# MOTHER GOOSE AND FATHER GOD: EXTENDING THE EQUAL ACCESS ACT TO PRE-HIGH-SCHOOL STUDENTS

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## I. INTRODUCTION

The once-dormant Establishment Clause[1] has been shaken from its slumber[2] over the last sixty years.[3] Extra-curricular religious student

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1 "*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." U.S. CONST. amend. I (emphasis added). *See generally* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 1-78 (1994) (providing a history of state-established churches in the United States); Mark G. Valencia, Note, *Take Care of Me When I Am Dead: An Examination of American Church-State Development and the Future of American Religious Liberty*, 49 SMU L. REV. 1579 (1996) (providing a history of the Establishment Clause with a particular interest in the perspective of James Madison, the author of the Bill of Rights).

2 WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL RIGHTS AND LIBERTIES: CASES, COMMENTS, QUESTIONS 820 (1991) ("Prior to 1947, only two decisions concerning the establishment clause produced any significant consideration by the [United States Supreme] Court."); *see* Quick Bear v. Leupp, 210 U.S. 50 (1908) (upholding the federal government's disbursement of Sioux trust funds for parochial education); Bradfield v. Roberts, 175 U.S. 291 (1899) (upholding federal funding to construct a ward for the care of indigent patients at a hospital run by the Catholic Church).

3 *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Lee v. Weisman, 505 U.S. 577 (1992); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Edwards v. Aguillard, 482 U.S. 578 (1987); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Stone v. Graham, 449 U.S. 39 (1980); Lemon v. Kurtzman, 403 U.S. 602 (1971); Engel v. Vitale, 370 U.S. 421 (1962); Everson v. Bd. of Educ., 330 U.S. 1 (1947).

groups now enjoy access to universities[4] and high schools.[5] The same cannot be said for pre-high-school students.[6] Increasingly, schools limit students' rights to form extra-curricular religious groups meeting on school grounds due to fears that young students will perceive the schools as establishing religion by its acquiescence.[7]

This problem results from school administrators' hyper-enforcement efforts to prevent violating their duties under the Establishment Clause. The administrators do not bare the blame alone. Courts, interpreting the religious rights of students, rely almost exclusively on forum analysis, which views school restrictions through the lens of the Free Speech Clause. By doing so, courts overlook additional rights of students and parents in the religious student organization context.

In *Good News Club v. Milford Central School*,[8] the United States Supreme Court settled whether community groups with young members may use school grounds for meetings at the conclusion of the school day; it did not, however, address whether groups formed by students under the auspices of the school, meeting on school grounds during school hours, are permissible. This article focuses on that question in relation to extending the Equal Access Act ("EAA")[9] to pre-high-school students with particular attention to the protection of student and parental rights.

Although helpful, forum analysis alone is insufficient to protect the rights of those parents and students affected by schools' decisions to limit religious discussion. *Good News Club* hinted at a new approach to using forum analysis, one that takes into account parental and student rights beyond free speech.[10]

First, this article analyzes *Good News Club*, detailing its impact on the rights of pre-high-school students to form religious groups meeting during school hours on school property. Second, this article reviews relevant forum analysis law. Third, it considers the constitutional rights

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4 *See* Widmar v. Vincent, 454 U.S. 263 (1981) (holding public universities could not bar religious student groups from a limited public forum).

5 Equal Access Act, 20 U.S.C. §§ 4071-74 (1999); *see also* Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding the Equal Access Act, thereby ensuring high-school religious groups equal access to school facilities).

6 While most school systems are comprised of primary, intermediate, and high schools, the generic term "pre-high-school students" will be used as a blanket term covering primary and intermediate school students.

7 *See* John W. Whitehead & Alexis I. Crow, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and* Tinker *Doctrines*, 28 TULSA L.J. 149, 186 (1992); *see also* Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 296-97 (E.D. Pa. 1991).

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

9 20 U.S.C. §§ 4071-74.

