William & Mary Bill of Rights Journal

Volume 28 (2019-2020)
Issue 3

Article 2

March 2020

The Bad News of Good News Club: Obliterating the Wall Between Church & State

Kevin W. Connell

THE BAD NEWS OF *GOOD NEWS CLUB*: OBLITERATING THE WALL BETWEEN CHURCH & STATE

Kevin W. Connell*

In recent decades, the Supreme Court has imposed upon school districts and their constituent taxpayers the unconstitutional burden of endorsing and advancing religion. By mandating that school districts embrace religion by granting access of their facilities to religious organizations, the Supreme Court has polluted the integrity of both Church and State. Consequently, our natural born right to freedom of conscience is under siege. This unconstitutional assault requires a judicial return to strict separation if we are to preserve freedom from government impositions of religion and the erosion of freedom of conscience in America.

Among our most sacred principles in the First Amendment, the Free Exercise and Establishment Clauses protect individuals against being limited in their right to practice religion under the former and from compulsion by the State under the latter.[1] Writing in 1802, Thomas Jefferson penned his famous letter to the Danbury Baptist Association in response to concerns surrounding uncertain religious protections under the Connecticut Constitution.[2] Asserting that religion has been intentionally removed from the public realm to our own private spheres, Jefferson declared that "religion is a matter which lies solely between Man [and] his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, [and] not opinions."[3]

---

* Kevin W. Connell is a 2015 cum laude graduate of the University of Rochester and 2018 graduate of William & Mary Law School. After graduating, Kevin returned to his hometown of Rochester, New York, where he began his career practicing education law representing public school districts throughout the state of New York. Kevin is currently an associate at Trevett Cristo, specializing in insurance law and labor law. In addition to his legal career, Kevin has also published two books on higher education reform, titled *Degrees of Deception: America's For-Profit Higher Education Fraud* and *Degrees of Deception: The College Affordability Crisis & Our Next Financial Bubble*.

This Article is dedicated to Professor Mark McGarvie for his life's work concerning religion and law in America.

[1] *See* U.S. CONST. amend. I; Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 97–98, 100–01 (1998).

[2] *See* Letter from Thomas Jefferson, President of the United States, to the Danbury Baptist Association (Jan. 1, 1802), *in* 36 THE PAPERS OF THOMAS JEFFERSON, 1 DECEMBER 1802–3 March 1802, at 258 (Barbara B. Oberg et al. eds., 2009) [hereinafter Letter from Thomas Jefferson]; *see also* Letter from the Danbury Baptist Association to Thomas Jefferson (Oct. 7, 1801), *in* 35 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 407–08.

[3] *See* Letter from Thomas Jefferson, *supra* note 2, at 258.

This distinction of private and public spheres is implicit in the restructuring of religious organizations during the early republic, when churches were converted from public entities to "private voluntary associations."[4] Jefferson concludes that the American people, through this restructuring, have built "a wall of separation between Church [and] State," adding that a person's natural rights include the "rights of conscience," including freedom from religious endorsement.[5]

Departing from this fundamental principle, the Supreme Court has chipped away at Jefferson's wall of separation in recent decades. Obliterating, brick by brick, the founding principle of separation, the Supreme Court mandates access to publicly funded school resources and facilities for religious organizations.[6] In these cases, modern Supreme Court jurisprudence grapples with two pivotal issues: (1) First Amendment claims brought by religious organizations asserting viewpoint discrimination; and (2) Establishment Clause claims asserting affirmative defenses by school districts.[7] Jurisprudence surrounding this analysis has heavily favored the former while virtually dismissing the latter.[8] In doing so, the Supreme Court has confused the issue from one of Establishment to Free Speech, thereby fueling the modern reactionary social movement towards unification between Church and State during the second half of the twentieth century.[9] The result has been one of irreparable harm. The Supreme Court has converted the religion clauses from a shield to a sword, allowing religious organizations to infiltrate the public domain and impose their beliefs, morals, and attitudes upon society.

Embodying this perversion from shield to sword in the context of public education is the case of *Good News Club v. Milford Central School*, which held that school districts may not engage in viewpoint discrimination by barring religious organizations from accessing school facilities otherwise opened to the public.[10] Specifically, the Court broadly held that "[w]hen Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause under the First Amendment."[11] This decision is wrongfully considered on two grounds.

---

[4] MARK DOUGLAS MCGARVIE, ONE NATION UNDER LAW: AMERICA'S EARLY NATIONAL STRUGGLES TO SEPARATE CHURCH AND STATE 3 (2004).

