

**THE FIRST AMENDMENT: PROTECTING THE FREE  
SPEECH RIGHTS OF RELIGIOUS SPEAKERS WHILE  
AVOIDING AN ESTABLISHMENT CLAUSE CONFLICT**

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I.	INTRODUCTION .....	101
II.	HISTORY .....	103
	A. <i>Overview of the Public Forum Analysis of Free Speech Issues</i> .....	103
	B. <i>Overview of Establishment Clause Decisions Related to Public Education</i> .....	107
	C. <i>Prior Decisions Involving Both Free Speech Rights and the Establishment Clause in Public Schools and Universities</i> .....	113
III.	THE <i>GOOD NEWS CLUB</i> DECISION.....	119
	A. <i>The Facts</i> .....	119
	B. <i>The Court’s Analysis</i> .....	124
	1. <i>Free Speech Rights</i> .....	124
	2. <i>Establishment Clause</i> .....	126
IV.	ANALYSIS.....	128
	A. <i>Public Schools May Not Discriminate Against Community Groups with Religious Viewpoints</i> .....	128
	B. <i>Public Schools Do Not Violate the Establishment Clause by Allowing Religious Speakers to Exercise Their Free Speech Rights on School Property</i> .....	130
V.	CONCLUSION.....	132

I. INTRODUCTION

Many commentators agree that an inherent tension exists between the rights embodied in the Free Speech Clause<sup>1</sup> and the

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<sup>1</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press. . .”).

Establishment Clause<sup>2</sup> of the First Amendment.<sup>3</sup> For example, a public school or university may consider it necessary to prohibit religious groups from using the school's facilities in order to comply with the Establishment Clause.<sup>4</sup> Yet, exclusion of religious speakers from public school facilities because their speech is religious appears to violate the Free Speech Clause.<sup>5</sup> The tension between the Free Speech and Establishment Clauses may be lessened when the speech is characterized as merely from a religious viewpoint, not proselytizing.<sup>6</sup>

The United States Supreme Court considered both the Free Speech and Establishment Clauses in *Good News Club v. Milford Central School*.<sup>7</sup> *Good News Club* involved a private religious group's request to use a public school's facilities for the group's after-school meetings.<sup>8</sup> The Court correctly ruled that the school's exclusion of the Club violated its free speech rights under the First Amendment and that allowing the Club to use the school's facilities would not have violated the Establishment Clause.<sup>9</sup>

Part II of this note provides an overview of the Supreme Court's public forum analysis of free speech issues and briefly

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2. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion. . .").

3. See, e.g., ERWIN CHEREMINSKY, CONSTITUTIONAL LAW 1238 (2001) (discussing the tension between the First Amendment's right to free speech and its prohibition against establishing religion); Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 326 (1997) ("[T]here is an inherent tension between the Establishment Clause and the Free Speech Clause."). Cf. Marilyn E. Thompson, *Rosenberger v. Rector & Visitors of University of Virginia: Harmonizing the Free Speech and Establishment Clauses*, 25 CAP. U. L. REV. 1015, 1025 (1996) (discussing the United States Supreme Court's struggle to find a balance between not discriminating against or endorsing religion).

4. Chemerinsky, *supra* note 3, at 1238. See *infra* Part II.C. See also *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (concerning a request by a church to show a film series with a religious viewpoint in public school facilities); *Widmar v. Vincent*, 454 U.S. 263 (1981) (involving a state university's policy of prohibiting use of school facilities for religious discussion).

5. Chemerinsky, *supra* note 3, at 1238. See also Sadurski, *supra* note 3, at 326 (asserting the Free Speech Clause may require the government to facilitate religious speech in the same manner as any other speech in direct conflict with the Establishment Clause prohibition of the same).

6. Sadurski, *supra* note 3, at 326 (stating government support of speech merely about religion need not implicate the Establishment Clause).

7. 121 S.Ct. 2093 (2001).

8. *Id.* at 2098.

9. *Id.* at 2097.

reviews the Court's Establishment Clause decisions related to public education. Part II also examines the Court's prior decisions involving both free speech rights and the Establishment Clause in public schools and universities. Part III discusses the *Good News Club* decision and Part IV explores the decision's implications. This note concludes that the Court correctly extended its free speech and Establishment Clause jurisprudence by reaffirming the First Amendment rights of speakers with a religious viewpoint.

## II. HISTORY

### A. *Overview of the Public Forum Analysis of Free Speech Issues*

Justice Marshall declared, in *Police Department of Chicago v. Mosley*,<sup>10</sup> “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>11</sup> Despite this sweeping pronouncement, the government often regulates speech on its property.<sup>12</sup> The United States Supreme Court has adopted the public forum analysis as one way to evaluate whether government regulation of speech on government property is

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10. 408 U.S. 92, 94 (1972) (holding city ordinance prohibiting all picketing, except picketing involved in labor disputes, within 150 feet of any school to be unconstitutional because of its impermissible distinction between labor and other peaceful forms of picketing).

11. *Id.* at 95.

12. *See, Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (“[G]overnment need not permit all forms of speech on property that it owns and controls.”); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985) (“Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property. . . .”); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (“[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.”); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 110 (1996) (discussing government favoritism of certain speech because of its subject matter or content); Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 FORDHAM URB. L.J. 1255, 1256-57 (1995) (recognizing that the First Amendment does not prohibit regulation of speech on its property). In the *Mosley* decision, Chief Justice Burger tried to limit Marshall's statement by insisting that “the First Amendment does not literally mean we are guaranteed the right to express any thought, free from government censorship.” *Mosley*, 408 U.S. at 103 (Burger, J., concurring).

constitutional.<sup>13</sup> The Court articulated the public forum analysis in two decisions during the 1980s.<sup>14</sup>

In *Perry Education Association v. Perry Local Educators' Association*,<sup>15</sup> the Court considered whether a school district violated the First Amendment by granting Perry Education Association (PEA) exclusive access to teachers' school mailboxes.<sup>16</sup> A separate association, Perry Local Educators' Association (PLEA), filed suit to obtain access to the teachers' mailboxes, claiming the district's preferential treatment of PEA violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>17</sup>

According to the Court, the right to access government property depends on the character of the property, which the Court divided into three categories.<sup>18</sup> First, where the property is a traditional or "quintessential public forum[]" such as a park, sidewalk or street, the government may not restrict speech unless it shows a compelling state interest and narrowly tailors its prohibition to achieve that interest.<sup>19</sup>

Second, when the government has designated property as a public forum, the government may not restrict speech unless it has a compelling state interest.<sup>20</sup> The government must intentionally designate property as a public forum<sup>21</sup> and may limit the forum to certain purposes only.<sup>22</sup> This category is often referred to as a "limited public forum."<sup>23</sup>

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13. *Cornelius*, 473 U.S. at 800; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24 (2d ed. 1988) (reviewing the development of the public forum concept).

14. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Cornelius*, 473 U.S. at 800.

15. 460 U.S. 37 (1983).

16. *Id.* at 44.

17. *Id.* at 41.

18. *Id.* at 44-45.

19. *Id.* at 45. See also *Krishna Consciousness v. Lee*, 505 U.S. at 678 (stating government restriction on speech in traditional public forum is subject to highest scrutiny and survives only if "narrowly drawn to achieve a compelling state interest").

20. *Perry*, 460 U.S. at 45-46.

21. See *id.* at 46; *Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction. . .but only by intentionally opening a nontraditional forum for public discourse.").

22. *Perry*, 460 U.S. at 46 n.7; See also Rudy, *supra* note 12, at 1260 (stating the scope of a designated public forum may be limited from its inception).

23. *Cornelius*, 473 U.S. at 817 (Blackmun, J., dissenting) ("The second category, which we have referred to as 'limited public forums,' consists primarily of government property which the government has opened for use as a place for

Finally, where property is “not by tradition or designation a forum for public communication,” the government may restrict speech as long as it is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>24</sup> This category is generally called a “nonpublic forum.”<sup>25</sup> The government’s interest in preserving the purpose of a nonpublic forum is usually more compelling than a person’s free speech rights.<sup>26</sup> Still, government restriction of speech in nonpublic forums must be reasonable and not based on the speaker’s viewpoint.<sup>27</sup>

The *Perry* Court determined that the school district’s mail system was a nonpublic forum since there was no evidence that the mail system was open for use by the general public.<sup>28</sup> As a nonpublic forum, the school district had the right to make distinctions in access based on subject matter and speaker identity in order to limit the forum to its intended purpose.<sup>29</sup> However, these distinctions had to be “reasonable in light of the purpose which the forum at issue serve[d].”<sup>30</sup> Having stated these principles, the Court concluded that the limitations on PLEA’s access were reasonable in light of the district’s interest in preserving the mail system for its intended use and the alternative channels PLEA could have used to access the teachers.<sup>31</sup>

The Court expanded the public forum analysis in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*<sup>32</sup> After reiterating the three categories of government property identified in *Perry* – “the

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expressive activity for a limited amount of time, or for a limited class of speakers, or for a limited number of topics”) (internal citations omitted).