10 *Good News Club*, 533 U.S. at 98.

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and duties of parents, students, and schools. Fourth, this article argues for an extension of the EAA to pre-high-school students and for a judicial emphasis on the protection of all constitutional rights, not just free speech concerns, in protecting the rights of students to form extra-curricular religious clubs.

## II. *GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL*

In *Good News Club v. Milford Central School*,[11] the Supreme Court reviewed a school district's decision to exclude a religious group from meeting on school grounds. The school district created a limited public forum[12] for district residents to meet on school property for "instruction in any branch of education, learning or the arts [and for] social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."[13] The school district denied the Good News Club's request to use the school's cafeteria to host after-school meetings, which the district found were "for the purpose of conducting religious instruction and Bible study."[14] The Supreme Court granted certiorari to address the split among the Courts of Appeals over governmental entities excluding groups from a limited public forum because of the religious nature of their speech.[15]

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[11] *Id.*

[12] *See infra* text accompanying notes 31-48 (enumerating types of forums).

[13] N.Y. EDUC. LAW § 414 (McKinney 2000), *reviewed by Good News Club*, 533 U.S. at 102.

[14] *Good News Club*, 533 U.S. at 104. The Good News Club was an adult-led group established for the benefit of its student-aged members. The organization had no affiliation with the school. The Good News Club, its leader, and a member filed suit in the United States District Court alleging violation of their constitutional rights to free speech and equal protection found in the First and Fourteenth Amendments. The District Court granted the school district's motion for summary judgment. A divided panel of the United States Court of Appeals for the Second Circuit affirmed the District Court, holding that the subject matter of the Good News Club's meetings was "quintessentially religious," falling "outside the bounds of pure 'moral and character development,'" thereby rendering the school district's decision constitutional subject discrimination, not unconstitutional viewpoint discrimination. *Id.* at 105; *see also* Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d Cir. 2000).

[15] *Good News Club*, 533 U.S. at 105-06. *Compare* Gentala v. City of Tucson, 244 F.3d 1065 (9th Cir. 2001) (en banc) (upholding Tucson's refusal to allow National Day of Prayer organizers to apply for the city's civic events fund), *and* Campbell v. St. Tammany's Sch. Bd., 206 F.3d 482 (5th Cir. 2000) (holding that a school's policy against permitting religious instruction in a limited public forum was constitutional), *and* Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) (holding a school's ban on religious services and instruction in a limited public forum constitutional), *with* Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996) (holding Albuquerque's action to be unconstitutional viewpoint discrimination where the city denied permission to show a religious film in a senior center), *and* Good News/Good Sports Club v. Sch. Dist., 28

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The school district asserted that its exclusion did not violate the free speech rights of the Good News Club because the school district retained the right to limit overt expressions of religious worship in creating a limited public forum.[16] The school district justified any violation of the Good News Club's free speech rights under its Establishment Clause obligation.[17] The Supreme Court held that the school district's actions were unconstitutional viewpoint discrimination because the exclusion prevented a group from presenting an otherwise permissible subject matter because it was propounded from a religious viewpoint.[18]

Neither the religious content[19] of the Good News Club's lessons nor the Club's mode of expression[20] necessitated that the school district bar the group's access because of Establishment Clause concerns.

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F.3d 1501 (8th Cir. 1994) (concluding that a school district's prohibition against a Good News Club meeting during times when Boy Scouts were meeting was unconstitutional).

[16] *Good News Club*, 533 U.S. at 103. A typical Good News Club meeting began with an adult leader taking attendance. If the children were present and able to recite a memorized Bible verse, they received a treat. Following attendance, the children would sing songs. Next, the Club members would participate in a game designed to help them memorize Bible verses. At the end of the game, the adult leader would read a Bible story to the members and explain how to apply its moral principles to members' lives. After a final prayer, the adult leader would distribute parting treats and Bible verses. *Id.*

[17] *Id.* at 102. The Court relied on Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) and Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995), to hold that the school district's refusal violated the Good News Club's free speech rights. *Good News Club*, 533 U.S. at 102.