[5] Letter from Thomas Jefferson, *supra* note 2.

[6] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–94 (1993).

[7] *See, e.g.*, *Good News Club*, 533 U.S. at 102; Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23 (1995).

[8] *See Good News Club*, 533 U.S. at 113.

[9] *Rosenberger*, 515 U.S. at 822–23; *see also, e.g.*, Noah Feldman, *A Church-State Solution*, N.Y. TIMES (July 3, 2005), https://www.nytimes.com/2005/07/03/magazine/a-church state-solution.html [https://perma.cc/C893-W5XD].

[10] 533 U.S. at 107–09.

[11] *Id.* at 120.

First, the Supreme Court fails to recognize the inherent endorsement of religion through publicly funded benefits to religious organizations that result from mandating access to public resources. When a religious organization is granted access to public resources, taxpayers subsidize religion through financial support.[12] Public funding to religious organizations either directly funds religious activity or incidentally pays for non-religious resources that allow religious organizations to divert more of their own funding to religious activity. Whether direct or incidental, access to public resources by religious organizations advances religion.

Second, even if the inherent endorsement theory is not accepted, the majority opinion in *Good News Club* fails to distinguish between the different types of potential activity conducted by the religious organization while accessing public facilities.[13] This activity includes traditional forms of speech, worship, and proselytization.[14] Even if the claim for broad exclusion is dismissed and general access to school resources is granted, the activities of religious organizations should be limited to otherwise secular forms of conduct consistent with other types of community group use. Religious worship or proselytization must be excluded from all public property.[15]

I. CURRENT STANDARD

Before exploring these two proposed alternatives, we must evaluate the current standard established by *Good News Club* to understand how far Supreme Court jurisprudence has ventured from separating Church and State as a means of protecting freedom of conscience. Courts have recognized three criteria for evaluating these cases: (1) the type of forum; (2) whether the policy is facially neutral; and (3) whether there exists viewpoint discrimination.[16]

The basis of the forum analysis begins with the presumption that a school district's facilities are not open to the public for unlimited use.[17] "Nothing in the Constitution requires the Government . . . to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[18] From this basic understanding, "Freedom to speak on government property is largely dependent on the nature of the forum in which the speech is delivered."[19]

---

[12] Esbeck, *supra* note 1, at 35–36; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 209–10 (1992).

[13] *See* 533 U.S. at 111.

[14] *See id.* at 130–33 (Stevens, J., dissenting) (distinguishing religious speech into three categories).

[15] *See* Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 51 (2d Cir. 2011).

[16] *Cf., e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985) (using the criteria to examine a first amendment claim).

[17] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47–49 (1983).

[18] *Cornelius*, 473 U.S. at 799–800.

[19] Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 211 (2d Cir. 1997).

Although the State has the authority to restrict speech, there are parameters on this power.[20] "The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be 'reasonable in light of the purpose served by the forum.'"[21]

Judicial scrutiny of a school district's intention to restrict use of its school facilities "varies with the nature of the forum in which the speech occurs."[22] The Supreme Court has recognized a spectrum of forums that determine the level of constitutional protection that speech will be granted.[23] "The categories from highest protection to lowest are the traditional public forum, . . . the limited public forum, and the non-public forum."[24]

A "traditional public forum" is comprised of places "which '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.'"[25] These include places like public sidewalks, parks, and others located in the vast public commons.[26] Government attempts to regulate the content of speech in a traditional public forum will be the subject of strict judicial scrutiny.[27] Any restrictions must be "necessary to serve a compelling [S]tate interest and [must be] narrowly drawn to achieve that end."[28] Regulations of "time, place, and manner" in a public forum will survive if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[29]

The "limited public forum" is established when the State "opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects."[30] In other words, "When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech."[31] Therefore, "The State may be justified 'in reserving [its forum]

---

[20] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

[21] *Id.* at 106–07 (internal citation omitted) (quoting *Cornelius*, 473 U.S. at 806).

[22] Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 625 (2d Cir. 2005).

[23] *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44–46 (1983); *see also Peck*, 426 F.3d at 625.

[24] DeFabio v. E. Hampton Union Free Sch. Dist., 658 F. Supp. 2d 461, 473 (E.D.N.Y. 2009).

[25] *Perry Educ. Ass'n.*, 460 U.S. at 45 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

[26] *Peck*, 426 F.3d at 625–26.

[27] *Perry Educ. Ass'n*, 460 U.S. at 45.

