Good News Club v. Milford Central School: Viewpoint Discrimination or Endorsement of Religion

Jason E. Manning

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol78/iss3/7

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
COMMENT

GOOD NEWS CLUB v. MILFORD CENTRAL SCHOOL:
VIEWPOINT DISCRIMINATION OR
ENDORSEMENT OF RELIGION?

Jason E. Manning*

INTRODUCTION .................................................. 834

I. VIEWPOINT DISCRIMINATION .................................. 837
   A. Relevant Case Law ........................................... 837
      1. Widmar v. Vincent ........................................ 838
      2. Lamb's Chapel v. Center Moriches Union Free School District ........................................... 841
      3. Capitol Square Review & Advisory Board v. Pinette ... 843
      4. Rosenberger v. Rector & Visitors of University of Virginia ..................................................... 846
   B. Blueprint of the Court's Viewpoint Discrimination Inquiry .......................................................... 849
      1. Who Is the Speaker? ........................................ 849
      2. What Type of Speech, and Where Is the Speaker? 851
      3. How Does the Restriction Apply to the Speech? ... 852

II. FIRST AMENDMENT BATTLINGROUNDS: THE ALLEGED CONFLICT BETWEEN THE CLAUSES ........................................... 853

III. GOOD NEWS CLUB v. MILFORD CENTRAL SCHOOL ........ 857
   A. Procedural History .......................................... 857
   B. Majority Holding and Rationale. .......................... 862
   C. Separate Opinions .......................................... 868

IV. ANALYSIS ......................................................... 876

CONCLUSION ....................................................... 883

* Candidate for Juris Doctorate, Notre Dame Law School, 2003; B.A. Vanderbilt University, 2000. I would like to thank my parents for the firm foundation they have provided for me to build a life upon. I am especially thankful for the love of my wife Katrina who brings joy to my life and never fails to support and encourage me. I am also grateful for all the members of the Notre Dame Law Review, in part for their help in the publication of this Comment, but primarily for helping make my time in law school so enjoyable.
INTRODUCTION

"[W]e can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."¹ With these words, the Supreme Court either: (1) reaffirmed the value of religion as a constitutionally protected viewpoint for moral instruction and character development, thus upholding the Free Speech Clause; or (2) obscured the separation of church and state by forcing the government to provide aid to an overtly religious group, thus denigrating the Establishment Clause.²

Either of these competing interpretations of the Court's decision in Good News Club v. Milford Central School could reasonably apply, depending on the beholder's outlook on contemporary First Amendment jurisprudence.³ For this reason, the Supreme Court's most recent proclamation regarding viewpoint discrimination in Good News Club provides a useful insight into the alleged "conflict between the clauses."⁴ Additionally, Good News Club is illustrative of a complicated area of First Amendment jurisprudence in a particularly salient scenario because it involves two subjects that are very important to many Americans: religion and education.⁵ Indeed, the Supreme Court granted certiorari in Good News Club expressly to resolve a conflict among the Courts of Appeals as to whether religious speech can be


² See id. at 144 (Souter, J., dissenting) ("[A]ddressing the Establishment Clause, we can say this: there is a good case that Good News's exercises blur the line between public classroom instruction and private religious indoctrination.").

³ This statement assumes that there is, and can be, a hierarchy within the First Amendment. This assumption finds support in the Court's Good News Club decision—as well as in earlier viewpoint discrimination cases. See id. at 113 ("[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."). For a discussion of commentators who have contested the validity of assuming a conflict between the clauses within the First Amendment see infra notes 156-61 and accompanying text.


⁵ See infra Part I for a discussion of viewpoint discrimination.
prohibited in a limited public forum. In particular, the Eighth Circuit—in a case so similar that it even involved another Good News club—held that the First Amendment mandated that permission be granted to use the defendant school district's facilities. In light of the Second Circuit's polar opposite holding in Good News Club, the Court clearly needed to attempt to clarify this difficult species of First Amendment law—especially with one member from both the Second and Eighth Circuit panels dissenting.

The Supreme Court answered the preliminary question of which circuit had correctly interpreted the Constitution and the relevant precedents by reversing the Second Circuit's decision. The Court held that, given the school's community use policy, an adult-led Christian club was constitutionally entitled to use a New York public school's facilities to teach elementary school children about the "good news" of Jesus Christ. To understand the Court's ruling, determine whether it successfully addressed the circuit split, and predict the implications of the decision, one necessarily begins with the specific facts of the case.

Milford Central School, pursuant to New York law, adopted a "Community Use Policy" in 1992, authorizing its building to be used after school hours by residents of the school district. Milford only granted permission to use its building, however, if the community use was directed toward what the school deemed permissible purposes,

---

6 See Good News Club, 533 U.S. at 105-06 (comparing Second, Fifth, and Ninth Circuit decisions upholding the exclusion of religious speech with Eighth and Tenth Circuit decisions striking down such restrictions).

7 Good News/Good Sports Club v. Sch. Dist. of Ladue, 28 F.3d 1501, 1510 (8th Cir. 1994) (holding that the school's Amended Use Policy violated the Free Speech Clause as impermissible viewpoint discrimination).

8 Good News Club v. Milford Cent. Sch., 202 F.3d 502, 511 (2d Cir. 2000) (holding that the Club was permissibly excluded because its activities were not "pure moral and character development" (internal quotations omitted)), rev'd, 533 U.S. at 98.

9 See Good News/Good Sports Club, 28 F.3d at 1510 (Bright, J., dissenting); Good News Club, 202 F.3d at 511 (Jacobs, J., dissenting).

10 Good News Club, 533 U.S. at 120.

11 See id.

12 Where possible the following facts were taken from the Chief Judge McAvoy's decision from the Northern District of New York. See Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147 (N.D.N.Y. 1998), aff'd, 202 F.3d at 502, rev'd, 533 U.S. at 98.

13 See N.Y. EDUC. LAW § 414 (2002) (delineating uses for which school facilities may be used and delegating to local school boards the authority to adopt reasonable regulations for such uses).

14 See Good News Club, 21 F. Supp. 2d at 150.
which were enumerated in the policy. Specifically, the district residents were permitted to use the building for: (1) "instruction in any branch of education, learning or the arts," or (2) "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such . . . uses shall be non-exclusive and shall be open to the general public." Although the school's community-use policy essentially reiterated the relevant state guidelines, it also expressly prohibited the use of Milford's property for "religious purposes." The specific provisions of the community-use policy were implicated when Stephen and Darleen Fournier sought permission to hold Club meetings in the school after hours.

The Fourniers, who were residents of the school district, led a non-denominational, Christian organization for children between the ages of six and twelve whose stated purpose was to instruct children in family values and morals "from a Christian perspective." When the school stopped busing students to Club meetings (at the Milford Center Community Bible Church where Mr. Fournier was pastor), the Fourniers requested permission to use the school's facilities for Club meetings immediately following the end of the school day. After reviewing the Fourniers' request, Milford denied the Club access to the school facilities. Club meetings included prayer, Christian songs, Bible verse memorization, scripture readings, and an emphasis on cultivating a personal relationship with Jesus Christ. Based

15 Id.
16 Id. at 149 n.2.
17 Id. at 150.
18 Id. at 149-50.
19 Id. at 154.
20 Id. at 149.
21 Id.
22 See id. at 157 ("Praying is also a regular part of each Club meeting. During these prayers, the children may at times pray . . . to receive Jesus as their personal Savior." (internal quotations omitted)).
23 See id. ("The children regularly sing songs of a religious nature that make references to God or Jesus Christ.").
24 See id. ("[T]he teacher emphasizes the importance of memorizing Biblical verses by awarding the children prizes or candy for correctly reciting the assigned verse.").
25 See id. ("The common theme emphasized in each lesson is the importance of having a relationship with Christ." (internal quotations omitted)).
26 See id. (describing how several times throughout the lesson "challenges" and "invitations" are issued). The "saved" children, "those who already believe in the Lord Jesus as their Savior," are "challenged" to ask God for the strength to live morally. Id. at 156. The "unsaved" children are "invited" to "trust in the Lord Jesus to be your Savior from sin." Id. (internal quotations omitted).
on these characteristics, the superintendent concluded that the club meetings were the "equivalent of religious worship," and consequently the community-use policy precluded access to the Club. The Fourniers believed their rights had been violated and sought a judicial remedy in the Northern District of New York.

This Comment examines the Supreme Court's *Good News Club* decision and discusses its implications for future viewpoint discrimination cases, as well as for Free Speech and Establishment Clause cases in general. Part I begins by tracking the Supreme Court's decisions in the four most relevant viewpoint discrimination cases leading up to *Good News Club*. In each of the four equal access cases the plaintiff alleged viewpoint discrimination and the defendant asserted an endorsement defense, as in *Good News Club*. Part I continues by discerning a blueprint of the Supreme Court's inquiry in viewpoint discrimination cases. Part II develops a snapshot of the jurisprudential background for *Good News Club* by surveying the two sides of the constitutional debate regarding whether the clauses of the First Amendment are in conflict. Part III is the heart of this Comment, analyzing in depth the Court's decision in *Good News Club* including the procedural history, the majority holding and rationale, and each of the separate opinions. Part IV provides the author's analysis of *Good News Club*, discussing its implications for future viewpoint discrimination cases as well as suggesting that the Court provided some guidance affecting the conflict-between-the-clauses debate in general and the test for endorsement more specifically.

I. VIEWPOINT DISCRIMINATION

A. Relevant Case Law

The First Amendment's prohibition against viewpoint discrimination has been summarized by the Supreme Court recently as requiring the "government [to] abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Cases involving allegations of viewpoint discrimination and government endorsement of religion

\[27\text{ Id. at 149 n.3 (stating in a letter from the superintendent that the reason for the denial was that the Club's activities constituted "religious worship," which was prohibited under school policy).}\]

\[28\text{ See id. at 150 (suing for injunctive relief, damages, and attorney fees). See also infra Part III.A for a discussion of the procedural history of the case.}\]

\[29\text{ Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).}\]
usually require close factual analysis. Although there is nothing unusual about questions of fact, such inquiries are complicated when the related questions of law require the adjudicator to make several fine distinctions. Four cases in particular lay the legal groundwork upon which an understanding of the Court’s viewpoint discrimination jurisprudence. In each of the following cases, reviewed in chronological order, the Court considered a viewpoint discrimination claim under the Free Speech Clause with an Establishment Clause defense.

1. **Widmar v. Vincent**

   In 1977, the University of Missouri at Kansas City excluded a student group named Cornerstone from use of its buildings for religious worship and religious discussion. The University based the prohibition on one of its regulations denying use of college facilities “for purposes of religious worship or religious teaching.” Students from the group brought suit against the University seeking a declaratory judgment and injunctive relief, and the district court found the regulation not only justified, but required by the Establishment Clause. On appeal, the Eighth Circuit remanded, finding content-based discrimina-

---

30 See, e.g., Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 778 (1995) (O’Connor, J., concurring) (“I continue to believe that government practices relating to speech on religious topics must be subjected to careful judicial scrutiny.” (internal quotations omitted)).

31 In three of the Court’s recent religious viewpoint discrimination cases, careful “fact-sifting” was necessary before deciding the question of law regarding content-based exclusions of speech without a compelling state interest. See, e.g., Rosenberger, 515 U.S. at 831 (finding that the university targeted student journals with religious editorial viewpoints for disfavored treatment); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993) (holding that all religious viewpoints, though treated equally, were impermissibly equally discriminated against); Widmar v. Vincent, 454 U.S. 263, 269–70 (1987) (determining that the exclusion of groups seeking to engage in religious worship and discussion was content-based discrimination).


34 Id. at 265.

35 Id.

36 Chess v. Widmar, 480 F. Supp. 907, 908, 918 (W.D. Mo. 1979), rem’d, 635 F.2d 1310 (8th Cir. 1980), aff’d, 454 U.S. 263 (1981) (reasoning that “speech with religious content cannot be treated the same as any other form of speech” because doing so “would make a nullity of both the establishment clause and the free exercise clause of the first amendment”).
tion against religious speech without a compelling justification.\textsuperscript{37} The Supreme Court affirmed the decision of the Eighth Circuit.\textsuperscript{38}

The Court began its analysis by finding that the University had created an open forum for its student groups.\textsuperscript{39} After stating that First Amendment rights of speech extend to college campuses, and that religious worship and discussion are forms of protected speech, the Court determined that the University’s regulation was content-based because the students were excluded due to the religious content of their intended speech.\textsuperscript{40} Justice White disagreed with the majority’s determination that religious worship is protected speech, reasoning that religious worship should be distinguished from religious speech.\textsuperscript{41} The majority rejected this distinction as unintelligible, in-administrable, and irrelevant.\textsuperscript{42} Although the argument between the Justices regarding how to characterize the religious activities at issue was limited to one dissenting Justice here, the same dispute would arise with greater force in \textit{Good News Club}.\textsuperscript{43}

\textsuperscript{37} Chess v. Widmar, 635 F.2d 1310, 1320 (8th Cir. 1980) (reasoning that “[a] neutral accommodation of the many student groups active at UMKC would not constitute an establishment of religion even though some student groups may use the University’s facilities for religious worship or religious teaching”).

