

From Bus Bans on Religious Advertisements to Beyond: Why Religion Is More Appropriately Classified as a Viewpoint Rather Than a Subject Matter

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* © 2022 Anna Kukharenok. J.D. 2022, University of San Diego School of Law; B.A. 2018 (Psychology), University of California Los Angeles. I dedicate this Comment to my mother and grandmother, who made tremendous sacrifices as immigrants in order to give me the chance to explore the countless opportunities this country has to offer. I would like to thank my faculty advisor Steven Smith for his mentorship and my comment editor Sara Roa for her advice and support.

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I. INTRODUCTION

Religion is a fundamental aspect of the lives of billions of people across the world.¹ Its enormous reach extends to numerous areas of modern society including the political realm,² legal realm,³ and popular culture.⁴ Notwithstanding this broad influence, religion is a polarizing topic seldom

1. According to a study conducted by the Pew Research Center, more than eight out of ten people worldwide identify with a religious group. *The Global Religious Landscape*, PEW RSCH. CTR. (Dec. 18, 2012), <https://www.pewforum.org/2012/12/18/global-religious-landscape-exec/> [<https://perma.cc/SF8R-HXC7>]. “There are roughly 5.8 billion religiously affiliated adults and children around the globe, representing 85% of the world population of 2010.” *Id.*

2. See *Religion & Politics*, PEW RSCH. CTR., <https://www.pewresearch.org/topics/religion-and-politics/> [<https://perma.cc/656E-GKEQ>] (providing numerous articles about the interplay between religion and politics). However, many Americans believe that religion should stay out of politics. *Americans Have Positive Views About Religion’s Role in Society, But Want it Out of Politics*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewforum.org/2019/11/15/americans-have-positive-views-about-religions-role-in-society-but-want-it-out-of-politics/> [<https://perma.cc/P9CZ-LGMY>] (finding that nearly two thirds of Americans believe that churches and houses of worship should keep out of political matters).

3. See Camille Veselka, *A Detrimental Influence: The Effect Religion Has on Laws*, HUFFPOST (Feb. 4, 2012), https://www.huffpost.com/entry/a-detrimental-influence-t_b_1106045 [<https://perma.cc/LHH5-9HLH>] (highlighting how religion affects laws and arguing that religion should be kept separate from laws). Currently, forty-five states and the District of Columbia have religious exception laws, and fifteen states allow moral or philosophical exemptions, illustrating the vast effect that religion has on the American legal field. Kate Cohen, *What’s So Special About ‘Religious Belief’?*, WASH. POST (Oct. 6, 2019), <https://www.washingtonpost.com/opinions/2019/10/06/whats-so-special-about-religious-belief/> [<https://perma.cc/2SM7-AT69>]. Some advocate for the addition of religious values into the judicial decision-making process. See Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993). The author believes that judges should look to religion because of the historical significance of religion in the birth of the Constitution, the participatory government and communitarian theory in contemporary political philosophy, and the empirical perspective that religious values are already informing judicial decision making. *Id.* at 455–67, 473–78.

4. See Ken Chitwood, *The Interplay of Religion and Popular Culture in Contemporary America*, RELIGIOUS STUD. PROJECT (Mar. 12, 2016), <https://www.religiousstudiesproject.com/response/the-interplay-of-religion-and-popular-culture-in-contemporary-america/> [<https://perma.cc/C8TZ-B7UK>] (providing examples of religion’s reach into popular culture).

discussed in public.⁵ As the popular saying goes, “[n]ever discuss politics or religion in polite company.”⁶ Although this might be the general sentiment in modern times, some scholars believe that the idea of religion as a separate subject matter⁷ is a relatively modern invention.⁸ Religion was historically categorized not as a separate aspect of life, but intertwined with life itself.⁹ Historians generally believe that the subject of religion became separated from general life for legal and governmental purposes.¹⁰

Nonetheless, although religion may be a relatively modern category, the legal world is faced with the predicament of navigating around the subject

5. A study found that about half of American adults seldom or never talk about religion with people outside of their family, and four out of ten Americans say they seldom or never discuss religion even with members of their immediate family. *Many Americans Don't Argue About Religion—Or Even Talk About It*, PEW RSCH. CTR. (Apr. 15, 2016), <https://www.pewresearch.org/fact-tank/2016/04/15/many-americans-dont-argue-about-religion-or-even-talk-about-it/> [<https://perma.cc/LTM6-SEFV>].

6. Leslie Sholly, *The Politics of Email*, LIFE IN EVERY LIMB (July 8, 2012), <https://lifeineverylimb.com/tag/etiquette/> [<https://perma.cc/CFH8-EP2E>]. Furthermore, Judith Martin, columnist and author behind Miss Manners, concedes that the general rule banning casual discussion of politics is sometimes thought to be “prissy” and may validly be called a repression of free speech, but believes that these accusations may only have validity if people knew how to express their opinions civilly and listen with open minds—a feat that most people cannot manage. Judith Martin, Nicholas Ivor Martin & Jacobina Martin, *Keep Politics and Religion Out of the Conversation*, UEXPRESS (Apr. 6, 2010), <https://www.uexpress.com/miss-manners/2010/4/6/keep-politics-and-religion-out-of> [<https://perma.cc/V4W7-USS5>].

7. Religious academics disagree on a definition of religion as a subject matter. Michael Bergunder, *What Is Religion? The Unexplained Subject Matter of Religious Studies*, 26 METHOD & THEORY STUDY RELIGION 247–52 (2014) (discussing different theoretical approaches to defining religion).

8. See Ninian Smart, *Study of Religion*, BRITANNICA, <https://www.britannica.com/topic/study-of-religion> [<https://perma.cc/EHH8-NU4D>] (noting that the study of religion emerged as a formal discipline during the 19th century); see also Paul J. Griffiths, *The Very Idea of Religion*, FIRST THINGS (May 2000), <https://www.firstthings.com/article/2000/05/the-very-idea-of-religion> [<https://perma.cc/9RDC-83BF>] (“[T]he idea that there is a genus called ‘religion’ of which there are many species . . . [is] a modern invention.”).

9. Scholars suggest that the low importance of the word “religion” in ancient civilizations implies that religion was not distinct from life, but simply fused with life itself. See Griffiths, *supra* note 8.

10. See *The First Amendment Says Nothing About “Separation of Church and State” or a “Wall of Separation Between Church and State.” Where Did This Idea Come From? Is It Really Part of the Law?*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/about/faq/the-first-amendment-says-nothing-about-separation-of-church-and-state-or-a-wall-of-separation-between-church-and-state-where-did-this-idea-come-from-is-it-really/> [<https://perma.cc/2AU5-GBCX>].

and forming appropriate legal jurisprudence.¹¹ This dilemma is amplified in an ongoing constitutional First Amendment debate exemplified by a recent circuit split highlighting the dispute over the following question: Is religion correctly classified as a subject matter or a viewpoint?¹² This distinction is relevant because the government may place restrictions on religious speech only if religion is found to be a subject matter, not a viewpoint.¹³

The Supreme Court has never answered the broad question of whether religion always constitutes a viewpoint or a subject matter, but it has been faced with the daunting task of categorizing some religious-based laws as those proscribing religion as either a viewpoint or a subject matter.¹⁴ Using a laborious and fact-intensive test, the Court classified religion as a viewpoint in all three cases where it was presented with such a question.¹⁵

Notwithstanding this precedent, the United States Court of Appeals of the District of Columbia Circuit in *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority* found in 2018 that a guideline prohibiting religious advertisements on buses was viewpoint neutral and thus constituted a permissible subject matter regulation.¹⁶ This holding implied that religion as a whole should be characterized as a subject matter. However, the United States Court of Appeals for the Third Circuit in *Northeastern Pennsylvania Freethought Society v. County of Lackawanna*

11. Courts often struggle to decide whether a claim, activity, organization, purpose, or classification is religious. For a perspective on the struggle of courts to define religion and an argument that courts should decide whether something is religious by comparison with the indisputably religious, see generally Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984).

12. Compare *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 325 (D.C. Cir. 2018) (classifying religion as a subject matter), with *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 436 (3d Cir. 2019) (classifying religion as a viewpoint).

13. See *infra* Section II.A.

14. For a discussion about a different line of Supreme Court cases which dealt not with explicitly analyzing the presence of viewpoint discrimination, but instead analyzed instances where schools punished students for wearing religious T-shirts, see generally Kristi L. Bowman, *Public School Students’ Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187 (2007). The author argues that the Supreme Court has permitted schools to engage in limited viewpoint discrimination due to the unique and distinctive relationship established between schools and students, creating important interests and allowing such discrimination. *Id.* at 211, 212, 215, 219.

15. See *infra* Section III.A; see also Bowman, *supra* note 14, at 211–12. The author distinguished *Lamb’s Chapel v. Center Moriches Union Free School District* and *Good News Club v. Milford Central School* from the student T-shirt cases because the speech at issues in *Lamb’s Chapel* and *Good News Club* belonged to community organizers, not the actual students. *Id.* at 211. Thus, neither of those two cases engaged in the issue of viewpoint discrimination in the context of the school as an educational setting. *Id.* at 212.

16. *Archdiocese of Wash.*, 897 F.3d, at 322.

Transit System, created a circuit split in 2019 when it found that functionally the same guideline constituted unconstitutional viewpoint discrimination.¹⁷

This circuit split created the issue identified herein: Is a ban on religious advertisements—aimed at all religions equally—permissible because it constitutes a restriction of a subject matter, or is it impermissible because it constitutes restriction of a viewpoint? This narrow issue implies the existence of a broader issue: Should religion as a whole be classified as a subject matter or a viewpoint in order to avoid laborious and fact-intensive inquiries into each particular law? This Comment aims to answer this question through the lens of not only legal precedent, but policy perspectives as well. This Comment advances the position that a ban on religious advertisements constitutes unconstitutional viewpoint discrimination using the fact-intensive analysis developed by the Court. Furthermore, this Comment argues that religion should *always* be classified as a viewpoint—a lens through which to discuss particular subjects—rather than as an entire subject matter, in order to avoid fact-intensive tests and extensive litigation.

Part II will provide an overview of First Amendment jurisprudence by discussing the forum analysis and its relevance, defining the types of speech restrictions and rationale thereof, and providing a history of the birth of the viewpoint discrimination principle. Then, Part III will provide an analysis of the legal issue identified herein: Is a ban on religious advertisements on buses a permissible subject matter regulation or an impermissible viewpoint regulation under the First Amendment? Finally, Part IV will conclude that a ban on religious advertisements on buses is an impermissible viewpoint regulation under the First Amendment, and that religion should always be broadly classified as a viewpoint.