[28] *Id.*

[29] *Id.*

[30] Hotel Emps. & Rest. Emps. Union Local 100 v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 545 (2d Cir. 2002) (quoting N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 128 n.2 (2d Cir. 1998)).

[31] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

for certain groups or for the discussion of certain topics.'"[32] The State's power to restrict speech, however, is not without limits. "The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be 'reasonable in light of the purpose served by the forum.'"[33] Consequently, the State may place restrictions on speech in a limited public forum so long as they are reasonable and viewpoint-neutral.[34]

The forum with the lowest level of scrutiny is a "'non-public forum,' which is neither traditionally open to public expression nor designated for such expression by the State."[35] Additionally, with respect to all unspecified uses, school district property remains a non-public forum.[36] The Second Circuit justifies this broad restriction on all unspecified uses by citing to Supreme Court precedent restricting various forms of unspecified activity at schools, such as solicitations, political speeches, and for-profit entities.[37]

Furthermore, "In addition to time, place, and manner restrictions, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[38] Specifically, "a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created."[39] However, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[40]

Considering these three fora, a public school district is not required to open its facilities to outside organizations, but once it chooses to do so, it creates a limited public forum. If a school district acknowledges that it has in the past and presently does open the school facility to outside community groups for certain uses, the facility cannot be described as a non-public forum.[41] Conversely, "public schools do not possess all of the attributes of streets, parks, and other traditional public forums."[42] If a school district has opened its facilities to the public, it has not opened that

---

[32] *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[33] *Id.* at 106–07 (internal citation omitted) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

[34] *Id.*

[35] Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626 (2d Cir. 2005).

[36] *See* Deeper Life Christian Fellowship v. Bd. of Educ., 852 F.2d 676, 679 (2d Cir. 1988).

[37] *See id.* at 679–80 (citing Greer v. Spock, 424 U.S. 828, 838–39 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974)).

[38] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); *see also Good News Club*, 533 U.S. at 106–07.

[39] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985).

[40] *Id.*

[41] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).

[42] *Id.*

facility "for indiscriminate use by the general public."[43] Instead, a school district presumably exercises control over the use of its facilities, limiting public use in accordance with its facility use policy.

Therefore, a school district falls squarely within the intermediate category of a limited public forum when it opens its facilities to community organizations during noninstructional hours. Although the classification of a school as a limited public forum has been correctly decided, albeit for the misguided reasons of neutrality and viewpoint discrimination, school districts have been wrongfully mandated to open their limited public forums to religious organizations once the limited public forum has been opened to the public.

The neutrality of policies regarding community access to school facilities and resources is a flawed element of the religious access analysis under the status quo. Although the State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics," the State's power to restrict speech has been determined by the Court to have strict limits.[44] These strict limits have erroneously included limits on restricting religious activity despite Establishment Clause prohibitions.[45] Despite this constitutional bar, the Supreme Court in *Good News Club* held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion."[46]

The Supreme Court has further held that, "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[47] In other words, if a policy is neutral, it will likely be upheld against an Establishment Clause challenge.[48] To clarify what it means for a policy to be "neutral," the Supreme Court has set the standard that the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[49]

Consequently, this standard suggests that the policy should be facially neutral in its treatment of all community groups attempting to access public school resources. If one community group has access to school facilities and resources, then the school district must permit all community groups to use the facility regardless of their

---

[43] *Perry Educ. Ass'n*, 460 U.S. at 47.

[44] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[45] *See* Mitchell v. Helms, 530 U.S. 793, 877–78 (2000) (Souter, J., dissenting).

[46] 533 U.S. at 114 (internal quotations omitted) (quoting *Rosenberger*, 515 U.S. at 839).

[47] *Mitchell*, 530 U.S. at 809 (Thomas, J., plurality opinion).

[48] *See id.* at 838 (O'Connor, J., concurring); Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 45 (2d Cir. 2011).

[49] *Good News Club*, 533 U.S. at 114 (internal quotation omitted) (quoting *Rosenberger*, 515 U.S. at 839).

religious viewpoint.[50] This broad standard of neutrality is blind to other constitutional mandates, such as those prohibiting religious establishment, which are inherently unneutral.[51]

Despite the clearly unneutral mandate of the Establishment Clause, the current standard also erroneously requires that restrictions on access must not discriminate against speech on the basis of viewpoint and any restrictions must be "reasonable in light of the purpose served by the forum."[52] The Supreme Court has ruled in favor of religious organizations in several recent cases that consider the scope of viewpoint discrimination in limited public forums.[53] These decisions confuse the issue from one of Establishment to Free Speech, ignoring the implications on religious establishment that result from its misguided characterization of the issue as one of religious speech.

