INTRODUCTION

Despite a multiplicity of judicial decisions throughout the country, the line between religious and secular influence in education has remained cloudy since the U.S. Supreme Court first addressed the issue.1 Perhaps because "[t]he task of separating the secular from the religious in education is one of magnitude, intricacy, and delicacy,"2 the courts have been cautious to draw hard lines on the government’s interaction with religious institutions.3 In recent years, the ambiguity created by overlapping analysis has stretched to religious use of school facilities and funds.4


3 See id. at 237–38 (stating that the complexity of religion in education would turn any hard-line standard into a wall “as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded”).
4 See Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000) (holding that University tuition can be used to fund activities that advocate
Throughout the nation, groups have targeted religious recognition in the context of governmental operations. Thus, a court must act with vigilance when deciding whether to afford or deny a specific group rights because the court’s decision ultimately may implicate the group’s right to expression. While the words “Separation of Church and State” are not included in the Constitution, this long-standing principle has shaped all levels of government decision-making when religion enters into secular society. The First Amendment’s guarantee of religious autonomy has created a peculiar labyrinth of standards that the government must follow to accord religious groups fair treatment under the law. While the Church and State are fundamentally separate entities, both must co-exist and inherently influence the community’s expectations.

The First Amendment states in part that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” While the Constitution prohibits Congress from establishing a national church or taking any religious preference, its broad language has begged many questions that the Supreme Court has aimed to answer. As a result, the Court’s application of the First Amendment has evolved over time, as evidenced by various Supreme Court decisions that illustrate the complexities of religious liberty in a secular society.

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5 See, e.g., Southworth, 529 U.S. at 220–21; Rosenberger, 515 U.S. at 822–23.
6 Witte, supra note 1, at 1871–72 (stating that separationism in Supreme Court decisions has abandoned harsh application and avoided metaphors).
7 See U.S. CONST. amend. I; Witte, supra note 1, at 1871–72.
8 See Zelman v. Simmons-Harris, 536 U.S. 639, 653–54 (2002); Rosenberger, 515 U.S. at 841.
10 U.S. CONST. amend. I.
Amendment to specific instances has resulted in various inconsistencies.\footnote{12 Compare Locke v. Davey, 540 U.S. 712, 725 (2004), with Witters v. Wash. Dep’t of Servs. for the Blind, 474 U.S. 481, 488–89 (1986).}

Expectedly, the Court’s application of the First Amendment in the context of public education has resulted in significant controversy.\footnote{13 See Laycock, supra note 9, at 1667–70.} With the proper rearing of our nation’s youth fixed as a standard in the public discourse, religion’s role in education has found an unsettling lack of direction.\footnote{14 See Witte, supra note 1, at 1904.} Spirited debate has resulted about when and where religious interjection is appropriate in various stages of education.\footnote{15 See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 108 (2001); Rosenberger, 515 U.S. at 831–32. The Court has created several different categories of State forums, as well as multiple degrees of scrutiny and analysis so that specific cases come down to trivial differences of when and where State and religious interaction can occur. See Rosenberger, 515 U.S. at 843.} Groups have targeted the use of school buildings and funds for religious purposes, as well as religious expression by practice or speech.\footnote{16 See Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000); Rosenberger, 515 U.S. at 287–28.} The Court’s inconsistent decisions have accorded religious institutions an expansion of rights that seemingly cross the “high and impregnable” wall that separates Church and State.\footnote{17 See Reynolds v. United States, 98 U.S. 145, 164 (1878) (stating that Thomas Jefferson’s 1802 Letter to the Danbury Baptist Association reasoned that the Establishment Clause required strict separationism).}

Like minority groups, religious institutions are protected by virtue of the reasonableness standard and strict scrutiny.\footnote{18 See Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2990 (2010).} The standard forbids the government from denying religious institutions equal funding or access to a forum where reasonable.\footnote{19 Good News Club, 533 U.S. at 106–07.} Rather than excluding religious institutions from public venues, the Supreme Court has recognized that the First Amendment’s Establishment Clause does not trump religious organizations’ freedom of expression.\footnote{20 Locke v. Davey, 540 U.S. 712, 724 (2004).}
government allowed a secular group access to a public forum, it must grant the same access to a religious group.21 Applying the reasonableness standard, the Supreme Court has held that any speech, including religious speech, cannot be discriminated against unless a reasonable interest in creating a limited public forum exists.22

The Supreme Court has attempted to define the boundaries between religion and public education.23 Through the adaptation of the Lemon test, the Court established an overarching standard, which mandates that schools not discriminate or deny access based on any beliefs absent a reasonable justification.24 This aimed to remove any preference for one viewpoint over another.25 Such viewpoint discrimination would deny all citizens the right to a neutrally-operated government by favoring one group over another.26 The Court has since molded its analysis on public forum cases around the type of discrimination in which the State engages.27

The First Amendment’s guarantees of free speech, of free religious exercise, and against establishment have made it nearly impossible for the Court to take any hard stance on religion’s role in education.28 While schools have been afforded the ability to create limited forums with specific purposes, they are also hard-pressed to

21 See Rosenberger, 515 U.S. at 835.
22 Id.
24 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (holding that a policy will not offend the Establishment Clause if it passes a three-prong test: (1) The government’s action must have a secular legislative purpose; (2) the primary effect of the government’s action must not advance or inhibit religion; and (3) it must not foster and result in “an excessive government entanglement with religion”).
25 See Rosenberger, 515 U.S. at 829 (holding that viewpoint discrimination is an egregious form of content discrimination and that the government must abstain from regulating any speech when the restriction is based on the message or perspective the speaker is expounding).
26 Id.
27 Id.
avoid enforcing regulations on religious groups’ various forms of expression. Schools may define the purpose and uses of such forums so as not to discriminate, but may not limit the discourse in which its students engage. However, these limited forums have created tension when they restrict religious expression.

Moreover, the same analysis is applied to schools when they fund student activities. Be it university newspapers, speaker presentations, or events by religious organizations, schools are generally not allowed to deny funding because of a particular viewpoint expressed by those organizations. Such funding is subject to the same limited forum exceptions as other public forums. Again, problems arise under the Free Speech, Establishment, and Exercise Clauses when affording religious groups public funds.

Recent Supreme Court viewpoint discrimination analysis has left federal circuits to question when religious recognition has overstepped its bounds. Some circuits have upheld state denial of forums and funds when religious exercises rise to the level of worship. Alternatively, other circuits have allowed religious groups access to forums when their meetings include group prayers, religious

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29 See Rosenberger, 515 U.S. at 843–44.
30 See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001). While these forums are still subject to scrutiny under viewpoint discrimination analysis, schools may designate a forum’s boundaries so as not to violate the Constitution, federal or state law, or its own rules and regulations. Id.
31 See generally Good News Club, 533 U.S. 98; Witte, supra note 1, at 1904.
32 See Rosenberger, 515 U.S. at 834–35.
34 See Rosenberger, 515 U.S. at 845–46.
35 See Good News Club, 533 U.S. at 107.
36 See Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 780 (7th Cir. 2010); Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 104 (2d Cir. 2007) (Calabresi, J., concurring); Prince v. Jacoby, 303 F.3d 1074, 1092 (9th Cir. 2002).
speakers, and numerous other religious activities. In many instances, what has been found as religious worship or practice in one circuit is interpreted as mere public activity by a religious organization in another.

