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OF SPEECHES AND SERMONS: WORSHIP IN LIMITED PURPOSE PUBLIC FORUMS

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". . . we worship what we know . . . ." - John 4:22

I. INTRODUCTION

Concurring in the result in *Faith Center Church Evangelistic Ministries v. Glover*, Judge Lawrence Karlton regrets that the United States Supreme Court cannot tell the difference between a speech and a sermon.[1] Sermons, he believes, ought not – or at least need not – be permitted on public property or in government sponsored forums. If, he writes, a majority of justices really cannot tell the difference between prayer and a political address, they ought to get out more and consult the putative wisdom of the man or woman on the street.[2]

In *Glover*, a divided panel of the United States Court of Appeals for the Ninth Circuit held that a California county that had opened up its libraries' meeting rooms for use by the public for "educational, cultural and community-related" meetings may refuse to permit these rooms to

[1] 462 F.3d 1194 (9th Cir. 2006), *cert.* denied at 128 S.Ct. 143 (2007).

[2] *Id.* at 1198.

be used for worship.[3] It was the burden of the majority to distinguish Supreme Court precedents holding that religious speech cannot be excluded from such "limited purpose" public forums if that speech is otherwise within the forum's purpose.[4]

One member of the majority, Judge Richard Paez, attempted to construct an argument that worship differs from speech on secular matters from a religious perspective in a way that is constitutionally significant.[5] Judge Karlton regretted that the exercise was necessary. It reflected, in his view, the sorry state of the law "governing religious speakers in public place."[6]

Judge Karlton has friends in high places. Dissenting in *Good News Club v. Milford Central School*, Justice David Souter lamented the unwillingness of the majority to permit a school to deny a community group use of its facility for what he characterized as "an evangelical service of worship."[7] Justice John Paul Stevens, in a separate dissent, argued that governmental bodies who have opened their facilities to community speech may nevertheless exclude those

[3] *Id.* at 1202-07.

[4] *Id.* at 1202-03.

[5] *Id.* at 1215 (Karlton, J., concurring).

[6] *Id.* at 1216.

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

who wish to worship or to proselytize or to inculcate belief in a particular faith.[8] For both Justices (and for, at least, Justice Ginsburg who joined the Stevens dissent), government, while it may have the obligation to permit some types of religious perspectives on secular subjects for which it has created a forum, need not – and perhaps even may not – permit religious speech that is, in some way, " too religious", e.g., is proselytizing or contains too much prayer or confessional content. [9] Justice Stephen Breyer took the view that the exclusion of such communication might be justified on Establishment Clause grounds.[10]

But not enough friends. Although Judge Karlton would apparently regard even speech on secular topics from a religious perspective as impermissible "sermons," the rule, as Judge Paez recognized, is that "even quintessentially religious" speech may not be excluded from a limited purpose public forum simply because it is religious.[11] But we can borrow Judge Karlton's phrase to suggest a different line of demarcation. The question in *Glover* – and the issue here – is whether there is a judicially cognizable category of religious speech called "worship" which may

[8] *Id.* at 133-34.

[9] *Id.*

[10] *Id.* at 127-130 (Breyer, J., concurring in part).

[11] Faith Center, 462 F.3d at 1207.

be constitutionally excluded from public forums. If the state must permit religious speeches, must it suffer prayer and sermons in public forums?

In this article, I argue that the distinction cannot readily be made, at least not without adopting a characterization of worship that is at odds with what many worshippers think they are doing. I maintain that if the Court is to maintain neutrality between religion and irreligion with respect to those speakers for whom it provides a forum, the distinction of worship from other forms of communication, even if it can be made, undermines that neutrality.

In what follows, I review the current law governing forums for speech provided by the government and the treatment of religious speech within limited purpose public forums. I go on to consider application of that law to religious speech that can be categorized as worship and pose the question of the circumstances under which worship may be excluded from limited public forums. The article briefly reviews selected paradigms of Christian worship suggesting that worship constitutes communication among participants. This communication, moreover, is likely to concern temporal, as well as spiritual matters, and, therefore, can be expected to fall within the purpose of broadly defined limited purpose public forums. I then consider whether

worship, while conveying information within the purpose of many such forums, might nevertheless fall within a separate category of speech, either because of its special attributes, supposed divisiveness or to avoid an Establishment Clause violation. I maintain that it cannot. Finally, I conclude that permitting worship within limited purpose public forums is consistent with both a desire to maintain neutrality between religion and irreligion and helps to facilitate the development of private spheres of meaning.

II. PRIVATE RELIGIOUS SPEECH IN PUBLIC SPACES

First, a matter of definition. We are not concerned here with speech by the government itself or even private speech that is directed at a captive audience, such as students in classroom, assembly or a graduation ceremony. Our focus here is on circumstances in which the government provides a forum for speech to members of the community by, for example, allowing outside groups to use a school building during nonschool hours or permitting the community to reserve and use a meeting space in a public building.

A. Government Forum Analysis

As a general matter, no one has the right to speak on government property.[12] But some public spaces such as streets, parks and civic plazas that, by tradition and custom, have been devoted to public assembly and debate have come to be regarded as traditional public forums. In such places, a speaker – even a religious one and even one in prayer or worship – may be excluded only if "necessary to serve a compelling state interest" and that exclusion must be "narrowly drawn to achieve that interest."[13]

Even public places not traditionally recognized as public assembly and debate may become so by government policy.[14] Restrictions on these designated public forums are also subject to strict scrutiny.[15] An example might be a community broadcast facility made open to all comers for any purpose.

But the government need not open a place or channel of communication to everyone for every thing. A limited purpose public forum is created when government designates a forum for

[12] Greer v. Spock, 424 U.S. 828, 837 (1976).

[13] Perry Educ. Ass'n. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).

[14] *Id.*

[15] *Id.* at 45-46.

use by certain speakers or for the discussion of certain subjects.[16] In these circumstances, an entire class of speakers or entire subjects may be excluded through the application of reasonable restrictions on the *content* of the speech allowed.[17] But, crucially, those restrictions must be *viewpoint neutral*.[18] The distinction between what comprises content and what constitutes a viewpoint sounds troublesome and it is. Courts have struggled with the distinction and we will here as well.

Finally, nonpublic forum that are not open to the public may impose content-based restrictions as long as these restrictions do not "suppress expression merely because public officials oppose the speaker's view."[19]

B. Community Use Policies

It is limited purpose public forums with which we are concerned here. Government creates these forums in a variety of ways. School districts often allow their buildings to be used

[16] Rosenberger v. Rectors, 515 U.S. 819, 825 (1995).

[17] *Id.*

[18] *Id.*

[19] Perry Education Association v. Perry Local Educators Associations, 460 U.S. 37, 46 (1983) (citation omitted.)

by community groups both after school and during the weekend.[20] Libraries and other municipal buildings are also frequently available for public use.[21] At times, the use is restricted to matters that touch upon the mission of the school, *i.e.*, it must be some kind of programming for children and might perhaps be limited to programs with a broadly defined educational purpose.[22]

In other instances, the permitted purposes are even less narrowly defined, with access policies focusing more on *who may use a facility rather that the purpose* for which it is to be used.[23] Thus a governmental body may make its facilities generally available to a variety of community groups.[24]

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[20] Sometimes state law authorizes such use. See, e.g., New York Educ. L. § 414.

[21] The Milwaukee Public Library's meeting rooms are "open to organizations engaged in educational, cultural, intellectual or charitable activities." Preference is given to city residents and uses associated with the library. No commercial uses are permitted but there is no exclusion of religious activities or worship. (Milwaukee Public Library Policy and Guidelines for Meeting Room Use, available on line at http://www.mpl.org/file/meetingroom_policy.html/availability. The Los Angeles public library makes its facilities broadly available "for public use." (Los Angeles Public Library, Policies for the Use of Library Facilities and Meeting Rooms, available on line at "http://www.lapl.org/facilities/policies.html.

[22] The Mequon-Thiensville School District (WI) provides for broad use to support the "educational, recreation and social development of the community "and confers a priority on uses more closely identified with the school district's educational mission. (Policy available on line at http://mtsd.k12.wi.us/mtsd/rec_dept/general_info_registration/use_of_school_facilities/policy_use_of_facilities_rev04.pdf). The Seattle Public Schools have a similar policy. (Available on line at http://www.seattleschools.org/area/policies/e/e54.00.pdf).

[23] For example, Milwaukee's public school facilities are generally available for after-hours use without apparent restriction, see, e.g., Administrative Procedure 502(3), although there are requirements for public and, where pertinent, candidate access, as well as, for political meetings, a pre-election "blackout" period for "speaker, panel, round table debate or discussion programs of the forum type on economic, social and political subjects . . ."

The key, for our purposes, is that the reasons that public facilities are made available to outsiders are likely to consist of some combination of a general desire to serve the community and a particular desire to build support for the government within the community. These will generally point to broader access and, indeed, most governments with community use policies define them expansively.

But municipal bodies have, nevertheless, attempted to curtail religious uses. Either out of the fear of litigation or in the belief that such uses would be divisive or violate legal principles calling for the separation of church and state, government have frequently created religious use exceptions to policies permitting otherwise broad access to public facilities.[25]

(Administrative Procedures of the Milwaukee Public Schools, available on line at http://www.milwaukee.k12.wi.us/governance/rulespol/procs/pdf/ch05/5_02.pdf).

[24] A limited public forum may be nonphysical as well. Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833-34 (1995). Husain v. Springer, 494 F.3d 108, 121 (2d Cir. 2007) (student activity fund at public university), Child Evangelism Fellowship v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1069 (4th Cir. 2006) (discretionary waiver of fees by school district), Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004) (state "Choose Life" license plates), Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany, 399 F. Supp. 2d 136, 147 (D.N.Y. 2005) (student activity fund at public university), Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1558, 1560 (D. Ala. 1996) (access to public university funds). *See also* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 801 (U.S. 1985) (Combined Federal Campaign).

[25] For example, Hamilton County (Cincinnati, Ohio) library meeting rooms are available for "educational, cultural, civic, social, political [and] religious . . . ", but not for "conducting religious services." The Dayton (Ohio) public library meeting rooms may not be used for "religious services or events promoting the doctrine of one church or religious faith." The Upper Arlington (Columbus, Ohio) meeting rooms may be used by committees of a church "provided no religious services are involved." The library meeting rooms may not be used for "religious or political campaign meetings . . . ." The New York public library rents its facilities to all comers subject to certain restrictions

C. Limits on the Exclusion of Religious Speech

1. *Widmar v. Vincent.*

These restrictions have not fared well before the Supreme Court. In *Widmar v. Vincent*,[26] the Court considered the University of Missouri-Kansas City's policy of excluding religious groups from its open forum policy, which made university facilities generally available for registered student groups. Although not phrased in terms of public forum analysis, the Court held that an exclusion of speech based upon its content must be justified by a compelling state interest.[27] Although avoiding a violation of the Establishment Clause could be such an interest, an "equal access" policy would risk no such violation.[28]

Writing for the Court, Justice Powell rejected the notion that religious worship is not speech generally protected by the First Amendment. Rejecting the idea that there is a distinction

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including the exclusion of "political or religious functions . . . ." ("Special Events Guidelines and Restrictions for the Use of the New York Public Library, Humanities and Social Sciences Library Building," available on line at http://www.nypl.org/spacerental/pdf/guidelines.pdf).

[26] 454 U.S. 263 (1981).

[27] Id. at 269.

[28] Id. at 270-71.

between some types of religious speech and "a new class of religious speech 'acts' . . .

constituting worship," he wrote:

> First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "signing hymns, reading scripture, and teaching biblical principles," post, at 281, cease to be "singing, teaching, and reading" – all apparently forms of "speech," despite their religious subject matter – and become unprotected "worship."
>
> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U.S. 67, 70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953). Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E.g., Walz v. Tax Comm'n.*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970).[29]

Justice Powell also questioned the relevance of the distinction, seeing no constitutional

distinction between "religious speech" designed to win religious converts . . . [and] religious

worship by persons already converted.[30]

2. *The Lamb's Chapel Trilogy*

[29] *Id.* at 270.

[30] *Id.* at 270.

a. <u>*Lamb's Chapel*</u>. In *Lamb's Chapel v. Center Moriches School District*,[31] a school district, acting pursuant to state law, had adopted a policy authorizing off hours use of school property for, among other things, "social, civic and recreational purposes."[32] The policy further specified[33] that they were not available for religious purposes.[34] Lamb's Chapel, an evangelical Christian church sought permission to use the school building to show a six-part series on childrearing from a Christian perspective.[35]

The school district denied its request and Lamb's Chapel brought suit, alleging that the denial constituted "a violation of both the free speech and religion clauses."[36] The district court granted summary judgment for the school district and the Court of Appeals affirmed.

