

FORUM DOMINATION: RELIGIOUS SPEECH IN EXTREMELY LIMITED PUBLIC FORA

*Nicholas Matich**

INTRODUCTION

IF you are religious, where do you worship? A church? A synagogue? A mosque? A public school cafeteria? Many Americans may be surprised to learn that there are a large number of religious communities across the country—perhaps as many as 24,000—that have no permanent physical plant, no building to call their own.¹ These “church-in-a-box” communities carry their equipment—everything from altars, to sound amplification systems, to coffee pots—in trailers for same-day set-up and teardown in whatever temporary space they find.² Unlike the old-fashioned tent revivals of high school history textbooks, however, this temporary space is usually not an open field. Often, it is a public school building.³

While these churches follow the old American tradition of religious re-awakening, their opponents follow another old American tradition: litigation. Since at least 1872, those opposed to the religious use of school buildings have taken to the courts,⁴ where their arguments have run the gamut of First Amendment doctrines.⁵

* J.D. expected May 2013, University of Virginia School of Law; B.A. 2006, University of Notre Dame. I am immensely grateful to Professor Douglas Laycock for all of his guidance throughout the note process. Thank you also to Joseph D’Agostino and the other editors at the *Virginia Law Review* for their criticism and advice. Finally, and most of all, I thank my wife, Elise, and our son, Thomas, for their help, love, and support. All errors are my own.

¹ Cathy Lynn Grossman & Natalie DiBlasio, A Divide Over ‘Portable’ Churches, *USA Today*, July 19, 2011, at A1.

² *Id.*

³ *Id.*

⁴ See *Townsend v. Hagan*, 35 Iowa 194, 194–95 (1872) (dismissing a statutory challenge to the use of a public school for worship services and Sunday school).

⁵ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–30, 844–46 (1995) (discussing viewpoint discrimination, content discrimination, the implications of financial burdens on speakers, and entanglement with religion); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality opinion) (discussing endorsement of religion and the *Lemon* test); *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 42 (2d Cir. 2011) (discussing forum domination and endorsement of religion);

Much has been settled by this litigation, including the question of whether religious groups must receive access to a public forum on an equal footing with non-religious groups. They must. Part I of this Note will briefly explain the relevant First Amendment doctrines.

Many of the Supreme Court doctrines that comprise this case law, however, assume that public fora are not only *available* to groups with religious and non-religious viewpoints, but that a variety of groups in fact *use* such fora.⁶ Indeed, the Supreme Court has worried about what to do if a religious group dominates a public forum,⁷ but has never faced the question directly.⁸

In spite of the Court's speculation on the matter, and although the specter of forum domination is often raised, cases of courts actually finding forum domination have been quite rare.⁹ More recently, however, in *Bronx Household of Faith v. Board of Education*, the Second Circuit showed a willingness to find forum domination in a wider range of scenarios.¹⁰ In *Bronx*, the court held

Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd., 17 F.3d 703, 708 (4th Cir. 1994) (discussing subsidies to religion).

⁶ See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–95 (1993).

⁷ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 128 (2001) (Breyer, J., concurring in part); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777–78 (1995) (O'Connor, J., concurring in part and concurring in the judgment); *Mergens*, 496 U.S. at 252 (plurality opinion); *Widmar v. Vincent*, 454 U.S. 263, 275 (1981).

⁸ See *Lamb's Chapel*, 508 U.S. at 394–95. This question has been a long-standing one in state courts as well. See, e.g., *Southside Estates Baptist Church v. Bd. of Trs.*, 115 So. 2d 697, 700 (Fla. 1959).

⁹ See, e.g., *Widmar*, 454 U.S. at 275 (finding no forum domination); *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 284–86 (4th Cir. 1998) (same); *Fairfax Covenant Church*, 17 F.3d at 708 (holding that a school district had not been dominated by a single church); *Doe v. Small*, 964 F.2d 611, 625 (7th Cir. 1992) (Cudahy, J., concurring in the judgment) (declining to reach the forum domination issue); *Concerned Women for Am., Inc. v. Lafayette Cnty.*, 883 F.2d 32, 35 (5th Cir. 1989) (finding no forum domination); *Citizens for Cmty. Values, Inc. v. Upper Arlington Pub. Library Bd. of Trs.*, No. C-2-08-223, 2008 WL 3843579, at *15 (S.D. Ohio Aug. 14, 2008) (finding no evidence of forum domination). For a district court case holding of forum domination that was subsequently reversed, see *Doe v. Small*, 726 F. Supp. 713, 724 (N.D. Ill. 1989), vacated, 964 F.2d 611, 622 (7th Cir. 1992). Similarly, in *Kreisner v. City of San Diego*, 1 F.3d 775, 776 (9th Cir. 1993), the majority on a Ninth Circuit panel upheld a religious display in a park, over the dissent's objection that the display dominated the forum. *Id.* at 795, 797 (Boochever, J., dissenting).

¹⁰ 650 F.3d at 41–42.

2012]

Forum Domination

1151

that the regular use of a school for worship services could constitute forum domination, even when no other group was denied access to the forum on account of the church's use of the space.¹¹ Part II will argue that the Second Circuit took an overly broad view of forum domination that does not comport with the Supreme Court's case law. Under a proper reading of the Court's opinions, forum domination occurs only when one group uses a forum's resources to the exclusion of others who actually seek access to them.

Although forum domination is a problem of narrower scope than the Second Circuit held, Part III will argue that it still is a genuine problem. Forum domination may result in impermissible government aid to or endorsement of religion, for the obvious reason that a government building is being used exclusively as a church. Yet, this problem creates some tension within the First Amendment: because the First Amendment also forbids government discrimination against religion, religious groups cannot simply be banished from the forum. Accordingly, Part IV will argue that the most plausible reading of the case law is that the forum domination problem presents a limit, not on private speech, but on the government's administration of public fora. Part V will examine the specific policies through which schools can provide equal access to religious groups in a forum at risk for domination, while steering clear of Establishment Clause concerns.

Finally, Part VI will argue that the steps necessary to provide equal access to religious groups are necessary in any public forum where space is limited, regardless of the religiosity of the speakers. When a religious speaker uses a public forum, the problem can be viewed through the Establishment Clause, and it is important that the religious speaker not receive preferential treatment. But parallel problems arise under the Free Speech Clause if the government gives preferential treatment to any viewpoint (except those it is willing to adopt as its own and promote with government speech). When fully analyzed, the problem is not peculiar to religious groups. The solution, as in other issues arising in public fora, is viewpoint neutrality and equal treatment.

¹¹ Id. at 43.

I. WORSHIP, FREE SPEECH, AND EQUAL ACCESS

A. Public Forum Doctrine

When the government makes public facilities or other resources available for private speakers, the restrictions that the government puts on the speakers are regulated under the First Amendment's public forum doctrine.¹² The public forum doctrine subjects these regulations to a three-step inquiry: first, as a threshold matter, courts ask if the speech involved is government speech or private speech.¹³ For example, a protest held in a public park is private speech, but the park's "no littering" signs are government speech. Government speech is not affected by the First Amendment, except in so far as it is limited by the Establishment Clause, and, in general, the government may endorse messages of its own choosing.¹⁴ Consequently, a finding that speech is government speech ends the public forum doctrine inquiry.

If, however, the regulated speech is private speech, then the court must proceed to the second step of the inquiry. Here, courts ask what type of forum is involved. A broad range of things can be considered "fora" for the purposes of the public forum doctrine. Most obviously, a physical forum, such as an auditorium, can be a type of forum. But pools of money or other resources made available to promote private speech are sufficiently analogous to a physical forum to qualify under the doctrine.¹⁵

This second step in the inquiry, however, centers not on whether the forum is a physical forum or an analogical one, but on legal categories created by the Supreme Court. The Court has said that there are three categories of fora: traditional public fora, limited public fora, and non-public fora.¹⁶ Places that, by long tradition,

¹² See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

¹³ See, e.g., *id.* at 472–73 (holding that a privately donated monument on public land is government speech).

¹⁴ *Id.* at 467–68.

¹⁵ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (holding that funds made available by a university for student expression are a forum).

¹⁶ *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). In spite of the fact that the Court has said that there are only three categories of fora, the Court has not been consistent in how it refers to various kinds of public fora and commentators have identified as many as six separate categories or subcategories within the Court's

have been used for public expression, such as parks and sidewalks, are “traditional public fora.”¹⁷ Government-owned facilities dedicated to particular private uses, such as a government concert hall, are “limited public fora,” and government facilities whose public access is severely restricted, such as a government office building, are “non-public fora.”¹⁸

It remains an open question what type of forum is created when a public school is made available for rent by the public.¹⁹ The Court has said that it is either a traditional or a limited public forum,²⁰ but in many cases, the parties simply assume that it is a limited public forum.²¹ In any event, for the purposes of a religious group attempting to use the forum, the final step of the public forum doctrine inquiry makes this question irrelevant.

The final step of the public forum doctrine inquiry simply asks whether the regulations on speakers within the forum withstand the relevant level of scrutiny.²² Reasonable restrictions on the “time, place, and manner” of speech, such as noise ordinances, are permissible in all types of public fora.²³ Restrictions on the subject matter of speech are permitted in limited public fora and non-public fora, but not in traditional public fora.²⁴ Finally, restrictions based on a speaker’s viewpoint—the perspective or ideology of the

public fora jurisprudence. Lower courts remained confused by the Supreme Court’s inconsistent forum taxonomy. See James Duane, *Say What, Say Where: Contours of the Public Forum Doctrine 14* (2011) (unpublished manuscript) (on file with the author). For the reasons given below, this confusion is not relevant to the problem of forum domination.