Such inconsistencies are exemplified in the recent Seventh Circuit decision, *Badger Catholic, Inc. v. Walsh*. While the court recognized the University of Wisconsin-Madison’s right to create a forum for a limited purpose, the court held that the university had to provide identical funds to both religious groups and other student groups. In doing so, the Seventh Circuit muddied the line between Church and State in public education beyond what is justified by precedent, the Constitution, or history.

The Seventh Circuit’s decision in *Badger Catholic* departed from its previous decisions and misapplied the standards expressed by the Supreme Court. Moreover, numerous circuits across the country have heard cases similar to *Badger Catholic* and have reasoned differently. Plainly, the decision chips away at the wall between Church and State.

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38 See *Prince*, 303 F.3d at 1093–94.
39 Compare *Badger Catholic*, 620 F.3d at 781, with *Bronx Household of Faith*, 492 F.3d at 100–01.
40 See generally *Badger Catholic*, 620 F.3d 775.
41 *Id.* at 780–81.
42 *Id.* at 779.
44 See *Linnemeir v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757, 759–60 (7th Cir. 2001) (academic freedom and states’ rights require deference to educational judgment that is not invidious); *Doe v. Small*, 964 F.2d 611, 618 (7th Cir. 1992) (mere compliance with the Establishment Clause is not a compelling state interest that would warrant discrimination against a religious group).
45 See *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 492 F.3d 89, 104 (2d Cir. 2007) (Calabresi, J., concurring); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002).
46 See *Witte, supra* note 1, at 1870–71.
In understanding the direction of the Seventh Circuit’s recent divergence, it is critical to understand judicial precedent as it relates to Church and State and the First Amendment. Understanding the evolution of Supreme Court jurisprudence, along with the purpose of the First Amendment, is markedly important because they highlight the overarching purpose of the Establishment Clause.

Additionally, it is imperative to understand the federal circuits’ current interpretations of the relationship between religion and public education, as they highlight how the public in general perceives the Supreme Court. Coming to this understanding will provide insight into the Seventh Circuit’s recent decision in this area of law.

This Comment will examine both the implications and potential shortcomings of the Badger Catholic decision. With other circuits broadening religious interaction in public education, the Seventh Circuit’s holding in Badger Catholic was ultimately decided incorrectly.

Because the Supreme Court has failed to provide a clear standard for circuits to apply, decisions like Badger Catholic represent an opportunity to provide clarity. Until viewpoint discrimination is more clearly explained, public funds and facilities remain in a

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47 See generally Badger Catholic, 620 F.3d 775.
48 There is constant debate over the exact meaning of the Free Speech, Free Exercise, and Establishment Clauses, stretching as far back as the drafting of the Constitution and the Federalist Papers, which discussed the proper approach American governance should follow. See Witte, supra note 1, at 1871. Recent decisions have aimed to carve out an understanding that promotes neutrality of gift and denial in relation to religion. See Green, supra note 43, at 1113–14. Generally, the court aims to treat religious institutions in the same manner as it would any other group. Id.
49 See Bronx Household of Faith, 492 F.3d 89, 92–106 (Calabresi, J., concurring).
50 See id.
51 See generally Badger Catholic, 620 F.3d 775.
53 See generally Badger Catholic, 620 F.3d 775.
nebulous state that burdens the Seventh Circuit as well as other circuits across the country.\footnote{Laycock, supra note 9, at 1669.}

I. BACKGROUND

A. What is Separation of Church and State?

The difficulty in distinguishing between the establishment of religion and facilitating its free exercise may be attributed to the different understandings of what the Constitution confers through the First Amendment.\footnote{Id.} In many ways, the Free Speech Clause, the Establishment Clause, and the Free Exercise Clause are in constant constraint of and contradiction to each other.\footnote{Indeed, in Locke v. Davey, the Court recognized that there is an inherent tension between the Establishment and Free Exercise Clauses of the First Amendment. 540 U.S. 712, 718 (2004). Nevertheless, such tension is relieved as the Court’s interpretation allows some “room for play in the joints.” Id.} The government is barred from the unequal recognition of religious institutions while simultaneously providing these institutions the same expressive rights that all citizens enjoy.\footnote{See U.S. CONST. amend. I; Locke, 540 U.S. at 718.} As such, it is difficult to determine whether the government is merely providing a forum or funding to the citizenry and when it is funding religious activity.\footnote{See Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 237 (1948) (Jackson, J., concurring) (“the task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy”).}

The line dividing Church and State is unclear because the precedent does not follow one coherent path. Whereas a state cannot supplement religious schoolteachers’ salaries,\footnote{See Lemon v. Kurtzman, 403 U.S. 602, 622–23 (1971) (holding that Pennsylvania’s Nonpublic Elementary and Secondary Education Act violated the Establishment Clause when it reimbursed salaries of nonpublic schoolteachers who taught secular material, as well as reimbursed the schools for secular textbooks and instructional materials).} it can provide public transportation for religious school pupils.\footnote{Everson v. Bd. of Educ., 330 U.S. 1, 16–18 (1947).} The State can loan books
to religious schools, but it cannot loan any supplemental material to
them. Rather than providing a clear rule, these inconsistencies breed
confusion among the nation’s courts. In many ways, the divisions
drawn by the Supreme Court were agonizingly trivial. Nonetheless,
such decisions aimed to discern what separation actually meant in
society.

Separationism can be divided into three general categories. As
postulated by Carl H. Esbeck, separationist views can be classified
as strict, pluralist, or institutional. While strict separationists
would command a completely secular state, institutional separationists
envision a theocentric state just short of a theocracy. However, what
jurisprudence has created is a neutral and pluralistic separation
between Church and State. Justice Black attempted to define exactly
what the separation meant to American society, with the government
barred from establishing a national church or selectively aiding or
preferring one religious group to another.

Nevertheless, Justice Black’s view has developed into a fiction
in actual practice. The government has consistently funded various
religious institutions without any conflict with the Supreme Court’s
analysis of the Establishment or Free Exercise Clauses. From
providing tax breaks to churches to facilitating religious activity in
public buildings, the government has not followed Justice Black’s
perception of religion’s role in government. As such, the conundrum

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61 Lemon, 403 U.S. at 624.
62 See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995);
Lemon, 403 U.S. at 624.
63 See Lemon, 403 U.S. at 624.
64 Id.
65 See Esbeck, supra note 28, at 378–79.
66 Id.
67 Id. at 379 (dividing the separation ideologies into strict separationists, who
desire a secular state, pluralistic separationists, who desire a neutral state, and
institutional separationists, who envision a theocentric state).
68 Id. at 388.
71 Id. supra note 43.
72 Id. at 1120.
of religious interaction with government is an overwhelming area because it involves contradictions in interpretation, viewpoint, and jurisprudence.\(^{73}\) This problem is only magnified when a court focuses on specific intrusions of religion into government activity.\(^{74}\) In recent years, courts have paid special attention to funding and facilitating religious activity.\(^{75}\) Regardless of the focus, the separation remains a serpentine wall.\(^{76}\)

### B. The Supreme Court’s Stance

Parsing through the U.S. Supreme Court’s decisions dealing with religion can be daunting. Perhaps because this is an “extraordinarily sensitive area of constitutional law,”\(^{77}\) the Court has struggled to draw hard lines on how religious institutions and government funding should interact.\(^{78}\) Nevertheless, the Court’s constant refinement of law and its understanding of the First Amendment has provided some shape to the lingering questions.\(^{79}\)

In examining the government’s approach to funding and facilitating religious activity, the Court has adopted an evenhanded approach so as to neither affirm nor deny any religious group’s position.\(^{80}\) To a degree, the government is forbidden from stopping or limiting religious expression.\(^{81}\) However, the First Amendment’s Establishment Clause negates the government’s ability to foster these activities.\(^{82}\) Even so, the Court has recognized the division between Church and State as something other than a complete barrier.\(^{83}\)

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\(^{73}\) See id.