The Court in *Lamb's Chapel* dealt with a similar limited public forum allowing social, civic, and recreational use, but prohibiting use "by any group for religious purposes." *Lamb's Chapel*, 508 U.S. at 387. The school district in *Lamb's Chapel* used the religious exclusion in its limited public forum to exclude a church desiring to present a film teaching family values from a Christian perspective. *Id.*

The *Rosenberger* Court held that a university unconstitutionally discriminated on the basis of viewpoint in refusing to provide equal funding for a student publication espousing a Christian viewpoint. Although the university funded a wide-range of student organizations, it refused to provide funding to the Christian magazine which "challenge[d] Christians to live, in word and deed, according to the faith they proclaim and . . . encourage[d] students to consider what a personal relationship with Jesus Christ means." *Rosenberger*, 515 U.S. at 826, *cited with approval in Good News Club*, 533 U.S. at 110. The Court found the university's argument to be without merit and concluded that the denial of funding was unconstitutional because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Rosenberger*, 515 U.S. at 831, *cited with approval in Good News Club*, 533 U.S. at 110.

[18] *Good News Club*, 533 U.S. at 109 (construing *Lamb's Chapel*, 508 U.S. at 394).

[19] *Id.* at 110 ("Given the obvious religious content of [the student magazine in *Rosenberger*], we cannot say that the [Good News] Club's activities are any more 'religious' or deserve any less First Amendment protection than did that publication . . . .").

[20] *Id.* The Court held that the Good News Club, like the church in *Lamb's Chapel*, sought to address an otherwise permissible subject matter from a religious viewpoint. The only distinction between the two groups, which the majority labeled as inconsequential, was that the group in *Lamb's Chapel* taught by film while the Good News Club taught moral lessons through live storytelling and prayer. *Id.*

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Importantly, the Court rejected the school district's contention that the "quintessentially religious" nature of the Good News Club's teachings allowed its exclusion in limited public forums that generally allow for the teaching of morals or character.[21] The Court also rejected the school district's Establishment Clause argument,[22] holding that the school district had no compelling interest to protect because the Good News Club meetings took place after school hours without the sponsorship of the school and were open to the public at large.[23]

The Court relied on two principles to conclude that permitting the Good News Club to meet did not violate the Establishment Clause. First, the preeminent value within the Establishment Clause is the principle of neutrality.[24] The majority held that the Good News Club sought only a neutral application of the school district's policy to give them access to speak on the same topics as non-religious groups, and "allowing the Club to speak on school grounds would ensure neutrality, not threaten it . . . ."[25]

Second, the relevant community to consider, where perception of establishment is an issue, is the parents, not the students. While the Court had previously recognized that young students are more impressionable than adults,[26] it refused to allow a "modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."[27]

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[21] *Id.* at 111.

[22] *Id.* at 112-15. The school district argued that the Establishment Clause obligated it to forbid the Good News Club from meeting on school property because elementary school children may "perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities take place on school grounds, even though they occur during non-school hours." *Id.* at 111. "An Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination." *Id.* at 112 (quoting Widmar v. Vincent, 454 U.S. 263, 271 (1981)). The Court refrained from ruling on whether an Establishment Clause violation may be compelling enough to justify viewpoint discrimination. *Id.* at 115.

[23] *Id.* at 113-14.

[24] *Id.* at 114 ("[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." (citing *Rosenberger*, 515 U.S. at 839)); *see also* Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality*, [to] uphold aid that is offered to a broad range of groups or persons without regard to religion.").

[25] *Good News Club*, 533 U.S. at 114.

[26] *See* Lee v. Weisman, 505 U.S. 577, 592 (1992). *But see* Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice . . . .").

[27] *Good News Club*, 533 U.S. at 119.