II. AN OVERVIEW OF FIRST AMENDMENT JURISPRUDENCE

The First Amendment announces, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁸ Although the Establishment Clause, Free Exercise Clause, and Free Speech Clause of the First Amendment are all related to religion,¹⁹

17. *Ne. Pa. Freethought Soc’y*, 938 F.3d, at 436–37.

18. U.S. CONST. amend. I.

19. For a foundational examination of the relationship between the religious liberty clauses and the Free Speech Clause, see generally Carl H. Esbeck, *Religion and the First*

only the Free Speech Clause is relevant to answer the legal question here—whether a law banning religious advertisements on public buses constitutes permissible subject matter discrimination or impermissible viewpoint discrimination.

The Free Speech Clause protects the rights of the people to freely express their opinions without censorship, restraint, or interference by the government.²⁰ This clause has been used by the Supreme Court to analyze and critique those laws passed by various governmental entities that restrict expression in any way.²¹ The Free Speech Clause implicates religion when the government passes a law restricting religious expression.²²

The Supreme Court has created guidelines to ascertain whether or not such laws pass constitutional muster. First, the government-controlled place of expressive activity must be classified as either a traditional public forum, a designated public forum, or a non-public forum.²³ Second, upon a finding of non-public fora, the Court determines whether the law constitutes permissible subject matter restriction or impermissible viewpoint restriction.²⁴ Subject matter restrictions, but not viewpoint restrictions, are permissible in non-public fora because the Court deems them less threatening to distort the free marketplace of ideas.²⁵

Section A will provide a brief background of the different types of fora espoused by the Court and the restrictions on speech permissible therein. Section B will define the viewpoint and subject matter principles and analyze why this distinction developed and the purposes it served. Section

Amendment: Some Causes of the Recent Confusion, 42 WM. & MARY L. REV. 883 (2001). Carl Esbeck, a professor of law, believes that the religious clauses were not a vesting of new power to restrain religion, but a “negative” on existing governmental power, and all three of the clauses operate independently of each other so that it is impossible for any to override the Free Speech Clause. *Id.* at 917–18. Scholars attempt to define religion in the context of the religious liberty clauses. For an attempt to properly define religion using historical, judicial, psychological, theological, and sociological contexts, see generally Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123 (2007).

20. See Victoria L. Killion, CONG. RSCH. SERV., IF11072, *The First Amendment: Categories of Speech* (2019).

21. See *infra* Section II.C. For a discussion of the historical meanings of the First Amendment, see Jud Campbell, *What Did the First Amendment Originally Mean?*, RICH. L. MAG. (July 9, 2018), <https://lawmagazine.richmond.edu/features/article/-/15500/what-did-the-first-amendment-originally-mean.html> [<https://perma.cc/2V8Z-LJ3X>]. The author advances the position that the founders thought that the First Amendment required Congress to restrict speech only in promotion of the public good and guaranteed rules protecting expressive freedom. *Id.*

22. See *infra* Section II.C.

23. See *infra* Section II.A.

24. See *infra* Section II.A.

25. See *infra* Section II.A.

C will provide a discussion of the development of the viewpoint discrimination principle through historical Supreme Court cases.

A. *The Forum Analysis and Its Relevance*

A forum under First Amendment jurisprudence is a place of speech, and the forum in which a speaker speaks is relevant in ascertaining the constitutionality of restrictions on speech.²⁶ The First Amendment protects the right to speak in different ways based on the place of speech. The Supreme Court articulated a tripartite classification for government-controlled places where expression may occur in *Perry Education Association v. Perry Local Educators' Association*.²⁷

First, traditional public fora are those that have been traditionally “devoted to assembly and debate.”²⁸ Such places include public parks, sidewalks, and other places created for citizens to assemble, “communicat[e] thoughts between [one another], and discuss public questions.”²⁹ In such fora, content-based restrictions on speech—which include *both* subject matter and viewpoint restrictions—must satisfy strict scrutiny.³⁰ Content-neutral restrictions—restrictions on the time, place, and manner of speech—are permissible if reasonable.³¹

26. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (“The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.”).

27. *Id.* at 45–46.

28. *Id.* at 45. Scholars argue that no clear-cut test emerged for determining when a traditional public forum exists. See Michael J. Friedman, *Dazed and Confused: Explaining Judicial Determinations of Traditional Public Forum Status*, 82 TUL. L. REV. 929, 930 (2008). The author used social science techniques to explain judicial determinations of public forum status and found seven relevant factors:

(1) whether the property is perceived as a street, park, or sidewalk, (2) whether the property is distinguishable from surrounding public spaces, and (3) proximity to a seat of legislative or executive power. The judicial determinations were also affected by the ways in which the property is used, including (1) extent of public access, (2) historic use for discourse, (3) particularity of purpose, and (4) use as a public thoroughfare or as a part of a transportation grid.

Id. at 969.

29. *Perry*, 460 U.S. at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

30. *Id.* (“[The state] must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980))).

31. *Id.*

Second, designated public fora are public property that the government has opened for use by the public as a place for all types of expressive activity.³² This type of forum is bound by the same standards as those applying to the traditional public forum.³³ A subset of the designated public forum,³⁴ the limited public forum,³⁵ is created when governments open nonpublic fora, but limit expression to certain kinds of speakers or subjects.³⁶ Strict scrutiny is applied to restrictions on speech that fall within the designated category for which the forum has been opened.³⁷

Third, non-public fora include “[p]ublic property which is not by tradition or designation a forum for public communication.”³⁸ In such fora, content-based restrictions on speech are permissible as long as the law is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”³⁹ In other words, subject matter restrictions are permissible and viewpoint restrictions are impermissible in non-public fora. Other types of permissible restrictions on speech include those based on mode of expression and speaker status, so long as such restrictions have no viewpoint discrimination.⁴⁰

As exemplified by these rules, the viewpoint versus subject matter distinction is only relevant when a law has been passed in a non-public forum. Thus, this Comment will focus on the non-public fora only because they are the only areas where the issue identified herein is relevant.

B. Types of Speech Restrictions and Rationale for Distinctions

The constitutionality of restrictions on speech depends upon not only the forum of the speech, but upon the type of restriction the government

32. *Id.*

33. *Id.* at 45–46.

34. Scholars argue that the distinction between designated and limited public fora are ambiguous. See generally Ronnie J. Fischer, Comment, “What’s in a Name?”: An Attempt to Resolve the “Analytic Ambiguity” of the Designated and Limited Public Fora, 107 DICK. L. REV. 639 (2003).

35. For an argument that the limited public forum doctrine is unworkable because it is impossible for one to differentiate between a presumptively invalid content-based restriction on speech and a legitimate adjustment of the content parameters that define the forum, see generally Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929 (2000).

36. Hotel Employees & Restaurant Employees Union, Local 100 v. City of N.Y. Dep’t of Parks & Recreation, 311 F.3d 534, 545 (2d Cir. 2002).

37. *Id.*

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

39. *Id.* (citing U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns, 453 U.S. 114, 131 n.7 (1981)).

40. Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 682 (1998) (finding speech properly excluded on the basis of the speaker’s status).

places on the speech as well. The two broad categories of speech restrictions include content-based and content-neutral restrictions.⁴¹ First, content-neutral restrictions limit speech without regard to the substance of the message being conveyed.⁴² They include laws that “serve purposes unrelated to the content of expression.”⁴³ In other words, such laws have no bearing on the ideas or views expressed.⁴⁴ These types of laws are also known as “‘time, place, and manner’ regulations”⁴⁵ because they focus on the when, how, and where of expression, rather than the what, who, or why.⁴⁶ Content-

41. See R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2083 (2016).

42. See *Perry*, 460 U.S. at 45. For a perspective that content-neutral rules established by the Court are hazy, see generally Jay Alan Sekulow & Erik M. Zimmerman, *Uncertainty Is the Only Certainty: A Five-Category Test to Clarify the Unsure Boundaries Between Content-Based and Content-Neutral Restrictions on Speech*, 65 EMORY L.J. 455 (2015). These scholars argue that five categories of laws should be subject to strict scrutiny:

- (1) The government’s actual purpose is to suppress speech based on its content or viewpoint, or to impose subjective editorial control over content or viewpoint.
- (2) The government interest that the law is intended to further relates to an aspect of the direct or emotive communicative impact of regulated expression, rather than the manner of its delivery.
- (3) The law, on its face, treats speakers differently due to the content or viewpoint of their message, or excludes from its coverage speech or conduct relating to different subject matter or viewpoints that pose similar threats to the government’s asserted interests.
- (4) The actual or inevitable effect of the law is to prevent speakers espousing certain messages from effectively reaching their intended audience, such as by targeting a particular location or manner of expression that is closely tied to one subject matter or viewpoint.
- (5) The law lends itself to use for content- or viewpoint-discriminatory purposes, or there is a realistic possibility that official suppression is afoot.

Id. at 457–58.

43. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

44. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). See generally Clay Calvert, *Content-Based Confusion and Panhandling: Muddling a Weathered First Amendment Doctrine Takes Its Toll on Society’s Less Fortunate*, 18 RICH. J.L. & PUB. INT. 249 (2015) (providing a discussion of content-neutrality in panhandling laws).

45. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (noting that reasonable time, place, and manner regulations are permitted).

46. See Minch Minchin, *The Content-Neutrality Doctrine Still Works*, 67 FLA. L. REV. F. 320, 322 (2015), http://www.floridalawreview.com/wp-content/uploads/Minchin_Published.pdf [<https://perma.cc/8EPN-AB5Y>]. For a discussion that courts should completely abandon the doctrine of content neutrality, see generally Wright, *supra* note 41. The author argues that the distinction between content-based and content-neutral is no longer clear or practical because judicial trends establish that content-based restrictions are no longer subject to more demanding judicial scrutiny than content-neutral restrictions. *Id.* at 2082.

neutral laws are subject to the “rational basis” inquiry and are seldom struck down.⁴⁷

Second, content-based laws proscribe speech based on the substance of the message communicated.⁴⁸ Content-based regulations include both subject matter-based and viewpoint-based regulations.⁴⁹ The difference between a regulation based on a subject matter or a viewpoint is tenuous. A subject matter regulation intends to regulate speech on the basis of the substance of the message.⁵⁰ On the other hand, a viewpoint regulation proscribes speech based on the particular position, ideology, perspective, or viewpoint of the speaker.⁵¹ Viewpoint discrimination is a subset of content discrimination,⁵² which means that all viewpoint discrimination is content discrimination, but not all content discrimination is viewpoint discrimination—content discrimination includes subject matter discrimination as well.