\(^{75}\) See Rosenberger, 515 U.S. at 835.

\(^{76}\) See Witte, supra note 1, at 1869.


\(^{78}\) See generally Rosenberger, 515 U.S. 819.


\(^{81}\) See id.

\(^{82}\) See Rosenberger, 515 U.S. at 835–36.

Because religion is an integral part of American society and values, it shapes how we understand the very question it aims to answer. In doing so, religion has gained many liberties, which in turn has created a labyrinth of jurisprudence that precludes any possibility of clear guidance for lower courts to follow.

Adding to the complexity of the relationship between Church and State, public education provides a sensitive area where society demands religious independence, yet such independence cannot encroach on religion’s involvement in the student’s life outside school. In addressing the ability of religious groups to operate in the public sphere, the Court has concentrated on the State’s purpose in enacting its rules.

1. Tests in Development

In addressing the relationship between Church and State, the Court has developed several tests that help to understand exactly what principles the First Amendment aims to protect. Historically, the Establishment Clause has been analyzed under the three-pronged test developed in Lemon v. Kurtzman. The test requires that government action (1) have a secular purpose; (2) not have the effect of either advancing or inhibiting religion; and (3) not result in government entanglement with religion. The Lemon test has become integral to framing how public education and religious organizations must...
Recent Supreme Court decisions have attempted to guide the federal circuits. The Court analyzed situations based on whether the government was discriminating against the viewpoint of certain speech, or the content of that speech. The Court has held viewpoint discrimination as a more egregious form of content-based discrimination. Generally, the government is forbidden from denying religious organizations access when the denial is based purely on the propagated message. Likewise, content discrimination is presumptively unconstitutional due to its focus on the content of what a group is saying. Though these categories are markedly similar, content discrimination has faced less scrutiny and has been found acceptable in some situations. Through this analysis, the Court has aimed to prevent discrimination of a particular group based on its views or actions, while allowing the government to set the parameters for the time, place, and manner in which the speech is made.

Additionally, the Court has allowed the government to separate religious and government activity by creating limited public forums. While open forums require the state to provide full protection and funding for all speech, a government institution that establishes a

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91 See Mawdsley & Beckmann, supra note 88, at 455 (“While framed in the context of government financial support for religious schools, the Lemon test has been invoked in a wide range of religion cases to both prohibit and permit efforts to accommodate religious beliefs in public schools and permit government support for religious schools.”).


93 Good News Club, 533 U.S. at 108.

94 Rosenberger, 515 U.S. at 829.


98 See Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (the time, place, and manner test is applicable only to speech regulations that are content neutral).

99 See Widmar, 454 U.S. at 278.
limited forum for a particular purpose may regulate the use of that forum.\textsuperscript{100}

Whether it is dealing with elementary schools or public universities, the government must tread lightly so as not to overstep its citizens’ rights as well as the rights of religious organizations.\textsuperscript{101}

2. Content and Viewpoint Discrimination

In many ways, content and viewpoint discrimination are ambiguous.\textsuperscript{102} Discrimination against speech is presumed to be unconstitutional.\textsuperscript{103} Likewise, the First Amendment is breached whenever the government places financial burdens on groups because of the subject matter of their speech.\textsuperscript{104} Content discrimination occurs when government intervention is based on a speaker’s actions rather than the subject matter of his or her speech.\textsuperscript{105} Generally, the content of the speech being expounded cannot be the focus of governmental prejudice.\textsuperscript{106} Such regulations explicitly or implicitly presume to regulate the speech because of the substance of the message.\textsuperscript{107} Furthermore, the Court has developed the notion of viewpoint discrimination, which constitutes a more egregious form of content discrimination.\textsuperscript{108} Viewpoint discrimination violations target the specific ideology behind an opinion that the group or speaker is presenting.\textsuperscript{109} Such regulations are imposed because of a disagreement

\textsuperscript{100} See Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2975 (2010).
\textsuperscript{102} Id. at 828.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 843.
\textsuperscript{105} See Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys., 578 F. Supp. 2d 1121, 1137 (W.D. Wis. 2008).
\textsuperscript{107} Roman Catholic Found., 578 F. Supp. 2d at 1137.
\textsuperscript{108} Rosenberger, 515 U.S. at 829.
\textsuperscript{109} See Roman Catholic Found., 578 F. Supp. 2d at 1137.
with the particular position that the speaker expounds.\textsuperscript{110} Thus, content discrimination always occurs when viewpoint discrimination does, but not vice versa.\textsuperscript{111}

The Court has examined situations where the government has refused to fund religious groups under a Free Exercise analysis, as well as situations where the government recognized religious groups’ rights under the Establishment Clause.\textsuperscript{112}

In Lamb’s Chapel v. Center Moriches Union Free School District, a school district provided its facilities to community groups, yet refused a church’s request to show religious films.\textsuperscript{113} The Court held that because the school district opened its doors to the public, it could not refuse organizations merely because they were religious.\textsuperscript{114} The school’s focus on the subject matter of the speech, rather than on the manner in which it was being expressed, constituted viewpoint discrimination.\textsuperscript{115} Following Lamb’s Chapel, the Court attempted to define the differences between viewpoint and content discrimination.\textsuperscript{116}

Just as schools cannot close their doors to religious groups merely because they are religious, they cannot deny them funding where there are secular parallels to the activities that receive funding.\textsuperscript{117} Whether it is the printing and distribution of newspapers on campus\textsuperscript{118} or disbursement of federal scholarships to students

\textsuperscript{110} Id.

\textsuperscript{111} Id. ("Viewpoint discrimination is thus an especially egregious form of content discrimination in which the government targets not just subject matter, but the particular views taken on subjects by speakers.").


\textsuperscript{113} 508 U.S. 384, 389–90 (1993).

\textsuperscript{114} Id. at 392.

\textsuperscript{115} Id. at 391.


\textsuperscript{117} Id.

\textsuperscript{118} See id. at 845–46 (holding that the University’s refusal to fund a campus organization’s publication, written from a Christian viewpoint, when other publications from other viewpoints were funded violated the Free Speech Clause: “[the University’s] course of action was a denial of the right of free speech and
pursing religious training,119 public institutions must maintain a neutral stance on how they conduct their activities.120

In *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, the Court held that a publicly-funded law school’s anti-discrimination policy could be evenly applied to all groups that it funded, including religious groups.121 There, a Christian society at the school barred homosexuals from joining the organization.122 Because this was in violation of the school’s anti-discrimination policy, the law school denied the group funding and access to its facilities.123 The Court found that the school’s policy was applicable to all organizations in the school and thus did not single out the religious group.124 In fact, the Court noted that because the policy was so inclusive, it was impossible to contend that it was discriminatory against any one group.125 When a public university implements regulations on a limited public forum, it can decide the parameters of the content that that forum allows, but views that fit within the parameters cannot be discriminated against.126

Contrastingly, in *Locke v. Davey*, a student pursuing a degree in theology was denied a government-funded scholarship and contended that this was discrimination in contravention of the Free Exercise Clause.127 The Court disagreed, reasoning that the Free Exercise Clause and the Establishment Clause allow some “play in the joints between them.”128 While the government could not hinder the student’s pursuits, funding his pursuits would amount to providing for

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120 *Id.* at 649–50.
121 130 S. Ct. 2971, 2989 (2010).
122 *Id.* at 2979–80.
123 *Id.* at 2989.
124 *Id.*
125 *Id.* at 2993 (“It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers.”) (emphasis in original).
126 *Id.*
128 *Id.* at 718 (internal quotation marks omitted).
religious training. The school was allowed to participate in its own form of government speech by deciding the limits of what it endorses, and what it does not. So long as the institution is not evincing hostility towards religion in its actions, it is not required to supply funds or access to religious institutions merely because a secular alternative exists.