¹⁷ *Ark. Educ. Television Comm’n*, 523 U.S. at 677; see also *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) (listing sidewalks as the “prototypical” traditional public forum).

¹⁸ *Ark. Educ. Television Comm’n*, 523 U.S. at 677; cf. *United States v. Kokinda*, 497 U.S. 720, 727–29 (1990) (holding that a sidewalk that was built exclusively for use by the postal service is treated differently under the First Amendment than other sidewalks).

¹⁹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

²⁰ *Id.*

²¹ See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226, 235–36 (1990) (upholding a federal statute forbidding schools that receive federal funds from discriminating on the basis of religion in their limited public fora).

²² See *Good News*, 533 U.S. at 106.

²³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . .”).

²⁴ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677–78 (1998).

speaker—are always subject to strict scrutiny and so rarely permitted in any forum.²⁵ For example, a ban on all discussion of U.S. trade policy in a forum would be a subject matter based restriction. Barring free-trade supporters from the forum while allowing access to tariff supporters, on the other hand, would be impermissible viewpoint discrimination. More importantly for the problem of forum domination, it is settled law that religion is not merely a subject matter, but a viewpoint.²⁶ Hence, restrictions based on a speaker's religiosity are subject to strict scrutiny in all types of fora.²⁷

Although in every religious speech case to date, the Court has struck down viewpoint discrimination when it has been found, it remains unsettled whether avoiding a violation of the Establishment Clause is a sufficiently compelling state interest to survive strict scrutiny and justify viewpoint discrimination.²⁸ The Court has suggested that avoiding an Establishment Clause violation could be a sufficiently compelling reason for the government to engage in viewpoint discrimination,²⁹ but has specifically reserved the question.³⁰ Hence, it is possible that some viewpoint discrimination will be held permissible in the future. This forms the heart of the forum domination problem: if the use of a forum by a religious group to the exclusion of others violates the Establishment Clause, then the Establishment Clause may very well serve as a limit on their access to public space, notwithstanding the normal constitutional protections against viewpoint discrimination.

²⁵ *Id.* at 682; *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

²⁶ *Good News*, 533 U.S. at 110–12.

²⁷ Because viewpoint discrimination is treated with equal suspicion in all types of fora, the type of forum involved becomes irrelevant when the question is whether there has been viewpoint discrimination. Consequently, in religious speech cases courts often dispense with the earlier parts of the forum analysis and go directly to the question of whether there has been viewpoint discrimination. Often, the parties simply agree on the forum analysis and the litigation focuses on the question of viewpoint discrimination. See, e.g., *id.* at 106.

²⁸ *Good News*, 533 U.S. at 113 (“[I]t is not clear whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.” (citations omitted)).

²⁹ See *Widmar* 454 U.S. at 270–71 (characterizing a university’s interest in complying with the Establishment Clause as “compelling”).

³⁰ *Good News*, 533 U.S. at 113.

Finally, many, if not most, of the churches that rent public school space do so because they want to hold worship services there. Although there appears to be a circuit split regarding whether the government may forbid “worship” in a public forum, that question is not relevant here. Some courts have held that worship is the manifestation of a “viewpoint,” which may not be discriminated against in a public forum, while others have held that worship is merely a mode of expression—a type of activity—that is subject to reasonable time, place, and manner restrictions.³¹ Regardless, it is settled law that churches have *some* access to public school buildings,³² and thus the potential for them to dominate a forum exists, notwithstanding the unsettled issue of what they may do once they have accessed the school.

B. The Establishment Clause

In *Lynch v. Donnelly*, the Supreme Court refused to “be confined to any single test or criterion” in its Establishment Clause jurisprudence,³³ and indeed, the Court has not been so confined. Rather, there are at least four different tests that the Court has used at various times in Establishment Clause cases: the *Lemon* test, the coercion test, the history and traditions test, and the endorsement test. With four tests available, it is difficult to predict which one the Court will use in any given case or how it will be applied. Although even Justices have criticized the Court’s inconsistent jurisprudence,³⁴ some prediction and analysis is possible.

³¹ Compare *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 781 (7th Cir. 2010) (holding that denying a Catholic student group access to a public forum because they intended to conduct worship services was viewpoint discrimination), with *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 37–38 (2d Cir. 2011) (holding that worship is not a viewpoint and is subject to time, place, and manner restrictions).

³² See *Good News*, 533 U.S. at 120.

³³ 465 U.S. 668, 679 (1984).

³⁴ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 655–56 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

1. *The Lemon Test*

The Supreme Court's most famous Establishment Clause test is the *Lemon* test from *Lemon v. Kurtzman*.³⁵ In order to be constitutional, a government policy, action, or law must survive the test's three prongs: (1) The policy must have a secular purpose, (2) its primary effect must neither advance nor hinder religion, and (3) it must not foster excessive government entanglement with religion.³⁶ There has been some recent confusion among lower courts over when *Lemon* controls,³⁷ and indeed, some speculation on the Court itself on whether *Lemon* is dead.³⁸ Nonetheless, the Court has continued to apply it.³⁹

2. *The Coercion Test*

There is broad agreement that coercion by the state in matters of religion violates the Establishment Clause.⁴⁰ However, in *Lee v. Weisman*, the Court found that the obvious types of coercion, such as using taxes to support a church, or requiring religious oaths, are not the only types of coercion that violate the Establishment Clause.⁴¹ More "subtle" coercion, like student peer pressure, can qualify as well when it is attributable to the state.⁴²

3. *The History and Traditions Test*

In several Supreme Court cases, government actions have been upheld in the face of significant Establishment Clause concerns because the actions were rooted in the long history and traditions of the Republic. For example, in *Marsh v. Chambers*, the court upheld the use of prayer to open sessions of the Nebraska legislature

³⁵ 403 U.S. 602 (1971).

³⁶ *Lee v. Weisman*, 505 U.S. 577, 585 (1992).

³⁷ See *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1244–45 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc).

³⁸ *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment); see also Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795, 797 (1993).

³⁹ See, e.g., *Santa Fe*, 530 U.S. at 314 (applying the *Lemon* test).

⁴⁰ *Weisman*, 505 U.S. at 587; see also Micah Schwartzman, *Conscience, Speech, and Money*, 97 Va. L. Rev. 317, 382–84 (2011) (discussing the philosophical underpinnings of non-coercion and its understanding at the time of the founding).

⁴¹ 505 U.S. at 588.

⁴² *Id.*

because the practice was “deeply embedded in the history and tradition of this country.”⁴³ Thus, some traditional government practices may be upheld even when they would fail the Court’s other tests.

4. *The Endorsement Test*

The endorsement test is the most difficult of the Supreme Court’s Establishment Clause tests to apply. It asks whether a reasonable observer would think that the government action in question constitutes an endorsement of religion, or makes “religion relevant . . . to a person’s standing in the political community.”⁴⁴ The difficulty in applying the test is twofold. First, the test’s relationship with the other Establishment Clause tests is unclear. There is some indication that the test is really a part of the *Lemon* test’s “purpose” and “effects” prongs.⁴⁵ But at other times the test has been applied independently of *Lemon*.⁴⁶ Even if the endorsement test is a subpart of *Lemon*, endorsement analysis tends to focus on the perception of the policy in the community, whereas “purpose” cases under *Lemon* primarily look for the impermissible motives of legislators and government officials and “effects” cases look for the advancement of religious goals.⁴⁷ For simplicity and

⁴³ 463 U.S. 783, 786 (1983); see also *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (upholding a Ten Commandments display on public property).

⁴⁴ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)).

⁴⁵ *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring) (“The central issue in this case is whether [the government] has endorsed [religion]. To answer that question, we must examine both what [the government] intended to communicate . . . and what [it] actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the [government’s] action.”).

⁴⁶ For an example of the endorsement test used outside the *Lemon* test, see *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302–10 (2000). There, although the Court eventually discussed endorsement in terms of the *Lemon* test, *id.* at 314, it spent the majority of the opinion treating “endorsement” as a separate and sufficient means of finding the school district’s policies unconstitutional.

⁴⁷ Compare, e.g., *Santa Fe*, 530 U.S. at 309–10 (discussing whether participation in a prayer at a school football game was relevant to standing in the political community), with *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (focusing on the motives of a legislator in enacting a school prayer statute), and *Lemon*, 403 U.S. at 613 (discussing, under the effects prong, whether a program of state aid to religious schools advanced their religious mission).

clarity, this Note will treat the endorsement test as a separate Establishment Clause test.