Balanced against the small likelihood that young students might perceive endorsement were the rights of the parents to control their children's access to the group and the free speech rights of the Club's members to participate in the forum.[28] The students could only attend with parental permission. Therefore, it was irrelevant whether the students believed the school was endorsing religion because the decision whether they would attend fell on the parents.[29]

*Good News Club* clarified the importance of balancing the rights of parents and students with the obligations of schools in the religious speech context. Balancing the differing rights and obligations of the parties, the Court held that the free speech rights of the Good News Club and its members outweighed the perception of an Establishment Clause violation. Yet, the decision did not go far enough in recognizing that more than free speech rights are at stake when pre-high-school students seek equal access for religious clubs.

## III. FORUM ANALYSIS

As witnessed in *Good News Club*, courts rely primarily on forum analysis to determine if religious student clubs have a right to meet on school grounds. Forum analysis is the courts' attempt to balance "the individual's right to speak while on public property against the state's interest in restricting the property for specific uses."[30] Courts conducting a forum analysis must first determine whether the First Amendment protects the speech, then determine the type of forum where the speech occurs, and finally, apply the appropriate standard of review.[31] The courts' first task is normally perfunctory in religious speech cases because the First Amendment protects religious expression, both religious discussion and worship.[32] Because the standard of review flows from the determination of the type of forum, the second task is often the most critical.

Three major forums exist: a traditional public forum, a designated public forum, and a nonpublic forum.[33] Traditional public forums

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[28] *Id.*

[29] *Id.* at 115.

[30] JOHN W. WHITEHEAD, THE RIGHTS OF RELIGIOUS PERSONS IN PUBLIC EDUCATION 67 (1991); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1985).

[31] *See* WHITEHEAD, *supra* note 30, at 67-71; *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985) (plurality opinion).

[32] *See* Whitehead & Crow, *supra* note 7, at 174; Widmar v. Vincent, 454 U.S. 263, 269 (1981). *See generally* Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948).

[33] *See Perry*, 460 U.S. at 45-49.; Bd. of Educ. v. Mergens, 496 U.S. 226, 235-36, 242-43 (1990). In *Mergens* the Court held that a "limited open forum" is a Congressionally created term of art found in the Equal Access Act which compels secondary schools to

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encompass "places which by long tradition or by government fiat have been devoted to assembly and debate [or] which 'have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[34] Parks, sidewalks, and other areas traditionally used to facilitate the "free exchange of ideas" qualify as traditional public forums,[35] but public schools normally do not.[36]

Designated public forums are similar to traditional public forums with "the only difference being that they are created by an intentional act of government and as such may be closed by the government."[37] The government may limit access to a designated public forum for "use by certain speakers, or the discussion of certain subjects."[38] When the government exercises its right to limit speech in the designated public forum, it creates a limited designated public forum, commonly called a limited public forum.[39] Thus, the government opens a designated public forum for all expressive uses while it opens the limited public forum for only those uses it explicitly designates.[40] To determine whether schools have created a designated public forum or a limited public forum, courts review the schools' policies and practices.[41]

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extend access to student groups once schools have made the decision to allow even one non-curriculum related group to meet. *Id.* Therefore, those schools falling under the act still have the power to determine whether to allow a limited open forum. *Id.* at 240-41. Additionally, the school may prohibit meetings interfering with order or the primary mission of the school to educate. *Id.* at 240; *see also* Equal Access Act, 20 U.S.C. § 4071(b) (1999) ("A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time.").

[34] *Perry*, 460 U.S. at 45.

[35] *See* Frisby v. Schultz, 487 U.S. 474, 489-91 (1988); *see also* Whitehead & Crow, *supra* note 7, at 178.

[36] *See, e.g.*, Gregorie v. Centennial Sch. Dist., 907 F.2d 1366, 1370-71 (3d Cir. 1990). *But see* Shumway v. Albany County Sch. Dist. No. 1, 826 F. Supp. 1320, 1325-26 (D. Wyo. 1993) (holding that the school district's school facilities were a public forum); Country Hills Christian Church v. Unified Sch. Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983) (holding that an open forum was created in an elementary school).