\textsuperscript{38} \textit{Widmar}, 454 U.S. at 276. Justice White as the sole dissenter found no First Amendment violation on the facts in \textit{Widmar}. \textit{Id.} at 289 (White, J., dissenting). \textit{But see Lamb’s Chapel}, 508 U.S. at 386 (Justice White writing the unanimous decision).

\textsuperscript{39} \textit{Widmar}, 454 U.S. at 267.

\textsuperscript{40} \textit{Id.} at 268–69.

\textsuperscript{41} \textit{Id.} at 282 (White, J., dissenting) (stating that the argument that religious worship is protected speech “not different from any other variety of protected speech as a matter of constitutional principle . . . is plainly wrong”).

\textsuperscript{42} \textit{Id.} at 269 n.6. The Court stated that the distinction was unintelligible because there was no meaningful standard available to determine when religious singing and teaching because unprotected religious worship. \textit{Id.} For the sake of argument, the Court assumed that even if a meaningful standard was found, schools and the courts would be required to monitor the speech in a way that would impermissibly entangle the state with religion. \textit{Id.} Lastly, the Court rejected the dissent’s assumption religious speech aimed at winning converts was entitled to greater protection that religious speech by converts. \textit{Id.}

\textsuperscript{43} \textit{See Good News Club v. Milford Cent. Sch.}, 533 U.S. 98, 138 (2001) (Souter, J., dissenting, with Ginsburg, J., joining) (“It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion.”). \textit{Compare Widmar}, 454 U.S. at 280 (Stevens, J., concurring) (“I agree with the Court that the University has not established a sufficient justification for its refusal to allow the Cornerstone group to engage in religious worship on the campus.”), with \textit{Good News Club}, 533 U.S. at 130 (Stevens, J., dissenting) (emphasizing the importance of classifying speech for
After finding that the University had violated the Free Speech Clause by denying access to Cornerstone, the Court considered the University's argument that its exclusion of Cornerstone was justified in the interest of avoiding an Establishment Clause violation. The Court agreed with the University that “complying with its constitutional obligations may be characterized as compelling,” specifically referring to the University's duty to avoid an Establishment Clause violation. Nevertheless, the Court immediately qualified this general proposition by stating that the “equal access policy” at issue did not run afoul of any of the three Lemon-test prongs. In its reasoning on the Establishment Clause issue, the Court emphasized both that the open forum created by the University did not “confer any imprimatur of state approval” on religion and that the forum was open to over one hundred diverse student groups. Thus, the Court's chief concern regarding whether permitting the religious group to share the open forum would have the primary effect of advancing religion was resolved in favor of not finding a violation.

Lastly, in the interest of laying the groundwork for later portions of this Comment, note that Widmar has been cited as authority supporting the conclusion that a defendant's interest in avoiding an Establishment Clause violation can justify a Free Speech Clause violation. The Court's language in Widmar is ambiguous enough to be used in good faith to support such a principle; however, the Court has never held in accordance with this principle, and its validity is a matter of dispute.

"religious purposes" into one of three different categories: discussion, worship, or proselytizing).

44 See Widmar, 454 U.S. at 270-71.
45 Id. at 271.
46 Id.
47 Id. at 274, 277.
48 Id. at 275.
50 The Court summarized its First Amendment conclusions by stating, On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. On the other hand, the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well.

Widmar, 454 U.S. at 276.
51 See Part II for a discussion of legal scholars' denial of a supposed conflict between the clauses.
2. **Lamb’s Chapel v. Center Moriches Union Free School District**\(^{52}\)

The next viewpoint discrimination claim arose when a public school in New York denied a local evangelical church access to its facilities to show a film series on family values from a Christian perspective.\(^{53}\) When the church brought suit alleging First Amendment violations, the district court granted summary judgment for the school.\(^{54}\) The district court characterized the school’s facilities as a limited public forum, stating that “once a limited public forum is opened to a particular type of speech, selectively denying access to other activities of the same genre is forbidden.”\(^{55}\) Nevertheless, the district court held that because the school district had not permitted other groups akin to Lamb’s Chapel—namely, those that were engaged in religious worship or instruction—the school district’s denial of access was viewpoint neutral and constitutional.\(^{56}\) In its reasoning, the district court distinguished the Second Circuit’s decision in **Travis v. Owego-Appacliachin School District**.\(^{57}\) In **Travis**, the Second Circuit held the Free Speech Clause required a religious fundraiser be permitted access to school facilities on the ground that a religious Christmas program involving collecting toys for needy children was permitted in the past.\(^{58}\) Unlike in **Travis**, where the court found a limited public forum for private fundraisers with religious themes, the district court in **Lamb’s Chapel** held that there was no limited public forum for “organizations of similar character to Lamb’s Chapel.”\(^{59}\)

The Second Circuit affirmed the district court’s judgment “in all respects.”\(^{60}\) The circuit court began by stating that the question of “[w]hether Center Moriches has opened its facilities to religious uses and purposes presents a close question here.”\(^{61}\) Lamb’s Chapel tried
to show that the school district had a limited public forum permitting access to school facilities for similar purposes by comparing their proposed use to a Salvation Army Band Benefit Concert, a Gospel Music Concert, and a lecture series entitled "Psychology and the Unknown." The court distinguished these past uses as only incidentally religious. The court also distinguished the Supreme Court’s decisions in Widmar and Board of Education of Westside Community Schools v. Mergens. Widmar and Mergens involved students seeking to use school property in a situation where many student groups had been given access resulting in a "generally open forum." Thus, the court emphasized the location and the speaker in differentiating the precedents. In particular, the fora were less restricted and the speakers were students rather than outside individuals; therefore, the court determined that the holdings were not controlling. Additionally, the Second Circuit briefly noted that the holding in Mergens was based on statutory grounds rather than constitutional grounds and that the Supreme Court had specifically refrained from deciding whether the Free Speech Clause required the same result.

The Supreme Court unanimously reversed, finding the school district’s denial of access to the church “plainly invalid” under the Free Speech Clause because an otherwise permissible film—a film discussing family values—would be permitted as having civic purposes, yet such a film was denied simply because it was presented from a religious perspective. Furthermore, as in Widmar, the defendant claimed that the state has an interest in avoiding an Establishment Clause violation, “justifying an abridgment of free speech otherwise
protected by the First Amendment." After applying *Lemon*, the Court dismissed this argument, stating that the "posited fears of an Establishment Clause violation are unfounded." In support of its conclusion, the Court noted that the film would have been after school hours, not sponsored by the school, and open to the public. Thus, the Court concluded that there was "no realistic danger" of the community perceiving endorsement of religion.

3. *Capitol Square Review & Advisory Board v. Pinette*

Justice Scalia wrote the plurality opinion in *Capitol Square*, one of six Justices filing opinions. In the interest of brevity, this summary will only highlight portions of Justice Scalia’s plurality opinion and Justice O’Connor’s concurrence. *Capitol Square* involved the denial of the Ku Klux Klan’s request to display a cross on Capitol Square, a state-owned plaza next to the statehouse in Columbus, Ohio. Although various holiday displays were permitted, such as a Christmas tree and a menorah, the KKK’s formal application was denied. The district court found in favor of the KKK’s constitutional right to publicly display a Latin cross, and the Sixth Circuit affirmed.

Finding Capitol Square a public forum, the Court held that the Advisory Board had failed to meet the strict-scrutiny test applicable to content-based restrictions. The defendants did not contest that they had banned the display due to its content, but claimed they did so to

---

69 Id. at 394. The Court cited *Widmar* as having "suggested" that "the interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgment of free speech otherwise protected by the First Amendment." Id.

70 Id. at 395. Justices Kennedy, Scalia, and Thomas were disturbed to a varying degree by the application of *Lemon* to determine whether there was an Establishment Clause violation. *Id.* at 397 (Kennedy, J., concurring) (stating that the application of *Lemon* was "unsettling and unnecessary"); *id.* (Scalia, J., concurring, with Thomas, J., joining) (emphasizing that the *Lemon* test had been "repeatedly killed and buried").

71 Id. at 395.

72 Id.


74 *Id.* at 756. Justice Thomas filed a concurring opinion, Justice O’Connor and Justice Souter filed opinions concurring in part and in concurring in the judgment, and Justice Stevens and Justice Ginsburg filed dissenting opinions.

75 *Id.* at 757–58.

76 *Id.* at 758–59.


79 *Capitol Square Review & Advisory Board*, 515 U.S. at 770.
avoid state endorsement of Christianity. Justice Scalia's plurality opinion emphasized the Court's precedents in *Lamb's Chapel* and *Widmar* and stated that the same factors that were determinative in those cases were present in *Capitol Square*: (1) private speech not sponsored by the state, (2) made on state property open to the public, and (3) permission requested through the same process required of other private groups. Only two Justices dissented, but three Justices who concurred in the judgment declined to join Justice Scalia's enunciation of the endorsement test. Justice Scalia applied a fixed test regarding endorsement: "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." Relying on dictionary definitions of the word, Justice Scalia stated that "'[e]ndorsement' connotes an expression or demonstration of approval or support;" therefore, the Establishment Clause prohibition on government endorsement of religion will only be triggered by "expression by the government itself, or else government action alleged to discriminate in favor of private religious expression or activity." Three other Justices agreed with this clear statement of law, and Justice Scalia supported their interpretation with two policy arguments justifying the rejection of a perception inquiry (such as Justice O'Connor's) under the endorsement test.

---

80 Id. at 761. Thus the presence of viewpoint discrimination was practically undisputed here, and the defendants relied entirely on the Establishment Clause as their defense. Consequently, the Court spent little time discussing the elements of viewpoint discrimination. Justice Scalia did, however, reaffirm the full protection of private religious speech under the Free Speech Clause of the First Amendment: "in Anglo-American history ... government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be like Hamlet without the prince." Id. at 760.

81 See id. at 756. Justice Scalia announced the opinion of the Court, and he was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. Id. at 757. Justices O'Connor, Souter, and Breyer concurred in the judgment but rejected the plurality's per se endorsement test. Id. at 772 (O'Connor, J., concurring, with Souter & Breyer, JJ., joining); id. at 783 (Souter, J., concurring, with O'Connor & Breyer, JJ., joining). Justices Stevens and Ginsburg both filed their own dissenting opinions. Id. at 797 (Stevens, J., dissenting); id. at 817 (Ginsburg, J., dissenting).


84 *Capitol Square Review & Advisory Bd.*, 515 U.S. at 763.

85 Id. at 764 (citation omitted).

86 Chief Justice Rehnquist and Justices Kennedy and Thomas joined Justice Scalia. Id. at 757.
First, Justice Scalia stated that to apply the Establishment Clause to private speech would put the First Amendment clauses in tension with each other, and “[p]olicymakers would find themselves in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other.” Second, he reasoned that it would be unrealistic to force judges or lawmakers to anticipate observers’ misperceptions about endorsement, whether those misperceptions are reasonable or not.

Justice O’Connor explained her reason for parting company with the plurality by stating that the “plurality today takes an exceedingly narrow view of the Establishment Clause that is out of step both with the Court’s prior cases and with well-established notions of what the Constitution requires.” Justice O’Connor described the endorsement inquiry as asking whether a “reasonable person”—who is the “personification of a community ideal of behavior, determined by the [collective] social judgment”—would perceive a particular action as an endorsement of religion. Therefore, under Justice O’Connor’s “perception inquiry,” a private party’s actions or words violate the Establishment Clause if a reasonable person would perceive that private speech as endorsed by the government. Despite their different interpretations of the Establishment Clause, Justice O’Connor and the two

---

87 Id. at 767–68. The subsequent litigation surrounding public school policies in Rosenberger and Good News Club reveal the sagacity of this statement.

88 See id. at 768 n.3.

89 Id. at 777 (O’Connor, J., concurring). Justice O’Connor disapproved of the “fixed, per se rule” approach applied by Justice Scalia and instead insisted that “every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.” Id. at 778 (O’Connor, J., concurring).