The second difficulty in applying the endorsement test is determining the nature of the test's "reasonable observer." Justice O'Connor, the test's inventor, declared that her First Amendment "reasonable observer" was a cousin to the "reasonable man" of tort law.⁴⁸ This comparison is not as helpful as it might appear. *Capitol Square Review and Advisory Board v. Pinette*, a case concerning a religious display near the Ohio state capitol building, highlights the problem.⁴⁹ There, not even the Justices who applied the reasonable observer test could agree on its application. On the one hand, Justice O'Connor's reasonable observer was more aware of the circumstances surrounding the display than the average citizen, but was still capable of making reasonable mistakes.⁵⁰ Justice Stevens, on the other hand, also applied the reasonable observer test, but would have made the reasonable observer any casual observer, prone to mistakes and gaps in his knowledge.⁵¹ Finally, Justice Scalia, speaking for the plurality, cited the O'Connor-Stevens disagreement and similar disagreements among lower courts to support his argument that *any* reasonable observer test is too hopelessly subjective to permit principled application.⁵² Recent Supreme Court decisions have not shed much light on the nature of the endorsement test,⁵³ and confusion in the lower courts persists.⁵⁴

This confusion has particular application to the forum domination problem. Under a Scalia approach, so long as no preference is given to a religious group in gaining access to a forum, there is no endorsement, and hence no Establishment Clause problem or forum domination problem. But if one applies the reasonable observer test instead of the endorsement test, then it is possible that

⁴⁸ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

⁴⁹ *Id.* at 757 (majority opinion).

⁵⁰ *Id.* at 779–81 (O'Connor, J., concurring in part and concurring in the judgment).

⁵¹ *Id.* at 807–08 (Stevens, J., dissenting).

⁵² *Id.* at 768 n.3 (plurality opinion).

⁵³ *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 476–77 (2009) (implying that both the intended and perceived meaning of a government monument is relevant).

⁵⁴ See *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1245–48 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc) (discussing an example of the Tenth Circuit's confusion in applying the reasonable observer test).

even government actions that are in fact neutral may be struck down, depending on who the reasonable observer is. O'Connor's knowledgeable reasonable observer would take into account government actions to mitigate perceptions of endorsement, even though large sections of the population would be ignorant of such actions.⁵⁵ But if the reasonable observer is Stevens's uninformed observer, then no government action mitigating endorsement is likely to overcome the observer's perception of endorsement, and religious groups are far more likely to be excluded even if they were in fact given no preference.

II. WHAT IS FORUM DOMINATION?

In *Widmar v. Vincent*, the Supreme Court first raised the concern of a religious group dominating a public forum.⁵⁶ There, the Court held that a religious student group at the University of Missouri at Kansas City was entitled to equal access to university facilities, at least absent evidence that the religious group was dominating the forum.⁵⁷ The Court did not define domination, nor did it say that domination, however defined, would constitute an Establishment Clause violation. However, the Court found two factors important: First, the university gave no official endorsement of the student group, and second the forum was available to many groups.⁵⁸ This suggests that the problem of forum domination is that the use of a forum by a single group could result in impermissible perceptions of endorsement.

Recently however, in *Bronx Household of Faith v. Board of Education*, a case involving New York City's public schools, the Second Circuit expressed its concern that forum domination may be a problem of broader scope.⁵⁹ The *Bronx* court found at least three factors besides those identified by the Supreme Court that could constitute forum domination. First, the court argued that a worship service by its nature dominated a forum.⁶⁰ Second, the

⁵⁵ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (applying O'Connor's reasonable observer test).

⁵⁶ 454 U.S. 263, 275 (1981).

⁵⁷ *Id.*

⁵⁸ *Id.* at 274–75.

⁵⁹ 650 F.3d 30, 42–44 (2d Cir. 2011).

⁶⁰ *Id.* at 42.

court argued that the special availability of schools on Sundays, when Christians worship, meant that Christian use of the schools on Sunday constituted forum domination.⁶¹ Finally, the court evaluated domination at the level of school building or even schoolroom, not at the level of the school system.⁶² Since *Widmar*, courts have rarely found domination when the issue has been raised, making *Bronx* an unusual case.⁶³ Moreover, the types of “domination” discussed by the *Bronx* court do not pose the serious risks with which the *Widmar* court was concerned. For precisely these reasons, however, the *Bronx* decision merits close attention.

A. The Bronx Approach to Forum Domination

1. All Church Use is Domination

The *Bronx* majority argued that conducting religious rites on school property would dominate the space because these rites “establish[]” the church there, and “consecrate[]” the space in a way that secular groups do not.⁶⁴ The dissent criticized the majority for its “metaphysical[]” distinctions,⁶⁵ but the problems with the majority’s reasoning go deeper than this jibe.

First, the majority’s reasoning is simply unclear. It offers no reason why a speaker’s content or even a mode of speech can “dominate[]” a forum.⁶⁶ A charitable interpretation of the majority’s argument would be that worship as a mode of speech is particularly powerful, and that its presence in a government facility suggests government endorsement in a way other speech does not. If this is what the majority meant, however, its references to domination are misplaced. Endorsement is an entirely separate doctrine from domination,⁶⁷ and as Part III will argue, endorsement is not at issue in a situation like *Bronx*.⁶⁸

⁶¹ Id. at 43.

⁶² Id. at 45.

⁶³ See supra note 9 and accompanying text.

⁶⁴ *Bronx*, 650 F.3d at 41, 45 (emphasis omitted).

⁶⁵ Id. at 62 (Walker, J., dissenting).

⁶⁶ See id. at 41–42.

⁶⁷ See supra Subsection I.B.4.

⁶⁸ See infra Section III.D.

Second, to hold that religious activity by its nature dominates a public forum in an impermissible fashion, as the *Bronx* court did, is clearly contrary to the Supreme Court's holding in *Widmar* that restrictions on worship of this type violate both the Religion Clauses and the Free Speech Clause of the First Amendment.⁶⁹ As the *Widmar* Court and *Bronx* dissent point out, there is no principled and constitutionally significant distinction between worship and other forms of clearly protected religious speech.⁷⁰ What criteria would lower courts use to determine when a space has been dominated by the nature of the religious activity? Would a Catholic Mass be treated differently than a more free-form Protestant worship service? What of a Quaker meeting without any clergy, or a non-denominational Bible study? Tellingly, the *Bronx* court proposed no such criteria. Even if such distinctions could be made, their enforcement would risk entanglement with religion. Any such distinctions would necessarily be theological distinctions—"A Catholic Mass 'consecrates' a space, but a Quaker meeting does not"—and require administrators and courts to substantively evaluate religious doctrines.⁷¹ This would be a clear violation of the Establishment Clause.

2. Sunday Only

In most public schools, regular class schedules during the week and extracurricular schedules on Saturday make schools more

⁶⁹ *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9 (1981).

⁷⁰ *Id.* at 271 n.9; *Bronx*, 650 F.3d at 55–56 (Walker, J., dissenting).

⁷¹ See *Widmar*, 454 U.S. at 272 n.11 (noting that enforcing a distinction between religious worship and religious speech risks unconstitutional entanglement with religion); *Bronx*, 650 F.3d at 55–56 (Walker, J., dissenting) (describing the practical and constitutional problems that occur when the government tries to determine what is and is not "worship"); William A. Glaser, Comment, *Worshiping Separation: Worship in Limited Public Forums and the Establishment Clause*, 38 *Pepp. L. Rev.* 1053, 1088–89 (2011) (discussing the problems this distinction raises); see also *Lee v. Weisman*, 505 U.S. 577, 616–17 (1992) (Souter, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible [than comparative theology]."); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (plurality opinion) (arguing that the monitoring of speech involved in such distinctions result in excessive entanglement with religion); Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 *Va. L. Rev.* 443, 445 (2010) (discussing courts' incompetence to decide questions of religious dogma).

available for rent on Sunday than other days. The *Bronx* majority argued that making schools available to churches on Sundays gave the perception that the school was endorsing Christianity, and gave Christian denominations an advantage in renting school space, allowing them to dominate the forum.⁷² But these problems are separable from the issue of forum domination.

First, although the Court has agreed that the government's decision not to hold classes or other activities on Sunday is to some extent religiously motivated,⁷³ this argument does not really concern forum domination, but rather the school's schedule itself. A school's closing on Sunday benefits Christianity because children are more able to attend Christian worship if they are not in school. Muslim children, by contrast, must be in class on their day of worship. But this benefit to Christians accrues regardless of *where* the worship occurs. The schedule itself favors Christianity far more than renting school space for worship services.

Second, this objection to the school's schedule is not a trivial objection, but it is one that has been settled. Although the American social convention of treating Sunday differently has religious roots,⁷⁴ as the Court ruled in *McGowan v. Maryland*, the convention serves legitimate secular purposes, such as providing a universal day of rest,⁷⁵ and is sufficiently removed from its religious context that it no longer violates the Establishment Clause.⁷⁶ Under current doctrine, a law is not unconstitutional simply because it harmonizes with the beliefs of a religious sect.⁷⁷ Consequently, the real argument here is with *McGowan*, not the school's rental policy. It is the school's closing policy, not its rental policy, that creates any endorsement, and if a school fears that it is impermissibly endorsing religion, it is free to alter its schedule.⁷⁸

⁷² *Bronx*, 650 F.3d at 42–43.

⁷³ See *McGowan v. Maryland*, 366 U.S. 420, 431–33 (1961) (discussing blue laws and arguing that “[t]here is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces”).

⁷⁴ *Id.*

⁷⁵ *Id.* at 433–35.

⁷⁶ *Id.* at 444 (holding that Sunday closing laws “presently . . . bear no relationship to establishment of religion as those words are used in the Constitution”).

⁷⁷ *Id.* at 442.