The directions in Locke are not applicable across the board. In Zelman v. Simmons-Harris, taxpayers challenged a scholarship program that funded recipients who attended religious schools. The scholarship program aimed to allow parents and students the ability to attend any school of their choice. The Court held that the scholarship program was not a violation of the Free Exercise Clause because the program was neutral and provided funding to a broad class of citizens. The fact that the families directed the funding to religious institutions was not unconstitutional. As the school had created an open forum for its students, it could not discriminate against certain institutions merely because they support religion. However, the Court’s decision faced serious criticism because it appeared as indirect preferential treatment for religion. By providing funding to parents who chose private religious institutions over public schools, the separation between Church and State became a farce.

The commingling of content and viewpoint discrimination looks to be a mess of precedent. Nevertheless, distinctions in their

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129 Id. at 725.
130 Id. at 729–30.
131 Id. at 724–25 (the state had a substantial interest in not funding the pursuit of devotional degrees).
133 Id.
134 Id. at 647.
135 Id. at 652–53.
136 Id.
137 Id. at 652.
138 Id. at 685 (Stevens, J., dissenting).
139 Id.
analysis exist.\(^{141}\) The government “is not required to and does not allow persons to engage in every type of speech”; content discrimination is appropriate when the restrictions are “reasonable in light of the purpose served by the forum.”\(^{142}\) Conversely, viewpoint discrimination is generally prohibited in open forums as well as limited forums.\(^{143}\) While the views of a speaker cannot be the basis of State regulation, the Court has endorsed the idea that universities can focus a forum on a specific, intentional purpose and regulate speech that falls outside that content.\(^{144}\)

3. Open and Limited Forums

In \textit{Lamb's Chapel}, the Court also addressed the issue of when a government creates a forum.\(^{145}\) There, a church sued a school district because it was refused access to facilities to show religious films on family values.\(^{146}\) The Court recognized that the school district was allowed to preserve property under its control and dictate its use.\(^{147}\) However, because the school district did not intentionally define the limits of the forum, thus creating an open forum, it could not deny the church access because of its religion.\(^{148}\)

In \textit{Good News Club v. Milford Central School}, the Court held that a school conducted viewpoint discrimination because it refused a religious youth club access to its facilities after school hours.\(^{149}\) The

\(^{143}\) \textit{Id.} at 107.
\(^{146}\) \textit{Id.}
\(^{147}\) \textit{Id.} at 2146.
\(^{148}\) \textit{Id.} at 2148. Though the Court recognized that there may be a compelling interest in avoiding an Establishment Clause violation, an open access policy to the forum allowed religious use of the property. \textit{Id.}
Court rejected the school’s argument that granting access would be
government endorsement amounting to a violation of the
Establishment Clause. On the contrary, permitting the school to
deny the religious organization access would be just as threatening to
the Constitution as allowing that organization access. Critically, the
Court viewed the school as an open facility, rather than a limited
forum. Just as in Lamb’s Chapel, a forum open to the public had
been created without intentional limits.

Moreover, a forum does not necessarily have to be a physical
space; funding can represent a metaphysical forum. In Rosenberger
v. Rector and Visitors of the University of Virginia, the Court held that
there was no difference between a public school funding a physical
facility and giving students access to its funds to pay for activities.
The Court recognized that a university may appropriate public funds to
promote particular policies as it wishes, so creating a limited forum.
In order to do so, it need only intentionally create the forum and set
out its limits and purpose. From that point, the forum is judged as to
whether its limits are reasonable in light of its defined purpose.

In creating a limited forum, the State must distinguish it from
the traditional or open public forum. In that sense, the restrictions
that the government imposes on an open forum are placed under
greater scrutiny than those imposed on a limited public forum. In
limited public forums, the government opens property for use by
certain groups and dictates its use.

150 Id.
151 Id.
152 Id.
153 See id. at 109; Lamb’s Chapel, 113 S. Ct. at 2148.
155 Id. at 843.
156 Id. at 833.
157 Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802
(1985).
158 Id. at 806.
160 Id.
161 Rosenberger, 515 U.S. at 829–30.
Additionally, there is another division between these two types of forums.\(^{162}\) While there is the traditional open forum, and the limited public forum, there also exists a designated public forum.\(^{163}\) In the case of a designated public forum, the Court uses strict scrutiny to ensure that the government does not unreasonably restrict speech in the nontraditional space.\(^{164}\) While a traditional open public forum usually uses public spaces like parks and streets, a designated public forum uses spaces that are not typically open to the public.\(^{165}\)

Deciding what type of forum a school creates is critical because it changes the analysis under the neutrality test.\(^{166}\) If a forum is left open to the public, content and viewpoint discrimination are subject to harsher treatment and the State’s restrictions are subject to strict scrutiny.\(^{167}\) Alternatively, a limited public forum’s restrictions need only be viewpoint-neutral and reasonable in light of its purpose.\(^{168}\) Therefore, knowing whether a university has reasonably restricted a forum is critical when deciding if its actions are constitutional.\(^{169}\)

\(^{162}\) Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2983 (2010).
\(^{163}\) Id.
\(^{164}\) Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985); see also Choose Life Ill., Inc. v. White, 547 F.3d 853, 864 (7th Cir. 2008).
\(^{165}\) Good News Club, 533 U.S. at 106. Universities and schools can fall into all three categories, but generally, they fall into either a traditional open forum or a limited public forum. See id. These spaces are usually open to and funded by the public. See id. However, unless the school sets a purpose for its facilities, they are presumed to be “nonpublic forum[s]”—property that “is not by tradition or design a forum for public communication.” See Choose Life Ill., 547 F.3d at 864.
\(^{166}\) See Martinez, 130 S. Ct. at 2983; Rosenberger, 515 U.S. at 829–30; Cornelius, 473 U.S. at 802.
\(^{167}\) Martinez, 130 S. Ct. at 2983.
\(^{168}\) Cornelius, 473 U.S. at 802; Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).
\(^{169}\) See Choose Life Ill., 547 F.3d at 864.
C. Division Among Circuits

Not surprisingly, the lack of specific direction from the Supreme Court has led to varying approaches on how to decide the constitutionality of forum restrictions. While some circuits have been more rigid in their understanding of what an open forum is and when viewpoint discrimination actually occurs, opposing views still linger.