The viewpoint versus subject matter distinction is crucial in understanding the constitutionality of laws in non-public fora.⁵³ In such fora, viewpoint discrimination is impermissible and subject matter discrimination is permissible.⁵⁴ In order to understand and correctly apply the viewpoint discrimination principle, care must be taken to understand why the distinction between content-based and content-neutral laws—as well as the distinction

47. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (“[I]t should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny.”).

48. *See* *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537–38 (1980).

49. *See id.* at 537.

50. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984))).

51. *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass’n*, 942 F.3d 1215, 1241 (11th Cir. 2019).

52. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is thus an egregious form of content discrimination.”).

53. Some scholars believe that once determining that viewpoint discrimination exists, courts find the law unconstitutional without further analysis required by the strict scrutiny inquiry. *See* Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 728 (2018); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 109 (2007) (arguing that modern cases establish a per se rule of unconstitutionality when met with viewpoint discrimination); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996) (arguing that courts invalidate viewpoint discriminatory regulations without applying strict scrutiny as it would to content-based regulations).

54. *See supra* text accompanying notes 24–25.

between subject matter and viewpoint-based laws—emerged and what purposes these distinctions served.

The Supreme Court is much more comfortable with content-neutral laws rather than content-based laws.⁵⁵ Content-neutral laws are generally seen as justified on grounds not pertaining to the message of the speech, but rather of the time, place, or manner of the speech.⁵⁶ Typical purposes of such laws are to control noise levels, mitigate public nuisances, or establish appropriate and inappropriate places for speech.⁵⁷ These types of laws are generally upheld because they apply neutrally to all topics and thus are less likely to unconstitutionally skew private discussion.⁵⁸ Because these types of laws treat all speakers equally, they are “relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome.”⁵⁹ Scholars have also suggested that because the broad coverage of such laws makes them harder to enact, the Court respects and defers to the legislature’s balancing of the costs and benefits in the enactment of such laws.⁶⁰

55. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”); see also Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGEORGE L. REV. 595 (2003). The author advances that resolution of the issue is murky because the Court often merges the content-based and viewpoint-based inquiries. *Id.* at 596 (citing *Turner*, 512 U.S. at 643 (distinguishing content-based from content neutral speech restriction by whether they “distinguish favored speech from disfavored speech on the basis of the ideas or views expressed”)). The problem of this merging is that it makes it difficult to tell the different types of government action apart, leading to a confused and outcome-driven doctrine. *Id.* at 597–98 (first citing *Rosenberger*, 515 U.S. at 831 (“[T]he distinction [between content and viewpoint discrimination] is not a precise one.”); and then citing *Hill v. Colorado*, 530 U.S. 703, 741 (2000)).

56. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

57. See, e.g., *id.* at 792 (stating that the principal purpose of the regulation was to control noise levels at the park).

58. See Jacobs, *supra* note 55, at 598.

59. *Turner*, 512 U.S. at 676 (O’Connor, J., concurring in part and dissenting in part).

60. Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 609–10 (1996). However, the author advances the notion that content-neutral laws may sometimes be as dangerous as content-based laws. *Id.* at 594–96 (“A law banning picketing of any kind in front of a manufacturing establishment is content-neutral, but probably almost as disadvantageous to union speech as a similar law prohibiting only picketing related to labor disputes.”).

On the other hand, content-based laws are deemed much more constitutionally dangerous. First, because content-based laws treat speech differently based on its content, they distort the ordinary workings of the “marketplace of ideas,” leaving the public with an incomplete perception of society based on the content of speech.⁶¹ As a result, content-based restrictions undermine two principal purposes of free speech: They “distort the search for truth” and distort the way citizens make decisions on matters of public policy because they limit discourse of only certain types of speech while allowing other types to prevail.⁶²

Within the realm of content-based laws, viewpoint-based laws are deemed more suspicious than subject matter-based laws for a variety of reasons. First, the danger of distortion of the marketplace of ideas is more severe in cases of viewpoint discrimination than subject matter discrimination. The Court repeatedly emphasized the distortion that may occur to the marketplace of ideas if viewpoint discriminatory laws were deemed constitutional.⁶³

A second possible explanation of the Court’s anti-viewpoint-discrimination approach is the Court’s belief that it is impermissible for the government to restrict speech because it disapproves of the message that is conveyed. The Court famously articulated this reasoning by stating that, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁶⁴ The reference to “opinion” in this reasoning exemplifies the Court’s fear of viewpoint discrimination because of the danger that governments will force the public to abide by certain viewpoints deemed correct by the state.

61. See *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment). For an argument that the Court’s reasoning lacked analytical clarity in attempting to distinguish subject matter regulations, see generally Geoffrey R. Stone, *Restriction of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). The author advances a new framework of dividing the subject matter restrictions into two categories: (1) “subject-matter restrictions defined in terms of speech about a specific issue”; and (2) “[those consisting of] subject-matter restrictions that are directed against broad classes of speech, cutting across a wide spectrum of issues.” *Id.* at 109, 112.

62. Stone, *supra* note 61, at 101.

63. In his concurrence, Justice Kennedy states, “[The viewpoint discrimination principle] protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating [a particular viewpoint], the law . . . might silence dissent and distort the marketplace of ideas.” *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

64. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The reason why this danger exists in the first place stems from the familiar premise articulated by the Court in 1919 that free speech seeks to promote the discovery of truth.⁶⁵ This premise rests upon the assumption that the search for truth is more fruitful when relying on “the power of the thought to get itself accepted in the competition of the market,” rather than relying on government censorship.⁶⁶ Furthermore, this danger also stems from the principle that allowing individuals to make decisions for themselves is crucial to “produce a more capable citizenry”⁶⁷ and enhance “individual dignity and choice upon which our political system rests.”⁶⁸ This emphasis on individual autonomy is another reason why the Court so favors government impartiality and is thus so concerned with governmental proscription of views it deems unacceptable.

C. Development of the Viewpoint Discrimination Principle

The viewpoint discrimination principle can be traced all the way back to 1939 when the Supreme Court expressed fear that an ordinance governing issuance of public street speaking permits could “be made the instrument of arbitrary suppression of free expression of *views* on national affairs.”⁶⁹ This fear of censoring particular perspectives exemplifies the very heart of the viewpoint discrimination principle.

Four years later, the Supreme Court articulated this point further in *West Virginia State Board of Education v. Barnette* when it struck down a school board’s mandatory flag salute rule and showed concern that the law would allow the government to identify correct and incorrect opinions in matters such as politics, nationalism, and religion.⁷⁰ This fear of government intervention into individual viewpoints by restricting some opinions and

65. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

66. *Id.*

67. *Cohen v. California*, 403 U.S. 15, 24 (1971).

68. *Id.*

69. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939) (emphasis added).

70. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Although *Barnette* held that requiring students to salute the flag and recite the Pledge of Allegiance infringes upon their rights to free speech, lower courts are divided on the “question of whether a state may require teachers to lead their classes in the Pledge of Allegiance.” John J. Concannon III, Note, *The Pledge of Allegiance and the First Amendment*, 23 SUFFOLK U. L. REV. 1019, 1020 (1989). The author argues that the government will be unable to demonstrate the prerequisite compelling interest for upholding a mandatory Pledge and that it cannot achieve this interest through less restrictive means. *Id.* at 1046–47.

allowing others provides the core of the early justification for the Court's growing hostility towards viewpoint discrimination.

The Court next addressed viewpoint discrimination in 1969, stating that the government must show something beyond the “desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” to create laws restricting speech.⁷¹ This reasoning was built on the idea that viewpoint discrimination occurs when the government aims to suppress one side of a particular viewpoint—usually an unpopular one.

*Cohen v. California*⁷² further supported this principle.⁷³ The Court, in striking down a conviction under a statute that prohibited offensive conduct, discussed “the usual rule that governmental bodies may not prescribe the form or content of individual expression.”⁷⁴ Although this language articulated the Court's concern with content-based laws, the Court expressed further worry that governments may censor particular words under the “guise [of] banning the expression of unpopular views.”⁷⁵ Banning unpopular views was deemed so dangerous because it conflicted with the principle that a “capable citizenry” values individual viewpoints and allows citizens to decide which views to voice.⁷⁶ The Court emphasized the inability to ascertain any social benefit that might result from the “grave” action of censoring unpopular views.⁷⁷ The notion that minimal governmental restraints into individual viewpoints enhances society as a whole provided justification for the adoption of the viewpoint discrimination principle.⁷⁸ This justification serves useful in ascertaining modern viewpoint discrimination cases today.

The Court continued its emphasis on allowing all points of view an equal opportunity to be heard in *Police Department of Chicago v. Mosley*.⁷⁹ In *Mosley*, the Supreme Court stated that an ordinance was unconstitutional because it described “permissible picketing in terms of its subject matter.”⁸⁰ Although this case was decided on subject matter

71. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

72. *Cohen v. California*, 403 U.S. 15 (1971).

73. *See id.* at 24.

74. *Id.*

75. *Id.* at 26 (“Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”).

76. *See id.* at 24.

77. *Id.* at 26. For an article revisiting and reexamining *Cohen*, see generally Thomas G. Krattenmaker, *Looking Back at Cohen v. California: A 40-Year Retrospective from Inside the Court*, 20 WM. & MARY BILL RTS. J. 651 (2012). The author concedes that the motive of the law in *Cohen* was admirable—to protect innocent people from indecent, distasteful speech. *Id.* at 686. However, allowing the government to enforce such restrictions would turn citizens into “simple agents of the State.” *Id.*

78. *See Cohen*, 403 U.S. at 26.

79. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92 (1972).

80. *Id.* at 95.

restriction grounds rather than viewpoint discrimination grounds, the Court used language indicating concern with viewpoint discrimination as well:

[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. . . . [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . [The] government must afford all points of view an equal opportunity to be heard.⁸¹

By distinguishing between a message and the *ideas* espoused in the message, and between acceptable and controversial views, the Court began to articulate the distinction between viewpoint discrimination and subject matter discrimination. Plainly, all points of view, including the less favored, must be given an equal opportunity to be heard.

In *Lehman v. City of Shaker Heights*, a city sold advertising space on a public transit system only to purveyors of goods and services, and refused to sell space for political advertisements.⁸² Finding that the advertising space constituted a nonpublic forum,⁸³ the Court upheld the restriction because the policy aimed to “minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.”⁸⁴ This holding implied that the Court believed politics were better characterized as a subject matter, rather than a viewpoint.⁸⁵

In *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, a regulation prohibited discussion of nuclear power in bill inserts.⁸⁶ The Court rejected the argument that the law was constitutional because it applied to all discussion of nuclear power, pro or

81. *Id.* at 95–96.

82. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974).

83. *Id.* at 301–02.

84. *Id.* at 304.