⁷⁸ Cf. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) (noting that secondary school students are able to tell the difference between endorsement and equal access).

Finally, a faithful adherence to the principle in *Bronx* requires either the unequal treatment of religious groups or the absolute exclusion of all religious groups from public fora. Either violates the Constitution. If the use of schools on Sunday by Christians creates the perception of endorsement because that is the Christian day of worship, then Muslims and Jews would similarly need to be excluded on Sundays lest they be treated differently (and given more rental opportunities) than Christians. But since Friday and Saturday are days of worship for Muslims and Jews, those days would be kept from use as well, in addition to Yom Kippur, Rosh Hashanah, the month of Ramadan, Holy Thursday, Ash Wednesday, Lent, and Christmas. The list could go on. Since so many days are special to some religious group, excluding religious groups *because* that day is special ends in the unequal treatment of religion.

3. What is the forum?

The *Bronx* majority held that a church's use of the largest space in a building or its use of the building for the whole day could constitute domination.⁷⁹ Implicit in this holding is the unexamined assumption that the forum was a single school or a single room, not the school district as a whole. Since it is obviously easier to "dominate" a room than it is to dominate the entire New York City school system, the majority's finding of domination follows easily from its assumption.

On closer examination, however, the majority's assumption makes little sense. It is the school district to which churches apply for use of the space. It is the school district that allocates the space. It is the school district policy that sets up the forum. And it is the school district that defends its policies in court.⁸⁰ Accordingly, the forum should be evaluated at the level of the school district.⁸¹ If it were otherwise, school districts attempting to deny access to reli-

⁷⁹ See 650 F.3d at 42.

⁸⁰ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001) (describing the New York statute authorizing the rental of public schools); *Bronx*, 650 F.3d at 62–63 (Walker, J., dissenting) (discussing New York City's school rental policy); *Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd.*, 17 F.3d 703, 708 (4th Cir. 1994) (discussing the rental policies in a Virginia school district).

⁸¹ See *Fairfax Covenant Church*, 17 F.3d at 708 (holding that forum domination is not an issue when there is ample space within the school system for other speakers).

gious groups could artificially create a domination problem by putting all of the religious groups in a single building when it might be more sensible to spread the groups equally among the district's facilities.

B. A Narrower Problem

One of the most interesting features of the *Bronx* decision is that there was ample space throughout the rest of the New York City school system available for other groups to rent.⁸² In other words, no other group was excluded from using the city's limited public forum because of the church's use. Thus, implicit in the *Bronx* decision is that forum domination is possible even when the religious use of the forum does not exclude other users of the space. However, in *Good News Club v. Milford*, a case involving a Christian after-school club, the Supreme Court specifically rejected this notion.⁸³ A forum is not dominated because only a religious group chooses to use the space.

Moreover, the Court's decision in *Marsh v. Chambers* upholding the use of a prayer to open sessions of the Nebraska legislature similarly supports this position.⁸⁴ There, the legislature had for many years employed only one clergyman, a Presbyterian, to deliver the prayer.⁸⁵ Although it can be fairly argued that *Marsh* is a limited holding that focuses on the unique history of legislative prayers in the United States,⁸⁶ it bears on the problem of forum domination that the Court did not find it separately problematic that the Nebraska legislature's prayer had been dominated by a single denomination.⁸⁷ If anything, the risk of domination in *Marsh*

⁸² *Bronx*, 650 F.3d at 63 n.9 (Walker, J., dissenting).

⁸³ 533 U.S. at 119–20 n.9 (“When a limited public forum is available for use by groups presenting any viewpoint, however, we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.”). But see *id.* at 140 (Souter, J., dissenting) (arguing that the case should have been remanded for the trial court to discover how many other groups used the forum).

⁸⁴ 463 U.S. 783, 786 (1983).

⁸⁵ *Id.* at 793.

⁸⁶ But see *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 665 n.4 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part) (suggesting that *Marsh* has broader application).

⁸⁷ *Marsh*, 463 U.S. at 793–94.

2012]

Forum Domination

1165

would have been greater than in a public school access case because the speech involved was government speech. If the government engages in religious speech, the need to ensure that one group does not dominate the speech will be particularly acute. Yet, the Court found no such problem because there seemed to be no complaints about the chaplain's service or requests to hire one of another denomination.⁸⁸

Admittedly, the Court passed over the forum domination issue in silence. The Court's silence, however, is important. The "forum" of legislative chaplain was completely occupied by a single group, and so the forum domination problem seems to have squarely presented itself. Even so, the court found no problem, because no other group sought access.

Hence, the domination problem identified in *Widmar* is relatively narrow in scope. There can be no forum domination so long as no speakers are actually excluded. Nothing in the Supreme Court's cases suggests that it shares the *Bronx* court's broader view of forum domination. The type of domination that does concern the Court is a limited public forum being used to the exclusion of all other potential forum participants. This is most likely to occur in a smaller locality where there is perhaps only one school, and thus very limited space within the forum. This scenario will be analyzed in Parts III and IV. Part III will consider the problem of forum domination under the Court's Establishment Clause tests, and Part IV will demonstrate that the Establishment Clause limits government action, not private speech.

⁸⁸ Id. at 793 ("We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that [the chaplain] was reappointed because his performance and personal qualities were acceptable to the body appointing him."). Indeed, the only complaint discussed in *Marsh* was from a Jewish legislator whose request for a more inclusive prayer was accommodated. Id. at n.14. This accommodation and the fact that other clergymen did serve as guest chaplains, id. at 793, may suggest that *Marsh* is inapposite because the forum was not truly dominated due to the variety of speakers present in the "forum." However, even if these prayers were not dominated by a single denomination, the office of legislative chaplain certainly was.

III. THE PROBLEM OF FORUM DOMINATION

A. *The Lemon Test*

After *Good News Club v. Milford*, it should have been easy for a religious group to gain access to a normal limited public forum even when the religious group is the forum's only user. But when a religious group's use excludes others from the space the *Lemon* analysis may change in significant ways.

1. *Secular Purpose*

The analysis under the secular purpose prong of the *Lemon* test is unlikely to change much. The Court has routinely upheld justifications for limited public fora in school buildings, such as promoting "community welfare,"⁸⁹ or providing meeting spaces for the community. Consequently, the secular purpose prong of the *Lemon* test is rarely in dispute.

Nonetheless, courts are alert to the possibility that public officials will institute policies to advance their own religions.⁹⁰ This is perhaps a greater risk in small communities because of their homogeneity.⁹¹ Such communities also face the heightened risk of domination because fewer facilities are available in the forum. In the absence of clear evidence that the limited public forum was created for the advancement of religion, however, *Lemon's* secular purpose prong is likely to be satisfied.⁹² And even if some of the public officials had religious motives for creating the forum, the

⁸⁹ See, e.g., *Good News Club v. Milford*, 533 U.S. 98, 102 (2001) (upholding a policy that allowed "uses pertaining to the welfare of the community"); see also *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 864 (2005) ("[I]t is fair to add that . . . a legislature's stated reasons will generally get deference . . .").

⁹⁰ *McCreary Cnty.*, 545 U.S. at 864.

⁹¹ See *Green v. Haskell Cnty. Bd. Of Comm'rs*, 568 F.3d 784, 801–02 (10th Cir. 2009) ("We conclude, in the unique factual setting of a small community . . . , that the reasonable observer would find that [statements by the county board members] tended to strongly reflect a government endorsement of religion."); see also *The Federalist* No. 10 (James Madison) (arguing that small communities are more likely to suffer the ill effects of political and religious factions).

⁹² See *McCreary Cnty.*, 545 U.S. at 864 (explaining that the government receives deference on the secular purpose requirement of the *Lemon* test).

2012]

Forum Domination

1167

Court has suggested that there may not be a problem so long as the forum is operated neutrally.⁹³

2. *Advancing or Inhibiting Religion*

To escape the “advancing religion” prong of the *Lemon* test, *Good News* seemed to rely on the idea that the government was providing a generally available benefit in creating the limited public forum, and thus was no more advancing religion than in providing other generally available services to churches such as sewage disposal and police protection.⁹⁴ This reasoning is obviously less persuasive when a religious group is using the space to the exclusion of others.⁹⁵ The case starts to look less like access to public utilities and more like a special benefit for religion.

But even when a church’s use of the space excludes others, the actual benefit that a church receives is unchanged. It still gets only the space, and the Supreme Court has repeatedly upheld the use of public space by religious groups.⁹⁶ The critical factor, however, is not the size of the benefit, but its neutral administration.⁹⁷ It is this neutral administration that comes into question when a religious group excludes other groups.

A forum is not being neutrally administered if a religious group, through its access to the space, can effectively deny others the benefits of the forum. Of course, when a religious group is the only

⁹³ *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (“Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law. Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act’s purpose was not to endorse or disapprove of religion.” (internal quotation marks omitted)).

⁹⁴ *Good News*, 533 U.S. at 114. The Court did not actually apply the *Lemon* test in *Good News*. Nonetheless, in *Widmar v. Vincent* the Court faced nearly the identical problem, applied the *Lemon* test, and found no violation of the Constitution. 454 U.S. 263, 271–75 (1981).

⁹⁵ *Widmar*, 454 U.S. at 275 (“At least in the absence of empirical evidence that religious groups will dominate [the] forum, we agree with the Court of Appeals that the advancement of religion would not be the forum’s primary effect.” (internal quotation marks omitted)).