In *Bronx Household of Faith v. Board of Education of the City of New York*, the Second Circuit addressed the State’s refusal to permit church use of school facilities for Sunday worship.\(^{170}\) There, under two concurring opinions, the court vacated the permanent injunction enjoining the school district from enforcing its prohibition against religious use.\(^{171}\) The court decided that the State’s restriction on worship was not viewpoint discrimination.\(^ {172}\) Because the purpose of the Bronx Household was specifically for worship, it fell outside the content of the school’s purpose and was properly denied.\(^ {173}\)

In the Ninth Circuit case, *Prince v. Jacoby*, a high school student brought an action against a school district because it refused to allow a bible club the same benefits that it does to other clubs.\(^ {174}\) Namely, the club was given different access to school supplies, audio/visual equipment and school vehicles.\(^ {175}\) The court held that the different treatment of the bible club from other school-sanctioned clubs was in violation of the First Amendment under *Widmar*.\(^ {176}\) The school created a limited public forum and chose to give benefits to groups; having done so, it could not restrict a group’s access to these benefits based on the group’s views.\(^ {177}\) The court further held that even if it were not an open forum, the State did not have unlimited power to restrict speech, and any restriction had to be viewpoint-

\(^{170}\) 492 F.3d 89, 92–93 (2d Cir. 2007).
\(^{171}\) Id. at 90–123.
\(^{172}\) Id. at 98–99.
\(^{173}\) Id. at 100–01.
\(^{174}\) 303 F.3d 1074, 1077 (9th Cir. 2002).
\(^{175}\) Id.
\(^{176}\) Id. at 1091.
\(^{177}\) Id.
neutral and “reasonable in light of the purpose served by the forum.” Because the restriction against the bible club was based purely on its religious viewpoint, the restriction was unconstitutional.

In another Ninth Circuit case, Tucker v. State of California Department of Education, an employee sued the State for a ban on displays of religious material and religious advocacy by employees. The court there held that such a restriction was unwarranted under the First Amendment. Again, the court emphasized that the State had not created a limited forum and could not constitutionally restrict its employees’ speech. Although this particular case involved a state employee and was subject to another type of analysis, analysis under viewpoint discrimination and open forum precedent was still appropriate. Pursuant to Widmar and Rosenberger, the court decided that there was no “plausible fear” that the employee’s speech would be attributed to the State and implicate the Establishment Clause. As such, the State’s ban was unconstitutional.

While the Ninth Circuit has recognized that religious discrimination in open forums is generally not permissible, it has held prohibitions limiting religious organizations constitutional when

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178 Id. The school officially recognized and allowed full access to “groups that engage in any lawful activity which promotes the academic, vocational, personal, or social/civil/cultural growth of students.” Id. at 1091–92 (internal quotation marks omitted).
179 Id.
180 97 F.3d 1204, 1208 (9th Cir. 1996).
181 Id. at 1209–10.
182 Id. at 1209 (“[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse”) (emphasis in original) (internal quotation marks omitted).
183 The court decided that Pickering v. Board of Education, 391 U.S. 563 (1968), was the controlling analysis for government employee speech. Tucker, 97 F.3d at 1210.
184 Id. at 1211.
185 Id.
186 Id. at 1213.
187 Prince, 303 F.3d at 1074; Tucker, 97 F.3d at 1213.
the State creates a limited public forum. In *Faith Center Church Evangelistic Ministries v. Glover*, the court held that a library constituted a limited public forum because the State intentionally dedicated its property for expressive conduct. The court set out the different levels of scrutiny applicable to open forums, nonpublic forums, and limited public forums. In traditional public forums, like streets and parks, the State can engage in content-based regulations when it is “necessary to serve a compelling state interest and [when it is] narrowly drawn to achieve that end.” Regulation in nonpublic forums is less demanding: restrictions need only be reasonable and not enforced against the speaker’s view. The court determined that the library did not fall into either of these categories because the State did not make the meeting room open for indiscriminate use; it excluded use by schools “for instructional purposes as a regular part of the curriculum,” as well as use for religious services. Nevertheless, pursuant to *Good News Club v. Milford Central School*, there was a distinction between religious activity and mere religious worship devoid of any moral teachings. As such, the court listed various activities, like effective communication of a group’s goals, the discussion of religious books, teaching, praying, singing, and sharing testimonials as permissible. However, pure religious worship is not a viewpoint but a category of content, and can be properly excluded.

It is clear from just these few cases discussing the boundaries of limited public forums and its relationship to viewpoint discrimination that the circuits are engaging in complex precedential

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189 *Id.* at 907.
190 *Id.* at 907–08.
191 *Id.* at 907 (internal quotation marks omitted).
192 *Id.* at 907–08.
193 *Id.* at 909.
195 *Glover*, 480 F.3d at 913–14.
196 *Id.* at 915.
weaving.\textsuperscript{197} What is apparent is that when a State creates a limited public forum, it is within its power to restrict religious activity like worship.\textsuperscript{198} While the government must allow some activity “quintessentially religious” in nature, not all religious activity is protected under the doctrines of neutrality.\textsuperscript{199}

II. THE SEVENTH CIRCUIT

A. Decisions Before Badger Catholic

The Seventh Circuit has addressed the issues surrounding the Establishment Clause, religion in public institutions, and the scope of forum creation in various recent cases.\textsuperscript{200}

In one instance, several churches challenged an ordinance that restricted the use of land zoned for commercial and business uses.\textsuperscript{201} The court looked to the motivation for the regulations and determined that the city was not motivated by a disagreement with the churches’ message but rather was concerned with the effective use of land.\textsuperscript{202} As this was a viewpoint-neutral purpose and a reasonable restriction of the land’s use, the court held that it was constitutional.\textsuperscript{203}

In \textit{Southworth v. Board of Regents of the University of Wisconsin System}, students challenged the mandatory activity fee that the University imposed on grounds that such a fee amounted to

\textsuperscript{197} See \textit{Bronx Household of Faith v. Bd. of Educ. of N.Y.}, 492 F.3d 89, 92–93 (2d Cir. 2007); \textit{Tucker v. Cal. Dep’t of Educ.}, 97 F.3d 1204, 1208 (9th Cir. 1996).

\textsuperscript{198} See \textit{Bronx Household of Faith}, 492 F.3d at 101.


\textsuperscript{200} Choose \textit{Life Ill., Inc. v. White}, 547 F.3d 853, 864 (7th Cir. 2008); Christian Legal Soc’y \textit{v. Walker}, 453 F.3d 853, 865–66 (7th Cir. 2006); Civil Liberties for \textit{Urban Believers v. City of Chicago}, 342 F.3d 752, 765 (7th Cir. 2003); \textit{Southworth v. Bd. of Regents of Univ. of Wis. Sys.}, 307 F.3d 566, 580 (7th Cir. 2002).

\textsuperscript{201} Civil Liberties for Urban Believers \textit{v. City of Chicago}, 342 F.3d 752, 758–59 (7th Cir. 2003).

\textsuperscript{202} \textit{Id.} at 765.

\textsuperscript{203} \textit{Id.}
support for views to which they objected. The court held that the fee was reasonable and that the fund constituted a metaphysical limited public forum. Even so, the court held that the student government that defined the parameters of the forum was not entitled to unbridled discretion. Instead, it had to develop specific and concrete standards guiding its funding decision. So while the court recognized that the University could create a limited forum that could discriminate against certain content, these limits would have to be spelled out specifically.

The court also examined the application of neutrality in Christian Legal Society v. Walker. There, a student organization sued a public law school after it was derecognized for excluding homosexuals from its organization’s voting membership, citing that it was entitled to free speech and free exercise of religion. The school had a nondiscrimination policy that was concededly viewpoint-neutral; however, the court questioned whether it was applied in a viewpoint-neutral way. Although the court noted that denying recognition to a student organization is a significant infringement, it still found that the group showed a likelihood of success on its claim that the school unconstitutionally derecognized it. In doing so, the court recognized that a student organization could be restrictive if found to be a limited public forum. Here, the court was concerned with the student’s expressive rights. Even with a viewpoint-neutral stance, it is

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204 307 F.3d at 570–71.
205 Id. at 580.
206 Id.
207 Id.
208 Id.
210 Id.
211 Id. at 866.
212 Id. at 867.
213 Id. at 866.
214 Id. at 867 (the policy would significantly affect the organization’s ability to express its disapproval of homosexuality).
possible for a university to improperly restrict the activities of its students.  

