

Not Today, Satan: Re-examining Viewpoint Discrimination in the Limited Public Forum

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NOT TODAY, SATAN: RE-EXAMINING VIEWPOINT DISCRIMINATION IN THE LIMITED PUBLIC FORUM

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INTRODUCTION

In 2016, the Satanic Temple (the “Temple”) announced an after-school program¹ that was sure to disturb the parents of public school students across the United States. After School Satan, as the program is known, is an extracurricular club the Satanic Temple actively promotes and wishes to host after the normal school day in public elementary schools.² The Temple specifically targets schools that already host the prominent evangelical Christian after-school program, the Good News Club,³ run by the Child Evangelism Fellowship.⁴ As of the writing of this Note, After

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¹ Press Release, After Sch. Satan, The Satanic Temple Leverages Religious Freedom Laws to Put After School Clubs in Elementary Schools Nationwide, <https://afterschoolsatan.com/press-releases/> [<https://perma.cc/U2WJ-8WAD>] (last visited Apr. 12, 2018).

² *Id.*

³ *Id.*

⁴ *Ministries*, CHILD EVANGELISM FELLOWSHIP, <https://www.cefonline.com/ministries/> [<https://perma.cc/X5W2-F23K>] (last visited Apr. 12, 2018).

School Satan hosts chapters of its clubs in nine public elementary schools,⁵ although the Temple's goal is to host chapters in all schools that already host a chapter of the Good News Club.⁶

The Satanic Temple cites *Good News Club v. Milford Central School*⁷ for its right to hold After School Satan.⁸ In *Good News Club*, the Supreme Court held that it was constitutional for the Good News Club to host its after-school program in a public school.⁹ Not allowing the Good News Club to do so, the Court reasoned, constituted viewpoint discrimination in a limited public forum, which is prohibited by the First Amendment.¹⁰

The Satanic Temple has a specific goal in mind with promoting After School Satan. As the Satanic Temple's spokesman Lucien Greaves¹¹ stated:

It's important that children be given an opportunity to realize that the evangelical materials now creeping into their schools are representative of but one religious opinion amongst many. While the *Good News Clubs* focus on indoctrination, instilling them with a fear of Hell and God's wrath, *After School Satan Clubs* will focus on free inquiry and rationalism, the scientific basis for which we know what we know about the world around us. We prefer to give children an appreciation of the natural wonders surrounding them, not a fear of everlasting other-worldly horrors.¹²

⁵ Such schools include Still Elementary School in Powder Springs, Georgia; Chase Street Elementary School in Panorama City, California; C. A. Weis Elementary School in Pensacola, Florida; Nehalem Elementary School in Nehalem, Oregon; Vista Elementary School in Taylorsville, Utah; Centennial Elementary School in Mount Vernon, Washington; Watkins Elementary School in Springfield, Missouri; Roskrige Bilingual in Tucson, Arizona; and Bradbury Heights Elementary in Capitol Heights, Maryland. *Find a Club*, AFTER SCH. SATAN, <https://afterschoolsatan.com/find-a-club/> [<https://perma.cc/3TZZ-ZUZ7>] (last visited Apr. 12, 2018).

⁶ See *Educatin' with Satan*, AFTER SCH. SATAN, <https://afterschoolsatan.com> [<https://perma.cc/H4G2-X4DP>] (last visited Apr. 12, 2018).

⁷ 533 U.S. 98 (2001).

⁸ *FAQ*, AFTER SCH. SATAN, <https://afterschoolsatan.com/educatin-with-satan/faq/> [<https://perma.cc/K2QC-AL4H>] (last visited Apr. 12, 2018).

⁹ 533 U.S. at 102 (concluding that Milford Central School's prevention of Good News Club hosting its after-school club in the school was a violation of the Club's First Amendment free speech rights).

¹⁰ *Id.* at 112 (“[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.”).

¹¹ *Lucien Greaves of the Satanic Temple*, DETROIT METRO TIMES (May 27, 2014), <http://www.metrotimes.com/detroit.lucien-greaves-of-the-satanic-temple/Content?oid=2201492> [<https://perma.cc/PFC9-26QG>].

¹² Press Release, After Sch. Satan, *supra* note 1.

Thus, the Satanic Temple does not wish to indoctrinate elementary school children with the tenants of Satanism through an extracurricular program.¹³ Rather, the Temple is making a broader statement addressing evangelical Christianity and the supposed dangers it poses to children.¹⁴ Yet not everyone takes the Temple at its word. In fact, some suspect the Satanic Temple only hopes to create controversy and bring the always-contentious issue of separation of church and state to the forefront of the American public consciousness.¹⁵

After School Satan, while supported by some, faces considerable opposition.¹⁶ Focused legal opposition comes from the Liberty Counsel, the group responsible for legal representation of the Child Evangelism Fellowship.¹⁷ According to the Liberty Counsel, the Satanic Temple is a “phony organization” whose primary goal “is to stop Christian organizations from meeting in public schools.”¹⁸ The Liberty Counsel even goes as far as to “offer[] *pro bono* legal counsel to the schools targeted by this bogus, disruptive group.”¹⁹ While the Liberty Counsel states the legal basis for why the Good News Club has a First Amendment right to meet in public schools,²⁰ it does not suggest any *legal* basis for why an After School Satan Club (ASSC) could *not* do the same.²¹

¹³ *See id.*

¹⁴ Greaves believes that “the *Good News Clubs* focus on indoctrination, instilling [elementary school children] with a fear of Hell and God’s wrath.” *Id.*

¹⁵ *See generally* Katherine Stewart, *After School Satan Club Proposal Spurs Debate on Religious Activity in Public Schools*, WASH. POST (Aug. 4, 2016), https://www.washingtonpost.com/local/education/after-school-satan-club-proposal-already-sparking-debate-at-schools/2016/08/04/0f01a972-59ec-11e6-831d-0324760ca856_story.html?utm_term=.cca44c81b2ac [<https://perma.cc/HVU3-EZS8>] (“Legal experts say the head-to-head competition between the Good News Clubs and the After School Satan Clubs could set up a test for religious liberty.”).

¹⁶ For example, a poll on the *Washington Post*’s website asked readers the question: “Should The Satanic Temple be allowed to open After School Satan Clubs in elementary schools?” While the *Washington Post* admits the user poll is non-scientific (and thus, not statistically valid), as of 9:15 PM on March 17, 2018, 54% of 55,501 respondents selected the answer, “No, they shouldn’t,” while the remaining 46% chose, “Yes they should be allowed.” *Id.*

¹⁷ *See* Press Release, Liberty Counsel, Satanist Group Has No Right to Disrupt School (Aug. 2, 2016), <https://www.lc.org/newsroom/details/080216-satanist-group-has-no-right-to-disrupt-school> [<https://perma.cc/P3DT-4PM3>]. The Liberty Counsel is a Christian ministry. *About Liberty Counsel*, LIBERTY COUNS., <http://www.lc.org/about> [<https://perma.cc/U3M7-EPQ8>] (last visited Apr. 12, 2018). The organization is “dedicated to advancing religious freedom, the sanctity of life, and the family since 1989, by providing *pro bono* assistance and representation on these . . . topics.” Press Release, Liberty Counsel, *supra*.

¹⁸ Mat Staver, *After School Satan Club Targets Christian Clubs*, LIBERTY COUNS. (Aug. 5, 2016, 2:55 PM), <http://libertycounsel.com/after-school-satan-club-targets-christian-clubs-liberty-counsel/> [<https://perma.cc/B8CQ-CK7J>].

¹⁹ *Id.*

²⁰ *See id.* (referencing the Supreme Court’s holding in *Good News Club*).

²¹ *See id.* (stating that ASSC may be disruptive for children in public schools).

This Note addresses two issues related to the First Amendment concerns raised by After School Satan. First, it would be unconstitutional for public school administrators to prohibit the Satanic Temple from hosting After School Satan in public schools, as doing so would amount to viewpoint discrimination in a limited public forum under *Good News Club*. Any claims the Liberty Counsel might bring against the Satanic Temple would be frivolous and highly unlikely to succeed. Second, After School Satan may present the Court with an opportunity to re-examine the place, if any, religion has in public schools. At the least, the Court can re-examine the lenient standard for viewpoint discrimination in a limited public forum. It is due time for such a re-examination, as the controversy created by After School Satan and the rigorous opposition to it by groups such as the Liberty Counsel brings to fruition Justice Souter's prediction that, because of *Good News Club*, "any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque."²² The fact that After School Satan has already caused such disruption in religious communities, particularly in the evangelical Christian community,²³ gives Justice Souter's words even more weight than they carried in 2001.