24. *Perry*, 460 U.S. at 46.

25. *Cornelius*, 473 U.S. at 802 (identifying the third type of forum as the nonpublic forum); *See also id.* at 819 (Blackmun, J., dissenting) (“The third category, nonpublic forums, consists of property that is not compatible with general expressive activity.”).

26. *See Perry*, 460 U.S. at 46 (asserting government has power to preserve its property for its lawfully dedicated use) (quoting *United States Postal Service v. Greenburgh Civic Ass’n*, 453 U.S. 114, 129 (1981)); *Rudy*, *supra* note 12, at 1259 (stating the right to free speech is never as compelling in nonpublic forums as in public forums).

27. *Perry*, 460 U.S. at 46.

28. *Id.* at 46-48 (stating the district had no constitutional obligation to let the general public use the mail system because the system was a nonpublic forum).

29. *Id.* at 49.

30. *Id.*

31. *Id.* at 50-51, 53 (asserting that PLEA’s ability to communicate with teachers was not “seriously impinged” by restricted access to the mail system).

32. 473 U.S. 788 (1985).

traditional public forum, the public forum created by government designation, and the nonpublic forum<sup>33</sup> – the Court went on to state that restrictions on speech in nonpublic forums must be reasonable and viewpoint neutral.<sup>34</sup> Thus, the government could exclude a speaker from a nonpublic forum when the speaker’s topic was not within the purpose of the forum or the speaker was not part of the class for whom the forum was created.<sup>35</sup> The Court cautioned, however, that the government would violate the First Amendment if it restricted a speaker’s access to a nonpublic forum “solely to suppress the point of view [the speaker] espouses on an otherwise includible subject.”<sup>36</sup>

Although *Perry* and *Cornelius* expressed the viewpoint neutrality requirement most clearly in the context of nonpublic forums, viewpoint neutrality is an important element in limited public forums.<sup>37</sup> For example, in *Perry*, the Court stated that “[r]easonable time, place and manner regulations are permissible” in a limited public forum, and any restrictions on content “must be narrowly drawn to effectuate a compelling state interest.”<sup>38</sup> Twelve years later, in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>39</sup> discussed below, the Court reiterated the requirement that exclusion of speech in a limited public forum must be reasonable and viewpoint neutral.<sup>40</sup> Viewpoint neutrality was decisive in the Court’s consideration of *Good News Club*.<sup>41</sup>

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33. *Id.* at 802.

34. *Id.* at 806.

35. *Id.*; *See also* Heins, *supra* note 12, at 112 (discussing the Court’s elaboration of the nonpublic forum concept in *Cornelius*).

36. *Cornelius*, 473 U.S. at 806.

37. *See, e.g., Good News Club*, 121 S.Ct. at 2100 (including viewpoint neutrality as an element of limited public forum analysis); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) (explaining that exclusion of speech in a limited public forum must be reasonable and viewpoint neutral); *See also* Nicole V. Casarez, Article, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 522-33 (2000) (examining the Court’s use of viewpoint discrimination in limited public forum cases).

38. *Perry*, 460 U.S. at 46.

39. 515 U.S. 819 (1995).

40. *Id.* at 829. *See also Lamb’s Chapel*, 508 U.S. at 394 (“The principle that has emerged from our cases ‘is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.’”) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)); Heins, *supra* note 12, at 105-22 (tracing the history and application of the Court’s viewpoint discrimination doctrine).

41. *See infra* notes 206-222 and accompanying text.

*B. Overview of Establishment Clause Decisions Related to Public Education*

In today's society, some communities may find it odd or even upsetting to see religious organizations using their public schools for religious purposes or meetings.<sup>42</sup> Yet, one hundred years ago, communities most likely used their public schools for numerous social purposes, including religious services, Sunday schools or other religious meetings.<sup>43</sup> Several Supreme Court decisions examine the First Amendment implications of mixing religion with public schools.<sup>44</sup>

*Everson v. Board of Education of Ewing Township*<sup>45</sup> required the Court to determine whether a New Jersey school district could subsidize transportation of children to parochial schools.<sup>46</sup> A state statute authorized school districts to make arrangements for transportation of children to public and nonpublic schools.<sup>47</sup> Pursuant to this statute, the Ewing Township Board of Education authorized reimbursement to parents who sent their children to school by public transportation busses.<sup>48</sup> Part of this money went to parents of parochial school children.<sup>49</sup> A district taxpayer sued claiming reimbursement of these parents was unconstitutional.<sup>50</sup>

Before deciding the Establishment Clause issue, the Court provided a detailed examination of the environment that existed prior to passage of the First Amendment.<sup>51</sup> The Court concluded that the Establishment Clause meant at least that the state and

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42. In Minnesota, communities may not be startled to find their public schools in use by churches or other religious groups, since state law specifically allows local school boards to authorize use of schoolhouses for divine worship and Sunday school. MINN. STAT. § 123B.51, Subd. 2 (2000).

43. C.T. Foster, Annotation, *Use of Public School Premises for Religious Purposes During Nonschool Time*, 79 A.L.R.2d 1148, 1150 (1961).

44. See *infra* notes 45-107 and accompanying text.

45. 330 U.S. 1 (1947).

46. *Id.* at 5.

47. *Id.* at 3.

48. *Id.*

49. *Id.*

50. *Id.* at 3-4.

51. *Id.* at 8-16 (summarizing that the Colonial resentment of laws compelling support of and attendance at government-favored churches ultimately led to the passage of the First Amendment). Distain for government-sponsored religion resulted in the "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." *Id.* at 11.

federal governments could not “aid one religion, aid all religions. . .prefer one religion over another. . .[or] influence a person to go to or to remain away from church against his will. . .In the words of Jefferson, the [Establishment] [C]lause. . .was intended to erect ‘a wall of separation between Church and State.’”<sup>52</sup>

The Court held that New Jersey’s statute did not violate the Establishment Clause, in part because the state had complied with the First Amendment requirement that states be neutral toward religion by neither helping nor hindering it.<sup>53</sup> New Jersey was not supporting parochial schools directly through the statute but was merely helping parents get their children to school safely.<sup>54</sup>

During the 1960s, the Court struck down certain government actions, which the Court deemed government advancement of religion or religious exercises.<sup>55</sup> First, in *Engel v. Vitale*<sup>56</sup> the Court ruled that state-directed prayer in public schools violated the Establishment Clause.<sup>57</sup> In *Engel*, students were required to recite the following prayer at the beginning of each school day: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.”<sup>58</sup> The Court concluded that use of the public school system to encourage recitation of prayer was inconsistent with the Establishment Clause, even though observance of the nondenominational prayer by students was voluntary.<sup>59</sup> The government’s action essentially had the effect of influencing the religious practices and beliefs of the American people, an activity in which the government had no power to engage.<sup>60</sup>

Following *Engel*, the Court decided *School District of Abington*

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52. *Id.* at 15-16 (quoting *Reynolds v. United States* 98 U.S. 145, 164 (1878)).

53. *Id.* at 17-18.

54. *Id.* at 18.

55. *See infra* notes 56-64 and accompanying text.

56. 370 U.S. 421 (1962).

57. *Id.* at 430.

58. *Id.* at 422. The prayer was composed and recommended by the State Board of Regents, a governmental agency, to which the New York legislature had granted broad powers over the state’s public school system. *Id.* at 422-23.

59. *Id.* at 430.

60. *Id.* at 425. The Court found that under the Establishment Clause, state and federal governments are “without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.” *Id.* at 430.

*Township, Pennsylvania v. Schempp*,<sup>61</sup> where a Pennsylvania law required voluntary readings from the Bible and recitation of the Lord's Prayer at the start of each school day.<sup>62</sup> The Court stated that in order for a government action to withstand Establishment Clause scrutiny, it must have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>63</sup> Applying this test to the facts in *Schempp*, the Court ruled that both the religious exercises and the law mandating them violated the Establishment Clause.<sup>64</sup>

Five years later, the Court decided *Board of Education of Central School District No. 1 v. Allen*<sup>65</sup> and upheld a New York textbook program requiring local school districts to lend textbooks free of charge to all junior high and high school students, both public and private.<sup>66</sup> Based on the test set forth in *Schempp*, the Court concluded that the purpose and primary effect of the law was to get textbooks to children in order to further the educational opportunities available to them, not to assist or sponsor religious institutions.<sup>67</sup>

In *Lemon v. Kurtzman*,<sup>68</sup> the Court synthesized its prior decisions by articulating a three-part test for evaluating governmental actions under the Establishment Clause.<sup>69</sup> First, the government action must have a "secular legislative purpose;" second, the action must have a primary effect that neither advances nor inhibits religion; and third, the practice must avoid "excessive government entanglement with religion."<sup>70</sup> At issue in *Lemon* were two state statutes authorizing salary supplements for nonpublic schoolteachers<sup>71</sup> and reimbursement to nonpublic schools for teachers' salaries, textbooks and instructional materials.<sup>72</sup> The

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61. 374 U.S. 203 (1963).