Likewise, *Doe v. Small* addressed the use of public spaces by religious groups. The action was sought to enjoin the display of a religious painting in a park. The injunction ordered by the district court that forbade the painting was held overly broad. The Seventh Circuit determined that the park, as a public forum, must accept religious speech. By limiting expression, the State does not act neutrally, but is hostile towards the religious groups’ viewpoint. The court instructed that any restriction placed on the open forum must be narrowly tailored.

In *Choose Life Illinois v. White*, the court addressed the definition of public forums. An anti-abortion group sought to compel the State to issue “Choose Life” license plates. After deciding that license plates did not constitute government speech, the court held that they were a limited public forum. Because the plates had not been open for general public discourse, the court concluded that the State had not intentionally opened the nontraditional forum for public use. In the end, the court concluded

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215 See id.
216 964 F.2d 611 (7th Cir. 1992).
217 Id. at 612–13.
218 Id. at 621.
219 Id. at 619.
220 Id.
221 Id. at 621 (“The district court’s order was not narrowly tailored because it sought to eliminate the display of the paintings ‘by any party’ instead of limiting it to the ‘evil’ of the City’s alleged endorsement of the painting alone.”).
222 547 F.3d 853, 864 (7th Cir. 2008).
223 Id.
224 Id. at 863 (“Messages on specialty license plates cannot be characterized as the government’s speech. Like many states, Illinois invites private civic and charitable organizations to place their messages on specialty license plates. The plates serve as ‘mobile billboards’ for the organizations and like-minded vehicle owners to promote their causes and also are a lucrative source of funds.”).
225 Id. at 864–65 (declining to qualify license plates as an open or designated forum).
226 Id. at 864.
that the government was allowed to restrict this area based on the content of the message.\textsuperscript{227} As it had restricted all license plate designs that addressed abortion, rather than targeting only the pro-life view, the government was engaging in content discrimination.\textsuperscript{228} The court held this restriction reasonable in light of the plates’ purpose, especially since the State evinced no hostility towards any particular view.\textsuperscript{229}

Additionally, in \textit{Linnemeir v. Board of Trustees of Purdue University}, students sought to enjoin a play that a university was presenting because it evinced anti-Christian beliefs.\textsuperscript{230} Though the court recognized that a university policy promoting a particular belief would violate the First Amendment, merely allowing students to choose a play and display it did not amount to endorsement.\textsuperscript{231} The court stated that just as a classroom is not a public forum, neither is a university theater.\textsuperscript{232} Moreover, it recognized the need for academic freedom:

\begin{quote}
If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a ‘curriculum review committee’ unto himself.\textsuperscript{233}
\end{quote}

The court urged that educational deference and deference to State’s rights are required so long as the action is not invidious.\textsuperscript{234} Again, the court recognized the rights that universities have in defining and funding their actions.\textsuperscript{235} This decision was criticized, as there was no

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\textsuperscript{227} Id. at 865.  \\
\textsuperscript{228} Id.  \\
\textsuperscript{229} Id.  \\
\textsuperscript{230} 260 F.3d 757, 758–59 (7th Cir. 2001).  \\
\textsuperscript{231} Id. at 759–60.  \\
\textsuperscript{232} Id. at 760.  \\
\textsuperscript{233} Id.  \\
\textsuperscript{234} Id.  \\
\textsuperscript{235} Id.
\end{flushright}
evidence that the University allowed other theater groups to use its stage, and its choice of one ideology and denial of others constituted viewpoint discrimination.236

These cases demonstrate the breadth of application that the court has made in viewpoint discrimination and limited forum cases. When the State acts against a religious group, or any group for that matter, it must be motivated by something other than the group’s views.237 Moreover, when it creates a limited forum, it needs to specify the limits of that forum, so it is readily identifiable which content is not allowed.238 It is also important to recognize that the mere existence of a viewpoint-neutral policy does not mean that its application will also be viewpoint-neutral.239

B. Badger Catholic

Decided in 2010, Badger Catholic, Inc. v. Walsh involved a religious group at the University of Wisconsin and its attempt to gain funding for its activities.240 The school collects nearly $400 from each of its students in order to provide for a variety of non-instructional student services and programs.241 These funds are made available to qualifying student organizations, which include those that engage in “expressive activities, concerts, some athletic activities, and recreational activities.”242 Additionally, the fund’s purpose was to “provide a source of funds to ensure that students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life

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236 Id. at 767 (Coffey, J., dissenting).
237 Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003).
238 See Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 580 (7th Cir. 2002).
240 Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 776–77 (7th Cir. 2010).
242 Id.
outside the lecture hall.”  

In order to gain access to these funds, student organizations must meet criteria primarily set by the student government. Moreover, the University stated that the forum was developed to foster “dialogue, or discussion, or debate.”

In 2005, the University of Wisconsin Roman Catholic Foundation (RCF) began to seek reimbursement from the school’s fund. Though the school expressed concerns about RCF’s eligibility, it eventually approved the group as a registered student organization. In achieving eligibility, RCF submitted to student control and agreed not to seek funding for “masses, weddings, funerals, or other sacramental acts requiring the direct control of ordained clergy.”

Although by 2007, RCF was allowed to seek funding, the University did not fund RCF’s activities in their entirety. Specifically, the University concluded that it could not reimburse four of RCF’s expenditures because they were for worship, proselytizing, or sectarian religious instruction. RCF provided a mentoring program with spiritual directors for spiritual mentoring, a training institute for the organization’s leaders to gain perspective on how to talk about prayer, worship, and the Catholic faith, a drum shield

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243 Id. (emphasis added).
244 Id.
245 Id. at 1134 (internal quotation marks omitted).
246 Id. at 1127.
247 Id. The RCF was not a recognized student organization originally. While it later met the criteria under the student government’s mandates, it initially struggled as it had members who were not University students. Id. Moreover, it was not controlled by students but by the St. Paul’s Catholic Center and various religious officials, including a pastor and bishop. Id. The organization was also in violation because it did not allow non-Catholics to participate in its meetings. Id.
248 Id.
249 Id.
250 Id.
251 Id.
252 The spiritual mentors included nuns and priests who would talk to the students about anything they wanted to talk about for a half-hour. Id. at 1127–28.
253 These meetings included a variety of activities including masses, prayer, and worship services. Id. at 1128.
used in praise and worship bands, and the cost of a Rosary
instructional pamphlet that told students how to pray the Rosary.\textsuperscript{254} By
the time the case reached the court, the University had also denied
RCF funding for a summer training camp that trained the
organization’s leaders and included several masses, communal
prayers, and worship programs.\textsuperscript{255} Moreover, the University denied
funding for a program that brought nuns from Italy to Madison to meet
with the group’s students to advise them on their “path in the world”
and determine whether they should “be a priest, or religious, or . . .
marr\textsuperscript{i}ed.”\textsuperscript{256} While the school did not fund these activities, it still
funded the majority of RCF’s actions, including large and small group
discussion, education and service offerings, theater and choral
activities, and welcoming activities.\textsuperscript{257}