In *Widmar v. Vincent*, the University of Missouri at Kansas City permitted a variety of student groups to congregate at its facilities, and from 1973 until 1977, a registered student group called "Cornerstone" was granted permission to meet on University premises.[54] Cornerstone was "an organization of evangelical Christian students from various denominational backgrounds" that "sought access to the facilities for the purpose of offering prayer, singing hymns, reading scripture, and teaching biblical principles."[55] Cornerstone suggested, "Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere."[56]

In 1977, the University withdrew its permission for Cornerstone to meet on University premises, relying on a regulation prohibiting the use of University facilities "for purposes of religious worship or religious teaching."[57] The Supreme Court ruled against the University, holding that the University had "created a forum generally open for use by student groups" and that it "ha[d] discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion."[58] In recognizing that religious worship and discussion are "forms of speech and association protected by the First Amendment," the Court rejected the categorization of worship as a separate class of religious speech.[59]

The broad treatment of these two very different types of activity is significant because it allows any form of religious activity, whether a discussion in an otherwise

---

[50] *See id.* at 108–10.

[51] *See* U.S. CONST. amend. I.

[52] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

[53] *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–94 (1993); Widmar v. Vincent, 454 U.S. 263, 277 (1981).

[54] 454 U.S. at 265.

[55] *Id.* at 265 n.2; *id.* at 283 (White, J., dissenting).

[56] *Id.* at 283 (quoting Chess v. Widmar, 480 F. Supp. 907, 910 (W.D. Mo. 1979)).

[57] *Id.* at 265 (majority opinion).

[58] *Id.* at 267, 269.

[59] *Id.* at 269 & n.6.

secular form or a full church service. Such broad treatment of religious activity fails to recognize the purpose of opening the limited public forum in the first place, in that religious worship and proselytization are fundamentally different from otherwise universal forms of discussion and activity that the forum is generally opened to. Although *Widmar* concerned Universities, the Supreme Court later extended the application of this standard to K–12 education in *Board of Education of Westside Community Schools v. Mergens*.[60]

Twelve years later in *Lamb's Chapel v. Center Moriches Union Free School District*, a school district adopted a forum limitation that opened its facilities to "social, civic, or recreational use" but prohibited use "for religious purposes."[61] Pursuant to this policy, the school district denied the application of Lamb's Chapel, an evangelical church, to use school facilities for a film series dealing with family and child-rearing issues and containing the message that contemporary media influences "could only be counterbalanced by returning to traditional, Christian family values."[62] The school district denied the first application because the film was "church related," as well as the second application that characterized the film as a "[f]amily oriented movie—from a Christian perspective."[63] Upon review, the Supreme Court concluded that the policy was an impermissible viewpoint restriction.[64] It noted that lectures on child rearing and family values were within the "social or civic purposes" for which the forum was open and held that the school district's denial of the application due to its religious perspective was invalid.[65]

In *Rosenberger v. Rector & Visitors of University of Virginia*, decided just two years after *Lamb's Chapel*, the Supreme Court considered the University of Virginia's limited forum.[66] Specifically, the forum consisted of Student Activities Funds that were available to student groups for activities "related to the educational purpose of the University," including "student news, information, opinion, entertainment, or academic communications media groups."[67] The funding was not available for religious activity or activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[68] Plaintiffs' student organization sought funding to publish, "Wide Awake: A Christian Perspective at the University of Virginia," a student publication that "offer[ed] a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia."[69] The paper committed "to challenge Christians to live, in word and deed,

---

[60] *See* 496 U.S. 226, 234 (1990).
[61] 508 U.S. 384, 387 (1993).
[62] *Id.* at 387–89.
[63] *Id.* at 388–89.
[64] *See id.* at 393–94.
[65] *Id.*
[66] 515 U.S. 819, 824 (1995).
[67] *Id.*
[68] *Id.* at 825.
[69] *Id.* at 826.

according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."[70]

The application for funding was denied on the ground that the paper was a "religious activity" within the meaning of the forum rules.[71] Although, like the school district in *Lamb's Chapel*,[72] the University argued that its denial of the application was based on the content of the religious activity, not on viewpoint, the Supreme Court concluded that "[t]he prohibited perspective, not the general subject matter, resulted in the refusal to . . . [fund plaintiffs' paper], for the subjects discussed were otherwise within the approval category of publications."[73]