62. *Id.* at 207. As in *Engel*, students could be excused from the Bible readings and recitation of prayer upon request. *Id.*

63. *Id.* at 222.

64. *Id.* at 223.

65. 392 U.S. 236 (1968).

66. *Id.* at 238.

67. *Id.* at 243-44.

68. 403 U.S. 602 (1971).

69. *Id.* at 612-13.

70. *Id.*

71. *Id.* at 607 (citing the Rhode Island Salary Supplement Act).

72. *Id.* at 609 (referring to the Pennsylvania Nonpublic Elementary and Secondary Education Act). Both the Rhode Island and Pennsylvania laws placed certain restrictions on obtaining the government aid, including limiting eligible teachers to those teaching only subjects offered in public schools and prohibiting

Court found both statutes unconstitutional because they “foster[ed] an impermissible degree of entanglement.”<sup>73</sup>

One of the main considerations in the Court’s analysis was the “danger that a teacher under religious control and discipline pose[d] to the separation of the religious from the purely secular aspects of precollege education.”<sup>74</sup> Although teachers might not intentionally violate the First Amendment, the Court recognized that teachers in religious schools would have great difficulty “remaining religiously neutral.”<sup>75</sup> Thus, continuous state surveillance would have been necessary to ensure that state aid was not used to further the religious aspects of the schools.<sup>76</sup> In the Court’s opinion, such surveillance would have led to “excessive and enduring entanglements between state and church.”<sup>77</sup>

*Tilton v. Richardson*<sup>78</sup> was decided on the same day as *Lemon*.<sup>79</sup> In this case, the Court upheld the use of federal funds for construction projects at church-related colleges and universities.<sup>80</sup> *Tilton* involved the Higher Education Facilities Act, which authorized federal grants and loans to public, private, and religiously-affiliated colleges and universities for construction of academic facilities.<sup>81</sup> To obtain funds under the Act, colleges and universities were required to give assurances that none of the project would be used for religious instruction, worship or training.<sup>82</sup>

The Court’s analysis was based on the same three-part test set forth in *Lemon* but focused primarily on the potential for excessive entanglement.<sup>83</sup> The Court ruled that there was no excessive

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reimbursement for any religious subject matter. *Id.* at 608, 610.

73. *Id.* at 615.

74. *Id.* at 617.

75. *Id.* at 618-19 (stating a teacher in a religious school “would find it hard to make a total separation between secular teaching and religious doctrine”).

76. *Id.* at 619.

77. *Id.*

78. 403 U.S. 672 (1971).

79. *Id.* at 672.

80. *Id.* at 689.

81. *Id.* at 675.

82. *Id.* Enforcement of the restrictions on use of the facilities was to be accomplished by government on-site inspections. *Id.*

83. *Id.* at 678 (considering four questions: “[1] does the Act reflect a secular legislative purpose? . . . [2] is the primary effect of the Act to advance or inhibit religion? . . . [3] does . . . administration of the Act foster an excessive government entanglement with religion? . . . [4] does . . . implementation of the Act inhibit the free exercise of religion?”).

entanglement between government and religion under the Act and cited three factors that diminished the extent and potential danger for entanglement.<sup>84</sup> First, the Court made a significant distinction between religious colleges and universities and parochial elementary and secondary schools.<sup>85</sup> Not only were college students “less impressionable and less susceptible to religious indoctrination,”<sup>86</sup> than elementary or secondary school students, but “religious indoctrination [was] not a substantial purpose or activity of . . . church-related colleges and universities.”<sup>87</sup> Therefore, religion was less likely to “permeate the area of secular education” in colleges and universities than in primary and secondary schools.<sup>88</sup> Second, entanglement was lessened because the aid provided through the federal grants was of a “nonideological character.”<sup>89</sup> Finally, entanglement was lessened because the government aid was “a one-time, single-purpose construction grant.”<sup>90</sup> Thus, there was no “continuing financial relationships or dependencies.”<sup>91</sup>

The secular purpose element of the *Lemon* test later directed the Court’s opinions in *Wallace v. Jaffree*<sup>92</sup> and *Edwards v. Aguillard*.<sup>93</sup> *Wallace* involved an Alabama statute authorizing a moment of silence for meditation or voluntary prayer at the start of each school day.<sup>94</sup> The evidence showed the sole purpose for the statute was to return voluntary prayer to public schools.<sup>95</sup> The Court

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84. *Id.* at 684-85.

85. *Id.* at 685-86 (discussing the significant differences between religious institutions of higher education and parochial elementary and secondary schools).

86. *Id.* at 686.

87. *Id.* at 686-87 (contrasting instruction in religious colleges and universities with that of parochial elementary and secondary schools and claiming the dominant policy of parochial elementary and secondary schools was to “assure future adherents to a particular faith by having control of their total education at an early age”) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 671 (1970)).

88. *Id.*

89. *Id.* at 687-88 (finding that the need for government surveillance in the facilities was less than the surveillance required for teachers in *Lemon*).

90. *Id.* at 688.

91. *Id.* (finding the inspections necessary to monitor use of the funds to be a minimal contact).

92. 472 U.S. 38, 56 (1985) (holding Alabama moment of silence statute unconstitutional because of its clearly secular purpose).

93. 482 U.S. 578, 597 (1987) (striking down Louisiana statute requiring instruction in creation science).

94. *Wallace*, 472 U.S. at 41-2.

95. *Id.* at 47 (citing a statement to this effect by the state senator sponsoring the law).

quickly disposed of the statute since it had no secular purpose and “convey[ed] a message of state approval of prayer activities in the public schools.”<sup>96</sup>

In *Edwards*, a Louisiana law required schools teaching evolution to teach creation science at the same time.<sup>97</sup> Schools were not required to teach either evolution or creation, but if one subject was taught the other had to be taught as well.<sup>98</sup> The Court again based its analysis on the three-part *Lemon* test and concluded that the law failed the secular purpose element.<sup>99</sup>

Although the law’s stated purpose was to protect academic freedom, the Court determined that the paramount purpose of the law was “to advance the religious viewpoint that a supernatural being created humankind.”<sup>100</sup> The law’s legislative history documented that the primary purpose of the law “was to change the science curriculum of public schools in order to provide persuasive advantages to a particular religious doctrine that rejects the factual basis of evolution.”<sup>101</sup> Because the primary purpose of the law was to advance a religious doctrine, the law violated the Establishment Clause.<sup>102</sup>

Finally, in *Lee v. Weisman*,<sup>103</sup> the Court held that a nonsectarian invocation and benediction at a public school graduation ceremony violated the Establishment Clause.<sup>104</sup> Even though attendance at the graduation ceremony was voluntary, the Court was very concerned about the potential coercive pressure on students who did not wish to participate in the invocation or benediction.<sup>105</sup> According to the Court, the case involved an “overt religious exercise in a secondary school environment where...subtle coercive pressures exist and where the student ha[s] no real alternative...to avoid the fact or appearance of participation.”<sup>106</sup> The Court reiterated its concern about the

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96. *Id.* at 56, 61.

97. *Edwards*, 482 U.S. at 581 (citing the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act).

98. *Id.*

99. *Id.* at 585 (stating there was “no clear secular purpose for the Louisiana Act”).

100. *Id.* at 591.

101. *Id.* at 592.

102. *Id.* at 594.

103. 505 U.S. 577 (1992).

104. *Id.* at 598.

105. *Id.*

106. *Id.* at 588.

impressionability of elementary and secondary public school children in finding the school's practice unconstitutional.<sup>107</sup>

*C. Prior Decisions Involving Both Free Speech Rights and the Establishment Clause in Public Schools and Universities*

Beginning in 1981, the Court decided a series of four cases involving both free speech rights and the Establishment Clause in public schools and universities.<sup>108</sup> The first three cases involved religious groups seeking access to public school and university facilities,<sup>109</sup> and the fourth concerned a student religious organization's request for funding from a public university.<sup>110</sup> The Court consistently ruled that discrimination against religious groups on the basis of their religious viewpoint violated the free speech rights embodied in the First Amendment<sup>111</sup> and that no Establishment Clause violation was present in any of the cases.<sup>112</sup>

In *Widmar v. Vincent*,<sup>113</sup> the University of Missouri at Kansas City allowed a student religious group called Cornerstone to use the University's facilities for the group's meetings from 1973 to 1977.<sup>114</sup> However, in 1977, Cornerstone was informed that the group could no longer use the University's facilities due to a regulation prohibiting use of the facilities for religious worship or teaching.<sup>115</sup> Eleven students filed suit challenging the regulation.<sup>116</sup> The district court upheld the regulation, finding it justified and required by the Establishment Clause.<sup>117</sup> The Eighth Circuit reversed concluding the regulation discriminated against the group's speech on the

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107. *Id.* at 592 ("There are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").