This Note proceeds with Part I, which discusses contemporary Satanism to provide the reader with an understanding of the Satanic Temple's beliefs and practices. Part II discusses the relevant legal background, including public forum doctrine and the principal case, *Good News Club v. Milford Central School*. Part III presents the Note's argument concerning the two issues mentioned above. Finally, the Conclusion

²² *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 139 (2001) (Souter, J., dissenting).

²³ For example, America Needs Fatima is the American Society for the Defense of Tradition, Family and Property's campaign "to win the heart and soul of America for Mary by spreading Our Lady's Fatima message and promoting devotion to Her Immaculate Heart." *Welcome to America Needs Fatima*, AM. NEEDS FATIMA, <https://americaneedsfatima.org> [<https://perma.cc/VA6C-VULM>] (last visited Apr. 12, 2018). The website for America Needs Fatima has a petition for users to sign in opposition to After School Satan, and as of March 17, 2018, the petition has acquired 23,996 signatures out of a goal of 30,000 signatures. *Satanists Are Targeting America's Grade School Children. Say NO!*, AM. NEEDS FATIMA, <https://americaneedsfatima.org/forms/web235.html> [<https://perma.cc/SF4A-9EWV>] (last visited Apr. 12, 2018). The petition claims that After School Satan "denies the existence of God, eternity, sin and the spiritual realm; promotes science and reason as the sole sources of truth; says children should have no fear of future punishment for sin or reward for virtue; [and] is a direct affront to the 1st Commandment of the law of God." *Id.* The American Society for the Defense of Tradition, Family and Property has also physically protested a meeting of an After School Satan Club in Tacoma, Washington. Kevin McCarty, *Parents, Community Members Protest Satanic After-School Club*, KIRO 7, <http://www.kiro7.com/news/local/parents-community-members-protest-satanic-after-school-club/476045659> [<https://perma.cc/CNL7-CNWT>] (last updated Dec. 14, 2016, 8:06 PM). The Tacoma After School Satan Club later closed, claiming lack of funding as the main reason for why it did so. See Candice Ruud, *Tacoma's After-School Satan Club Is on Pause for Now, Says Satanic Temple of Seattle*, THE NEWS TRIB. (Sept. 13, 2017, 8:00 AM), <http://www.thenewstribune.com/news/local/article173005561.html> [<https://perma.cc/9HDJ-3JMX>].

emphasizes that this Note does not advocate for Satanism over evangelical Christianity, or for any religion over another. Rather, it proposes that the Satanic Temple, despite its wish to generate controversy and garner publicity for itself, actually might be pursuing a goal—changing the viewpoint discrimination standard in limited public forums, at least where public schools are concerned—that would benefit public school children all across the United States.

I. SATANISM

In order to fully understand what the Satanic Temple is trying to do with After School Satan—and consequentially, the legal implications of After School Satan—it is necessary to understand both what Satanism is as a religion and the sect of Satanism embraced by the Satanic Temple. This is not the only sect of Satanism that exists, however, as there are innumerable different sects seen both throughout history and in the world today.²⁴

The thought of Satanism, or Satan in general, may conjure up disturbing images of devil worship, demon summoning, and blood sacrifice in the minds of those unfamiliar with the religion. Perhaps this is in large part a result of how Satan is thought of and described in Christian texts as the antithesis of Christianity; indeed, the Christian Bible references Satan by many names with generally negative connotations.²⁵ However, these perceptions are highly inaccurate to characterize the sect of Satanism adopted by the Satanic Temple—that is, “contemporary religious Satanism.”²⁶

Contemporary religious Satanism is a form of Satanism that “[is] easily identifiable as religio[us], with doctrine, practice, community and organization,” as opposed to Satanism that is more “mystical [and] spiritual . . . [with] a loose network or carnal brotherhood.”²⁷ Generally, contemporary religious Satanism focuses on Satan as a representation of the self and a rejection of higher authorities.²⁸ It emphasizes

²⁴ See generally Jesper Aagaard Petersen, *Introduction: Embracing Satan*, in CONTEMPORARY RELIGIOUS SATANISM: A CRITICAL ANTHOLOGY 1 (Jesper Aagaard Petersen ed., 2009) [hereinafter *Embracing Satan*].

²⁵ Such names include Abaddon, *Revelation* 9:11 (King James); Beelzebub, *Luke* 11:15 (King James); the evil one, 1 *John* 5:19 (New International); the father of lies, *John* 8:44 (New International); and Lucifer, *Isaiah* 14:12 (King James).

²⁶ The term “contemporary religious Satanism” can be attributed to Jesper Aagaard Petersen. See *Embracing Satan*, *supra* note 24, at 1.

²⁷ *Id.*

²⁸ A common misconception is that Satanism is specifically anti-Christian in that it rejects the traditional Christian God above all others; in other words, that Satanism is the antithesis of Christianity. See Paul Thomas, *New Religious Movements*, in THE ROUTLEDGE COMPANION TO RELIGION AND FILM 214, 230–31 (John Lyden ed., 2009). But in fact, Satanism rejects all modern forms of authority, even those that are not religious. See *Embracing Satan*, *supra* note 24, at 3. For example, contemporary religious Satanism also rejects institutions that promote or facilitate capitalism, consumerism, and sexual repression. See *id.*

empowerment and development of the self; therefore, the figure of Satan can be conceptualized as “the Adversary or ultimate rebel and is thus symbolically a stance one takes in the pursuit of self interest and self development.”²⁹ In fact, the Seventh Circuit described the figurehead of Satan “as a symbol of man’s self-gratifying animal impulses.”³⁰

Although the founding of contemporary religious Satanism can be attributed to a variety of sources, it can be attributed in large part to one man: Anton Szandor LaVey.³¹ In 1966, he founded the Church of Satan, a religious group whose tenants originated from the teachings contained in his book, *The Satanic Bible*.³² Although *The Satanic Bible* described different types of rituals and practices, it also projected Satan as the ultimate representation of the self and a rejection of authoritative institutions.³³

In recent years, the Church of Satan has become the most cited sect of Satanism in recorded case law.³⁴ However, there are other large sects as well, including the sect responsible for After School Satan—the Satanic Temple.³⁵

A. *The Satanic Temple*

The Satanic Temple is a group of contemporary religious Satanists who have become quite notorious in recent years.³⁶ According to the Satanic Temple’s website, its mission “is to encourage benevolence and empathy among all people, reject tyrannical authority, advocate practical common sense and justice, and be directed

²⁹ *Id.*

³⁰ *Childs v. Duckworth*, 705 F.2d 915, 918 n.3 (7th Cir. 1983). This case concerned a state prisoner who claimed that he was unable to practice his Satanic religion while in prison, unlike prisoners who belonged to other religious groups and were allowed to practice their own respective religions. *Childs v. Duckworth*, 509 F. Supp. 1254, 1257 (N.D. Ind. 1981). In finding the prison’s restrictions on the prisoner’s religious practice of Satanism to be reasonable, the District Court noted “the concept of satanism was associated with an affinity for evil.” *Id.* at 1263.

³¹ ASBJØRN DYRENDAL, JAMES R. LEWIS & JESPER AA. PETERSEN, *THE INVENTION OF SATANISM* 3 (2016). The founding of contemporary religious Satanism in the 1960s coincided with several other movements, such as the sexual revolution of the ‘60s, that likely influenced Anton Szandor LaVey, and consequently, the rationale behind Satanism. *See id.* at 3–4. However, contemporary religious Satanism was influenced by older, more historic sources as well. *See id.* at 3.

³² *See id.* at 3, 6.

³³ *See generally* ANTON SZANDOR LAVEY, *THE SATANIC BIBLE* (1969).