⁹⁶ See *Good News*, 533 U.S. at 114; *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).

⁹⁷ *Good News*, 533 U.S. at 114; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 843 (1995); see *infra* Part IV.

group desiring access to the forum there is no problem.⁹⁸ In such a case, “first-come, first-served” may be an acceptable neutral principle, even if a religious group occupies all of the available rental space. On the other hand, if after some period of use by the first comer, another group (perhaps another religious group) applies to use the forum, the forum cannot really be called a public forum if the second group is denied access on the grounds that the first group has access to the space indefinitely. Continuing access for only the religious group simply because they were there first gives the religious group a benefit that cannot now be denied to others.⁹⁹

A first-come, first-served policy in this scenario would effectively give the first group the right to bar all other groups from accessing the forum. Not only could the first group bar those with whom they disagreed from accessing the forum, they could provide access to those with whom they did agree. The space could be sublet, or speakers from allied groups could be allowed to speak during the first comer’s meetings. The forum would be fully converted from a public forum to a private one and a religious group’s speech would cease to be private speech. It would become government-subsidized speech.

It does not follow from this, however, that religious groups must be denied access to the forum. Indeed, excluding a religious user for being religious would make particularly little sense if the only other group requesting to use the forum were also religious. Then *both* potential users of the forum would be denied use of the forum, and it would sit empty. Parts IV and V will explore the means by which a forum can be neutrally administered, and forum access can be equally provided.

3. Excessive Entanglement

It is plausible that the operation of a limited public forum in a public school could present entanglement problems. For example,

⁹⁸ See *supra* notes 83–88 and accompanying text.

⁹⁹ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 480–81 (2009) (arguing that a permanent monument on public property is most likely government speech but a temporary one may be considered private speech); see also *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion) (explaining that there is an inherent preference for “pre-existing recipients . . . in any governmental aid program . . . that could lead to a program inadvertently favoring one religion”).

2012]

Forum Domination

1169

the criteria used in regulating forum participants may involve school officials making religious judgments, as when a public school forbids certain types of religious practices.¹⁰⁰ Indeed, one of the strongest arguments for the equal access of religious groups is that the very mechanisms by which they would be excluded would entangle the government in religion. The distinctions between religious and non-religious speech that would need to be made, and the monitoring of all speakers for religious content would violate both the Free Speech Clause and the Religion Clauses of the First Amendment.¹⁰¹

However, as cases such as *Widmar*, *Lamb's Chapel*, *Mergens*, and *Good News* demonstrate, there is no necessary entanglement problem in the operation of a limited public forum. Non-entanglement simply requires that school officials not interfere with speakers in the forum except to the extent necessary to maintain order.¹⁰² The exclusive use of the forum by a single religious group does not present any entanglement problems over and above those already associated with the operation of a limited public forum generally. Hence, it is of no concern here.

B. The Coercion Test

The *Lee v. Weisman* coercion test is also not relevant to the problem of domination. In *Weisman*, the Court found that “subtle coercive pressure” to conform to religious belief was created by a rabbi’s invocation at a high school graduation.¹⁰³ But it is inherent in a limited public forum that there is no obligation to attend or participate as there was in *Weisman*. In *Weisman*, the Court held that although the graduation ceremony was formally optional, graduations are such a central part of American life that it could not be treated as optional for the purposes of the Establishment Clause.¹⁰⁴ This is an entirely different situation from a third-party sponsored event that has no similar role in the life of the school.

¹⁰⁰ See supra notes 69–71 and accompanying text.

¹⁰¹ See infra Part IV.

¹⁰² *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (plurality opinion); see also *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) (holding that de minimis contact between a church and government officials does not constitute entanglement).

¹⁰³ *Lee v. Weisman*, 505 U.S. 577, 592–93 (1992).

¹⁰⁴ *Id.* at 586–87.

The Court has held that *Weisman* does not apply to third-party sponsored events since any coercion involved is not attributable to the government.¹⁰⁵

Furthermore, although the *Weisman* Court indicated that children and teenagers are particularly susceptible to the coercion of peer pressure,¹⁰⁶ the susceptibility of teenagers and children is not relevant in public forum cases. In *Good News*, for example, the children needed parents' permission to attend non-school functions.¹⁰⁷ The Court held that the relevant inquiry is into the coercive pressure on the parents, not the children.¹⁰⁸ Since even the *Weisman* Court admitted that this subtle coercion does not operate the same way on adults,¹⁰⁹ there was no risk of impermissible coercion. A scenario like *Bronx* is arguably distinguishable from *Good News* because the *Bronx* religious services were not an after-school club that required permission slips and the parents never had the opportunity to give or withhold their permission. But such a distinction would be erroneous. The *Bronx* church did not require permission slips precisely because their services occurred not after school, but on weekends when parents are expected to be responsible for their children.

Finally, even if a public school were to coerce participation in a religious activity, it would be no less problematic for a locality to coerce participation in an event populated by many religious speakers than it would for them to coerce participation where there is only one. The government may not coerce citizens to choose from a menu of religions any more than it may coerce them to choose any one particular religion. Thus, forum domination presents no additional risks of unconstitutional coercion.

¹⁰⁵ *Good News*, 533 U.S. at 119.

¹⁰⁶ *Weisman*, 505 U.S. at 593.

¹⁰⁷ 533 U.S. at 115.

¹⁰⁸ *Id.* (holding that *Weisman* is inapposite when parents must give their permission for children to attend an event).

¹⁰⁹ See *Weisman*, 505 U.S. at 597 (indicating that prior cases had treated adults in analogous situations differently). But see *id.* at 593 (reserving the question of whether adults would be treated differently).

2012]

Forum Domination

1171

C. The History and Traditions Test

It is believed by some that the original purpose of the Religion Clauses was to maintain federal neutrality in sectarian disputes and that it does not prohibit government promotion of religion over non-religion.¹¹⁰ Whatever relevance this original meaning has to other areas of Establishment Clause jurisprudence, it is not relevant to the problem of forum domination. Forum domination presents the possibility of government favoring one religious sect over another, because another religious group may be the group that is excluded in a case of forum domination. This is unconstitutional on virtually anyone's reading of the First Amendment.

Furthermore, forum domination cannot be justified on the basis of longstanding tradition. Although there is evidence to support the proposition that worshiping in public buildings is a traditional American practice akin to the legislative prayer in *Marsh v. Chambers*,¹¹¹ there is nothing to suggest that there is an American tradition of worshiping in a public building to the exclusion of other groups. Consequently, the history and traditions test presents no solution to the forum domination problem.

D. The Endorsement Test

The essence of the endorsement test is whether the government has made "religion relevant, in reality or public perception, to status in the political community."¹¹² The use of a school building by a religious group presents this risk because some may feel a heightened or diminished status in the political community because they do or do not worship in a government building. In *Good News* and its predecessors, however, the Court made clear that this risk

¹¹⁰ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) (arguing that the Religion Clauses do not require neutrality between religion and non-religion). But see Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 *Wm. & Mary L. Rev.* 875, 922-23 (1986) (arguing that the original meaning of the Establishment Clause is unclear and that the framers had no cause to think about many of the Establishment Clause problems that arise today in a less homogeneous society).

¹¹¹ See Glaser, *supra* note 71, at 1054, 1094-95.

¹¹² *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 626 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (citing *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)).

cannot trump a religious group's right to equal access. Mere use of school property for religious functions does not constitute endorsement.¹¹³ And misunderstandings in the community regarding the school's role do not play into the endorsement analysis.¹¹⁴ Finally, the presence of, or possibility of, other groups having similar access to the school building negates any legitimate perceptions of endorsement.¹¹⁵

In the case of forum domination, however, where a religious group's use of the forum has excluded other groups, the risk of perceived endorsement returns with greater force. In *Santa Fe Independent School District v. Doe*, for example, the Court held that the school's endorsement of a student prayer at football games was so strong that the prayer was in fact government speech.¹¹⁶ A number of factors played into this finding, but chief among them was that only one student was permitted to deliver the prayer for the entire school year.¹¹⁷ There were no other speakers allowed, giving the impression that the forum was not in fact a public forum.¹¹⁸ Similarly, in *County of Allegheny v. ACLU*, the Court found that the central position given to a Catholic Christmas display in the county seat, a position given to no others, meant that the public forum doctrine did not apply and that the government had endorsed the display.¹¹⁹ The Court so held notwithstanding the fact that the display was privately owned.¹²⁰ This strongly suggests that the use of a forum by a religious group to the exclusion of others would violate the Establishment Clause.

But, the endorsement test cuts both ways. Although permitting a religious group to use a forum to the exclusion of others risks endorsement, keeping them out, even if only to avoid endorsement, risks perceptions of hostility towards religion.¹²¹ Hence, simply ex-

¹¹³ *Good News*, 533 U.S. at 119.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 114; see also *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).

¹¹⁶ 530 U.S. 290, 309–10 (2000).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 492 U.S. 573, 600 n.50 (1989).

¹²⁰ *Id.* at 600–01.

¹²¹ *Good News*, 533 U.S. at 118.

2012]

Forum Domination

1173

cluding religious groups to avoid any endorsement cannot be the solution.