108. *See infra* notes 113-168 and accompanying text.

109. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

110. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

111. *See infra* notes 113-168 and accompanying text.

112. *Id.*

113. 454 U.S. 263 (1981).

114. *Id.* at 265. Cornerstone included students from various denominations, and its meetings were open to the public. *Id.* at 265 n.2.

115. *Id.* The regulation had been in place since 1972.

116. *Id.* at 266.

117. *Id.* (citing *Chess v. Widmar*, 480 F.Supp. 907, 916 (W.D.Mo. 1979)). In the district court's view, religious speech did not deserve as much protection as other types of speech. *Id.* at 267 (citing *Chess*, 480 F.Supp. at 918)).

basis of content without a compelling state interest.<sup>118</sup>

The Supreme Court affirmed, finding that the University had created a forum “generally open for use by student groups.”<sup>119</sup> Therefore, the University had to show that its regulation was “necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end.”<sup>120</sup> Since the University claimed the compelling state interest was its interest in preserving separation of church and state, the Court applied the *Lemon* test to determine whether allowing Cornerstone equal access to the University’s facilities would have violated the Establishment Clause.<sup>121</sup>

Each element of the test was satisfied. The Court agreed with the district court and court of appeals that the University’s “open-forum policy, including nondiscrimination against religious speech, [had] a secular purpose and . . . avoid[ed] entanglement with religion.”<sup>122</sup> The Court also concluded that allowing religious groups to use University facilities would not have had the primary effect of advancing religion.<sup>123</sup> The Court acknowledged that a religious group may enjoy incidental benefits from use of the University facilities, but the Court asserted that “enjoyment of merely ‘incidental’ benefits does not violate the prohibition against the ‘primary advancement’ of religion.”<sup>124</sup> Thus, with no compelling Establishment Clause interest, the Court held that the University’s exclusion of the religious group from a forum generally open to student groups violated the group’s free speech rights under the First Amendment.<sup>125</sup>

Three years after *Widmar* was decided, Congress passed the Equal Access Act,<sup>126</sup> which prohibits public secondary schools that receive federal funding and have a “limited public forum” from discriminating against student religious or political groups that

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118. *Id.* (citing *Chess v. Widmar*, 635 F.2d 1310, 1315-20 (8th Cir. 1980)).

119. *Id.*

120. *Id.* at 270.

121. *Id.* at 271-75.

122. *Id.* at 271-72.

123. *Id.* at 273.

124. *Id.* The Court viewed the benefits as incidental because “an open forum does not confer any imprimatur of state approval on religious sects or practices” and the University’s forum was “available to a broad class of nonreligious [and] religious speakers.” *Id.* at 274.

125. *Id.* at 277.

126. 20 U.S.C. § 4071 (2001).

wish to meet on school premises.<sup>127</sup> Under the Act, a school creates a limited public forum when it allows one or more “noncurriculum related student groups to meet on school premises during noninstructional time.”<sup>128</sup> In *Board of Education of the Westside Community Schools v. Mergens*,<sup>129</sup> the Court ruled that the Act did not violate the Establishment Clause.<sup>130</sup>

Westside High School allowed about thirty student groups to meet on the school’s premises after school.<sup>131</sup> The groups included the Chess Club and Subsurfers, a club for students interested in scuba diving.<sup>132</sup> Bridget Mergens proposed forming a Christian club at the school for purposes of reading and discussing the Bible, fellowship and prayer.<sup>133</sup> The school rejected Mergens’ proposal because it believed allowing a religious group at the school would have violated the Establishment Clause.<sup>134</sup> The Court disagreed.

The Court concluded that the Act applied to Westside because at least one of the student groups meeting at the school was unrelated to the school’s curriculum.<sup>135</sup> Consequently, Westside’s denial of Mergens’ request discriminated against the group based on its religious speech and denied the group equal access under the Act.<sup>136</sup>

Applying the *Lemon* test, the Court then upheld the Act against the school’s Establishment Clause challenge.<sup>137</sup> The Act’s intended purpose of prohibiting discrimination against political, religious and other types of speech was sufficient to meet the secular purpose test.<sup>138</sup> Excessive entanglement was avoided because the

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127. *Id.*

128. *Id.*

129. 496 U.S. 226 (1990).

130. *Id.* at 253.

131. *Id.* at 231. The school district required that all student groups have a faculty sponsor and did not allow groups to be sponsored by political or religious organizations. *Id.* at 231-32.

132. *Id.* at 254-58.

133. *Id.* at 232. Unlike the other student groups, the proposed group would not have had a faculty sponsor. *Id.*

134. *Id.* at 233. The school also denied the request because the group did not have a faculty sponsor. *Id.* at 232.

135. *Id.* at 245-47 (finding the Chess Club, Subsurfers, and Peer Advocates to be noncurriculum related student groups). Because groups unrelated to the school’s curriculum were allowed to meet at school facilities, the school was a limited public forum under the Act and, therefore, prohibited from discriminating against speech on the basis of its content. *Id.* at 246-47.

136. *Id.* at 247.

137. *Id.* at 248-53.

138. *Id.* at 248-49 (noting that the Act granted equal access to both religious

Act proscribed school sponsorship of any religious meetings and prohibited school faculty from participating in any religious activity.<sup>139</sup> With respect to the third part of the *Lemon* test, the Court provided three reasons why the Act's primary effect was not advancing religion.<sup>140</sup> First, secondary students were mature enough to discriminate between "government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."<sup>141</sup> Second, any participation by school officials at meetings of student religious groups was limited by the Act.<sup>142</sup> Finally, allowing student-initiated religious groups to meet at the school on the same basis as other student groups did not convey a message of state endorsement or approval.<sup>143</sup>

The Court's next significant decision in this context did not involve a request for equal access to public school facilities by a religious student group but rather a community church. *Lamb's Chapel v. Center Moriches Union Free School District*<sup>144</sup> was decided in 1993 and raised the same free speech and Establishment Clause issues the Court addressed in *Widmar*. *Lamb's Chapel*, an evangelical church, twice requested permission to use school district property to show a film series on family issues and child rearing from a Christian perspective.<sup>145</sup> Both requests were denied because the school district considered the film to be church-related.<sup>146</sup>

The Court held that the school district's refusal to allow the

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and secular speech and was not intended to endorse religion).

139. *Id.* at 253 (concluding any faculty oversight of a student religious group did not impermissibly entangle government and religion).

140. *Id.* at 249-52.

141. *Id.* at 250 ("[W]e note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion.").

142. *Id.* at 251 (seeing little risk of endorsement since school officials did not participate and no formal classroom activities were involved).

143. *Id.* at 252.

144. 508 U.S. 384 (1993).

145. *Id.* at 387-89. The six-part film series contained lectures by Dr. James Dobson, which discussed his "views on the undermining influences of the media that could only be counterbalanced by returning to tradition, Christian family values instilled at an early stage." *Id.* at 388.

146. *Id.* at 388-89. The school district policy governing the use of school facilities for nonschool purposes provided that school facilities could not be used for religious purposes. *Id.* at 387. The policy was adopted pursuant to New York Education Law section 414, the same statute at issue in *Good News Club*. See *infra* note 169 and accompanying text.

showing of the film on school premises was impermissible viewpoint discrimination.<sup>147</sup> The Court focused on the fact that the subject of family values and child rearing were otherwise permissible subjects for discussion in school facilities by other nonreligious groups, but the church's request was denied solely because the film dealt with these subjects from a religious viewpoint.<sup>148</sup> In essence, the school favored nonreligious viewpoints over religious viewpoints, an activity forbidden by the First Amendment.<sup>149</sup>

Relying on its holding in *Widmar*, the Court quickly disposed of the Establishment Clause issue.<sup>150</sup> The Court concluded there was no "realistic danger that the community would think the [d]istrict was endorsing religion" since the film would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public in general.<sup>151</sup> Without offering any details, the Court said there would have been no establishment of religion under the *Lemon* test.<sup>152</sup>

Two years later, in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>153</sup> the Court addressed a state university's refusal to grant funding to a student organization because of the organization's religious viewpoint.<sup>154</sup> The University of Virginia paid the printing costs of certain student publications through the Student Activities Fund (SAF) but excluded from the program any student organization with "religious activity."<sup>155</sup> An organization called Wide Awake Publications requested SAF funds to pay the printing costs of the group's publication called "Wide Awake: A

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147. *Id.* at 394.

