the service in some other capacity in the forum.[168] The court reiterated that the individual components of a service, such as prayer, singing, and preaching were themselves not banned by the clause under review. Thus, all views could still be expressed.[169]

After determining that the prohibition on religious worship services was viewpoint neutral, the court then proceeded to analyze whether the restriction was "reasonable,"—the other requirement for valid restrictions on speech in a

162. *Id.* at 36.
163. *Id.* at 38.
164. *Id.* at 36-38.
165. *Bronx Household IV*, 650 F.3d at 37.
166. *Id.* at 37.
167. *Bronx Household IV*, 650 F.3d 30, 37-38 (2d Cir. 2011).
168. *See id.* at 36-37 (allowing expressions seen in worship services but not worship event).
169. *See id*. at 37.

limited public forum.[170] In particular, the court examined whether the Board's asserted rationale—excluding religious worship services to avoid an Establishment Clause violation—was reasonable.[171] The court made clear that it was not deciding whether allowing religious worship services on school property as part of a limited forum would in fact violate the Establishment Clause, only if it were reasonable to believe it would.[172] Thus, the issue was whether there was a "strong basis for concern" that allowing religious worship services on public school property would violate the Establishment Clause.[173]

The court concluded that such a strong basis existed. The court began by setting out the three-prong *Lemon* test, which requires that government action must have a secular purpose, a "principal or primary effect" that neither advances nor inhibits religion, and does not create an excessive entanglement with religion.[174] In applying this test, the court identified several different concerns. For example, it noted that by not charging rent for use of school facilities, which was the policy for any group, the state substantially subsidized religious worship.[175] The court stated that it was reasonable to see this as "'foster[ing] an excessive government entanglement with religion' that advances religion."[176]

However, the court's dominant concern regarding a possible Establishment Clause violation was the potential perception of government endorsement of religion posed by permitting worship services on public school property.[177] In this regard, the court noted three concerns. First, Christian worship services tended to dominate use of school space on Sunday mornings, and this created the perception that the school not only endorsed religion, but specifically endorsed Christianity.[178] Second, the court noted that church members post signs and distribute flyers outside the schools, leading members of both the community and the congregation to identify the church with the school.[179] Third, the court expressed particular concern with the fact that "young and

170. *See id*. at 40.

171. *See Bronx Household IV*, 650 F.3d at 40.

172. *See id*.

173. *Bronx Household IV*, 650 F.3d 30, 40 (2d Cir. 2011).

174. *Id*.; *see* Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) (establishing "*Lemon*" test). The *Lemon* test dominated Supreme Court Establishment Clause analysis for a number of years, but its influence has substantially waned over the past quarter century. *See* Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clause*, 7 J. CONTEMP. LEGAL ISSUES 357, 365 (1996); Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 797 (1993). Lower courts, however, continue to apply the *Lemon* test on a regular basis, since it has yet to be overruled.

175. *See Bronx Household IV*, 650 F.3d at 41.

176. *Id.* (quoting *Lemon*, 403 U.S. at 612).

177. *See id.* at 42. The court highlighted the endorsement concern at both the beginning and end of its Establishment Clause analysis. *See id*. at 40, 44. The court devoted the majority of its discussion to the problem of endorsement. *See id*. at 40-44.

178. *See Bronx Household IV*, 650 F.3d at 42.

179. *Bronx Household IV*, 650 F.3d 30, 42 (2d Cir. 2011).

impressionable students" who attend the schools that the church used for worship on Sundays might perceive government endorsement of the worship services.[180]

Judge Walker filed a strong dissent, arguing that under Supreme Court precedent the exclusion policy constituted unconstitutional viewpoint discrimination. Further, he argued that permitting worship services as part of a broader forum in which school facilities were available to various community groups did not violate the Establishment Clause.[181] Nonetheless, the majority held that the exclusion was viewpoint neutral and thus constitutional, asserting that permitting worship services would raise serious Establishment Clause concerns. As suggested by the dissent, this goes against the grain of the five Supreme Court decisions involving attempts to exclude religion from school-created forums. The next two parts of the article will examine those issues in-depth. Part III will examine whether excluding worship services from an otherwise broad community forum violates free speech, and Part IV will examine whether inclusion of worship services in such a forum violates the Establishment Clause.

III. FREE SPEECH, WORSHIP, AND THE LIMITED PUBLIC FORUM

Schools, of course, are not a traditional public forum, and therefore religious groups and others do not have a right per se to use them.[182] The Supreme Court has noted, however, that even if the state is not obligated to open up its facilities for speech, once it does so, it has to make them available on a content-neutral basis.[183] Although the Court has not always drawn clear distinctions, it appears that the state might create two types of fora: a designated public forum, in which government property is indiscriminately open to a wide variety of speech and is treated like a traditional public forum, or a limited public forum.[184]

Where school districts open their facilities to various community groups, as occurred in the *Bronx Household* litigation, such policies are best viewed as creating limited public forums. While the court examines each case on the specific nature of the policy, school policies typically open school facilities to the community for limited purposes and do not create a more general free speech forum. Moreover, the Supreme Court has tended to view such policies

180. *Id*.

181. *See id.* at 52-64 (Walker, J., dissenting).

182. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390-391 (1993).

183. *See id.*; Widmar v. Vincent, 454 U.S. 263, 267-68 (1981).

184. *See Lamb's Chapel*, 508 U.S. at 391-93. In *Lamb's Chapel*, the Court stated that the school district's community-use policy was expansive enough that it might have created a "designated public forum," in which case even subject-matter restrictions would be prohibited. *See id*. The Court declined to decide the issue, however, since the policy failed even the less rigorous standard for limited public fora. *See id.* at 391-92.

involving schools as establishing limited public forums.[185]

Restrictions on speech in a limited public forum must meet two requirements to be valid. First, the restrictions must be viewpoint neutral, but not necessarily subject-matter neutral.[186] Thus, speech can be limited to certain topics, but restrictions must be viewpoint neutral regarding those topics.[187] Second, the restrictions must be "reasonable."[188] As a practical matter, most limited public forum cases turn on whether or not the restriction is viewpoint neutral, and pay less attention to the reasonableness requirement.[189]

As noted in Part I, in limited public forum cases, the Court has been quick to characterize speech restrictions as viewpoint based.[190] Though not addressing the issue in *Widmar* or *Mergens*, the Court found the restrictions in *Lamb's Chapel*, *Rosenberger*, and *Good News Club* to be unconstitutional viewpoint restrictions.[191] In each case, the Court said that the schools created a forum for speech that implicitly included certain topics, but that the schools unconstitutionally excluded religious perspectives on those topics. For example, in *Lamb's Chapel* the Court noted that a community group could use school space to discuss child-rearing, but could not present the religious perspective on the same topic.[192] Similarly, in *Rosenberger*, nonreligious publications could address topics such as racism and the environment, but precluded religious viewpoints on those issues.[193] Finally, in *Good News Club* the Court said groups like the Boy Scouts could teach values, but banned religious perspectives on the same topic.[194]

Based on these cases, it would clearly be viewpoint discrimination if a church were denied use of school space for worship pursuant to a school policy prohibiting religious use in general. Such a situation would suffer the same infirmity as in the above cases: religious views, whether communicated in the context of worship or otherwise, would be precluded. Thus, prohibition of worship services pursuant to a broad prohibition of religious activities in general, as found in the broad policies in *Lamb's Chapel*, *Rosenberger*, and

185. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 99 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

186. *See Good News Club*, 533 U.S. at 106-07; *Rosenberger*, 515 U.S. at 829-31.

187. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Control can be "based on subject matter and speaker identity so long as the distinctions drawn are reasonable light of the purpose served by the forum and are viewpoint neutral." *Id.*

188. *See Good News Club*, 533 U.S. at 106-07; *Rosenberger*, 515 U.S. at 829-31.

189. *See Good News Club*, 533 U.S. at 107 (declining discussion of reasonableness).

190. *See supra* Part I.C.

191. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111-12 (2001); (reaffirming *Lamb's Chapel* and *Rosenberger*); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831-32 (1995) (finding viewpoint discrimination in university objections); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993).

192. *See Lamb's Chapel*, 508 U.S. at 393-94.

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

194. *See Good News Club*, 533 U.S. at 107-08.

Good News Club, would constitute viewpoint discrimination.

Admittedly, however, the type of policy in *Bronx Household*, which essentially prohibited only worship, rather than religious uses in general, is not as obviously viewpoint-based. As emphasized by the majority opinion in *Bronx Household IV*, unlike the policies in previous cases, the policy at issue did not prohibit use of school facilities by religious groups or for religious purposes, which clearly would have been unconstitutional.[195] According to the majority, school facilities were open for use to discuss religious views on any topic and of any type; none were precluded.[196]

Moreover, the majority went a step further and said that the first clause in the policy banning "worship services," the only prohibition the court interpreted, applied only to worship services themselves, and not to their various components. Indeed, the crux of the majority opinion was that the policy only prohibited an activity, worship services, and did not regulate speech. The majority stated that school policy would permit the various components typically found in many Christian worship services, such as prayer, singing, and religious instruction.[197] The majority stated that "[t]here is an important difference between excluding *the conduct of an event or activity* that includes expression of a point of view, and excluding the *expression* of that point of view."[198] It then proceeded to give examples of events that could be excluded from a limited public forum in schools, "such as martial arts matches, livestock shows, and horseback riding, even though, by participating in and viewing such events, participants and spectators may express their love of them."[199] The court reasoned that the same applied to worship services, which could be precluded in the same way other events could be.[200]

Notwithstanding the majority's analysis, restrictions on religious worship services are best viewed as viewpoint-based and thus, unconstitutional. To begin with, the majority's distinction between a worship service, which is merely an event or activity, and the various elements of such a service, such as preaching, prayer, and singing, is highly problematic for several reasons.[201] First, the majority failed to give any meaningful explanation for this distinction, merely noting that Bronx Household had used the term religious worship service in its application. But the church's application also described the service as including "singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion,

195. *See Bronx Household IV*, 650 F.3d 30, 39-40 (2d Cir. 2011).
196. *See id*. at 37-38.
197. *See id*. at 36.
198. *Id*. at 37.
199. *Bronx Household IV*, 650 F.3d at 37.
200. *Id*. at 38.
201. *See Bronx Household IV*, 650 F.3d 30, 36 (2d Cir. 2011).

