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THE ESTABLISHMENT CLAUSE
AND PUBLIC UNIVERSITIES:
DRAWING THE CONSTITUTIONAL LINE
BETWEEN PERMISSIBLE AND
IMPERMISSIBLE SUPPORT OF RELIGIOUS
STUDENT GROUPS

James E. Mitchell*

INTRODUCTION

The framers of the Constitution almost certainly did not contemplate the ramifications the First Amendment’s Establishment Clause would have, centuries later, on the modern American public university. But, thanks to the incorporation of the Bill of Rights, the Establishment Clause’s prescription that “Congress shall make no law respecting an establishment of religion” applies with equal strength to the states and their political subdivisions. One such subdivision, of course, is the state-run university.

Consider the following hypothetical. A village is looking to build a public community center on government property made up of ten vacant lots. The mayor proposes the establishment of a public square, consisting of a civic center, a courthouse, a hospital, a police station, a grammar school, a secondary school, a community college, a Catholic church, a Presbyterian church, and a temple for Reform Judaism. The mayor’s legal adviser, looking over the proposal, sees a possible constitutional issue, as building three places of worship would seemingly violate the Establishment Clause. “No, sir,” replies the mayor, “because the Establishment Clause only means that I have to be ne-

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1 U.S. Const. amend. I.

tral to religion, and that's exactly what I did. I didn't make all the proposals religious. I have places that deal with civic involvement, education, law enforcement, and a hospital. You can't say that I am being partial, or that I'm favoring civics over religion, or vice versa. I'm not being anything but neutral amongst the different religions, too. Our town is approximately one-third Catholic, one-third Presbyterian, and one-third Jewish, so I'm being neutral on that issue as well."

While the mayor is undoubtedly correct in defending his proposal as facially neutral, his lawyer is just as correct in spotting a constitutional violation. If the Establishment Clause stands for one proposition, it is that the government may not use public money to fund a religious institution or place of worship. Given their status as public entities, state universities are under the same Establishment Clause proscriptions as state governments, and they may not directly establish any church or religious institution. Of course, it would be highly unlikely for a public university to establish an official, school-sponsored religion. Religious student groups are, however, quite common at American colleges. Their existence at state schools raises the following constitutional question: To what extent may public universities support religious student groups without running afoul of the Establishment Clause?

The Supreme Court's recent ruling in Christian Legal Society v. Martinez suggests that there is a higher standard for religious groups seeking monetary support from state universities than for those merely seeking use of school facilities. While the standard for granting religious groups access to school facilities may be low, common sense dictates that there should be a limit to this type of support, as no one would realistically contend that any religious group could constitutionally rent a public facility and transform it into a place of worship.

See id. at 16 ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.").

For example, Penn State University, at its University Park campus, offers 58 "Religious/Spiritual" clubs, such as the Alliance Christian Fellowship, the Byzantine Catholic Ministry, the Hindu Students Council, the Korean Buddhist Organization, and the Muslim Student Organization. See Student Organization Directory, Penn St. Union & Student Activities, http://www.sa.psu.edu/usa/studentactivities/search results.asp?orgcat=Religious/Spiritual (last visited Sept. 24, 2011).

See id. at 2978–81, 2986.

This Note attempts to discern that line between constitutional and unconstitutional state support of religious student groups at public universities. Part I describes four key cases composing the Supreme Court's modern jurisprudence in this area. Part II analyzes the Court's holding in *Christian Legal Society v. Martinez*, and Part III examines a case, recently decided by the Court of Appeals for the Seventh Circuit, that directly addresses the question presented here. Lastly, Part IV sets forth a standard for judging where university support of religious groups violates the Establishment Clause.

**I. THE SUPREME COURT ON THE ESTABLISHMENT CLAUSE AND PUBLIC UNIVERSITIES**

Any discussion of the Supreme Court's Establishment Clause jurisprudence should begin with *Lemon v. Kurtzman*, the most canonical case regarding the Establishment Clause and public education. At issue in *Lemon* were two state statutes prescribing government aid to religious schools. In striking down the statutes as unconstitutional, Justice Burger, writing for the majority, devised a three-pronged test for ascertaining whether state support of religious institutions contravenes the Establishment Clause. The *Lemon* test is as follows: For a statute to be permissible under the Establishment Clause, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."  

In many modern Establishment Clause cases, the Court has applied *Lemon* when determining the constitutionality of a given statute. Since its inception, however, the *Lemon* test has been slightly recalibrated and criticized somewhat. Nevertheless, *Lemon* is still

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8 403 U.S. 602 (1971).
9 See id. at 606.
10 See id. at 612–13.
11 *Id.* (citation and internal quotation marks omitted).
13 The most notable instance of such recalibration arose in *Agostini v. Felton*, 521 U.S. 203 (1997). There, the Court reduced the "excessive entanglement" criterion to only a factor to be considered in determining a statute's primary effect. See id. at 232–33.
14 See, e.g., Bd. of Educ. v. Grumet, 512 U.S. 687, 719–20 (1994) (O'Connor, J., concurring) (arguing that the *Lemon* standard's broad guidelines have become "more and more amorphous and distorted"); Lamb's Chapel v. Ctr. Moriches Union Free
good law and therefore provides a helpful analytical backdrop for examining the Establishment Clause concerns raised at public universities.

A. Widmar v. Vincent

A decade after Lemon, the Court again examined the Establishment Clause in Widmar v. Vincent.15 There, the Court considered the constitutional ability of a public university, having made its facilities generally available to all registered student groups, to deny such access to a registered religious group.16 The Widmar plaintiffs attended the University of Missouri and were members of Cornerstone, a religious student group.17 After four years of granting Cornerstone registered status, the University rescinded Cornerstone's ability to conduct meetings on campus.18 The Supreme Court found for Cornerstone, holding that, "[h]aving created a forum generally open to student groups," the University could not "enforce a content-based exclusion of religious speech."19

Writing for the Widmar majority, Justice Powell focused on the "generally open" nature of the University's policy regarding access to campus facilities.20 Where a state university creates a generally open forum, "[t]he Constitution forbids [it] to enforce certain exclusions from [the] forum generally open to the public, even if it was not required to create the forum in the first place."21 The Widmar Court thus rejected the university's claimed interest in following the Estab-

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16 See id. at 264–65.
17 See id. at 265.
18 See id.
19 Id. at 277.
20 See id. at 267. While Widmar characterizes the forum at issue as a "generally open" one, later cases, including Christian Legal Society v. Martinez, modify the analysis. When a university provides a forum to student groups, the forum created is a "limited public forum." Christian Legal Soc'y v. Martínez, 130 S. Ct. 2971, 2984 n.12 (2010); see infra notes 91–93 and accompanying text.
21 Widmar, 454 U.S. at 267–68. In order to justify an exclusion of religious content from a generally open forum, the burden is on the state—or, as here, the public university—to show that its exclusion is justified by a "compelling state interest." Id. at 269–70.
lishment Clause as a valid justification for excluding religious groups from campus facilities.22

B. Lamb's Chapel

A dozen years after Widmar, the Court revisited many of the same issues in a slightly different context in Lamb's Chapel v. Center Moriches Union Free School District.23 Lamb's Chapel concerned a local school district's refusal to grant a church's application to use school facilities to present a religious film series.24 The church, Lamb's Chapel, had applied to the school district for permission to present films that dealt with family and child-rearing concerns from a Christian viewpoint.25 The district rejected Lamb's Chapel's request, invoking a school board regulation that "[t]he school premises shall not be used by any group for religious purposes."26

Lamb's Chapel presented the question "whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."27 Therefore, the Court considered the Free Speech Clause at issue, not either of the Religion Clauses.28 The speech clause, according to the Court, "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."29 The Court,