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[31] 508 U.S. 384 (1993)

[32] *Id.* at 387.

[33] New York Educ. Law § 414 had authorized (and still does authorize) school districts in that state to adopt reasonable regulations for permitting the public to engage in off-hour use of school facilities for a variety of purposes including ["social, civil and recreational meetings and entertainments, and other uses pertaining to the general welfare of the community . . . ." N.Y. Educ. Law § 414(1)(c). Such uses "shall be nonexclusive and shall be open to the general public." *Id.*].

[34] Lamb's Chapel, 508 U.S. at 587. This restriction was apparently required by state law which did not list "religious purposes" as a permitted use and had been interpreted to exclude such use. Trictley v. Board of Ed. of Buffalo, 65App. Div. 1, 409 N.Y. Supp.2d 912, 915 (1978) ("[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414.")

[35] Lamb's Chapel, 508 U.S. at 389 n. 3.

[36] *Id.* at 389.

The Supreme Court unanimously reversed. Noting the wide variety of uses that had been permitted in the past[37] and that discussions on childrearing were otherwise permissible uses, the Court held that such a discussion could not be excluded simply because it was to be approached from a religious perspective. To do so would constitute viewpoint discrimination and be impermissible for a limited public forum. Writing for the Court, Justice White observed:

> There is no suggestion from the courts below or from the District or the State that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius* . . .

In so holding, the majority continued to apply the three-part test set forth in *Lemon v. Kurtzman*,[38] holding that the school district's broad open access policy 1) had a secular purpose, 2) did not have the principal or primary effect of advancing or inhibiting religion, and 3) did not

[37] *Id.* at 391. Among those uses was a "New Age religious group" known as the Mind Center. *Id.* at n. 5.

[38] 403 U.S. 602 (1971).

foster an excessive entanglement with religion.[39] Implicit in this reasoning is the notion that the absence of a secular purpose or a primary or principal effect that did advance religion (even in general) would raise constitutional concerns.

But also implicit is the notion that evenhanded treatment of religion does not "advance" it and that government, at least when it comes to limited purpose public forum, must be neutral not only among religions, but between religion and irreligion.[40]

Notably, the Court rejected the school district's contention that the exclusion of religious uses could be justified by a desire to avoid an Establishment Clause violation or because religious use would be divisive.[41] In doing so, it addressed language in *Widmar*, suggesting that the State may have a compelling interest in avoiding an Establishment Clause violation.

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[39] Lamb's Chapel, 508 U.S. at 395. Justices Kennedy and Scalia (joined by Justice Thomas) wrote separately to express their disapproval of the Court's continued adherence to the three-part test of Lemon v. Kurtzman, 403 U.S. 602 (1971). 508 U.S. at 397 (Kennedy, J., concurring in part and concurring in the judgment); 508 U.S. at 398 (Scalia, J., concurring in the judgment). "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." *Id.* Justices Scalia and Thomas also disagreed with the majority's view that *Lamb's Chapel's* proposed use is constitutional because it would not signal an endorsement of religion in general, arguing that such an endorsement is not prohibited by the Establishment Clause. *Id.* at 400-401.

[40] See also, McCreary County v. ACLU of Ky., 125 S.Ct. 2722, 2733 (2005); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).

[41] *Id.* at 396-96.

Although acknowledging that this interest may, in proper circumstances, justify the regulation or abridgment of otherwise protected speech, Justice White rather easily disposed of the Establishment Clause rationale for excluding Lamb's Chapel:

> We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. [42]

b. <u>*Rosenberger*</u>. In *Rosenberger v. Rector and Visitors of the University of Virginia*,[43] the Court held that the University of Virginia could not deny use of University printing services to a religious group seeking to publish a Christian magazine. University policy provided for the payment of certain outside bills incurred by officially recognized student organizations known as "Contracted Independent Organizations" [44] (CIOs). That policy, however, precluded payment for expenses incurred in certain activities, including "religious activities, philanthropic

[42] 508 U.S. at 395.

[43] 515 U.S. 819 (1995).

[44] *Id.* at 822.

contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses."[45] A religious activity, for purposes of this exclusion, was defined as any activity that "primarily promotes or manifests a particular belief in or about a deity or ultimate reality."[46]

Wide Awake Productions, founded by Ronald Rosenberger and others, was a qualified CIO formed to publish a "magazine of philosophical and religious expression from a Christian perspective."[47] Issues of *Wide Awake* included articles about "racism, crisis pregnancy, stress, prayer, [and] C.S. Lewis' ideas about evil and free will."[48] The University refused to pay printing bills that it would have paid for secular publications on the ground that publication of

[45] *Id.* at 825.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 826.

the newspaper amounted to a "religious activity" and, under the University's definition, there is little doubt that it did.[49]

The district court granted summary judgment for the university and the Court of Appeals affirmed. The Supreme Court reversed, although this time by a 5-4 vote. A majority found that the refusal to pay Wide Awake's printing bills constituted viewpoint discrimination. For the Court, Justice Kennedy acknowledged that the funding of CIOs was "a forum more in the metaphysical than . . . spatial or geographic sense," but that the Court's public forum analysis was nevertheless applicable.[50] While recognizing that the government may make viewpoint distinctions when it is the speaker, e.g., when it "appropriates public funds to promote a particular policy of its own" or "disburses public funds to private parties to convey a governmental message," viewpoint restrictions are not proper when it "expends funds to encourage a diversity of views from private speakers."[51]

[49] The masthead of Wide Awake bore St. Paul's exhortation that "the hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed. Romans 13:11." *Id.* at 865. Articles included statements such as "'[g]o into all the world and preach the good news to all creation' (Mark 16:15)" and " [t]he great Commission is the prime directive for our lives as Christians . . . ." *Id.*

[50] *Id.* at 830.

[51] *Id.* at 833-34.

As in *Lamb's Chapel*, the Court held that the exclusion of religious perspectives from a generally available forum constitutes viewpoint discrimination.[52] It rejected the notion that religious viewpoints constituted a separate category of content, finding that Wide Awake's religiously themed communication was:

> a specific premises, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.[53]

Once again, it found that the exclusion of religious perspectives could not be justified by the desire to avoid an Establishment Clause violation [54] and rejected the idea that the exclusion of all religious viewpoints passed constitutional muster.[55]

The university had argued, and the Court of Appeals agreed – that:

> [B]ecause Wide Awake is "a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy,' the University's provision of SAF funds for its publication would 'send an

[52] *Id.* at 837.

[53] *Id.* at 831.

[54] *Id.* at 845-46.

[55] *Id.* at 831-32.

> unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values."[56]

Without mentioning *Lemon*, the Supreme Court responded by emphasizing the neutrality of the university's funding programs toward the private speech that it chooses to underwrite.

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. We have decided a series of cases addressing the receipt of government benefits where religion or religious views are implicated in some degree. The first case in our modern Establishment Clause jurisprudence was *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.' *Id.* at 16, 67 S.Ct., at 512. We have held 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.[57]

The Court noted, in particular, the difficulty that would accompany a rule that required (or for that matter, permitted) the university ". . . to scrutinize the content of student speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content."[58]

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[56] *Id.* at 838.

[57] *Id.* at 839.

[58] *Id.* at 844

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented. In their view, even the magazine's essays on apparently secular topics became "platforms from which to call readers to fulfill the tenets of Christianity in their lives."[59] The publication was not, he wrote, "merely descriptive examination of religious doctrine or even of ideal Christian practice."[60] It was not "merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation."[61] Rather, Justice Souter wrote, the magazine "is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ."[62] In the dissent's view, Wide Awake was:

> "[N]ot the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life." Using public funding to subsidize this would violate the Establishment Clause.[63]

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[59] *Id.* at 867.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 868.

That this took place in an evenhanded manner pursuant to a neutral program did not allay Justice Souter's concerns. In his view, neutrality is only one salient Establishment Clause concern, and a prohibition against direct funding of religious activities is at the heart of the Establishment Clause. Avoiding this would justify the exclusion of Wide Awake from university funding:

> This recognition reflects the Court's appreciation of two general rules: that whenever affirmative government aid ultimately benefits religion, the Establishment Clause requires some justification beyond evenhandedness on the government's part; and that direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause and would strike at the very heart of the Clause's protection.[64]

c. <u>*Good News Club*</u>. Finally, in *Good News Club v. Milford Central School*, the Milford Central School had permitted community use of its building for "instruction in any branch of education, learning or the arts" or for "social, civic and recreational meetings and 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."[65]

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[64] *Id.* at 878.

[65] 533 U.S. at 102.

Two district residents sponsored an organization called Good News Club, a private Christian organization for children ages 6 to 12. The group proposed after-school meetings in which children would learn and memorize Bible verses, sing songs and play Bible-themed games, and listen to Bible stories and discuss how those stories related to their lives.[66] The school denied the Club's request because:

> [T]he kinds of activities proposed to be engaged in by the *Good News Club* were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.[67]

The Club sued. The district court granted summary judgment for the school district and a divided panel of the Second Circuit Court of Appeals affirmed.[68] The majority held that the district's restriction against allowing religious instruction in its school is not unreasonable and that, because the Club's proposed use was "quintessentially religious" and fell "outside the

[66] *Id.* at 103.

[67] *Id.* at 103-104.

[68] *Id.*

bounds of pure 'moral and character development,'" the policy of exclusion was constitutional subject discrimination and not unconstitutional viewpoint discrimination.[69]

The Supreme Court reversed – once again by a 5-4 vote. Because Good News Club taught morals and character development (albeit from a nonsecular perspective)[70] its proposed use fit within the purpose for which the building was made available and its exclusion constituted viewpoint discrimination.[71]

Writing for the Court, Justice Thomas was untroubled by the Court of Appeals' characterization of the Good News program as "quintessentially religious." In fact, he conceded the essential accuracy of Justice Souter's description of *Good News* meetings as an "evangelical service of worship calling children to commit themselves in an act of Christian conversion."[72] Justice Thomas denied that something "quintessentially religious" or "decidedly religious in nature" cannot "also be characterized properly as the teaching of morals and character

[69] *Id.*, quoting Good News Club v. Milford Central School, 292 F.3d 502, 510-11 (2d Cir. 2000).

[70] *Id.*

[71] *Id.* at 108-109.

[72] *Id.* at 138 (Souter, J., dissenting).

development from a particular viewpoint."[73] Notwithstanding the accuracy of Justice Souter's description, the majority refused to hold that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not."[74]

That the program was open to elementary school children and would take place immediately after school was insufficient to distinguish *Lamb's Chapel*. The Court emphasized that even-handed treatment of religious uses would respect, rather than violate, the requisite neutrality toward religion.[75] It was, the Court noted, parents who would decide whether their children would attend,[76] and there was no evidence that children were permitted to loiter.[77] The Court rejected the notion that the mere presence of religious instruction in an elementary school where children may be present raises Establishment Clause concerns.[78]" Justice Thomas wrote,

> [E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of

[73] *Id.* at 111.

[74] *Id.*

[75] *Id.* at 114.

[76] *Id.* at 115.

[77] *Id.* at 116-17.

[78] *Id.* at 117-18.

> religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.[79]

Justice Scalia concurred, noting that the dissent's inability to agree on whether the potentially offending speech was excludable because it was "proselytizing" or because it was an "evangelical service of worship"[80] was probative of Justice Powell's observation in *Widmar* that attempting to distinguish between acceptable and unacceptable religious speech by private persons is both unmanageable and unrelated to anything of constitutional significance.[81] He conceded that the Court has drawn distinctions "between religious speech generally and speech about religion," but "only with regard to restrictions the State must place on its own speech where pervasive state monitoring is unproblematic."[82]

Justice Stevens and Justice Souter (joined by Justice Ginsburg) dissented.[83] Justice Stevens divided religious speech into three categories: 1) speech about a particular topic from a religious point of view; 2) speech that amounts to worship or its equivalent and 3) speech that is

[79] *Id.* at 118.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Justice Breyer concurred in part, but would have permitted the case to go to trial on Milford's Establishment Clause defense. *Id.* at 127-130.

aimed principally at proselytizing or inculcating belief in a particular religious faith."[84] In his view, a school can, consistent with the First Amendment, create a limited public forum that admits the first type of religious speech without allowing the other two.[85] Acknowledging that the lines distinguishing these types of speech are difficult to draw, Justice Stevens nevertheless thought it critical that a school, "particularly an elementary school," be permitted to draw them.[86]

For Justice Stevens, school officials could reasonably believe that evangelical meetings will be too divisive:

> Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. If a school decides to authorize after school discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups – for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan – to hold meetings, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not. Such recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission. Cf. *Lehman v. Shaker Heights*, 418 U.S. 298, 94

[84] *Id.*

[85] *Id.*

[86] *Id.* at 133, citing Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty., 333 U.S. 203, 231, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring) ("In no activity of the State is it more vital to keep out divisive forces than in its schools . . .").