[and] sharing of testimonies."[202] Arguably, if the church, instead of applying to use the school for a religious worship service, had instead simply applied to use the school for the activities listed above, the school would have approved its application. Free speech rights should not turn on such fine, and in the end, meaningless distinctions.[203]

Second, the majority's distinction between events and activities from expression is problematic, especially as applied to expressive activities. The analogy the majority uses to "martial arts matches, livestock shows, and horseback riding" fails to work, because, unlike worship services, those activities are not inherently expressive.[204] True, as the majority notes, there is an element of expression in those activities, if nothing else than to communicate that people enjoy "participating in [or] viewing such events."[205] That proves too much, however, because all conduct communicates something. As such, the Supreme Court has drawn a distinction between expressive conduct—conduct that is characterized by its expressive purpose and features—and other conduct; only the former qualifies for First Amendment protection.[206]

The more appropriate analogy, therefore, would be expressive events, such as rallies, debates, and parades. Each of these is an event, in the same way that a religious worship service is an event, but each certainly qualifies for free speech protection. For example, if a group applied to use the school for a "Save the Whales" rally and was denied, it is hard to imagine that a court would treat the rally as a mere activity. To deny the rally is to deny what would be said at the rally; the two cannot be separated on the basis that one is merely conduct of an event or activity, and the other is speech. Such is the case with expressive, as opposed to non-expressive, activities.

The same is true of a religious worship service. Worship does not become an event merely because the word "service" is tacked on. Rather, it is an inherently expressive activity, as the Supreme Court recognized in *Widmar*.[207]

202. *Id*. at 33.

203. See Burnidge, *supra* note 18, at 1344-45. Burnidge explains that the court's distinction in *Bronx Household IV* is "equivalent to saying that a Thanksgiving celebration cannot be held in a recreational center, but a group of people can assemble in a recreational center on the fourth Thursday of November with pumpkin pie, turkey, sweet potatoes, and stories of grateful pilgrims to celebrate their blessings." *Id.* at 1345.

204. *See Bronx Household IV*, 650 F.3d at 37-38.

205. *Id.* at 37.

206. *See* Spence v. Washington, 418 U.S. 405, 410-11 (1974). The Supreme Court has noted that virtually all conduct communicates something, but that does not bring the conduct within the purview of the First Amendment. Instead, the Court applies a two-factor test to determine if conduct qualifies as speech for purposes of the First Amendment. *Id.* First, the Court asks if the purpose of the conduct was to communicate a message, and second, whether it would be understood as such by those who observe the conduct. *Id. See generally*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1064-65 (3d ed. 2006). Under that test, it is clear that "martial arts matches, livestock shows, and horseback riding" would fail to qualify as speech. *See Bronx Household IV*, 650 F.3d at 37.

207. *See* Widmar v. Vincent, 454 U.S. 263, 269 (1981) (finding discrimination on part of university). The

To be sure, worship is not merely an expressive activity, nor is it simply the sum total of its expressive components, such as prayer, singing, preaching, and teaching. As Judge Calabresi correctly noted in his concurrence in *Bronx Household IV*, to characterize worship as "only an agglomeration of rites would be a judicial finding on the nature of worship that would not only be grievously wrong, but also deeply insulting to persons of faith."[208]

But to recognize that worship is more than assorted expressive acts does not negate its expressive nature both in its parts and in its whole. It is certainly much more than mere expression, but recognizing that fact does not in any way negate that worship services constitute an expressive activity qualifying for protection under the First Amendment. Indeed, in *Widmar*, the first of the limited public forum cases involving religious speech, the Court expressly stated that worship is a form of speech protected under the Free Speech Clause.[209]

Attempting to draw a distinction between a worship service and worship, or between worship and its express elements, is of little value and misleading. A ban on using school facilities for worship services or for worship is a ban on speech protected under the First Amendment. The real question is whether such a ban constitutes viewpoint discrimination, or is best seen as a viewpoint-neutral content restriction. The restriction is valid if the latter, but unconstitutional if the former.[210]

As noted earlier, the question is not as simple as the issue presented in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, each which clearly prohibited religious perspectives on topics that individuals might have otherwise addressed in the created forum. As argued by the majority in *Bronx Household IV*, the policy does not prohibit religious viewpoints per se, and permits religious views on a variety of subjects—certainly any subject that one might address from a secular perspective.[211] Though a ban on worship obviously constitutes content discrimination, because particular speech content is prohibited, it does not amount to viewpoint discrimination.

On closer examination, however, such an argument fails. To ban worship and its expressive components bans particular views and ways of understanding and communicating about fundamental questions of life, such as who God is, who we are, and about the meaning of life. Each of the elements of worship, as well as the worship as a whole, communicates, and is intended to communicate,

Court determined that the university had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment." *Id.*

208. *Bronx Household IV*, 650 F.3d 30, 51 (2d Cir. 2011) (Calabresi, J., concurring).

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

210. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993).

211. *See Bronx Household IV*, 650 F.3d at 38-39.

views about the important questions we face in life.[212]

To say that those views can still be presented in the form of discussion, debate, and teaching, is to alter the views communicated. Views about God, the world, human nature, and so forth are inevitably different when expressed in the context of worship, revealing understandings and beliefs not fully captured in other formats. Songs of praise, prayers of confession, liturgy, and even preaching constitute expressive conduct where the means of communication are integral to a full understanding of the views expressed. To attempt to disconnect views that might be expressed from the means of expression not only changes the meaning, but for some people may be completely impossible to express.[213]

For this reason, any prohibition of worship services from a limited public forum open to various speech topics inevitably, and in very real ways, constitutes viewpoint discrimination.[214] The fact that all worship is prohibited in public schools, no matter what the theological content, hardly makes it any better. As noted by the Supreme Court in *Rosenberger*, banning multiple views on a topic does not make a restriction any more constitutional.[215]

Therefore, prohibiting worship services in public schools when a limited public forum is created for other community uses will typically constitute unconstitutional viewpoint discrimination. It will, of course, partly turn on the policy in question and the particular facts of the case. In contexts similar to the *Bronx Household* litigation, prohibition of religious worship is almost certainly viewpoint discrimination. This is consistent with the Supreme Court's analysis in other limited forum cases involving exclusion of religious speech, where it has consistently and appropriately found such exclusions to constitute viewpoint discrimination.[216] As problematic as the Second Circuit's free speech analysis was in *Bronx Household IV*, the most disturbing part of the court's opinion was its Establishment Clause analysis, where the Court suggested that permitting religious worship services in public schools raised significant Establishment Clause concerns. The next section of the article will address this issue.

212. *See* Esenberg, *supra* note 18, at 493-505 (discussing worship as speech in depth).

213. *Cf.* Cohen v. California, 403 U.S. 15 (1971). In *Cohen*, the Court struck down a disturbing the peace conviction for wearing a "Fuck the Draft" jacket in a courthouse. *Id.* at 16-26. In holding the conviction unconstitutional, the Court rejected the argument that Cohen's anti-draft message could be conveyed by other, less profane language. *See id.* at 26. The Court noted that any other choice of words would inevitably change the nature and emotive impact of the message. *See id.* at 25-26.

214. *See* Burnidge, *supra* note 18, at 1345 (stating exclusion of worship services from limited public forum likely viewpoint discrimination).

215. *See* 515 U.S. 819, 831-32 (1995).

216. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107-08 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831-32 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993).

IV. WORSHIP IN PUBLIC SCHOOLS AND THE ESTABLISHMENT CLAUSE

The most troubling aspect of the majority opinion in *Bronx Household IV* was its treatment of the Establishment Clause issue.[217] Although the Second Circuit was careful to clarify that it was not saying that allowing worship in public schools would in fact violate the Establishment Clause, only that it was reasonable for the school district to believe that it might, its analysis strongly suggests that allowing worship posed significant Establishment Clause problems.[218] Indeed, the court stated that there was a "strong basis" to believe such a practice would violate the Establishment Clause.[219]

This is troubling because it might lead school districts who want to accommodate religious groups by making their facilities available for worship decline to do so because of Establishment Clause concerns. Even if a court determines that exclusion of worship services from public schools does not violate the Free Speech or Free Exercise clauses, schools should still be free to allow worship services if they so choose. Indeed, many, if not most, school districts have no problem letting religious groups use their facilities for worship at appropriate times. This is what is called "play in the joints," where even if the state is not required to accommodate religion under the Free Exercise or Free Speech clauses, it is still permitted to do so under the Establishment Clause.[220]

The Supreme Court has employed a variety of tests over the years for resolving Establishment Clause issues, including the *Lemon* test, endorsement test, and coercion test. The *Lemon* tripartite test requires that valid government action must have a secular purpose, have a primary effect that neither advances nor inhibits religion, and avoid excessive entanglement with religion.[221] Although at one time the *Lemon* test dominated Establishment Clause analysis,[222] its influence has greatly diminished over the past quarter-century and the Court often completely ignores the test.[223] In the context of religion in public schools, the Court has often used the first prong of the *Lemon* test to

217. *See generally* Glaser, *supra* note 18 (examining Establishment Clause concerns in allowing worship in public buildings); Matich, *supra* note 18 (addressing potential Establishment Clause problems when particular viewpoint appears to dominate limited public forums).

218. *See Bronx Household IV*, 650 F.3d 30, 40 (2d Cir. 2011).

219. *Id*. at 40, 51 (holding Christian services in school buildings creates appearance of endorsement).

220. *See* Locke v. Davey, 540 U.S. 712, 718-19 (2004) (explaining concept of "play in the joints"); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (noting tension between Free Exercise and Free Establishment clauses results in "play between the joints").

221. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

222. *See, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 380-83 (1985); Stone v. Graham, 449 U.S. 39, 40 (1980); Wolman v. Walter, 433 U.S. 229, 235-36 (1977); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 478 (1973).

223. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 5-6 (1993) (describing reversal of Court of Appeals application of *Lemon* test); Lee v. Weisman, 505 U.S. 577, 644 (1992) (explaining court decision to set aside *Lemon* test).

invalidate government action where government itself promotes a religious agenda.[224] As discussed in Part II.B, the primary focus in cases involving religion in public schools has been between government-promoted prayer or religious exercise, which inevitably violates the Establishment Clause, and privately-initiated religious exercise, which is permitted and sometimes protected under the First Amendment.[225]

With regard to the coercion and endorsement tests, the Court continues to apply both tests to varying degrees depending on the particular Establishment Clause concern before the Court.[226] It is fair to say that government coercion of religious exercise always violates the Constitution.[227] Government endorsement of religion also violates the Establishment Clause, though both tests are subject to a variety of interpretations. Common to both approaches, however, is that it is government action—either coercing religious exercise or endorsing religion—that is impermissible.[228]

In the context of resolving Establishment Clause issues in the limited public forum, however, the Court has largely resorted to a neutrality analysis. Neutrality has long been an important part of Establishment Clause analysis, dating back to the Court's initial Establishment Clause case in *Everson v. Board of Education*[229] and to the *Schempp* school prayer decision.[230] But the past quarter century has seen neutrality emerge as one of the Court's primary analytical vehicles for resolving an assortment of Establishment Clause issues.[231]

224. *See* Edwards v. Aguillard, 482 U.S. 578, 585-86 (1987) (describing second and third prongs of *Lemon* test as unnecessary); Wallace v. Jaffree, 472 U.S. 38, 56-57 (1985) (applying first prong); Stone v. Graham, 449 U.S. 39, 41-43 (1980) (holding statute unconstitutional under first prong of *Lemon*).

225. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302, 313 (2000) (permitting voluntary prayer but prohibiting state-sponsored prayer); Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion) (discussing difference between government promotion of religion and private promotion of religion).

226. *See* Lynch v. Donnelly, 465 U.S. 668, 688-89 (1984) (O'Connor, J., concurring) (clarifying "endorsement test" in determining display of nativity scene did not violate Establishment Clause).

227. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992). "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise and in a way which establishes a [state] religion or religious faith, or tends to do so." *Id.* (internal citations omitted).

228. *See* Santa Fe, 530 U.S. at 301-10; Lee, 505 U.S. at 586-88. In both *Santa Fe Independent School District v. Doe* and *Lee v. Weisman*, both of which applied a coercion test, the Court spent considerable time at the beginning of its analysis establishing that the prayers in those cases were attributable to the state. *Santa Fe*, 530 U.S. at 301-10; *Lee*, 505 U.S. at 586-88. The Court's endorsement test examines whether the government's acts create the perception of endorsement.

229. 330 U.S. 1, 18 (1947).

230. *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 215-22 (1963).

231. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001); Mitchell v. Helms, 530 U.S. 793, 809 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839-40 (1995); Bd. of Educ. v. Grumet, 512 U.S. 687, 696-705 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993). *See generally* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997); Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505 (1998).

This has been particularly true in the context of the limited public forum cases, where the Court has relied almost exclusively on the neutrality of the created forum to find that inclusion of religious speech in a school-created forum would not violate the Establishment Clause. This was first hinted at in *Widmar*, where the Court applied the *Lemon* test and held that providing equal access to a public forum to religious groups would not have a primary effect of advancing religion.[232] In particular, the Court noted that an equal-access policy would not confer the state's imprimatur on religion, because it would be treating student religious groups the same as any other student groups.[233] The Court made a similar observation in *Lamb's Chapel*, stating that under the circumstances, where other community groups repeatedly used school property, there was no realistic danger of perceived endorsement.[234] Although the Court did not specifically stress neutrality in these cases, it was essentially the neutral treatment of religion that prevented Establishment Clause violations.

This emphasis on neutrality in addressing the Establishment Clause issue came to the forefront in the other three limited forum cases—*Mergens*, *Rosenberger*, and *Good News Club*. As noted earlier, these cases increasingly began to stress neutrality in rejecting Establishment Clause concerns.[235] For example, Justice O'Connor's plurality opinion in *Mergens* explains that inclusion of religious groups would not violate the Establishment Clause, as the basic message of the Equal Access Act was "one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[236] Justices Scalia and Kennedy, in a concurring opinion, similarly stressed that neutral treatment of religious groups satisfied the Establishment Clause.[237]

The Court's two most recent cases, *Rosenberger* and *Good News Club*, have particularly emphasized the importance of neutrality in Establishment Clause analysis. The Court began its Establishment Clause discussion in *Rosenberger*

232. *See* Widmar v. Vincent, 454 U.S. 263, 273 (1981).

233. *See id*. at 274.

234. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993). In *Lamb's Chapel* the Court said:

> The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The [school] property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the [school] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

Id.

235. *See supra* Part I.C.

236. Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990).

237. *See id*. at 260 (Kennedy, J., concurring) (explaining agreement with plurality).

by stating, "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion," noting that it had previously applied that principle "to religious speakers who participate in broad-reaching government programs neutral in design."[238] On that basis, the Court held that including a religious publication in the university's funding program for student groups would not violate the Establishment Clause, because it would simply be treating religion neutrally, not preferentially.[239] Similarly, the Court in *Good News Club* characterized neutrality as a significant factor in its Establishment Clause analysis, stating that "[b]ecause allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school] face[d] an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."[240] Thus, though neutrality was not dispositive, it created a strong presumption of constitutionality.

It is not surprising that the Court so strongly stresses neutrality and related concepts in these decisions, because neutrality reinforces some of the Court's basic Establishment Clause concerns. First, a program's neutrality ensures that any religious speech emanates from private choices, rather than government. As noted earlier, a fundamental distinction in many Establishment Clause cases is that government itself has no business promoting religion, but privately initiated religious action generally poses no constitutional threat.[241] This is most clearly seen in the school prayer cases, where the Court has drawn a fundamental distinction between government-sponsored prayer or religious activity that inevitably violates the Establishment Clause, and student-initiated prayer—a constitutionally permitted and often protected practice.[242] The focus, therefore, is whether the religious exercise is primarily attributable to the state or to private parties.

Where religious exercise such as worship arises from a neutral program open to various participants, the religious exercise is clearly attributable to private parties and not to the government.[243] This is certainly true of worship services that might occur through a neutral limited forum program. Any worship occurring in such situations is attributable to the private choice of parties using the facility, rather than to the government itself.

Neutrality also reinforces Establishment Clause values relating to

238. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995).

239. *See id*. at 846.

240. 533 U.S. 98, 114 (2001).

241. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993); Witters v. Wash. Dep't of Servs. for Blind, 474 U.S. 481, 487 (1986).

242. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000); Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion).

243. *See Rosenberger*, 515 U.S. at 841-42 (discussing how religious speech in question attributable to private parties, not university); *Mergens*, 496 U.S. at 250 (plurality opinion) (noting difference between government religious speech prohibited under Establishment Clause, and permitted private religious speech).

endorsement concerns. The Court has often expressed sensitivity to this topic with regard to religion in public schools. As the Court has noted in various public forum cases, religious speech in the context of a neutral limited forum negates any concerns of perceived state endorsement of religion.[244] In such situations, the objective observer will attribute the religious speech not to the government, but to the choice of the private party. The endorsement issue will be discussed more fully below, but a neutral program negates concerns of the state's endorsement of the religious speech in question.

Thus, if worship services occur as part of a neutral program that treats religious speech and exercise the same as nonreligious speech, then it creates an extremely strong presumption of constitutionality. As important as neutrality is to the Court's Establishment Clause framework, however, it is not dispositive. Instead, the Court's cases suggest the possibility that other considerations might still indicate an Establishment Clause violation. As noted above, the Court in *Good News Club* said the program's neutrality created an uphill battle to show an Establishment Clause violation, but did not preclude the possibility altogether.[245] Similarly, the Court in *Rosenberger*, though strongly emphasizing the program's neutrality, also pointed to other factors mitigating Establishment Clause concerns.[246]

As a starting point, the neutrality of programs where worship might occur on school property as part of a limited public forum creates a very strong presumption that the worship does not pose Establishment Clause concerns. The majority in *Bronx Household IV* failed to appreciate the importance of the program's neutrality, and instead listed a variety of concerns, two of which are worth addressing. First, the court suggested that allowing groups to use public school space for worship services without charging rent, as the New York program did, effectively amounted to subsidization of religious worship.[247] The court noted that the community groups using school space do not pay rent nor cover the cost of utilities, such as electricity, gas, and air conditioning.[248] The court characterized the use of school space for worship as "foot[ing] a

244. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (determining granting religious groups access poses "no realistic danger" of endorsing religion); *Mergens*, 496 U.S. at 248 (plurality opinion) (holding granting religious groups equal access to facilities communicates neutrality, not endorsement); Widmar v. Vincent, 454 U.S. 263, 274-75 (1981) (indicating treating religious group neutrally does not place state's imprimatur on group).

245. *See Good News Club*, 533 U.S. at 114.

246. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841-42 (1995). The Court in *Rosenberger*, while primarily stressing the program's neutrality, also noted that not only were funds allocated from student fees, rather than from general tax revenues, but also that no money went directly to student groups. *See id.* Instead, qualified student groups contracted for services and the submitted bills to the student council, which then paid the creditors. *See id.* The Court equated this to providing rooms for religious group meetings, which posed no Establishment Clause issues in *Widmar* and *Lamb's Chapel*. *See id.* at 43-44.

247. *See Bronx Household IV*, 650 F.3d 30, 41 (2d Cir. 2011).