148. *Id.* at 393-94.

149. *Id.* at 394 ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.')(citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

150. *Id.* at 395.

151. *Id.*

152. *Id.* (stating that allowing the film to be shown on school premises would have had a secular purpose, did not have primary effect of advancing or inhibiting religion, and did not foster excessive entanglement between government and religion). In his concurrence, Justice Scalia decried the Court for applying the *Lemon* test at all. *Id.* at 399-400 (Scalia, J., concurring).

153. 515 U.S. 819 (1995).

154. *Id.* at 831.

155. *Id.* at 824-25. The Student Activity Fund was funded by a mandatory \$14.00 per semester contribution from each student. *Id.* at 824.

Christian Perspective at the University of Virginia.”<sup>156</sup> The publication’s purpose was to challenge Christians to live according to their faith and to encourage students to consider the meaning of a personal relationship with Christ.<sup>157</sup> The University refused to pay the group’s printing costs because of its religious focus.<sup>158</sup>

The Court first addressed the free speech issue and concluded that the University impermissibly excluded religious student groups from funding based on their viewpoint, effectively denying their right of free speech.<sup>159</sup> The Court then analyzed whether the Establishment Clause compelled the University’s denial of free speech.<sup>160</sup> The Court said neutrality was a “significant factor in upholding governmental programs in the face of Establishment Clause attack” and determined that the University’s program was neutral toward religion.<sup>161</sup>

The Court reiterated its previous holdings that a public university does not violate the Establishment Clause by granting access to its facilities on a “religion-neutral basis.”<sup>162</sup> Neutrality was present in this case for several reasons: SAF was not created to advance religion, was not used to support one religion over another, respected the distinction between government speech endorsing religion and private speech endorsing religion, and did not distribute funds directly to student groups but rather to neutral outside printers.<sup>163</sup> This neutrality would be compromised, the Court said, by the University’s denial of the group’s free speech rights.<sup>164</sup> The Court concluded that “[t]here [was] no Establishment Clause violation in the University’s honoring its duties under the Free Speech Clause.”<sup>165</sup>

Four justices dissented.<sup>166</sup> Writing for the dissent, Justice Souter emphasized the publication’s direct attempt to convert

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156. *Id.* at 826-27.

157. *Id.* at 826.

158. *Id.* at 827.

159. *Id.* at 832, 837 (holding that denial of the group’s request for funding was a denial of the group’s right of free speech).

160. *Id.* at 837.

161. *Id.* at 839-40.

162. *Id.* at 842 (citing *Widmar*, 454 U.S. 263, 269 (1981) and *Mergens*, 496 U.S. 226, 252 (1990)).

163. *Id.* at 840-44.

164. *Id.* at 845.

165. *Id.* at 846.

166. Justice Souter wrote the dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 863.

others to Christianity and asserted that this was precisely what governments could not subsidize under the Establishment Clause.<sup>167</sup> Justice Souter also believed there was no viewpoint discrimination in the University's denial of funding.<sup>168</sup>

### III. THE *GOOD NEWS CLUB* DECISION

#### A. *The Facts*

New York education law section 414 authorizes the trustees or board of education of each school district to permit public use of school buildings, grounds or other property for ten specified purposes.<sup>169</sup> In accordance with the law, Milford Central School

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167. *Id.* at 867-68 (Souter, J., dissenting).

168. *Id.* at 895 (Souter, J., dissenting) (stating the University's denial of funding to religious groups applied not only to Christian groups but to all religious sects).

169. N.Y. EDUC. LAWS § 414 (McKinney 2000). The ten purposes authorized by Section 414 are, generally: (1) educational instruction; (2) public library purposes; (3) general meetings and entertainments open to the public; (4) meetings and entertainments where admission is charged; (5) voting purposes; (6) civic forums and community centers; (7) classes for mentally retarded minors; (8) recreational purposes; (9) child care services; and (10) graduation exercises by nonprofit elementary and secondary schools that involve no religious service. *Id.* Several other states have enacted similar laws, some of which specifically authorize use of school facilities for religious purposes. *See, e.g.*, ALA. CODE § 16-63-4 (1995) (requiring local boards of education receiving community school funding to develop programs for increased use of public schools by community); ALASKA STAT. § 14.03.100 (2000) (authorizing governing body of a school district to allow reasonable and impartial use of school facilities for any legal gatherings); CAL. EDUC. CODE § 38134 (West Supp. 2001) (permitting school boards to authorize use of school facilities or grounds by nonprofit organizations such as the Girl Scouts and allowing school board to charge no greater than school's direct costs to religious organizations or churches using school facilities for youth sports league activities); ILL. COMP. STAT. 5/10-22.10 (1998) (giving school board ability to grant temporary use of public schoolhouses for religious meetings, Sunday schools, literary societies and other meetings when schoolhouses are not occupied for school purposes); IND. CODE § 20-5-6-7 (1995) (allowing school board to permit use of school facilities by any person when such use would not interfere with use of facilities for school purposes); MD. CODE ANN., EDUC. § 7-108 (1999) (directing county boards to encourage use of public school facilities for community purposes such as discussion of public questions, lectures or other civic purposes and to permit use of public school facilities for religious purposes); MINN. STAT. § 123B.51, Subd. 2 (2000) (permitting school boards to authorize use of schoolhouses for divine worship, Sunday school, public meetings and other community purposes that do not interfere with use of the facilities for school purposes); MO. REV. STAT. § 177.031 (2000) (giving school boards authority to allow use of school facilities and grounds for discussion of public questions, meetings of citizens and other civic, social or educational purposes that do not

(“Milford”) adopted the Milford Community Use of School Facilities Policy (the “Policy”) in 1992 to govern the use of Milford’s facilities and grounds when not in use for school purposes.<sup>170</sup>

The Policy includes seven of the ten purposes in section 414, two of which were relevant to the Good News Club.<sup>171</sup> First, the Policy permits use of Milford’s facilities and grounds for “the purpose of instruction in any branch of education, learning or the arts.”<sup>172</sup> Second, the Policy permits use of the facilities and grounds for “holding social and civic meetings, entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.”<sup>173</sup> The Policy, however, specifically prohibits use of Milford’s premises “by any individual or organization for religious purposes.”<sup>174</sup>

The Good News Club is a nondenominational Christian<sup>175</sup> organization open to children between the ages of six and twelve.<sup>176</sup>

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interfere with primary purpose of school facilities); N.J. STAT. ANN. § 18A:20-34 (1998) (allowing school board to permit, at its discretion, use of school property during nonschool hours for such purposes as receiving instruction in any branch of education, learning or the arts or holding meetings and entertainments); N.C. GEN. STAT. § 115C-207 (1999) (directing local school board that implements community schools program with state money to develop programs for increased community use of public school facilities); OHIO REV. CODE ANN. § 3313.77 (1999) (directing school boards to adopt a policy governing use of school facilities by the public for four specific purposes, including instruction in any branch of learning, education or the arts and holding religious meetings, when facilities are not in use for school purposes); WIS. STAT. § 120.13 (Supp. 2000) (allowing school boards to grant temporary use of school facilities to responsible persons for lawful nonschool purposes provided such use does not interfere with school purposes or functions).

170. 121 S.Ct. at 2098; Pet. for Cert. at 3.

171. 121 S.Ct. at 2098.

172. *Id.*; Pet. for Cert. at 3.

173. 121 S.Ct. at 2098; Pet. for Cert. at 4.

174. 121 S.Ct. at 2098; Pet. for Cert. at 2.

175. The name “Good News Club” is taken “from the ‘good news’ of Christ’s gospel and the ‘good news’ that salvation is available through belief in Christ.” *Good News Club v. Milford Central School*, 202 F.3d 502, 504 (2d Cir. 2000). Good News Club is affiliated with Child Evangelical Fellowship (CEF), “a Bible-centered, worldwide organization composed of born-again believers whose purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the local church for Christian living.” CHILD EVANGELISM FELLOWSHIP INC., A BRIEF HISTORY OF CHILD EVANGELICAL FELLOWSHIP, at <http://www.gospelcom.net/cef/about/history.php>. CEF notes that two of its most identified programs are 5-Day Clubs and Good News Clubs. *Id.*

176. *Good News Club*, 121 S.Ct. at 2098.