90 Id. at 779–80 (O’Connor, J., concurring) (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)). Justice O’Connor originally espoused this interpretation of the Establishment Clause in Lynch v. Donnelly, 465 U.S. 668 (1984), submitting that identification of government endorsement required inquiring into how individuals perceive the “objective” content of the message. See id. at 690 (O’Connor, J., concurring) (asserting that “[t]he effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval”); id. at 694 (O’Connor, J., concurring) (“Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”). Unlike Capitol Square, the facts in Lynch involved a local government setting up a religious display, rather than the government merely administering a neutral public forum. See id. at 671; cf. Capitol Square Review & Advisory Bd., 515 U.S. at 774 (O’Connor, J., concurring) (dismissing this factual distinction as immaterial).
Justices joining her opinion agreed with the plurality that there was no government endorsement of religion.91

4. **Rosenberger v. Rector & Visitors of University of Virginia**92

   *Rosenberger*, the companion case of *Capitol Square*, returns our review of viewpoint discrimination cases to religious speech at public schools.93 A student group called Wide Awake Productions (WAP) at the University of Virginia brought the case.94 WAP published a student periodical, *Wide Awake*, which its editors described as offering a “Christian perspective on both personal and community issues.”95 As a college recognized “Contracted Independent Organization” involved in publication of a student periodical, WAP believed it was entitled according to guidelines at the University of Virginia to have its printing costs reimbursed by the Student Activities Fund (SAF).96 After publication, the University refused to reimburse the $5862 bill on the ground that the periodical was “religious activity” and not entitled to reimbursement under the university guidelines.97 With no further recourse within the University, WAP filed suit against the University in the U.S. District Court for the Western District of Virginia, seeking damages for the printing costs, injunctive and declaratory relief, and attorney’s fees.98

   The district court granted the University’s summary judgment motion, finding no viewpoint discrimination because the SAF was a nonpublic forum and the university guidelines restricting access to

---

91 See *Capitol Square Review & Advisory Bd.*, 515 U.S. at 770 (plurality opinion); *id.* at 783 (O’Connor, J., concurring, with Souter & Breyer, JJ., joining). Justice Stevens called Justice O’Connor’s conceptualization of the “reasonable person” an “enhanced tort-law standard [that] is singularly out of place in the Establishment Clause context.” *Id.* at 800 n.5 (Stevens, J., dissenting). Instead, Justice Stevens would find endorsement where “some viewers of the religious display would be likely to perceive a government endorsement.” *Id.* (Stevens, J., dissenting).


93 *Id.* at 822-23.

94 *Id.* at 825.

95 *Id.* at 826.

96 See *id.* at 827. University guidelines specified that one of the CIO activities qualifying for funding was “student news, information, opinion, entertainment, or academic communications media groups.” *Id.* at 824.

97 *Id.* at 827. A “religious activity,” was defined under the guidelines as any activity that “primarily promotes or manifests a particular belief[f] in or about a deity or an ultimate reality.” *Id.* at 825.

98 *Id.* at 827.
the funds were reasonable. The Fourth Circuit disagreed, holding that the SAF guidelines engaged in viewpoint discrimination by forbidding funding for "religious activities." Nonetheless, the Fourth Circuit found for the University because it held that the discrimination by the University was justified by the "compelling" interest in "avoiding the creation of an 'establishment' of religion at the University of Virginia." The court applied the Lemon test reasoning that although its precedential value had been repeatedly questioned, it was still the mandatory test. The court held that the primary effect of paying WAP's publication costs would be to advance religion and would result in an excessive government entanglement with religion. The court also determined that the prohibition of SAF funding to all "religious activities" was narrowly tailored in light of the difficulty of avoiding entanglement with religion by other means.

A majority of the Supreme Court disagreed. The Court began its analysis with the determination that the University had created a limited public forum and it was constructed to impermissibly "select[ ] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." The Court then proceeded to rely on Lamb's Chapel as the controlling precedent as evidence of viewpoint discrimination. At one time, the Court's analysis regarding the Establishment Clause issue could have been complicated by the issue of state funding; however, the presence of state funding had no effect on

---

101 Id. at 282 (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981)).
102 See id. at 282 n.30 (citing five Justices who have questioned the validity of the Lemon standards).
103 See id. ("For purposes of the Establishment Clause question presented here, therefore, we are bound to consider Lemon governing precedent.").
104 See id. at 285. The court was particularly concerned about the third Lemon prong, excessive government entanglement with religion, because direct monetary subsidization was involved:
   Because Wide Awake is a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy, for the University to subsidize its publication would, we believe, send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values.

Id. at 286.
105 See id. at 287.
107 See id. at 829, 831.
108 See id. at 831–33.
the Court's approach. The Court emphasized the open forum for various student groups, the equal access of those groups to funding, and efforts of the University to disassociate itself from endorsement of the views of any of the student run organizations. Therefore, the Court found that because the neutrality principle had been satisfied, there was no Establishment Clause violation.

On a related note, Justice Kennedy concluded his opinion with an intriguing statement: "[t]here is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause." This statement could be read as implying the Supreme Court's disavowal of the conflict-between-the-clauses approach to the interaction between the clauses in the First Amendment. Such speculation may not be worthy of conclusive generalization, but Justice Kennedy's statement is indicative of the emerging pattern within the Court's First Amendment jurisprudence characterized by a symbiotic relationship between the clauses rather than a parasitic one. For example, Rosenberger marked the fourth straight time that the Court found for plaintiffs alleging viewpoint discrimination and rejected the government's argument that avoidance of an Establishment Clause violation constituted an affirmative defense. More significantly, Rosenberger repeated the Court's increasingly apparent tendency to find a Free Speech Clause violation claim while denying the parallel Establishment Clause defense. Thus, rather than encouraging the expansion of an Establishment Clause that grows at the expense of the Free Speech Clause, the Court has fostered a mutually beneficial relationship between the two clauses as part of one Amend-
ment. Good News Club further establishes the strength of this constitutional mandate.118

For these reasons, Rosenberger is a fascinating introduction to the Court’s decision in Good News Club. The Rosenberger decision also fore-shadowed the result in Good News Club because the Justices in Rosenberger divided along nearly identical lines in Good News Club.119 Additionally, Rosenberger demonstrated the importance of characterizing the determinative facts because both the majority and dissent spend a greater portion of their time examining the specific facts in the case, similar to the Court’s factual analysis in Good News Club.120 With this case law as the backdrop, this Comment will now attempt to summarize the Court’s viewpoint discrimination inquiry.

B. Blueprint of the Court’s Viewpoint Discrimination Inquiry

As a subcategory of free speech protection, the prohibition against viewpoint discrimination requires the court to make a series of detailed inquiries that run the question-word gamut. Who is the speaker, the government or a private individual? What is the speaker saying, and is the speech protected? Where and when is the speech uttered, namely, what is the forum? How and why was the restriction imposed, for example, was the restriction content-based or content-neutral?121 A brief elaboration of each of these inquiries as applied to viewpoint discrimination follows with illustrations from Supreme Court decisions where relevant.

1. Who Is the Speaker?

The Supreme Court has emphasized the importance of preventing viewpoint discrimination: “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.”122 In determining viewpoint discrimination, the first step is to

118 See infra notes 197–203 and accompanying text.
119 Rosenberger, 515 U.S. at 822. Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined. Id. at 863 (Souter, J., dissenting).
120 See generally id. at 822–46 (analyzing facts that are similar to Good News Club); id. at 863–99 (Souter, J., dissenting) (same).
121 This blueprint for judicial analysis of religious viewpoint cases is present to a varying degree in each of the four cases discussed in Part II.A.
122 Rosenberger, 515 U.S. at 829.
identify the speaker, the who. The Free Speech Clause only applies as a restraint on the government. Therefore, if the government cannot be identified as restricting private speech, the case ends there. Although the options for a speaker are limited to two, either the government or a private individual, the determination is complicated by the need to consider the speaker under both the Free Speech Clause and the Establishment Clause. Justice O'Connor framed the inquiry by stating that the "crucial difference [is] between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." The problem is that the Court is divided on how to identify government speech in the context of the Establishment Clause. For example, in Capitol Square, a majority of the Court interpreted the Establishment Clause prohibition on government endorsement of religion as potentially reaching the actions or words of a private party. Consequently, a vast, largely uncharted gray area exists in the viewpoint discrimination context, making the courts' task of identifying the type of speech very difficult, though there are a few clearly defined landmarks to guide courts along their way. This legal wilderness is particularly precarious when the avowedly private plaintiffs are engaged in religious speech of some variety while in a government controlled forum. The difficulty of distinguishing between private speech and government endorsement, or the perception of such, is most likely the cause of—as well as the strongest supporter in the maintenance of—the "clauses-in-conflict" argument discussed in greater detail in Part III.

123 Though often not explicitly stated, the state-actor requirement must be present in each viewpoint discrimination case because the First Amendment does not restrain private actors.

124 See Carl H. Esbeck, Religion and the First Amendment: Some Causes of the Recent Confusion, 42 WM. & MARY L. REV. 883, 885–86 (2001) (stating that "the First Amendment, indeed, each of the first eight Amendments, further limited the existing powers enumerated of the national government while adding to its powers not at all," therefore, "the [First] Amendment is a check on government and government alone").


126 See supra notes 82–91 and accompanying text for discussion of the split between four Justices who interpreted the Establishment Clause as only applying to government speakers, three Justices who interpreted it as extending to private speech that a reasonable person could perceive as receiving government endorsement, and one Justice who interpreted it as further extending to private speech that some people are likely to perceive as receiving government endorsement.

127 The Supreme Court cases cited in Part II.A demonstrate the difficult line-drawing required in the viewpoint discrimination or endorsement inquiry.
2. What Type of Speech, and Where Is the Speaker?

The second and third inquiries in the free speech analysis, a finding of constitutionally protected speech and a determination of the speaker’s forum, are normally undisputed in viewpoint discrimination cases.\textsuperscript{128} The speech in viewpoint discrimination cases is often religious, and the Supreme Court has repeatedly stated that religious speech is entitled to constitutional protection under the First Amendment.\textsuperscript{129} Similarly, though to a lesser extent, the forum at issue in viewpoint discrimination cases—especially those involving schools—tends not to be highly disputed.\textsuperscript{130} The standards that the Court applies to determine whether the government has engaged in impermissible viewpoint discrimination will depend on the type of forum.\textsuperscript{131} Three types of speech fora exist: public, limited or designated public, and nonpublic.\textsuperscript{132} In each, the government has a varying degree of control over protected speech in those fora and has exercised it in different ways: public fora must be made available for speech—for example, sidewalks and parks;\textsuperscript{133} limited public fora may be opened to

\textsuperscript{128} The nature of the forum at issue was undisputed in each of the four cases mentioned in Part II.A, as it was in \textit{Good News Club} itself. \textit{See Good News Club v. Milford Cent. Sch.}, 533 U.S. 98, 106 (2001).

\textsuperscript{129} \textit{See, e.g.}, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993) (holding that a film series on family and child-rearing issues from a Christian perspective was protected under the Free Speech Clause); \textit{Bd. of Educ. of Westside Cnty. Schs.}, 496 U.S. at 250 (stating that private speech endorsing religion is protected by the Free Speech Clause); Widmar v. Vincent, 454 U.S. 263, 269 & n.6 (1981) (stating that religious worship is speech protected under the Free Speech Clause); Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 656 (1981) (stating that religious proselytizing is speech protected under the Free Speech Clause).

\textsuperscript{130} In \textit{Good News Club} itself, the parties stipulated that the school had created a limited public forum, thus the Court assumed that it had. \textit{See Good News Club}, 533 U.S. at 106; \textit{see also Lamb’s Chapel}, 508 U.S. at 389 (following the district court’s finding of a limited public forum without further discussion).

\textsuperscript{131} \textit{See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n}, 460 U.S. 37, 44 (1983).


speech on specified subjects;\(^{134}\) and nonpublic fora are areas that the
government has permissibly closed to public speech completely.\(^{135}\) It
is essential to note that "[o]nce it has opened a limited forum . . . the
state must respect the lawful boundaries it has itself set."\(^{136}\) As previ-
ously stated, when the government makes content-based restrictions
on speech in an open or limited public forum, the restrictions are
subject to strict scrutiny and are invalid unless they are narrowly tai-
lored to achieve a compelling state interest.\(^{137}\) Therefore, though the
classification of the forum at issue is often not disputed, it is an essen-
tial step that often provides a strong indication of how the Court will
resolve the case.\(^{138}\)

3. How Does the Restriction Apply to the Speech?

The fourth inquiry, the determination of whether the govern-
mental restriction on the speech in question was content-based or
content-neutral, cuts to the very heart of viewpoint discrimination.\(^{139}\)
Viewpoint discrimination is, after all, an "egregious form of content
discrimination."\(^{140}\) The import of this is that all content discrimina-
tion, or "[d]iscrimination against speech because of its message[,] is
presumed to be unconstitutional."\(^{141}\) Like the question of who is the
speaker, this inquiry is highly fact specific and often will be a close call
in viewpoint discrimination cases—particularly if the defendant al-
leges that the government is endorsing the religious speech in viola-
tion of the Establishment Clause.