248. *See id.*

major portion of the costs of the operation of a church."[249] It saw this practice as potentially fostering an excessive entanglement with religion that is prohibited under the Establishment Clause.[250]

The problem with this argument is that it would prohibit use of limited public forum space by any religious group—a position the Supreme Court has thoroughly rejected. As noted by Judge Walker in his *Bronx Household IV* dissent, whenever a school provides free space and utilities to any group for its use, a subsidy exists.[251] This was in fact true in four limited-public forum cases that the Supreme Court decided—*Widmar*, *Mergens*, *Lamb's Chapel*, and *Good News Club*. Yet the Court rejected the Establishment Clause concerns in all four cases as long as access to the forum was the same for both religious and nonreligious groups alike. As noted by the Court in *Rosenberger*,

> The government usually acts by spending money. Even the provision of a meeting room, as in *Mergens* and *Widmar*, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. . . . If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled.[252]

In *Rosenberger*, the form of subsidy was even more dramatic than in *Bronx Household IV*. Instead of free use of space and modest utilities, as in the four other limited public forum cases, the *Rosenberger* student group essentially received funds to publish a blatantly Christian publication.[253] As noted earlier, this was a sensitive Establishment Clause issue because direct funding of religion deeply concerned the Founders when the United States adopted the Establishment Clause.[254] Nevertheless, the Court in *Rosenberger* held the provision of such funds would be constitutional, largely because the funds would be part of a neutral program that applied to all eligible student groups.[255]

The subsidization in *Bronx Household IV* is minor compared to the subsidy permitted in *Rosenberger*, and is essentially the equivalent of that approved in *Widmar*, *Mergens*, *Lamb's Chapel*, and *Good News Club.* Indeed, permitting modest benefits to flow to religion on the same terms as provided to nonreligious persons is consistent with the Establishment Clause, even if such

249. *Id.*
250. *See id*.
251. *See Bronx Household IV*, 650 F.3d at 63-64 (Walker, J., dissenting).
252. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 843 (1995).
253. *See id.* at 823-27 (majority opinion).
254. *See id.* at 868 (Souter, J., dissenting); *see also infra* note 42 and accompanying text.
255. *See Rosenberger*, 515 U.S. at 838-44.

benefits indirectly subsidize religious exercise.[256] Therefore, there is little to support the first concern that the *Bronx Household IV* majority voiced.

The second Establishment Clause concern that the majority raised was that permitting worship services on public school facilities would amount to a perceived state endorsement of the worship and religion. This was the majority's primary Establishment Clause concern, as it directed most of its Establishment Clause discussion to the endorsement issue. As the court stated near the end of its analysis:

> the use of New York City public schools for religious worship services—with a heavy predominance of Christian worship services because school buildings are most available for non-school use on Sundays—would create a very substantial appearance of governmental endorsement of religion and give the Board a strong basis to fear that permitting such use would violate the Establishment Clause.[257]

The majority based its conclusion on several perceived concerns under the facts of the case. First, and most significantly, the court based its reasoning around the perception that Christian churches dominated community use of school facilities on Sunday mornings, stating that some schools effectively became churches on Sunday mornings.[258] The court also discussed how the church brought further attention to religious use of the school by posting signs and distributing flyers outside.[259] The majority stated that as a result, "both church congregants and members of the public identify the churches with the schools."[260] Second, the court also expressed concerns that "young and impressionable students" might be particularly likely to "mistake the consequences of a neutral policy for endorsement."[261]

Concerns about perceived government endorsement of religion have long informed the Supreme Court's Establishment Clause jurisprudence. Sensitivity to endorsement concerns in Establishment Clause analysis took on a special focus in 1984, however, with the advent of Justice O'Connor's endorsement test in a concurring opinion in *Lynch v. Donnelly*.[262] In *Lynch*, the Court addressed the constitutionality of a nativity scene on public property and held

256. *See* Zorach v. Clauson, 343 U.S. 306, 312-13 (1952) (noting Constitution permits religious organizations to enjoy societal benefits, including police and fire protection).

257. *Bronx Household IV*, 650 F.3d 30, 51 (2d Cir. 2011).

258. *See id.* at 42 (explaining overwhelming church use of schools on Sundays); *see also* Matich, *supra* note 18, at 1151, 1166 (discussing potential problem of forum domination, especially as applied to religious uses).

259. *See Bronx Household IV*, 650 F.3d at 42 (noting signs posted outside school buildings).

260. *Id.* at 42.

261. *Id*.

262. 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

that no Establishment Clause violation existed under *Lemon*.[263] Although Justice O'Connor joined the majority opinion, she wrote a concurring opinion to sharpen the Court's focus under *Lemon*. She argued that the real concern is whether a government action endorses religion, and thus advocated for what is now known as her endorsement test.[264]

In the years since *Lynch*, the endorsement concerns that Justice O'Connor's concurring opinion raised have become an increasingly significant part of Establishment Clause analysis. The Court has never officially adopted the endorsement test per se, and some justices have expressed doubts about it, but an important focus of the Court has often been sensitivity to possible government endorsement of religion.[265] To some extent, the endorsement test's role depends on the particular Establishment Clause issue before the Court, as some issues lend themselves to an endorsement analysis. Even Justice O'Connor resorts to the test more or less often depending on the issues involved.[266]

In the limited public forum cases involving religious speech, the Court occasionally mentions endorsement concerns, though often in a perfunctory manner. As noted above, the Court in *Widmar* essentially raised an endorsement concern when it noted that inclusion of a religious group on equal terms with other groups would not put the state's imprimatur on religion.[267] Similarly, Justice O'Connor's plurality opinion in *Mergens* stressed that the message given by an equal access policy was "one of neutrality rather than endorsement."[268] Lastly, in *Lamb's Chapel*, the Court stated that under the circumstances of the cases there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed . . . ."[269]

Thus, in all these cases, the Court thought it was important to acknowledge the issue of endorsement, but dispensed with any endorsement concerns quite readily.[270] As mentioned before, the Court's dismissal of endorsement concerns is not surprising given the close connection between neutrality and endorsement. When religious expression occurs pursuant to a neutral public

263. *See id*. at 684-85 (majority opinion).

264. *See id.* at 687-94 (O'Connor, J., concurring); *see also* Matich, *supra* note 18, at 1157-59, 1171-74 (discussing endorsement test applied to worship in public schools); Glaser, *supra* note 18, at 1060-62, 1101-03 (exploring endorsement test further).

265. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring) (rejecting endorsement test).

266. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33-34 (2004) (O'Connor, J., concurring) (quoting Bd. of Educ. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) ("'There are different categories of Establishment Clause cases, which may call for different approaches.'").

267. 454 U.S. 263, 274-75 (1981).

268. *Mergens*, 496 U.S. at 248 (plurality opinion).

269. 508 U.S. 384, 395 (1993).

270. *See Widmar*, 454 U.S. at 274-75; *Mergens*, 496 U.S. at 248; *Lamb's Chapel*, 508 U.S. at 395.

forum open to religious and nonreligious groups alike, any religious expression is attributable to the private choice of forum participants rather than to the actions of the state. It is no surprise, therefore, that even though the Court has acknowledged the issue of endorsement with religious speech in limited public forums, it has consistently and quickly dismissed such concerns when the forum was found to be neutral.[271]

The majority in *Bronx Household IV* acknowledged those cases, but believed worship services in public schools was different, even if pursuant to a neutral policy, because of the nature of the activity and the way it would dominate the forum on Sundays.[272] In particular, the court noted that Sunday use of school property was almost exclusively for Christian worship, and that churches often advertised their presence at the building. According to the majority, this results in "both church congregants and members of the public identify[ing] the churches with the schools."[273] This concern was compounded according to the court, because of the "impressionable" students who attended the schools and might be aware of that they were used for worship on Sunday mornings.[274]

There are two related problems with this endorsement analysis. First, as articulated by Justice O'Connor, the endorsement analysis must be seen from an objective observer's perspective—one who has a full understanding of the background and context of the religious exercise in question.[275] Thus, the bystander who merely sees or hears about a worship service in a public school on Sunday morning does not judge perceptions of endorsement. Rather, the relevant judgment is the objective observer's—the individuals who are aware of the Board's policy of opening public school facilities to various community groups regardless of religious affiliation, and are aware that use for worship is only one of many different uses for which schools are being used. To such an observer, it is difficult to attribute state endorsement to the worship any more than the state would be endorsing other community activities occurring on school property during the week.

The second problem associated with the *Bronx Household IV* majority analysis is the narrow way in which it framed the relevant forum. Religious worship might dominate the created forum if the forum only consists of certain buildings on Sunday mornings. The relevant forum, however, is the school buildings during non-school hours throughout the week, as opposed to Sunday mornings only. The fact that a particular use might dominate one narrow segment of the forum should not skew the endorsement analysis.[276] Rather, one

271. *See supra* notes 267-69 and accompanying text (discussing *Mergens*, *Lamb's Chapel*, and *Widmar*).

272. *See* 650 F.3d 30 (2d Cir. 2011).

273. *Id.* at 42.

274. *See id*.

275. *See* Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); *see also* McCreary Cnty. v. ACLU, 545 U.S. 844, 862 (2005).

276. *See* Matich, *supra* note 18, at 1164 (stating what constitutes forum "evaluated at the level of the

should view the forum as it was created and operates, which encompasses all eligible properties during all eligible times throughout the week. From this perspective, an observer is unlikely to perceive religious worship as dominating the forum, but instead as one part of a greater whole, where access to school property is granted on the same terms as to everyone else. As the Supreme Court has repeatedly explained, there is no reason to attribute state endorsement of religion in such circumstances.

Concerns about "young and impressionable students" perceiving endorsement might be interpreted in numerous ways.[277] The Court has, at times, emphasized sensitivity about how impressionable young students are when discussing religion in public schools,[278] but this concern typically arises where the state itself promotes religion such as through prayer,[279] posting of the Ten Commandments,[280] or teaching creationism.[281] The Court ought to be particularly vigilant when monitoring government's own advancement of religion, especially around impressionable young students. It is a much different matter, however, if government itself does not promote religion in school or at school-sponsored activities, but instead simply creates a forum for private speech.

Even to the extent that the court takes student impressionability into account, arguably the occurrence of worship on Sundays mitigates rather than advances endorsement concerns. Sundays are a time when students themselves are less likely to come into contact with the religious activity in question, as opposed to the activity occurring during the week at school. Moreover, even to the extent a young student is aware that the school building is used for worship, it occurs at a time that the school is not in operation. Both of these create a distance between the normal school activity and the religious activity, lessening, not increasing, potential problems of endorsement.

As the dissent in *Bronx Household IV* argued, the potential for perceived endorsement is greater if the religious activity occurs immediately after school, such as in *Good News Club*.[282] There, the club wanted to meet in a school classroom immediately after school and invite students in the school itself. The meetings included learning Bible verses, singing Christian songs, hearing a Bible story, and closing with prayer—meetings that Justice Souter's dissent

school district"). If evaluation is at a level other than the school district, the districts could manipulate what constitutes a forum to create appearance of viewpoint domination. *See id.*

277. *See Bronx Household IV*, 650 F.3d at 42 (observing potential for young, impressionable students to mistake neutral policy for endorsement).

278. *See* Edwards v. Aguillard, 482 U.S. 578, 583-85 (1987) (noting Court's vigilance in monitoring religion in public schools because of impressionable young students).

279. *See supra* Part I.B.