22 See id. at 271. Accordingly, a university's interest in following the Establishment Clause was not considered to have met the compelling state interest standard necessary for exclusion. See id. But see Nelson Tebbe, Excluding Religion, 156 U. Pa. L. Rev. 1263, 1267–68 (2008) (arguing that the government should be able to exclude religious groups from receiving certain benefits, even where the Establishment Clause does not require such an exclusion).
24 See id. at 387.
25 See id. at 387–88.
26 Id. at 387 (citation omitted).
27 Id. at 393. Implicit to this line of thinking is the premise that while the government is creating a forum for speech, it is the private individual who is in fact speaking, not the government. See Claudia E. Haupt, Mixed Public-Private Speech and the Establishment Clause, 85 Tul. L. Rev. 571, 573 (2011) (explaining how private speech in a government forum implicates the Free Speech Clause, while government speech does not).
28 See Lamb's Chapel, 508 U.S. at 393–94.
29 Id. at 394 (internal quotation marks omitted). Viewpoint discrimination is generally considered the primary evil the Free Speech Clause was meant to combat. See Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 546 (1980) (Stevens, J., concurring) ("A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view . . . is the purest example of a law abridging the freedom of speech . . . .") (internal quotation marks omitted)); Leslie
therefore, implicitly considered a dichotomy between free speech and free exercise cases. Where a religious group aims to speak on a topic that is not per se religious, such as child-rearing, from a viewpoint informed by its religious faith, the implicated right is the right to free speech.\(^{30}\) This rule suggests, conversely, that where speech or conduct is solely religious and does not relate to a secular matter, the Free Exercise Clause is the constitutional guarantee implicated.\(^{31}\) Accordingly, because the films at issue dealt with secular topics from a religious perspective,\(^{32}\) the Court decided the case under the Free Speech Clause.\(^{33}\) Concluding that any nonreligious film series on family and child-rearing would be allowed under the school district's policy, and that the only reason given for the district's rejection of the Lamb's Chapel application was the films' religious nature, the Court held the denial of the church's application to be unconstitutional viewpoint discrimination.\(^{34}\)

The Court did consider the effect of the Establishment Clause on the public school's provision of access to the church, but it considered Widmar wholly controlling on this point.\(^{35}\) As in Widmar, the Court found "the posited fears of an Establishment Clause violation," posed by allowing the church group access to school facilities, to be "unfounded."\(^{36}\) Because the school district property was open to a variety of groups, religious and nonreligious, the Court saw little chance that anyone could have concluded the state was sponsoring the religious message at issue. Echoing Widmar, the Court decided that such a fear was baseless, given the myriad of student groups provided with access to university facilities.\(^{37}\)

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\(^{30}\) See Lamb's Chapel, 508 U.S. at 393–94.


\(^{32}\) See Lamb's Chapel, 508 U.S. at 388 n.3 (describing the film series, which addressed such secular topics as fatherhood, relationships, adolescence, abortion, pornography, and alcoholism).

\(^{33}\) See id. at 393–94.

\(^{34}\) See id. at 394.

\(^{35}\) See id. at 395.

\(^{36}\) Id.

\(^{37}\) See id. Creating the perception of state sponsorship or endorsement of religion is commonly considered an Establishment Clause violation. See Lee v. Weisman, 505 U.S. 577, 587 (1992) (holding that a public school violated the Establishment Clause when it arranged for a religious prayer to be said at graduation ceremonies, as
C. Rosenberger v. University of Virginia

Both Widmar and Lamb's Chapel dealt exclusively with the provision of state facilities—physical, tangible space—to religious student groups. A couple of years after Lamb's Chapel, in Rosenberger v. Rector & Visitors of University of Virginia, the Court considered the constitutionality of a public university's monetary support of religious groups. At issue in Rosenberger was a request by a religious student group at the University of Virginia for reimbursement of the printing costs of a campus magazine. The University regularly reimbursed student groups with money from the Student Activities Fund (SAF), an account compiled from a mandatory student fee.

The editors of "Wide Awake: A Christian Perspective at the University of Virginia" described the contested publication as "offer[ing] a Christian perspective on both personal and community issues." The magazine presented traditional Christian prayer and imagery, as well as articles addressing secular student concerns, such as racism, stress, and eating disorders. The school ultimately rejected Wide Awake Productions' (WAP) request for reimbursement. The University based its conclusion on a provision of the SAF policy prescribing that money from the fund may be used to support "news" or "media" student groups, but not to support "religious activities."

The Court's holding in Rosenberger was two-fold. First, it held that the University violated WAP's constitutionally protected free speech the school's actions constituted "a state-sponsored and state-directed religious exercise"); infra note 164 and accompanying text.

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39 See id. at 822-23.
40 See id. at 827.
41 See id. at 824.
42 Id. at 826 (citation and internal quotation marks omitted).
43 See id. The editors of Wide Awake "committed the paper to a two-fold mission: 'to challenge Christians to live, in word and deed, according to the faith they proclaim and encourage students to consider what a personal relationship with Jesus Christ means.'" Id. (citation omitted). Additionally, each page of the magazine, as well as the end of every article, was marked with a traditional Christian cross. See id.
44 See id. This latter type of material in Wide Awake evokes the Lamb's Chapel standard of speech "from a religious perspective" that is protected under the Freedom of Speech Clause. See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1995).
45 See Rosenberger, 515 U.S. at 827.
46 See id. at 825 (defining "religious activity" as "any activity that 'primarily promotes or manifests a particular belief[f] in or about a deity or an ultimate reality'" (citation omitted)).
right when it refused to make the reimbursement. The Court made two necessary logical steps to reach this result. First, the Court extended the open-access rationale of Widmar and Lamb's Chapel to the provision of monetary funding. "The SAF is a forum more in a metaphysical than in a spatial or geographic sense," wrote Justice Kennedy for the majority, "but the same principles are applicable." By characterizing the question of monetary support as rather one of equal access, the Court reformatted the issue presented in Rosenberger into a more standard constitutional question.

The majority's second analytical step involved the characterization of the Wide Awake publication as analogous to the film series in Lamb's Chapel: speech on a secular subject from a religious viewpoint. The Court considered the University's exclusion of WAP from the SAF to be based on the group's viewpoint, rather than the substance of the group's speech. This classification was determinative for the purposes of the Court's free speech analysis, given the diverging legal standards for viewpoint discrimination and content discrimination: Viewpoint discrimination is per se unconstitutional in a limited public forum, while discrimination based on a speaker's content is permissi-

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47 See id. at 837.
48 The phrase "logical steps" is putting it quite mildly. As Justice Souter's dissent makes clear, the majority's analysis is problematic in two respects. Characterizing the SAF as a forum equivalent to the campus facilities in Widmar or the school building in Lamb's Chapel ignores one of the central tenets of the Court's Establishment Clause jurisprudence—namely, that "[u]sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause." Id. at 868 (Souter, J., dissenting). Secondly, the majority's characterization of the nature of the magazine as one that is merely from a "religious viewpoint" understates the level of proselytizing and religion invocation contained in the magazine. See id. at 865–68. "Each issue of Wide Awake," Justice Souter opines, "echoes [St. Paul's] call to accept salvation." Id. at 865. Even articles on seemingly secular topics—such as the all-too-common problem of eating disorders, which undoubtedly pervades both public universities and private religious ones—contain religious commands and adulations. "Christ is the Bread of Life (John 6:35). Through him, we are full. He alone can provide the ultimate source of spiritual fulfillment which permeates the emotional, psychological, and physical dimensions of our lives." Id. at 867. The Court’s questionable classification, of course, allows the majority to view the University’s exclusion as per se impermissible viewpoint discrimination. See id. at 837 (majority opinion).
49 See id. at 830.
50 Id. As in Lamb's Chapel, the forum created here constituted a limited public forum. See id. at 829–30.
ble if it is reasonable in light of the state's interest in creating the forum.\textsuperscript{52} By classifying Wide Awake's content as religious in viewpoint rather than in substance, the Court concluded, as a logical consequence, that "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."\textsuperscript{53} Therefore, the University was engaging in viewpoint discrimination when it barred WAP from receiving monetary support that was available to nonreligious groups.\textsuperscript{54}