³⁴ *See* Christopher B. Gilbert, *Harry Potter and the Curse of the First Amendment: Schools, Esoteric Religions, and the Christian Backlash*, 198 EDUC. L. REP. 399, 404–05 (2005) (noting that while LaVey’s Church of Satan seems to be the most recorded sect of Satanism in American case law, “there may be significant differences that make different sects appear to be completely different religions”).

³⁵ *See FAQ*, *supra* note 8.

³⁶ *See infra* notes 41–47 and accompanying text.

by the human conscience to undertake noble pursuits guided by the individual will.”³⁷ The Satanic Temple considers itself vastly different from the Church of Satan.³⁸ In addition to following different tenants than the Church of Satan,³⁹ the Satanic Temple claims the Church of Satan’s beliefs and practices are more supernaturalist and less scientific than the Temple’s beliefs and practices.⁴⁰

The Satanic Temple is certainly no stranger to making headlines.⁴¹ Lucien Greaves, the leader of the Satanic Temple,⁴² became the center of the American public’s attention in 2013 when he proposed to erect a statue as a homage to Satan in the Oklahoma State Capitol.⁴³ He garnered attention again in 2015 when a statue of Baphomet caused controversy in Detroit.⁴⁴ The capitol building in Oklahoma displayed a monument of the Ten Commandments, and the Satanic Temple claimed this was a

³⁷ *About Us*, THE SATANIC TEMPLE, <https://thesatanictemple.com/pages/about-us/> [<https://perma.cc/UA9G-456K>] (last visited Apr. 12, 2018).

³⁸ On The Satanic Temple’s [TST] website, one can find a FAQ with one question asking, “How does TST’s Satanism Differ From LaVeyan Satanism?” *FAQ*, THE SATANIC TEMPLE, <https://thesatanictemple.com/pages/faq> [<https://perma.cc/LWQ7-5ZAW>] (last visited Apr. 12, 2018). The Satanic Temple answers the question by pointing out the Satanic Temple’s rejection of “the LaVeyan fetishization of authoritarianism” because “it is antithetical to Satanic notions of individual sovereignty.” *Id.*

³⁹ The Satanic Temple’s “seven fundamental tenets” can be found on the group’s website. *Tenets*, THE SATANIC TEMPLE, <https://thesatanictemple.com/pages/tenets/> [<https://perma.cc/H2V2-65P3>] (last visited Apr. 12, 2018). In contrast, the Church of Satan has “Nine Satanic Statements,” “Eleven Satanic Rules of the Earth,” and “Nine Satanic Sins” listed on its website. *Satanic Theory/Practice*, CHURCH OF SATAN, <http://www.churchofsatan.com/theory-practice.php> [<https://perma.cc/A9RG-34AV>] (last visited Apr. 12, 2018).

⁴⁰ See *FAQ*, *supra* note 38. The Satanic Temple views itself as a representation of “a natural evolution in Satanic thought.” *Id.* It explicitly “reject[s] LaVeyan social Darwinist rhetoric that fails to agree with what is currently known regarding social evolution, specifically as it relates to research in evolutionary biology, game theory, reciprocal altruism, cognitive science, etc.” *Id.*

⁴¹ For example, the Satanic Temple has garnered significant media attention for providing public school children with Satanic workbooks after those students had been given copies of the Bible, and organizing a homosexual kiss on the grave of the grandmother of the Westboro Baptist Church’s founder. See Cimminnee Holt & Jesper Aagaard Petersen, *Modern Religious Satanism: A Negotiation of Tensions*, in THE OXFORD HANDBOOK OF NEW RELIGIOUS MOVEMENTS: VOLUME II 441, 449 (James R. Lewis & Inga B. Tøllefsen eds., 2016).

⁴² See Shane Bugbee, *Unmasking Lucien Greaves, Leader of the Satanic Temple*, VICE (July 30, 2013, 2:07 PM), <http://www.vice.com/read/unmasking-lucien-greaves-aka-doug-mesner-leader-of-the-satanic-temple> [<https://perma.cc/WF2P-E6F4>].

⁴³ See Sean Murphy, *Satanists Want Statue Beside Ten Commandments Monument at Oklahoma Legislature*, NBC NEWS (Dec. 8, 2013, 4:23 PM), <https://www.nbcnews.com/news/other/satanists-want-statue-beside-ten-commandments-monument-oklahoma-legislature-f2D11712595> [<https://perma.cc/G897-JC8F>].

⁴⁴ See Nash Jenkins, *Hundreds Gather for Unveiling of Satanic Statue in Detroit*, TIME (July 27, 2015), <http://time.com/3972713/detroit-satanic-statue-baphomet/> [<https://perma.cc/7QVC-WFV3>].

violation of the separation of church and state.⁴⁵ The Baphomet statue was introduced as a “poison pill” to get the result that the Satanic Temple wanted—that is, either the removal of the Ten Commandments or the inclusion of the statue of Baphomet.⁴⁶

The controversy the Satanic Temple created in Oklahoma illustrates well the group’s attitude toward the separation of church and state and the kind of political activism it will employ to achieve its goals.⁴⁷ The Satanic Temple is not concerned with gaining followers and spreading its doctrine, but instead wishes to promote secularism in response to the privilege it believes Christianity receives in the United States.⁴⁸ It is highly likely, therefore, that the Satanic Temple is using After School Satan as a means of achieving this end.

B. After School Satan

By posting a video on YouTube juxtaposing grim, “Satanic” images with clips of young children going to school, the Satanic Temple announced After School Satan, its most recent public battle in the Temple’s ongoing struggle for greater separation of church and state in the United States.⁴⁹ According to the After School Satan website, the extracurricular program for elementary school students includes different games and activities designed to “help [students better] understand how we know

⁴⁵ *See id.*

⁴⁶ Said Greaves of the goals behind the political activism of the Satanic Temple:

The idea was that Satanists, asserting their rights and privileges where religious agendas have been successful in imposing themselves upon public affairs, could serve as a poignant reminder that such privileges are for everybody, and can be used to serve an agenda beyond the current narrow understanding of what “the” religious agenda is. So at the inception, the political message was primary, though it was understood that there are, in fact, self-identified Satanists who live productive lives within the boundaries of the law, and that they do deserve just as much consideration as any other religious group.

See Bugbee, supra note 42.

⁴⁷ A more recent example of the Satanic Temple’s political activism was its members’ participation in the Women’s March in Washington, D.C., where the group was seen protesting the inauguration of President Trump. *See Shenequa Golding, Even Women Who Identify as Satanists and Atheists Protested Donald Trump*, VIBE (Jan. 22, 2017, 10:07 AM), <http://www.vibe.com/2017/01/satanists-atheists-protest-donald-trump/> [<https://perma.cc/5CHA-C99D>]. When asked why they participated in the Women’s March, one of the protesters said, “He’s going to take most of our rights away. Not happy about that. We want to protect you.” *Id.*

⁴⁸ *See Holt & Petersen, supra* note 41, at 449 (“Challenging Christian privilege . . . is [the Satanic Temple’s] primary means of participating in current debates The Satanic Temple, then, is using its fringe status . . . with the ultimate concern of transforming society as a whole in a more secular, and thus more satanic, direction.”).

⁴⁹ *See The Satanic Temple, After School Satan Clubs Coming to Public Schools*, YOUTUBE (July 30, 2016), <https://www.youtube.com/watch?v=b48-SBYbahQ>.

what we know about our world and our universe.”⁵⁰ Individual members of the Satanic Temple, who have already been vetted for appropriate teaching abilities and lack of a criminal background, are the chosen administrators of the program.⁵¹ Children who wish to attend the program must receive permission from their parents.⁵²

After School Satan makes no attempt to disguise its goal in attempting to facilitate separation of church and state.⁵³ In fact, on its website the Satanic Temple writes that “it’s best to keep religion out of schools.”⁵⁴ Yet it also states that if evangelical Christianity can be taught to children by means of extracurricular after-school programs in public schools, then those children should also have the opportunity to learn the worldview and teachings of a different religion, such as Satanism.⁵⁵

The Satanic Temple states that it has a constitutional right to host its after-school program in public schools because of the 2001 Supreme Court case, *Good News Club*.⁵⁶ As the Temple ties its legal reasoning to the holding in *Good News Club*, After School Satan is specifically and strategically targeting schools that already hold a Good News Club.⁵⁷ The Temple believes that if Good News Clubs are allowed to meet in a particular public school, then After School Satan Clubs should be allowed to do so as well.⁵⁸

The Liberty Counsel, which provides legal representation for the Child Evangelism Fellowship,⁵⁹ currently offers legal support to any school district that does not wish for After School Satan to operate in its schools.⁶⁰ The Liberty Counsel maintains the position that After School Satan is promoted by a group of atheists whose main goal is to cause controversy—therefore, according to the Liberty Counsel, After School Satan holds no real value for public school children.⁶¹

⁵⁰ See *FAQ*, *supra* note 8.