The district court determined that the fund that the University
created constituted a nonphysical forum under \textit{Rosenberger} and stated
that such a forum was required to distribute reimbursements on a
viewpoint-neutral basis.\textsuperscript{258} Likening the case to \textit{Rosenberger}, the court
referred to the University of Virginia’s rejected argument that the
publications primarily promoted or manifested a particular belief in or
about a deity or an ultimate reality.\textsuperscript{259} Just as that was considered a
limited public forum, so too was the University of Wisconsin’s
fund.\textsuperscript{260} The court concluded that the University was entitled to adopt
reasonable content-based restrictions on the limited forum, but that its
current denials were too broad.\textsuperscript{261} The court noted that merely labeling
types of speech as dialogue or worship was not dispositive of whether
the regulations were constitutional.\textsuperscript{262} Instead, the University would
have to explain its choices in funding and needed to analyze the

\begin{itemize}
  \item \textsuperscript{254} \textit{Id.}
  \item \textsuperscript{255} \textit{Id.}
  \item \textsuperscript{256} \textit{Id.}
  \item \textsuperscript{257} \textit{Id.}
  \item \textsuperscript{258} \textit{Id.} at 1129–30.
  \item \textsuperscript{259} \textit{Id.} at 1130; \textit{see} \textit{Rosenberger v. Rector & Visitors of Univ. of Va.}, 515 U.S.
  \item \textsuperscript{260} \textit{Id.} at 1130. \textit{Roman Catholic Found.}, 578 F. Supp. 2d at 1130.
  \item \textsuperscript{261} \textit{Id.} at 1133–34.
  \item \textsuperscript{262} \textit{Id.}
\end{itemize}
specific content of each disputed activity, rather than rely on highly abstract labels.\footnote{Id. at 1134–35.}

In \textit{Badger Catholic, Inc. v. Walsh}, the Court of Appeals for the Seventh Circuit affirmed the district court’s decision.\footnote{620 F.3d 775 (7th Cir. 2010).} The court rejected the argument that funding prayer, proselytizing, or religious instruction would violate the Establishment Clause.\footnote{Id. at 778.} Instead, it held that because the University had decided that nonreligious counseling groups were within the forum’s scope, it could not exclude religious groups offering prayer as a means of counseling.\footnote{Id.} Furthermore, the court did not agree that the University was allowed to make this decision, whether or not the Establishment Clause required it.\footnote{Id. at 779.} Relying on \textit{Locke}, the court stressed that the State’s program should not evince hostility towards religion.\footnote{Id. at 780; see Locke v. Davey, 540 U.S. 712, 724–25 (2004).} Though \textit{Locke} noted that schools could speak through their decisions about which programs to support, such as having a department on philosophy but not theology, the court held that the forum created by the University of Wisconsin was not to propagate its own message, but to provide its students the ability to speak.\footnote{Badger Catholic, 620 F.3d at 780. The court noted that this seemed like an overly formalistic distinction. Id. Nevertheless, it qualified its holding because the University of Wisconsin had previously told the Supreme Court that it would establish neutral rules and not shut out any perspectives. Id.} The court concluded that the University cannot shape Badger Catholic’s message by selectively funding speech of which it approves, and not funding views of which it disapproved.\footnote{Id.} Because the University created a public forum, it had to accept all comers within the forum’s scope.\footnote{Id.}
III. ANALYSIS

A. Overarching Problem

Religion in public education is much like Pandora’s box, unleashing an area of the law that lends itself to excessive complication and entanglement.\(^{272}\) Regardless of the standard or test applied by the courts, religion has faced a burden unlike any other institution in American democracy.\(^{273}\) Focusing specifically on content and viewpoint discrimination, courts have struggled to apply these seemingly straightforward tests.\(^{274}\) In one instance, a court may find that the government is acting constitutionally, while another court may find activity of nearly the same nature unconstitutional.\(^{275}\) Thus, different circuits have reached markedly different results.\(^{276}\)

The Seventh Circuit’s holding, which determined what public universities must fund, is perilous.\(^{277}\) In an attempt to make the situation clearer for government institutions, *Badger Catholic* unnecessarily integrates Church and State.\(^{278}\) Ironically, the goal that

\(^{272}\) See Witte, *supra* note 1, at 1904.


\(^{274}\) See *Bronx Household of Faith* v. Bd. of Educ. of N.Y., 492 F.3d 89, 99–100 (2d Cir. 2007) (finding a violation of the Establishment Clause where a church was permitted to use school facilities for Sunday service); *Prince v. Jacoby*, 303 F.3d 1074, 1092–93 (9th Cir. 2002) (requiring a school to give bible club access to facilities even though it conducted religious speech); *Linnemeir v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757, 759–60 (7th Cir. 2001) (finding no First Amendment violation where a public university presented a student play that evinced anti-Christian beliefs).

\(^{275}\) Compare *Bronx Household of Faith*, 492 F.3d at 100, with *Prince*, 303 F.3d at 1093.

\(^{276}\) See *Bronx Household of Faith*, 492 F.3d at 99–100; *Prince*, 303 F.3d at 1092–93; *Linnemeir*, 260 F.3d at 759–60.

\(^{277}\) See *Badger Catholic*, Inc. v. Walsh, 620 F.3d 775, 782–83 (7th Cir. 2010) (Williams, J., dissenting); *Green, supra* note 43, at 1118–19.

\(^{278}\) See *Badger Catholic, Inc.*, 620 F.3d at 789 (Williams, J., dissenting).
the Seventh Circuit hoped to achieve may end up working towards an opposite end.\(^{279}\)

The problem stems from the constant battle between the Establishment Clause and the Free Exercise Clause.\(^{280}\) The tests developed to handle the varying issues under each clause fail to address the true complexity of the problem—resulting in the Supreme Court’s inability to come to a clear answer.\(^{281}\) Decisions like *Badger Catholic* exemplify the inherent problem that American jurisprudence has created for itself.\(^{282}\) Whether with respect to funding or facilitating in some manner, analyzing religion’s role in education under independent tests developed for specific clauses of the First Amendment belittles the magnitude of the situation.\(^{283}\)

The Seventh Circuit’s decision in *Badger Catholic* placed an unnecessary burden on the State and forced the government as well as students to implicitly endorse various religious activities, regardless of their own ideology.\(^{284}\) By concluding that the forum in *Badger Catholic* was an open forum, the Seventh Circuit missed the direction of the law and misinterpreted the purpose of viewpoint discrimination analysis.\(^{285}\) What the University created was a forum for a specific purpose and with concrete limitations.\(^{286}\) These limitations were

\[^{279}\text{See id. at 781 (the court aimed to define parameters that would enforce neutrality towards religion).}\]

\[^{280}\text{See Green, supra note 43, at 1126–27.}\]


\[^{282}\text{See Green, supra note 43, at 1132 ("[E]venhanded neutrality is incomplete as a constitutional doctrine because it fails to account for the other important values that inform the religion clauses, such as protecting religious liberty and autonomy, ensuring religious (and secular) equality, alleviating religious dissension, and protecting the legitimacy and integrity of both government and religion. A focus on neutrality, however, discounts these values of liberty, equality, diffusion, and government integrity.").}\]

\[^{283}\text{Id. at 1131–32.}\]

\[^{284}\text{See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001).}\]

\[^{285}\text{See Badger Catholic, 620 F.3d at 781; Green, supra note 43, at 1135–36.}\]

\[^{286}\text{Badger Catholic, 620 F.3d at 783 (Williams, J., dissenting).}\]
publicly available and reasonable in light of the forum’s purpose and the tenets of the Constitution.\(^{287}\)

Plainly, the Seventh Circuit’s decision failed to recognize that public institutions have the ability to stop some activity and are required in some instances to limit religious speech so that religion receives no preferential treatment from the State.\(^{288}\) There is a specific distinction between the state providing equal access to all groups regardless of their views and the funding and propagating of religious worship and activity.\(^{289}\) While the former is necessarily protected under the First Amendment, the latter represents an unreasonable encroachment.\(^{290}\)

In looking at where to go from here, the Seventh Circuit must understand the true movement of its own law as well as how the Establishment Clause was meant to affect religion.\(^{291}\) What has occurred here is but a tremor of what may come if other circuits follow the same route.\(^{292}\)

**B. Badger Catholic Detailed**

The Seventh Circuit failed to recognize the University of Wisconsin’s prerogative to create a limited forum and restrict access to that forum based on the content of activities.\(^{293}\) Specifically, the University created the forum to foster discussion of philosophical, religious, scientific, social, and political subjects.\(^{294}\) Moreover, it fully

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\(^{287}\) Id.