Stephen and Darleen Fournier sponsor the Good News Club,<sup>177</sup> the purpose of which is to “develop children’s moral values by using Bible stories, games, scripture, and songs in a fun setting.”<sup>178</sup> The Good News Club initially held its meetings at Milford Center Community Bible Church.<sup>179</sup> However, when Milford decided to stop providing bus transportation from the school to the church,<sup>180</sup> Darleen Fournier, on behalf of the Good News Club, requested use of Milford’s cafeteria for the Club’s afternoon meetings.<sup>181</sup>

As residents of the Milford school district, the Fourniers were eligible to use Milford’s facilities and grounds with approval from the school.<sup>182</sup> On September 22, 1996, the Good News Club submitted its request to Milford’s interim superintendent Dr. Robert McGruder, who formally denied the request on October 3, 1996.<sup>183</sup> Dr. McGruder’s denial was based on the interpretation that the Club’s proposed use – “to have a fun time of singing songs, hearing a Bible lesson and memorizing scripture” – equaled religious worship.<sup>184</sup>

Following denial of its request, the Club’s attorney sent a letter to Milford promising to sue if Milford did not reverse its position.<sup>185</sup> In response, Milford’s attorney requested additional information to “clarify the nature of the Club’s activities.”<sup>186</sup> The Club then submitted a set of materials used during typical Club meetings and the following description of meetings:

The Club opens its session with Ms. Fournier taking

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177. *Id.* at 2098. Stephen Fournier was not a party to the action but called himself a teacher for the Good News Club. *Good News Club*, 202 F.3d at 505 n.2.

178. Pet. for Cert. at 4.

179. *Good News Club*, 202 F.3d at 506; Brief of Respondent at 2-3. Milford had provided bus transportation to the church “as a matter of courtesy” as long as the buses had room and were traveling toward the Church. Brief of Respondent at 3.

180. Milford decided to stop providing transportation because buses were no longer available. Brief of Respondent at 3.

181. *Good News Club*, 121 S.Ct. at 2098. Good News Club asked to use the school’s facilities from 2:30 to 4:30 p.m. on Tuesdays, even though Milford’s school day ended at 2:56 p.m. Brief of Respondent at 2. The Club’s meeting was to be held from 3:00 to 4:00 p.m. *Id.* The time between 2:30 and 3:00 was for preparation, and the time between 4:00 and 4:30 was for clean up. *Id.*

182. *Good News Club*, 121 S.Ct. at 2098.

183. *Id.* Dr. McGruder initially denied the request on September 22, 1996, because “religious groups could not use the school building.” Pet. for Cert. at 5. After receiving a second request from the Good News Club, Dr. McGruder issued a formal denial letter. *Good News Club*, 202 F.3d at 507.

184. *Good News Club*, 121 S.Ct. at 2098.

185. *Good News Club*, 202 F.3d at 507.

186. *Good News Club*, 121 S.Ct. 2098.

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 . . . learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.<sup>187</sup>

After reviewing the Club's materials, Dr. McGruder and Milford's attorney concluded that the Club's activities were the equivalent of religious instruction and not a discussion of secular subjects from a religious perspective.<sup>188</sup>

In March of 1997, the Good News Club, Ms. Fournier and her daughter Andrea Fournier, sued Milford under 42 U.S.C. § 1983.<sup>189</sup> The Club claimed Milford's denial of the Club's request "violated 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."<sup>190</sup> On April 14, 1997, the district court granted the Club's motion for preliminary injunction,<sup>191</sup> thereby allowing the Club to use Milford's facilities for its weekly meetings during the period from April, 1997, to June, 1998.<sup>192</sup> In October,

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187. *Id.*

188. *Id.* The Milford Board of Education adopted a resolution in February, 1997, rejecting the Club's request "to use Milford's facilities for the purpose of conducting religious instruction and Bible study." *Id.*

189. *Id.* Section 1983 governs claims for deprivation of civil rights by persons acting under color of state law. 42 U.S.C. § 1983 (1999).

190. *Id.* The Club's claim under the Religious Freedom Restoration Act (RFRA) was dismissed because the Supreme Court had found the Act to be unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Id.* at 2098 n.1. The RFRA prohibited government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.'" *City of Boerne*, 521 U.S. at 515-16 (citing Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1). The Act applied to all parts of the federal government and to the states and their subdivisions. *Id.* at 516 (citing 42 U.S.C.A. § 2000bb-2(1)). In *City of Boerne*, the Court ruled that Congress exceeded its power under the Constitution when it enacted the RFRA. *Id.* at 535. RFRA was "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534.

191. *Good News Club*, 121 S.Ct. at 2099. The Club sought the injunction to prevent Milford from enforcing its Policy and allow the Club to use Milford's facilities for its meetings. *Id.*

192. *Id.* The meetings were held "in a high school resource and middle school

1998,<sup>193</sup> the district court vacated the preliminary injunction and granted Milford's motion for summary judgment,<sup>194</sup> concluding that the Club's activities were religious instruction and prayer and that Milford had not allowed other groups to use its facilities for such purposes.<sup>195</sup>

A divided Second Circuit affirmed the district court after concluding Milford's exclusion of the Club was reasonable and viewpoint neutral.<sup>196</sup> The court found that the Club's activities "clearly and intentionally communicate[d] Christian beliefs by teaching and by prayer,"<sup>197</sup> and, therefore, it was reasonable for Milford to restrict the Club's access to its facilities.<sup>198</sup> The court also found that Milford's decision to exclude the Club was not based on the Club's viewpoint but the content of its meetings.<sup>199</sup> After analyzing the conduct of the Club's meetings,<sup>200</sup> the court determined the Club's focus to be "teaching children how to cultivate their relationship with God through Jesus Christ," which was "quintessentially religious," and not simply "a religious perspective on the secular subject of morality."<sup>201</sup>

Judge Jacobs dissented, finding it impractical to distinguish

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special education room." *Id.*

193. The District Court's decision is dated October 23, 1998. *Good News Club v. Milford Central School*, 21 F. Supp 2d 147 (N.D.N.Y. 1998). The Supreme Court incorrectly states that the District Court's decision was issued in August, 1998. *Good News Club*, 121 S.Ct. at 2099.

194. *Good News Club*, 21 F. Supp 2d at 161.

195. *Id.* at 160.

196. *Good News Club*, 202 F.3d at 511.

197. *Id.* at 510.

198. *Id.* The court thought it reasonable that Milford would not want to send a message to non-Christian students "that they were less welcome [in the school] than students who adhere to the Club's teachings," especially since the children at the school were "young and impressionable." *Id.*

199. *Id.* The court of appeals believed the Club's Christian viewpoint added "an additional layer" to the teaching of secular values such as obedience. *Id.* at 509. This additional layer involved knowing Jesus Christ and influenced the court's decision that the Club's activities were beyond "the bounds of pure 'moral and character development.'" *Id.* at 511.

200. Unlike the Supreme Court, the court of appeals and the district court spent considerable time analyzing the Club's meetings and materials used during those meetings. 202 F.3d at 504-06; 21 F. Supp 2d at 154-57. Both courts focused on the "Challenge" and "Invitation" sections of the Club's meetings. 202 F.3d at 505-06; 21 F. Supp 2d at 156. In the Challenge segment, the teacher challenges the children to trust in God and Jesus Christ in order to live by the value taught in the day's lesson. 202 F.3d at 505. The Invitation segment invites children to believe in Jesus Christ and be saved. *Id.* at 506.

201. *Id.* at 510.

between religious viewpoints and religious subject matter.<sup>202</sup> He also found Milford's exclusion of the Club to be viewpoint discrimination under *Lamb's Chapel*.<sup>203</sup> Notably, neither the district court nor the court of appeals ruled on the Establishment Clause issue.<sup>204</sup>

### B. *The Court's Analysis*

In a 6-3 decision, the United States Supreme Court reversed the court of appeals, ruling on both the free speech issue and the Establishment Clause issue.<sup>205</sup>

#### 1. *Free Speech Rights*

The Court first addressed whether Milford violated the Club's free speech rights when it excluded the Club from meeting at the school.<sup>206</sup> Since the parties had agreed Milford created a limited public forum, the Court did not need to decide whether Milford created a limited or traditional public forum when it opened its facilities pursuant to Section 414.<sup>207</sup> The Court next had to decide whether Milford's exclusion was reasonable and viewpoint neutral.<sup>208</sup>

Finding this case to be indistinguishable from *Lamb's Chapel* or *Rosenberger*, the Court concluded that Milford's exclusion of the Club based on the Club's religious nature constituted impermissible viewpoint discrimination.<sup>209</sup> The Court found that "teaching morals and character development to children [was] a permissible purpose under Milford's policy," and the Club clearly

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202. *Id.* at 512 (Jacobs, J., dissenting). Judge Jacobs found the Club's message to be focused on "teaching lessons for the living of a morally fit life, and not on worship." *Id.* at 515 (Jacobs, J., dissenting).