85. Scholars dispute this finding. See Wojciech Sadurski, *Does the Subject Matter? Viewpoint-Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315 (1997). The author discussed the irony resulting from characterizing politics as a subject matter and religion as a viewpoint because this characterization would result in politics “receiv[ing] inferior protection compared to religious speech, notwithstanding numerous declarations that political speech ranks highest on the hierarchy of speech under the First Amendment.” *Id.* at 327 n.39.

86. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 532 (1980).

con.⁸⁷ The Court implicitly suggested that the law was *not* viewpoint discriminatory, but rather subject matter discriminatory, by stating that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”⁸⁸ This statement suggested that the appropriate test for ascertaining viewpoint discrimination was whether the law bans only one side of a particular debate. However, this test was later abandoned by the Supreme Court’s holding in *Rosenberger v. Rector and Visitors of the University of Virginia*.⁸⁹

A statute in *Carey v. Brown* banned picketing in front of residences, but exempted peaceful picketing involving labor disputes.⁹⁰ In a footnote, Justice Brennan noted that it was irrelevant that the ordinance discriminated on the basis of subject matter rather than the speaker’s viewpoint because both subject matter and viewpoint discrimination were impermissible.⁹¹ This aimed to further strengthen the notion that subject matter discrimination and viewpoint discrimination were two separate ideas.

In 1983, the Court articulated the tri-part forum distinction analysis in *Perry Education Association v. Perry Local Educators’ Association*.⁹² In finding that the interschool mail system was nonpublic, the Court upheld a restriction on a rival union from using the mail system as viewpoint neutral because there was “no indication that the School Board intended to discourage one viewpoint and advance another,” and the exclusive access policy was based on the parties’ status instead of their views.⁹³

87. *Id.* at 537. The Court based its holding—that a state may not bar a utility from including a political message with its bills—on the fact that the speech involved a political message, not commercial speech. *Id.* at 539–40. This type of content-based restriction triggered strict scrutiny by the Court. See R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 421 (2019). On the other hand, classifying speech as commercial speech has wholly different implications. *Id.* at 419. The commercial speech doctrine has a four-part analysis: First, the “[Court] must determine whether the [speech] is protected by the First amendment” and for commercial speech to apply, it “must concern lawful activity and not be misleading.” *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 577, 566 (1981)). Second, “[the Court] ask[s] whether the asserted governmental interest is substantial.” *Id.* If both questions are answered positively, “[the Court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.” *Id.*

88. *Consol. Edison*, 447 U.S. at 537.

89. See *infra* Section III.A.

90. *Carey v. Brown*, 447 U.S. 455, 457 (1980).

91. *Id.* at 462 n.6 (quoting *Consol. Edison*, 447 U.S. at 537).

92. See *infra* text accompanying notes 26–27.

93. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 49 (1983) (“Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.”). The Court in *Perry* deferred heavily to the wisdom of the school board in the determination that no such viewpoint

In his dissent, Justice Brennan argued that the restriction was viewpoint-based because only one particular group was denied from using the system, and thus it was created to deny rival unions with differing points of view access to effective communication channels.⁹⁴ The majority responded by noting that the restriction applied to *all* outside unions and that “there [was] no indication in the record that the policy was motivated by a desire to suppress [rival unions’] views.”⁹⁵ However, as became clear later, the fact that a restriction applies to all sides of a topic does not preclude it from being viewpoint discriminatory.⁹⁶ Furthermore, requiring courts to ascertain individual motivations behind all policies advanced by lawmakers is not an efficient and effective use of judicial resources.

The next case to evaluate viewpoint discrimination was *Pacific Gas & Electric Co. v. Public Utility Commission*.⁹⁷ The Commission mandated that PG&E allow an advocacy group, Toward Utility Rate Normalization (TURN), to include content in PG&E’s newsletter four times per year.⁹⁸ The Commission required that TURN state views that were different from PG&E’s.⁹⁹ The order was invalidated because it “select[ed] the other speakers on the basis of their viewpoints.”¹⁰⁰ In other words, a government may not force a speaker to adopt a particular message.

In *Texas v. Johnson*, the Court invalidated a statute that made it illegal to desecrate a venerated object, including a flag.¹⁰¹ The Court stated that

discrimination exists. *Id.* Scholars critique this finding on the basis that the Court “narrowly focused on the character of the public property and passively scrutinized the justifications for the exclusive access policy.” *See* David C. Sarnacki, Case Note, *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 103 S. Ct. 948 (1983), 67 MARQ. L. REV. 772, 784 (1984). The author concludes that the consequences of such deference lead to viewpoint discrimination and suggests that state legislatures should enact statutes guaranteeing teacher unions equal access to communication channels. *Id.*

94. *Perry*, 460 U.S. at 64–65 (Brennan, J., dissenting) (“[T]he intent to discriminate can be inferred from the effect of the policy, which is to deny an effective channel of communication to the respondents, and from other facts in the case.”).

95. *Id.* at 50 n.9 (majority opinion).

96. *See* Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 703–04 (1996) (noting that it is “hardly relevant to viewpoint discrimination” that a law does not prefer one side over another).

97. *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1 (1986).

98. *Id.* at 6.

99. *See id.* at 6–7.

100. *Id.* at 20–21.

101. *See Texas v. Johnson*, 491 U.S. 397, 420 (1989). For a discussion of flag desecration laws, *see* generally S. Kathryn Spruill, Comment, *Old Glory and Flag Protection Legislation: Can Congress Wrap Itself in the Flag Without Getting Burned?*, 95 DICK. L.

the principle that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable” is a “bedrock principle underlying the First Amendment.”¹⁰² Although the Court did not decide the case on viewpoint grounds, the majority noted in a footnote that “surely one’s attitude toward the flag and its referents is a viewpoint.”¹⁰³ This suggested that patriotism constituted a viewpoint, rather than a subject matter.

R.A.V. v. City of St. Paul further articulated the distinction between content-neutrality and viewpoint-neutrality.¹⁰⁴ The Court stated that content discrimination involved the “entire class of speech.”¹⁰⁵ On the other hand, viewpoint discrimination was defined as “hostility—or favoritism—towards the underlying message expressed.”¹⁰⁶ The ordinance at issue applied only to fighting words that insult or provoke violence “on the basis of race, color, creed, religion or gender.”¹⁰⁷ Because fighting words that argued *in favor of* racial, religious, and gender equality would be lawful under the ordinance, and fighting words that that *opposed* racial, religious, and gender equality would be implicated, the ordinance was deemed viewpoint discriminatory.¹⁰⁸ The Court stated that “[the city] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.”¹⁰⁹ Namely, allowing only one

REV. 407 (1991). After the case was decided, there was a widespread plea for a constitutional amendment permitting governments to ban desecration of the flag. *Id.* at 410. When that did not work, Democrats put forth the Flag Protection Act of 1989, which would protect the physical integrity of the flag. *Id.* at 412. However, the Supreme Court found the law unconstitutional. *Id.* at 420 (quoting *United States v. Eichman*, 496 U.S. 310, 317 (1990)). Another constitutional amendment was introduced after but was defeated in the House. *Id.* at 421–22. The author suggested that Congress was correct in defeating the constitutional amendments because the amendments would open the door for further amendments anytime an “emotional, inflammatory dispute arises between . . . citizens and the Supreme Court.” *Id.* at 427. Although flag desecration laws prohibit some of the most unpopular and dislikable political speech, flag desecration is expressive in nature, which makes striking down such laws difficult for the Court to justify. *Id.*

102. *Johnson*, 491 U.S. at 414.

103. *Id.* at 413 n.9.

104. *R.A.V., v. City of St. Paul*, 505 U.S. 377 (1992).

105. *Id.* at 388.

106. *See id.* at 386.

107. *Id.* at 380 (quoting ST. PAUL, MINN., BIAS-MOTIVATED CRIME ORDINANCE Legis. Code § 292.02 (1990)).

108. *Id.* at 391–92.

109. *Id.* at 392. *R.A.V.* was decided on purely First Amendment grounds. *See id.* For a perspective that the Thirteenth and Fourteenth Amendments should have been considered, see generally Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992). The author advances that the hate speech and symbols, such as burning crosses, constitute badges of servitude that may be prohibited under the Thirteenth and Fourteenth Amendments. *Id.* at 155. The Court could have found

side of a debate to speak constituted viewpoint discrimination. However, the limitation on only one side of a debate is one possible form of viewpoint discrimination, but it is not the only possible form, as exemplified in the next case.

In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, a charity drive limited participation to agencies which met certain criteria.¹¹⁰ The Court found that the government violates the Constitution when it “denies access to a speaker solely to suppress the point of view [a speaker] espouses on an *otherwise inculdible subject*.”¹¹¹ Thus, the second type of viewpoint discrimination was born: Not only does viewpoint discrimination arise when one particular side of a debate is silenced, but it arises also when *any position* taken on otherwise allowable topics of discussion is silenced. This principle added a completely new level of complexity to the otherwise straightforward notion advanced prior to this decision. Prior to *Cornelius*, the Court was concerned only with whether or not a *particular side* of a debate or subject was silenced.¹¹² After *Cornelius*, an entirely new analysis was required—inquiry into permissible subjects and determination of whether the law restricts any viewpoints of otherwise permissible subjects.

In *Walter v. Sons of Confederate Veterans, Inc.*, the Court characterized license plates as government speech, bypassing the viewpoint discrimination analysis.¹¹³ In dissent, Justices Alito, Scalia, and Kennedy argued that an ordinance rejecting Confederate flag license plate messages was “blatant”

that the burning cross was a badge of the slavery system, which the government is authorized to abolish. *Id.* (quoting *The Civil Rights Case*, 109 U.S. 3, 20 (1883)).

110. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 792, 795 (1985).

111. *Id.* at 806 (emphasis added).

112. *See infra* Section III.A.

113. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219–20 (2015). This case was decided on government speech grounds and government speech is not subject to strict scrutiny. *Id.* at 207–09 (“We have therefore refused ‘to hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.’” (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991))).

For an article arguing that former president Donald Trump’s Twitter account should have been classified as government speech instead of speech made in a designated public forum, see generally Lauren Beausoleil, Comment, *Is Trolling Trump a Right or a Privilege?: The Erroneous Finding in Knight First Amendment Institute at Columbia University v. Trump*, 60 B.C. L. REV. E. SUPP. II-31, II-44 to -46 (2019).

viewpoint discrimination because Texas only rejected those designs that the public would find offensive.¹¹⁴ This argument exemplified the use of the classic viewpoint discrimination determination—whether one particular side or viewpoint was silenced.