Now, with a greater familiarity with the Supreme Court's view-
point discrimination jurisprudence, an inquiry into the debate be-

\(^{134}\) See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829
\(^{135}\) See U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129
(1981) (stating that the "First Amendment does not guarantee access to property sim-
ply because it is owned or controlled by the government").
\(^{136}\) Rosenberger, 515 U.S. at 829.
\(^{137}\) See Republican Party of Minn. v. White, 122 S. Ct. 2528, 2534 (2002); Perry
\(^{138}\) Compare Widmar, Lamb's Chapel, and Capitol Square, where only one Justice in
all three cases found no viewpoint discrimination in the context of a generally open
public forum, with Rosenberger and Good News Club, where a total of eight Justices
found no viewpoint discrimination in the context of more restrictive limited public
fora.
\(^{139}\) Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (ap-
plying the test for viewpoint discrimination as triggered by finding a content-based
exclusion).
\(^{140}\) Rosenberger, 515 U.S. at 829.
\(^{141}\) Id. at 828.
tween the commentators can be made. Throughout Part III, remember that in all four of the Court's preeminent cases on viewpoint discrimination, the parties pitted the two First Amendment clauses against each other. Is the conflict between the Free Speech Clause and the Establishment Clause inherent in the First Amendment and thus unavoidable, or is the conflict a construct of litigious parties seizing upon ambiguous, perhaps sloppy, language from the Court's decisions in the interest of securing a favorable judgment?

II. FIRST AMENDMENT BATTLEGROUND: THE ALLEGED CONFLICT BETWEEN THE CLAUSES

This Part begins by surveying the constitutional battlefield that is regularly fought within the courts. The dispute over how to interpret the Establishment Clause is just one battle in a much larger war; and, like all significant battles, it has moral, social, political, and economic facets that require consideration. On one side is the camp that interprets the Establishment Clause as extending beyond government speech: "[p]rivate religious expression becomes constitutionally problematic whenever the expression creates a reasonable perception of a linkage between the government and a particular set of sectarian principles—even if the government endorsement of those principles is implicit rather than explicit." In other words, even when the speaker engaged in religious speech is a private individual, the Establishment Clause may still be implicated. On the other side is the camp that interprets the Establishment Clause as applying "only to the words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." This generalization of the two sides to the Establishment

---

142 See Part IV for a discussion of the non-legal implications of the battle over the interpretation of Establishment Clause and viewpoint discrimination in general.
143 Steven G. Gey, The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere, 85 MINN. L. REV. 1885, 1888 (2001); see, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000) (holding that school policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause because "delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech").
144 See supra notes 89-91 (discussing Justice O'Connor's "perception inquiry" under the Establishment Clause to determine whether the private speaker's words or actions constitute government speech endorsing religion).
145 Capitol Square Review & Advisory Bd., 515 U.S. at 767. Accordingly, this camp interprets the majority's holding in Santa Fe Independent School District very differently.
Clause debate provides the backdrop for the analysis of the alleged conflict between the clauses in this Part. The battle lines on how to identify government endorsement of religion are drawn when the Court is faced with a viewpoint discrimination claim under the Free Speech Clause. Both clauses are potentially implicated because the particular views targeted by the government for disparate treatment are, in fact, very often religious.\textsuperscript{146} Thus, injecting religion into the Court's intellectually challenging free speech jurisprudence immediately complicates the difficult task before a court, while probably guaranteeing that the case will be more controversial, thereby making a carefully reasoned decision by the court that much more important.

Rather than dispelling the clauses-in-conflict argument as unfounded or erroneous, the Court has given credence to it by stating that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions."\textsuperscript{147} The Court based this balancing approach—where the Free Speech and Establishment Clauses are weighed against each other—on similar statements in \textit{Lamb's Chapel} and \textit{Widmar}.\textsuperscript{148} Earlier in \textit{Mergens}, the Court gave perhaps its clearest expression of a supposed conflict between the clauses, stating that the "case involves the intersection of two First Amendment guarantees—the Free Speech Clause and the Establishment Clause"\textsuperscript{149} and "introduction of religious speech into the public schools reveals the tension between

\textsuperscript{146} See, e.g., \textit{Santa Fe Indep. Sch. Dist.}, 530 U.S. at 318 (Rehnquist, C.J., dissenting) ("The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life.").

\textsuperscript{147} See, e.g., \textit{Rosenberger}, 515 U.S. at 832 (involving university denial of student funds to student newspaper because its contents revealed an "avowed religious perspective"); \textit{Lamb's Chapel} v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (involving school district's denial of church's request to use school facilities to show a film on an otherwise permissible subject solely because of its religious viewpoint); \textit{Widmar} v. Vincent, 454 U.S. 263, 265 (1981) (involving university's denial of student group's request to use school facilities for "religious worship and religious instruction").

\textsuperscript{148} \textit{Capitol Square Review & Advisory Bd.}, 515 U.S. at 761–62.

these two constitutional commitments, because the failure of a school
to stand apart from religious speech can convey a message that the
school endorses rather than merely tolerates that speech.\textsuperscript{150} The
Court has yet to find a violation of the Free Speech Clause and then
state that it was justified by the need to avoid an Establishment Clause
violation that would have otherwise occurred. Therefore, it is likely
that the Court has only given nominal recognition to such a balancing
approach. More encouragingly, the Court in \textit{Rosenberger} shied away
from language supporting the purported tension between the clauses.\textsuperscript{151} Moreover, the Court took a step toward enunciating a
symbiotic relationship between the clauses by stating in its conclusion
that "[t]here is no Establishment Clause violation in the University's
honoring its duties under the Free Speech Clause."\textsuperscript{152} Though this
language is a step in the right direction, it is probably insufficient to
eliminate confusion in the courts.

In light of the above discussion, one possible explanation for the
competing interpretations of the Court's decision in \textit{Good News Club},
mentioned above—namely, whether it is commendable as expanding
free speech rights or contemptible as eviscerating Establishment
Clause rights—is that the Free Speech and Establishment Clauses are
in conflict with each other: expanding the Free Speech Clause means
contracting the Establishment Clause, and vice versa. Many of the
Court's viewpoint discrimination cases give credence to this embattled
conceptualization of the First Amendment,\textsuperscript{153} including \textit{Good News
Club}, though to a lesser extent.\textsuperscript{154} Nevertheless, this "clauses-in-conflict"
nomenclature, however plausible, is logically inaccurate.\textsuperscript{155}

Professor Carl Esbeck,\textsuperscript{156} the paradigmatic commentator seeking
to debunk the clauses-in-conflict nomenclature, argues that the Free

\textsuperscript{150} Id. at 264 (emphasis added).
\textsuperscript{151} See infra Part I.A.4.
\textsuperscript{152} Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 846 (1995).
\textsuperscript{153} See supra Part I.A for a discussion of the Court's First Amendment decisions in
\textit{Widmar, Lamb's Chapel, Capitol Square,} and \textit{Rosenberg.}
\textsuperscript{154} See infra Part III.B for a discussion of the majority opinion in \textit{Good News Club.}
\textsuperscript{155} Carl H. Esbeck and Richard W. Garnett, on behalf of the Christian Legal
Society, and Nathan J. Diament, on behalf of the Institute for Public Affairs Union of
Orthodox Jewish Congregations of America, also disputed the validity of the conflict
between the clauses in the amicus brief they submitted in support of \textit{Good News
Club. See Amicus Brief for Petitioners, Good News Club v. Milford Cent. Sch., 553
U.S. 98 (2001) (No. 99-2036) (arguing that the Supreme Court should "reject any
invitation to use the Establishment Clause as a sword driving private religious expres-
sion from the marketplace of ideas").}
\textsuperscript{156} Professor Esbeck is the Isabella Wade and Paul C. Lyda Professor of Law at the
University of Missouri-Columbia. See Esbeck, supra note 124, at 883 n.1.
Speech and Establishment Clauses cannot be in conflict with each other at all. 157 Professor Esbeck has written prolifically on the subject of the "clash-of-the-clauses" in the First Amendment in a consistent attempt to confront and clear up the confusing inaccuracies in the Court's jurisprudence. 158 Esbeck calls the so-called conflict between the clauses "completely nonsensical" and supports his argument by summarizing the intricate interaction between the Free Speech and Establishment Clauses by saying, "If the speech is government speech (including private speech that has the government's imprimatur) and the content is inherently religious, then the Establishment Clause prohibits the speech." 159 Esbeck qualifies his statement with the parenthetical which notes that there are many difficult cases where the presence of the "government's imprimatur" is the crux of the case. The test for identifying private speech with the government's imprimatur, therefore, is critical to determining the scope of the Establishment Clause and ensuring a symbiotic relationship with the Free Speech Clause. 160 Indeed, such is the case all too often in viewpoint discrimination cases, *Good News Club* included. It is undeniable that the First Amendment only applies to, and accordingly, only constrains

157 See id. at 887 ("Given that the Establishment Clause restrains government and government alone, not private individuals, this 'clash-of-the-Clauses' argument is completely nonsensical."); Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 301 (1999) (arguing that the Court should avoid arbitrarily favoring one First Amendment clause over another when confronted with an alleged conflict between the clauses and instead "ought to conclude from this apparent tension . . . that it has miscued when interpreting one or both clauses") [hereinafter Esbeck, *Myths, Miscues, and Misconceptions*]; Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 11 (1998) ("[C]ourts are increasingly confronted with supposed 'collisions' of the Establishment Clause with other Clauses in the First Amendment that force them to subordinate one Clause to give the other full play. This makes no sense."); Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 45 n.134 (1997) ("[T]here is nothing in the wording of the First Amendment that suggests that when clauses ostensibly 'conflict,' the Establishment Clause overrides the Free Exercise and Free Speech Clauses. One could just as easily presume that the Free Exercise and Free Speech Clauses supersede the Establishment Clause."); Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 594–95 (1995) (stating that "a cardinal rule of construction is that the text of the First Amendment has to be assumed internally coherent" and suggesting that the distinction between government speech and private speech determines whether the Free Speech Clause or the Establishment Clause applies).

158 See sources cited supra note 157.

159 Esbeck, *supra* note 124, at 889 (footnote omitted).

160 See infra Part IV for a discussion of the test for endorsement and its implications.
the government on its face. Such governmental constraint, however, has practical restrictions for private individuals, as applied.

Maximizing speech by private, religious groups by emphasizing the Free Speech Clause does not necessarily mean subordinating the Establishment Clause in the First Amendment hierarchy. On the contrary, the two clauses are part of the same constitutional amendment for good reason—namely, both clauses seek to protect individual thought. More specifically, the Free Speech Clause prevents the government from interfering with individual thought by restricting private speech, and the Establishment Clause prevents the government from interfering with individual thought by becoming a speaker itself, rather than leaving Mill’s “marketplace of ideas” to private individuals. Both clauses create negative rights for individuals. This guarantee of “freedom from” is accomplished by targeting the government, and the clauses restrict the government alone. Accordingly, the two clauses technically cannot be in tension with each other; rather, one is the natural corollary of the other. Each clause supports the other in an attempt to accomplish a common goal: to limit the government, both in its control over private speech and in its influence over religion. Nonetheless, the litigation on this matter indicates that there currently is an undeniable tension between the clauses. The Court’s complicated, often indeterminate, viewpoint discrimination jurisprudence is a particularly vivid example of this reality. Part III focuses on the Court’s most recent viewpoint discrimination case, the nexus of this Comment.

III. Good News Club v. Milford Central School

A. Procedural History

Following Milford’s denial of the Club’s request to hold meetings after hours on school property, the Club, along with Ms. Fournier and her daughter Andrea, filed suit under 42 U.S.C. § 1983 against Milford, alleging, inter alia, that free speech rights under the First Amendment had been violated. Subsequently, the Club moved for,
and was granted, a preliminary injunction to prevent the school from excluding the Club. The district court later vacated the preliminary injunction and granted the school’s motion for summary judgment. The court based its holding on the finding that the Club’s primary emphasis was “religious subject matter” rather than “merely a religious perspective on a secular subject.” Noting that Milford had not allowed other groups providing religious instruction to use its facilities, the court reasoned that the school could constitutionally deny access to the Club because the prohibition was “based on the general subject matter—religious instruction and prayer, and not on a particular perspective or viewpoint on a subject otherwise within the forum’s limitations.” Therefore, the court concluded that the school district had not engaged in impermissible viewpoint discrimination.

On appeal, Judge Miner, writing for the Second Circuit, affirmed the district court’s decision by holding that Milford had not engaged in unconstitutional viewpoint discrimination. After agreeing that Milford had created a limited public forum, the appellate court applied a two-part test for impermissible viewpoint discrimination: “[r]estrictions on speech in a limited public forum will withstand First Amendment challenge if they are reasonable and viewpoint neutral.” Like the Northern District of New York District Court, the Second Circuit focused on the Club’s emphasis on a personal relationship with Jesus Christ as the foundation for living a moral life as being “quintessentially religious.” In support of this conclusion, the court relied heavily on its ruling in Full Gospel Tabernacle v. Community School.

complaint also included a § 1983 claim for equal protection rights under the Fourteenth Amendment and a claim under the Religious Freedom Restoration Act of 1993. 