⁵¹ *Id.* The After School website states that the Executive Ministry of The Satanic Temple also vets these volunteer members for “professionalism, social responsibility, [and] superior communication skills.” *Id.*

⁵² See *Permission Slip*, AFTER SCH. SATAN, <https://afterschoolsatan.com/permission-slip/> [<https://perma.cc/NTL5-SJEN>] (last visited Apr. 12, 2018).

⁵³ See, e.g., *FAQ*, *supra* note 8.

⁵⁴ *Id.*

⁵⁵ The Satanic Temple believes that if the Good News Club is allowed to hold its meetings in public schools, then After School Satan should be allowed to do the same so “that plurality and true religious liberty are respected.” *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *id.*

⁵⁹ See Press Release, Liberty Counsel, *supra* note 17.

⁶⁰ See Staver, *supra* note 18 (“Liberty Counsel has offered *pro bono* legal counsel to the schools targeted by this bogus, disruptive group.”).

⁶¹ See *id.* (“The primary goal of this phony organization that is actually a small group of atheists, is to stop Christian organizations from meeting in public schools, targeting the schools where The Good News Clubs meet.”).

II. LEGAL BACKGROUND

As both the Satanic Temple and Child Evangelism Fellowship rely on First Amendment public forum doctrine and the holding from *Good News Club* to support their respective positions, it is necessary to examine both the doctrine and case in order to answer the constitutional question of whether the Temple has a First Amendment right to host After School Satan in public elementary schools. As such, the following sections provide background information on the First Amendment, public forums, viewpoint discrimination, and *Good News Club*.

A. Viewpoint Discrimination in Limited Public Forums

First Amendment law is complex and covers a vast breadth of different topics relating to speech and other forms of expression.⁶² This Note examines the First Amendment and its application to speech and other forms of expression in public schools. Specifically, it examines viewpoint discrimination in public schools that operate as limited public forums under the First Amendment.

The roots of public forum doctrine can be traced back to the 1939 Supreme Court case *Hague v. Committee for Industrial Organization*.⁶³ In dictum, Justice Roberts articulated why citizens have a First Amendment right to express themselves in a public forum:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.⁶⁴

In response to that case, two different approaches to public forum doctrine emerged. The first of these, the compatibility approach, asked whether the type of expression in the public forum at issue was compatible with the other uses of that forum.⁶⁵ This

⁶² See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

⁶³ 307 U.S. 496 (1939).

⁶⁴ *Id.* at 515–16.

⁶⁵ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (holding that a protest held in proximity to a public school was incompatible with the school’s purpose in that the protest

approach was largely abandoned, however, in favor of the categorical approach adopted by the Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.⁶⁶

In *Perry*, the Court divided the public forum into different categories with the “right of access to [the forum] and the standard by which limitations . . . must be evaluated differ[ently] depending on the character of the property at issue.”⁶⁷ The three categories the Court carved out for public forums were the traditional public forum,⁶⁸ designated public forum,⁶⁹ and limited public (or nonpublic) forum.⁷⁰ While content-based laws prohibiting speech in traditional and designated public forums are subject to strict scrutiny, the government can “[c]ontrol . . . access to a nonpublic [or limited public] forum . . . based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”⁷¹ Thus, because public schools are generally considered limited public forums,⁷² any laws or policies prohibiting speech or expression in the school based on content can discriminate based on subject matter, but must be both reasonable and viewpoint neutral.⁷³ Viewpoint neutrality is especially important when it comes to matters of religious speech,⁷⁴ as seen in *Good News Club*.⁷⁵

disrupted the ordinary operation of the school); *Adderley v. Florida*, 385 U.S. 39 (1966) (holding that a student protest against arrests and racial segregation held in the driveway of a county jail was incompatible with the ordinary use of the jail’s driveway); *Brown v. Louisiana*, 383 U.S. 131 (1966) (holding that a silent protest by African Americans in a “white only” public library’s silent reading room was compatible with the purpose of the reading room).

⁶⁶ 460 U.S. 37 (1983).

⁶⁷ *Id.* at 44.

⁶⁸ The Court largely based its categorization of traditional public forum on Justice Roberts’ language from *Hague*. *See id.* at 45. That is, the Court defined the traditional public forum as a “quintessential” forum, one that was used throughout history as a place where the public could freely engage in protected speech and expression. *See id.* Traditional public forums are usually thought of as streets and parks. *See id.*

⁶⁹ The designated public forum is one that the state “opened for use by the public as a place for expressive activity,” even if the state “was not required to create the forum in the first place.” *Id.* (citations omitted).

⁷⁰ The limited public forum, sometimes called a nonpublic forum, is one that was only opened to the public for limited purposes. *See, e.g., Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (holding that the Port Authority–run airport was a nonpublic forum both because there was no tradition of airports being used as places where people express themselves, and because the purpose of the airport was to facilitate travel and not expression); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that a federal fundraising drive was a nonpublic forum because the government consistently limited participation in the fund to certain agencies).

⁷¹ *Cornelius*, 473 U.S. at 806 (citation omitted).

⁷² *See generally* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

⁷³ *Id.* at 106–07.

⁷⁴ *See* Lyrrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1989 (2011) (“[T]here is some indication that the Court may be especially stringent in examining viewpoint neutrality if religious viewpoints are involved.”).

⁷⁵ *See generally* *Good News Club*, 533 U.S. 98.

B. Good News Club v. Milford Central School

In 1996, the Good News Club sought permission from Milford Central School, a public elementary school in the State of New York, to hold its meetings for students during after-school hours in the school's cafeteria.⁷⁶ The superintendent of Milford Central School denied the request, claiming that allowing the Good News Club to host its extracurricular program in the school would be the equivalent of allowing religious worship within the school halls.⁷⁷ The Good News Club brought suit against Milford Central School, alleging that the school's refusal to allow the Good News Club to hold its after-school program violated the Club members' free speech rights.⁷⁸

The United States District Court for the Northern District of New York granted summary judgment for the school, stating: "[T]he Club's 'subject matter is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under [Milford's] use policies.'"⁷⁹ The Club appealed, but the Second Circuit affirmed, once again finding the Club's activities were "quintessentially religious, and the activities f[e]ll outside the bounds of pure moral and character development."⁸⁰ The Club appealed once again, and the Supreme Court granted certiorari.⁸¹

As previously mentioned, a longstanding principle of First Amendment public forum doctrine is that restrictions on speech, even religious speech, in a limited public forum are constitutional as long as the restriction remains both reasonable and viewpoint neutral.⁸² The Court held that Milford's refusal of the Good News Club's entry into the school amounted to a violation of the Club's free speech rights under

⁷⁶ *Id.* at 103.

⁷⁷ *Id.* at 103–04. The superintendent received a description of the activities that would take place during the Good News Club, and largely based his decision on that description:

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

Id. at 103 (citation omitted).

⁷⁸ Specifically, the Good News Club claimed that Milford Central School deprived it of "its free speech rights under the First and Fourteenth Amendments, its right to equal protection under the Fourteenth Amendment, and its right to religious freedom under the Religious Freedom Restoration Act of 1993." *Id.* at 104.

⁷⁹ *Id.* at 104–05 (second alteration in original) (citation omitted).

⁸⁰ *Id.* at 105 (internal quotation marks and citations omitted).

⁸¹ *Id.* at 106.