This determination did not end the \textit{Rosenberger} Court's inquiry, as it still had to decide whether the University's viewpoint discrimination was permissible in light of the school's interest in obeying the Establishment Clause.\textsuperscript{55} In holding that the Establishment Clause did not excuse the denial of WAP's application for SAF funding, the Court construed the Establishment Clause as requiring "neutrality towards religion."\textsuperscript{56} A university fund for student clubs that distributed money on an impartial basis—not distinguishing between religious and nonreligious groups—would meet such a standard of neutrality.\textsuperscript{57}

\textbf{D. Good News Club v. Milford}

At first blush, the holding in \textit{Good News Club v. Milford Central School}\textsuperscript{58} seems unsurprising in light of prior case law. The plaintiffs in \textit{Good News Club} were sponsors of a private Christian organization whose aim was to provide after-school religious instruction for children.\textsuperscript{59} Once the school denied the organization's request to be

\begin{footnotesize}
\begin{enumerate}
\item \textit{Rosenberger}, 515 U.S. at 831.
\item See id. at 837.
\item See id.
\item \textit{Id.} at 839. The Court found this "guaranty of neutrality [to be] respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." \textit{Id.} Looking at the Establishment Clause as commanding government neutrality switches the focal point of the analysis from the character of the government action to the effect on the individual. \textit{See Patrick M. Garry, An Equal Protection View of the First Amendment}, 28 \textit{Quinnipiac L. Rev.} 787, 815 (2010) (characterizing the neutrality approach as an analogue to the Court's equal protection jurisprudence, wherein individuals have the right to be free from government discrimination).
\item See \textit{Rosenberger}, 515 U.S. at 840.
\item 533 U.S. 98 (2001).
\item See id. at 103.
\end{enumerate}
\end{footnotesize}
allowed to have weekly meetings in the school cafeteria after school hours, the plaintiffs challenged the denial as a violation of their free speech rights.60 The Court, relying primarily on *Lamb’s Chapel* and *Rosenberger*, held that the school’s exclusion of the club from the limited public forum it had created constituted impermissible viewpoint discrimination,61 and that the Establishment Clause did not excuse such a violation.62

Despite this seemingly routine application of precedent, the diametrically opposed interpretations of the religious activities at the heart of *Good News Club* are of greater import. Both the District Court for the Northern District of New York and the Court of Appeals for the Second Circuit upheld the school’s rejection of the Good News Club’s application.63 The District Court determined that, as the club’s “subject matter is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under [the school’s] use policies,”64 the club’s exclusion was not unconstitutional viewpoint discrimination.65 The Court of Appeals, likewise, did not view the content of the Good News Club’s speech as secular speech delivered from a religious viewpoint, but rather as “quintessentially religious” material “fall[ing] outside the bounds of pure moral and character development.”66

The dissents of Justice Stevens and Justice Souter also treat the content of the religious meetings at issue as inherently different from speech made from a religious perspective. Justice Stevens’s dissent compartmentalizes this type of speech, embodied by the *Lamb’s Chapel* film series, as only one of three distinct categories of religious speech.67 The other types, according to Justice Stevens, are “religious

60 See id. at 103–04.
61 See id. at 111–12.
62 See id. at 119.
63 See id. at 104–05.
65 See id. at 160.
67 See Good News Club, 533 U.S. at 130 (Stevens, J., dissenting). Of course, there is scholarly disagreement with the premise that religious speech can be compartmentalized into distinct categories. See, e.g., Norman T. Deutsch, *May Religious Worship Be Excluded From a Limited Public Forum? Commentary on the Ninth Circuit Court of Appeals Decision in Faith Center Church Evangelistic Ministries v. Glover*, 31 U. HAW. L. REV. 29, 50 (2008) (arguing that, as “much of religious worship in fact involves verbalized points of view,” religious belief cannot be adequately considered conceptually separate from other viewpoints). Further, the idea that different types of religious speech
speech that amounts to worship” and speech “aimed principally at proselytizing or inculcating belief in a particular religious faith.”

According to Justice Stevens, a state should be able to exclude speakers engaging in the latter two types of speech from a limited public forum, while leaving it open to groups engaging in the first type of Lamb’s Chapel speech.

Justice Souter’s dissent gives considerable attention to the evangelical nature of the Good News Club’s meetings. Citing the findings of the District Court, Justice Souter recounts a sample meeting of the club where “children [were] instructed that [t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him.” Additionally, the leaders of the club would frequently give separate instruction to “unsaved” children in order that they could be “saved.”

Justice Souter thus argued that, as the meetings were clear attempts at religious instruction and conversion and not merely discussion from a Christian perspective, the district engaged in permissible content discrimination when it excluded the club from meeting at the school.

Despite this uniformity of decision, the majority in Good News Club did not consider the meetings at issue to be any different from the contested speech in Lamb’s Chapel. Because the school district’s policy regarding after-school use permitted discussion of “the development of character and morals from a religious perspective,” and because it was “clear that the Club teaches morals and character devel-

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68 Good News Club, 533 U.S. at 130 (Stevens, J., dissenting). To illustrate that such categories of speech can be coherently compartmentalized, Justice Stevens made an analogy to different types of political speech. According to Justice Stevens, “just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship.” Id. at 132.

69 See id. at 131–33.

70 Id. at 137 (Souter, J., dissenting) (internal quotation marks omitted).

71 See id. at 137–38. Such unabashed proselytizing certainly appears to go beyond speech informed by a religious perspective. For an argument describing how the Court’s holding in Good News Club ignores the coercive effects of such speech on schoolchildren and accordingly constitutes more than mere speech from a religious viewpoint, see Steven K. Green, All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools, 42 U.C. Davis L. Rev. 843, 870–71 (2009).

72 See Good News Club, 533 U.S. at 134–36 (Souter, J., dissenting).

73 See id. at 108–10 (majority opinion).
opment to children . . . even if it does so in a nonsecular way," the Court "[found] it quite clear that [the school district] engaged in viewpoint discrimination when it excluded the Club from the after-school forum." Additionally, the Court found that permitting the club to meet at the school was consistent with the Establishment Clause, which it viewed as requiring neutrality between religion and nonreligion. Thus, the Good News Club Court held that, far from requiring the exclusion of the religious group from school facilities, the Establishment Clause encouraged, or perhaps even required, the school grant the club access.