> S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding a city's refusal to allow 'political advertising' on public transportation).[87]

Justice Souter, joined by Justice Ginsburg, emphasized, as had the Court of Appeals, the "quintessentially religious" nature of the Club's meetings:

> In a sample lesson considered by the District Court, children are instructed that '[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him . . . . If you have received the Lord Jesus as your Saviour from sin, you belong to God's special group – His family.' App. to Pet. for Cert. C17-C18 (ellipsis in original). The lesson plan instructs the teacher to 'lead a child to Christ,' and, when reading a Bible verse, to '[e]mphasize that this verse is from the Bible, God's Word,' and is 'important – and true – because God said it.' The lesson further exhorts the teacher to '[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel' and cautions against 'neglect[ing] this responsibility.' *Id.* at C20.[88]

He accused the majority of ignoring reality by characterizing the Club's activity in a "bland and general" way.[89] Unless, he concluded, the Court's decision was understood in "equally generic terms" it would stand for "the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque."[90]

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[87] *Id.* at 131-32.

[88] *Id.* at 137.

[89] *Id.* at 138-39.

[90] *Id.* at 139.

III. WORSHIP IN PUBLIC SPACES

Notwithstanding Justice Souter's concern about the implications of *Good News*, municipal and other government bodies have attempted to restrict the access of religious groups to generally available facilities and forums if they propose to engage in something that is characterized as worship.

A. Lower Court Cases.

1. Faith Center.

The few lower court decisions to reach the matter have differed. In *Faith Center Church Evangelical Ministries v. Glover,*[91] noted at the beginning of this article, an evangelical church had sought permission to use a meeting room at the Antioch Library in Contra Costa County, California. County policy made library meeting rooms available to groups for "educational, cultural and community related meetings, programs and activities."[92] Library policy initially

[91] 462 F.3d at 1205, Glover, supra note 1.

[92] 462 F.3d at 1198.

prohibited use of the room for "religious purposes."[93] Applying this policy, it denied Faith Center's application for use of the meeting room and the church filed suit.[94]

Although the Faith Center's application had been denied under the old policy (which the county conceded was overly broad), the policy was subsequently revised to prohibit "religious services."[95] Under this revised policy, the county drew a distinction between a proposed morning "Wordshop" entitled "The Making of an Intercessor" in which attendees would be taught "how to pray fervent, effectual prayers that God hears and answers, and an afternoon "Praise and Worship Service" with a sermon. The former would be permitted, while the latter would not.[96]

The district court granted Faith Center's motion for a preliminary injunction but a divided panel of the Ninth Circuit Court of Appeals reversed. Faith Center argued that religious worship was an "educational, cultural and community related" activity and thus within the purposes of the forum. The majority concluded, without further explanation, that not everything community-

[93] *Id.*

[94] 462 F.3d at 1199.

[95] *Id.*

[96] 462 F.3d at 1200.

related must be granted access.[97] A library, it concluded, "is quintessentially 'a place dedicated to quiet, to knowledge and to beauty'"[98] and use of the meeting room "was not intended to undermine the library's primary function as a venue for reading, writing, and quiet contemplation."[99]

Judge Paez, writing for the panel majority, held that the county could reasonably exclude worship to avoid, borrowing from Justice Souter, the "remarkable proposition that any public [building] opened for civic meetings must be opened for use as a church, synagogue or mosque."[100] The panel majority held that the county:

> [R]easonably could conclude that the controversy and distraction of religious worship within the Antioch Library meeting room may alienate patrons and undermine the library's purpose of making itself available to the whole community.[101]

[97] *Id.* at 1211.

[98] *Id.* at 1205, quoting Brown, 383 U.S. at 142.

[99] Faith Center, 462 F.3d at 1205.

[100] *Id.* at 1206, quoting Good News Club, 533 U.S. at 139.

[101] *Id.* at 1207.

Although one might conclude that excluding something because it may cause "controversy" and "distraction" sounds like viewpoint discrimination,[102] the majority regarded this exclusion as content-based. In so concluding, it maintained that the *Good News Club* Court's assertion that the Club's activities were not "mere religious worship" amounted to the recognition of a constitutional distinction between speech from a religious perspective and "mere religious worship."

> The Court drew a line at religious worship because it did not regard worship in this case as merely a 'viewpoint from which ideas are conveyed.' *Id.* To the contrary, pure religious worship held a purpose unto itself, and it exceeded the boundaries of a forum limited to a discussion of the moral and character development of children. See *id.* at 138 n. 3, 121 S.Ct. 2093.[103]

To exclude the morning session would constitute viewpoint discrimination. In the Court's view, Faith Center's proposed "Wordshop" – "an Endtime call to Prayer for every Believer and how to pray fervent, effectual Prayers that God hears and answers" was devoted "to the topic of communication and how to communicate effectively with one's God."[104] Because

[102] The library certainly did not seem to exclude all "controversial" uses, permitting meetings by the Contra Costa Democratic Club and Sierra Club. *Id.* at 1210. Nor did it bar uses in which participants might assert personal beliefs about – or experiences with God – hosting, for example, meetings of Narcotics Anonymous. *Id.*

[103] *Id.* at 1209 (footnote omitted).

[104] *Id.* at 1207.

groups such as a speech and debate club had been permitted to use the library meeting room, the court concluded that "'communication is a permissible topic of discussion in the Antioch library meeting room."[105]

Religious worship, in the majority's view, is "not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter"[106] and is "not a viewpoint but a category discussion within which many religious perspectives abound.[107] Although conceding that "[i]t is difficult to imagine . . . that religious worship could ever truly be divorced from moral instruction or character development," in the majority's view, *Good News Club* permits the exclusion of "pure religious worship." Given that, Faith Center's proposed use must be "too tenuously associated to forum's purposes."[108]

The court also regarded the presence of the meeting in a building that would be simultaneously used for other purposes as significant.[109] While the implication of this point was

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[105] *Id.*

[106] *Id.* at 1210-1211.

[107] *Id.* at 1211.

[108] *Id.*

[109] *Id.* at 1211-12.

that the presence of religious activities might be divisive or disturbing to other patrons, the court did not explain why something called "pure religious worship" was different than the apparently heavily confessional divine communication seminar that it recognized must be permitted.

Faith Center's argued, predicated on *Widmar* and the *Lamb's Chapel* trilogy, that religious worship cannot be distinguished from other permissible forms of religious speech. But the majority dismissed concerns about judicial competence and the dangers of entanglement in making such a distinction. It cited, albeit to different effect, Justice Scalia's observation about the court making distinctions between speech about religion and religious speech generally. The Court noted that "[s]chool officials routinely draw such distinctions in public schools where the subject of religion may be taught but religious speech is barred from the government speaker,"[110] and that similar distinctions are made limiting the kinds of religious speech by government employees in the workplace.[111]

[110] *Id.* at 1213. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994).

[111] *Id.* See Berry v. Dep't of Soc. Serv., 447 F.3d 642, 655 (9th Cir. 2006) ("Permitting appellants to evangelize while providing services to clients would jeopardize the state's ability to provide services in a religion-neutral matter." (internal citation omitted).

The court also noted a line of cases permitting the restriction of proselytizing private religious speech in schools.[112] Although noting that Faith Center's morning "Wordshop" certainly involved proselytization in the form of a call to prayer, it concluded that "this proselytizing activity also furthers the discussion about communication and communicating with a higher authority . . . ."[113]

Having suggested that a distinction between pure religious speech and other types of religious – even proselytizing speech – are possible, the court saw no need to make it (or to discuss how it might be made) because Faith Center had already done so by calling its afternoon session "praise and worship." Apparently regarding Faith Center as stuck with its own choice of nomenclature, the panel majority vacated that part of the injunction prohibiting the county from excluding that use.

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[112] *Id.* at 1213. Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1051 (9th Cir. 2003) (while holding that religious camps may not be excluded from a general policy to distribute summer camp brochures noted that a school is not obliged to distribute materials with "direct exhortations to religious observance.") See, e.g., Prince v. Jacoby, 303 F.3d 1074, 1086-87 (9th Cir. 2002) (finding that while student religious group must be given equal access to school's public address system to announce its activities, the group may be barred from doing so to "pray and proselytize"); Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979, 980 (9th Cir. 2003) (permitting discussion of religious beliefs in a high school graduation speech but prohibiting "proselytizing"); Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1104 (9th Cir. 2000) (upholding school district's refusal to allow valedictorian to give a "sectarian, proselytizing speech" at graduation ceremonies). Of course, all of these cases involve captive audiences that are, at least, in some sense, captive.

[113] *Id.* at 1214.

Judge Karlton, sitting by designation, concurred, but wrote separately to make clear that he thought the laborious reasoning of Judge Paez' opinion ought not to have been necessary. In his view, religious speech is categorically different and should be analyzed under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech.[114] Thus, he expressed frustration at the "inability" to call a sermon a sermon.

Judge Tallman dissented, arguing that religious worship may not be parsed from other religious speech.[115] Faith Center's "concession,"[116] in his view, did not resolve the problem because it had brought a facial, as well as an "as applied," challenge:

> Announcing the strange rule that '[r]eligious worship services can be distinguished from other forms of religious speech by the adherents themselves,' Maj. Op. at 1214, creates a system whereby the applicant itself decides what constitutes worship. Under the policy, the County will still have to determine what is and what is not religious worship in instances where a group does not identify in such detail its activity, and the County is not off the hook even if a group does say it will engage in religious worship. Creative word-play cannot avoid the reality that worship is intangible, and even what Faith Center itself determines is religious worship may not be worship to another. See *Bronx Household*, 331 F.3d at 354-55 (finding 'no principled basis upon which to distinguish [such] activities").[117]

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[114] *Id.* at 1215.

[115] *Id.* at 1218-19.

[116] In addition, Faith Center did not concede that its "worship" involved no teaching about morals, character or other temporal matters. 462 F.3d at 1225 (Tallman, J., dissenting).

[117] Faith Center, 462 F.3d at 1220 (Tallman, J., dissenting).

Noting that Faith Center did not concede that its services are "mere worship devoid of speech on permissible secular topics," Judge Tallman suggested that the majority opinion amounted to an assertion that Faith Center "cannot express a viewpoint because of the *way* ideas are communicated – through prayer and sermons."[118] Judge Tallman suggested that it was unlikely that worship would not also convey messages about worldly matters:

> Singing a religious song may very well be akin to singing about morality according to religious tenets. Praying is usually speech containing praise to a higher being, but may also contain personal characterizations of one's own life, wishes, hopes, or concerns. Pastor Hopkins's sermon is the clearest example of religious speech which expresses a viewpoint on otherwise permissible secular topics. One can imagine the variety of subject matter that could be included in a sermon – money, family, love, or avoiding drugs and alcohol, to name few. The list is endless.[119]

A petition for rehearing en banc was denied, with six judges dissenting.[120] In the view of the dissent, *Widmar* and the *Lamb's Chapel* trilogy foreclosed the exclusion of worship and the Contra Mesa County had to live with the breadth of the forum it had created:

For example, if the library had set aside its meeting rooms for book clubs, it could certainly exclude every other category of expressive activity that did not fall within the purposes of the forum. The library could exclude worship services that were not book clubs, just as it could exclude political debates and city council meetings. What it could not do is exclude book clubs discussing the Koran, the Torah, or the Tibetan Book of the Dead. Or the library might open its

[118] *Id.* at 1223.

[119] *Id.* at 1225-26.