Finally, in *Good News Club v. Milford Central School*, the Supreme Court resolved the "conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech."[74] One of the primary conflicts was considered against the backdrop of *Bronx Household*, which the Court characterized as "concluding that a ban on religious services and instruction in the limited public forum was constitutional."[75] Specifically, the Supreme Court disagreed with the Second Circuit's holding in *Good News Club* that the "characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school."[76]

Another issue weighed in this case concerned the distinction between religious worship services and proselytization from other forms of speech with a religious viewpoint. The Court specifically held, in its assumed limited public forum, the school district could not prohibit activities that, while "quintessentially religious," were not "mere religious worship, divorced from any teaching of moral values" and that a prohibition of those activities would constitute viewpoint discrimination.[77]

The Supreme Court also examined several additional claims pertaining to community and student perception of endorsement in the context of granting religious organizations access to the school facilities. The Court not only concluded that the community would not be "coerced into engaging in the Good News Club's religious activities" because "the children [could not] attend without their parents' permission," but further held that "possible misperceptions by schoolchildren" who might be present at school facilities during non-instructional hours does not justify "foreclose[ing] private religious conduct."[78]

---

[70] *Id.* (internal quotations omitted).

[71] *Id.* at 827.

[72] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387–89 (1993).

[73] *Rosenberger*, 595 U.S. at 831.

[74] 533 U.S. 98, 105 (2001).

[75] *Id.* at 105–06 (citing Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997)).

[76] *Id.* at 110–11.

[77] *Id.* at 111–12, 112 n.4.

[78] *Id.* at 115, 117.

Collectively, these cases have classified restrictions on religious organizational access to school facilities as viewpoint discrimination, deeming each of the restrictions unconstitutional.[79] Ultimately, the current standard set by *Good News Club* and other Supreme Court jurisprudence requires school districts to neutrally open their facilities and offer their resources to all community organizations, despite their religious affiliation, once they have granted access to any community group as a limited public forum.[80] This standard ignores the unneutral mandate of the Establishment Clause, and should be overturned as a result.[81]

II. ABSOLUTE SEPARATION

Contrary to the *Good News Club* standard of neutrality, which encourages public endorsement and advancement of religion, the Establishment Clause requires a standard of absolute separation.[82] This *separationist* position, which holds that Church and State should operate distinctly within their own private and public spheres, is a stark contrast from that of the *Good News Club* standard of neutrality.[83] Proponents of neutrality tend to subscribe as *accommodationists*, who believe that Church and State should coexist in the public sphere and religion "should help set the moral direction of civil society."[84]

Ultimately, these juxtaposing philosophies have served as the polarities of a fierce political debate that has invaded the legal realm. This misplaced politically charged legal fight has resulted in a heated battle between honoring the Establishment Clause with a bright line rule of separation and tarnishing the Establishment Clause through blurring the line between Church and State. David Sehat, Professor of History and Religion in American Life at Georgia State University, suggests that "[t]he debate over the public role of religion in American life has now entered its sixth decade of intense conflict."[85] Over the course of this intense half-century conflict, the Supreme Court has erroneously embraced the accommodationist view in this debate, electing to erode, rather than defend, the Establishment Clause.

Lynch v. Donnelly illustrates the Supreme Court's fervent adoption of the accommodationist position in recent decades.[86] There, the Supreme Court held that "[r]ather than mechanically invalidating all governmental conduct or statutes that

---

[79] *See* cases cited *supra* notes 53–78 and accompanying text.

[80] *See* cases cited *supra* notes 53–78 and accompanying text.

[81] *See* U.S. CONST. amend. I.

[82] *Compare Good New Club*, 533 U.S. at 114, *with* U.S. CONST. amend. I.

[83] *Compare* U.S. CONST. amend. I (explicitly forbidding "laws respecting an establishment of religion"), *with Good News Club*, 533 U.S. at 114 (emphasizing neutrality towards religion as an important factor).

[84] A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 3 (1985).

[85] DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 283 (2011).

[86] 465 U.S. 668 (1984).

confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate," it should instead "scrutinize[ ] challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so."[87] This standard is perplexing because after recognizing the existence of conferred benefits and special recognition, the Supreme Court neglects to hold that such benefits or recognition endorse or advance religion even though such endorsement or advancement is inherent on its face.