II. Christian Legal Society v. Martinez

In all four of the previously discussed Established Clause cases, the Supreme Court found for the complaining religious group and against the law or school policy denying the group a benefit. Further, in both Rosenberger and Good News Club, the Court construed the Establishment Clause as requiring neutrality to, not separation from, religion. This trend in the modern Court’s jurisprudence resembles the theory of government accommodation of religion, which has been

74 Id. at 108.
75 Id. at 109.
76 See id. at 114.
77 See id. ("The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. . . . [The school district] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."). The divide between those that believe the First Amendment prohibits government aid to religion and those who believe such aid is constitutionally required reflects the expansive gulf between the various methodological approaches to the Establishment Clause. Compare Tebbe, supra note 22, at 1271 (arguing that government exclusion of religion is constitutional and justifiable because, “[w]hen the government singles out religious actors and entities for denials of support, it frequently leaves them just as free to observe their faith as they were before the government program existed”), with Patrick M. Garry, Religious Freedom Deserves More Than Neutrality: The Constitutional Argument For Nonpreferential Favoritism of Religion, 57 FLA. L. REV. 1 (2005) (criticizing the neutrality approach for failing to adhere to the broad, pro-religion original understanding of the Establishment Clause, and claiming that government preferential treatment of religion is constitutional). 78 See Good News Club, 533 U.S. at 113–14; Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839–40 (1995); Edward Rubin, Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause, 63 VAND. L. REV. 763, 785 (2010) (explaining how the neutrality approach to the Establishment Clause "forbids government from favoring one religion over another, but is distinguishable from strict separation . . . because it also forbids the government from favoring secularism over religion").
promoted by the Court's more conservative members.\textsuperscript{79} However, the religious accommodation approach has its limits, as evidenced by the Court's decision in \textit{Christian Legal Society v. Martinez}.\textsuperscript{80}

The University of California Hastings College of the Law ("Hastings") offers student groups, through its Registered Student Organization (RSO) program, the ability to obtain school-approved status. Becoming registered under the RSO entitles groups to a number of benefits, including the ability to seek monetary support, place announcements in weekly school newsletters, advertise on bulletin boards, and apply for permission to use the school's facilities for meeting space.\textsuperscript{81} The law school conditions RSO status on a nondiscrimination policy that obliges all registered groups to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."\textsuperscript{82} Essentially, for a student group at Hastings to receive school sponsorship and monetary support, it must permit any interested student into the group.\textsuperscript{83}

The plaintiff-petitioners in \textit{Martinez} were members of a student chapter of the national Christian Legal Society (CLS).\textsuperscript{84} The group at Hastings, in accordance with the national organization's requirements, requires all student members to sign a "Statement of Faith" and to pledge to follow certain Christian principles.\textsuperscript{85}

\textsuperscript{79} See, e.g., \textit{Lee v. Weisman}, 505. U.S. 577, 645 (1992) (Scalia, J., dissenting) ("[T]he longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it."); see also Christopher L. Eisgruber & Lawrence G. Sager, \textit{Religious Freedom and the Constitution} 95 (2007) (describing the religious accommodation theory as one asserting that religious "groups and individuals are entitled to be free from discrimination on the basis of the spiritual foundations of their [beliefs]"); S. Ezra Winn, \textit{Recent Developments: Constitutional Law—First Amendment—Religious Activities in State Universities}, 49 TENN. L. REV. 623, 627 (1982) (demonstrating the accommodation-oriented notion that "the denial of . . . incidental benefits would make government the adversary of religion in contradiction to the command of neutrality set forth in the Establishment Clause").

\textsuperscript{80} 130 S. Ct. 2971 (2010).

\textsuperscript{81} See id. at 2979.

\textsuperscript{82} Id. (citation and internal quotation marks omitted).

\textsuperscript{83} See id. at 2979–80. The challenging student group in the case contended that the relevant Hastings policy was merely one of nondiscrimination, rather than the all-comers policy which the school adopted, according to the group, only after the school rejected the group's application. See id. at 2982. For the purposes of this Note, it is enough to say that the Court, after a detailed discussion, accepted the trial court's finding that the policy at issue was the all-comers policy. See id. at 2982–84.

\textsuperscript{84} See id. at 2980.

chapter interpreted this requirement as excluding from membership any person who practices "unrepentant homosexual conduct," as well as any person "hold[ing] religious convictions different from those in the Statement of Faith." The Hastings administration, having determined that CLS discriminated on the basis of sexual orientation and religion, rejected the group's application for RSO status. Nevertheless, the school agreed to provide CLS with access to Hastings facilities for the purposes of meetings and activities, as well as access to school chalkboards and bulletin boards. Consequently, the primary deprivation suffered by CLS was exclusion from the money allocated to school-sponsored RSOs.

A divided Supreme Court upheld Hastings' all-comers policy. Justice Ginsburg, writing for the majority, asserted that the limited public forum analysis of Lamb's Chapel, Rosenberger, and Good News Club was the correct judicial yardstick for measuring the policy's validity, as Hastings had created such a forum through its RSO program. The Court deemed the policy constitutional, as it was both reasonable and viewpoint neutral. The Court distinguished Widmar and Rosenberger as cases where the challenged university policy disfavored certain groups on the basis of their religious character. Here, by contrast, Hastings did not draw distinctions based on the content of CLS's speech or its religious affiliation, but rather applied the all-com-

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86 Martínez, 130 S. Ct. at 2980 (citation omitted).
87 See id.
88 See id. at 2981.
89 See id. at 2979–81.
90 See id. at 2995.
91 See id. at 2984 & n.12.
92 See id. at 2989–93. In the Court's reasonability analysis, Justice Ginsburg highlighted a number of justifications advanced by Hastings for its all-comers policy. An all-inclusive policy for student groups, the school argued and the Court accepted, would provide all students with equal access to the social and educational opportunities offered by such groups; it would ensure that no student would be forced to fund, through the mandatory student activities fee, a student group that he or she would not be able to join; it would encourage toleration and cooperation between students; and it would reflect the school's decision not to subsidize discriminatory conduct. See id. at 2989–91.
93 See id. at 2993–94. The Court found it "hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers." Id. at 2993. But see Jack Willems, The Loss of Freedom of Association in Christian Legal Society v. Martínez, 130 S.Ct. 2971 (2010), 34 Harv. J.L. & Pub. Pol'y 805, 815 (2011) (asserting that Hastings's all-comers policy infringed on the right of CLS to express its viewpoint via the membership requirements at issue).
ers policy to all organizations seeking RSO status. While the Court acknowledged that such a policy would likely have a greater effect on some groups than others—i.e., a greater effect on religious groups than nonreligious ones—the Court deemed such a burden merely incidental. CLS's argument that the policy discriminated against the group on the basis of the members' religious viewpoint was therefore unavailing, as the Court concluded that the policy targeted the act of exclusion itself, rather than the religious beliefs motivating the exclusion.

Additionally, the Court gave special credence to the fact that CLS was not barred from access to the school's facilities. Despite its lack of RSO status, CLS was still permitted to meet, advertise, and host activities at the school. This level of access informed the Court's conclusion that the all-comers policy was a reasonable one. The Court reasoned that "when access barriers are viewpoint neutral, [it is constitutionally] significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers." Concluding that what CLS was seeking was "effec-

\[95 \text{ See Martinez, 130 S. Ct. at 2993.}\\
\[96 \text{ See id. at 2994 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").); see also Julie A. Nice, How Equality Constitutes Liberty: The Alignment of CLS v. Martinez, 38 Hastings Const. L.Q. 631, 666-67 (2011) (comparing the Court's tendency to permit incidental effects on associational freedom to its Equal Protection jurisprudence, where the "Court refuses to apply higher scrutiny unless the Court is persuaded that the government's discrimination is intentional"). But see William E. Thro & Charles J. Russo, A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez, 261 Educ. L. Rep. 473, 485 (2010) (arguing that denying groups access to limited public forums will have an unduly burdensome effect on their free-\\
\[97 \text{ See Martinez, 130 S. Ct. at 2994. The Court here suggests a dichotomy between religious belief, which may not be regulated, and action upon that religious belief, which may be. The Court has recognized such a distinction in the past, but the view does have its critics. Compare Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73-74 (1977) (describing how, under Title VII of the Civil Rights Act, an employer may permissibly fail to accommodate an employee's religious practice if such an accommodation would pose an undue hardship, but may never discriminate on the basis of belief), with Willems, supra note 93, at 817 (arguing that limiting the ability of a group like CLS to set membership criteria is, in itself, a form of viewpoint discrimination).}\\
\[98 \text{ See Martinez, 130 S.Ct. at 2986, 2991.}\\
\[99 \text{ See id. at 2981, 2991.}\\
\[100 \text{ See id. at 2991.}\\
\[101 \text{ Id.}
tively a state subsidy,"\textsuperscript{102} it was not unreasonable to exclude CLS from the monetary benefits of RSO status while still allowing the group equal access to the school’s facilities.\textsuperscript{103}

III. THE SOUTHWORTH SAGA

The Widmar-Lamb’s Chapel-Rosenberger-Good News Club quartet of cases, alongside \textit{Martinez}, provides the major precedent governing universities and religious student groups. An examination of \textit{Badger Catholic, Inc. v. Walsh}, a case recently decided by the Court of Appeals for the Seventh Circuit, reveals the inconsistencies in the Supreme Court’s jurisprudence in this area of the law. The rest of this Note will attempt to elucidate a new standard, post-\textit{Martinez}, for evaluating Establishment Clause cases at public universities.