⁸² See, e.g., Joshua B. Marker, Note, *The Worship Test: Balancing the Religion Clauses in the Limited Public Forum*, 60 HASTINGS L. J. 673, 676–77 (2009).

the First Amendment because the school's restrictions were not viewpoint neutral.⁸³ In writing for the majority, Justice Thomas found that Milford Central School was a limited public forum.⁸⁴ Speech in such forums can be constitutionally restricted based on subject matter, as the forum is still government-owned, but there are limits on those restrictions—specifically, the government cannot discriminate against the kind of speech to be used in the forum based on viewpoint.⁸⁵ Relying on two earlier holdings regarding religious speech in schools,⁸⁶ the Court believed that the Good News Club's goal was to teach moral and character development lessons to children from an evangelical Christian viewpoint.⁸⁷ Evangelical Christianity merely provided the groundwork for these lessons; thus, the Club's activities were not “quintessentially religious,” as the Second Circuit so thought.⁸⁸

The Court also rejected Milford's Establishment Clause claim that by allowing the Good News Club at the school, Milford would endorse a religion.⁸⁹ Essentially, Milford believed that children might feel compelled to take part in the Good News Club because the Club wished to meet on school premises.⁹⁰ The Court found this unpersuasive, as the Club planned to meet during after-school hours, and parental permission was required for a student's attendance.⁹¹

⁸³ See *Good News Club*, 533 U.S. at 109.

⁸⁴ See *id.* at 106 (“[T]he parties have agreed that Milford created a limited public forum when it opened its facilities in 1992 . . .”).

⁸⁵ *Id.* at 106–07.

⁸⁶ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that a university's refusal to fund a publication was unconstitutional viewpoint discrimination under the First Amendment because the university's refusal was based on the publication's religious perspective); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that a school's refusal to allow a private group to present films in a school amounted to viewpoint discrimination under the First Amendment because the refusal was based solely on the religious perspective of the films).

⁸⁷ See *Good News Club*, 533 U.S. at 107–11. Justice Thomas wrote, “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.” *Id.* at 108.

⁸⁸ See *id.* at 111–12 (“According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion.”).

⁸⁹ *Id.* at 112. The Court listed three specific reasons for why it rejected this argument. First, the Court found that Milford allowing the Good News Club to hold its after-school program would not harm the “neutrality” principle. *Id.* at 114. Second, the Court determined that parents, as the parties who choose whether to allow their children to attend the Good News Club, would not feel coerced into taking part in the Club's activities. *Id.* at 115. And third, the Court noted that it had “never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.” *Id.*

⁹⁰ *Id.* at 113–14.

⁹¹ See *id.* at 113–15.

Both Justice Stevens and Justice Souter filed dissenting opinions.⁹² Justice Stevens, while noting that he thought this was a close case,⁹³ disagreed with the majority and agreed with the Court of Appeals in its finding that Milford School District permissibly excluded religious speech from its limited public forum.⁹⁴

In Justice Souter's dissenting opinion,⁹⁵ he found the majority's conceptualization of the Good News Club's after-school activities as a mere teaching of moral and character issues from the standpoint of evangelical Christianity to be a vast understatement of the activities that actually took place in the Club.⁹⁶ Justice Souter described the Club's activities as follows:

Good News's classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that "[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him. . . . If you have received the Lord Jesus as your Saviour from sin, you belong to God's special group—His family." The lesson plan instructs the teacher to "lead a child to Christ," and, when reading a Bible verse, to "[e]mphasize that this verse is from the Bible, God's Word," and is "important—and true—because God said it." The lesson further exhorts the teacher to "[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel" and cautions against "neglect[ing] this responsibility."

While Good News's program utilizes songs and games, the heart of the meeting is the "challenge" and "invitation," which are repeated at various times throughout the lesson.⁹⁷

Based on this description, Justice Souter found it fair to say the Club's activities amounted to Christian conversion, and perhaps even something close to indoctrination.⁹⁸ Furthermore, he ominously warned that the majority's holding "would stand

⁹² See *id.* at 130–34 (Stevens, J., dissenting); *id.* at 134–45 (Souter, J., dissenting).

⁹³ *Id.* at 133 (Stevens, J., dissenting).

⁹⁴ Justice Stevens believed that "[s]chool officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose [a] risk" of "introduc[ing] divisiveness" into elementary schools and might work "to separate young children into cliques that undermine the school's educational mission." *Id.* at 131–32.

⁹⁵ See *id.* at 134–45 (Souter, J., dissenting).

⁹⁶ Justice Souter, like Justice Stevens, agreed with the majority opinion of the Court of Appeals. See *id.* at 136–37.

⁹⁷ *Id.* at 137 (alterations in original) (internal citations omitted).

⁹⁸ Justice Souter thought it to be "beyond question that Good News intend[ed] to use the public school premises not for the mere discussion of a subject from a particular, Christian

for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.”⁹⁹

This last statement from Justice Souter might be more relevant now than ever, considering the current controversy caused by the Satanic Temple and After School Satan.¹⁰⁰ In light of ASSC, perhaps Justice Souter would agree that now might be the time for the Court to rethink the standard for First Amendment viewpoint discrimination in limited public forums.

III. THE FIRST AMENDMENT AS APPLIED TO AFTER SCHOOL SATAN

As previously discussed, this Note presents two arguments in light of the recent controversies caused by After School Satan. First, because of the Supreme Court’s holding in *Good News Club*, public schools cannot prevent the Satanic Temple from hosting After School Satan as an extracurricular program after school. Second, After School Satan raises the question of whether it may be necessary to re-examine and change aspects of the First Amendment doctrine surrounding viewpoint discrimination in limited public forums.

A. Prohibiting After School Satan in Public Schools Is Unconstitutional Based on the Good News Club Precedent

As detailed previously, the Supreme Court held in *Good News Club* that a school could not prohibit the Good News Club from holding its meetings within the school after the normal school day, as doing so would constitute viewpoint discrimination in a limited public forum.¹⁰¹ The Satanic Temple is cognizant of this holding and has not hesitated to express its disagreement with it,¹⁰² which is perhaps why the Temple is pushing so hard for After School Satan.

With After School Satan, the Satanic Temple specifically targets schools that permit the Good News Club to host its meetings after school.¹⁰³ This is probably a strategic move on the part of the Temple, for if those schools already host a chapter of the Good News Club, then they consequently operate as limited public forums and provide a religious group with a platform for speech and expression within the forum. Therefore, it is unconstitutional for public schools hosting a Good News Club to prevent After School Satan from meeting. Such prevention would amount to viewpoint discrimination under *Good News Club*, which is apparent after comparing

point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion.” *Id.* at 138.

⁹⁹ *Id.* at 139.

¹⁰⁰ See discussion *supra* Section I.B.

¹⁰¹ See generally 533 U.S. 98 (2001).

¹⁰² See, e.g., *Educatin’ with Satan*, *supra* note 6.

¹⁰³ *Id.*

After School Satan and Justice Thomas's characterization of both the Good News Club and what the members of the Child Evangelism Fellowship sought to teach children who participated in the Club.¹⁰⁴

Through After School Satan, the Satanic Temple aims to teach children a certain system of morals and beliefs.¹⁰⁵ The Satanic religion is merely a conduit by which to teach public school children these morals and beliefs, just as evangelical Christianity was a conduit to teach public school children Christian morals and beliefs.¹⁰⁶ Put another way, Satanism lays the groundwork for After School Satan, just as evangelical Christianity laid the groundwork for the Good News Club. Any school that prohibited After School Satan would discriminate against the morals and beliefs of the Satanic Temple, which in turn would amount to unconstitutional viewpoint discrimination in a limited public forum.

In *Good News Club*, Justice Thomas did not disagree with Justice Souter's characterization of the Good News Club's program.¹⁰⁷ However, Justice Thomas did disagree with Justice Souter on whether the program actually involved religious worship—once again, Justice Thomas believed the Good News Club taught lessons of morality and character development to children, with evangelical Christianity serving as a backdrop or context from which to teach these lessons.¹⁰⁸

The same can be said of After School Satan, and perhaps to an even greater extent, as the program has been designed to teach children about certain viewpoints without relying heavily on Satanic doctrine to do so.¹⁰⁹ This is another strategic

¹⁰⁴ See *supra* notes 82–91 and accompanying text.