Importantly, the school district in *Bronx* itself controls any perception it gives of endorsement or hostility. The very concept of endorsement implies some action, or perhaps some conspicuous inaction, on the part of the endorser. Endorsement does not happen by accident, or through the actions of a third party. In *Board of Education v. Mergens*, for example, the Court held that it was the school's actions that would determine how its relationship with a religious student club would be perceived.¹²² Since the school did nothing to indicate its approval of the club's message, there could be no endorsement.¹²³ By contrast, in cases where the Court has found endorsement, the school has either promoted or influenced religious speech. In *Weisman*, the school endorsed religion by selecting the rabbi to speak and ensuring that there was a prayer at every graduation,¹²⁴ and in *Santa Fe*, the school endorsed religion

¹²² 496 U.S. 226, 251 (1990) (plurality opinion) (“[P]etitioners’ fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students. To the extent a school makes clear that its recognition of respondents’ proposed club is not an endorsement of the views of the club’s participants, . . . students will reasonably understand that the school’s official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.”); see also *Santa Fe*, 530 U.S. at 307–09 (holding that in addition to the fact that there was only a single speaker, the actions of school administrators and the control they exercised over the prayer led to the message of endorsement); *Weisman*, 505 U.S. at 587–88 (holding that the school selection of the rabbi led to “subtle coercive pressures”).

¹²³ *Mergens*, 496 U.S. at 251.

¹²⁴ *Weisman*, 505 U.S. at 587. In *Weisman*, Justice Kennedy’s majority opinion argued that the school violated the Constitution by coercing participation in a religious ceremony. *Id.* Apparently believing that mere endorsement is not sufficient to violate the Constitution, Justice Kennedy focuses exclusively on coercion and does not directly address the issue of endorsement, except in describing the lower court opinions. *Id.* at 585. By contrast, the concurring and dissenting opinions debate the issue of endorsement extensively. Compare *id.* at 618–19 (Souter, J., concurring) (arguing that the school endorsed and coerced participation in religion, and that regardless, endorsement alone was sufficient to violate the Constitution), with *id.* at 641–42 (Scalia, J., dissenting) (arguing that the school endorsed religion, but that non-coercive endorsement does not violate the Constitution). Whether Justice Souter is right that endorsement alone can violate the Establishment Clause or whether Justice Scalia is correct that coercion is required, all the Justices agreed that the school had endorsed religion.

by selecting a “chaplain” and ensuring that there was a prayer at pre-football games activities.¹²⁵

But the case of limited public fora is entirely different than *Weisman* and *Santa Fe*. There is no cause for government involvement in the content of the speech, and indeed, such involvement would violate the rights of the speaker.¹²⁶ As *Mergens*, *Good News*, and the Court’s other public forum cases make clear, the fact that the government operates a forum used by a religious group does not imply its endorsement. The onus is on the government to ensure that it does not operate the forum in such a way that it gives the impression of endorsement.¹²⁷ If the government becomes intimately involved with the religious speech itself, as in *Weisman* and *Santa Fe*, or provides special benefits to a religion as in *Allegheny*, the solution is for the government to disentangle itself from the speech and provide equal access to the forum, not to bar the religious group from participating.

Hence, there are two potential problems with forum domination. A forum used by a religious group to the exclusion of others may provide an impermissible exclusive benefit to religion, and it creates heightened risks of government endorsement of religion. But as Part IV will show, religious groups cannot simply be excluded from a public forum. Rather, governments operating a forum at risk for domination must find some way to include religious groups without running afoul of the Establishment Clause.

IV. RESTRICTIONS ON THE GOVERNMENT

*Rosenberger v. Rector & Visitors of University of Virginia*¹²⁸ provides the framework for local governments operating such fora at risk for domination. In *Rosenberger*, Justice Kennedy’s majority opinion observed that discriminating against religious speakers in a limited forum risks entanglement with religion and puts the rights of all speakers at risk.¹²⁹ If the government must treat religious speech in a limited public forum differently, then the government

¹²⁵ *Santa Fe*, 530 U.S. at 294, 305.

¹²⁶ See supra notes 24–27 and accompanying text.

¹²⁷ See supra notes 122–25 and accompanying text.

¹²⁸ 515 U.S. 819 (1995).

¹²⁹ *Id.* at 844–45.

2012]

Forum Domination

1175

will have to monitor the religious content of *all users* of the forum.¹³⁰ Notably, the logic of Justice Kennedy's argument applies to *any* difference in treatment between religious and non-religious forum participants. If the government is going to make a distinction based on religion, then it must decide who qualifies as "religious" in order to apply that distinction.

This will present little trouble if the speaker is a church holding worship services, because their religious content will be obvious. But other cases will be much harder. In *Lamb's Chapel v. Center Moriches Union Free School District*, for example, the Court ruled that a group wishing to show videos on child rearing could not be denied access to a school's public forum because the videos' perspective was religious.¹³¹ Had *Lamb's Chapel* come out the other way, however, the school would have been permitted to screen the videos first to see if they were too "religious." The risks of government censorship that this poses are obvious.¹³² Disfavored viewpoints could simply be classified as religious and thus excluded. Furthermore, whether speech is "religious" is a necessarily theological determination, and the Court has made clear that when the government makes theological distinctions, it runs the risk of becoming entangled in religion in violation of the First Amendment.¹³³ The government does not become entangled with religion every time it makes a distinction concerning religion.¹³⁴ For example, the government may, and in some cases must, grant religious exemptions from otherwise applicable laws.¹³⁵ Policing the line between worship and speech, however, is entanglement.¹³⁶

¹³⁰ *Id.*

¹³¹ 508 U.S. 384, 393–94 (1993).

¹³² See *Rosenberger*, 515 U.S. at 844–45 (holding that the First Amendment would be violated if "the Constitution [were] to be interpreted to require that state officials and courts . . . ferret out views that principally manifest a belief in a divine being").

¹³³ See *supra* note 71 and accompanying text.

¹³⁴ Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 *Cardozo L. Rev.* 1907, 1926–28 (2011) (discussing, in the context of the Religious Land Use and Institutionalized Persons Act, when and how the government can draw distinctions about religion for the purposes of granting exceptions to zoning laws without violating the Constitution).

¹³⁵ See, e.g., *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 439 (2006) (discussing how the Religious Freedom Restoration Act compels certain religious exemptions from federal laws).

¹³⁶ *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9 (1981).

These difficulties with classifying speech lie at the core of the forum domination problem. Forum domination presents serious Establishment Clause difficulties because religion may not be given a special place, yet the Free Exercise and Free Speech clauses constrain government attempts to identify potential Establishment Clause problems. But the First Amendment is not a contradiction. It merely commands the equal treatment of private religious speech. If private religious speech is treated equally with all other private speech, there is no need to identify it as religious, and the problems Justice Kennedy identifies do not occur. *Rosenberger* simply implements the First Amendment's command through scrupulous neutrality in the criteria used to administer public fora, particularly those at risk for domination.

In *Rosenberger*, the university attempted to distinguish itself from the defendants in *Widmar* and other equal access cases by arguing that those cases involved meeting space, which is in plentiful supply at a university, but that *Rosenberger* involved money, which is always scarce.¹³⁷ The Court rejected that argument and replied that if demand exceeds supply in a limited public forum, “[i]t would [be] incumbent on the State . . . to ration or allocate the scarce resources on some acceptable neutral principle; . . . scarcity would [not] give the State the right to exercise viewpoint discrimination that is otherwise impermissible.”¹³⁸ As Part II argued, forum domination is a constitutional problem only when one group uses a forum to the exclusion of others, and since *Rosenberger*'s “neutral principle” can solve the problem of scarce resources within the forum, it is clear that the problem of forum domination does not act as a constitutional disability to religious groups. Rather, forum domination acts as a restriction on *government* and on the manner in which it must administer a limited public forum. Exploring the nature of those restrictions will occupy Part V.

PART V: POLICY PROPOSALS

First, several of the potential solutions explored below involve constitutional questions separate from the issue of domination. This Note will highlight them here, but to the extent that they do

¹³⁷ 515 U.S. at 835.

¹³⁸ *Id.*

2012]

Forum Domination

1177

not bear on the problem of forum domination and equal access specifically, it will leave their full constitutional implications to be worked out by others.

Second, whatever neutral principle local authorities use in regulating access to a limited public forum must in fact be neutral. Some policies will have different impacts on different groups, but selecting a principle because it favors or disfavors a religion is likely unconstitutional.¹³⁹ For example, a policy that no group may rent a school building more than once per year is obviously neutral and may be a fine way of allocating space in a limited public forum. But if it were adopted *because* religious groups would be unable to hold regular meetings under such a policy, then it would take on a different color.

Third, one must keep in mind the problem when considering the solution: the groups that use the schools for church meetings are religious minorities. The very reason they rent the school is because they are too small to have a facility of their own. These are not cases of the majority, or even a sizeable minority, hijacking the coercive power of the state to enforce their religious views on the rest of us. Fears that these small religious groups will “establish” a state religion appear overblown when one realizes that these groups cannot even establish their own church.¹⁴⁰

Fourth, it is unlikely that a religious group, even a very large one, would be able to “dominate a forum” as large as, say, the New York City public school system, so we need not concern ourselves with that scenario. Domination is more likely to happen in a small town where the facilities are much more limited, and a single congregation could take up the one or two rental slots available. But in a small town, the government is also more likely to be one of a few, or perhaps the only, rental options available to non-profit groups seeking temporary space. Consequently, to disable the religious

¹³⁹ There is significant dispute about the precise role of motive in First Amendment cases, but these disputes are beyond the scope of this Note. In many cases, however, courts have found the motive of policy makers significant. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985); *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 800 (10th Cir. 2009).