A. Board of Regents v. Southworth

In \textit{Board of Regents of the University of Wisconsin System v. Southworth},\textsuperscript{104} the Court considered the constitutionality of the University of Wisconsin’s mandatory student activity fee.\textsuperscript{105} Students at the university challenged the fee on First Amendment grounds, claiming that the imposition of a fee used to support “political or ideological” student groups violated their free speech and free exercise rights.\textsuperscript{106} The \textit{Southworth} Court rejected the claim, holding: “[T]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”\textsuperscript{107} The Court reasoned that the university’s levying of a mandatory activities fee did implicate the students’ free speech rights, but nevertheless it found the fee constitutional. As long as the university allocated the funds drawn from the fee on a viewpoint-neutral basis, the Court considered the students’ constitutional rights to be sufficiently protected.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{102} \textit{Id.} at 2986.
\item \textsuperscript{103} \textit{See id.} at 2991–92. \textit{But see} Thro & Russo, \textit{supra} note 96, at 484 (arguing that “[r]estricting the freedom of association as a condition of accessing a limited public forum violates the doctrine of unconstitutional conditions,” which posits that the government may not deprive an individual of a constitutional right in exchange for a benefit).
\item \textsuperscript{104} 529 U.S. 217 (2000).
\item \textsuperscript{105} \textit{See id.} at 221.
\item \textsuperscript{106} \textit{See id.} at 227.
\item \textsuperscript{107} \textit{Id.} at 221.
\item \textsuperscript{108} \textit{See id.} at 233.
\end{itemize}
B. Badger Catholic, Inc. v. Walsh

While the outcome reached in Southworth was unambiguous—all nine Justices agreed that the university’s activities fee was constitutional—the University of Wisconsin controversy did not end there. With the ruling in hand to allocate the funds on a viewpoint-neutral basis, the school rejected an application from a religious student group named Badger Catholic. The university’s policy provided that “[i]t [was] willing to use student activity fees for . . . dialog, discussion, or debate from a religious perspective, but not for anything that it labels worship, proselytizing, or religious instruction.” While the university funded a number of Badger Catholic programs under the “religious perspective” prong of its policy, it refused to fund the group’s more sectarian activities, such as spiritual appointments with clergy members and a summer retreat involving masses and communal prayer sessions. Upon Badger Catholic’s challenge, the District Court for the Western District of Wisconsin entered a declaratory judgment in the group’s favor, holding that the university had to reimburse Badger Catholic for the cost of the activities at issue.

The Court of Appeals for the Seventh Circuit affirmed, holding that the viewpoint-neutral allocation of money for Badger Catholic’s religious activities would not violate the Establishment Clause. By refusing to allocate funds for Badger Catholic’s “prayer” and “sectarian instruction,” the university had engaged in impermissible viewpoint discrimination. The university could not bar the group from access to money from the activities fund because, “[o]nce it creates a public forum, a university must accept all comers within the forum’s scope.”

109 See id. at 219. Justice Souter, joined by Justice Stevens and Justice Breyer, concurred with the Court’s finding the student activities fee constitutional. See id. at 236 (Souter, J., concurring). Justice Souter would not have found the viewpoint-neutral allocation of the funds derived from the activities fee to have been determinative; rather, he would have rested the holding on the lack of a sufficient First Amendment interest on behalf of the protesting students. See id.
110 See Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 776 (7th Cir. 2010).
111 Id. at 777.
112 Id. at 777.
113 Id. at 783 (Williams, J., dissenting).
115 See Badger Catholic, Inc., 620 F.3d at 778.
116 Id. at 781.
117 Id. at 780.
The Badger Catholic court consciously withheld from deciding the case until the Supreme Court decided Martinez. The panel found Martinez controlling, declaring that "[t]here can be no doubt after Christian Legal Society that the University’s activity-fee fund must cover Badger Catholic’s six contested programs, if similar programs that espouse a secular perspective are reimbursed." Further, it relied on the Supreme Court’s characterization of Widmar as "a case holding that refusing to allow ‘religious worship and discussion’ in a public forum is forbidden viewpoint discrimination." Relying on these precedents, the panel had little difficulty striking down the university’s withholding of funds from Badger Catholic.

C. Judge Williams’s Dissent

Judge Williams of the Seventh Circuit dissented in Badger Catholic, as she viewed the University’s decision to financially support student groups engaging in speech from a religious viewpoint, but to withhold support for activities constituting “pure religious practice,” as constitutionally permissible. Because Judge Williams’s dissent applied the Supreme Court’s limited public forum analysis from Martinez and drew a constitutionally legitimate line between speech from a religious viewpoint and speech or conduct that is wholly religious in character, the reasoning of her dissent should be adopted over that of the Badger Catholic panel.

Judge Williams’s dissent properly characterizes the student activities fund as a limited public forum, rather than a generally open one. This classification follows Martinez, where the Court characterized Hastings’s RSO fund as a limited public forum. Thus, the panel in Badger Catholic erred in calling the university’s activities fund a generally open “public forum,” rather than a limited one.

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118 See id. at 781.
119 Id.
120 Id.
121 See id. at 777–78.
122 Id. at 787 (Williams, J., dissenting).
123 See id. at 783.
124 See id.
126 Badger Catholic, Inc., 620 F.3d at 777 (majority opinion).
127 In fact, the panel for the majority in Badger Catholic does not mention the phrase “limited public forum” a single time. See id. at 775–82; see also David A. Thomas, Whither the Public Forum Doctrine: Has This Creature of the Courts Outlived Its Usefulness?, 44 REAL. PROP. TR. & EST. L.J. 637, 685–86 (2010) (listing locales the Court has defined as limited public forums, including a conference room in a public library and a local community center).
ollowing the Court's limited public forum doctrine, viewpoint discrimination by the University of Wisconsin is unconstitutional, while content discrimination is permissible as long as such discrimination is reasonable.\footnote{128}

With this distinction in mind, the question becomes whether Badger Catholic's activities that are "mostly worship, proselytizing or prayer"\footnote{129} more greatly resemble speech on a secular topic from a religious point of view—in which case, the university's rejection of support would be impermissible—or rather a unique, nonsecular category of speech that the university could justifiably exclude from its limited forum. The majority in Badger Catholic failed to see such a distinction, as it considered all of the student group's activities, no matter how sectarian, to be religious speech protected by the principle of viewpoint neutrality.\footnote{130} This broad conception of religious speech, however, is not consistent with the principles of viewpoint and content discrimination and, more generally, the distinction between the Free Speech Clause and the Religion Clauses.