165 Id.
166 Id. at 161.
167 Id.
168 Id.
169 See id. (mentioning that because the plaintiff’s free speech rights had not been violated, there was no need to consider whether avoidance of an Establishment Clause violation would have justified a First Amendment violation).
171 Id. at 509.
172 Id. at 510 (stating that teaching children how to “cultivate their relationship with God through Jesus Christ” is quintessentially religious “[u]nder even the most restrictive and archaic definitions of religion”).
District, which upheld a school's denial of access to a church that desired to use its auditorium for religious services.\textsuperscript{174}

Finding that the Club's activities were "quintessentially religious" proved to be the crux of the court's decision. Based on that determination, the court concluded that it was "eminently reasonable that the Milford school would not want to communicate to students of other faiths that they were less welcome than students who adhere to the Club's teachings."\textsuperscript{175} The court further noted that the constitutionally problematic risk of the perception that the school was endorsing the Club was magnified "in view of the fact that those who attend the school are young and impressionable."\textsuperscript{176} Similarly, the court used its "quintessentially religious" finding as the basis for holding that the school had excluded the Club for its subject matter in accordance with its community use policy rather than because of its viewpoint on permissible subject matter.\textsuperscript{177} Specifically, the court concluded that the Club's activities were essentially religious worship rather than moral instruction from a religious viewpoint.\textsuperscript{178} The divided panel attempted to justify its conclusion in the face of the contradictory holding in Good News/Good Sports Club v. School District of City of La- due\textsuperscript{179} by implicitly suggesting that the Eighth Circuit erroneously overlooked the nature of the Good News/Good Sports Club's activities.\textsuperscript{180}

In his well-written dissent, Judge Jacobs defended the validity and applicability of the Eighth Circuit's decision in Good News/Good Sports Club.\textsuperscript{181} Though Judge Jacobs began by agreeing with the majority on the finding of a limited public forum and the two-part test for view-

\begin{itemize}
\item \textsuperscript{173} 164 F.3d 829 (2d Cir. 1999) (per curiam).
\item \textsuperscript{174}  See Good News Club, 202 F.3d at 510 ("It is difficult to see how the Club's activities differ materially from the 'religious worship' described in Full Gospel Tabernacle.").
\item \textsuperscript{175}  Id. at 509.
\item \textsuperscript{176}  Id.
\item \textsuperscript{177}  See id. at 509–10 (concluding that the "Good News Club is doing something other than simply teaching moral values").
\item \textsuperscript{178}  See id.
\item \textsuperscript{179}  28 F.3d 1501, 1507 (8th Cir. 1994) (holding that the school district's amended-use policy "result[ed] in viewpoint discrimination because it deny[ed] the Club access based on the Club's religious perspective on otherwise includible subject matter").
\item \textsuperscript{180}  See Good News Club, 202 F.3d at 511 ("The Eighth Circuit apparently took for granted that the Good News/Good Sports Club's activities amounted only to speaking on moral and character development. The opinion contains only a brief recitation of the types of activities that take place at a club meeting, but no examination of their import.").
\item \textsuperscript{181}  See id. at 511, 513 (Jacobs, J., dissenting) (stating that though "the area of my agreement with the majority is substantial," "[a]s I read the Eighth Circuit opinion ... the court carefully sifted the facts—facts substantially identical to those in the present
point discrimination, he reached the opposite conclusion. Judge Jacobs relied heavily on the Supreme Court's holding in Lamb's Chapel as justification for his alternative conclusion that Milford, like the school district in Good News/Good Sports Club, had discriminated against the Christian Club based on its viewpoint. According to Judge Jacobs, the Club's emphasis of the value and necessity of a personal relationship with Jesus Christ as legitimizing the Club's exclusion was erroneous because "Christ is also the central and animating spirit in the viewpoint expressed in the Lamb's Chapel films." As a matter of fact, Judge Jacobs pointed out that the already elusive distinction between permissible subject matter and impermissible viewpoint discrimination is more evasive when morality is at issue. Though Judge Jacobs refrained from line-drawing at this point, he apparently felt compelled to conclude that the Club's primary focus was teaching morals, not "worship," and that even if such a determination was impossible, courts should err on the side of free speech. This conclusion is intriguing for several reasons. First, this distinction suggests that if the Club's focus was religious worship Judge Jacobs would have held that Milford could exclude the Club under its community-use policy even though it tangentially provided teaching of morals and values. Second, though Judge Jacobs began by presuming that such a distinction was possible, he qualified it by suggesting that it may not be. The fact that Judge Jacobs attempted to quantify the Club's emphasis between worship and teaching morals is surprising because he had refrained from making similarly difficult distinctions earlier in his dissent.

---

182 Id. at 512 (Jacobs, J., dissenting).
184 See Good News Club, 202 F.3d at 513–14 (Jacobs, J., dissenting) ("I cannot square the majority's analysis in this case with Lamb's Chapel.... this case seems to be much closer to Lamb's Chapel than to Full Gospel Tabernacle.").
185 Id. at 514 (Jacobs, J., dissenting) ("I see no basis for saying that the message of the Good News Club has religious content and that the message of the movie is no more than a religious viewpoint on a secular subject.").
186 See id. at 514–15 (Jacobs, J., dissenting) ("No one should be surprised if a religious viewpoint on morality looks very like religion itself.").
187 See id. at 515 (Jacobs, J., dissenting).
188 See id. (Jacobs, J., dissenting) ("Because the Club's focus appears to be on teaching lessons for the living of a morally fit life, and not on worship, I believe that the Club's message is in fact the 'teach[ing of] morals from a religious perspective.'" (quoting id. at 508 (majority opinion))).
189 See id. at 514 (Jacobs, J., dissenting) (stating that the distinction between the Club's activities and Lamb's Chapel's activities "lacks traction").
Furthermore, immediately before making the worship/teaching distinction, Judge Jacobs quoted from *Widmar v. Vincent*, in which the Supreme Court refused to make that same distinction because it lacked "intelligible content."\(^{190}\) In *Good News Club*, the Court wrestled with this same distinction; therefore, Judge Jacob’s opinion serves as a useful introduction to the way the Justices ruled.\(^{191}\)

The Supreme Court’s opinion in *Good News Club* ultimately vindicated Judge Jacobs because the majority essentially agreed with his dissent in the Second Circuit case.\(^{192}\) The majority avoided endorsing what Judge Jacobs had labeled a “fallacy” by refusing to engage in difficult, “quixotic” line-drawing to distinguish religious instruction from a religious viewpoint on morality.\(^{193}\) Furthermore, Justice Thomas supported Judge Jacobs by questioning the Court of Appeals majority’s “remarkable” failure even to mention the *Lamb’s Chapel* decision upon which the Supreme Court relied heavily in its reversal of the Second Circuit.\(^{194}\) Justice Thomas’s opinion is discussed in greater detail in the following section.

---

190 Id. (Jacobs, J., dissenting) (quoting *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981)); see also *Widmar*, 454 U.S. at 272 n.9 ("We think that the distinction [between religious ‘speech’ and religious ‘worship’] advanced by the dissent lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable.").

191 See text accompanying infra notes 245-58 (discussing Justice Souter’s argument that the majority’s characterization of the Club’s activities “ignores reality” because if taken literally, then “any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque” (quoting *Good News Club v. Milford Cent. Sch.*, 553 U.S. 98, 139 (2001) (Souter, J., dissenting))).

192 See *Good News Club*, 553 U.S. at 109 ("Applying *Lamb’s Chapel*, we find it quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the afterschool forum.").

193 See id. at 111–12. In his dissent, Judge Jacobs called the panel’s line-drawing a “fallacy” because it “treats morality as a subject that is secular by nature, which of course it may be or not, depending on one’s point of view.” *See Good News Club*, 202 F.3d at 515 (Jacobs, J., dissenting).

194 *Good News Club*, 553 U.S. at 109 n.3 (quoting Judge Jacobs as evidence of the ample reminders the Second Circuit had to consider *Lamb’s Chapel*: “I cannot square the majority’s analysis in this case with *Lamb’s Chapel*” (quoting *Good News Club*, 202 F.3d at 513 (Jacobs, J., dissenting))). Additionally, during oral argument before the Supreme Court, the Second Circuit majority’s “remarkable” oversight was identified when one of the Justices illuminated the fact that Judge Miner wrote the opinion in both *Lamb’s Chapel*—which the Supreme Court reversed—and *Good News Club*. Transcript of Oral Argument, Good News Club v. Milford Cent. Sch., 553 U.S. 98 (2001) (No. 99-2036), at 2001 WL 196997, at *4.
B. Majority Holding and Rationale

The majority began by assuming that Milford Central School operated a limited public forum.\textsuperscript{195} Despite granting the state the constitutional power to restrict speech on its grounds, Justice Thomas quickly proceeded to state why the Court's decisions in \textit{Lamb's Chapel} and \textit{Rosenberger} required finding Milford guilty of unconstitutional viewpoint discrimination.\textsuperscript{196} Because the Court considered these analogous precedents dispositive, it summarily reversed the Second Circuit's decision.\textsuperscript{197} The Court used the same two-part test that the district and appellate courts used to conclude no impermissible viewpoint discrimination existed, which required that the restriction be "reasonable in light of the purpose served by the forum" and also viewpoint neutral.\textsuperscript{198}

In support of their determination that the substance of the Club's activities was "materially indistinguishable" from the activities in \textit{Lamb's Chapel} and \textit{Rosenberger}, the majority emphasized that in both cases "religion is the viewpoint from which ideas are conveyed."\textsuperscript{199} The school district was permitted to chose the categories of content permissible on its grounds; however, the school district could not discriminate against viewpoints on the subjects to which the school had opened its grounds.\textsuperscript{200} Consequently, though the divided Second Circuit panel found that the Club's activities were "quintessentially religious," the Supreme Court said this did not preclude the Club from teaching morals from a constitutionally protected viewpoint in accordance with Milford's community-use policy.\textsuperscript{201} In other words, the majority held that, regardless of the magnitude of the religious presence of the Club, their right to use the school facilities was still constitutionally guaranteed as long as they were teaching morals and character development. This conclusion is consistent with the major-

\textsuperscript{195} \textit{Good News Club}, 533 U.S. at 106. Both parties stipulated that Milford, pursuant to N.Y. Educ. Law § 414, created a limited public forum rather than an open public forum. \textit{Id.} This distinction is important because the Court stated that a limited public forum permits the state to restrict access to its facilities, though that power is not without limitations. \textit{Id.}

\textsuperscript{196} \textit{See id.} ("Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination.").

\textsuperscript{197} \textit{See id.} at 119.

\textsuperscript{198} \textit{See id.} at 107 (quoting \textit{Rosenberger v. Rector & Visitors of Univ. of Va.}, 515 U.S. 819, 829 (1995); \textit{Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.}, 473 U.S. 788, 806 (1985)).

\textsuperscript{199} \textit{Id.} at 112 n.4.

\textsuperscript{200} \textit{Id.} at 111-12.

\textsuperscript{201} \textit{See id.} at 111.
ity's implied policy determination—and Judge Jacobs's dissent in the Second Circuit—that the judiciary should refrain from actively weighing the amount of the purely "religious" qualities of groups' activities. Accordingly, the majority found that *Rosenberger* and *Lamb's Chapel* were controlling because in those cases, too, the Court found a "religious viewpoint."

On the contrary, Justice Stevens's dissent espoused a radically different legal rule regarding the religious nature of the Club's activities. Justice Stevens advocated a method of analyzing viewpoint discrimination cases that conceptualized a much more active, discretionary role of the court. Rather than considering the presence of moral and character development as sufficient to justify finding the Club entitled to constitutional protection, Justice Stevens delineated three categories of speech for religious purposes: (1) discussion of a topic from a religious viewpoint, (2) religious worship, and (3) proselytizing. Based on this categorization, Justice Stevens concluded that Milford was justified in excluding the Club because he categorized its activities within either the second or third categories. Therefore, while the majority resisted difficult, ambiguous line-drawing as to how "religious" the Club's activities were, Justice Stevens advocated even greater judicial quantification of religious activities.

Justice Thomas also voiced his concern with the "unstated principle" of the Second Circuit's reasoning that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." The Court emphat-

---

202 Id. ("We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character from a particular viewpoint.").

203 Id. at 110.

204 See id. at 130–34 (Stevens, J., dissenting).

205 See id. at 131 (Stevens, J., dissenting) (regarding the ability to distinguish between different types of religious speech).

206 See id. at 130 (Stevens, J., dissenting).

207 See id. at 133 (Stevens, J., dissenting).

208 See id. (Stevens, J., dissenting) ("The 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, particularly an elementary school, must be permitted to draw them.").