This standard creates confusion regarding earlier jurisprudence addressing conferred benefits and special recognition. In *Committee for Public Education and Religious Liberty v. Nyquist*, the Supreme Court held that it is "firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than another but merely benefits all religions alike."[88] Although the Supreme Court went on to hold that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid," a law may not "further[ ] any of the evils against which that Clause protects. Primary among these evils have been 'sponsorship, *financial support*, and active involvement of the sovereign in religious activity.'"[89] Thus, any form of "financial support," including that of providing a free facility with free running water, free electricity, free furniture, and countless other free publicly funded resources, creates by definition what the Supreme Court has determined to be a primary evil against which the Clause protects.[90]

In order to protect the right of conscience, the Court must classify monetary endorsements and advancements of religion as evils against which the Establishment Clause is intended to prevent. Accommodationists view human conscience as something that ought to be influenced by religion for the good of civil society.[91] Derek H. Davis, Director of the J.M. Dawson Institute on Church-State Studies at Baylor University, notes the utilitarian benefit of religion to society, thereby seeming to justify limitations of the Establishment Clause.[92] "A broad evangelicalism provide[s] the religious glue for the republic, establishe[s] the ethical norms that st[and] above parties, creeds, and denominations, and *inform*[*s*] *the conscience*[ ] and mold[s] the lifestyles of most Americans."[93] Under this philosophy of State-sponsored religious morals, "nationalism [is] integrated into civil religion through a marriage of evangelical

---

[87] *Id.* at 678.

[88] 413 U.S. 756, 771 (1973) (first citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); then citing Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (internal citations omitted)).

[89] *Id.* at 771–72 (emphasis added) (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

[90] *Id.* at 772.

[91] Richard V. Pierard, *The Role of Civil Religion in American Society*, *in* THE OXFORD HANDBOOK OF CHURCH AND STATE IN THE UNITED STATES 479, 487 (Derek H. Davis ed., 2010).

[92] *Id.*

[93] *Id.* (emphasis added).

Christianity and . . . democracy."[94] Providing a "basic moral law," accommodationists strive toward a civil religion in which the boundaries of Church and State are blurred and their distinct missions are diluted into a single mission of moral governance.[95]

A fine line exists between *informing* and *invading* the free conscience of individuals. Publicly funded resources must respect the constitutionally guaranteed right of conscience, protecting believers of one faith from the need to support another and non-believers from the need to support any religion. When the State forces individuals to endorse or advance religion by making available publicly funded resources to religious organizations, it crosses the threshold from informing into invasion. Despite the Supreme Court's endorsement of neutrality, members of the Court have noted that the Establishment Clause is intended "to guarantee the individual right to conscience. The right to conscience, in the religious sphere, is not only implicated when the government engages in direct or indirect coercion."[96] Rather, "[i]t is also implicated when the government requires individuals to support the practices of a faith with which they do not agree."[97]

After establishing this fundamental principle that religious coercion, whether direct or indirect, violates the sacred right to conscience, the Supreme Court has confused "separation" as being synonymous with "neutrality."[98] In fact, these two terms represent the philosophical poles of the debate between separationists and accommodationists. While separation supports a clear division between Church and State, neutrality has proven to open the flood gates for the religious invasion of the public sphere and infestation of individual freedom of conscience. Religious pollution of the public sphere is critical because as private voluntary associations, religious organizations ought to be "nongovernmental institutions that remain apart from government in order to counterbalance the power of the [S]tate. [Forming part of civil society,] [t]hey are the voluntary expressions of like-minded peoples' association and can, but need not, form the basis of political organization and lobbying."[99]

With this understanding, Professor Sehat asserts that "civil society protects individuals from governmental intrusion and nongovernmental oppression. It preserves a disorderly space that provides a buffer between the power of the [S]tate and freedom of individuals."[100] Proponents of civil religion, however, seek to eliminate this buffer. Relying upon coercion through forced endorsement and advancement of religion by channeling public funding and resources to religious organizations, the individual right to conscience is defiled. Neutrality has proven to render the Establishment Clause toothless against claims of viewpoint discrimination, which

---

[94] *Id.*
[95] *Id.*
[96] Marsh v. Chambers, 463 U.S. 783, 803 (1983) (Brennan, J., dissenting) (footnote omitted).
[97] *Id.*
[98] *Id.*
[99] SEHAT, *supra* note 85, at 285.
[100] *Id.*

then require public schools to advance and endorse religion through making publicly funded resources available to religious organizations.[101] Absolute separation is the best way to ensure protection against coercion of conscience. Without absolute separation, we have proven to sacrifice the individual right to conscience on the altar of neutrality.