The viewpoint-neutrality doctrine requires the state to allow all views be heard on a subject if the state has already permitted some views on that subject be heard. For example, if a school allowed a group of Lady Gaga fans to rent the school gymnasium for a meeting of their fan club, the school could not then deny a corresponding application from an anti-Gaga group. To frame the hypothetical in slightly more relevant terms, if a school had opened its doors to the Lady Gaga fan club, the school could not then reject a religious group, whose religious convictions animated a disapproval of Gaga, from meeting in that same forum. No matter how religiously motivated the group's anti-Gaga animus were, the group would still be allowed to speak on the subject if the pro-Gaga fans had been permitted access.

Most subjects of popular discussion, from Lady Gaga and Harry Potter to abortion and the economy, are, by definition, secular topics. They are subjects of the world, not limited to the concern of any homogenous group or sect.\footnote{131} Consequently, under the requirement

\footnotetext[129]{129} See Badger Catholic, Inc., 620 F.3d at 783 (Williams, J., dissenting) (internal quotation marks omitted).
\footnotetext[130]{130} See id. at 777–78 (majority opinion).
\footnotetext[131]{131} See Secular Definition, Webster's New World College Dictionary 1296 (Michael Agnes & David B. Guralnik eds., 4th ed. 2010) (defining secular as "of or relating to worldly things as distinguished from things relating to church and religion").
of viewpoint neutrality, a school that provided access to a pro-choice group would need to permit a pro-life religious group equal access to its facilities. This is logically and legally correct—despite how religiously motivated that group’s anti-abortion sentiments may be—because abortion is a secular topic. It pertains to all, and the state cannot give preference to some views on the topic over others, regardless of the religious or nonreligious inclination of the speaker.

Despite the wide umbrella of speech that can be considered secular, not all of a religious group’s speech fits under this rubric. Religious exercise and worship seems, at least on the surface, quite distinct from other types of religious speech. While there are secular alternatives to most topics of concern to religious groups—there are obviously secular reasons why one could be against abortion, the death penalty, war, etc.—there is no truly secular version of, for instance, a Catholic mass. Religious exercise and worship obviously involve speech but are quite different from most speech, as they do not comment on secular subjects but are inherently self-referential. Religious speech given at a religious ceremony may, of course, comment on matters of secular concern. This is quite common, for instance, in most Catholic homilies, where the priest will apply the lesson of the particular Gospel reading to modern issues pertaining to daily life. Nevertheless, the primary focus of a Catholic mass remains on the ideals and commands of the religion itself. Therefore, given that there is no secular alternative to this type of religious speech (hereinafter referred to as “religious speech,” as opposed to “speech from a religious perspective”), the normal rules of viewpoint discrimination do not logically, and should not legally, apply. Accordingly, religious speech should be considered its own separate category of content, and a state—and by extension a public university—should be able to exclude that speech from a limited public forum it has created. Judge Williams applied this framework to the religious activities that the University of Wisconsin refused to fund, and she properly determined that as “there is no equivalent secular speech funded,” an exclusion of “purely religious activities is a categorical, neutral exclusion.”

The text of the First Amendment provides justification for this distinction as well. As Judge Williams described, if the Free Speech Clause protected all religious activity, then the Free Exercise Clause

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132 Religious proselytizing would not be included under this label of exercise and worship because any person may speak of the perceived positive or negative qualities associated with a particular religion. Proselytizers merely speak—from a quite subjective perspective, of course—on a topic that is open to all for comment and criticism.

133 Badger Catholic, Inc., 620 F.3d at 786 (Williams, J., dissenting).
would be rendered superfluous.\footnote{See id. at 785 ("If religion, and the practice of one's religion, can be described as merely dialog or debate from a religious perspective, what work does the Free Exercise clause of the First Amendment do?").} Such a reading would violate the canon of statutory interpretation instructing not to interpret a textual provision in such a way that will render another provision meaningless.\footnote{See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").} Given the First Amendment provides for the freedom of both religious exercise and speech, it is sensible to presume that the framers contemplated that at least some “speech” by religious actors was not covered by the Free Speech Clause.

Not only is this result a clear interpretation of the constitutional text, it also respects the special status religion is afforded in our society. As Judge Williams’s dissent acknowledges, the Badger Catholic panel’s conclusion that “purely religious activities . . . cannot be meaningfully distinguished from the categories of dialog, discussion or debate from a religious perspective,” is one that “degrades religion and the practice of religion.”\footnote{Badger Catholic, Inc., 620 F.3d at 785 (internal quotation marks omitted).} Defending religious freedom under the umbrella of the Free Speech Clause is a specious defense, because equating religious practice with all other areas of human experience fails to recognize the important role religion has played in our society and legal tradition. Thus, drawing a valid line separating religious speech from speech from a religious perspective is justified on three grounds. It is the logical extension of the distinction between viewpoint and content discrimination, follows the textual command of the First Amendment, and respects the wholly unique standing given to religious practice by American law and culture.

The last necessary step in Judge Williams’s content-discrimination analysis required a finding that the university’s exclusion of Badger Catholic’s activities constituting “purely religious practice” was reasonable in light of the university’s purpose in creating its limited public forum.\footnote{See id. at 789–90.} The dissent surmised that it was reasonable, given the limited funding available, for the university to refuse to directly subsidize such religious speech and practice.\footnote{See id. at 789–90.} Having met this low bar for content exclusion, Judge Williams concluded that the decision not to fund purely religious speech was constitutional.\footnote{Id.}
IV. A Sensible Establishment Clause Standard for Public Universities

Public universities generally offer two types of support to student groups: monetary subsidies and access to campus facilities. Despite the Rosenberger Court’s suggestion that the same rules apply to both types of benefits, Martinez’s divergent treatment of financial support as compared to facility access suggests that different legal standards should govern their validity.

A. Funding: Why Money Is Different

While Martinez did not explicitly overturn Rosenberger, it undermined its presumption that there is no constitutional difference between a university’s grant of access to facilities and its provision of monetary support. The Martinez Court suggested that a university may extend one type of benefit to a religious group—physical access—while withholding another type—a monetary benefit. Of course, a school may not do so arbitrarily on the basis of the religious inclination of the student group alone, as that would constitute textbook viewpoint discrimination. However, following Martinez, if a public university extends access to all groups, the school constitutionally may then condition the procurement of monetary support on complying with an antidiscrimination policy. This result rings true even where the policy places a disparate burden on religious groups seeking to restrict club membership along sectarian lines. While Justice Alito’s Martinez dissent argued that Hastings’s policy unduly burdened CLS’s constitutional right of expressive association, the members of CLS are not hampered from associating with those that they choose. Rather, Hastings is only burdening their ability to do so on university property.

141 Professor Eugene Volokh, in a prescient essay written four years before Martinez, described the legal ramifications of CLS’s discriminating in membership at public universities. See Eugene Volokh, Freedom of Expressive Association and Government Subsidies, 58 STAN. L. REV. 1919 (2006). Professor Volokh described how private actors have the constitutional right to associate, and not to associate, with whomever they desire. See id. at 1920. Despite the existence of this private right, however, the government has no duty to “subsidize the exercise of constitutional rights, even when it subsidizes other analogous behavior.” Id. at 1924.
B. Facility Access: Why the Establishment Clause Requires More than Mere Neutrality

Given the special status Martinez afforded financial support of religious student groups, the bar to access to school facilities appears lower than that to a monetary subsidy. Widmar made clear that a public university could not deny religious groups access merely because the group would use the facilities for religious worship and discussion. Nevertheless, given that the Establishment Clause supposes that permissible state support of religious institutions is not unlimited, it logically follows that public universities may not grant boundless access to religious groups looking to practice religion in a wholly unconstrained way. To phrase the issue more succinctly, it seems apparent that if the college in Widmar or the school district in Lamb's Chapel allowed a Catholic group to indefinitely rent a public space and convert it into a church, that action would violate the Establishment Clause. Such conduct is, literally, a physical establishment of religion. The question then becomes, when does a student group's activity so resemble the establishment of a church, or an analogous religious institution, that a university may not constitutionally allow it to do so on public property?