¹⁴⁰ Cf. Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 *Notre Dame J.L. Ethics & Pub. Pol’y* 341, 349 (1999) (discussing, in the context of school vouchers going to religious schools, how it is in fact minority religions that are most benefited by programs of equal access).

group from renting that space would put them at a particular disadvantage.

Fifth, there will always be an inclination in a democratic society to resolve problems democratically. But who speaks in a public forum may not be decided by majority vote.¹⁴¹ The very essence of a public forum is that it is a place where minority views can stand on equal footing with majority views.¹⁴² This is all the more true when the protected speech is religious speech. The core of the First Amendment is that the government may not favor any one religion. But there would be little difference between deciding that a religion gets a preference because it has the most adherents and deciding that it gets a preference because it got the most votes. Thus, criteria that have majoritarian characteristics, such as number of group members, are not neutral and are impermissible means of allocating space in a limited public forum.

Finally, although various religion-neutral policies are examined below that may minimize the domination problem, no particular policy is constitutionally required so long as the neutrality principle is met. The Supreme Court has held that while the line between Free Exercise and Establishment is sometimes a thin one, there is “play in the joints.”¹⁴³ It would be foolish to think that the Constitution prescribed in detail the facilities management policies of public schools.

A. Close the Forum

When a locality is faced with a situation where a single religious group has become the sole user of a forum that others wish to use, one option that may cross the minds of policymakers is to shut down the forum altogether. The constitutionality of such an action is unclear, and the Supreme Court has never faced the question of whether a forum may be closed to prevent the expression of a particular viewpoint.¹⁴⁴ On the one hand, dicta from the Court and at

¹⁴¹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304–05 (2000).

¹⁴² *Id.* at 304; *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“Access to a public forum . . . does not depend upon majoritarian consent.”).

¹⁴³ *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 669 (1970)).

¹⁴⁴ Kerry L. Monroe, Note, Purpose and Effects: Viewpoint-Discriminatory Closure of a Designated Public Forum, 44 *U. Mich. J.L. Reform* 985, 991 (2011).

2012]

Forum Domination

1179

least one respected commentator indicate that such a course of action would be permissible.¹⁴⁵ Some lower courts have also taken this view in the context of religious speakers specifically.¹⁴⁶

Nonetheless, there is substantial reason to think that closing a forum in response to forum domination is not a “neutral” response. Although the government retains the right to close a public forum it voluntarily created, doing so to silence religious speakers may violate the Constitution.

Indeed, even if the public officials harbored no malice towards religion, but simply wanted to avoid potential Establishment Clause problems, the action may be unconstitutional. The fact that such an action would not be taken against a non-religious speaker, because no Establishment Clause problems could exist for a non-religious speaker, means that this policy would be inadvertently targeting a religious viewpoint. Indeed, as this Note argued above, there is no Establishment Clause problem unless the school itself has created it,¹⁴⁷ so closing the forum, rather than simply altering the school’s unconstitutional rental policies, would be a targeting of religious belief.

In any event, it is unlikely that a school official would use forum closure as a policy of first resort. In general, the public fora of which churches take advantage are quite popular, and thus unlikely to be closed by politically accountable officials. Consequently, regardless of its constitutionality, it is unlikely that forum closure will be a viable solution to the forum domination problem.

B. Traditional Lease

A second option for a forum at risk of domination would be to cease operating the school as a limited public forum and simply make the school available for rent on standard terms to the highest bidder. Such a move by a school system would eliminate any Establishment Clause problems by using the neutral criterion of fair

¹⁴⁵ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995); *id.* at 783–84 (Souter, J., concurring); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 699–700 (1992) (Kennedy, J., concurring in the judgments); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 *Stan. L. Rev.* 1919, 1928 (2006).

¹⁴⁶ For a full survey of these cases see Monroe, *supra* note 144, at 996–97.

¹⁴⁷ See *supra* notes 122–25 and accompanying text.

market price. This would put a genuine limit on the school's ability to favor any group over another, but the practical effect on who uses the space is likely to be small.

Under a fair market value lease, both the endorsement analysis and the *Lemon* analysis would change. The endorsement analysis will become much easier. The Court assigns no independent significance to the fact that an event takes place on school premises,¹⁴⁸ and there could be no reasonable confusion that the government is endorsing a speaker who paid the going rate to use the space. Of course, some confusion might arise from those who were unfamiliar with the school's policy of awarding the space to the highest bidder and saw only a school occupied by a church. For some on the Court, this confusion would likely be enough to qualify as impermissible endorsement.¹⁴⁹ However, a majority of the Court disagrees.¹⁵⁰ So long as the rates are truly the market rates, there can be no confusion about endorsement.

The *Lemon* analysis changes in a very similar way. The *Lemon* entanglement analysis would not change. There is no risk of entanglement so long as the lease for the school is indeed a standard lease with no unusual requirements put on the school or the church. The issue of secular purpose is easily disposed of: the government's secular purpose changes from "community welfare" to raising revenue, an obviously legitimate government motive. But the "advancement/hindrance" analysis turns on the terms of the lease.

For the free market solution to work, it is critical that the church be given no favorable (or unfavorable) terms that are not achieved through a bona fide negotiation process.¹⁵¹ Terms that do not result from bona fide negotiations are likely to be considered impermissible government aid to (or discrimination against) religion.¹⁵² The school will have merely exchanged one constitutional problem for another. But again, if the lease results from a bona fide negotiation

¹⁴⁸ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115–16 (2001).

¹⁴⁹ See *supra* Subsection I.B.4; cf. *Capitol Square*, 515 U.S. at 806 (Stevens, J., dissenting) (discussing his reasonable observer test).

¹⁵⁰ *Good News*, 533 U.S. at 119; see *supra* Subsection I.B.4 (discussing the reasonable observer test).

¹⁵¹ Shelley Ross Saxer, *Government and Religion as Landlord and Tenant*, 58 *Rutgers L. Rev.* 409, 431–32 (2006).

¹⁵² See *id.*

2012]

Forum Domination

1181

between the school and all those interested in using the forum, and as long as the school's sole objective is to obtain the most favorable terms possible, then religion will have been neither advanced nor hindered.

This is not to say that simply because a locality knows when it puts the school on the rental market that there is a strong likelihood that it will be rented by a church that this would constitute an aid to religion. In *Zelman v. Simmons-Harris*, the Court acknowledged the fact that virtually all of the aid offered in Cleveland's voucher program would go to religious institutions.¹⁵³ Yet, that fact was irrelevant, because individual choices, not government policy, were responsible for the direction of the aid.¹⁵⁴ In the case of a school available for rent, individual choices play a similar role. The willingness of individuals and organizations to pay rent determines who gets the space. Accordingly, even if school officials know that only religious groups are interested in renting the space, a free market solution is still constitutionally permissible.

One plausible objection to the constitutionality of the free market solution is that a well-heeled church may be more able to gain access to the facility than others. Since the amount of money a group has can be a proxy for group size, a court could view the free market solution as an impermissible attempt to allocate the resources on the basis of group size.¹⁵⁵ However, this objection fails for two reasons. First, the correlation between group size and money is at best imperfect. One or two wealthy group members could make all the difference in the bidding process. Second, a wealthy group is likely to acquire its own facilities that do not come with the drawbacks of a temporary public school rental. Few organizations desire space that has no storage capacity, is available only on nights and weekends, and comes pre-decorated with children's art. Religious groups that use schools often do so precisely because they lack the funds to meet elsewhere.¹⁵⁶

¹⁵³ 536 U.S. 639, 658 (2002).

¹⁵⁴ *Id.*; see also Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51, 70–71 (2007) (discussing *Zelman*).

¹⁵⁵ See *supra* notes 141–42 and accompanying text.

¹⁵⁶ Cf. Grossman & DiBlasio, *supra* note 1, at A1 (noting that it is cheaper for churches to rent space than to build their own churches).

Thus, it is worth noting that the probable outcomes in these free market leases and more common limited public forum arrangements will not vary greatly. First, the “buyers” market for leases of this type is likely to be very small, and thus the “market price” very low. The only organizations that are likely to want such a space are small, non-profit organizations like start-up churches, which are ill equipped to enter a bidding war. Consequently, the market price may not be much higher than the price in the limited public forum. Second, although a church attempting to rent the school would lose the free speech protections of the limited public forum, the free exercise and equal protection guarantees would still prohibit the government from discriminating against a church if it offered the most attractive lease terms to the school. Nonetheless, the bidding process provides a valuable way to maintain the schools’ neutrality while still offering at least some benefits associated with limited public fora.