¹⁰⁵ See *FAQ*, *supra* note 8 (“All *After School Satan Clubs* are based upon a uniform syllabus that emphasizes a scientific, rationalist, non-superstitious world view. . . . *After School Satan Clubs* incorporate games, projects, and thinking exercises that help children understand how we know what we know about our world and our universe.”).

¹⁰⁶ As the majority wrote in *Good News Club*, “What matters for purposes of the Free Speech Clause is that we 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.” 533 U.S. at 111.

¹⁰⁷ Justice Thomas noted that Justice Souter's description of the activities at a general Good News Club meeting was “accurate,” but nevertheless still saw religion as merely “the viewpoint from which ideas are conveyed.” *Id.* at 112 n.4.

¹⁰⁸ *Id.* at 108–10. Justice Thomas also felt it important to point out that the lower court actually made no finding that the activities of the Good News Club amounted to religious worship. See *id.* at 112 n.4. Thus, he thought it inconsistent to call the Good News Club “quintessentially religious.” *Id.* at 111.

¹⁰⁹ For example, the permission slip for ASSC is clear in emphasizing that students attending the after-school program will learn basic critical reasoning, problem solving, character qualities, and creative expression through science, art projects, and educational stories. See *Permission Slip*, *supra* note 52. No mention is made to anything one might normally associate with religion, such as prayer or recitation of religious doctrine. See *id.* Furthermore, the After School Satan website is careful to mention that participating students will learn from “a uniform syllabus that emphasizes a scientific, rationalist, non-superstitious world view.” *FAQ*, *supra* note 8.

move on the part of the Temple, as it makes the After School Satan curriculum even less religious and more secular than the Good News Club's curriculum.¹¹⁰ If the Court found the Good News Club's activities did not amount to religious worship of the Christian God in *Good News Club*, then it would be wildly inconsistent for a court to hold that After School Satan's activities amount to religious worship of Satan.

A group that opposes After School Satan, the Liberty Counsel, has already pledged its legal support for any public school that does not wish for After School Satan to operate within its halls, even though the Liberty Counsel is aware of the *Good News Club* holding.¹¹¹ In doing so, the Liberty Counsel misunderstands not only the holding of that case, but contemporary religious Satanism itself.

First, the Liberty Counsel mischaracterizes the Satanic Temple as "a small group of atheists,"¹¹² perhaps in an attempt to distinguish After School Satan from the type of religious club involved in *Good News Club*. It dismisses the Satanic Temple's sect of Satanism as atheism and suggests that if religion is not involved, then *Good News Club* does not apply.¹¹³ However, this view has falsely assumed that the Satanic Temple's belief is that there is no god and that the figure of Satan serves as a representation of the rejection of God and other forms of authority.¹¹⁴ Even though the Satanic Temple opposes many forms of religion, it still considers its sect of Satanism a religion,¹¹⁵ and courts have assumed Satanism is a religion for purposes of a First Amendment analysis.¹¹⁶

¹¹⁰ The Temple notes that "[u]nlike the *Child Evangelism Fellowship*, which openly seeks to convert children to their religious view through fear of eternal suffering, *The Satanic Temple* does not believe in imposing a one-size-fits-all approach to religious opinion." *Corrections*, AFTER SCH. SATAN, <https://afterschoolsatan.com/92-2/> [<https://perma.cc/QA5C-EHLS>] (last visited Apr. 12, 2018).

¹¹¹ See Staver, *supra* note 18.

¹¹² *Id.*

¹¹³ See *id.*

¹¹⁴ The Satanic Temple's website states, "To embrace the name Satan is to embrace rational inquiry removed from supernaturalism and archaic tradition-based superstitions," and "Satan is symbolic of the Eternal Rebel in opposition to arbitrary authority, forever defending personal sovereignty even in the face of insurmountable odds." *FAQ*, *supra* note 38.

¹¹⁵ In response to the question, "If you do not believe in the supernatural, how is TST [The Satanic Temple] a religion?" the Temple replied by saying that even though it does not advocate for one's personal belief in or worship of Satan, Satanism still serves as "a narrative structure by which we contextualize our lives and works. It provides a body of symbolism and religious practice—a sense of identity, culture, community, and shared values." *Id.*

¹¹⁶ Many of these cases involve prisoners asserting their right to practice their religion of choice and requesting a copy of *The Satanic Bible* in order to do so, with varying degrees of success. See, e.g., *Burton v. Frank*, No. 03-C-0374-C, 2004 WL 1176171, at *1 (W.D. Wis. May 20, 2004). Although this question has not reached the Supreme Court, lower courts have taken two different approaches. While the first is to not reach the question of whether Satanism is a religion, the second is to assume Satanism is a religion as long as it can be shown that the individual sincerely believes in it. Compare *McCorkle v. Johnson*, 881 F.2d 993, 995 (11th

Second, the Liberty Counsel claims the Satanic Temple has an ulterior motive with After School Satan, and this motive should bar them from holding the program in public schools.¹¹⁷ In other words, the Liberty Counsel believes the Satanic Temple does not truly wish to teach children the tenants of Satanism, but instead wants to cause controversy, attack Christianity, and create unnecessary problems for public schools.¹¹⁸ Yet even though the Satanic Temple may have a particular end game in mind with After School Satan, it would be false to say that the Temple does not wish to teach children certain morals, beliefs, and character development through the program. In fact, one reason the Temple created it was to provide public school children with other viewpoints and worldviews, or at least ones other than evangelical Christianity.¹¹⁹ And regardless of the Temple's motives behind creating After School Satan, the majority in *Good News Club* did not discuss whether the Good News Club had any motives other than teaching children the morals and beliefs of evangelical Christianity.¹²⁰ It was enough for the majority that the Good News Club wished to teach its system of morals and beliefs.¹²¹

Finally, the Liberty Counsel's website labels the Satanic Temple as a "disruptive group" and claims the Temple wishes to "disrupt the school and target other legitimate clubs."¹²² Through this characterization, the Liberty Counsel seems to invoke *Tinker v. Des Moines Independent Community School District*,¹²³ where the Court held that expressive conduct taking place in a public school must "materially and substantially interfere with . . . the operation of the school" or invade the rights of other students in order for the government to constitutionally suppress that speech.¹²⁴ Importantly, the government must have a reasonable belief of such disruption and not just a fear of disruption.¹²⁵ After School Satan fails to raise to this reasonable

Cir. 1989) (refusing to answer the question if Satanism was a religion for purposes of the First Amendment), *with* *Carpenter v. Wilkinson*, 946 F. Supp. 522, 528 (N.D. Ohio 1996) (assuming that for purposes of the First Amendment, Satanism was a religion because evidence demonstrated that the inmate truly believed in it).

¹¹⁷ See Staver, *supra* note 18 ("School administrators do not have to tolerate groups that disrupt the school and target other legitimate clubs.").

¹¹⁸ While the last claim is untrue, the other two are not far from the truth, considering both the goal of After School Satan and the Satanic Temple's fierce advocacy for separation of church and state. See discussion *supra* Part I.

¹¹⁹ See Press Release, After Sch. Satan, *supra* note 1 (quoting Satanic Temple spokesman Lucien Greaves: "It's important that children be given an opportunity to realize that the evangelical materials now creeping into their schools are representative of but one religious opinion amongst many.").

¹²⁰ See 533 U.S. 98, 102–20 (2001).

¹²¹ *Id.* at 108.

¹²² Staver, *supra* note 18.

¹²³ 393 U.S. 503 (1969). *Tinker* involved a case brought by students who protested the Vietnam War by wearing black armbands to school, for which the school suspended them. *Id.* at 504.

¹²⁴ See *id.* at 509 (citation omitted).

¹²⁵ See *id.* at 509 & n.3.

belief standard, for it would not interfere with the actual day-to-day operation of the school due to it taking place after the normal school day.¹²⁶ Furthermore, any controversial aspects of Satanic doctrine have been removed from After School Satan's curriculum, and the program focuses on providing children with exposure to multiple worldviews that students can either choose to adopt or reject without forcing a decision upon them.¹²⁷ Although the *Tinker* standard has become somewhat nuanced since the Court adopted it in 1969,¹²⁸ the nuances arguably do not reach nonstudent groups outside the school hosting extracurricular programs after the conclusion of the normal school day.