280. *See* Stone v. Graham, 449 U.S. 39, 39-40 (1980) (per curiam) (holding law at issue impermissibly endorses religion through creationism teachings).

281. *See Edwards*, 482 U.S. at 583-85.

282. *See Bronx Household IV*, 650 F.3d 30, 61-62 (2d Cir. 2011) (Walker, J., dissenting).

characterized as essentially "worship."[283] The close proximity in terms of time between the meeting and the school day arguably presented greater endorsement problems to impressionable minds than Sunday morning worship services; yet, the Court in *Good News Club* held no Establishment Clause violation existed and permitted such a meeting on a neutral basis.

In sum, there is no reasonable basis to find that use of public school facilities for worship services, pursuant to a neutral community-use program, violate the Establishment Clause. A program's neutrality creates a strong presumption of constitutionality that is not overcome by a typical community-use program, as in *Bronx Household*. Importantly, the program's neutrality eliminates any potential endorsement concerns, because private parties, rather than the state, choose to use the school facility for worship.

V. FREE EXERCISE AND WORSHIP IN PUBLIC SCHOOLS

As noted earlier, issues regarding religion and public schools primarily focus on the Establishment Clause and Free Speech Clause, with no significant attention to the Free Exercise Clause. This is not surprising, since restrictions on religious activities typically occur in the context of a limited public forum, which is necessarily grounded in free speech principles. Since the Supreme Court has consistently held that excluding religious speech from a limited public forum violates the Free Speech Clause, there was no reason to examine whether the exclusion might also violate the Free Exercise Clause.[284]

By rejecting the free speech claim in *Bronx Household IV*, however, the Second Circuit opened the door to a more thorough examination of the free exercise claim. Although the district court found that the prohibition on "religious worship services" violated the church's right to free exercise of religion, the Second Circuit in *Bronx Household V*, once again reversed, finding no violation.[285]

This section will briefly discuss whether exclusion of worship services violates the free exercise of religion. Part V.A will provide a brief overview of free exercise jurisprudence, Part V.B will then examine the Second Circuit's decision in *Bronx Household V*, and Part V.C will discuss whether excluding worship services from an otherwise broad community-use policy violates the Free Exercise Clause.

A. Free Exercise Doctrine

The Supreme Court's earliest free exercise cases did not suggest a

283. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 n.4 (2001) (Souter, J., dissenting).
284. *See id*. at 107; Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830-32 (1995).
285. 750 F.3d 184, 204-05 (2d Cir. 2014) (holding no excessive entanglement).

particularly expansive protection for religious liberty.[286] This changed substantially with the Court's 1963 decision in *Sherbert v. Verner*.[287] In *Sherbert*, the Court reviewed a South Carolina statute that denied unemployment benefits to a Seventh-day Adventist because she refused to work on Saturday due to her religious beliefs.[288] In finding the denial of benefits unconstitutional, the Court employed a two-step analysis for resolving free exercise questions. First, a court must determine whether the government in fact infringes upon a person's free exercise right. Second, if the government does infringe such rights, then the action is subject to strict scrutiny, requiring that the infringement is the least restrictive means of furthering a compelling state interest.[289] In applying this test, the Court held that the government infringed on free exercise, noting that the law forced the claimant to choose between her religion and receipt of important government benefits, thereby placing the same kind of burden on her beliefs as a direct prohibition.[290] The Court further held that the state did not have a compelling interest in not granting a religious exemption, since the state could still meet its interest in avoiding fraud by creating an exemption for Sabbatarians.[291]

This two-step free exercise analysis, which held sway for nearly three decades, was significant in several respects. It made clear that even neutral and generally applicable laws not focused on religion can trigger free exercise concerns and heightened scrutiny if the law, as applied to a particular person, imposes a significant burden on religious exercise.[292] For example, in *Wisconsin v. Yoder* the Court held that Wisconsin's compulsory education law, which required school attendance until sixteen, violated the rights of the Amish because their religion prohibited attending school after the eighth grade.[293] Thus, the Court primarily focused not on whether religion was unfairly targeted

286. *See* Reynolds v. United States, 98 U.S. 145, 167 (1878) (drawing distinction between unregulated religious beliefs, and regulated religious actions).

287. 374 U.S. 398 (1963).

288. *See id*. at 399-400. To qualify for unemployment benefits, an applicant had to be able to and available for work, and had to accept suitable work when offered by the unemployment office or employer. *See id*. at 400-01.

289. *See id*. at 403, 406.

290. *See id.* at 403-06. In finding that the denial of benefits in *Sherbert* infringed the claimant's free exercise rights, the Court focused on the coercive effect the denial placed on the claimant to abandon a cardinal tenet of her religion. In doing so, the Court emphasized that the claimant's ineligibility for benefits derived "solely from the practice of her religion," effectively penalizing her for her religious beliefs. *Id.* at 404. As such, the law forced the claimant to choose between her religion and receiving important government benefits. *See id*. at 403-06.

291. *See Sherbert*, 374 U.S. at 406-09.

292. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972).

293. *See id.* at 207-09. In finding the law unconstitutional as applied to the Amish, the Court essentially engaged in the *Sherbert* two-step analysis. It began by examining the impact of Wisconsin's compulsory education law on Amish faith, and concluded that it imposed a substantial burden on a core religious belief. *See id.* at 215-19. The Court then assessed whether the state had an "overriding" interest that would justify an infringement of the Amish free exercise rights, and concluded that it did not. *See id*. at 221, 234.

or treated, but on the burden imposed on religion, even from a neutral program.

This standard of analysis, requiring heightened scrutiny for even incidental but substantial burdens on religion, came to an abrupt end in 1990 in *Employment Division v. Smith*.[294] There, two Native Americans had ingested peyote as part of a religious observance at their Native American church.[295] Use of peyote was illegal under Oregon law, and as a result, the two men were fired from their jobs as counselors at a private drug rehabilitation center.[296] They were subsequently deemed ineligible for unemployment benefits, since they had been discharged for work-related misconduct.[297] The two men challenged the dismissal as violating their free exercise rights, arguing that the law imposed a substantial burden on their free exercise of religion because peyote use serves sacramental purposes in their church.[298]

The Supreme Court, in a 5-4 decision, held that the law did not violate the free exercise rights of the claimants, articulating an analysis that substantially changed free exercise jurisprudence. The Court began by recognizing the noncontroversial proposition that the First Amendment prohibits "governmental regulation of religious *beliefs* as such."[299] When it comes to religious conduct, however, the *Smith* Court drew a fundamental distinction between laws that specifically target religion, which are subject to strict scrutiny, and neutral laws of general applicability that incidentally burden religion.[300] According to the Court, the latter category does not infringe on free exercise, no matter how substantial the burden on religious exercise.[301] It is only the former type of restrictions, those that target religion with unique burdens, that trigger heightened constitutional scrutiny. Since the case before the Court involved a neutral and generally applicable law, it held there was no free exercise infringement.[302]

The Court, in rejecting the application of the "compelling government interest" test to neutral and generally applicable laws of the type before it, noted that the compelling government interest test is reserved for unequal treatment.[303] Thus, the Court noted that it reserves strict scrutiny for

294. 494 U.S. 872 (1990).

295. *See id.* at 874.

296. *See id.*

297. *See id.*

298. *See Smith*, 494 U.S. at 882-83.

299. *Id*. at 877 (quotation omitted).

300. Emp't Div. v. Smith, 494 U.S. 872, 877-79 (1990).

301. *See id*. at 878-79.

302. *See id*. at 882. For commentary on the *Smith* decision, see Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

303. *See Smith*, 494 U.S. at 885-87 (comparing various applications of "compelling governmental interest" test).

differential treatment of race, but not for race-neutral laws that have a disproportionate impact on race.[304] Similarly, content distinctions on speech invoke strict scrutiny, whereas content-neutral speech restrictions do not.[305] Thus, according to the Court, the compelling government interest test is designed to produce "equality of treatment."[306]

The Court applied *Smith*'s free exercise analysis just three years later, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.[307] In this case, adherents of the Santeria religion, who practice animal sacrifice as a principal form of worship, leased land in Hialeah, Florida, to establish a house of worship and other facilities.[308] In response, the city council held an emergency meeting and passed a series of ordinances directed toward the church.[309] Although the ordinances were facially neutral with regard to the Santeria religion, the ordinances prohibited cruelty to animals, animal "sacrifice," and slaughtering of animals outside of restricted zones.[310] At the same time, the ordinances contained numerous exceptions, such that the ordinances effectively only applied to Santeria and other religions that practice animal sacrifice.[311]

The Supreme Court unanimously held the ordinances violated the Free Exercise Clause. The Court began its analysis by reference to *Smith*, stating that neutral and generally applicable laws that burden religion do not trigger heightened scrutiny, but laws that fail to meet those requirements "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[312] The starting point to determine whether a law is neutral or not is to examine the text; at a minimum, the law must not discriminate on its face.[313] The Court acknowledged that the language of the ordinances was facially neutral, but said that was only the beginning, not the end of the analysis.[314] Instead, the Court proceeded to examine the entire record of the case, which clearly demonstrated "that suppression of the central

304. *See id.* at 886 n.3 (examining level of scrutiny applied to race-neutral laws of general applicability).

305. *See id.* at 885-86.

306. Emp't Div. v. Smith, 494 U.S. 872, 886 (1990).

307. 508 U.S. 520 (1993).

308. *See id*. at 524-26.

309. *See id*. at 526-28.

310. *See id.* at 527-28 (outlining substantive ordinances regarding ritualistic sacrifice).

311. *See Lukumi*, 508 U.S. at 526. According to the Court, a number of city residents were "distressed" that a Santeria church was moving into the community. *See id*. at 526. In response, the city council held an emergency session on June 9, 1987, at which time they passed an emergency ordinance enacting Florida's animal cruelty laws. *See id*. At a September meeting, the council proceeded to adopt three other ordinances relating to animal sacrifices. *See id.* at 527.

312. *See id*. at 531.

313. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

314. *See id*. at 534. The Court rejected the city's argument that facial neutrality is all that is needed to avoid heightened scrutiny, stating that "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id*.

element of the Santeria worship service was the object of the ordinances."[315] This was reflected in a number of factors, including the legislative record, the sequence of events, language used in the ordinances, and, perhaps most importantly, the only conduct subject to the ordinances was "the religious exercise of Santeria church members."[316] Taken as a whole, the Court said there was no doubt that the purpose of the ordinance was to suppress the Santeria religion. Stating that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," the Court explained the law was neither supported by a compelling interest nor narrowly drawn, and thus unconstitutional.[317]

Taken together, *Smith* and *Lukumi* established what appeared to be a clear neutrality approach to free exercise questions. Neutral and generally applicable laws (as in *Smith*) do not trigger heightened scrutiny, whereas laws that burden religious practice that are not neutral or of general applicability (as in *Lukumi*) are subject to strict scrutiny, and are almost inevitably unconstitutional. In two more recent cases, however, *Locke v. Davey*[318] and *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*,[319] the Court tweaked this analysis by indicating that laws that target religion with burdens might still be constitutional, and laws that treat religion neutrally might be subject to heightened scrutiny.

In *Locke*, the Court reviewed a State of Washington scholarship program designed to assist academically promising students with their college educations. Although students could use the scholarship for studies at religious institutions, the state constitution prohibited use of the scholarship to pursue a "devotional theology degree."[320] The state awarded Davey a scholarship, but told him that he could not use it to pursue a major in pastoral ministries, which was conceded to be a devotional theology degree.[321] Davey sued, claiming inter alia that the scholarship program was not neutral toward religion, and thus violated the Free Exercise Clause.[322]

The Supreme Court held that the program did not violate the Free Exercise

315. *Id*.

316. *Id*. at 535. The Court stated that "[a]part from the text, the effect of a law in its real operation is strong evidence of its object." *Id*.

317. *Lukumi*, 508 U.S. at 546-47. The City had argued two interests to support the ordinances: health and avoiding cruelty to animals. The Court noted that the laws were not narrowly drawn to support those interests, stating that all four ordinances were "overbroad or underinclusive in substantial respects." *Id*. at 546. The Court further stated that the city had failed to show that the asserted interests were compelling in the context of the ordinances. Specifically, it stated that "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id*. at 546-57.

318. 540 U.S. 712 (2004).

319. 132 S. Ct. 694 (2012).

320. *See Locke*, 540 U.S. at 715-19.

321. *See id*. at 717.

322. *See id*. at 717-18.

Clause.[323] In holding the program constitutional, the Court acknowledged that the Establishment Clause did not prohibit use of the scholarships for devotional theology degrees; indeed, an earlier Supreme Court case held that use of state monies under such circumstances did not violate the Establishment Clause.[324] The Court recognized, however, that the scholarship program was not neutral toward religion in that it excluded a particular type of religious study. But the Court explained that this was an example of "play in the joints," where the Establishment Clause permits a state action that the Free Exercise Clause does not require.[325] In other words, the state could choose to include devotional theology degrees if it wanted, but was free to exclude them under the Free Exercise Clause.

In holding that the disparate treatment of religion did not violate the Free Exercise Clause, the Court drew three distinctions with the discriminatory treatment of religion in *Lukumi*. First, the Court noted that, unlike *Lukumi*, where religious adherents were subject to criminal sanctions, the disfavor of religion in the case before it was "far milder."[326] The Court noted that the program imposed neither criminal nor civil sanctions, did not deny the right of political participation, nor required students "[t]o choose between their religious beliefs and receiving a government benefit."[327] Instead, the Court said the state simply chose "not to fund a distinct category of instruction."[328]

Second, even though funding devotional theology degrees would not violate the Establishment Clause, the Court deferred to the special concerns that led the State of Washington to prohibit funding to the education of clergy. Indeed, the Court stated it could "think of few areas in which a State's antiestablishment interests come more into play."[329] In recognizing this, the Court noted the special sensitivities that funding of clergy played as an impetus to the Establishment Clause. This was reflected not only in James Madison's *Memorial and Remonstrance Against Religious Assessments* (*Memorial and Remonstrance*), and the subsequent Virginia Bill for Religious Liberty, but also in numerous state constitutions at the time which prohibited use of public funds

323. *See id.* at 725.

324. *See* Locke v. Davey, 540 U.S. 712, 719 (2004); *see also* Witters v. Wash. Dep't of Servs. for Blind, 474 U.S. 481, 486-87 (1986). The Court stated that under Establishment Clause precedent, "the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719. The Court said that in situations where the State gives aid to a private individual who then chooses to use it at a religious institution, any aid that flows to religion is attributable to the choice of a private party, and not to religion. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (discussing use of school vouchers at religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993) (explaining use of sign-interpreter at religious school).

325. *See Locke*, 540 U.S. at 718-19; *see also* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (discussing "play in the joints" between the Religion Clauses).

326. *Locke*, 540 U.S. at 720.

327. *Id.* at 720-21.

328. *Id*. at 721.

329. *Id*. at 722.

for ministry.[330]

Finally, the Court noted that, unlike the ordinances in *Lukumi*, the scholarship program in *Davey* showed no evidence of hostility toward religion. Instead, the program allowed students to use their scholarships at religious schools and to take distinctly religious classes, including devotional theology classes.[331] They just could not use the scholarships to obtain a degree in devotional theology.[332] The Court thus concluded that there was nothing in either the text of the state constitution nor the operation of the program that suggested animus toward religion.[333] It concluded by saying, "[g]iven the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect."[334]

The second and most recent case tweaking of the *Smith/Lukumi* neutrality analysis is *Hosanna-Tabor*. Whereas *Locke* indicated that in limited circumstances a non-neutral law targeting religion might still be constitutional, *Hosanna-Tabor* indicated that even neutral and generally applicable laws might violate the Free Exercise Clause. In that case, a church-school dismissed a "called teacher," who had the title and status of a minister, ostensibly for a disability. The Equal Employment Opportunity Commission (EEOC) sued, claiming the dismissal violated the Americans with Disabilities Act.[335]

The Supreme Court reversed, finding that the Religion Clauses of the First Amendment created a "ministerial exception" to anti-discrimination laws.[336] The Court was careful to limit this exception, for the time being, to the immediate facts of the case, but stated the right of religious institutions to appoint and dismiss their ministers was inherent in both the Free Exercise Clause and the Establishment Clause.[337] This was necessary to ensure non-interference with the basic governance, doctrine, and mission of religious institutions, which should be free from government control.[338] Although the

330. *See* Locke v. Davey, 540 U.S. 712, 723 (2004). The Court noted that "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id*. at 723.

331. *See id.* at 724.

332. *See id*. at 724-25.

333. *See id*. at 725.

334. *Locke*, 540 U.S. at 725.

335. *See* Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 132 S. Ct. 694, 699-701 (2012).

336. *See id*. at 706.

337. *See id*. at 707.

338. *See id*. at 706-07. The Court focused on four considerations, in concluding that the teacher in question qualified for the ministerial exception. First was the formal title given to the teacher, which was "Minister of Religion, Commissioned." *Id.* at 707. Second was the "substance reflected in that title," which included annual reviews of her "skills in ministry," and provision of continuing education in ministry. *Id.* at 707-08. Eligibility for the position also required college-level courses in doctrine and ministry. *Id*. at 708. Third, the teacher held herself out as a "minister" in several respects, including on her taxes. *Id.* at 707-08. Finally, her responsibilities included some limited teaching of religion, leading students in prayer three times a

law applied was neutral and of general applicability, the Court said the *Smith* analysis did not apply in a situation that concerned the internal affairs and leadership of a religious body.[339]

Taken together, *Locke* and *Hosanna-Tabor* reflect modest but important limitations on the *Smith/Lukumi* neutrality analysis. *Locke* demonstrates that in limited circumstances a non-neutral law targeting religion might not trigger heightened scrutiny, whereas *Hosanna-Tabor* demonstrates that some religious values are so fundamental that they are insulated from even a neutral and generally applicable law. As a practical matter, however, the *Smith/Lukumi* neutrality approach governs unless these modest limitations apply. The next section of this article will briefly discuss the decision in *Bronx Household V*, in which the Second Circuit held that exclusion of "religious worship services" from a forum allowing community use of public school facilities did not violate the Free Exercise Clause.

B. Bronx Household V *and the Free Exercise Clause*

The initial litigation in *Bronx Household* focused on the church's free speech claim, culminating in the Second Circuit's final rejection of that claim in *Bronx Household IV*.[340] At that point, the church again moved for a preliminary injunction against enforcement of the Board's prohibition of worship services, this time on free exercise grounds.[341] The district court again sided with the church, first granting a preliminary injunction[342] and then a permanent injunction on the grounds that the Board's regulation violated the Free Exercise Clause.[343] In doing so, the district court primarily emphasized that by prohibiting worship services, but allowing other activities, the Board discriminated against religion, triggering strict scrutiny under the Supreme Court's decisions in *Smith* and *Lukumi*.[344]

Once again, the Second Circuit, in a 2–1 decision reversed the district court, holding that the Board's regulation did not violate the Free Exercise Clause.[345] In doing so, the court essentially interpreted current free exercise jurisprudence as only prohibiting selective treatment of religion that imposes burdens, but

week, and twice a year overseeing a chapel service. *See id*.

339. *See Hosanna-Tabor*, 132 S. Ct. at 706-07. The Court specifically rejected the application of *Smith*, stating that "a church's selection of its ministers is unlike an individual's ingestion of peyote." *Id.* at 707. "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id*. at 707.

340. 650 F.3d 30, 39-40 (2nd Cir. 2011).

341. *See Bronx Household IV.A*, 876 F. Supp. 2d 419, 423-24 (S.D.N.Y. 2012), *rev'd in part, vacated in part*, 750 F.3d 184 (2d Cir. 2014).

342. *See* Bronx Household of Faith v. Bd. of Educ., 855 F. Supp. 2d 44, 67 (S.D.N.Y. 2012).

343. *Bronx Household IV.A*, 876 F. Supp. 2d at 445.

344. *See id*. at 423-28.