C. Limited Public Forum

The final option available to school districts operating an extremely limited public forum is to keep the forum open and operating as a limited public forum. As Part II suggests, this is not without legal hazards. The school district must come up with some neutral criteria to determine who gets the limited space, and, even once neutral criteria are in place, it will be advisable for the school to distance itself from the speakers in the forum to avoid perceptions of endorsement.¹⁵⁷ Furthermore, as the term “neutral” suggests, the steps that the school district takes must apply equally to all groups, religious and non-religious, in order to be constitutional. Finally, the Supreme Court has said that a religious group does not dominate a forum simply because it is the only group to use the forum.¹⁵⁸ But the Court has also made the corollary point that a mere objection from the public to a religious group is not enough to create a constitutional problem.¹⁵⁹ It follows that no restrictions need be, or should be, put on the user of the public forum until there is a

¹⁵⁷ See supra notes 122–25 and accompanying text.

¹⁵⁸ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119–20 n.9 (2001).

¹⁵⁹ *Id.* at 119; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion).

2012]

Forum Domination

1183

bona fide desire by another group to access the limited public forum.

1. Mandatory Rotations

One solution that is likely constitutional is to require some kind of rotation system in the forum. For example, a school system might limit the number of days per year when a single group can use a forum, or rotate groups through different meeting times if one meeting time (perhaps Sunday) is considered more attractive than the others. This would obviously make the forum less attractive to churches, which typically require a regular Sunday meeting place in order to achieve their objectives. Barring any clear and impermissible motives on the part of the school system, however, there would be nothing unconstitutional about such a policy because it would also adversely affect others who wish to use the forum. Secular as well as religious groups seek regular meeting times. But, for this very reason, such a policy is likely to be politically unpopular. School officials are not likely to implement a policy that makes a popular forum inconvenient to all.

2. Lottery

A similar policy would be to assign space in the limited public forum via lottery. While this system appears fair at first, in practice it is likely to be unconstitutional, unpopular, or both. If space were assigned randomly, but the winners could keep their randomly assigned space as long as they desired, it would present some of the same constitutional problems that would occur if a group acquired the space on a first-come, first-served basis. First-come, first-served is actually a special case of randomization, since the government does not control who applies for the space first. Although there might be no endorsement problems since a lottery is clearly a “neutral principle” in conformity with *Rosenberger*,¹⁶⁰ as with a first-come, first-served policy, the recipients of the space would be given a special benefit by the government that no other group received.

¹⁶⁰ See *supra* Part IV.

This would impermissibly subsidize private speech in a public forum.¹⁶¹

If, on the other hand, the lottery were conducted at a regular interval, all groups would have an opportunity to access the space, and the government would no longer be giving a special subsidy to a single group. But as with a rotation system, all users of the forum would find the arrangement inconvenient because they could not predict if or when they could meet. A lottery policy may generate even more resentment than a rotation policy if a new group gained access over one that had been waiting for a long time. Consequently, a lottery is probably not a viable solution to the forum domination problem.

3. *Adjust Lease Terms*

Another likely constitutional solution would be to limit the length of leases in public fora and require leaseholders to give up their leases and move to the end of the line when other groups are waiting to use the forum. This would allow groups to use the space at a regular time, at least until they could raise sufficient funds to acquire a private meeting location.

One lower court case suggests that school districts are already thinking along these lines. In *Fairfax Covenant Church v. Fairfax County School Board*, the school board limited the leases of all forum participants to one year and singled out religious groups for escalating rental fees to encourage them to leave.¹⁶² The Fourth Circuit rightly found this unequal treatment of religious groups unconstitutional and held that the school's fears of forum domination were particularly unfounded given that it is one of the nation's largest school districts and had significant additional rental capacity.¹⁶³ Nonetheless, had the risk of forum domination been real, and had the school treated religious and non-religious groups equitably, its policy of short-term leases would have been a reasonable solution to the problem of domination.

¹⁶¹ See *supra* notes 98–99 and accompanying text.

¹⁶² 17 F.3d 703, 704–05, 708 (4th Cir. 1994).

¹⁶³ *Id.* at 708–09 (calling the school's fears unfounded); U.S. Dep't of Educ., Digest of Education Statistics 2008, at 151 (2009), available at <http://nces.ed.gov/pubs2009/2009020.pdf> (listing Fairfax County as one of the one hundred largest school districts in the country).

2012]

Forum Domination

1185

4. *Negotiate*

Another alternative that may be available in a small number of situations would be negotiation. In a small forum in a small town, the number of competing forum participants is also likely to be small. Consequently, there may be an opportunity for the school administrator to come to an agreement with all of those wishing to use the forum and arrange an equitable solution. Although the opportunities for such a solution may be rare, it could have enormous benefits. First, it may allow for arrangements that might not be achieved through inflexible bureaucratic policies. For example, two churches may agree to share a lease for Sundays and come to their own accord about which will use what space how and when. School officials acting by themselves are unlikely to know the details that would make such an arrangement possible. Second, there may be cases where a group applies to use a forum, not out of a genuine desire to use it, but to prevent its use by its current user either out of spite or confusion about the government's endorsement of the other speaker. A negotiation would provide a substantial opportunity to discover such attempts to unfairly deny access to a religious group, and in the case of a mere misunderstanding, explain the government's actual relationship to the religious user of the forum.¹⁶⁴

5. *Limit Involvement of School Officials in Programming Choices*

Even if a school system does take the actions above to ensure that access to the forum is equitably distributed, there is still a risk that government interference in the programming could aid, hinder, or entangle the government with religion. This was the central issue in *Santa Fe Independent School District v. Doe*.¹⁶⁵ Although the Court did not say so, one suspects that there would not have been a constitutional problem had a student announcer at the football game spontaneously read a prayer over the loud speaker

¹⁶⁴ Cf. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (rejecting a "heckler's veto" whereby a single objector could prevent a group from accessing the public forum); *Capitol Square*, 515 U.S. 753, 766 (1995) (plurality opinion) ("Private religious speech cannot be subject to veto by those who see favoritism where there is none.").

¹⁶⁵ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000).

without any prompting. It was the election of a “chaplain” and the school’s decision to limit the chaplain’s message to an “invocation” that turned private speech into government speech.¹⁶⁶ Consequently, schools would do well to limit their involvement with forum participants to the maximum extent possible. Once the school’s interest in a safe, clean, and orderly environment is met, there is no need to further guide or restrict speakers.

6. Disclaimers

Finally, to the extent that the above measures do not fully soothe any fears of endorsement, in the community or in the judiciary, a simple disclaimer can solve the problem. The Court has indicated that any problems of endorsement are created by the school, and can be solved by it with a clear statement from the school itself.¹⁶⁷ Disclaimers will not work, however, when the underlying policy is not in fact neutral. In *County of Allegheny v. ACLU*, for example, a sign merely indicating that the crèche was privately owned was not sufficient because the crèche did get favored treatment in obtaining a place of prominence.¹⁶⁸ On the other hand, if a school took additional measures such as those suggested above, indicating as much on any disclaimer would probably be helpful. For example, a disclaimer might include a notice to readers detailing how their group could obtain access to the space, through the bidding process, lease rotation, etc.

VI. A BROADER PROBLEM

Part II argued that when a religious group dominates a forum and is allowed to continue its use of the forum without any limitations, the religious group would be able to grant or deny access to the forum at its discretion, and the forum would cease to be pub-

¹⁶⁶ Id. at 306–10.

¹⁶⁷ *Capitol Square*, 515 U.S. at 776 (O’Connor, J., concurring in part and concurring in the judgment) (arguing that “a disclaimer helps remove doubt about state approval of [a party’s] religious message”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841–42 (1995) (holding that endorsement is “not a plausible fear” given the university’s efforts to distance itself from the speaker); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (plurality opinion) (holding that the school controlled any perception of endorsement).

¹⁶⁸ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 599–600 (1989).

2012]

Forum Domination

1187

lic.¹⁶⁹ What is most interesting about this hypothetical is that nothing in it turns on the forum's occupant being religious. If a forum truly is a *public forum*, then when the forum is small enough that it may be entirely occupied by one group, the government must use some of the neutral selection criteria discussed above in order to maintain its status as a public forum. This is true regardless of the religiosity of the speakers. Even a secular speaker could monopolize a forum's resources.

Of course, governments can, without constitutional difficulty, fund or subsidize organizations promoting a non-religious viewpoint. But if the government allowed a secular group to dominate a forum, it would be subsidizing that group. This subsidy would convert the private speech into government speech, and the forum would cease to be public. Thus, if a forum is to remain a public forum and not government speech, forum administrators must be wary of forum domination regardless of a speaker's religiosity. The problem of viewpoint discrimination remains, but forum domination presents no real Establishment Clause problem. There is no need to subject religious groups to additional scrutiny because the forum domination problem sounds entirely in the Free Speech Clause and not the Religion Clauses. Any speaker can dominate a forum, and all must be treated equally.

VII. CONCLUSION

It is indisputable that the use of a public forum by a religious group could violate the Establishment Clause. This is particularly true in a small public forum where competition for space is keen. When giving access to one group excludes another, the risk of government favoritism is high. But this does not mean religious groups can or should be excluded. Indeed, as Part VI shows, in a public forum the government may not favor any groups, even secular ones. The burden lies with the government to ensure that all are treated equally, and that no religion is established or excluded. And even a very small forum can be operated to achieve the twin goals of the Religion Clauses.¹⁷⁰

¹⁶⁹ See supra notes 98–99 and accompanying text.

¹⁷⁰ See *Allegheny*, 492 U.S. at 661–62, 663 n.2 (Kennedy, J., concurring in the judgment in part and dissenting in part).

**