[37] Andrew A. Cheng, Note, Rosenberger v. Rector & Visitors of Univ. of Va. *and the Equal Access Rights of Religious People*, 18 U. HAW. L. REV. 339, 384 (1996); *see Perry*, 460 U.S. at 45.

[38] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 803 (1985) (plurality opinion).

[39] *Perry*, 460 U.S. at 45.

[40] *See id.*

[41] *See, e.g.*, Planned Parenthood v. Clark County Sch. Dist., 887 F.2d 935, 940 (9th Cir. 1989); Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991); Grace Bible Fellowship v. Sch. Admin. Dist. No. 5, 941 F.2d 45 (1st Cir. 1991); Bell v. Little Axe Indep. Sch. Dist. No. 70, 766 F.2d 1391, 1402 (10th Cir. 1985).

Courts reviewing designated public forums apply the strict scrutiny standard.[42] Generally, schools bear the burden of proving that they have a compelling interest to limit certain viewpoints within the designated public forum and that their methods are narrowly tailored.[43] In a limited public forum, while the government "is free to impose a blanket exclusion on certain types of speech . . . once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre," without passing the standard of strict scrutiny.[44] Otherwise, schools would be practicing unconstitutional viewpoint discrimination. For this reason, the *Good News Club* Court held that once the school district created a limited public forum to discuss morals, it could not prevent religious groups from using the forum to discuss morality from a Christian perspective.

At the other end of the forum spectrum, the nonpublic forum is publicly held property not open for public communication either by traditional use or governmental action.[45] A nonpublic forum designation allows the government to "preserve the property under its control for the use to which it is lawfully dedicated."[46] Due to the extent of government control over nonpublic forums, it retains the greatest discretion in limiting outside access.[47] Schools that do not open their facilities for public use or use by student groups are usually nonpublic forums.

## IV. ATTENDANT RIGHTS OF THE INVOLVED PARTIES: PARENTS, STUDENTS, AND SCHOOLS

In recognizing the ability of students to form extra-curricular religious clubs at schools, courts should not rest their opinions only on free speech rights. Instead, courts should balance the rights of parents and students against the schools' duty to uphold the Establishment

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[42] *See Perry*, 460 U.S. at 45; *cf.* Widmar v. Vincent, 454 U.S. 263, 270 (1981). This standard also applies to content bans on subjects and speakers that the government includes in the limited public forum. *Id.*

[43] *See* Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 293 (E.D. Pa. 1991); Frisby v. Schultz, 487 U.S. 474, 485 (1988) (holding that a restriction "is narrowly tailored if it targets and eliminates no more than the exact source of 'evil' it seeks to remedy.").

[44] *Owego-Apalachin Sch. Dist.*, 927 F.2d at 692; *see, e.g.*, Gregorie v. Centennial Sch. Dist., 907 F.2d 1366, 1376-77 (3d Cir. 1990) (holding that when school officials "created an open forum for religious discussion in [the school's] evening classes and in the afternoon student activity period *to which outsiders may be invited*," they were barred from preventing outsiders from using the school facilities for such purposes).

[45] *See Perry*, 460 U.S. at 46.

[46] *Id.* (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 130 (1981)).

[47] *Id.* Generally, the government must pass the less burdensome rational basis test which allows the government to exclude speech on the basis of content of any subject or speaker as long as the exclusions are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

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Clause to allow pre-high-school students to form such clubs. Doing so focuses on the full exercise of the constitutional rights of both parents and students.