The Court continued its discussion of the anti-viewpoint-discrimination principle in 2017 in *Matal v. Tam*.¹¹⁵ A federal statute, the “disparagement clause,” prohibited registration of trademarks that disparage, bring into contempt, or disrepute any “persons, living or dead, institutions, beliefs, or national symbols.”¹¹⁶ Although the clause implicated all sides of every possible issue, it was found viewpoint discriminatory because it denied registration to any offensive trademark.¹¹⁷ The Court noted “time and again” that speech may not be prohibited merely because it may be offensive to some.¹¹⁸

Justice Kennedy, in his four-Justice concurrence, built on the test first articulated in *Cornelius* and stated that the test for viewpoint discrimination was “whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.”¹¹⁹ Applying this test to *Matal*, Justice Kennedy found the relevant subject matter was “persons, living or dead, institutions, beliefs, or national symbols.”¹²⁰ Within that category, positive or benign trademarks were permissible, whereas derogatory ones were not, which Kennedy thought was “the essence of viewpoint discrimination.”¹²¹ In other words, censoring by allowing only one type of view about a subject constituted viewpoint discrimination.¹²² Kennedy finished with another summary of the viewpoint neutrality principle:

The First Amendment’s viewpoint neutrality principle protects more than the right to identify with a particular side. It [also] protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.¹²³

114. *Walker*, 576 U.S. at 223, 234 (Alito, J., dissenting).

115. *Matal v. Tam*, 137 S. Ct. 1744 (2017).

116. *Id.* at 1753 (quoting 15 U.S.C. § 1052(a)).

117. *Id.* at 1763 (“Giving offense is a viewpoint.”).

118. *Id.*

119. *Id.* at 1766 (Kennedy, J., concurring).

120. *Id.* (quoting 15 U.S.C. § 1052(a)).

121. *Id.* (noting that imposing restrictions on certain trademark names “reflects the Government’s disapproval of a subset of messages it finds offensive”).

122. *Id.*

123. *Id.* Scholars advance that this holding is a sharp “departure from long prevailing U.S. [federal law], as well as the rest of the world, where most countries have some form of prohibition against the registration of ‘immoral’ marks.” Mark Sommers & Naresh Kilaru, *The Supreme Court’s Tam Decision: Federally Registered Offensive Trademarks*,

The Court revisited another provision of the Trademark Act in 2019 in *Iancu v. Brunetti*.¹²⁴ The provision prohibited “immoral” and “scandalous” trademarks.¹²⁵ The Court defined viewpoint discrimination by noting that the “government may not discriminate against speech based on ideas or opinions it conveys.”¹²⁶ Comparing this case to *Matal*, the Court found viewpoint discrimination because the provision “disfavor[ed] certain ideas.”¹²⁷ The Court specified that the provision distinguished between two opposed sets of ideas—those aligned with moral standards and those hostile to them; those inducing society’s approval and those not.¹²⁸ Because the provision favored the former set of ideas and disfavored the latter, the Court found it viewpoint discriminatory.¹²⁹

III. ANALYSIS: RELIGION IS A VIEWPOINT

Religion is more aptly characterized as a viewpoint. Section A will provide a summary of relevant Supreme Court precedent that supports this assertion, including *Lamb’s Chapel v. Center Moriches Union Free School District*, *Rosenberger v. Rector & Visitors of the University of Virginia*, and *Good News Club v. Milford Central School*. Section B will discuss the recent circuit split ascertaining whether a law banning religious advertisements on buses is a permissible subject matter restriction or an impermissible viewpoint restriction before concluding that the Third Circuit was correct in holding that religion constitutes a viewpoint. Section C

FINNEGAN (Sept. 6, 2017), <https://www.finnegan.com/en/insights/articles/the-supreme-courts-tam-decision-federally-registered-offensive-trademarks.html> [https://perma.cc/Q6F2-MUFR]. The authors advance the proposition that as a result of this decision, the arbiter of unsavory marks “is no longer the courts or the U.S. Patent and Trademark Office, but the commercial marketplace” in the form of “commercial alienation, blowback, and public outrage.” *Id.*

124. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

125. *Id.* at 2297.

126. *Id.* at 2299.

127. *Id.* at 2297.

128. *Id.* at 2300.

129. *Id.* Some suggest that the implications of the case leave open a roadmap for legislative action barring registration of obscene, vulgar, or profane marks because the dissenters expressly indicated that such provisions would withstand First Amendment challenges. See Tim Lince, *Iancu v. Brunetti Ruling – Trademark Community Has Its Say on Implications of Momentous US Supreme Court Decision*, WORLD TRADEMARK REV. (June 25, 2019), <https://www.worldtrademarkreview.com/enforcement-and-litigation/iancu-v-brunetti-ruling-trademark-community-has-its-say-implications> [https://perma.cc/U9QN-7L4J].

will provide a discussion of why religion should always be classified as a viewpoint.

A. Relevant Supreme Court Precedent

Decided in 1993, *Lamb's Chapel v. Center Moriches Union Free School District* was the first case to tackle viewpoint discrimination in the religious sphere.¹³⁰ In *Lamb's Chapel*, New York law permitted the use of school property for “social, civic, or recreational uses.”¹³¹ A school board added the regulation that “the school premises shall not be used by any group for religious purposes.”¹³² A church wanted to screen a film on school property that dealt with family and child-rearing issues, including urging return to traditional, Christian values.¹³³

The Court explained that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”¹³⁴ Even though the law treated all religions alike by banning *all* religious purposes, the Court found that the “critical question” was whether the rule “discriminate[d] on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.”¹³⁵ The Court invoked the test from *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* to advance the rule that banning points of view about otherwise permissible subjects constituted viewpoint discrimination.¹³⁶ Thus, because a film about child rearing and family values would be otherwise permitted under New York law, a ban on a film presenting these same ideas “from a religious perspective” would be viewpoint discriminatory.¹³⁷

130. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (applying the *Cornelius* viewpoint discrimination test to a statute regulating religion).

131. *Id.* at 387.

132. *Id.* (quoting Appendix to Petition for Writ of Certiorari at 57a, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (No. 91-2024)).

133. *Id.* at 387–88.

134. *Id.* at 394 (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

135. *Id.* at 393. For a discussion about the effect of *Lamb's Chapel* on the modern forum analysis, see generally Ralph D. Mawdsley, *Lamb's Chapel Revisited: A Mixed Message on Establishment of Religion, Forum and Free Speech*, 101 EDUC. L. REP. 531 (1995).

136. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (noting viewpoint discrimination exists when denying access to a speaker's point of view on an “otherwise includible subject”).

137. See *Lamb's Chapel*, 508 U.S. at 393–94. For discussions on the constitutional conflict between the Free Speech Clause and the Establishment Clause established in *Lamb's Chapel*, see Timothy K. Hall, Casenote, *Constitutional Conflict: The Establishment Clause*

This case signified the non-intuitive idea that religion as a whole can be classified as a viewpoint rather than a subject matter. Although on the surface, religion, especially when it encompasses *all* religions, appears to be a general subject matter, the Court developed the idea that religion can be a lens or viewpoint through which other subjects are discussed.

Rosenberger v. Rector & Visitors of the University of Virginia built on this reasoning.¹³⁸ In this case, a university authorized payments for the printing costs of a variety of student publications, but withheld payments for publications about “religious activit[ies]” that implicated belief in any deity.¹³⁹ An organization wanted to publish a magazine “of philosophical and religious expression.”¹⁴⁰ The magazine’s “Christian viewpoint” was evident in the journals’ mission in offering a Christian perspective on personal and community issues.¹⁴¹ The Court stated that speech regulation is unconstitutional when “the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”¹⁴² Speaking about religion broadly, the Court stated:

It is . . . something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. . . . Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.¹⁴³

Applying this idea to the facts, the Court found that the law prohibited a religious perspective on the otherwise allowable subjects of personal and

Meets the Free Speech Clause in Lamb’s Chapel v. Center Moriches Union Free School District, 45 MERCER L. REV. 875 (1994); Mawdsley, *supra* note 135, at 536–43.

138. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 820 (1995). For a discussion that the Court in *Rosenberger* “abandoned that traditional approach by conflating secular speech and religious speech under the First Amendment; by treating religious speech as simply another ‘view point,’” see Barbara K. Bucholtz, *What Goes Around, Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 319 (2007). For a contradictory discussion about the “praiseworthy” nature of the Court’s reasoned and sound opinion in *Rosenberger*, see *The Supreme Court, 1994 Term—Leading Cases*, 109 HARV. L. REV. 210, 214–20 (1995).

139. *Rosenberger*, 515 U.S. at 825.

140. *Id.* (citation omitted).

141. *Id.* at 826.

142. *Id.* at 829.

143. *Id.* at 831.

community issues.¹⁴⁴ The Court dismissed the dissent's argument that barring the entire topic of religion did not constitute viewpoint discrimination, stating that silencing all religious speech simply means that debate "is skewed in multiple ways."¹⁴⁵

Scholars have criticized *Rosenberger* because the Court stated that religion was not "just a viewpoint," yet "characterized [it] as a viewpoint for the purposes of th[e] decision."¹⁴⁶ Wojciech Sadurski, a professor of law, argued that *Rosenberger* expanded the viewpoint discrimination principle too far because even the "most directly proselytizing talk about religion . . . can always be characterized as being about something else (salvation, peace of mind, human perfection, child rearing, community duties), with 'religion' providing merely a 'perspective.'"¹⁴⁷ However, perhaps that is exactly what the Court in *Rosenberger* aimed to do—permanently classify religion as a viewpoint.¹⁴⁸

Finally, *Good News Club v. Milford Central School* concluded the Supreme Court's discussion of religion in the viewpoint discrimination context.¹⁴⁹ A New York law authorized school boards to allow use of school property for "instruction in any branch of education, learning or the arts" and "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community."¹⁵⁰ However, a community use policy prohibited use of facilities "by any individual or organization for religious purposes."¹⁵¹ The Good News

144. *Id.* ("University [did] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."). For a prediction that *Rosenberger* offers little to the body of free speech jurisprudence beyond the narrow facts of that case, see Robert L. Waring, *Wide Awake or Half-Asleep? Revelations from Jurisprudential Tailings Found in Rosenberger v. University of Virginia*, 17 N. ILL. U. L. REV. 223, 260–61 (1997).

145. *Rosenberger*, 515 U.S. at 831–32. The dissent argued that because the law applied to all religions, and even atheism, it denied funding for the entire subject matter of religion. *See id.* at 898 (Souter, J., dissenting). In other words, the dissent believed that the law applied not to those who wished to discuss general issues from religious perspectives, but religious conversation and observances as a whole. *Id.*

146. *See* Sadurski, *supra* note 85, at 326.

147. *Id.* at 326–27 (emphasis omitted).

148. *See infra* Section III.C.