[120] 480 F.3d 891.

meeting rooms broadly, while prohibiting food or drink. That policy would exclude meetings at which communion might be served, or a Seder celebrated, or prashad [Prasad????] distributed, just as it would exclude serving refreshments at a Boy Scout Court of Honor or tea at a meeting of the Garden Club. What the library cannot do is permit food and drink *except* when it is consumed in connection with religious services. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). But that is exactly what the library has done here: It has opened the forum to all community and cultural speech *except* such speech that encompasses a viewpoint that is unique to religion.[121]

The United States Supreme Court has denied Faith Center's petition for *certiorari*.[122]

2. Bronx Household of Faith

In *Bronx Household of Faith v. Board of Education of City of New York*[123] (*Bronx Household I*), the Second Circuit initially held that the New York City Board of Education could deny access to the Bronx Household of Faith, a local church group, which wished to use school facilities for Sunday worship services. The Board's policy, while it permitted groups to discuss "religious material or material which contains a religious viewpoint," prohibited religious organizations from conducting "religious services or offering religious instruction on school premises after school."[124]

[121] Id at.

[122] 128 S.Ct. 143 (2007).

[123] 127 F.3d 207 (2d Cir. 1997).

[124] *Id.* at 210.

Following the United State Supreme Court's decision in *Good News Club*, the Bronx Household once again applied for permission to use school facilities for Sunday meetings and was once again denied access. In the ensuing litigation, *Bronx Household of Faith v. Board of Education of the City of New York*[125] (*Bronx Household II*), a divided panel of the Second Circuit affirmed the district court's preliminary injunction against denial of the permit.

A majority of the panel could find "no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that Bronx Household of Faith has proposed for its Sunday meetings . . . ."[126] It premised that holding, however, on the district court's finding that the proposed activities, which consisted both of "quintessentially religious" activities such as "prayer, the singing of songs and communion," also contained secular elements such as "a fellowship meal during which church members may talk about their problems and needs." For this reason, the district judge concluded and the panel majority presumed that the proposed meetings were not "simply religious worship, divorced

[125] 331 F.3d 354 (2d Cir. 2003).

[126] *Id.* at 354.

from any teaching of moral values or other activities permitted in the forum."[127] The Court of Appeals expressly declined to review the district court's determination that, after *Good News Club*, "religious worship cannot be treated as an inherently distinct type of activity, and that the distinction between worship and other types of religious speech cannot meaningfully be drawn by the courts."[128]

This conflict between the Second and Ninth circuits was to be short lived. Following the decision in *Bronx Household II*, the Board of Education modified its policy to prohibit use for "the purpose of holding religious worship services or otherwise using a school as a house of worship." Both sides moved for summary judgment. The district court enjoined enforcement of the policy but a divided panel of the court vacated the injunction.[129]

But the panel did not resolve the merits. Judge Calabresi would have vacated the injunction on the merits.[130] He also placed significance on the *Good News Club* majority's statement that the speech at issue there was not "pure religious worship," but instruction on

[127] *Id.*

[128] *Id.* at 355.

[129] Bronx Household of Faith v. Board of Educ. of City of New York, 492 F.3d 889 (2d Cir. 2007).

[130] *Id.* at 92-106.

morals and character. In Judge Calabresi's view, the "boundary of [the Court's] ruling must be defined by the otherwise permitted subject at stake."[131]

Judge Calabresi acknowledged that the activities proposed by the Bronx Household were "some of the same" at issue in *Good News*, *i.e.*, "the singing of Christian hymns and songs along with Biblical preaching and teaching," but this was permitted "only because they could 'also be characterized properly as' the viewpoint from which students were instructed in moral and character development."[132]

Judge Calabresi's distinction of *Bronx Household's* activities turned not so much on what it did not convey, i.e., there was apparently no evidence that it did not convey instruction on morals and character development, but on what he regarded to be present in worship and not other forms of religious speech:[133]

> Prayer and worship services are not religious viewpoints on the subjects addressed in Boy Scouts rituals and in Elks Club ceremonies. Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false.[134]

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[131] *Id.* at 102 (citation omitted).

[132] *Id.* at 103.

[133] *Id.*

[134] *Id.*

He concluded that excluding what he regarded as separate category of speech is reasonable to avoid misunderstanding by school children, feelings of marginalization and an inability to accommodate all faiths.[135]

Judge John Walker would have affirmed the injunction, holding that the exclusion of worship constituted unconstitutional viewpoint discrimination. The board's purpose in opening school property to the public was to "improve 'school community relations in ways that can enhance community support for the school'" and Bronx Household's activities would fit that purpose, being aimed at "the development of a community of believers which has as its anticipated result increased community support for the school."[136] He criticized Judge Calabresi for failing to define the "limits" of the forum or developing an objective definition of worship.[137] Even if "pure worship" could be excluded, Judge Walker could conceive of no judicially cognizable way of defining it. In his view, permitting Bronx Household to use the school

[135] *Id.* at 105.

[136] *Id.* at 126.

[137] *Id.* at 124.

pursuant to a neutral access policy should not create the impression that the district has endorsed those activities and that any remaining concerns could be addressed by reasonable time, place and manner restrictions.

Judge Leval cast the deciding vote to vacate the injunction, but on the ground that the matter was not yet ripe for decision as it was unclear that the board of education had actually adopted the revised policy or how it might be applied.[138]

3. DeBoer

Faith Center is arguably in conflict with the decision of the Seventh Circuit in *De Boer v. Village of Oak Park*.[139] Oak Park permitted public use of its Village Hall under the following conditions:

[138] Faith Center may rest uneasily with, but is not in conflict with, the decision of the Second Circuit in Amandola v. Town of Babylon. 251 F.3d 339 (2d Cir. 2001). In that case, the town of Babylon, New York maintained a Town Hall Annex with meeting rooms open for community use. The town's access policy was silent on whether the town's facilities could be used for religious purposes. Pastor John Amandola and the Romans Chapter Ten Ministries, Inc. requested use of the facility for Thursday evening Bible study and Sunday morning services. Permission was granted and the church began to meet in the Annex. After a complaint from a town resident that the facility was being used for church services, the church's permit to use the building was revoked. Id. at 341.

The church sued and a magistrate judge recommended a preliminary injunction barring the town from denying the church access to its facilities. The district judge, however, found that the plaintiffs did not establish irreparable harm and denied the requested injunction.

The Court of Appeals reversed the denial of a preliminary injunction and remanded for entry of a declaratory injunction in favor of the plaintiffs. Although the Second Circuit's decision in *Good News Club*, soon to be reversed, had permitted the exclusion of a religious use, the absence of a written policy foreclosed such exclusion.

> The forum, event or activity must: (1) be open to all citizens of the Village; (2) have as its primary purpose providing a civic program or activity which benefits the public as a whole; (3) not be based on or must not promote or espouse the philosophy, ideas or beliefs of any particular group, entity or organization[;] (4) be sponsored or put on by a local not-for-profit group or organization based within the Village; (5) not be sponsored or put on by a group or organization that has sponsored or put on a forum, event or activity in the Village Hall during the preceding twelve months, unless exceptional circumstances are involved; and (6) not be a fundraising event. [140]

In 1993, 1994 and 1995, the plaintiffs were permitted to use the Village Hall to conduct a prayer service, open to all, in conjunction with the congressionally declared National Day of Prayer. From 1996 through 1998, however, permission was denied and the plaintiff filed suit.

The district court granted summary judgment, holding that the Village had engaged in viewpoint discrimination. The use of prayer to convey a civic message was, the court held, indistinguishable from a discussion about civic leaders from a religious viewpoint.[141] In addition, the court held that the "promote and espouse" requirement was facially discriminatory[142] and that the requirement that the program or activity benefit the community as a whole granted village officials unbridled discretion in violation of the Free Speech Clause.

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[139] 267 F.3d 558 (7th Cir. 2001).

[140] *Id.* at 561.

[141] *Id.* at 563.

[142] *Id.* at 561.

> The [district] court disagreed with the defendants . . . that this . . . actually promoted viewpoint neutrality because it mandated that "no viewpoint or all viewpoints be expressed." Rather, . . . [the district court held] that viewpoint neutrality requires that government be indifferent to the viewpoints of speakers in its forums . . . . [143]

The plaintiffs held their event in 1999. Following that service, the village moved for reconsideration presenting a transcript of the event as "newly discovered" evidence. The district judge now held that the plaintiff's proposed use could be constitutionally excluded because the prayer service was primarily religious and not civic, citing the following aspects of the event:

> (1) the theme of the service was "Light the Nation with Prayer," and event leaders read and preached about passages from the New Testament and the teachings of Jesus Christ; (2) the audience was led in a hymn entitled "Heal Our Land," the verses of which contained various quotations from Jesus Christ; (3) lengthy segments of the service were "about the church itself," in which a pastor led groups in prayers for "the Church," which was defined as "the Body of Christ;" and (4) the group sang a song entitled "Shine, Jesus, Shine" and recited a closing prayer for the church and for government that praised Jesus Christ and asked for his help to "build back a great nation."[144]

Although the service also included prayer for the community, reflection upon the role of prayer in the founding of American government and preaching that touched on a number of contemporary issues, this did not transform it into a civic event. Because, the district judge

[143] *Id.* at 563.

[144] *Id.* at 564

concluded, "the line between civic and non-civic prayer is too fine to be drawn by the law," no form of prayer could be considered civic.[145]

The Seventh Circuit reversed. Relying on the Supreme Court's then-recent decision in *Good News Club*, it held that the Village's exclusion of prayer and worship as a form of communication about an otherwise permitted topic constitutes viewpoint discrimination:

> As did the school in *Good News*, here the Village attempts to distinguish between the discussion of permissible subject matter (here, civic issues) from a religious perspective and the use of prayer and religious instruction or worship to discuss or convey a message regarding such subject matter. As the Supreme Court has noted, this is a distinction without a real substantive difference. See *id.* at 2101; *Widmar v. Vincent*, 454 U.S. 263, 268 n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (noting that a distinction between religious speech and religious worship lacks "intelligible content"). [Emphasis supplied.][146]

The *DeBoer* opinion might be reconciled with *Faith Center* through the Seventh Circuit's observation that the Village could deny "permission to conduct worship services held as part of a faith's regular religious regimen and bearing no relationship to a specific civic purpose."[147] But the Antioch library's use policy was not limited to civic purposes and the Ninth Circuit's opinion

[145] *Id.* The district court refused, however, to vacate that portion of its judgment holding that the "promote or espouse" and "benefits the public as a whole" requirements were unconstitutional.

[146] *Id.* at 569.

[147] *Id.* at 570 n. 11.

seems to have placed worship in a distinct category such that there was no need to examine what, if any, message it might convey.[148]

4. Citizens for Community Values and Roman Catholic Foundation

Several district courts have addressed the question. In *Citizens for Community Values v. Upper Arlington Public Library Board of Trustees*,[149] a public library made its meeting rooms available on a first come, first served basis "for cultural activities and discussion of public questions and social norms."[150] The policy excluded use for "commercial, religious or political campaign meets" but permitted use by "committees affiliated with a church . . . provided no religious services are involved."[151]

[148] Faith Center is also arguably at odds with the district court's decision in Campbell v. St. Tammany Parish School Board, 2003 WL 21783317 (E.D. La. 2003) holding that a meeting that was "primarily" but not "merely" a religious service could not be excluded. That court acknowledged that [I]t is difficult to imagine any religious service, no matter how traditional or nontraditional that does not include sermons, homilies or lessons directed at moral and ethical conduct or how one should live one's life. It is likewise difficult to imagine any after school policy that could somehow limit its scope to preclude such basic topics for discussion without creating virtually no forum at all." Similarly, in *Roman Catholic Foundation, UW-Madison, Inc. v. Walsh,* a Roman Catholic organization at the University of Wisconsin challenged, among other things, the University's right to deny it funding for speech considered to be "prayer, worship and/or proselytizing." Relying on *Rosenberger*, the district judge granted the group's motion for a preliminary injunction as to that aspect of its claim.

[149] 2008 WL 3843579 (S.D. Ohio).

[150] Id.

[151] Id.

The plaintiff, a nonprofit religious group formed to "promote Judeo-Christian moral values for civil government" proposed a series of events called "Politics In The Pulpit" which would involve discussion of biblical and legal issues regarding involvement by the church in politics as well as a time for "petitionary prayer," "singing praise" and "giving thanks."[152] The latter eventually caused the library to deny the group permission to use its facilities.

[152] Id.