203. *Id.* at 514 (Jacobs, J., dissenting). According to Judge Jacobs, there was no basis for finding the Club's message to have religious content but the movie in *Lamb's Chapel* to have "no more than a religious viewpoint on a secular subject." *Id.* (Jacobs, J., dissenting).

204. The district court did not consider the Establishment Clause issue because it found Milford had not violated the Club's First Amendment right of free speech. *Good News Club*, 21 F. Supp 2d at 160.

205. *Good News Club*, 121 S.Ct. at 2097.

206. *Id.* at 2100.

207. *Id.* In *Lamb's Chapel*, the Court declined to decide whether a school creates a limited or traditional public forum when it allowed the public to use its facilities pursuant to Section 414. *Id.*

208. *Id.*

209. *Id.* at 2103.

taught “morals and character development to children.”<sup>210</sup> As in *Lamb’s Chapel*,<sup>211</sup> the Court determined that the Good News Club sought to address a permissible subject in a forum that had allowed other groups to address the same subject.<sup>212</sup> According to the Court, excluding the Club from meeting at the school, after school hours, violated the First Amendment in the same way that prohibiting the church in *Lamb’s Chapel* from showing its film series violated the First Amendment.<sup>213</sup> Comparing the case to *Rosenberger*, the Court concluded that the Club’s activities were no more religious than the content of *Wide Awake* and, therefore, deserved First Amendment protection.<sup>214</sup>

Speaking to the court of appeals’ finding that the Club’s activities were quintessentially religious, the Court opined that something religious or religious in nature could also be characterized as teaching morals and character from a religious perspective.<sup>215</sup> The Court saw no difference between the Club’s invocation of Christianity as the basis for its teaching and another group’s invocation of teamwork or loyalty.<sup>216</sup> The Club’s reliance on the Christian perspective did not taint its instruction on moral and character development in such a way as to remove it from the realm of permissible subjects under Milford’s policy.<sup>217</sup> Thus, the Court concluded that the Club’s speech was otherwise permissible and could not be excluded on the grounds that it had a religious viewpoint.<sup>218</sup>

Because Milford’s conduct was not viewpoint neutral, the Court did not need to address whether Milford’s exclusion of the Club was reasonable.<sup>219</sup> When government conduct in a limited public forum is based on viewpoint discrimination, any

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210. *Id.* at 2101.

211. *Id.* (noting that both Milford and the school in *Lamb’s Chapel* had adopted the social, civic or recreational use category of Section 414).

212. *Id.* The Court indicated that both the film in *Lamb’s Chapel* and the activities of the Good News Club involved teaching moral lessons from a Christian perspective. *Id.* The only difference between the two was that the Good News Club taught its lessons through “live storytelling and prayer” and not film. *Id.*

213. *Id.*

214. *Id.* at 2102.

215. *Id.*

216. *Id.*

217. *Id.* (noting that the court of appeals did not conclude that the Club’s activities were religious worship, the Court concluded the Club’s activities were not religious worship “divorced from any teaching of moral values”). *Id.*

218. *Id.*

219. *Id.* at 2101.

reasonableness associated with the conduct is immaterial.<sup>220</sup>

Justice Stevens dissented claiming the Club's religious speech was "aimed principally at proselytizing or inculcating belief in a particular religious faith," which put it "beyond the scope of the school's limited public forum."<sup>221</sup> Justice Souter, joined by Justice Ginsburg, also dissented, asserting the Club intended to use the school's facilities for "an evangelical service of worship," not a mere discussion of morals from a Christian viewpoint.<sup>222</sup>

## 2. *Establishment Clause*

The second question addressed by the Court was whether Milford's exclusion of the Club was justified by its concern that allowing the Club to meet in the school would violate the Establishment Clause.<sup>223</sup> Despite the fact that neither the district court nor the court of appeals had ruled on this issue, the Court concluded that Milford would not have violated the Establishment Clause by permitting the Club to meet at the school.<sup>224</sup>

The Court avoided deciding whether a compelling state interest would justify viewpoint discrimination by concluding Milford had no valid Establishment Clause interest.<sup>225</sup> The Court relied on its holdings in *Lamb's Chapel* and *Widmar* in reaching this conclusion.<sup>226</sup>

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220. *Id.* at 2100.

221. *Id.* at 2112, 2114 (Stevens, J., dissenting). Justice Stevens classified religious speech into three categories: (1) religious speech about a topic from a religious point of view; (2) religious speech that amounted to religious worship; and (3) religious speech falling into an intermediate category aimed at "proselytizing or inculcating belief in a particular religious faith." *Id.* at 2112 (Stevens, J., dissenting). Justice Stevens believed the Club's speech fell into the third category. *Id.* at 2114 (Stevens, J., dissenting).

222. *Id.* at 2117 (Souter, J., dissenting).

223. *Id.* at 2103.

224. *Id.* at 2107. The Court addressing the Establishment Clause issue at all is a point of contention. The dissenting justices pointed out that the Establishment Clause issue was not properly before the Court because it had not been addressed by either the district court or the court of appeals. *Id.* at 2115 (Stevens, J., dissenting); *Id.* (Souter, J., dissenting). Justice Souter criticized the majority for acting as a "court of first instance" in reviewing the Establishment Clause issue, thereby derogating the Court's "proper role as a court of review." *Id.* at 2117 (Souter, J., dissenting).

225. *Id.* at 2103 (noting that a state may have a compelling interest to avoid an Establishment Clause violation, which may justify content-based discrimination, but this did not necessarily mean the interest would justify viewpoint discrimination).

226. *Id.* The case resembled *Lamb's Chapel* in that the Club's use of Milford's

The Court was not persuaded by Milford's argument that elementary students at the school would "perceive that the school [was] endorsing the Club and...feel coercive pressure to participate, because the Club's activities take place on school grounds."<sup>227</sup> The Court provided five reasons to support this conclusion. First, allowing the Club to speak on school grounds would have ensured neutrality toward religion, not threatened it.<sup>228</sup> Second, the relevant community who might feel coercive pressure was the parents, not the elementary children.<sup>229</sup> Third, the Court's previous Establishment Clause rulings had never foreclosed "private religious conduct during nonschool hours merely because it takes place on school premises where elementary children may be present."<sup>230</sup> Fourth, the facts of the case did not support the misperception of endorsement.<sup>231</sup> Finally, the danger of the children perceiving an endorsement of religion was no greater than the danger of them perceiving hostility toward religious viewpoints if the Club was prohibited from meeting at the school.<sup>232</sup>

In his dissent, Justice Souter criticized the majority for

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facilities would have been after school, not sponsored by the school, and open to any student, not just Club members. *Id.* See *supra* Part II.C. The case was like *Widmar* because Milford had opened its facilities to other organizations. *Id.* See *supra* Part II.C.

227. *Id.*

228. *Id.* at 2104 (acknowledging that neutrality toward religion was "a significant factor in upholding governmental programs in the face of Establishment Clause attack") (quoting *Rosenberger*, 515 U.S. at 839). Thus, it would have been very difficult for Milford to support its argument that the Establishment Clause compelled it to exclude the Club. *Id.*

229. *Id.* (finding that the children could not be coerced because they could not attend the Club's meetings without parental permission).

230. *Id.* *Lee v. Weisman*, was not applicable because it involved obligatory attendance at graduation exercises. *Id.* See *supra* Part II.B. *Edwards v. Aguillard* was also inapplicable because it involved "curriculum taught during the school day to children required to attend." *Good News Club*, 121 S.Ct. at 2105. See *supra* Part II.B.

231. *Id.* at 2106 (finding no evidence that elementary school children loitered around the school after school was dismissed). In addition, the Court emphasized that the Club's meetings did not take place in an elementary classroom, but in a high school resource room and middle school special education room. *Id.* Finally, unlike the children's normal classroom, not all children in the Club were the same age. *Id.*

232. *Id.* (noting that Milford's school contained grades Kindergarten through 12 and that members of the public at large could use the building). These factors helped persuade the Court that the perception of hostility toward the Club was likely. *Id.*

deciding the Establishment Clause issue.<sup>233</sup> Nonetheless, he asserted that the incomplete record before the Court indicated a violation of the Establishment Clause.<sup>234</sup> Justice Souter found a “good case” that the Club’s activities “blur[red] the line between public classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction [was] the business of the school while the latter evangelism [was] not.”<sup>235</sup>

#### IV. ANALYSIS

The *Good News Club* decision is consistent with the United States Supreme Court’s previous rulings and solidifies the rights of religious speakers to access public school property on an equal basis with other speakers. The principles espoused by the Court in this decision are sound. Public schools that have created limited public forums may not discriminate against community groups because of their religious viewpoints. Public schools that have created limited public forums do not violate the Establishment Clause by allowing religious groups to exercise their free speech rights on school property.