149. *See* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). For a discussion about *Good News Club* in the context of the Establishment Clause, see generally Rebecca A. Valk, Note, *Good News Club v. Milford Central School: A Critical Analysis of the Establishment Clause as Applied to Public Education*, 17 ST. JOHN'S J. LEGAL COMMENT. 347 (2003).

150. *Good News Club*, 533 U.S. at 102 (quoting Appendix to Petition for Writ of Certiorari at D1, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (No. 99-2036)).

151. *Id.* at 103 (quoting Appendix to Petition for Writ of Certiorari, *supra* note 150, at D2).

Club, a private Christian organization for kids, sought to hold weekly meetings in the school cafeteria for singing songs, hearing Bible lessons, and memorizing scripture.¹⁵²

Because the policy was interpreted by the school to allow any group that “promote[s] the moral and character development of children,” and the Club taught morals and character development to children, the Court found that the guideline constituted viewpoint discrimination.¹⁵³ The Court stated that even if something is “quintessentially religious” or “decidedly religious in nature,” that does not mean that it cannot be characterized as advancing non-religious messages from a religious viewpoint.¹⁵⁴ Thus, the Court held that “speech discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint.”¹⁵⁵

B. The Recent Circuit Split and Analysis Thereof

The issues the Court met in *Rosenberger*, *Good News Club*, and *Lamb’s Chapel* are still prevalent today. The federal circuits are currently split on the issue of whether bans on religious advertisements on public buses constitute permissible subject matter discrimination or impermissible viewpoint discrimination. The D.C. Circuit concluded that the ban on religious

152. *Id.* (citation omitted).

153. *Id.* at 108–09 (quoting Brief for Defendant-Appellee at 9, *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2000) (No. 98-9494)). The Club taught morals and character development to children from a religious perspective. *Id.* at 110.

154. *Id.* at 111 (“We disagree that something that is ‘quintessentially religious’ or ‘decidedly religious in nature’ cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.”).

155. *Id.* at 112. Dissenting Justices Souter and Ginsburg argued that *Good News Club* was distinguishable from *Lamb’s Chapel* because the Club intended to use the premises not for the discussion of a subject from a religious point of view, “but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion.” *Id.* at 138 (Souter, J., dissenting). Scholars have also picked up on this point and wondered whether any possible distinction exists between “a group primarily focused on worship or evangelism and a group primarily focused on teaching morals from a religious perspective.” Jason E. Manning, Comment, *Good News Club v. Milford Central School: Viewpoint Discrimination or Endorsement of Religion?*, 78 NOTRE DAME L. REV. 833, 880 (2003); see also Jacobs, *supra* note 55, at 597–98 (noting the Court’s inconsistent approaches to the determination of viewpoint discrimination). For a closer look at the possible implications of *Good News Club*, see generally John E. Dunsford, *A Closer Look at Good News v. Milford: What Are the Implications?* (*Stay Tuned*), 25 SEATTLE U. L. REV. 577 (2002).

advertisements was not viewpoint discriminatory, and was simply subject matter discriminatory. The Third Circuit, however, found that the ban on religious advertisements constituted impermissible viewpoint discrimination.

*1. The D.C. Circuit Finds Permissible Subject Matter Discrimination—
This Analysis Strays from Supreme Court Precedent*

In *Archdiocese of Washington v. Washington Metro Area Transit Authority*, decided in 2018, the Catholic Archdiocese brought an action against the Washington Metropolitan Transit Authority (WMTA).¹⁵⁶ The WMTA closed its advertising space on buses to “advertisements that promote or oppose any religion, religious practice or belief.”¹⁵⁷ The Archdiocese sought to place an ad on the exterior of WMTA’s buses that “depict[ed] a starry night and the silhouettes of three shepherds and sheep on a hill facing a bright shining star high in the sky, along with the words ‘Find the Perfect Gift,’” and a web address and social media hashtag promoting the Catholic Church.¹⁵⁸

The D.C. Circuit began by finding that WMTA’s advertisement space constituted a nonpublic forum.¹⁵⁹ Thus, the restriction would be upheld if it constituted permissible subject matter restriction.¹⁶⁰ The Archdiocese contended that the law was impermissibly viewpoint discriminatory because it suppressed religious viewpoints on otherwise permissible subjects.¹⁶¹ The church apparently wished to address topics such as charitable giving, Christmas, opening hours, and places to visit—topics on which WMTA allowed non-religious messages.¹⁶²

The D.C. Circuit disagreed, stating that the guideline did not “exclude religious viewpoints but rather proscribe[d] advertisements on the entire subject matter of religion.”¹⁶³ Finding the commercial nature of the forum relevant,¹⁶⁴ the court stated that “[t]hese contentions [were] unpersuasive

156. *Archdiocese of Wash. v. Wash. Metro Area Transit Auth.*, 897 F.3d 314, 318 (D.C. Cir. 2018).

157. *Id.* at 320 (quoting WASH. METRO. AREA TRANSIT AUTH., GUIDELINES GOVERNING COMMERCIAL ADVERTISING (2015), https://www.wmata.com/about/records/public_docs/upload/Advertising_Guidelines.pdf [<https://perma.cc/8LK4-GHE9>]).

158. *Id.*

159. *Id.* at 322–24.

160. *See id.* at 322.

161. *Id.* at 325.

162. *Id.* at 328.

163. *Id.* at 325.

164. *See id.* at 323. In a Ninth Circuit case decided in 1999, an advertiser sued a school district because of the school’s refusal to post a paid advertisement containing the Ten Commandments along the school’s fence. *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 962 (9th Cir. 1999). The court found that the refusal to post the sign did not constitute viewpoint discrimination in light of the forum’s reservation for commercial

because the subjects” were “either not subjects within the forum or [were] not subjects on which [the church has] shown they could not speak.”¹⁶⁵ The court stated that the challenged ad was not “primarily or recognizably about charitable giving . . . opening hours or places to visit,” but instead was a religious ad urging viewers to attend mass at Catholic churches.¹⁶⁶ Thus, because the ad was evocative of the “saving grace of Christ,” which was *not* a permissible subject of the forum, the restriction did not constitute viewpoint discrimination.¹⁶⁷

The D.C. Circuit’s reasoning strays from Supreme Court precedent. First, in upholding the ban, the D.C. Circuit found convincing that the guideline prohibited religious speech in “clear, broad categories” and that lawmakers were not tasked with deciding which religious advertisements should be permissible.¹⁶⁸ However, although *Rosenberger* suggested that a broad prohibition on religious speech as a subject *may* be viewpoint neutral,¹⁶⁹ the Court in *Good News Club* foreclosed that argument, stating that even if something was “quintessentially religious” or “decidedly religious in nature,” it is still able to be characterized as advancing non-religious

speech. *See id.* at 969. “DiLoreto’s sign [did] not advertise, or even mention, a business.” *Id.* Furthermore, the ad did not “address[] otherwise-permissible subjects from a religious perspective; it set[] forth the Ten Commandments.” *Id.*

165. *Archdiocese of Wash.*, 897 F.3d at 328–29.

166. *Id.* at 329.

167. *Id.*

168. *Id.* at 325. Laws which leave application discretion in the hands of lawmakers are more suspect than those without such discretion because human biases, conscious or not, are always at play. Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401, 1408–09 (2017). Laws are generally categorized as using rules or standards to achieve a goal, but one scholar advances the idea of using technology to create a new category of laws: microdirectives. *Id.* at 1402–03. Using predictive technology, the author argues, will greatly diminish the need for human discretion because it will allow lawmakers to gather information and use predictive algorithms to update the law instantly based on all relevant factors. *See id.* at 1428. For example, some algorithms have already been developed to ascertain the likelihood of a criminal defendant skipping out on bail, leading to output data more reliable and less biased than any individual judge. *Id.* (citing Shaila Dewan, *Judges Replacing Conjecture with Formula for Bail*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html> [<https://perma.cc/B267-HDQR>]). This imparts a factor of impartiality and reduces the need for individual discretion in dealing with matters of the law. *See id.*

169. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (noting that the University of Virginia “does not exclude religion as a subject matter” and explaining that the prohibition of religious speech was viewpoint discrimination because it was not excluded on the basis of subject matter).

messages from religious viewpoints.¹⁷⁰ To illustrate, the exclusion in *Good News Club* broadly prohibited use of the forum “for religious purposes” and was still found viewpoint discriminatory.¹⁷¹ As such, the relevant inquiry is whether the law allows use of property for subjects discussed through a non-religious lens while prohibiting discussion of those same subjects through a religious lens.¹⁷² It is thus irrelevant that the guideline here prohibited religion broadly.

Second, the D.C. Circuit attempted to distinguish the regulation here from the regulations in *Rosenberger*, *Lamb’s Chapel*, and *Good News Club* on the basis of the contrast between the breadth of subjects encompassed by the fora in those cases and WMTA’s “express boundaries and narrow character.”¹⁷³ WMTA initially accepted ads on all types of subjects, but then “closed its advertising space to issue-oriented ads, including political, religious, and advocacy ads.”¹⁷⁴ The D.C. Circuit failed to explain how exactly a forum which is open to all ads except political, religious, and advocacy ads was characterized by its “express boundaries and narrow character.”¹⁷⁵

Third, apparently noting this inconsistency, the D.C. Circuit then went on to argue that the underlying messages the Archdiocese sought to address were not “primarily or recognizably” about secular subjects.¹⁷⁶ The Archdiocese stated that the topics it wished to address were “charitable giving, Christmas, and opening hours on which [WMTA] allows non-religious but not religious messages.”¹⁷⁷ The D.C. Circuit disagreed, stating that the “ad [was] not primarily or recognizably about charitable giving, as it [was] not primarily or recognizably about opening hours or places to visit.”¹⁷⁸ Instead, the D.C. Circuit advanced that the ad was a “religious ad, an exhortation . . . to be part of [the] evangelical effort to attend mass.”¹⁷⁹ “The imagery of the . . . ad [was] evocative . . . of the saving grace of Christ,” which was not an includible subject of the forum.¹⁸⁰

170. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001) (“We disagree that something that is ‘quintessentially religious’ or ‘decidedly religious in nature’ cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.”).

171. *Id.* at 103, 109.

172. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993).

173. *Archdiocese of Wash.*, 897 F.3d at 327–28.

174. *Id.* at 318.

175. *See id.* at 327.

176. *Id.* at 329.

177. *Id.* at 328.

178. *Id.* at 329.