The Court held that "the signing and prayer elements" of the proposed use" do not constitute new religious worship, divorced from the otherwise permissible discussion elements . . . ,"[153] concluding:

Further, worship, proselytizing and sectarian religious instruction, and dialogue, discussion and debate, are not mutually exclusive. An activity can integrate elements of worship and discussion, proselytizing and debate, and instruction and dialogue. An activity that includes some worship cannot be excluded on the ground that it is not "dialogue, discussion or debate" if that activity in fact includes some dialogue, discussion, or debate. In short, before excluding an activity from the segregated fee forum pursuant to a content-based distinction, the University must explain specifically why that particular activity, viewed as a whole, is outside the forum's purposes.

[153] Id.

Although the Court seemed to believe that some form of worship might be "mere" and, therefore, excludable from forums like this, it cannot be identified by the presence of "worship-like" elements and, therefore, the state may not condition permission for an otherwise acceptable use on the excision of such activities.

In *Roman Catholic Foundation v. Regents of the University of Wisconsin System*,[154] the court held that the university could not categorically refuse to fund activities involving "worship," proselytizing or "sectarian religious discussion."[155] However, it did engage in a rather extensive discussion maintaining that the university could exclude forms of worship that it deemed outside the purpose of the forum because it did not consist of "dialogue, discussion or debate."[156] Thus, the university might exclude "mechanical praise."[157]

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As noted below, it is unlikely that there is much, if any, "mechanical praise" that is devoid of assertions about life in the world. While worship may or may not contain dialogue (although liturgical worship can be seen as type of a structured dialogue), it is also the case that secular meetings – particularly those of political groups – may consist of little more than affirmations of preexisting beliefs."[158]

B. The Significance of Worship in Public Places

1. Can The Question Be Avoided?

How important is this? The Supreme Court denied *certiorari* in *Glover* and the Second Circuit's retreat in *Bronx Household* forestalls, at least for now, a clear circuit split. Good practitioners moreover, may be able to get most uses approved by describing them as something other than worship and emphasizing something in the proposed use that can be described as communication on a matter of secular importance.[159]

[158] The court also suggested that the university may consider the degree to which worship contributes to a purpose of the forum. While forums such as the funding of student activities must distinguish between more or less meritorious uses, discounting uses because of the presence or absence of worship (what would be the secular equivalent of "mechanical praise?" seems fraught with the potential for viewpoint discrimination.

[159] There may be traditional religious uses that cannot readily be recast as something other than worship. Indeed, the dissenters to the denial of rehearing *en banc* in *Faith Center* argued that a distinction between worship and other

Still, it seems that this is an issue that is likely to return. School districts and other units of local government remain committed to permitting off-hour and other community use of public facilities. In light of the increasing diminution (particularly within American Protestantism), of traditional organized and well established churches, it seems likely that requests for generally available public spaces will continue.

A common tenet of the church planting movement, for example, is that a start-up church ought not to immediately acquire a permanent facility, both because an initial investment in bricks and resources may not be the wisest stewardship of resources and because early acquisition of space that becomes a sunk cost may be a limiting factor in congregational growth.[160]

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forms of "quintessentially religious" speech would discriminate in favor of "Evangelical and Unitarian" groups and against liturgically oriented denominations such as Episcopalians and Catholics. 480 F.3d at 901. It also suggested that the distinction would favor non-theistic traditions who might conduct "highly ritualistic" religious services that they would not characterize as worship. *Id.* at 901-02.

[160] See, e.g., Richard Tatum, "Church Rentals: Have Space Will Worship," September 29, 2002 (available on line at http://tatumweb.com/blog/2007/09/29/church-rentals). Professor Marci Hamilton takes a darker view of the movement suggesting that it seeks "proximity to public school students (and families) – and thus a launching pad to find converts" and to fight "what [churches] view as 'secularization' in public schools." Marci Hamilton, "Must Public Schools Allow Worship if They Allow Social and Civic Meetings?" Find Law's Writ, December 1, 2005 (available on line at http://writ.news.findlaw.com/hamilton/2005/201.html).

In addition, if we believe that there is a continuing trend toward religious diversity in the United States, then the rise of new congregations in nontraditional denominations may also contribute to a growth in groups who, lacking their own physical plants, may seek to worship in spaces made available for public meetings.

Although government could limit the uses of facilities in a way that is specific enough to exclude worship without regard to its character, *i.e.*, by limiting the forum to discussion of the public school budget and curriculum or for instruction on arts and crafts, it is unlikely to do so. Municipalities have an incentive to make facilities broadly available both to meet the needs of taxpayers and to build affinity with the community. (The latter seems particularly salient for schools.) It seems likely then that use policies will continue to be framed in a way that is broad enough to include worship because they are likely to be concerned with facilitating the meeting of community groups or the discussion of issues "of import to" the community.

One could, of course, expressly exclude church services and worship, but that does nothing more than restate the question: if worship can be characterized as a community gathering

or if it can be called a discussion of issues that are of importance to the community or that relate to culture, morals and values, then how can it be excluded?[161]

2. Is The Question "Resolved?"

The *Glover* majority, as well as Judge Calabresi, suggested that the *Good News Club* resolved the issue, drawing a constitutional distinction between worship and other forms of religious expression. This is, most charitably, an overstatement and, more bluntly, flat wrong. In *Good News Club*, Justice Thomas responded, in a footnote, to dissenting Justice Souter's claim that the proposed after-school meeting was an "evangelical service of worship calling children to commit themselves in an act of Christian conversion:

> Despite *Milford's* insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F.3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development,' " *id.*, at 511. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values. Justice Souter's recitation of the Club's activities is

[161] Some scholars have criticized the Court's public forum analysis because it fails to adequately account for instances in which the government is using private parties to accomplish a stated end, e.g., the promotion of tourism or the area economy. See, e.g., Mary Jean Dolan, *The Special Public Purpose Forum And Endorsement Relationships: New Extensions of Government Speech*, 31 Hastings Const. L. Q. 71 (2004). In this view, the notion of "content" is insufficiently broad to limit private messages to those that serve the government's chosen end. Whatever the merits of such a view, it cannot extend to a "purpose" to pick and choose disfavored messages in an otherwise open forum without reading the First Amendment out of channels of communication provided by the government. It is one thing to say that a municipal website is reserved for users who wish to promote the area to tourists and business. It is quite another to say that a school building is open for community discussion, save for those messages that the government does not wish to have propagated or associated with the state.

> accurate. See post, at 4—5 (opinion of Souter, J.). But in our view, religion is used by the Club in the same fashion that it was used by *Lamb's Chapel* and by the students in *Rosenberger*: religion is the viewpoint from which ideas are conveyed. We did not find the *Rosenberger* students' attempt to cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys. According to Justice Souter, the Club's activities constitute "an evangelical service of worship." Post, at 5. Regardless of the label Justice Souter wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in *Lamb's Chapel* and *Rosenberger*.[162]

The Court certainly observed that the activities planned by the *Good News Club* were not "worship divorced from any teachings of moral values." But this is quite different from an assertion that, worship could ever be so characterized or, if it can be, that the distinction is something within the cognizance of governments and courts , such that it can be properly excluded. To dismiss a potentially relevant distinction as inapposite because it is not present is not to embrace it. The issue, under standard notions of construction, is left for another day.

More important is the Court's rather unambiguous determination that the inclusion of something that might be called "worship" in the proposed activities does not justify exclusion as long as the proposed use also contains attributes within the purpose of the forum. The Good News Club's use of worship was, at least in part, in service of education regarding moral values.

[162] 533 U.S. at 112 n. 4.

Because that purpose was within the forum's stated purpose of "(1) instruction in education, learning, or the arts and (2) social, civic, recreational, and entertainment uses pertaining to the community welfare," the use of worship to serve that purpose did not justify exclusion. If a purpose that is within the scope of the forum is served, it appears that the service of that purpose by the trappings of worship, e.g., call and response, prayer, reading of sacred texts and preaching, will not justify exclusion.

IV. WORSHIP AS SPEECH WITHIN THE PURPOSES OF LIMITED PUBLIC FORUMS

If we are left with the question of whether worship is a constitutionally distinct category of speech, how are we to go about determining what about it, if anything, might comprise this distinction? Is worship its own form of communication or does it constitute a subject matter that can, in and of itself, be distinguished from those for which limited public purpose forums are open? In assessing whether worship does not possess the attributes of speech within a forum's purpose, one possibility is to look at what worshippers believe they are doing, drawing upon the characteristics of worship and its theology.

What follows is hardly an exhaustive examination of either and focuses largely on the Christian theology of worship with which I am most familiar. Nevertheless, given that in the United States, most applications for worship will, for the foreseeable future, continue to come from Christians and that there is little reason to doubt that worship in other (at least theistic) traditions shares many, if not all, of the same attributes, I believe that this undertaking remains instructive. Moreover, even if all worship does not share these attributes, the difficulties attendant upon judicial divination of when it does and does not, combined with the weakness of the rationale for excluding it, suggests that we not make the effort.

A. Does Worship Communicate?

It is helpful to break this proposition apart. The notion that worship does not involve communication among or to the participants seems frequently, if not almost always, wrong. One need only attend a typical service of worship to understand that the group is affirming among its members – and communicating to newcomers – certain truths. These truths take at least two forms.

1. Talk About God.

One set of truths clearly relates to claims about an extra-material reality, i.e., about God and God's relation to humankind. A classic example might be the Nicene Creed which affirms a number of assertions about the divinity of Christ and his soteriological significance. Theologians have long remarked on the relationship between what is believed and what is prayed. The phrase "*lex orandi, lex credendi*, usually translated as "the law of prayer is the law of faith" is often attributed to Saint Prosper of Aquitane. Prayer, in this view, states and conveys the deposit of belief.[163] The former both reflects and acts upon the latter.[164] For our purposes, what is important is that something is being communicated between, as opposed to simply from, the congregants.

This may, in and of itself, be sufficient to place worship within the boundaries of many community use policies. Seen in this way, worship is certainly a cultural and educational activity, albeit one concerning itself with matters of faith.

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[163] See, e.g., CATECHISM OF THE CATHOLIC CHURCH, ¶ 1124, at 291 (1994). ("the Church's faith precedes the faith of the believer who is invited to adhere to it. When the Church celebrates the sacraments, she confesses the faith received from the apostles – whence the ancient saying: lex orandi, lex credendi (or: legem credendi lex statuat supplicandi, according to Prosper of Acquitane.")

[164] Geoffrey Wainwright argues that this interaction is reflected in the linguistic ambiguity of the Latin in which "it is equally possible to reverse subject and predicate and so take the tag as meaning that the rule of faith is the norm for prayer: what must be believed governs what may and should be prayed." GEOFFREY WAINRIGHT, DOXOLOGY: THE PRAISE OF GOD IN WORSHIP, DOCTRINE AND LIFE 218 (1980).

This is particularly so if the purpose of the forum is to facilitate the development of community groups and other intermediary institutions. As Professor Kathleen Brady has explained, the notion that religion is a private and individual matter, while informing much of our Establishment Clause jurisprudence, is most recently associated with "modern" or "liberal" theology.[165] More recently, post-modern theology tends to see religion as rooted in the particular traditions, history and interaction within particular communities. Professor Brady writes that "[i]n the postliberal view, the survival of religion depends on healthy religious communities whose symbols, rituals, and values can function as an integral part of the individual's conduct and thought. If religious belief systems no longer function as the central interpretative schemes within which individuals understand their lives, then religion will wither and die."[166] On this view, the communal affirmation and sharing of religious truths are vital to the maintenance of faith because they help to establish a community within which that faith is central.

[165] See, generally, Kathleen A. Brady, FOSTERING HARMONY AMONG THE JUSTICES: HOW CONTEMPORARY DEBATES IN THEOLOGY CAN HELP TO RECONCILE THE DIVISIONS ON THE COURT REGARDING RELIGIOUS EXPRESSION BY THE STATE, 75 NOTRE DAME L. REV. 433 (1999).

[166] *Id.* at 498.

If theologians and sociologists of religion tell us that the purpose and impact of worship is to build up the community of believers and to forge ties among those who participate,[167] then it is not clear why the state may provide a place for private individuals who choose to build community and forge ties around quilting or environmental politics and not religion. Much of what takes place in worship is expressly directed toward or at least has an effect toward this end, *i.e.*, the "passing of the peace" in Christian liturgical traditions or, in many traditions, prayers of the people in which congregants hold up the concerns of the community. While these prayers may be directed to God, they are heard by, and presumably build bonds between, the congregants. If that's so, and if the purpose of the forum is to make public facilities available for the creation of affinity groups and communities of common interest, then groups who gather to worship are performing a function within the forum's purpose.