Because of the similarities between the nature of After School Satan and the majority's characterization of the Good News Club in *Good News Club*, and because of the weaknesses in the Liberty Counsel's arguments as to why After School Satan should be barred from public schools, the Satanic Temple can constitutionally hold After School Satan in any public school that operates as a limited public forum.

*B. After School Satan as an Opportunity to Re-examine Viewpoint
Discrimination in Limited Public Forums*

By using the same argument described above, it is likely that any religious group, not just the Satanic Temple, could hold an after-school program in a public school. The argument would hinge on the fact that the program proposes to teach students a certain viewpoint that does not amount to religious worship. This could easily be achieved by closely mirroring the After School Satan program.

The After School Satan controversy, then, illustrates two major points. First, it is not especially difficult for a religious group to hold an extracurricular school program in a public school under *Good News Club*. As long as the religious group takes caution with how it describes the goals of the program and how central religious doctrine is to the program, it is likely that most prohibitive actions by school administrators against the group's program would amount to viewpoint discrimination.

¹²⁶ See Press Release, After Sch. Satan, *supra* note 1.

¹²⁷ See *Corrections*, *supra* note 110 (“[The Temple] see[s] the quest for knowledge as a noble pursuit, and we believe in personal autonomy. However, nobody needs to be a Satanist to benefit from any of these things, and children should be given access to a variety of comparative opinions with which they can ultimately decide what is best for them. *After School Satan Clubs* are conducted by Satanists in accordance with our values, but participating children are neither required to identify as Satanists, nor will we ask that they, at any point, do so.”).

¹²⁸ See, e.g., *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (holding that a school may prohibit a student's advocacy of illegal activity, such as drug use, during a school-sanctioned event); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that a school may regulate its curriculum in ways that are “reasonably related to legitimate pedagogical concerns”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986) (holding that a school can punish disruptive expressive conduct in the context of a school assembly held during the normal school day).

Second, the ease with which religious groups can permeate public schools by means of after-school programs highlights Justice Souter's predication from his dissent in *Good News Club*.¹²⁹ It would certainly be interesting to know if Justice Thomas ever thought that sixteen years after he wrote his majority opinion that a group of Satanists would use it as support for why it could hold Satanic after-school clubs in public schools.

At the heart of these two points is the contentious issue of separation of church and state, especially in the context of religion in public schools.¹³⁰ This is a multifaceted issue, a battle fought over and over again in the United States.¹³¹ Generally, groups arguing in favor of a limited or nonexistent role of religion in public schools believe in an absolute separation of church and state.¹³² They argue that there are many different religions in the world, each with its own unique set of beliefs, morals, and viewpoints; thus, choosing which religions to include or which to exclude in public schools is too controversial and difficult a decision for school administrators to make.¹³³ There is some legal support for this position, as the Court has stated that parents send their children to public school with "the understanding that the classroom will not purposely be used to advance religious views."¹³⁴ However, those on the other side of the argument see things quite differently. They believe that religion, regardless of whether you believe it, holds a certain amount of value for students because of the diverse and religious nature of society in the United States.¹³⁵ Even more, they note that religion has played an important role in shaping the United States and other countries around the world, both historically and in the present.¹³⁶ They also fear that removing religion from public schools may promote atheism or agnosticism.¹³⁷ As such, they believe that public school students should be able to express their religious beliefs in public school through classes and after-school programs.¹³⁸

¹²⁹ See 533 U.S. 98, 139 (2001) (Souter, J., dissenting).

¹³⁰ It is ironic that, at the end of the day, this is precisely one of the long-term goals the Satanic Temple has in advocating for After School Satan. Over the years, the group has vehemently advocated for a greater separation of church and state. See *supra* Section I.B.

¹³¹ See discussion *supra* Section II.A.

¹³² See Lauren Cooley, Note, *Accommodating Diversity: Teaching About Religion in Public Schools*, 12 RUTGERS J.L. & RELIGION 347, 352–55, 377 (2011).

¹³³ See *id.* at 377–78.

¹³⁴ *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); see Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 708 (1996).

¹³⁵ See Cooley, *supra* note 132, at 380–81.

¹³⁶ *Id.* at 382–83.

¹³⁷ See, e.g., *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999), *vacated sub nom. Chandler v. Siegelman*, 530 U.S. 1256 (2000). However, these fears may be unfounded. See Greenawalt, *supra* note 134, at 702 ("Any ban on religious expression might or might not include a ban on negative (atheist) claims about religious truth and (agnostic) claims of unknowability.").

¹³⁸ See Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 U.C. DAVIS L. REV. 843, 887 (2009). Professor Green

Although the Satanic Temple strongly advocates for the complete removal of religion from public schools, and uses After School Satan as a means to achieve that end, religion does hold educational value for public school students.¹³⁹ Religion has been protected by the Court in different public school contexts.¹⁴⁰ Therefore, After School Satan does not present the best opportunity for a *complete* re-examination of the place religion has in public schools, perhaps to the chagrin of the Satanic Temple.¹⁴¹

This should not be the end of the inquiry into religion in public schools, however. As the law stands right now, viewpoint discrimination against a religious group is quite easy to prove.¹⁴² Furthermore, the strength of the Satanic Temple's *Good News Club* argument for After School Satan suggests Justice Souter's warning that *Good News Club* could one day allow for "any public school opened for civic meetings [to] be opened for use as a church, synagogue, or mosque"¹⁴³ is now more of a reality than ever before.

Taking Justice Souter's words further, it is not unforeseeable that more conflict, like that between the Satanic Temple and the Liberty Counsel, will ensue if other religious groups hold their own after-school clubs in public schools. Indeed, the After School Satan controversy does not stem from the mere involvement of the Satanic Temple, but rather from the possibility of having two religious groups with opposing viewpoints operating their own after-school clubs in the same public space. As a precautionary matter, then, it may be time to re-examine the viewpoint discrimination standard in limited public forums in order to prevent any potential controversy caused by religious after-school clubs in public schools.¹⁴⁴

One possible solution that could prevent controversies like these would be to grant more deference to public school administrators when they discriminate against certain expressive conduct—especially expressive religious conduct—in their schools. As the After School Satan controversy shows, religious after-school programs do

suggests that students expressing their religious beliefs is just as important as students expressing their political beliefs, as "[b]oth perspectives can be equally important in the development of a student's personal identity and can advance the crucible of free expression generally." *Id.*

¹³⁹ See, e.g., *id.*

¹⁴⁰ See generally *id.*

¹⁴¹ Interestingly, the establishment of most Good News Clubs in public schools throughout the United States has not relied on the viewpoint discrimination precedent from *Good News Club*, suggesting this issue might not be as contentious as it seems. See Ralph D. Mawdsley, *Federal Court of Appeals Decisions in Good News Club Cases: Does this Litigation Represent Good News for Public Schools?*, 220 EDUC. L. REP. 1, 6–8 (2007).

¹⁴² See *id.* at 6–7.

¹⁴³ 533 U.S. 98, 139 (2001) (Souter, J., dissenting).

¹⁴⁴ At first thought, it might seem as if *Tinker* would provide an appropriate remedy for this type of situation. See *supra* notes 123–25 and accompanying text. However, *Tinker* largely dealt with substantial disruption in the operation of the normal school day. See 393 U.S. 503, 505, 508–09, 513 (1969). It is not clear if the *Tinker* standard would apply to operations outside of the normal school day, particularly religious after-school clubs. See generally *id.*

create some level of disruption when religious groups with different beliefs come into proximity with one another in the public school context,¹⁴⁵ and this level of disruption may rise if even more religious groups enter the fray. If school administrators are granted more deference when deciding to keep religious influences out of schools, they may be able to stop any possible controversy before it happens.

School administrators can be granted this proposed level of deference in one of two ways. First, the Court could cease to apply public forum doctrine to public schools, providing school administrators with the ability to discriminate according to both subject matter *and* viewpoint, with no First Amendment implications. Second, the Court could continue using public forum analysis for public schools, but could grant more deference to school administrators when they claim they are discriminating based on subject matter and not viewpoint, at least where matters of religion are concerned. The first approach has the potential for negative consequences, but the second might be flexible enough to provide school administrators with just the right amount of authority to prevent conflict while maintaining the positive aspects of public forum doctrine.