179. *Id.*

180. *Id.*

However, the Supreme Court has never attempted to parse speech as “primarily or recognizably” about anything. For example, in *Lamb’s Chapel*, the film series discussed views “on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage.”¹⁸¹ The Supreme Court characterized the film as “no doubt” one about the permissible subject of child rearing and family values,¹⁸² notwithstanding the Christian overtones surrounding the entire film, without attempting to distinguish what the “primary” focus of the film was.¹⁸³

Similarly, in *Rosenberger*, the Christian magazine included “articles about racism, crisis pregnancy, stress, prayer . . . religious music[,] . . . homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors.”¹⁸⁴ The Supreme Court found that religion provided a perspective from which a variety of subjects were discussed, notwithstanding the magazine’s “obvious religious content,”¹⁸⁵ without attempting to dissect the primary motivation of the magazine.¹⁸⁶

Finally, in *Good News Club*, the Club aimed to use facilities for “singing songs, hearing a Bible lesson and memorizing scripture.”¹⁸⁷ The Court found that “it [was] clear that the Club [taught] morals and character development to children,” an otherwise permissible purpose, notwithstanding the clear religious overtones,¹⁸⁸ without disseminating what the primary

181. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 388 (1993).

182. *Id.* at 394.

183. *See id.* at 393–96.

184. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 826 (1995). The magazine from the case, *Wide Awake*, calls itself “A Christian Perspective Literary Magazine” on its website with a focus “dedicated to centralizing and vocalizing Christian perspectives on grounds, uniting Christians at the University through artistic and literary expression” and “aim[s] . . . to provide members of the [University] with the opportunity to share their Christian perspectives with others.” *About Wide Awake*, WIDE AWAKE, <https://sites.google.com/site/wideawakeuva/> [<https://perma.cc/M9W8-W7TK>]. Surely such a strong reference to religion implies Christianity as the primary motivation for creating the magazine.

185. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 110–11 (2001) (discussing *Rosenberger*).

186. *See id.* at 110 (explaining that the holding in *Rosenberger* relied on denial of funding instead of religion as a subject matter for the purposes of viewpoint discrimination).

187. *Id.* at 103 (citation omitted).

188. *Id.* at 108. “What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.” *Id.* at 111.

purpose was. By stating that the Club “teaches” this secular purpose, implying that it teaches non-secular purposes as well, the Supreme Court implicitly rejected the notion that the secular purpose must be the dominant, overarching, or prominent purpose, a perception that the D.C. Circuit attempts to advance. Furthermore, the Court in *Good News Club* certainly recognized the overarching, and potentially even dominant, religious content of the Club, stating that “[g]iven the obvious religious content of Wide Awake, we cannot say that the Club’s activities are any more ‘religious’ or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger*.”¹⁸⁹ However, the Court still found the fact that the Club taught a secular purpose dispositive to the determination that the law was viewpoint discriminatory.

The intensive fact-based approach the D.C. Circuit attempted to advance is extremely subjective and lends itself to endless litigation and conflicting opinions. One person can look at a picture of a shepherd and see a non-secular message, and another person can see a secular message.¹⁹⁰ This exemplifies the problem with the D.C. Circuit’s approach. The approach places too much discretion in the hands of government officials who enforce the law and the judges who adjudicate it. It will force agencies with no lawmaking or enforcement power to determine whether a given advertisement is religious or not. Such extensive discretion is ripe for abuse.

2. *The Third Circuit Finds Impermissible Viewpoint Discrimination— This Analysis More Closely Adheres to Supreme Court Precedent*

In *Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System*, decided in 2019, an association of atheists, agnostics, secularists, and skeptics (Freethought) brought an action against the County of Lackawanna transit system (COLTS).¹⁹¹ COLTS leased advertising space on the inside and outside of its buses and barred ads that:

189. *Id.* at 110.

190. The profession has also been invoked biblically to portray God as a shepherd. See, e.g., *The Shepherd in Christianity*, JESUSBOAT, <https://www.jesusboat.com/the-shepherd-in-christianity/> [<https://perma.cc/U7W4-UAVV>]. Religious websites compare God to a shepherd in the sense that the shepherd guides the flock, the shepherd must know the way to guide the flock, the shepherd must protect the sheep, and the shepherd must be willing to sacrifice. *Id.*

191. *Ne. Pa. Freethought Soc’y v. Cnty of Lackawanna Transit Sys.*, 938 F.3d 424, 428 (3d Cir. 2019).

promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or that are otherwise religious in nature.¹⁹²

Freethought wanted to run an ad that simply read “Atheists” on a blue sky with clouds that included their web address.¹⁹³

The district court held that the policy was viewpoint neutral because it “put the entire subject of religion out of bounds.”¹⁹⁴ However, the Third Circuit found that *Rosenberger*, *Lamb’s Chapel*, and *Good News Club* were indistinguishable from the case here.¹⁹⁵ The Third Circuit reasoned that “if government permits the discussion of a topic from a secular perspective, it may not shut out speech that discusses the same topic from a religious perspective.”¹⁹⁶ Here, COLT’s policy and practice showed that “the forum [was] open to messages on all topics not expressly banned,” which implied that all other topics were acceptable.¹⁹⁷ The court determined that even though the ad related to the subject of religion at large, Freethought’s underlying “message [was] one of organizational existence, identity, and outreach.”¹⁹⁸ It was meant to communicate that “a local organization for atheists exists” and that they are “not alone.”¹⁹⁹ Because nothing in COLT’s policy would prohibit secular organizations from advertising, the fact that only religious organizations were banned from advertising constituted viewpoint discrimination.²⁰⁰

This analysis adheres to Supreme Court precedent. Because the bus policy would not “prohibit secular [organizations] from advertising their

192. *Id.* at 430.

193. *Id.* at 429. In London, Humanists UK launched the “Atheist Bus Campaign,” which was primarily intended for buses in London, but grew in popularity and expanded across the UK. *Atheist Bus Campaign*, HUMANISTS UK, <https://humanism.org.uk/campaigns/successful-campaigns/atheist-bus-campaign/> [<https://perma.cc/GW3S-P4XX>]. Launched in 2009, the campaign was a direct response to many Christian adverts running on London buses and drew massive public support. *Id.* Humanists UK believe that this support exemplifies the notion that non-religious people want their voice to be heard. *Id.*

194. *Ne. Pa. Freethought Soc’y*, 938 F.3d at 430.

195. *See id.* at 432.

196. *Id.* at 434 (quoting *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004)).

197. *Id.*

198. *Id.* at 435.

199. *Id.* at 434 (citation omitted).

200. *See id.* at 434, 442.

organizational philosophy or from communicating the message: ‘We exist, this is who we are, consider learning about or joining us,’” but atheist and religious organizations are banned from doing so, the Third Circuit correctly concluded that the restriction on speech was viewpoint discriminatory.²⁰¹ Even though the speech may have been “quintessentially religious” or “decidedly religious in nature,”²⁰² what matters to the analysis is not how religious a message is, but whether it communicates a religious or atheist viewpoint on a subject to which the forum is otherwise open.²⁰³ Thus, because the regulation prohibited Freethought’s statement of organizational identity, due solely to the statement’s atheistic character, it constituted viewpoint discrimination.²⁰⁴

One author, analyzing the same circuit split this Author identified herein, advanced the opposite conclusion to this Comment.²⁰⁵ That author argued that the Third Circuit’s proposed subject—one of informing others about the existence of the organization and inviting others to join—was “abstract” and would apply to too many advertisements looking to build a company or brand. However, the scholar fails to mention how exactly this purpose was “abstract” and why permitting too much speech is harmful in any way. To the contrary, that argument is in conflict with the Court’s repeated emphasis on promoting the free marketplace of ideas and limiting government censorship.²⁰⁶

C. *Why Religion Should Always be Classified as a Viewpoint*

Religion should always be classified as a viewpoint, a lens through which to see life, rather than an individual and separate subject matter. First, Justice Brennan’s dissent in *Lehman v. City of Shaker Heights* expanded the concept of viewpoint to embrace such broad perspectives as religion because of the critical point, embraced by some members of the

201. See *id.*

202. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001).

203. See *id.* at 112 & n.4.

204. *Ne. Pa. Freethought Soc’y*, 938 F.3d at 435.

205. See Blythe McGregor, *Forbidding Religious Advertisements on Buses: Subject Matter or Viewpoint Regulation?*, U. CIN. L. REV. (Nov. 13, 2019), <https://uclawreview.org/2019/11/13/forbidding-religious-advertisements-on-buses-subject-matter-or-viewpoint-regulation/> [<https://perma.cc/493E-896X>]. The author argues that because the Supreme Court construed subjects narrowly in the past, the term should be construed narrowly in the context of advertisements. *Id.* Because most advertisements are created with the purpose of promoting a group, company, or brand, no ads could possibly be prohibited under this framework. *Id.* However, this statement is too general, and in any case, the author fails to explain how allowing such a wide variety of advertisements can possibly be detrimental in light of the Court’s repeated emphasis on expanding the marketplace of ideas. See *supra* text accompanying notes 61–68.

206. See *supra* Section II.B.

Court, that discrimination does not become any less repugnant when it is among entire classes of ideas rather than only particular views within a class of ideas.²⁰⁷ This forecloses the argument that restrictions on religious speech are constitutional simply because they treat all religions alike—silencing multiple voices is equally as bad, if not worse, as silencing only one.

Furthermore, the conclusion that religion is better characterized as a viewpoint can be traced back to the Supreme Court’s statement in 1943 that “[i]f there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”²⁰⁸ By characterizing religion as a matter of opinion, the Court suggested that religion is more similar to a viewpoint than a distinct subject matter. Opinions by their very nature invoke positions, ideologies, and perspectives, which invoke viewpoints. Opinions do not merely involve substance or content of a message.

Merriam-Webster defines “opinion” as “a view, judgement, or appraisal formed in the mind about a particular matter.”²⁰⁹ This definition makes clear that opinions are akin to viewpoints, which are formed about subject matters—not that opinions are subject matters themselves. And because the Supreme Court directly placed religion in the same category of opinions, the conclusion advanced herein is significantly strengthened because it stems from the very nature of religion:

Religion is not only a subject. It’s a worldview through which believers see countless issues. It was so for our Nation’s founders, whose moral thesis changed the world and conceived a new birth of freedom in the United States: “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”²¹⁰

Comparing religion to other topics advances the conclusion that religion is more aptly classified as a viewpoint. In *Texas v. Johnson*, the Court

207. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 316–17 (1974) (Brennan, J., dissenting) (noting that discrimination does not become “any less odious” when it is “among entire classes of ideas, rather than among points of view within a particular class”); see also Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 102, 121–22 (1996). The author believes that the Supreme Court established the rule that discrimination against religious expression is *always* viewpoint-based. *Id.* at 102.

208. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added).

209. *Opinion*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/opinion> [<https://perma.cc/TD9P-AGDD>].