Therefore, to the extent that policies are directed at facilitating the growth and of intermediary institutions and community groups, worship once again seems within the purpose of the forum. For those forums so broadly defined, there seems to be little justification for

[167] See, e.g., KATHRYN TANNER, THEORIES OF CULTURE: A NEW AGENDA FOR THEOLOGY 52 (1997); GEORGE A. LINDBECK, THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POST LIBERAL AGE (*1984)*.

excluding the encouragement of religious institutions, while facilitating the development of secular ones. Such a practice would seem to step upon the Supreme Court's insistence on neutrality between religion and irreligion as reflected in *Widmar* and the *Lamb's Chapel* trilogy. To say that all groups but religious ones may avail themselves of the forum for this purpose constitutes discrimination against religious groups. Putting aside (for now) whether such disparate treatment can be justified by the need to avoid a potential Establishment Clause violation, this certainly seems to be viewpoint discrimination.

2. Talk About the World.

But let's imagine that these forums (or phrases like "educational and cultural purposes") are defined more narrowly. Assume that they are limited to communication about how we ought to live in the here and now. This may be what Judge Paez meant in suggesting that worship is not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter.[168]

[168] Faith Center, 462 F.3d t 1210.

May the government exclude communication that is limited to or, in some sense, overly concerned with, extra-temporal matters? Can we say that perspectives on how we ought to live are permitted, but "pure" religious communication unaccompanied by sufficiently explicit claims regarding its temporal application is outside the scope of the forum? In this view, to make an assertion about the existence and nature of the Trinity, for example, is to make a religious claim, but, in and of itself, may not say much about how we live.[169]

Of course, the temporal is unlikely to be so neatly divided from the eternal. As we have seen, religious people may, for example, go on to argue that claims about the Trinity have deep implications for the manner in which we should live. The postulation of a God consisting of three persons has been the occasion of extensive elaboration on the ways in which persons ought to live in community.[170] That one of these persons is claimed to have become incarnate – to

[169] Of course government must be evenhanded about this and, if it is to restrict communication to temporal matters, then it presumably must exclude claims about the absence of God.

[170] Cite.

have become, in fact, a human being – can be seen to have profound implications for the value of human life and the created order as well as for the equal dignity of human persons.[171]

Few theological claims are without implication for life in the world. Gordon Lathrop, writing on the ecological and economic implications of the Christian Eucharist, argues that worshippers ought to (and undoubtedly many do) attend to the lesson implicit in the divine provenance, communal nature and spareness of the Christian Eucharistic meal:

> Participation in the eucharist ought to be seen as fiercely questioning any easy cultural assumptions: that what we are is equal to what we own; that we may have all the energy we want, that what vehicle we drive is nobody's business but our own; that we should have a great variety of foodstuffs and clothing, building materials and consumer goods, drawn from all over the world at very low prices; that other people's salaries or poverty are not connected to our habits of consumption. Reminding each other of our common baptism will involve both the eucharist, the great feast-within-boundaries, and the continued discovery that these assumptions are lies.[172]

Perhaps we can draw a distinction between the assertion of proposition based upon (or with implications for) religious presuppositions and the religious presuppositions themselves, i.e., the assertion of beliefs about God or other theological propositions. On this view, what is

[171] See, e.g., DIETRICH BONHOEFER, THE COST OF DISCIPLINESHIP, 321 (". . . any attack even on the least of people is an attack on Christ, who took on human form.")

[172] GORDON LATHROP, HOLY GROUND, 101 (2003). Pope Benedict XVI, in his Apostolic Exhortation, *Sacramentum Caritatis*, also emphasizes the implications of the Eucharist for recognition of the fraternal connection between humans (¶ 88-89) and regard for the created world (¶ 92).

constitutionally significant is the assertion of "pure" religious claims. It is the nature of those claims – and not their implications for life in the world – that may (or perhaps must) be prohibited to speakers, or excluded from forums, too closely associated with the government. This type of distinction is not unknown in addressing the interplay of church and state. Indeed, it is precisely such a distinction that explains, in the view of some scholars, why government may not promote or, under certain circumstances, even countenance prayer, while it can itself engage in speech that contradicts or is actively hostile to the faith of certain citizens.[173] As long as we are not speaking directly about God, the fact that what we are saying about secular matters has profound implications for various beliefs about God does not matter. But, if we are speaking directly about God or matters of faith, we have moved into a different category of discourse – at least for Establishment Clause purposes.

My own view is that this distinction, particularly in the context of free speech analysis, is recommended more by its convenience than its logical force. The distinction between theological claims pregnant with temporal significance and the more explicit exposition of how they apply to life in the world seems tenuously related to any real concerns about religious liberty or establishment, such that we might treat them as categorically distinct.

[173] See, e.g., Steven H. Shiffrin, LIBERALISM AND THE ESTABLISHMENT CLAUSE, 78 CHI.-KENT L. REV. 717, 726 (2003) (arguing that communication that "logically entails" the negation of a theological proposition need not have that "social meaning.") Douglas Laycock, CONTINUITY AND CHANGE IN THE THREAT TO RELIGIOUS LIBERTY: THE REFORMATION ERA AND THE LATE TWENTIETH CENTURY, 80 MINN. L. REV. 1047, 1082 (1996). As long as schools have not taught "that there is no God," the fact that they have taught values and methods of reaching them that is incompatible with some students' religious views is not problematic.")

If our concern is about the protection of those who do not share the religious beliefs expressed in the forum, those who object to a set of religious presuppositions will not feel much differently if groups meeting in the local school building limit themselves to discussion of the implications of those premises rather than a "pure" consideration of the premises themselves.

If our concern is about the effect that a government provided forum may have on the religious choices of its citizens[174], the distinction does not obviously serve the neutrality required by *Widmar* and the *Lamb's Chapel* trilogy. Particularly if a forum permits the expression of views about ultimate meaning and the prime source of values, the exclusion of religious claims about these things ("There is a God," "He gave us the Bible [or the Koran]"), would seem to violate the requirement of neutrality.

In any event, few worship services will stop at the statement of fecund theological concepts without more.

B. Worship and the World

[174] See. e.g., Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VIRGINIA L.REV. 51 (2008)

Characterizing worship as any one thing is a fool's errand. Nor can worship be reduced to a form of communication about the material world. But if a brief examination of the theology of worship suggests that it is likely to convey information about that world, it seems unlikely that worship will not communicate content within the meaning of most public forums.

Theologian Hughes Oliphant Old divides Christian worship into a variety of categories, each of which may potentially involve assertions about life in the world.[175] *Epicletic doxology*, according to Old, is an invocation of the divine.[176] The worshipping community brings its needs to God but, in doing so, it defines those needs, not only for the God whose mercy and care the community invokes, but also for the community itself. So, as Old points out, by citing the prayer of the ancient Israelis for deliverance from bondage in Egypt, this is likely to occur "when we discover we are creatures of need. . . ."[177] In other words, when a congregation brings to their

[175] See, generally, HUGHES OLIPHANT OLD, THEMES AND VARIATIONS FOR A CHRISTIAN DOXOLOGY: SOME THOUGHTS ON THE THEOLOGY OF WORSHIP (1992).

[176] Old, at 17.

[177] Old, at __.

God some temporal need, they are communicating something about what in the world requires change.[178]

For example, standard intercessory prayers in the Episcopal Church's Book of Common Prayer hold up the concerns of the poor and oppressed and call for proper stewardship of the Earth.[179] It is not uncommon for liturgical prayer to direct adherents to act in the world.[180]While Christians of differing political persuasions might disagree as to the meaning of these imperatives, that they are imperatives is a temporal – and civic – assertion.

[178] Although one could argue that, in calling for a Divine resolution, worshippers are not proposing themselves to do anything about it, this seems an overly restrictive view of how people identify and respond to problems. Much of our political speech, for example, does not focus on solutions as much as it identifies problems. While one could dismiss this as pointless harping, viewpoint neutrality would seem to require that all "pointless harping" be treated equally and, in any event, the dismissal would seem to ignore the iterative way in which people and communities identify and respond to problems.

[179] See, e.g., THE BOOK OF COMMON PRAYER AND ADMINISTRATION OF THE SACRAMENTS AND OTHER RITES AND CEREMONIES OF THE CHURCH (Oxford University Press 1990), p. 383 (noting that the prayers of the people are offered "with intercession for . . . " "[t]he Nation and all in authority:" "[t]he welfare of the world," "[t]he concerns of the local community;" and "[t]hose who suffer and those in any trouble.") See, e.g., p. 384 ("For the poor and the oppressed, for the unemployed and for the destitute, for prisoners and captives . . . .") (The Prayers of the People, Form I); 386 ("I ask your prayers for the poor, the sick, the hungry, the oppressed, and those in prison . . . .") (Form II); 388 ("Give us all a reverence for the earth as your own creation, that we may use its resources rightly in the service of others . . . .") (Form IV); (For a blessing upon all human labor and for the right use of the riches of creation, that the world may be freed from poverty, famine and disaster . . . .") (Form V); 392 ("For the just and proper use of your creation.") (Form VI). Similar sentiments are expressed in The Great Thanksgiving. See 370 (referring to this "fragile Earth, our island home") (Eucharistic Prayer C); 374 ("To the poor, he proclaimed the good news of salvation; to prisoners, freedom . . . .") (Eucharistic Prayer D).

[180] See, e.g., BOOK OF COMMON PRAYER 376 ("If you are offering your gift at the altar and there remember that your brother has something against you, leave your gift there before the altar and go; first be reconciled to your brother, and then come and offer your gift.") (Offertory sentence, quoting Matthew 5:23.)

Indeed, one could see the collection of alms, often taking place in the course of worship, as a form of proclamation:

> A positive contribution of twentieth-century American Protestantism to the theology of worship has been its development of the concept of stewardship. The giving of alms for the support of suffering, the poor and the neglected has become an increasingly important liturgical concern. This is expressed by the fact that the collection of alms is made during the service of worship rather than before or after.[181]

The significance, as Old points out, is that "[f]aithful Christian worship issues in generous Christian service."[182]

Kergymatic doxology is worship involving proclamation, *e.g.*, of witness to others. This proclamation may be of another worldly truth, but it can also relate, directly or by analogy, to temporal affairs. Again, Christian concepts of divine incarnation, or of the death and resurrection of Christ as an act of universal salvation, have significant implications for human dignity and equality. These implications may simply be pregnant in their assertion as doctrinal claims, or as implications from theological practice. For example, Geoffrey Wainwright's highly acclaimed work on Christian worship, Doxology, argues that Christian worship provides a

[181] Old, at 109.

[182] Old, at 110.

foundation for *Liberte, egalite, fraternite*, the slogan of the French Revolution and a summary of "the best aspirations of modern western secular humanism."[183] For Wainwright:

> The Christian liturgy provides an opportunity and a pattern for forgiveness, reconciliation and mutual love. Eucharistic rites traditionally include the confession of sins against others, prayers of intercession for people, the exchange of peace, and the sharing of the one bread and the one cup in table fellowship.[184]

These principles may frequently be brought home by expository preaching. In fact, for Old, preaching belongs to the "kerygmatic dimension of worship."[185]

Prophetic doxology involves the making of claims about the world to come – perhaps out of time but also within it.[186] Wainwright notes, as a particular and historic example, the significance of worship for African-American Christians, citing the work of black theologian James Cone, who saw the eschatology of the African-American church congregation as one in which people believed that "the Spirit of Jesus is coming to visit them in the worship service

[183] GEOFFREY WAINWRIGHT, DOXOLOGY: THE PRAISE OF GOD IN WORSHIP, DOCTRINE AND LIFE, 415 (1980).

[184] Wainwright, at __.

[185] Old, at 56.