209 See id. at 111. The accuracy of Justice Thomas's perceptive critique is revealed by the Second Circuit panel's admission that the Club's "teachings may involve secular values such as obedience or resisting jealousy." Good News Club v. Milford Cent. Sch., 202 F.3d 502, 509 (2d Cir. 2000). The panel, however, immediately qualified its grudging admission by identifying "an additional layer" to the teachings that the
ically rejected such a conclusion. Justice Scalia wrote a separate concurring opinion, in part, to emphasize this point further by comparing treatment of the Boy Scouts to treatment of the Good News Club. As evidence of Milford's unconstitutional bias against the Club, Justice Scalia stated that "[f]rom no other group does respondent require the sterility of speech that it demands of petitioners."

To illustrate how the school district engaged in anti-religious viewpoint discrimination, Justice Scalia pointed to groups such as the Boy Scouts, who would undoubtedly be permitted to provide reasons for living morally upright lives, such as making the scouts more honorable, successful people or making their parents proud. The Club, however, is prohibited from providing its reasons—in particular, "because God wants and expects it... and because it emulates Jesus Christ." By preventing the Club from supporting its premise that God exists and dependence on Him is necessary for moral living, the school hobbles the effectiveness of the Club's undisputedly protected teachings on moral and character development: "[j]ust as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God's will are useless if the listeners do not believe that God exists." Therefore, according to Justice Scalia, not only are the allegedly "purely religious" aspects of the Club's activities inseparable from the Club's teachings on moral and character development, but the attempt to make such a distinction is itself a form of viewpoint discrimination.

The Court also rejected Milford's Establishment Clause argument as an affirmative defense, stating that "the school has no valid Estab-
lishment Clause interest.” The Court conceded that avoiding an Establishment Clause violation could be a compelling state interest justifying content-based restriction. The majority avoided giving support to the “clauses-in-conflict” theory with the qualification that “it is not clear whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.” The value this statement has in clarifying the conflict between the clauses and uncertainty in First Amendment law is limited, but should not be overlooked. Although the Court did leave the possibility of an Establishment Clause affirmative defense to a general Free Speech Clause claim open, it restricted the availability of such a defense by denying the presence of an Establishment Clause violation on the facts in Good News Club and implicitly questioning whether seeking to avoid government endorsement could ever justify viewpoint discrimination.

The Court applied the neutrality test to determine whether an Establishment Clause violation existed. The principle of government neutrality toward religion is actually one part of the three-part Lemon test: (1) the statute must have a secular purpose; (2) the statute’s principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion. It is worth noting that the majority’s silence on the other two prongs of the Lemon test is consistent with its recent jurisprudence involving the Establishment Clause and with the Court’s movement away from strict adherence to Lemon. Nonetheless, Justice Breyer’s concurring opinion contains a

217 See id. at 113.
218 See id. at 112 (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981)).
219 See id. at 113.
220 In his dissent, Justice Souter—not without a hint of apathetic sarcasm—describes the lack of resolution on the conflict-between-the-clauses issue as emblematic of the majority decision as a whole: “the consolation may be that nothing really gets resolved when the judicial process is so truncated, [though] that is not much to recommend today’s result.” Id. at 145 (Souter, J., dissenting).
221 See id. at 113 (“We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.”).
222 See id. at 114 (“[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.” (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995))).
223 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); see also Jonathan Mills, Strict Separationism’s Sacred Canopy, 39 Am. J. Juris. 397, 406–21 (1994) (discussing the logical consistency of the Lemon test with strict separationism, as well as the test’s key precedents and their presumptions about religion).
224 See, e.g., Agostini v. Felton, 521 U.S. 203, 222–23 (1997) (applying the neutrality test by asking “whether the government acted with the purpose of advancing or inhibiting religion” and “whether the aid has the effect of advancing or inhibiting re-
reminder that Lemon has not been overruled,\textsuperscript{225} and, despite the best efforts of some of the Justices, the Lemon test is not yet dead.\textsuperscript{226} Justice Breyer stated that the "government's 'neutrality' in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school's policy violates the Establishment Clause."\textsuperscript{227}

Applying the neutrality principle to the facts in Good News Club, Justice Thomas stated that "[b]ecause allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."\textsuperscript{228} This statement can be interpreted two ways. First, Justice Thomas appeared to suggest that Establishment Clause violations will be interpreted more narrowly under the neutrality test than they were under the Lemon test. For example, neutrality, by definition, means not only that religious groups can receive aid from the government as long as they are not preferred over non-religious groups,\textsuperscript{229} but that they are guaranteed the same aid as non-religious groups.\textsuperscript{230} Second, this statement can also be read as implying that an Establishment Clause violation could conceivably "trump" a Free Speech Clause violation. The ambiguity of this language keeps the possibility of an Establishment Clause violation open

\textsuperscript{225} See Good News Club, 533 U.S. at 127 (Breyer, J., concurring). The Court in Lamb's Chapel expressed a similar sentiment in response to Justice Scalia's concurring opinion: "Lemon, however frightening it might be to some, has not been overruled." \textit{Lamb's Chapel}, 508 U.S. at 395 n.7.

\textsuperscript{226} Justice Scalia documents this concerted effort to bury Lemon by stating that "[o]ver the years . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart." \textit{Lamb's Chapel}, 508 U.S. at 398 (Scalia, J., concurring). Justice Scalia then goes on to list the citations of the supporting cases. \textit{Id.} at 398–99 (Scalia, J., concurring).

\textsuperscript{227} Good News Club, 533 U.S. at 127 (Breyer, J., concurring).

\textsuperscript{228} See \textit{id.} at 114.

\textsuperscript{229} See, e.g., Eugene Volokh, \textit{Equal Treatment Is Not Establishment}, 13 \textit{Notre Dame J.L. Ethics & Pub. Pol'y} 341, 372 (1999) (stating that the "core meaning" of the Establishment Clause "is no special benefit for religion—'establishing' something must necessarily mean treating it better than its rivals").

\textsuperscript{230} See \textit{id.} at 369–70 ("And if giving special benefits to religion is favoritism, advancement, and endorsement, then discriminating against religion is hostility, inhibition, and disapproval.").
despite having just found viewpoint discrimination. Once again, this is problematic because it interprets the First Amendment expression and religion clauses as antagonistic rather than complementary.

At the very least, the Court’s holding and application of the neutrality test rather than the Lemon test makes a conflict between the clauses less likely. The Court’s reasoning supports this conclusion. In particular, the Court will not only prevent the Club from receiving preferential treatment (though it may receive benefits, such as the use of school facilities, as long as they are neither favored nor disfavored), but will prevent the school from treating the Club disparately: “we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if they were excluded from the public forum.”231 This is a favorable improvement from the Lemon test for religious groups because under Lemon they could not receive a benefit from the government; now, they simply may not receive favorable treatment.

Once again, the Court justified its conclusion by relying heavily on Widmar, Lamb’s Chapel, and Rosenberger.232 Of particular interest is the majority’s dismissal of any “misperception” of government endorsement of the Club’s views because the Club’s meetings were held after school, were open to all students with the required parental consent, and the school facilities were open to other groups teaching moral development.233 More importantly, the majority only discussed these factors in the context of their indication that they actually had not considered the potential misperceptions of students in their endorsement inquiry.234 Furthermore, the Court noted that “[a]ny bystander could conceivably be aware of the school’s use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement.”235 The Court’s reasoning suggests a departure from the “perception inquiry” espoused in Justice O’Connor’s concurring opinion in Capitol Square,236 but the majority

231 Good News Club, 533 U.S. at 118 (emphasis added).
232 See id. at 118–19.
233 See id. at 117–18.
234 Id. at 117 (“[E]ven if we were to consider the possible misperceptions by schoolchildren in deciding whether Milford’s permitting the Club’s activities would violate the Establishment Clause, the facts of this case simply do not support Milford’s conclusion.”).
235 Id. at 118.
236 See supra notes 89–91.
did not expressly rely upon a particular test in its consideration of Milford’s allegations of unconstitutional government endorsement.

The Court rejected as “unpersuasive” the presence of elementary school children as grounds for distinguishing Milford’s policy from the above-mentioned cases and seems to have based its holding on the Establishment Clause issue largely on the absence of any material distinction from previous precedents rather than on a clearly delineated test. The Court spent most of its time dismissing the problems that Milford alleged were of constitutional magnitude. For example, the majority determined parents, not children, to be the relevant community regarding the presence of coercive pressure to attend club meetings. The Court based this conclusion on the fact that the parents were required to give their permission before the children could attend Club meetings. Additionally, the possibility that other children may see the Club on the school premises and misperceive the relationship between the school and the Christian organization was considered overly speculative and without supporting precedent.

The majority’s finding of viewpoint discrimination and not endorsement was an important move toward clarifying First Amendment jurisprudence; however, investigation into the jurisprudential nuances embedded within the separate opinions is necessary to determine the magnitude of the adjustment and to predict how the Court will adjudicate similar factual scenarios in the future.

C. Separate Opinions

Although the Second Circuit majority ignored Lamb’s Chapel, the dissenting Justices on the Supreme Court not only addressed it, but asserted that it could be distinguished on the facts of the case. The

237 See Good News Club, 533 U.S. at 115–16 (conceding that the Court had found “heightened concerns” about “subtle coercive pressure” in elementary schools in Lee v. Weisman, 505 U.S. 577, 592–93 (1992), but distinguishing it on the fact that the activity at issue was obligatory).

238 See id. at 113 (“We rejected Establishment Clause defenses similar to Milford’s in two previous free speech cases, Lamb’s Chapel and Widmar.”).

239 See id. at 115.

240 See id.

241 See id. at 113–14, 119.

242 Justice Souter asserts that even though the Second Circuit panel did not mention Lamb’s Chapel, the “Court of Appeals unmistakably distinguished this case from Lamb’s Chapel, though not by name.” Id. at 135 (Souter, J., dissenting). Ironically, despite his suggestion that identifying the most relevant case by name is unnecessary formalism, Justice Souter then goes on to refer to Lamb’s Chapel twenty times in his dissenting opinion—a mere nine times shy of matching the number of times Justice Thomas refers to it.
discrepancy between the majority and the dissent on the presence of viewpoint discrimination can be summarized as two different readings of the facts in Good News Club—more specifically, the Justices disagreed about the nature of the Club’s activities. Identifying and contrasting the way the majority and dissents framed the factual issue is essential to understanding how they reached opposite conclusions. This discussion will begin with viewpoint discrimination issue and then proceed to the endorsement of religion issue.

As Justice Thomas framed the viewpoint discrimination issue before the Court, the case involved a club that undisputedly sought to develop the morals and character of attending children by instructing them to be obedient and kind to others even if others were not kind in return.243 With that as the starting point, Justice Thomas then set out to determine whether such a club could be excluded from school grounds simply because it taught the children about quality of character from a religious perspective.244 When this characterization of the facts is compared to the facts in Lamb’s Chapel and Rosenberger, the majority’s application of them as dispositive was almost a foregone conclusion.

On the contrary, Justice Souter, joined by Justice Ginsburg, asserted that the majority mischaracterized the Club’s essential nature: an “evangelical service of worship calling children to commit themselves in an act of Christian conversion.”245 Justice Souter argued that the majority’s characterization of the Club’s activities “ignores reality” because if taken literally, then “any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.”246 This argument raises an important question: at what point would a majority of the Court agree that substance of a religious group’s activities becomes something other than teaching about morals and character? For example, an Evangelical Christian church service on a Sunday morning would certainly provide moral and character teaching. Presumably, the Court did not mean that Milford

243 See id. at 108 (“Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford’s policy, it is clear that the Club teaches morals and character development to children.”).

244 See id. at 109–10.

245 See Good News Club, 533 U.S. at 138 (Souter, J., dissenting). To support his view of what he asserts is an obvious reality (and consequently not a difficult line-drawing problem), Justice Souter states that the heart of the meeting is the “challenge” to live lives worthy of Jesus Christ as Savior and the “invitation” “to trust in the Lord Jesus to be your Savior from sin” in order to have eternal life. Id. (Souter, J., dissenting) (internal quotations omitted).

246 Id. at 139 (Souter, J., dissenting).
Central School must grant access to local churches seeking to use its facilities. If so, the majority left a crucial question unanswered: how do the courts distinguish content-based discrimination from viewpoint discrimination?

The Court's First Amendment jurisprudence suggests that courts must draw such a distinction because the Court has treated content-based discrimination and viewpoint discrimination as different but related inquiries. Nevertheless, the majority in *Good News Club* "conclude[d] that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values." This language implies that Milford would only constitutionally be permitted to exclude the Club under its limited public forum permitting teaching of moral values if the Club's activities were purely religious worship. In turn, the only way a school district could prevent churches from using its facilities is not to permit any private groups to use its facilities for teaching moral values.