345. *See Bronx Household V*, 750 F.3d at 196.

permitting the selective withholding of benefits and subsidies when accompanied by significant Establishment Clause concerns.[346] It began its analysis by rejecting the strict scrutiny applied in *Lukumi*, drawing several distinctions between the two cases. In particular, it stressed that *Lukumi* involved the targeted imposition of burdens on religion, whereas the Board's regulation in the case before it simply declined to provide a subsidy to religion because of Establishment Clause concerns.[347] Moreover, the court reasoned that *Lukumi* involved clear animus toward the targeted religion, whereas the Board showed no animus.[348]

The court then proceeded to what it considered the controlling precedent, *Locke*, with facts it described as "very similar" to those in *Bronx Household*.[349] In particular, the court noted three ways in which the case before it was essentially the same as *Locke*. First, unlike *Lukumi*, which involved a significant burden on religion in the form of a criminal sanction, *Locke* simply refused to fund religious instruction. Similarly, the court said the Board's regulation merely withheld a subsidy from a very narrow type of religious activity, an action that imposed only a marginal burden.[350] Second, as in *Locke* and unlike in *Lukumi*, there was no evidence that the Board's regulation resulted from animus or disfavor toward religion.[351]

Third, and perhaps most importantly, the court stressed that, as in *Locke*, substantial Establishment Clause concerns governed the exclusion of religious worship services.[352] These concerns, coupled with the lack of animus and a relatively minor impact on religious exercise, indicated that the court should not apply strict scrutiny and that the regulation excluding worship services was constitutionally permissible. As stated by the court:

> We see no meaningful distinctions between [*Locke* and the present cases]. Our record reveals no animus toward religion generally or toward a particular religion or religious practice in either the [Board's regulation] or the operation of [the] Board's policy. Underlying the Board's prohibition is a slightly different manifestation of the same historical and constitutional aversion to the use of public funds to support the practice of religion cited by the Court in *Locke*. As in *Locke*, the Board's interest in respecting the principle of the Establishment Clause that disfavors public funding of religion is substantial, and the burden, if it can properly be called a burden, that falls on Bronx Household in needing to find a location that is not subsidized by the City for

346. *See id*. at 191-93.
347. *See Bronx Household V*, 750 F.3d 184, 192 (2d Cir. 2014).
348. *See id*. at 192-93.
349. *Id*. at 193.
350. *See id.* at 194-95.
351. *See Bronx Household V*, 750 F.3d at 194.
352. *See id*.

> the conduct of its religious worship services, is minor from a constitutional point of view.[353]

Thus, as a practical matter, the Second Circuit saw *Locke* as controlling. What emerges from its free exercise analysis is a willingness to allow government actions that disfavor religion when the resulting burden is minor and justified by significant Establishment Clause concerns. Although those were the primary concerns reflected in *Locke*, it is questionable whether *Locke* is as controlling as the Second Circuit suggested. The next section will examine the free exercise issue more fully, arguing that one should read *Locke* in a more limited fashion and is in fact quite distinguishable from the facts of *Bronx Household*.

C. Free Exercise and Exclusion of Worship from Schools

The starting point for modern free exercise jurisprudence is the *Smith* and *Lukumi* neutrality standard, which states that neutral and generally applicable laws do not trigger free exercise protection. Conversely, both decisions indicate that laws that target religion for unique burdens are subject to strict scrutiny.[354] The Court strongly suggested this in *Smith*, where it stated that the purpose of a "compelling government interest" test is to ensure "equality of treatment," which is lacking when unique burdens are imposed on religion.[355] *Lukumi* similarly emphasized that targeting religion with unique burdens triggers strict scrutiny, stating that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[356] It further noted that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[357]

A policy permitting community use of public school facilities that excludes worship services is neither neutral nor generally applicable, but instead targets religion for distinctly unfavorable treatment, and raises a presumption of strict scrutiny. If strict scrutiny is applied, little doubt exists that the exclusion of worship services from a general community-use policy would be unconstitutional. In particular, there would almost certainly be no compelling interest to justify such an exclusion. The only interest school districts ever assert for exclusion is avoiding an Establishment Clause violation. The

353. *Bronx Household V*, 750 F.3d 184, 194-95 (2d Cir. 2014).

354. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); Emp't Div. v. Smith, 494 U.S. 872, 885-86 (1990).

355. *See Smith*, 494 U.S. at 885-86.

356. 508 U.S. at 546.

357. *Id*.

Supreme Court has never decided whether that constitutes a compelling interest to pass strict scrutiny for speech discrimination, and specifically declined to address the issue.[358]

As noted in Part IV, however, permitting worship services on public school property clearly does not violate the Establishment Clause, or come anywhere near doing so. Although sensitivity to some Establishment Clause concerns might justify disparate treatment of religion in very narrow circumstances under *Locke*, discussed below, anything short of an actual violation clearly falls short of a compelling interest. Thus, if strict scrutiny is applied as required under *Smith* and *Lukumi* when religion is targeted for special burdens, then the exclusion of worship services clearly violates the Free Exercise Clause.

The only question, therefore, is whether the general prohibition on targeting religion for disfavored treatment from *Smith* and *Lukumi* apply, or whether exclusion of worship might be viewed as coming within the *Locke* "play in the joints" analysis. Although not completely clear, *Locke* is best seen as a rather limited exception to the general approach laid out in *Smith* and *Lukumi*. Not only does the broad language in *Lukumi* suggest that any special targeting of religion normally triggers strict scrutiny, but the careful way in which the Court in *Locke* distinguished *Lukumi* suggests that the Court intended that the *Locke* exception be very limited. Indeed, *Locke* is best understood as carving out an exception based on several considerations, most importantly a unique antiestablishment interest in excluding religion from a government program.

Locke itself turned on three considerations: the government motivation, the burden on religious exercise, and, most importantly, the antiestablishment concern raised by the state.[359] In the context of excluding worship services from an otherwise broad community-use policy, the first two of these factors—motivation and religious burden—are comparable to those in *Locke* and pose no free exercise concerns in themselves. It of course depends on the particular facts of the case, but it is fair to assume that exclusion of worship from a school's community-use program reflects genuine, if misplaced, concerns about separation of church and state rather than animus toward religion. That was certainly true in the *Bronx Household* litigation, where the policy seemed to be grounded in sincere concerns about the Establishment Clause.

Similarly, the burden on religion in such situations is rather modest, at least as compared to the burden in *Lukumi*. As in *Locke*, prohibiting use of public

358. *See* Widmar v. Vincent, 454 U.S. 263 (1981). The Court suggested that avoiding an Establishment Clause violation "may be characterized as compelling" and thus sufficient to justify a content-based restriction. *See id*. at 271. It did not, however, find an Establishment Clause violation to exist. In *Good News Club*, the Court said "[h]owever, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." 533 U.S. 98, 113 (2001). The Court did not have to decide the issue in either case, however, because in both cases it held that inclusion granting religion equal access to a school forum would not violate the Establishment Clause. *See id.* at 114-15; *Widmar*, 454 U.S. at 274-75.

359. *See* Locke v. Davey, 540 U.S. 712, 720-25 (2004).

schools for worship imposes no criminal or civil penalties on religion.[360] Rather, it simply forecloses the opportunity to use school space for worship. It neither penalizes the worship itself, interferes with how worship occurs, nor precludes churches from seeking alternative avenues to practice their faith. Moreover, absent creation of the forum, religious groups and others would have no right to use school space at all.[361]

Exclusion from school property will pose real hardships to some religious bodies with limited resources, especially in an expensive real estate market such as New York City. But this unfortunate reality cannot constitute a substantial *government*-imposed burden. A similar burden most likely existed in *Locke*, where some students desiring to pursue a devotional theology degree lacked their own resources to do so.[362] Such burdens, though real, reflect concerns and limitations independent of government action. This is particularly true where creation of a community forum is optional for schools; schools can decide not to let any community groups, including churches, use the facilities if they want.

Thus, the first two factors in the *Bronx Household* litigation are compatible with the type of "play in the joints" exception recognized in *Locke*. It is the third factor, concerning unique Establishment Clause concerns, where a significant difference emerges. This factor is certainly the most important one and, indeed, explains the primary rationale for the disparate treatment of religion not triggering heightened scrutiny in *Locke.* The *Locke* Court indicated that although disparate treatment of religion typically triggers heightened scrutiny, the Court will tolerate disparate treatment if designed to address sensitive issues of separation of church and state.[363] Thus, the Establishment Clause concern is not just one of three factors to be balanced, but is the lynchpin to the exception allowing disparate and disfavorable treatment of religion in limited situations.

And it is here that a major difference emerges between the concerns in *Locke* and those regarding worship services on public school property. As emphasized by the Court in *Locke*, the use of public funds to support clergy was a central concern giving rise to the Establishment Clause.[364] Although use of scholarship funds would not violate the Establishment Clause, because "the link between government funds and religious training [would be] broken by the

360. *See id.* at 720 (emphasizing prohibiting use of scholarship for devotional theology degree imposes no criminal or civil sanction).

361. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-46 (1983) (noting for limited public fora, state not under obligation to make fora available for speech); *see also* CHEMERINSKY, *supra* note 206, at 1137.

362. *See Locke*, 540 U.S. at 715-18.

363. *See id.* at 725 ("Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.").

364. *Id*. at 722-23.

independent and private choice of recipients," the Court nevertheless recognized the historical sensitivity of the issue. [365] In fact, the Court said there were "few areas in which a State's antiestablishment interests come more into play."[366]

The historical context of the First Amendment's adoption demonstrates this special sensitivity to use of public monies to fund clergy and ministry, which has often been viewed as a primary impetus for the Religious Clauses.[367] The Supreme Court has often looked to the debate regarding religious assessments in Virginia in 1786, and in particular Madison's *Memorial and Remonstrance*, as providing some evidence of the principles underlying the Establishment Clause. [368] Madison's *Memorial and Remonstrance*, written in opposition to a proposed assessment to support churches in Virginia, addressed the harm that government financial support of religion posed to liberty of conscience and the free exercise of religion. Subsequently, this document gave rise to the Virginia Bill for Religious Freedom, which similarly focused on financial support, asserting "[t]hat no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . ."[369]

To the extent that other states addressed church-state issues in the years immediately preceding the Constitution, they also focused on compelled worship and state-sponsored financial support for churches.[370] These state

365. Locke v. Davey, 540 U.S. 712, 719 (2004).

366. *Id.* at 722.

367. The colonies had a long history with various established churches, which in turn led to a tension with religious toleration. At the earliest stages of colonial development, establishment included a litany of church-state connections, such as voting restrictions and compulsory church attendance. However, by the time of the American Revolution, the concept of establishment was limited to various forms of financial support for churches and ministry, religious oaths for officials, and official state recognition of religion. *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 1-77 (1986); *see also* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1-26 (1994).

368. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 298, 298-304 (Robert A. Rutland, et al. eds., 1973); *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 n.28 (1973); Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947).

369. *See Bill for Religious Freedom*, 1786, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 51, 52 (Neil H. Cogan ed., 1987).

370. *See* PA. CONST. of 1776, ch. I, § II, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 369, at 32, 32. For example, the Pennsylvania Constitution of 1776 provided that, "[n]o man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will or consent." *Id.* Provisions in New Jersey, North Carolina, and Vermont similarly prohibited compelled worship and financial support of ministry and several other states enacted prohibitions on compelled worship and compelled financial support of ministry, but did permit, with consent, taxation for one's own religion. *See* N.J. CONST. of 1776, § XVIII, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 369, at 25, 25; N.C. CONST. of 1776, § XXIV, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 369, at 30, 30-31; PA. CONST. of 1776, ch. I, § II, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 369, at 32, 32; VT. CONST. of 1777, ch.I, § III, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 369, at 41, 41-42. For example, the Maryland Declaration of Rights stated

constitutional provisions enacted in the years immediately following the Federal Constitution arguably provide the best insights into the church-state concerns that animated the First Amendment. Though taking various forms, the state constitutions consistently addressed the dual concerns of compelled worship and financial support of churches and the ministry. Even these concerns were not universally shared, since a few states still continued their previously established practices of financial support to the church.[371] The opposition emerging during this time, however, was directed towards financial support of ministry and compelled worship. As noted, Madison's *Memorial and Remonstrance* expressed the same concerns, thereby further confirming the centrality of those concerns in our historical understanding of church-state issues.[372]

It is not surprising, therefore, that the Supreme Court in *Locke* was willing to grant deference to the State of Washington's concern about funding clergy education, especially when the burden on religion was quite minor. As noted, such funding would not violate the Constitution, since any state monies that might flow to religious instruction would result from the independent and private choice of the student.[373] The Court was willing, however, to acknowledge the special and significant historical concerns that accompanied state funding of ministers.[374]

No such historical concerns exist, however, for use of public schools or other public facilities for religious worship. Unlike financial support of ministry, a central concern that gave rise to the Establishment Clause, the historical record is devoid of concerns over use of public buildings for worship. If anything, use of public buildings for worship and religious meetings was accepted with little thought. As noted by the district court opinion in the *Bronx Household* case, the founders had no issue making public buildings available

that no person shall be "compelled to frequent or maintain, or contribute . . . [to] any particular place of worship, or particular ministry . . . ." However, the Maryland Constitution allowed the legislature to levy a general tax for the support of religion, granting each person the power to decide where the money should go. *See* MD. DECLARATION OF RIGHTS OF 1776, § 33-34, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 369, at 17, 17-18. Both Georgia and South Carolina had similar provisions. *See* GA. CONST. of 1777, § LVI, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 369, at 16, 16; S.C. CONST. of 1778, § XXXVIII, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 369, at 39, 39-41.

371. For example, both Massachusetts and Connecticut continued state financial support of established churches. *See* LEVY, *supra* note 367, at 29-49.

372. *See* CURRY, *supra* note 367, at 77 (reiterating Madison's Remonstrance's significance on disestablishment); LEVY, *supra* note 367, at 27-78 (explaining Madison's argument for religion as private affair not subject to governance); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 48-49 (1997) (describing purpose of Madison's Remonstrance against passing bill).

373. *See* Locke v. Davey, 540 U.S. 712, 719 (2004).

374. *See id.* at 722-23.

for worship.[375] Starting in 1795, George Washington permitted worship services in the U.S. Capitol building.[376] Thomas Jefferson attended worship services in the House of Representatives within a year of taking office, and continued to regularly do so throughout his presidency. James Madison similarly attended worship services in the Capitol during his two terms as president. Indeed, services continued there until after the Civil War. Further, the Supreme Court building, as well as the Treasury and War Office buildings, occasionally housed worship services.[377]

Thus, the strong historical concerns that informed the Court in *Locke* are nonexistent in the context of worship services in public schools. Further, as previously discussed, any such concerns under the Court's current Establishment Clause jurisprudence are minimal at best.[378] The Court has consistently held that the neutrality of any limited public forum that might include religious exercise mitigates Establishment Clause concerns.[379] This is particularly true under the Court's endorsement analysis, in which an objective observer would understand that worship services were permitted simply as part of the forum. Therefore, the Second Circuit was incorrect in characterizing Establishment Clause concerns as "substantial" and similar to those in *Locke*; they were far from it.[380]

This demonstrates that *Locke* is distinguishable from *Bronx Household* and similar situations where worship services are allowed in public schools

375. *Bronx Household IV.A*, 876 F. Supp. 2d 419, 436 (S.D.N.Y. 2012).

376. *Id*.

377. *See Religion and the Founding of the American Republic: Religion and the Federal Government, Part 2*, LIBRARY OF CONG., http://www.loc.gov/exhibits/religion/rel06-2.html, *archived at* http://perma.cc/MBL5-A46V (last visited Nov. 30, 2014). The Library of Congress, as part of a broader web exhibit on "Religion and the Founding of the American Republic," has a section discussing use of federal buildings, especially the Capitol Building, for worship services and religious meetings. Beginning with a subheading entitled "The State Becomes the Church: Jefferson and Madison," the site states:

> It is no exaggeration to say that on Sundays in Washington during the administrations of Thomas Jefferson (1801-1809) and of James Madison (1809-1817) the state became the church. Within a year of his inauguration, Jefferson began attending church services in the House of Representatives. Madison followed Jefferson's example, although unlike Jefferson, who rode on horseback to church in the Capitol, Madison came in a coach and four. Worship services in the House—a practice that continued until after the Civil War—were acceptable to Jefferson because they were nondiscriminatory and voluntary. Preachers of every Protestant denomination appeared. (Catholic priests began officiating in 1826). As early as January 1806 a female evangelist, Dorothy Ripley, delivered a camp meeting-style exhortation in the House to Jefferson, Vice President Aaron Burr, and a "crowded audience." Throughout his administration Jefferson permitted church services in executive branch buildings. The Gospel was also preached in the Supreme Court chambers.

Id.; *see also* Glaser, *supra* note 18, at 1074-76 (discussing historical use of public buildings for worship).

378. *See supra* Part III.

379. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995).

380. *See* Locke v. Davey, 540 U.S. 712, 720-22 (2004).

pursuant to a neutral and broader community-use policy. Although two of the three factors emphasized in *Locke*—the minimal burden imposed and lack of animus—are admittedly similar, the third factor, the significant Establishment Clause concerns grounded in history, is completely absent. This last factor appears to be the linchpin in *Locke*, and suggests that any exception to the general *Smith* and *Lukumi* prohibition on targeting religion for unfavorable treatment should not apply without it. Thus, strict scrutiny should apply, and the Board's policy would not meet this standard.

Admittedly, this free exercise analysis comes with a degree of uncertainty considering the limited nature of the *Locke* holding and the paucity of Supreme Court free exercise cases in this type of context. Unlike the Free Speech and Establishment Clause issues discussed in Parts III and IV, where the Supreme Court clearly and reasonably developed its analysis in the context of the limited public forum, the "play in the joints" analysis relied on in *Locke* remains somewhat embryonic. As such, this analysis suggesting that the school community-use policy excluding worship services violates the Free Exercise and Free Speech Clause, must be somewhat qualified.

Nonetheless, the conclusion that the school community-use policy violates the Free Exercise Clause is the most sensible one. Not only is *Locke* quite distinguishable, but applying strict scrutiny when religion is targeted for unfavorable treatment fits within the general tone and purposes of *Smith* and *Lukumi*. In the final analysis, however, the presence or absence of a Free Exercise violation is not dispositive of the issue, since unequal treatment of religious speech, which occurs when religious worship services are excluded from a community-use program, clearly violates freedom of speech.

VI. CONCLUSION

Government involvement with religion has long been, and continues to be, controversial. This is not surprising considering the dangers posed by government promotion of religion and the need to accommodate religious exercise. In recent years, the Supreme Court has sought to balance these competing concerns largely by focusing on neutral treatment of religion as required by the Free Speech and Free Exercise clauses. Doing so serves to avoid concerns under the Establishment Clause. This is particularly true in government created fora for speech, with the Court consistently holding that exclusion of religious speech from such fora violates the Free Speech Clause, and inclusion of religious speech on equal terms to other forms of speech does not violate the Establishment Clause.

For this reason, the Second Circuit's two recent decisions in the *Bronx Household* litigation upholding a New York City Board of Education policy excluding worship services from public schools were clearly wrong. Although schools need not open their facilities for worship services, once a public forum

is created providing access to various groups, the school may not exclude worship services. Contrary to the Second Circuit's conclusion that a worship service is an activity rather than speech, worship services are an expressive event falling within the First Amendment, consisting of elements such as prayer, singing, and preaching that are clearly considered speech. Moreover, any exclusion of worship services constitutes viewpoint discrimination, since views on some of life's most important questions are inevitably different when expressed in the context of worship, revealing beliefs not fully captured in other formats.

The Second Circuit also erred in concluding that there was a "strong basis" for the Board of Education to believe that permitting worship services in schools would violate the Establishment Clause. The Supreme Court has consistently held that the neutral treatment in a public forum mitigates any Establishment Clause concerns that might otherwise exist. In such situations, the content of any particular speech, religious or otherwise, is attributable to the participant in the forum, rather than government. For this reason treating religion neutrally also mitigates any endorsement concerns that might exist.

The exclusion of worship services would also likely violate the Free Exercise Clause, though this is admittedly less clear. Current free exercise jurisprudence, as established in *Smith* and *Lukumi*, provides that government actions that target religion with unique burdens are subject to strict scrutiny, which cannot be met with regard to excluding worship services from public schools. Although the Court held in *Locke* that exceptions might be made to this neutrality requirement where substantial Establishment Clause concerns exist, that would not be the case for worship services in schools. Unlike *Davey*, which included strong historical concerns about funding training for the ministry, no such historical concerns exist regarding use of public buildings for worship services; in fact, the historical record indicates the founders had no problem with using public buildings for worship. For that reason, the more general *Smith* and *Lukumi* standard should apply, making the distinct burden on worship services unconstitutional.