[186] Old, at 91.

each time two or three are gathered in his name, and to bestow upon them a new vision of their humanity."[187] Cone wrote:

> The Holy Spirit's presence with the people is a liberating experience. Black people who have been humiliated and oppressed by the structures of white society six days of the week, gather together each Sunday morning in order to experience a new definition of their humanity. The transition from Saturday to Sunday is not just a chronological change from the seventh to the first day of the week. It is rather a rupture in time, a kairos-event which produces a radical transformation in the people's identity. The janitor becomes the chairperson of the Deacon Board; the maid becomes the president of Stewardess Board Number I. Everybody becomes Mr. and Mrs., or Brother and Sister. The last becomes first, making a radical change in the perception of self and one's calling in the society. Every person becomes somebody, and one can see the people's recognition of their new found identity by the way they walk and talk and 'carry themselves'. They walk with a rhythm of an assurance that they know where they are going, and they talk as if they know the truth about which they speak. It is this experience of being radically transformed by the power of the Spirit that defines the primary style of black worship. This transformation is found not only in the titles of Deacons, Stewardesses, Trustees, and Ushers, but also in the excitement of the entire congregation at worship. To be at the end of time where one has been given a new name requires a passionate response with the felt power of the Spirit in one's heart.[188]

Cone cited a traditional African-American prayer:

> And now, Oh, Lord, when this your humble servant is done down here in this low land of sorrow; done sitting down and getting up; done being called everything but a child of God; Oh, when I am done, done, done, and this old world can afford me a home no longer, right soon in the morning, Lord, right soon, meet me at the River of Jordan, bid the waters to be still, tuck my little soul away in your chariot, and bear it away over yonder in the third heaven where every day will be a

[187] Wainwright, at 418-19.

[188] Wainright, at 419, citing J. H. Cone, *Sanctification, Liberation and Black Worship*, THEOLOGY TODAY 139-52 (1979).

> Sunday and my sorrows of this old world will have an end, is my prayer for Christ, my Redeemer's sake, and Amen and thank God.[189]

As Wainwright puts it, only an "insensitive fool" would dismiss this as "escapism" or "other worldliness."[190] One of the most significant Old Testament prophets was Amos whose authority was invoked by the Rev. Dr. Martin Luther King in his speech on the steps of the Lincoln Memorial on August 28, 1963, when he yearned for the day when "justice rolls down like waters and righteousness like a mighty stream."[191] Had Dr. King slipped into worship on the Washington Mall such that his speech might be excluded from a forum on civil rights? If the answer is yes, the question is wrong.

Old defines *wisdom doxology* as, for Christians, a "disciplined study of the Scriptures as the revelation of the divine Wisdom that enlightens all human life."[192] It is not unusual – it is

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[189] Wainright, supra, at 420, citing L. HUGHES AND A. BONTEMPTS, BOOK OF NEGRO FOLKLORE, 256 (1958).

[190] Wainwright, supra, at 420.

[191] Martin Luther King, Jr., "I Have A Dream," text available at http://www.yale.edu/lawweb/avalon/treatise/king/mlk01.htm (accessed March 6, 2008). See Amos 6:24.

[192] *Id.* at 64.

typical – for religious adherents to believe that their sacred texts say something about how to live, be it calls to forgiveness, charity or prescriptions about family life.

Finally, *covenantal doxology* – worship that emphasizes the community and that is a self-conscious communal act – is part and parcel of the formation of religious communities. While worship of and service to the divine might be a private and individual matter, for many believers, it is not.

The earliest exposition of Christian worship, Paul's First Letter to the Corinthians, made clear that worship was to be understood as a corporate covenant with Christ with profound implications for how the members of the body ought to treat one another:

> Now Paul turns to a particular problem in the celebration of the Lord's Supper. The Supper had become a feast in which those who had plenty feasted while the poorer members of the community went hungry. In the covenant bond, those who have plenty must share with those who do not.[193]

Protestant theologian Karl Barth argued that the theological claims of Christianity and its implications could not be kept to oneself. Preaching, he argued, was a message that bore repeating:

[193] Old, at 118.

> It is basically an expository word, the explaining and applying of Holy Scripture as the primal witness to Jesus Christ which underlies and sustains all the rest. It is when I speak a word like this to my neighbor that I fulfill my responsibility to Him.[194]

Of course, it can be argued that these messages are likely to possess varying degrees of specificity and detail. Admonitions to "love" and "forgive" and care for the least of these are extremely general and more evocative than prescriptive. Perhaps it can be said that worshipful invocations to charity will convey less hard information (but perhaps prompt more action) than a lecture on welfare reform. But this is unlikely to distinguish religious worship from other uses of the forum, such as the Boy Scouts' promotion of young men who are "physically strong, mentally awake and morally straight."

Of course, one could make the objection that not all worship may have these characteristics, say silent adoration of the sacrament or Muslim prayers recited entirely to one self (although they may have a community building character and may constitute symbolic communication to or among the participants). At this point, however, the issue of judicial

[194] KARL BARTH, CHURCH DOGMATICS, 4 vols., ed. Thomas F. Torrano, trans. Geoffrey W. Bromily (1936-1969), I/Z at 443.

competence asserts itself. How is a court to tell? Can we trust courts to make such distinctions about religious traditions that may be foreign from or even hostile to their own?[195]

V. IS WORSHIP ITS OWN CATEGORY OF COMMUNICATION?

A. Is There Something About Worship?

But what of the fact that worship may possess something "extra," whether it be, as Judge Calabresi would have it, "adoration" or some form of (at least claimed) communication with, or assertions about, the divine. There is certainly something to that claim.

Indeed, the frequent use of the term "doxology" (generally meaning "praise of God") to refer to the theology of worship, confirms this. Certainly those who worship believe that, however much worship may communicate about worldly matters, it is qualitatively different than a lecture or roundtable discussion. For most, worship also constitutes communication with or even the presence of the divine. Maybe this could justify treating worship as a distinct category of speech. It is not that it cannot constitute communication of subject matter within the scope of the forum, but that the way in which it communicates that subject matter – or what it couples that

[195] See, e.g., Widmar, 454 U.S. at 270.

communication with – justifies treating worship differently. Can we say that there is something about religious speech that not only makes theological claims but directs them to a God that others believe may not be there (or who, they believe, may not wish to be addressed in this way) that places it into a different category of communication?

There are at least three difficulties here. The first is doctrinal. After *Lamb's Chapel*, *Rosenberger* and *Good News Club*, the argument that this "something extra" – be it the assertion of theological truths or the invocation of, or direction of communication to, God – does not, in and of itself, remove communication from the scope of a forum in which it would otherwise fit. In other words, the mere presence of these characteristics seems to be an impermissible basis for the relegation of speech into a separate category of content. The *Lamb's Chapel* trilogy seems more concerned with the presence or absence of temporal communication than its accompaniment by prayer or theological content. *Rosenberger*, as we have seen, involved "a straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral teachings derived from the teachings of Jesus Christ."[196] *Good News*

[196] 515 U.S. at 867 (Souter, J., dissenting).

Club involved, essentially, an "evangelical service of worship,"[197] albeit one that conveyed teachings on moral and character development.[198] If that is so, then the distinction of worship would be a function of determining whether prayer and other attributes of worship predominate.

Second, if we accept this aspect of *Lamb's Chapel* and its progeny as fixed, it is difficult to know where mere religious perspectives on secular subjects end and worship with secular implications begin. Imagine, for example, a speaker who argues that "our loving God calls us to concern for the poor" and ends by urging that her audience "in silence, hold that concern in our hearts." When we must accept that mere presence of things like worship is not enough – that we must decide whether a proposed use involves "too much" worship and not enough temporal communication – the task becomes that much harder.

It is not that the distinction is meaningless. There may be a discernable difference between a speaker detailing the ways in which the New Testament creates a moral imperative of concern for the poor and one who calls upon God to open the hearts of the rich and to grant the hungry and the homeless delivery from material need. But it may not be a difference that we

[197] 533 U.S. at 138 (Souter, J., dissenting).

[198] *Id.* at 111.

want governmental agencies and courts, who we charge to be neutral about and among religions and whose dictates have the force of law, to make. While the presence of hard questions is a rather common feature of legal rules and principles, the nature of this question and the work required to answer it would involve courts in an assessment of religious doctrine and language.

Of course, courts do make distinctions between the ways in which government is permitted to speak about religion.[199] Schools can teach courses in comparative religion, describing, but not advocating, doctrine.[200] Although that distinction could be adopted here, it does not quite fit the purpose of most state-sponsored forums. We are now concerned with government rather than private speech and there is a material difference between self restraint and censorship. These forums normally do not require neutrality toward the topic to be discussed. If, for example, the purpose of the forum is "moral and character development," we can expect speakers to assert that certain moral propositions and character attributes are good. In other words, advocacy is permitted.

[199] See, e.g., Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (U.S. 1963); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 127, n.3 (U.S. 2001) (Scalia, J., concurring).

[200] Schempp, 374 U.S. at 225.

Once we abandon neutrality, the judicial task is dramatically changed. A judge is no longer attempting merely to determine whether a speaker is advocating something about which the court will make no judgment, but trying to discern what that something is and how to characterize it within categories (worship or not) requiring an assessment of their theological significance. While it is possible to imagine a judicial form of content analysis in which courts attempt to assess the relative proportion of "pure" and "applied" theology in a proposed use, it is hard to imagine the judge who would wish to undertake it and unlikely that the Supreme Court would countenance it. The risk of entanglement and the danger of cultural or religious bias in such an analysis suggest that it is a task left unattempted.

B. The Preservations of Social Peace and Nonestablishment.

But even if we put this difficulty aside, what justifies treating religious advocacy that constitutes worship (by including this "something extra") differently than that which does not? It cannot be, as we have seen, that it does not communicate messages of secular concern with temporal implications. What is it about worship that might justify its exclusion? What I suspect motivates most school districts and municipalities to restrict public access for worship is 1) a fear

of divisiveness or 2) a commitment to a vaguely understood concept known as the separation of church and state.

1. *Avoiding Divisive Uses*.

Justice Stevens argued that governmental bodies – or at least school districts – are free to bar meetings designed to recruit members to, at least, political and religious groups.[201] "Such recruiting meetings may," in his view, "introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission.[202] Putting aside the fact that *Good News Club* apparently forecloses such an exclusion, the distinction between advocacy of a religious perspective on a particular issue and an invitation to adopt that perspective is unclear.

Nor does it seem possible to distinguish that proselytization or recruiting which involves "divisive" or "controversial" topics from those which are not.[203] Perhaps a government could exclude any use that is likely to be controversial, but it seems unlikely that many will. Almost

[201] Good News Club, at 131.

[202] *Id.* (citation omitted).

[203] See, e.g., DeBoer v. Village of Oak Park, supra, 267 F.3d at 571 (cannot exclude all speeches that "promotes or espouses" a point of view).

any such exclusion is likely to be less than complete, raising the prospect of viewpoint discrimination.

In any event, a principle requiring the even-handed exclusion of everything that might be deemed controversial or divisive hardly seems to be workable. There is little of any significance that will not be controversial to some and excluding only that which is objected to by some significant number would seem to constitute the imposition of at least a broad form of orthodoxy. At least when government does not seek to convey a message of its own, it is difficult to see how this would not constitute viewpoint discrimination.

It seems, then, that a governmental body would have to argue that religion is uniquely divisive. In his recent book, Active Liberty, Justice Breyer makes such an argument[204] and there is a long tradition of such claims in Establishment Clause jurisprudence and commentary.[205]

[204] STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION*, 120-21 (Vintage Books 2006) (2005).

[205] Van Orden v. Perry, 125 S.Ct. 2854, 2868 (2005) (Breyer, J., concurring; Zelman v. Simmons-Harris, 536 U.S. 639, 715-16 (Souter, J., dissenting). See also, Steven G. Gey, UNITY OF THE GRAVEYARD AND THE ATTACK ON CONSTITUTIONALISM SECULARISM, 2004 BYU L. REV. 1005, 1017.

There are substantial criticisms of such arguments[206] and it is far from clear that a majority of the Court believes that religion is uniquely divisive.

More to the point, this view has not prevailed when it comes to excluding even quintessentially religious private expression from neutrally available public facilities. Justice Breyer, after all, dissented in *Rosenberger* and *Good News Club*. As we have seen, worship would seem to fulfill the purposes generally associated with public forum. It's not at all clear why worship – generally conducted at a higher level of generality - would be more divisive than, say, an evangelical lecture on same sex marriage.

2. *Avoiding establishment (or its appearance)*

Can the exclusion of worship be justified by the desire to avoid an Establishment Clause violation? The Supreme Court has certainly suggested that avoiding an Establishment Clause

[206] See, e.g., RICHARD W. GARNETT, RELIGION, DIVISION AND THE FIRST AMENDMENT, 94 Geo. L. J. 1667 (2006) (arguing that concerns about "political division along religious lines" should not supply the enforceable content of nonestablishment). It is far from obvious that religious differences are uniquely fundamental or divisive. See, e.g., Noah Feldmen, FROM LIBERTY TO EQUALITY: THE TRANSFORMATION OF THE ESTABLISHMENT CLAUSE, 90 CAL. L. REV. 673, 717 (2002).

violation might be a compelling state interest,[207] although in *Widmar* and the *Lamb's Chapel* trilogy, it declined to find one.