210. *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 437 (3d Cir. 2019) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

noted that “surely one’s attitude toward the flag and its referents is a viewpoint.”²¹¹ The Court could have found instead that patriotism was a subject matter, but instead classified it as a viewpoint. By the same token, religion should be classified as a viewpoint.

Scholars suggest that “[t]he connection between religion and patriotism is one that has long been noted.”²¹² Some similarities between religion and patriotism include the use of symbols and rituals, fierce loyalty, and emotional attachment. The blurring line between religion and patriotism can be seen in country music,²¹³ on American money,²¹⁴ and even in the Pledge of Allegiance.²¹⁵ In fact, a study found that 68% of white evangelicals report the most intense patriotic feelings, with the percentages of patriotism going down to 56% of white mainline Protestants, 49% of minority Christians, 48% of Catholics, and only 39% of religiously unaffiliated Americans.²¹⁶ This study exemplifies the intuitive idea that religion and patriotism are significantly entwined, and lends credibility to the notion that religion should be thought of as a viewpoint by all courts, much like patriotism was thought of as a viewpoint by the Supreme Court.

211. Texas v. Johnson, 491 U.S. 397, 413 n.9 (1989).

212. Gene Weinstein, *Aspects of Religion and Patriotism: Some Recent Studies*, 23 ANTIOCH REV. 515, 515 (1963–1964). The author, invoking Machiavelli, “commented that a prince must always appear religious” because citizens find it easier to fight and subsequently die for their nation if that also means that they are “simultaneously dying for God.” *Id.*

213. See Kelsey Dallas, *Jesus, Take the Radio Dial: Country Music’s Evolving Relationship with Religion*, DESERET NEWS (Jan. 25, 2016, 6:50 AM), <https://www.deseret.com/2016/1/25/20580894/jesus-take-the-radio-dial-country-music-s-evolving-relationship-with-religion> [<https://perma.cc/547T-8MU5>] (discussing country music and “their reflections on patriotism, faith, family and life in rural America”).

214. See Arthur Schlesinger Jr., *When Patriotism Wasn’t Religious*, N.Y. TIMES (July 7, 2002), <https://www.nytimes.com/2002/07/07/opinion/when-patriotism-wasn-t-religious.html> [<https://perma.cc/HU5A-N7RC>] (discussing the phrase “In God We Trust” on coins). One scholar describes recent arguments—made by states requiring public schools to post “In God We Trust” in classrooms—that the phrase isn’t really religious. Rob Boston, *If ‘In God We Trust’ Isn’t Really a Religious Statement, Then What Exactly Is It?*, AMERICANS UNITED: WALL OF SEPARATION BLOG (Jan. 25, 2019), <https://www.au.org/blogs/wall-of-separation/if-in-god-we-trust-isnt-really-a-religious-statement-then-what-exactly-is> [<https://perma.cc/6VSR-MBKQ>]. The arguments have actually worked, with courts asserting that such “generic forms of religiosity” have lost their “religious meaning by constant repetition.” *Id.* However, the author finds this proposition absurd, arguing that the phrase is obviously religious and urges children to trust in one God. *Id.*

215. See *The Pledge of Allegiance*, U.S. HIST., <https://www.ushistory.org/documents/pledge.htm> [<https://perma.cc/TUY8-WVXX>] (“[O]ne Nation, under God . . .”).

216. *White Evangelicals the Most Patriotic, Poll Finds*, USA TODAY (June 28, 2013, 5:44 PM), <https://www.usatoday.com/story/news/nation/2013/06/28/ms-evangelical-patriotic/2473971/> [<https://perma.cc/QNP6-HQ6D>].

In addition, the conclusion advanced herein finds direct support in Justice Kennedy's 2017 four-Justice concurrence in *Matal v. Tam*.²¹⁷ It is curious logically that banning *more* speech is more constitutional than banning *less*. This is the heart of Justice Kennedy's concurrence in *Matal v. Tam*. He stated that "prohibit[ing] all sides from criticizing their opponents makes a law more viewpoint based, not less so."²¹⁸ Thus, a general prohibition on all religious speech, whether that speech may be Buddhist, Christian, Catholic, Jewish, Hindu, Agnostic, Atheist, or of another affiliation, makes the law more viewpoint based, not less so. Furthermore, Justice Kennedy stated that the viewpoint neutrality principle "protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses."²¹⁹

Applying this analysis to the cases here, the Archdiocese's proposed advertisement in *Archdiocese of Washington v. Washington Metro Area Transit Authority* was aimed to encourage charitable gift giving during the holiday season and promote Christmas and holiday opening hours.²²⁰ The viewpoint neutrality principle should thus protect the right of the Archdiocese to advance this chosen position through an advertisement invoking religious aesthetic. Freethought's proposed advertisement in *Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System* was aimed to inform the public about and encourage membership in Freethought's organization.²²¹ Similarly, the viewpoint neutrality principle should thus protect the right of Freethought to spread a message of organizational awareness and involvement as chosen—through an advertisement with the word "Atheists" in it.

Categorizing religion as a viewpoint, as advanced herein, is justifiable through the lens of public policy as well. Back in 1919, the Supreme Court stated that free speech has the purpose of promoting the "free trade in ideas."²²² In order to meet this policy goal and promote such free trade of

217. See *Matal v. Tam*, 137 S. Ct. 1744, 1765–69 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

218. *Id.* at 1766.

219. *Id.*

220. See *supra* Section III.B.1.

221. See *supra* Section III.B.2.

222. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This is a popular justification for protecting free speech, which theorizes that the "free dissemination of ideas" allows "the truth [to] compete[] and eventually win[] out over falsehood." Brian Miller, *There's No Need to Compel Speech. The Marketplace of Ideas Is Working*, FORBES (Dec. 4, 2017, 3:44 PM), <https://www.forbes.com/sites/briank>

ideas, restrictions on speech should be seldom allowed. By this token, allowing for more rather than less speech to be broadcast “put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry.”²²³ In other words, allowing more types of speech presumably increases the quality of our society.²²⁴ Classifying religion as a viewpoint will lead to less restrictions on speech and enhance the pool of communication available to our society.

Furthermore, placing restrictions on religious speech may “distort the marketplace of ideas,” a fear that the Supreme Court emphasized repeatedly.²²⁵ Restricting religious speech may distort the marketplace of ideas in the sense that by restricting such speech, there will be fewer religious ideas expressed than there would be without the restrictions—this is a distortion in the pool of ideas.

Another related point for why religion is better characterized as a viewpoint is related to this interruption of the free trade of ideas and squelching of the marketplace of ideas. There are certain situations where religious speech is more clearly a viewpoint than a subject matter. For example, the subject of abortion is clearly secular on its face, but can be discussed through a religious lens. On the other hand, there are some circumstances where it is harder to find the secular meaning behind seemingly purely religious speech. For example, discussion about whether there is or is not a God seems to invoke the entire subject matter of religion.

Critics of this Comment will surely invoke such speech to argue that religion can sometimes be a subject matter as well. However, that “sometimes” is a reason for pause. To ban religious speech would cover *both* of the

millier/2017/12/04/theres-no-need-to-compel-speech-the-marketplace-of-ideas-is-working/?sh=3130fd344e68 [https://perma.cc/9TTH-UP65]. The author advances that this justification may explain recent attempts to limit speech. *Id.* The author then poses the question, once the truth is discovered, why should dissenting views be tolerated? *Id.* For example, this argument comes to light when people complain about controversial public speakers. *Id.* The author cautions that the law also protects the dissenters and controversialists, and this justification should not be used to quell free speech. *Id.*

223. *Cohen v. California*, 403 U.S. 15, 24 (1971).

224. The ACLU articulates three reasons why freedom of expression is essential to a free society: (1) “It’s the foundation of self-fulfillment”; (2) “It’s vital to the attainment and advancement of knowledge, and the search for the truth”; and (3) “It’s necessary to our system of self-government and gives the American people a ‘checking function’ against government excess and corruption.” *Freedom of Expression*, ACLU, <https://www.aclu.org/other/freedom-expression> [https://perma.cc/2MUS-KE9D].

225. *See Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015); *see also* *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537–38 (1980) (“If the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating’” (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972))).

scenarios laid out above. Even if religious speech may sometimes constitute a subject, a restriction on both types of scenarios would undeniably result in some forms of viewpoint discrimination, which is enough to invalidate the law. Furthermore, even the most purely religious speech can have secular roots as well. Using the example above, discussion of the existence of God invokes secular ideas such as thoughts about the meaning of life, fate, destiny, and the idea of secular morality.²²⁶

In addition, accepting religion as a viewpoint rather than a distinct subject matter will reduce extensive fact-based inquiries, legislation, uncertainty within the law, and disagreements between courts, as exemplified by the circuit split discussed herein. The analysis used for ascertaining whether or not a restriction bans religious viewpoint on an otherwise allowable subject is extensively fact based. It involves analyzing not only the permissible subjects allowed, but also the character of the religious speech, to understand whether there is an underlying secular subject. As discussed above, it is not hard to justify even the most seemingly religious speech on secular grounds such as membership in a group, promotion of an organization, or invocation of charity or generosity. Because it is hard to think of religious speech with absolutely no secular characterization, the analysis is not very relevant, taking up precious judicial time and resources. As such, religion should always be categorized as a viewpoint.

IV. CONCLUSION

The fear of viewpoint discrimination can be thought of as two-fold. First, the more obvious fear arises from the censoring of only one particular *side* of a subject matter. This constitutes obvious viewpoint discrimination because it allows the government to “prescribe what shall be orthodox” by suppressing one side and allowing another side to speak.²²⁷ Limits on only one side of a particular debate or subject are obviously unconstitutional in that by suppressing one side, the government advocates for another side without allowing the public to gain a broader understanding of all sides of particular subjects.

226. Religious morality rests on fear of reprisal from various deities, but secular morality is founded on a more reasoned and naturalistic worldview. See PHILIP A. PECORINO, PHILOSOPHY OF RELIGION ch. 9, § 7 (2001) (ebook). “There are therefore examples of societies and cultures that have moral codes without a belief in a deity and there are efforts to establish a moral order that is not founded on religion.” *Id.*

227. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The second form of viewpoint discrimination creates the legal issue analyzed in this Comment and is much more subtle and nuanced. This form ignores the fact that all particular “sides” of a seemingly innocuous subject matter are banned together²²⁸ and instead focuses on whether perspectives on otherwise includable subjects are restricted. Using this definition, the prohibition of religious advertisements on buses constitutes impermissible viewpoint discrimination because the advertisements will, in these two cases here and almost always, discuss permissible subjects through the impermissible lens of religion. Such a result stems from the very nature of religion—a viewpoint through which countless issues are often discussed.

228. See Greenawalt, *supra* note 96, at 703–04.