On the other hand, the Court uses other language suggesting that a greater emphasis on religious worship or proselytizing could have tipped the scales in favor of finding a permissible content-based restriction rather than viewpoint discrimination. For example, the Court held that "the substance of the Club's activities ... are materially indistinguishable from the activities in *Lamb's Chapel* and *Rosenberger*." This language leaves open the possibility that at some point the Club's emphasis on religion and proselytizing could be materially distinguishable from the activities in the Court's viewpoint discrimination precedents. Therefore, the majority's opinion is best charac-

---

247 See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination."). In *Rosenberger*, the Court further illustrated this distinction with the following statement: in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 829–30.

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

249 Id.

250 For example, if the district court had found that the Club's activities were "religious worship," then the Court may have been bound to conclude that Milford had denied the Club access consistent with its limited public forum—unless the district
terized as suggesting that the distinction between excludable religious worship/evangelism and protected moral teaching from a religious viewpoint may be necessary, but that it was not here because the Club’s activities were protected. The uncertainty within the majority’s opinion on this point, however, is revealed by Justice Souter’s dissenting opinion. Justice Souter’s dissenting opinion, therefore, helps demonstrate the need for the Court to explain the distinction between unconstitutional viewpoint discrimination and permissible content-based restrictions.

Justice Scalia wrote separately in part to address Justice Souter’s characterization of the Club’s activities. In his concurring opinion, Justice Scalia downplayed the distinction between viewpoint discrimination and content-based discrimination, stating that “I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination.” He also downplayed the distinction between worship/evangelism and moral teaching from a religious perspective. Justice Scalia pointed to the Court’s decision in Widmar v. Vincent to explain why Justice Souter was incorrect in attempting to distinguish between worship and religious speech. In Widmar, the Court stated that such a distinction not only has no intelligible content but also has no relevance to the constitutional issue.

One possible ground for questioning Justice Scalia’s use of Widmar, however, is that the Court’s refusal to distinguish between worship and religious speech was in the context of a “generally open forum” and content-based restrictions. Therefore, as discussed
above, the question remains whether such a distinction is possible in the context of a limited public forum and viewpoint discrimination, and if so, how that distinction is made. Justice Scalia appeared to have anticipated this factual difference and attempted to dismiss it by citing Rosenberger where the Court refused to distinguish between speech, including an evangelistic message and speech expressing views that a particular religion might approve.\textsuperscript{258} Therefore, Justice Scalia seems to have rejected the distinction entirely between religious worship/evangelism and moral teaching from a religious perspective. One implication of this position is that school districts' power to regulate their limited public fora would greatly be curtailed. Judge Jacobs briefly addressed this implication by suggesting that if the distinction was impossible, as Justice Scalia seems to have indicated, then courts should err on the side of protecting more religious speech in the name of the free speech rather than prohibiting more in the name protecting a school district's limited public forum.\textsuperscript{259}

The bottom line is that the six Justices in the majority, including Justice Scalia, believed that the facts of Good News Club did not necessitate a direct answer to the question. The three dissenting Justices disagreed, arguing that such a distinction was necessary and the Club's activities fell within the category of speech that may be restricted. This six-three split in the Court indicates that though Good News Club did not provide a bright-line rule distinguishing excludable religious speech from protected speech on permissible subjects from a religious viewpoint, the case does provide a fact-sensitive standard that cannot be far from the exact line. Therefore, this matter is likely to generate more litigation involving private religious speech. In turn, the parties involved will seek to elucidate the line between excludable worship or proselytization, on one hand, and speech on a permissible subject, on the other.\textsuperscript{260}

\textsuperscript{257} Id. at 267.
\textsuperscript{258} See Good News Club, 533 U.S. at 125–26 (Scalia, J., concurring) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 844 (1995)). Nonetheless, this response does not answer the question of whether such a distinction is ever possible or if it was simply not possible on the facts before the Court in Rosenberger.
\textsuperscript{259} See Good News Club v. Milford Cent. Sch., 202 F.3d 502, 515 (2d Cir. 2000) (Jacobs, J., dissenting) ("Even if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-permissible content, we should err on the side of free speech. The concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum.").
\textsuperscript{260} One example of a very recent legal battle involving a religious group on public school grounds is the conflict between the Anti-Defamation League (ADL) and Rage Against Destruction (RAD). See Anti-Defamation League, Rage Against Destruction and Joyce Meyer Ministries, at http://www.adl.org/church-state/rad.asp (Oct. 16, 2002).
In addition to their conclusions about the viewpoint discrimination issue, the Justices writing separate opinions also discussed the endorsement defense. The three dissenting Justices agreed that the Court should not have reached the endorsement of religion issue because it had not been considered by the district court or circuit court. Justice Souter was especially perturbed by the majority ruling on the issue: "the majority now sees fit to rule on the application of the Establishment Clause, in derogation of this Court's proper rule as a court of review." The district court refrained from making a legal determination regarding the Establishment Clause because it concluded that with no viewpoint discrimination, it was unnecessary to look to an affirmative defense. Consequently, Justice Souter's
review of why appellate courts must resist the temptation of acting as a court of first instance is not without justification.264

On the other hand, the existing facts may have presented a clear enough case to merit resolution of the issue without remanding the case for additional factfinding. In light of the fact that the Club was appealing the district court’s summary judgment verdict for Milford, with the Court interpreting the disputed facts most favorably to the Club, this action is not necessarily unreasonable.265 Justice Souter’s rejoinder to this rebuttal was that “[w]hat we know about this case looks very little like Widmar or Lamb’s Chapel.”266 Attempting to differentiate these cases from the facts at issue, Justice Souter argued that three distinguishing factors were present: the age of the children (as young as six), the location and intellectual atmosphere at the elementary school (as opposed to a university campus), and the timing and format of the Club’s meetings (immediately following school in a classroom).267

The common assumption underlying each of the factors Justice Souter demarcated is that the “particular impressionability of schoolchildren” demands a more sensitive analysis of the Establishment Clause, a violation of which is correspondingly easier to trigger.268 Justice Thomas rebutted this by distinguishing the supporting authority cited by Justice Souter, Edwards v. Aguillard, noting that Edwards addressed the susceptibility of young children to “the content of the curriculum taught by state teachers during the school day.”269 Additionally, Justice Thomas poignantly observed that children were only permitted to attend Club meetings with their parents’ permission.270 Thus, the majority stated that “the concerns expressed in Edwards are not present.”271 Though these facts may distinguish Edwards from Good News Club, it is not clear that the general principle Milford seeks to glean from Edwards and other sources is illegitimate.272

264 See Good News Club, 533 U.S. at 139–41 (Souter, J., dissenting).
265 See id. at 105. Justice Breyer makes a similar observation in his concurring opinion, which generally seeks to limit the majority’s holding. See id. at 128–29 (Breyer, J., concurring).
266 Id. at 142 (Souter, J., dissenting).
267 See id. at 142–44 (Souter, J., dissenting).
268 See id. at 142–43 (Souter, J., dissenting) (citing Edwards v. Aguillard, 482 U.S. 578 (1987)).
269 Id. at 116–17.
270 Id. at 117.
271 Id.
272 The majority required an express recognition of the impressionability of elementary school children, which was lacking. See id. at 117 n.7 (dismissing the relevancy of several cases relied upon by Milford to establish a controlling precedent.
Lastly, Justice Souter, citing Justice O'Connor’s concurrence in *Capitol Square*, questioned whether the majority accurately assessed whether a child could perceive that the school has endorsed a particular religion or religion in general.\(^{273}\) Justice Breyer expressed a similar concern, though he stated it as a clarification of the majority’s opinion rather than as a challenge to the legitimacy of the majority’s conclusion.\(^ {274}\) Justice Thomas addressed both Justices’ concerns by first indicating that the Court did not inquire into the minds of the school children to determine whether the Establishment Clause had been violated.\(^ {275}\) Second, even if he had, Justice Thomas could not say that “the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.”\(^ {276}\) Interestingly, Justice Thomas cited the same portion of Justice O’Connor’s concurring opinion to explain why the Court did not consider the misperceptions of the youngest children as dispositive.\(^ {277}\) The dissents’ concerns may explain why the majority addressed the “perception inquiry” by discussing a reasonable student’s potential misperception of government endorsement of the Club—or in this case, the lack thereof—despite having not considered it as part of their own Establishment Clause inquiry.\(^ {278}\)

---

\(^{273}\) See *Good News Club*, 533 U.S. at 142 n.4 (Souter, J., dissenting) (quoting Justice O’Connor’s concurring opinion in *Capitol Square*, stating that the endorsement test does not focus “on the actual perception of individual observers, who naturally have differing degrees of knowledge,” but on “the perspective of a hypothetical observer” (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995))).

\(^{274}\) See *id.* at 128 (Breyer, J., concurring).

\(^{275}\) See *id.* at 118 (“[E]ven if we were to inquire into the minds of schoolchildren in this case . . . .”).

\(^{276}\) *Id.*

\(^{277}\) See *id.* at 119 (“We decline to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.” (citing *Capitol Square Review & Advisory Bd.*, 515 U.S. at 779-80)).

\(^{278}\) Justice Thomas also noted that both parties had thoroughly briefed the Establishment Clause issue and neither had requested a remand. *Id.* at 119 n.9.
Unlike Justice Breyer and the dissenting Justices, Justice Scalia never addressed whether the Establishment Clause issue was properly before the Court. Instead, he agreed with the majority’s holding on the issue and wrote to emphasize two points. First, Justice Scalia wrote to emphasize that coercion was not a concern in the case, but rather the protected “private right to exert and receive that compulsion (or to have one’s children receive it) [that] is protected by the Free Speech and Free Exercise Clauses.”

Second, he wrote to reiterate the test he provided in Capitol Square for identifying impermissible government endorsement of religion under the Establishment Clause. After applying the test to the limited public forum at hand, Justice Scalia stated that “private speech that occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses” cannot violate the Establishment Clause. In other words, Justice Scalia reaffirmed his plurality opinion in Capitol Square, where he articulated the per se test for endorsement. Under this conceptualization of the Establishment Clause, if there is viewpoint discrimination, then no government endorsement of religion is possible.

IV. ANALYSIS

What are the implications of the Court’s decision in Good News Club? Did the Court provide any clarification of the “clauses-in-conflict” theory? Now that the dust has settled, what does the scope of the Free Speech and Establishment Clauses look like?

Although the Court took a step towards dispelling the “clauses-in-conflict” nomenclature, its decision is more analogous to sounding the retreat of the confusion in its First Amendment jurisprudence rather than ringing its death knell. One factor evidencing this reality is the Court’s unexplained change from the Lemon test toward a strict-

279 Id. at 121 (Scalia, J., concurring).
280 Id. (Scalia, J., concurring) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." (quoting Capitol Square Review & Advisory Bd., 515 U.S. at 770)).
282 Capitol Square Review & Advisory Bd., 515 U.S. at 767 ("By its terms that Clause applies only to the words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum.")
neutrality test for Establishment Clause violations. Although *Lemon* may continue to haunt the Court, the growing dominance of the neutrality test provides private religious groups with more freedom to receive, and the state has more freedom (and duty) to give, equal benefits. By permitting private religious groups to receive governmental aid as long as that aid is equally available to nonreligious groups, the Court brings greater clarity to the line delineating the complementary application of the Free Speech and the Establishment Clauses.

As a plurality of the Justices have stated, the Establishment Clause only applies to the government; it is not implicated by private speech. Justice Scalia, in particular, has consistently provided a clear test for identifying endorsement; a per se test that coherently resolves the supposed conflict between the clauses. This test, characterized by a bright-line rule approach to government speech rather than a totality-of-the-circumstances standard, has yet to be expressly embraced by a majority of the Court. However, by more carefully inquiring into who the speaker is—specifically by refraining from problematic considerations of the misperceptions of observers—the Supreme Court has aided the lower courts in their difficult task of adjudicating viewpoint discrimination cases in a way compatible with the Establishment Clause. Policymakers rely on these constitutional abstractions for guidance in making binding decisions affecting students, communities, and society as a whole.

Furthermore, from a purely logical perspective, Justice Scalia's test for government endorsement of religion makes good sense. To ask whether viewpoint discrimination can be justified by the compelling state interest in avoiding an Establishment Clause violation is to ask a nonsensical question such as asking whether God can make a rock so big that He cannot lift it. The question cannot be answered yes or no. Instead, the question itself is flawed. In the latter question, this flaw is revealed by pointing out that we must not be talking about God—who is omnipotent, and by definition must be—because no such rock exists nor can it exist. Similarly, in the former question, we must not be talking about viewpoint discrimination because no such Establishment Clause violation exists nor can it exist. Finding viewpoint discrimination presumes a neutral government policy where a

---

283 See supra notes 222-41 and accompanying text, discussing the majority's decision regarding the Establishment Clause in *Good News Club*.