III. GENERAL ACCESS WITH WORSHIP & PROSELYTIZING EXCEPTION

If the argument for absolute separation is dismissed and general access to school facilities is granted to religious organizations, then there should at least be restrictions placed on the type of activity permitted by such organizations while they are meeting on school property. Since the *Good News Club* decision, the Second Circuit has established such a standard, which challenges the Supreme Court's dilution of the distinction between content-based and viewpoint-based restrictions.[102] In *Bronx Household of Faith v. Board of Education the City of New York*, the Second Circuit ruled that the exclusion of worship services from public schools was content-based, not viewpoint-based, and justified by reasonable concern of the school board that permitting use of school facilities for worship services would violate the Establishment Clause.[103]

On the issue of content versus viewpoint discrimination, the Second Circuit ruled that the prohibition bars a type of activity, not a point of view.[104] Specifically, *Bronx Household* held that "The conduct of religious worship services, which the rule excludes, is something quite different from free expression of a religious point of view."[105] Elaborating on this distinction, the decision further held, "[t]he conduct of services is the performance of an event or activity. While the conduct of religious services undoubtedly *includes* expressions of a religious point of view, it is not the expression of that point of view that is prohibited by the rule."[106] Regarding what specific actions constitute worship, the Second Circuit clarified that "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded."[107]

While each of the activities are rooted in a religious viewpoint, the Second Circuit properly distinguishes between the content of the actions themselves and their viewpoint basis.[108] Referring to various secular activities, the Second Circuit illustrates the "important difference between excluding the *conduct of an event or activity* that includes expression of a point of view, and excluding the *expression* of

---

101 *See* cases cited *supra* notes 53–78 and accompanying text.
102 *See, e.g.*, Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 39–40 (2d Cir. 2011).
103 *Id.*
104 *Id.* at 36.
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*

that point of view."[109] The Second Circuit held that "schools may exclude from their facilities all sorts of activities" consistent with the purpose of the forum, "such as martial arts matches, livestock shows, and horseback riding."[110] Correctly identifying what is actually being restricted by the State, "[t]he basis for the lawful exclusion of such activities is not viewpoint discrimination, but rather the objective of avoiding either harm to persons or property, or liability, or a mess, which those activities may produce" due to the specific content they possess.[111]

Although a school district may not selectively ban the celebration of an activity, it may, for reasonable cause, ban the activity itself.[112] "While a school may prohibit the use of its facilities for such activities for valid reasons, it may not selectively exclude *meetings that would celebrate* martial arts, cow breeding, or horseback riding, because that would be viewpoint discrimination."[113] However, "[w]hen there exists a reasonable basis for excluding a type of activity or event in order to preserve the purposes of the forum, such content-based exclusion survives First Amendment challenges notwithstanding that participants might use the event to express their celebration of the activity."[114]

Transitioning back to a religious context, the Second Circuit ruled that although the school district was not permitted to restrict the celebration of worship, it was permitted to prohibit "conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion," otherwise referred to as a "religious worship service."[115] Because of this distinction, the Second Circuit held, "The conduct of a 'religious worship service' has the effect of placing centrally, and perhaps even of establishing, the religion in the school."[116]

To illustrate the appropriate premise of this distinction, the Second Circuit stated, "We think, with confidence, that if 100 randomly selected people were polled as to whether they attend 'worship services,' all of them would understand the questioner to be inquiring whether they attended services of *religious* worship."[117] The decision went on to conclude, "[w]hile it is true that the word 'worship' is occasionally used in nonreligious contexts, such as to describe a miser, who is said to 'worship' money, or a fan who 'worships' a movie star, the term 'worship services' has no similar use."[118]

---

[109] *Id.* at 37.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 38.
[113] *Id.* (emphasis added).
[114] *Id.* (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995)).
[115] *Id.* at 37.
[116] *Id.*
[117] *Id.* at 38.
[118] *Id.* at 38–39.