##### A. *Public Schools May Not Discriminate Against Community Groups with Religious Viewpoints*

The Court’s prior decisions clearly establish that government cannot restrict speech in a way that discriminates against a particular viewpoint.<sup>236</sup> The *Good News Club* decision continues this rule and emphasizes that public schools may not treat religious speech by private speakers differently from secular speech by other private speakers when both groups wish to address an otherwise permissible subject on school property.

When Milford established a limited public forum, it subjected itself to the requirement that any exclusion of speech from the

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233. *Id.* at 2118 (Souter, J., dissenting) (asserting the majority was not in a position to decide the Establishment Clause issue on an incomplete record).

234. *Id.* at 2120 (Souter, J., dissenting).

235. *Id.* (Souter, J., dissenting).

236. *See supra* Part II.A.-C.; *See also Mosley*, 408 U.S. at 96 (“[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”); *Sadurski*, *supra* note 3, at 319.

forum be viewpoint neutral.<sup>237</sup> As the Court found, other groups had used the school's facilities to teach the subject of morals from a secular viewpoint. The Good News Club wished to teach the same subject from a religious viewpoint.<sup>238</sup> Allowing Milford to exclude the Club because of its religious viewpoint would have been contrary to the Court's previous holdings and would have violated the constitutional prohibition against viewpoint discrimination.

Simply because speech is from a religious viewpoint does not mean it is any less protected under the First Amendment than other types of speech.<sup>239</sup> The Court's previous decisions make it clear that, in a limited public forum, discriminating against a speaker whose viewpoint is shaped by religion is prohibited under the Constitution.<sup>240</sup> Because the government cannot itself express a religious point of view does not mean it can suppress the religious viewpoint of speakers who can.<sup>241</sup>

The *Good News Club* decision correctly reaffirms the free speech rights of religious speakers seeking equal access to public school property. Yet, the Court's decision does not automatically mean religious groups will have access to public school property. The analysis will vary from case to case based on the nature of the forum.<sup>242</sup> Thus, public schools that have never allowed discussion of a particular subject on their property would not be required to allow religious groups to address that subject on school property.<sup>243</sup> Yet, where public schools have allowed other groups to address a subject on school property, religious groups must be given an equal opportunity to address the subject from a religious viewpoint.<sup>244</sup>

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237. See *supra* Part II.A; *Rosenberger*, 515 U.S. at 829 (discussing the requirement of viewpoint neutrality in limited public forum cases).

238. *Good News Club*, 121 S.Ct. at 2101.

239. See, e.g., *Widmar*, 454 U.S. at 267 (affirming that religious speech deserves as much protection as other types of speech).

240. See *supra* Part II.C.

241. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 11 (1986) (discussing the differences between private and government speech).

242. See *Cornelius*, 473 U.S. at 800-03 (using the public forum analysis to describe the rights of private speakers to access government property); *Perry*, 460 U.S. at 44 ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

243. See *Cornelius*, 473 U.S. at 806 (stating government may properly exclude private speakers from the forum when the topic to be discussed is "not encompassed within the purpose of the forum").

244. *Good News Club*, 121 S.Ct. at 2102 ("[S]peech discussing otherwise

*B. Public Schools Do Not Violate the Establishment Clause by Allowing Religious Speakers to Exercise Their Free Speech Rights on School Property*

In addition to ensuring that speech from a religious viewpoint can occur on public school property on the same terms as secular speech, the *Good News Club* decision should reassure public schools that allowing religious groups equal access to school property does not violate the Establishment Clause. Although the Court's Establishment Clause decision in *Good News Club* may be characterized as premature, the Court's decision was correct for three reasons.<sup>245</sup>

First, the distinction between government speech endorsing religion and private speech endorsing religion is unmistakably present in this case.<sup>246</sup> The *Good News Club* was not established or endorsed by the school, nor did any school officials take part in the meetings.<sup>247</sup> The only government involvement with the Club was the fact that it met in a public school classroom. This case involved no government speech endorsing religion.

In their admirable pursuit of compliance with the Constitution, school officials appear to overlook this important distinction between government endorsement and private endorsement of religion. The situation would have been substantially different if Milford had required its elementary students to participate in the *Good News Club* meetings, pray at the start of each school day or receive a blessing from a local priest as they left school at the end of the day.<sup>248</sup> None of these levels of

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permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.”).

245. In his concurrence, Justice Breyer noted that the Court could not fully address the Establishment Clause issue because the case was before the Court on a summary judgment record. *Good News Club*, 121 S.Ct. at 2111-12 (Breyer, J., concurring) (stating there may be genuine issues of material fact which both parties should have an opportunity to address).

246. *Mergens*, 496 U.S. at 250 (underscoring that there is a “crucial difference between *government* speech endorsing religion. . .and *private* speech endorsing religion”) (emphasis in original).

247. *Good News Club*, 121 S.Ct. at 2098 (describing the *Good News Club* as a “private Christian organization”).

248. *Cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (concluding student-led prayer at public high school football games violated the Establishment Clause); *Weisman*, 505 U.S. at 598 (finding invocation and benediction at public school graduation ceremony to be unconstitutional); *Schempp*, 374 U.S. at 223 (striking down state-directed Bible readings and prayer in public schools); *Engel*, 370 U.S. at 421 (striking down state-directed prayer in

endorsement were present. As the Court indicated, allowing Good News Club to meet on school property would merely have been an effort by the school to afford a group its constitutional right to free speech.<sup>249</sup>

Second, the assertion that elementary school students would perceive an endorsement of religion by the school is unfounded. The Court has previously expressed concern for the impressionability of elementary school students because of their tender age.<sup>250</sup> Yet, even elementary school students would be unlikely to perceive an endorsement of religion by the school under the facts of this case. The Club held its meetings in a high school classroom and middle school classroom, presumably separated from the elementary school classrooms. Students could not attend the meeting unless a parent consented.<sup>251</sup> Under these circumstances, it is probable that most of Milford's students did not even know the meetings were held at the school.

One could argue that elementary students might be more likely to perceive government endorsement of religion when the President of the United States addresses the nation nine days after the terrorist attacks on September 11, 2001, asking for God's wisdom and for God to watch over the country.<sup>252</sup> In addition, elementary students might perceive government endorsement when they see religious symbols on government property during the holidays,<sup>253</sup> or when they read the inscription "In God We Trust" on the American dollar, quarter, nickel and dime. However, American society does not seem concerned that these activities put

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public school).

249. *Good News Club*, 121 S.Ct at 2102.

250. *Weisman*, 505 U.S. at 592 (noting the concern of protecting impressionable elementary and secondary students); *Tilton*, 403 U.S. at 686 (stating elementary and secondary students were more impressionable than college students); *But see* James E. M. Craig, Comment, "In God We Trust," *Unless We Are a Public Elementary School: Making a Case for Extending Equal Access to Elementary Education*, 36 IDAHO L. REV. 529, 558 (asserting that the differences between elementary and secondary school students are not sufficient to keep the equal access approach from public elementary schools).

251. *See* Craig, *supra* note 250, at 558 (suggesting parental consent for elementary school students relieves problems associated with the impressionability and lack of maturity of elementary school students).

252. President George W. Bush, Address to Joint Session of Congress (Sept. 20, 2001).

253. *See* *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (finding that display of nativity scene on city property did not violate the Establishment Clause).

coercive pressure on elementary students.<sup>254</sup>

Although the examples noted above may appear more removed from the school building where the students spend a large portion of their lives, they illustrate that there is little danger of elementary students perceiving government endorsement of religion when religious groups are allowed to use public school facilities on the same terms as other groups.

Finally, government neutrality toward religion is reinforced by the Court's decision. The Constitution prohibits the government from taking a position on religion, but it also prohibits the government from suppressing religion.<sup>255</sup> The Court's decision underscores the principle that the government is more neutral towards religion when it treats private religious speech equally with secular speech.<sup>256</sup>

#### V. CONCLUSION

The United States Supreme Court correctly extended its line of free speech and Establishment Clause decisions in *Good News Club*. The Court reaffirmed the rights of religious speakers to access public schools that have created limited public forums and has given these schools comfort that they will not violate the Establishment Clause by giving religious speakers equal access. The tension between the right to free speech and the prohibition against government establishment of religion may continue, but the Court's decision in *Good News Club* has helped to reduce this tension for public schools and speakers with religious viewpoints.

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254. See *id.* at 675-78 (discussing many examples of government acknowledgement and public acceptance of the country's religious heritage, including National Day of Prayer and commemoration of Jewish High Holy Days).

255. See *Everson*, 330 U.S. at 15-16.

256. Laycock, *supra* note 241, at 13-14.