The Supreme Court's modern trend towards viewing the Establishment Clause as requiring governmental neutrality to religion, as exemplified by Rosenberger and Good News Club, diverges from the principles emanating the Lemon standard. While the Court's more conservative Justices have criticized Lemon, it is still valid law. The Lemon test's three prongs correspond to the three evils against which the Establishment Clause defends: state "sponsorship, financial support, and active involvement of the sovereign in religious activity."
The test's second prong, mandating that the relevant state statute's primary effect neither advance nor inhibit religion, does square with the understanding of the Establishment Clause as a vehicle for governmental neutrality. However, each of the other two prongs of Lemon—that the legislation have a secular purpose and that the policy does not excessively entangle the State with religion—are inspired by more than benign impartiality towards religion. Rather, Lemon is propelled by the notion that there is a limit to how much the government should involve itself with any religious institution, no matter how even-handedly it acts.\textsuperscript{147} The secular purpose prong is particularly telling. The requirement is not that a law be passed with both a secular purpose and a religious one, or even that the purpose be \textit{mostly} secular. By mandating that all state acts have a wholly secular purpose, Lemon makes clear that the government should act without regard to religion, rather than attempt to balance both secular and religious concerns.

Additionally, the constitutional text itself furthers the contention that the Establishment Clause requires more than mere neutrality towards religion. The First Amendment commands that Congress and, given incorporation, the States, "shall make no law respecting an establishment of religion."\textsuperscript{148} The text does not refer to any balancing of interests, nor of even-handedness, but rather it supposes a complete, unequivocal prohibition.

Recall the village hypothetical from the Introduction. There it was clear, both intuitively and as a matter of constitutional law, the mayor could not use public money to create three places of worship. This conclusion was valid even where the mayor acted neutrally towards religion—both amongst the religious faiths themselves and, more generally, between religion and nonreligion. The fallacy inherent to the neutrality approach thus becomes apparent, as the First Amendment embodies a presumption that there are limits to how far a state actor may provide support for religion.\textsuperscript{149} It seems relatively

\textsuperscript{147} See Leonard W. Levy, \textit{The Establishment Clause} 31–32 (2d ed. 1994) (describing the understanding that, when the Constitution was adopted, it was not understood to embody a nonpreferential view of religious accommodation—i.e., the Establishment Clause was not intended to merely bar government from favoring one religion over another, but rather to preclude government entanglement more generally).

\textsuperscript{148} U.S. Const. amend. I.

undisputed that a state university may not create a church or allow a student group to convert its facilities into a church. The remaining task is determining what religious speech and conduct is so similar to such creation or conversion that a state university violates the Establishment Clause when it permits it in public facilities.

Whether the line is drawn at speech that is wholly "religious in character," as the University of Wisconsin proposed in Badger Catholic, or at "purely religious practices," as asserted by Judge Williams's dissent, some line needs to be drawn between permissible and impermissible religious conduct that a state university may support in light of the Establishment Clause. Where to draw that line, of course, is precisely the problem that has proven so vexing for judges. Both the majority and dissent in Badger Catholic opine on the difficulty of distinguishing speech informed by a religious viewpoint from speech that is fundamentally religious. Furthermore, such line-drawing not only presents the problem of institutional competency for the judiciary, but it also poses a constitutional quandary for state actors looking to identify, on their own, speech from a religious perspective as opposed to pure religious exercise. One of the central premises behind the Religion Clauses, if not the central premise, is that there is...
a limit to state involvement with religious institutions. If a state entity, such as a university, were to entangle itself too closely with religious student groups and their religious exercises, this would undermine the separation doctrine generally, as well as Lemon's warning against "excessive government entanglement" with religion.

Nonetheless, the fact that line drawing may be difficult is not a sufficient argument against it, as judges are the actors whose role necessarily requires constitutional line drawing in tough cases. And, while there is merit to the excessive entanglement argument where state officers and agencies are directly overseeing religious practices, this concern does not apply wholly to the judiciary, which merely has the power of decision over litigated cases. Thus, the Court should no longer avoid, but rather attempt to resolve, the constitutional question presented here.

Lamb's Chapel presented two significant dichotomies: viewpoint versus content discrimination, and the protections offered by the Free Speech Clause versus those by the Free Exercise Clause. These dichotomies provide a sufficient framework for thinking about what separates speech from a religious viewpoint from purely religious

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156 See John Witte, Jr., That Serpentine Wall of Separation, 101 Mich. L. Rev. 1869, 1889-91 (2003) (describing a number of rationale for the separation of church and state, including the protection of the church from state control and the insulation of government from religious orthodoxy).

157 See Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (internal quotation marks omitted); see also Aguilar v. Felton, 473 U.S. 402, 409 (1985) (describing how close scrutiny of public, nonreligious instruction given in sectarian schools, so to make sure that the instruction given was not religious, was too excessive an "entanglement" for Lemon purposes), overruled by Agostini v. Felton, 521 U.S. 203, 223-24 (1997) (rejecting Aguilar's premise that public school teachers need to be supervised in a sectarian setting, but not the basic understanding that scrutiny of too close a character would constitute excessive entanglement with religion).

158 See, e.g., Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978) (declaring that, because "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," and no judicial "set formula" was available, reviewing courts must make ad hoc, case-by-case determinations); Barker v. Wingo, 407 U.S. 514, 521-22 (1972) (describing how the difficulty of ascertaining the scope of a criminal defendant's right to a speedy trial necessitates that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case").

159 But see 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. 1919, 1364 (2008) (arguing that attempts by district courts to ascertain whether or not a religious practice constituted worship would lead to "inquiries that penetrate so deeply into the intimate details of religious practice that an Establishment Clause violation seems unavoidable").
If speech on a secular topic is protected by the Free Speech Clause, then the Free Exercise Clause logically protects conduct regarding religious, nonsecular topics. However, such a category should be smaller than the broad class of activities that may be considered "worship," for two reasons. First, *Widmar* held that the government may not exclude individuals from a forum solely because their activity there constituted worship. Secondly, a broad reading of "worship" may encompass a great number of religious practices. While a more limited reading could confine the term to referring only to formal or ceremonial exercises of devotion, the word can also be thought to encompass all offerings of thanks and gratitude to a divine figure, whether formal or not. One can easily imagine a religious student group incorporating prayer and bible verses into meetings where the group discusses other secular topics as well. To attempt to limit such instances of religiosity is neither constitutionally nor normatively attractive. Accordingly, the class of religious conduct the Establishment Clause forbids at public universities should be far narrower in scope than the broad category of worship.

The three categories of religious speech described in Justice Stevens's dissent in *Good News Club* do not provide an adequate framework for resolving this problem. Justice Stevens's three categories—speech from a religious viewpoint, worship, and proselytizing—are theoretically distinct, but as already discussed, mere worship is not, and should not, be barred at public university facilities. Furthermore, proselytizing can be viewed as a category of the first type of speech, albeit from a viewpoint that is clearly not impartial.

A better standard may be gleaned from another look at the Catholic mass. In a typical mass, the homily follows the liturgical and gos-

160 The exclusion of speech made from a religious viewpoint on the basis of that viewpoint would, naturally, constitute textbook viewpoint discrimination. Excluding religious exercise, on the other hand, would be permissible content discrimination. *See* Caplan, *supra* note 52, at 651–52 (including, under permissible instances of content discrimination in nonpublic forums, "a rule disallowing the rental of public library conference rooms for religious services" (citing Faith Ctr. Church Evangelical Ministries v. Glover, 480 F.3d 891, 908 (9th Cir. 2007))).