\(^{289}\) Green, *supra* note 43, at 1131–32.

\(^{290}\) Id.

\(^{291}\) See Christian Legal Soc’y v. Walker, 453 F.3d 853, 865–66 (7th Cir. 2006); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003); Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 580 (7th Cir. 2002).


\(^{293}\) See Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2990 (2010).

funded dialogue and debate on these topics.\footnote{Id. at 1134.} What it did not fund was any form of worship, proselytizing, or religious instruction.\footnote{Id.} All student organizations could access this fund so long as they stayed within these limits.\footnote{Id. at 1126.} In doing so, the University created a specific limited forum.\footnote{See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).}

However, the court stretched the tenets of neutrality to demolish the barriers that the University created.\footnote{See Green, supra note 43, at 1131–32.} By requiring the school to reimburse Badger Catholic on the same basis that it reimburses other groups, the court missed the mark.\footnote{See Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2990 (2010); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995).} While facially, this approach appears viewpoint-neutral, it degraded what these activities actually were.\footnote{Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 785 (7th Cir. 2010) (Williams, J., dissenting).} The court seemed to see no difference between students mentoring students and students seeking advice from nuns and priests.\footnote{See id. at 779 (majority opinion).} However, there is a significant difference.\footnote{Id. at 785 (Williams, J., dissenting) (“If religion, and the practice of one’s religion, can be described as merely dialog or debate from a religious perspective, what work does the Free Exercise [C]lause of the First Amendment do?”); see also Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 102 (2d Cir. 2007) (Calabresi, J., concurring) (“Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false.”).} While one is a discussion and dialogue about various social problems at a school, the other is religious instruction.\footnote{See Rosenberger, 515 U.S. at 831 (“Religion . . . provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”).} It is not far-fetched that nuns and priests will be giving particular religious instruction that cannot be rivaled by a secular counterpart.\footnote{Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys., 578 F.Supp.2d 1121, 1127–28 (W.D. Wis. 2008).} By its very nature,
religious mentoring is on a level fundamentally different from student dialogue. \(^{306}\) It represents a spiritual experience. \(^{307}\) There is no comparison between the two, and trying to draw congruence only denigrates the value of religion. \(^{308}\)

All of the activity for which the University rejected funding follows this same analysis. \(^{309}\) A training institute for the organization’s leaders that conducts mass, prayer, and worship sessions is not equivalent to a normal organization’s leadership training. \(^{310}\) The same applies to the summer training camp that it conducted. \(^{311}\) These are exercises in religious devotion and proselytizing, not mere training. \(^{312}\)

Moreover, the pamphlets that Badger Catholic distributes differ significantly from the newspapers discussed in *Rosenberger*. \(^{313}\) While the newspapers were intended to give religious perspective and advice on current topics, Badger Catholic’s pamphlets were instructions on worship. \(^{314}\) It instructed members on the rosary and how to pray it. \(^{315}\) This is markedly different from evincing a religious perspective. \(^{316}\)

That the University funded all but 9% of Badger Catholic’s activities also lends some insight into how specific its limitations actually were. \(^{317}\) The six activities that it did not fund plainly did not

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\(^{306}\) See *Rosenberger*, 515 U.S. at 831.

\(^{307}\) See *Bronx Household of Faith*, 492 F.3d at 102.

\(^{308}\) Id.

\(^{309}\) See *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010).

\(^{310}\) Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 785 (7th Cir. 2010) (Williams, J., dissenting).

\(^{311}\) Id.

\(^{312}\) See *Green*, supra note 43, at 1120–21.


\(^{315}\) *Roman Catholic Found.*, 578 F. Supp. 2d at 1128.

\(^{316}\) See *Rosenberger*, 515 U.S. at 827.

\(^{317}\) Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 783 (7th Cir. 2010) (Williams, J., dissenting).
further the forum’s goals. By forbidding worship, proselytizing, or religious instruction, the University did not target religious views generally or Catholicism specifically. Instead, it forbade actions. Presumably, any group that might seek reimbursement under these categories would be rejected. The court attempted to liken Badger Catholic’s activities to secular counterparts and missed the point of these activities.

The court also incorrectly assumed that worship and proselytizing are automatically religious. It is just as likely that a student group could form to worship and proselytize for a sports team or a pop star. These are categories of conduct, not religious views. The separation is only magnified by the unrivaled equivalency that religion creates for itself. That mass, prayer, and worship are typically religious and hold no secular equal does not mean that the actions amount to a viewpoint. Instead, it demonstrates the specificity that the University has created in its forum. Mentoring programs are not the equivalent of religious

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318 Id.
320 See Martinez, 130 S. Ct. at 2990.
321 See id.
322 Badger Catholic, 620 F.3d at 785 (Williams, J., dissenting).
323 See id. at 777–78 (majority opinion).
324 See id. at 778–79.
326 See id.
327 See Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 102 (2d Cir. 2007) (Calabresi, J., concurring).
mentoring because the latter incorporates a specific level of worship and prayer outside the scope of the forum’s purpose.\(^{330}\)

Finally, the court ignored the academic deference that it had previously exercised and the well-respected notion that the State can preserve property under its control so long as the self-created barriers are reasonable and viewpoint-neutral.\(^{331}\) With scarce resources available, the University is allowed to decide which projects and conduct it wishes to fund.\(^{332}\) It must merely block access to the limited forum reasonably and without regard to viewpoint.\(^{333}\) The University is allowed to make hard decisions about its funding.\(^{334}\) As such, the Seventh Circuit’s decision in *Badger Catholic* was wrong.\(^{335}\)

**CONCLUSION**

The Court of Appeals for the Seventh Circuit had the chance to protect the separation of church and state in *Badger Catholic v. Walsh*, but instead misapplied the neutrality test and created further ambiguity. Perhaps because the court misunderstood the facts of the case or misinterpreted precedent, the University of Wisconsin is unnecessarily required to fund religious activity that it never aimed to. Rather than creating a more level playing field for participation by all student organizations, the court mishandled *Badger Catholic v. Walsh* and disregarded the high level of separation that the First Amendment demands. Moreover, by equating secular tasks with quintessential religious actions, the decision partakes in blanket assumptions about

\(^{330}\) *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 783 (7th Cir. 2010) (Williams, J., dissenting); *see Bronx Household of Faith*, 492 F.3d at 102 (Calabresi, J., concurring).

\(^{331}\) *See Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2983 (2010).

\(^{332}\) *Martinez*, 130 S. Ct. at 2998; *see also Badger Catholic*, 620 F.3d at 786–87 (7th Cir. 2010) (Williams, J., dissenting).


\(^{334}\) *See Martinez*, 130 S. Ct. at 2998; *see also Badger Catholic*, 620 F.3d at 786–87 (7th Cir. 2010) (Williams, J., dissenting).

\(^{335}\) *See id.*
religious activity. Rather than clarifying the discussion of religious funding in public education, the court’s decision merely adds to the serpentine wall of separation.