1. Abandoning Public Forum Analysis for Public Schools

As discussed previously, a public forum is property owned by the government where the government can regulate speech depending on the category of public forum at issue.¹⁴⁶ Public schools are generally considered limited public forums, in which the government can discriminate according to subject matter so long as the discrimination is reasonable and viewpoint neutral.¹⁴⁷ But if the Court ceases to apply public forum doctrine to public schools, then school administrators would have broad authority when making decisions about what kind of speech to permit in public schools. This would prevent religious groups from holding their after-school programs in public schools if school administrators so wished because they could discriminate in any way they wanted, as the distinction between subject matter and viewpoint would no longer matter. Under this approach, religious groups would be unable to take advantage of the lenient standard from *Good News Club* and use it to integrate themselves into public schools.

While this approach might have the effect of preventing disruption caused by different religious groups operating in public schools, it would come at a cost. Not only would school administrators be able to discriminate against religious groups operating in schools, they would be able to discriminate against other groups as well. This outcome could be disastrous in that it would affect public assembly in public schools, which can be valuable in a democratic society because it provides

¹⁴⁵ See Staver, *supra* note 18.

¹⁴⁶ See generally *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

¹⁴⁷ See discussion *supra* Section II.A.

citizens with a space to participate in political, social, and even religious aspects of life.¹⁴⁸ Furthermore, the outcome could negatively affect the activities of public school students.¹⁴⁹ Thus, this approach may actually grant school administrators too much deference in their ability to make discriminatory decisions. The appropriate standard must grant school administrators some deference when trying to prevent disruption from religious groups in public schools, but should not come at the expense of disallowing the public's use of public schools altogether, leaving the public's use of public schools largely to the whims of school administrators, or negatively impacting student activity.

2. Public Schools as Limited Public Forums with Added Deference Granted to Public School Administrators

A second approach to this dilemma is to keep the limited public forum designation for public schools, but with added deference for public school administrators as to when they claim they discriminate based on subject matter and not viewpoint, particularly in situations where religion or religious groups are concerned. Under this standard, school administrators would have more authority to discriminate against religious groups who wish to enter public schools and host extracurricular after-school clubs because of the conflict that stems from having religions with widely contrasting viewpoints operating in the same school.

In order to achieve this result, courts could grant the proposed heightened level of deference when school administrators choose to exclude a religious group from entering a public school under the guise of hosting an extracurricular after-school club. However, the school administrators' heightened deference should also be coupled with a necessary showing of outright religious activity that amounts to religious worship in the after-school club, as a means to keep the power of school administrators in check.¹⁵⁰

As the law stands now, public forum doctrine, especially limited public forum doctrine, can be quite confusing.¹⁵¹ The proposed standard might add to that confusion, but it could also allow school administrators to prevent unwanted conflict and

¹⁴⁸ See generally John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159 (2015).

¹⁴⁹ See, e.g., *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 673–74 (2010) (holding that a school's all-comers policy that prevented a Christian student organization from turning away members because of their religious beliefs did not violate the First Amendment).

¹⁵⁰ See Stephen M. Feldman, *Free Expression and Education: Between Two Democracies*, 16 WM. & MARY BILL RTS. J. 999, 1007–10 (2008). While this Note does not aim to answer what kind of activity would amount to outright religious worship, the activities as described by Justice Souter in *Good News Club* might be a good place to start. See 533 U.S. 98, 139 (2001) (Souter, J., dissenting).

¹⁵¹ See Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2141 (2009).

disruption caused by religious after-school clubs while remaining viewpoint neutral in the eyes of the law.

Take, for example, the holding in *Good News Club*. This case would have come out differently if the proposed standard were applied, which in turn would likely have prevented the recent controversy sparked by After School Satan. The extracurricular activities that took place in the Good News Club were “quintessentially religious,” as described by the Court of Appeals.¹⁵² Justice Souter also described the activities of the Good News Club in detail, almost in disbelief that the majority could find the Good News Club’s activities to be anything other than a form of evangelical Christian indoctrination of impressionable minds.¹⁵³ Under the proposed standard, this showing of outright religious activity that took place in the Good News Club, combined with the heightened level of deference, could be an example of what would be enough to show that the Milford administrators remained neutral in their original decision to keep the Good News Club out of their schools. With this deference, the Court would take school administrators at their word when they claimed they discriminated against the Good News Club because of its religious subject matter, not because of the Good News Club’s particular viewpoints on morality and character that it desired to teach children.

Of course, this standard is not without its faults. As with the proposed abandonment of public forum doctrine for public schools, it would be wise to ensure school administrators are not discriminating against religious groups on a whim. This is why the proposed standard couples deference to school administrators with a showing of outright religious activity amounting to religious worship, or in other words, activity that is “quintessentially religious,” to use the language of the Court of Appeals in *Good News Club*.¹⁵⁴ The most difficult part of applying this standard would be determining how much of a showing outright religious activity is required. While this Note suggests the activities described in *Good News Club*¹⁵⁵ would be enough, whether less of a showing might be sufficient would be a matter of discretion best left for the Court to decide. It is also important to note that the Court treats discrimination against religion or religious groups in public forums as viewpoint discrimination instead of subject-matter discrimination,¹⁵⁶ despite that approach being widely criticized.¹⁵⁷ As such, the Court may be hesitant to depart from its practice of characterizing religious activity as a viewpoint instead of subject matter.

¹⁵² See *Good News Club*, 533 U.S. at 105 (citation omitted).

¹⁵³ See *id.* at 137–39 (Souter, J., dissenting).

¹⁵⁴ See *id.* at 105 (majority opinion) (citation omitted).

¹⁵⁵ See discussion *supra* Section II.B.

¹⁵⁶ See Laura Gastel, Note, *Is Good News No News for Establishment Clause Theory?*, 52 DEPAUL L. REV. 125, 198–99 (2002).

¹⁵⁷ See, e.g., Toni M. Massaro, *Christian Legal Society v. Martinez: Six Frames*, 38 HASTINGS CONST. L.Q. 569, 615 (2011).

CONCLUSION

It is doubtful that when Justice Thomas penned the majority opinion for *Good News Club* that he ever thought a group of Satanists would attempt to hold its after-school program in public schools using his opinion for support.¹⁵⁸ The conflict now brewing between the Satanic Temple and the Liberty Counsel, and all others who oppose After School Satan, is a concrete realization of Justice Souter's *Good News Club* dissent.

It is true the Satanic Temple acts in ways to cause controversy and shed light on aspects of American life it does not agree with; this is something it does not deny.¹⁵⁹ But regardless of what one thinks about the Satanic Temple and its After School Satan agenda, it does raise important questions pertaining to the First Amendment. Should Americans, especially parents of children in public elementary schools, be at all concerned about the ease with which a religious group can enter a public school and influence the minds of public school students? Is this something that Americans should be comfortable with, even when church and state are supposed to be separate in the United States?

While this Note does not advocate for a complete removal of religion from public schools, it does suggest there should be a different standard in public forum doctrine for when a religious group can host extracurricular after-school clubs in public schools. As the law stands now, After School Satan and any other religious organizations can potentially host their own extracurricular after-school clubs in schools that operate as limited public forums. This can cause considerable controversy, and this controversy may only spread if other religious groups follow the Satanic Temple's example.

If the Liberty Counsel makes good on its promise to challenge After School Satan and the matter is brought before the Court, the Court's response should be, "Not today, Satan, not today."¹⁶⁰ Yet it should respond with the same disapproval to any and all other religious after-school programs in public schools, including the Good News Club. And ironically, this is the ideal outcome the Satanic Temple has been fighting for all along.

¹⁵⁸ See *FAQ*, *supra* note 8.

¹⁵⁹ See *supra* notes 41–47 and accompanying text.

¹⁶⁰ "Not today, Satan, not today," is a phrase made popular by comedian Bianca Del Rio during her run as a contestant on season six of the reality television competition show *RuPaul's Drag Race*. See *RuPaul's Drag Race: Sissy That Walk!* (Logo television broadcast May 5, 2014).