The doctrinal tests for an Establishment Clause violation are, of course, imprecise and susceptible to manipulation. Under the Court's on-again, off-again test in *Lemon v. Kurtzman*, it seems unlikely that there would be an Establishment Clause problem.

For example, whether the government's provision of public access in a way that would permit worship serves a secular purpose depends on the level of generality with which one describes the policy. If the question is whether there could be a secular purpose in permitting worship on public property, one's initial reaction is to say "no." But that would be the appropriate test only if the government had decided to permit public access for worship only. The proper question, as *Lamb's Chapel*, *Rosenberger* and *Good News Club* make clear, is whether there is a secular purpose in a policy that would permit a broad variety of communication that might include worship and, as noted above, it would seem that there is. The

[207] See, e.g., Good News Club, supra, 533 U.S. at 112-113; Widmar v. Vincent, supra, 454 U.S. at 271.

Court has, moreover, recognized that avoidance of the appearance of discrimination against religion may constitute a constitutionally permissible secular purpose.

Such a policy would neither advance nor inhibit religion. As others have noted, because this prong of the *Lemon* test is disaggregated,[208] the outcome can once again be manipulated by the level of generality with which one views the policy. Neutrality toward religion can be advanced as opposed to a policy that would exclude it in favor of an entirely secular forum. On the other hand, that exclusion could be said to inhibit religion. *Lamb's Chapel* and its progeny seem to stand for the proposition that including religion pursuant to some neutral and noncoercive policy is not in and of itself an establishment clause violation such that excluding it can be justified by that basis.

The potential for entanglement, of course, seems greater if government actors undertake to determine what it is and is not worship. Of course, as some have pointed out, there are areas in which we make distinctions about religious speech, e.g., we distinguish speech about government speech about religion from a secular perspective from government proselytization or

[208] See Douglas Laycock, FORMAL, SUBSTANTIVE AND DISAGGREGATED NEUTRALITY, 39 DEPAUL L. REV. 993 (1993).

government endorsement of religion. But this is a broader – and more easily discerned category than the distinction between religious speech about secular topics (which may endorse and seek to persuade adherence to a religious worldview) and worship without secular content. While it may be easy to determine whether one is "worshipping" in the sense of praising a divine being or presence or seeking to communicate with some extra material being or reality, it is much tougher to say whether or not that praise or communication has some import for how one is to live in the world. In fact, since most forms of worship will probably include something that can be construed as such a claim, the real question is likely to be whether those claims are sufficiently substantial to fall within the purpose of the forum. It is hard to imagine anything that is more susceptible to entanglement and to the potential for application biased by a judge's preexisting religious presuppositions.

One might reframe the state's Establishment Clause concern in terms of the endorsement test. As framed by Justice O'Connor, religious expression by the state is forbidden when its purpose or effect is to endorse religion or nonreligion, or one religion over another.[209]

[209] In McCreary, the Court came close to suggesting that impermissible endorsement will almost always have a "purpose" to advance religion or, more accurately, the "reasonable observer" would perceive a purpose to take sides on religious questions. 125 S.Ct. at 2735 ("If someone in the government hides religious motive so well that the

Endorsement, in her view, "sends a message to non-adherents that they are outsiders, not full members of the political community."[210] That message is to be assessed in terms of a hypothetical reasonable observer "familiar with the text and background of both the First Amendment and of the challenged practice."[211]

Doctrinally, *Lamb's Chapel* and its progeny foreclose an argument that the expression of religious sentiments on public grounds amounts to an endorsement. While worship may be higher octane religion, our reasonable and knowledgeable observer was apparently presumed to know why it has been permitted, *i.e.*, pursuant to a neutral policy of public access.[212] While a closer case may be presented where worship activities might be observed by others, *Good News*

'objective observer' . . . cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking sides."). But see Zelman v. Simmons-Harris, 536 U.S. 639, 707 (2002) (Stevens, J., dissenting) ("And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sale of channeling money into religious institutions.").

[210] County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 625 (1989) (quoting Lynch, 465 U.S. at 688).

[211] Some courts have seen the endorsement test as a refinement of the first two prongs in Lemon (i.e., "purpose" and "effect"). See Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 770 (7th Cir. 2000). Other courts have considered it to be a refinement of the effects prong. See ACLU v. Ashbrook, 35 F.3d 484, 503 (6th Cir. 2004). Again, in McCreary, the Court came close to eliding the two, suggesting that there is unlikely to be an "effect" without a "purpose." The endorsement test has attracted a fair number of critics. See, e.g., Richard M. Esenberg, *You Cannot Lose If You Choose Not To Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS L. REV. 1 (2006) and sources cited therein.

[212] In any event, a less restrictive alternative would be to merely require, as the Seattle Public Schools do, that "[a]ctivities of such groups should be clearly separated from school-sponsored activities so the School District does not support, or appear to support, the practice of religion." (Use of School Facilities By Religious Groups, E55-00, available on line at http://www.seattleschools.org/arpa/policies/e/e5500.pdf).

Club involved an after school program, suggesting that one can run a "quintessentially religious" program in fairly close proximity to school children without raising endorsement concerns.

In one sense, *Glover* may have been a more difficult case than *Good News Club* in that the religious activity in the Contra Mesa public library was to take place while other users of a public facility would be present, while at least most (but perhaps not all) users of the Milford School would not be present for the meeting of the *Good News Club*. But if our knowledgeable observer is presumed to know that religious perspectives on secular subjects – even those that claim the perspective to be true and which might be accurately characterized as an "quintessentially religious" involving prayer and singing and calls for religious commitment – are not endorsed by the government but merely permitted pursuant to a neutral policy of public access, then it is unclear why she would not know the same thing with respect to something which we might be willing to characterize as religious "worship."

Although religious services are often periodic and regular and, it is feared, may come to dominate the forum, the regular and repeated meetings of the Good News Club did not amount to endorsement. In any event, permitted an equal chance for all groups to have access to a forum is

a matter of reasonable time place and manner regulation. It does not require the exclusion of any particular group but evenhandedness toward all.

But this doesn't completely dispose of an Establishment Clause justification. Perhaps support for the exclusion of worship can be found in the Supreme Court's decision in *Locke v. Davey*,[213] in which the Court held that the state of Washington could refuse to permit the use of a generally available scholarship program to fund preparation for the ministry without violating a student's free exercise rights. The Court had earlier found the availability of such scholarships for such study would not violate the Establishment Clause,[214] but held in *Locke* that there is a "play in the joints" permitting the state to decline to fund religious activities that it would be permitted to fund.[215]

Locke rests uneasily with the *Lamb's Chapel* trilogy because it appears to permit departure from neutrality to exclude a religious use that is arguably comparable to permitted secular uses.

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[213] 540 U.S. 712 (2004).

[214] Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481 (1986).

[215] Locke, 540 U.S. at 718-19.

Some have argued that *Locke* means that government may discriminate in favor of a secular state.[216] Such a broad reading is hard to reconcile with much of the Court's recent jurisprudence mandating equality between religion and irreligion,[217] and others have seen *Locke* as a case about whether or not there is a constitutional compunction to spend money on religiously related entities.[218] Opening forums presumably requires the expenditure of some resources as well, although once it is open, it presumably costs little to extend it equally to religious entities. Time is finite and facilities can only be used so many hours of the day. Funding those who seek to study for the ministry clearly requires the government to spend more than it otherwise would.

[216] See, e.g., Laura S. Underkuffler, DAVEY AND THE LIMITS OF EQUALITY, 40 TULSA L. REV. 267, 268, 272 (2004).

[217] In addition, in the Lamb's Chapel trilogy, see Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (approving state plan permitting school vouchers to be used in both secular and sectarian private schools).

[218] See, e.g., Frederick Mark Gedicks, THE ESTABLISHMENT CLAUSE GAG REFLEX, 2004 BYU L. REV. 995, 1001 (2004); Others have noted an ambiguity in Locke between general principle that religious entities need not be funded or a more narrow rule absolving the government of an obligation to fund the training of clergy on the same basis as other educational funding. Douglas Laycock, THEOLOGY SCHOLARSHIPS, THE PLEDGE OF ALLEGIANCE, AND RELIGIOUS LIBERTY: AVOIDING THE EXTREMES BUT MISSING THE LIBERTY, 118 HARV. L. REV. 155, 184-87 (2004); Thomas C. Berg and Douglas Laycock, THE MISTAKES IN LOCKE V. DAVEY AND THE FUTURE OF STATE PAYMENTS FOR SERVICES PROVIDED BY RELIGIOUS INSTITUTIONS, 40 TULSA L. REV. 227, 229-30 (2004).

Perhaps *Locke* stands for the proposition that a state may decline to fund core religious functions too closely associated with the running of a church.[219] That rationale might well apply to the permitting public facilities to be used for regular worship services.[220]

On this view, the question would not be whether any of the communications proposed for a state-sponsored forum is akin to worship but whether the proposed use, as a whole, constitutes worship, *i.e.*, consists of assertions of doctrine and communications directed to the divine. Perhaps the regularity of the meetings would matter. The argument would be, not that the state must exclude worship to avoid an establishment violation, but that it can do so to avoid the appearance of one. The exclusion of religion would be within the Establishment Clause's "play in the joints."

But this may not translate well into cases involving state-sponsored forums which involve not simply free exercise and Establishment Clause values, but free speech concerns. *Good News Club* seems to say that these free speech concerns require permitting an awful lot of

[219] Locke, 540 U.S. at 719-720.

[220] Indeed, the Seventh Circuit suggested in DeBoer that the village of Oak Park would not have engaged in viewpoint discrimination had it "denied permission to conduct worship services held as part of a faith's regular religious regimen and bearing no relationship to a specific civic purpose." 267 F.3d at 570, n. 11.

communication that seems like worship as long as it is within the purpose of the forum. While it reserved the possibility that something called "pure worship" might be excluded, there is, as we have seen, unlikely to be any such thing. Again, we could imagine a court conducting an exacting content analysis to see if there is too much “high octane” or “pure” religion in a proposed use or whether it is too much like whatever the court views as a church service. But there is no more precise standard that would not require assumptions about what is and what is not worship and a determination of what dissidents are likely to find sufficiently objectionable. That standard will almost certainly be influenced by cultural and religious biases. The undertaking would seem to tax judicial competence to no clear advantage.

VI. CONCLUSION

The inclusion of worship within broadly defined limited purpose public forums where it communicates content within the forum’s purpose is consistent with a larger recognition of the role that religion plays in civic life and a recognition that true neutrality between religion and irreligion cannot be achieved by the creation of secular public spaces or publicly-sponsored "religion-free" dialogues bearing on matters to which religion speaks. If the government intends to facilitate the growth of community and the development of private values by providing spaces

and other opportunities for the discussion and promotion of a variety of political, social, moral and philosophical perspectives, it's exclusion of religious perspectives is not neutral. If the private speakers invited by the government to speak on these matters believe that they are best approached from a religious perspective, then government merely respects – rather than prefers – religious perspectives by permitting them to speak.

Even if the exclusion of religious perspectives could somehow be limited to uses that assert "core" or "extra-temporal" theological truths, the constitutional imperative of neutrality between religion and irreligion suggests that the state may not permit its facilities to be used for the promotion of secular sources of ultimate meaning or foundational principles and not religious ones.

This is not, of course, the only way to view the question of nonestablishment. If one sees that principle as opting for a rule of secular public places, whether based on the view that religious is uniquely divisive or that public discourse in a pluralistic society is best limited to "secular" rationales that all can assess, perhaps religion ought to be eliminated from government forums. But that is not the view adopted by a majority of the Supreme Court as reflected in *Widmar* and the *Lamb's Chapel* trilogy and other cases[221] recognizing that the choice by private individuals to devote neutrally available public resources to religious purposes does not run afoul of the Establishment Clause.

Of course, these private choices might involve "worship" in the sense of invoking the intercession of a deity or communicating with that deity or affirming beliefs about that deity does

[221] See, e.g, Zelman v. Simmons, 536 U.S. 638 (2002); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

not place them outside the general principle of neutrality toward religious choices by private actors. Worship may still communicate ideas within the boundaries of most limited purpose public forums and its unique characteristics do not justify its exclusion. Permitting private individuals to use neutrally available public spaces to express these ideas in this way is consistent with the mandate of evenhandedness between religion and irreligion.