162 *See* Worship Definition, *New Oxford American Dictionary* 1993 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010) (defining worship as both "the feeling or expression of reverence and adoration for a deity" and "the acts or rites that make up a formal expression of reverence for a deity"). Not many reasonable people would contend that personal prayer and reflection, performed in the solitude of one's own home, did not constitute a form of worship. Thus, "[c]haracterizing worship as any one thing is a fool's errand." *Richard Eisenberg, Of Speeches and Sermons: Worship in Limited Purpose Public Forums*, 78 Miss. L.J. 453, 499 (2009).
pel readings, and it allows the priest or deacon to apply the lessons of the religious text to everyday life. One could readily describe the Catholic homily as typical speech on a secular topic from a religious viewpoint. However, no reasonable person would assert that the entire Catholic mass, considered in its totality, is such speech. It would, seemingly, be “pure” religious speech and conduct, protected by the Free Exercise Clause, rather than the Free Speech Clause. Consequently, the proper test for determining when religious conduct moves beyond mere speech from a religious viewpoint should consider the underlying religious conduct in its entirety.

Thus, a possible test emerges: Where religious conduct, in its totality, consists of formal religious ritual or exercise, it becomes religious conduct a state university may not directly facilitate on campus. While it may be difficult to make a totality-of-the-circumstances determination in the context of unstructured, free-form religious activities, it is unlikely that such activities would even qualify under this standard. Rather, the standard will most likely catch the class of religious conduct—structured religious ceremony—that the test is intended to cover.

Concentrating on the category of formal religious exercise has at least two advantages over focusing on the broad class of activities that may constitute “worship.” First, university administrators can much more easily observe formal religious exercises and ritual than they can informal sessions of worship. Limiting the standard to “formal” religious exercises thus prevents university officials from becoming too entangled, to use the phraseology of Lemon, in students’ religious activities. Secondly, the occurrence of formal religious ritual taking place in campus facilities is much more likely to cultivate the impression that such rituals carry the imprimatur of the university, especially compared to more informal meetings of prayer and religious discussion.

163 See Alfred McBride, A Short History of the Mass 48 (2006) (describing the rise of the homily in the Roman Catholic tradition as a response to the understanding that “explanations of Scripture were needed and pastoral applications of the Word of God were paramount”).

164 The concern that religious exercise may be considered to be endorsed by the school evokes the so-called ’endorsement test’ for the Establishment Clause. See Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (positing that the government violates the Establishment Clause when it endorses religion, as such endorsement “sends a message to nonadherents that they are outsiders, not full members of the political community”); see also Winn, supra note 79, at 633 (describing how, “even absent state financial aid, the symbolic weight of state approval has supported a finding of primary effect” under the Lemon test).
The next point to consider is to what extent religious activities, considered in their aggregate, must contain instances of formal religious exercise in order to fall under this standard. Given both the tough factual determinations inherent to these types of cases and the desire not to disturb students' religious freedom, the proposed test should not be applied pursuant to a standard akin to the "preponderance of the evidence" test. In a close case, where the Court believes the contested religious activity is near equal parts speech on a secular topic and formal religious exercise, that activity should be permissible at public universities. Either the rigid "beyond a reasonable doubt" standard, or the intermediate "clear and convincing evidence" standard, is more appropriate. The incorporation of one of these higher standards respects the religious freedom of university students to pray or worship in their own way, while simultaneously allowing public universities, when presented with clear instances of formal religious exercise, to follow the dictates of the Establishment Clause.

Whether the religious periodical in *Rosenberger* or the sectarian instruction in *Good News Club* would meet this standard is, of course, a difficult question, depending on the entire factual record before the Court. Nevertheless, forcing the Court to consider whether the totality of the activities at issue rises to the level of formal religious exercise would ameliorate at least one flawed facet of this area of the law. The proposed standard would discourage accommodation-minded judges, attempting to uphold all religious exercise at public schools, from mischaracterizing all religious practice, instruction, and proselytizing as mere speech from a religious perspective. The line in any particular case may be quite hard to see, but, as Justice Stevens wrote in his dissent in *Good News Club*, "[t]he line between the various categories of religious speech may be difficult to draw, but I think that the distinctions are valid, and that a school . . . must be permitted to draw them."165

**C. Resolving the Badger Catholic Dilemma**

Neither of the standards previously described regarding monetary support and facility access apply directly to *Badger Catholic*. There, the student group did not participate in discriminatory practices when admitting members, and it also was not seeking the mere use of facilities for religious exercises. Instead, Badger Catholic sought monetary subsidies for religious activities that the school decided were not speech from a religious viewpoint, but instead were more "religious in

character.” Therefore, seemingly, the standards announced in Parts IV.A and IV.B appear, on the surface, to be unavailing.

However, there is no need to fashion a third standard for situations where a student group is seeking financial support from a university for activities constituting formal religious exercise. For, if the group’s conduct does not meet the Part IV.B standard of permissible religious activity in public university facilities, it should not qualify for a state subsidy for such activities. This is the logical conclusion from Martinez’s implicit assertion that the bar to a state financial benefit is higher than that for access to state facilities. Therefore, whatever the standard is for university financial support for student groups, the university should not be bound to meet a heightened standard of proof when denying a group’s application for monetary aid. Here, something akin to the “preponderance of the evidence” standard would be more appropriate. If a public university finds that a group’s religious activity contains more formal religious exercise than speech from a religious perspective, the school would be justified in refusing to subsidize such an activity.

If the Supreme Court were to adopt such a standard in deciding Badger Catholic or an analogous case, the proper response would be to vacate the judgment of the Court of Appeals. The lower court would then be obliged to consider whether the contested activities—in Badger Catholic, the spiritual appointments and the summer retreat—were, in their entirety, more akin to pure religious exercise or to speech on a secular topic from a religious viewpoint. If the reviewing court were to arrive at the former conclusion, it would then be compelled to uphold the university’s decision not to subsidize predominantly religious activities.

CONCLUSION

Today, the dual commands of the First Amendment’s Religion Clauses may seem contradictory. The Free Exercise Clause guarantees that the government will have no say in how one practices her religion, while the Establishment Clause prevents the government from promoting any religion. However, given the reality of the modern regulatory state, where government agencies touch many, if not

166 Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 777 (7th Cir. 2010).
167 See EISCRUPER & SAGER, supra note 79, at 18 (describing how embracing both Religion Clauses leads to the “curious position that requires government both to grant religion special privileges and to impose upon it special restrictions”).
most, facets of life, it becomes increasingly difficult to find instances where personal religious practice is completely divorced from any government regulation. This is especially true at the modern public university. For four years, thousands of students spend the vast majority of their lives in and around college campuses, which are under the exclusive dominion of the university, and by extension, the state. Fashioning a legal standard to govern religion at such institutions is therefore both conceptually difficult and constitutionally critical.

The standard proposed by this Note attempts to thread this constitutional needle. There is no denying that religion plays a vitally important role in American society, and that state actors, such as universities, and the courts should give wide latitude to individuals to practice their religion without inhibition. However, one must not fail to appreciate that in most Establishment Clause cases, the question is not whether the government is inhibiting an individual's religious freedom, but rather whether that individual or group is impermissibly donning the auspices of the state while it practices its religion. Prohibiting public facilities from being used as forums for formal religious exercise and ritual does not inhibit the personal practice of one's own religion. Rather, such a proscription serves as a recognition that the government, under the Establishment Clause, is under an affirmative duty to avoid the direct sponsorship of religion—nothing more, and nothing less.