284 See *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring); see also supra notes 70, 102-03, 110, 224-26, discussing the Court's view of *Lemon* as having very limited authority, if any.

285 See supra notes 83-88 and accompanying text.

286 See supra notes 83-88, 278-80 and accompanying text.
government actor has impermissibly banned a private group due to its viewpoint. In both scenarios, the two items, thus pitted against each other, cannot logically coexist.

This argument is further bolstered by the logical principle of non-contradiction\textsuperscript{287} The related principle of identity is an instructive introduction to the principle of non-contradiction.\textsuperscript{288} This self-evident principle simply states that “[a] thing is what it is.”\textsuperscript{289} To say that private speech is not private speech is illogical. One cannot prove that private speech cannot both be private and non-private (i.e., government) speech, but one cannot explain how the speech can be both private and non-private at the same time either. Some Justices and scholars have tried to prove the latter by arguing that the private speech is transformed into government speech via the perception of a “reasonable observer.”\textsuperscript{290} That “reasonable” observer, however, is irrational because he has denied the essence of the thing and is guilty of an illogical “misperception.”\textsuperscript{291} This reality is more lucid in the context of the First Amendment as a whole. The “perception inquiry” for endorsement as a defense to viewpoint discrimination requires the judge to view the same speech simultaneously as private under the Free Speech Clause and government under the Establishment Clause. To say that private speech under the First Amendment is also non-private, government speech under First Amendment is to deny that “the same thing cannot be affirmed and denied at the same time.”\textsuperscript{292} This argument can be further supported by relying on canons of interpretation such as applying the parts of one section of text consistent with each other.\textsuperscript{293} If the private speech is protected under the Free

\begin{footnotes}
\item[288] Id. at 137.
\item[289] Id.
\item[290] See supra notes 89–91 and accompanying text.
\item[292] 1 Thomas Aquinas, Summa Theologica I-II, q. 94, art. 2, at 1009 (Fathers of the English Dominican Province trans., Benziger Brothers 1947) (1485) (citing Aristotle, Metaphysics iv, text. 9).
\item[293] See sources cited supra note 157 emphasizing the importance of interpreting clauses within the same amendment as compatible so that the whole is internally coherent. Cf. William N. Eskridge, Jr. et al., Cases and Materials on Legislation app. at 20 (2002) (listing canons of statutory interpretation such as “[a]void interpreting a provision in a way that is inconsistent with the structure of the statute” and
\end{footnotes}
Speech Clause, then it cannot be government speech prohibited under the Establishment Clause. Unfortunately, this statement is best characterized as normative rather than descriptive in light of the Supreme Court's First Amendment jurisprudence.

Nevertheless, the Court in *Good News Club* made progress by refraining from applying the "perception inquiry" in its endorsement analysis, but it did not reject such an inquiry and even discussed factors relevant under the inquiry without actually "considering" it. This limits the precedential value of the decision, which also has limited precedential value for determining the nature of limited public fora because the Court merely assumed the existence of a limited public forum based on the parties mutual stipulations. Fortunately, *Good News Club* does, however, provide some additional guidance on how school officials and other government actors should respond to the request of private religious groups to use state facilities.

The Court relied heavily on its previous rulings in *Lamb's Chapel* and *Rosenberger* to such an extent that policymakers at public schools can permit religious groups presenting subject matter included under their school's community-use policy to use the facilities with confidence that the Establishment Clause will not be implicated. The Court considered its previous rulings dispositive and refused to engage in fallacious line-drawing to distinguish *Good News Club* from *Lamb's Chapel* and *Rosenberger*. The result is not a broader doctrine of viewpoint discrimination so much as a clearer statement that religious groups, even if their message is "quintessentially religious," are entitled to protection under the Free Speech Clause. Religious groups emphasizing the importance of a personal relationship with Jesus Christ—a focus present in all three of the above mentioned cases—cannot be singled out for disparate treatment. For a private group to instruct others about the need to repent of their sins, believe

"[a]void interpreting a provision in a way inconsistent with the policy of another provision").

294 *See supra* notes 234 & 275 and accompanying text.

295 *See supra* notes 195–203 and accompanying text, discussing the majority's decision in *Good News Club* regarding the absence of viewpoint discrimination.

296 *See supra* notes 192–93, 232 and accompanying text.

297 *See supra* notes 199, 247–51 and accompanying text. For a discussion of whether Justice Scalia may be suggesting that such a distinction is impossible, see *supra* notes 252–59.

298 Justice Scalia emphatically supported this statement by arguing, It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives than to private prayers. This would be merely bizarre were religious speech simply as protected by the Constitution as other forms of private speech; but it is out-
in Jesus Christ as God incarnate, and trust in Him alone for salvation involves a claim to Truth that is inherently religious. However, the Supreme Court has held repeatedly that when this message is combined with a discussion of permissible subject matter in a limited public forum, the government may not ban it.

A majority of the Court has yet to address whether any distinction between a group primarily focused on worship or evangelism and a group primarily focused on teaching morals from a religious perspective is possible. Judge Jacobs described this area of the First Amendment best by stating that “[t]he distinction between content discrimination and viewpoint discrimination is elusive and subtle” and is “especially slippery where the viewpoint in question is religious.”

If the Court’s viewpoint discrimination analysis is to be different from its content-based analysis, such a distinction is necessary and must be possible. If it is possible, the Court needs to articulate a principled means for making such a difficult determination. If it is not possible—and a standard so inherently fraught with the danger of appealing to the preconceptions of the judge may not be realistically administrable, especially when religion is involved—then more religious speech would be protected at the expense of schools’ power to restrict access to their limited public fora. Such a result is a win-win situation because schools would become greater assets to their communities and more effective facilitators to their students by opening their doors more widely to private groups on a neutral basis.

A definite pattern emphasizing a strict-neutrality test for the Establishment Clause is emerging in the Court’s religious viewpoint discrimination cases. The requirement of government neutrality toward religion emphasized in Good News Club appears to reflect a greater sensitivity regarding hostility to religion. This sensitivity should not be misperceived as privileging the religious over the secular; on the contrary, it is a correction of past misinterpretations of the Establishment Clause. Good News Club is properly perceived as yet another incremental correction of the Supreme Court’s oversensitivity toward endorse-

---

right perverse when one considers that private religious expression receives preferential treatment under the Free Exercise Clause.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion) (citation omitted). Eugene Volokh has made similar statements about the status of religious speech: “[r]eligious speech is not some stepchild of constitutional law: It is fully protected by the Free Speech Clause, and once the government sets up a generally open subsidy program, it can’t discriminate against religious speech in operating the program.” Volokh, supra note 229, at 366.

ment of religion in the past. To avoid further promulgating the confusion in the First Amendment—surrounding the Establishment Clause in particular—the Court should expressly embrace a strict-neutrality test. The Court is unlikely to make such a bold move in the near future; however, the recent series of incremental adjustments approach neutrality nonetheless. For example, just as the Court rejected the school district’s argument that children would perceive government endorsement of religion merely because a Christian club met on school grounds after hours on an equal basis with other private groups teaching moral development, the Court more recently rejected a very similar argument in Zelman v. Simmons-Harris.

In Zelman, the respondents, a group of Ohio taxpayers, sought to enjoin a Cleveland school voucher program on the ground that provision of tuition aid to students whose parents chose a private religious school violated the Establishment Clause. One of the respondents’ arguments was that the program created a “public perception that the State is endorsing religious practices and beliefs.” The majority flatly rejected this argument, stating that the Court had “repeatedly recognized that no reasonable observer would think a neutral program of private choice ... carries with it the imprimatur of government endorsement.” Because the Cleveland voucher program permitted individuals to “exercise genuine choice among public and private, secular and religious,” it was neutral and therefore, constitutionally permissible under the Establishment Clause. The Court emphasized that the Cleveland program was one of “true private choice,” reiterating another theme implicit in Good News Club. Specifically, for the government’s stance toward religion to be neutral, it must permit private individuals to make and listen to value judgments that incorpo-

300 See Ryan W. Decker, Note, Removing a Brick from the Jeffersonian Wall of Separationism: A Per Se Rule for Private Religious Speech in Public Fora, 41 Vill. L. Rev. 559, 604 (1996) (“Conflicting interpretations of Establishment Clause issues may persist as long as members of the Court refuse to abandon the unwieldy Lemon, endorsement and coercion analyses.”); see also id. at 594 n.133, 596 n.136 (citing sources describing the inherent flaws of Justice O’Connor’s endorsement test and Justice Kennedy’s coercion test); id. at 595 n.135 (citing sources criticizing the Lemon test).
302 Id. at 2463-65.
303 Id. at 2468.
304 Id. The divide between the Justices was nearly the same in Zelman as in Good News Club, except that in Zelman Justice Breyer joined the dissent rather than concurring in part and dissenting in part. See id. at 2502-08 (Breyer, J., dissenting); Good News Club, 533 U.S. at 127-30 (Breyer, J., concurring).
305 Zelman, 122 S. Ct. at 2473.
306 Id.
rate a religious viewpoint. For the government to tell an individual that it is permissible to speak on moral and character development or to choose how to educate the individual’s child and yet remove all of the religious options is to deprive that individual of a meaningful choice. Similarly, Good News Club reflects a proper view of the Establishment Clause, namely, one that is characterized by neutrality toward religion. This is particularly true in light of persuasive arguments that modern public education is inherently hostile to religion.

307 See Richard W. Garnett, A Supreme Court Ruling Bodes Well for School Vouchers, WALL ST. J., June 13, 2001, at A20 (predicting that the Court’s decision in Good News Club “makes it clear that the First Amendment permits religious schools and faith-based service providers to participate in our shared efforts for educational opportunity”).

308 See id. (“Our Constitution protects religious freedom both by telling governments that they may not establish religion and by promising citizens that they need not check their religious beliefs at the entrance of the public square.”); see also Volokh, supra note 229, at 365 (“The government may choose to fund only government-run schools and not private ones, because such a distinction would be based on government control, not religiosity; but any choice programs that help secular private schools may not exclude religious ones.”). But see Leslie C. Griffin, Their Own Prepossessions: The Establishment Clause, 1999-2000, 33 Loy. U. Chi. L.J. 237, 244 (2001) (asserting that “the core Establishment Clause principle is no-aid-to-religious-practice” and that “[a]id includes any use of public facilities”).

309 See Esbeck, Myths, Miscues, and Misconceptions, supra note 157, at 316 (“[N]eutrality is a means to minimizing the government’s influence over personal choices concerning religious beliefs and practices.”).

310 See, e.g., Amy Gutmann, Democratic Education 108 (1987) (arguing that the state “cannot present teenagers with a neutral account of the choice among abstinence, contraception, and abortion” because “[a]gnosticism about the significance of sex is no more neutral than agnosticism about the existence of God”); Paul Marshall, God and the Constitution 132 (2002) (“Neither ignoring God, nor simply listing a religion as a possible option of individual choice, ultimately treats religion, and religious differences, in their integrity. It implicitly deems or rejects them.”); Charles E. Rice, The Winning Side: Questions on Living the Culture of Life 65, 163-66 (1999) (arguing that “the Court’s requirement of suspension of judgment on the existence of God has resulted in the repudiation of the American Founding through the effective establishment of agnostic secularism as the national religion” and that “state schools indoctrinate their students in a religion of secularism”); Andrew A. Cheng, The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses, 19 U. Haw. L. Rev. 697, 728 (1997) (arguing that though the “privileging of secular perspectives and ideologies over religious beliefs” in public schools does not rise to the level of constitutionally impermissible hostility to religion, it does “create a climate that is alienating to conservative religious believers”)

CONCLUSION

Though separationists may proclaim degradation of the Establishment Clause, as Professor Esbeck says, that is simply "nonsensical." If the speaker is private, and if the state treats the religious speaker neutrally, then the Establishment Clause is not implicated. The per se test for endorsement that Justice Scalia has consistently applied meets this formulation of the Establishment Clause and would bring much needed clarity to the Court's First Amendment jurisprudence. The greater sensitivity to government hostility toward religion displayed in *Good News Club*, and the Court's recent First Amendment jurisprudence in general, is not favoring religious beliefs, but rather a much needed move toward treating religious perspectives equally. After all, "[t]he Constitution bars the 'establishment of religion,' and treating everyone the same without regard to religion is hard to see as 'establishing' anything—except equality." The Supreme Court's emphasis in *Good News Club* on neutrality over past misinterpretations of the Establishment Clause can and should be strengthened. Nevertheless, the Court took a promising step toward a clear, workable test for endorsement and a reconciliation of the clauses of the First Amendment. In the process, the Court reached the correct holding: a finding of viewpoint discrimination and not endorsement of religion.

311 See Esbeck, supra note 124, at 887.
312 See Volokh, supra note 229, at 345.