Directly confronting the aforementioned Supreme Court decisions in *Widmar*, *Lamb's Chapel*, and *Good News Club*, the Second Circuit definitively establishes a new standard in *Bronx Household*.[119] The distinction lies in the understanding that in each of the earlier cases, "the policy being enforced categorically excluded expressions of religious content. Here, by contrast, there is no restraint on the free expression of any point of view."[120] The foundation to the Second Circuit's refined standard is that while the "[e]xpression of all points of view is permitted. The exclusion applies only to the conduct of a certain type of activity—the conduct of worship services—and not to the free expression of religious views associated with it."[121] Consequently, the proposed standard recognizes a need to grant general access to avoid viewpoint discrimination claims, school districts ought to be permitted to restrict the activity of religious organizations after being admitted as content-based restraints.[122]

As a content-based, not viewpoint-based, restriction, the question then falls to whether the exclusion is "reasonable in light of the purpose served by the forum."[123] Supreme Court precedent under this standard calls for giving "appropriate regard" to the Board's judgment as to which activities are compatible with its reasons for opening schools to public use.[124] By excluding religious worship services, the school district seeks to avoid violating the Establishment Clause, and "[t]here is no doubt that compliance with the Establishment Clause is a [S]tate interest sufficiently compelling to justify content-based restrictions on speech."[125]

To determine whether the content restriction for this purpose is reasonable and permissible, it should be determined that "the Board has a strong basis for concern that permitting use of a public school for the conduct of religious worship services would violate the Establishment Clause."[126] When deciding the basis for concern, the test established in *Lemon v. Kurtzman* controls, which provides the framework for evaluating challenges under the Establishment Clause.[127] Specifically, government action which interacts with religion (1) "must have a secular . . . purpose," (2) must

---

[119] *Id.* at 38, 43–45.

[120] *Id.* at 39.

[121] *Id.*

[122] *See id.*

[123] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 893 n.12 (1995) (Souter, J., dissenting) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

[124] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 687 (2010).

[125] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761–62 (1995) (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981)).

[126] *Bronx Household*, 650 F.3d at 40 (citing Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 476 (2d Cir. 1999) ("[W]hen government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause.")).

[127] 403 U.S. 602, 612–13 (1971).

have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "must not foster an excessive government entanglement with religion."[128]

Considering the test in *Lemon*, the Second Circuit distinguished further religious worship *services* from other religious *activities*, stating: "The performance of worship services is a core event in organized religion . . . . Religious worship services are conducted according to the rules dictated by the particular religious establishment and are generally performed by an officiant of the church or religion."[129] Even more compelling, the Second Circuit held, "When worship services are performed in a place, the nature of the site changes. The site is no longer simply a room in a school being used temporarily for some activity," rather, "[t]he church has made the school the place for the performance of its rites, and might well appear to have *established* itself there. The place has, at least for a time, become the church."[130] Pursuant to this standard, religious worship services, proselytization, and other similar conduct should be exempt from general access by religious organizations if absolute separation is not adopted.

CONCLUSION

The current standard set out by the Supreme Court under *Good News Club* requires school districts, as limited public forums, to adopt neutral policies that force public schools to make their facilities available to religious organizations.[131] Mandating a policy of neutrality, rather than separation, the Supreme Court has promoted coercion of conscience by channeling publicly funded resources that advance and endorse religion.[132] This standard of neutrality, synonymous with advancement and endorsement, should be replaced with a principle of absolute separation to avoid furthering the evils against which the Establishment Clause protects. If absolute separation is not adopted, then the Supreme Court should at least restrict religious organizations from engaging in religious worship services, proselytization, and other comparable activities in public facilities in order to prevent the conversion of our public schools into churches.

Enthralled by the recent political movement of religious invasion into the public sphere, the Supreme Court has chipped away at Jefferson's wall of separation brick by brick through its endorsement of the neutrality standard.[133] Neutrality protects neither believers of one faith from the coercion of supporting another, nor non-believers from the coercion to support any religion at all. Violating the Establishment Clause's mandate that "Congress shall make no law respecting an establishment of

---

[128] *Id.* (internal quotations omitted).
[129] *Bronx Household*, 650 F.3d at 41.
[130] *Id.*
[131] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001).
[132] *See* cases cited *supra* notes 53–78 and accompanying text.
[133] *See* cases cited *supra* notes 53–78 and accompanying text.

religion," neutrality has unequivocally gone beyond establishing *a* religion by establishing *all* religion.[134]

An immediate separationist response is necessary if we are to prevent the total obliteration of Jefferson's wall entirely. If we expect the individual right of conscience to survive, neutrality must be replaced with separation, whether as an absolute restriction or as exceptions for the most severe forms of religious activity. No matter which form of substitution prevails, separation is our best hope of honoring the Establishment Clause and shielding the right to conscience it confers to all believers and non-believers alike.

[134] U.S. CONST. amend. I.