*Good News Club* helped return the focus to parental rights by striking down the Establishment Clause challenge.[48] This focus on the right of parents to direct the upbringing of their children is crucial in dealing with the rights of pre-high-school students who may be more impressionable. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[49] Parental rights encompass a variety of areas,[50] including the right to direct children's educational development.[51] That right includes the parental right to withdraw children from public schools when parents believe that schools' mandates run counter to their personal or religious values.[52]

The equal-access battle for religious student groups directly impacts parental rights, especially in younger age groups where the parents' influence is the strongest.[53] When the impressionability of the child is at issue, parents have a right, commensurate with the right to direct their children's upbringing, to act in their children's stead.[54] When children can participate in religious student clubs only with parental permission, the knowledge and maturity of the parents, not the children, is implicated. Therefore, because parents should be able to understand that the presence of student religious groups does not establish an

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[48] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001).

[49] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[50] *See, e.g.*, Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297-306 (1988) (discussing both the constitutional and common-law parental rights in rearing a child); Moe v. Dinkins, 533 F. Supp. 623, 629 (S.D.N.Y. 1981) (upholding a state statute requiring minors to obtain parental consent before marrying).

[51] *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a law forbidding teaching of a foreign language before the eighth grade unconstitutionally violated parents' right to educate their children in the manner they deem best); *see also* Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427, 431 (1993).

[52] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that compulsory attendance laws are unconstitutional when they prevent parents from exercising their rights in rearing their children); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that a law mandating public school attendance unconstitutionally violated the parents' right to religiously train their children). *See generally* John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1, 40-42, 91-94 (1997) (providing a detailed analysis and discussion of *Pierce* and *Yoder*).

[53] *See* Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996).

[54] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001); *Herdahl*, 933 F. Supp. at 590.

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endorsement of religion, that knowledge is imputed to their children.[55] In other words, "[t]hrough parental consent, the elementary children are on equal footing with secondary school students, who the Supreme Court has held are mature enough" to understand that schools are not endorsing religion.[56]

Assuming younger children are more susceptible to government coercion or more inclined to misperceive governmental establishment of religion, parents should be allowed to exercise parental rights to protect the interests of their children. Children should not hold a "modified heckler's veto" to exclude a pre-high-school student organization from a forum under the assumption that the youth will perceive endorsement.[57] Instead, parents, exercising final authority, should dictate their children's participation.

Beyond parental rights to direct their children's upbringing, constitutional rights inhere in students themselves.[58] The First Amendment grants rights to students while placing limitations on the government's ability to curtail speech.[59] Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[60]

First, and most importantly, students retain freedom of thought and may peaceably refrain from endorsing opinions directed by governmental officials that are contrary to their own beliefs.[61] The Supreme Court has explicitly held that universities may not prohibit students from

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[55] *See Good News Club*, 533 U.S. at 115; *Herdahl*, 933 F. Supp. at 590.

[56] *Herdahl*, 933 F. Supp. at 590.

[57] *Good News Club*, 533 U.S. at 119.

[58] *See In re* Gault, 387 U.S. 1 (1967) (holding that children are entitled to protections guaranteed by the Constitution); *see also* Goss v. Lopez, 419 U.S. 565, 582 (1975) (holding that school children are entitled to procedural due process when being suspended from classes). *See generally* Daniel N. McPherson, *Student-Initiated Religious Expression in the Public Schools: The Need for a Wider Opening in the Schoolhouse Gate*, 30 CREIGHTON L. REV. 393, 394-96 (1997) (surveying the free-speech rights of students).

[59] Robert M. Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 J.L. & EDUC. 523, 534 (1984).

[60] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[61] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *Barnette* involved a state statute requiring students to salute the United States flag at the beginning of the school day. *Id.* at 626. Refusal resulted in a charge of insubordination, punishable by expulsion. *Id.* Because the student was no longer attending classes due to expulsion, the school considered the student unlawfully absent. *Id.* Such absence allowed the state to proceed against the student as a delinquent and to hold the parents criminally liable until compliance. *Id.* at 629. The Court, in striking down the law, noted that the coercive power of the state, not only in expulsion but also through imprisonment, was wrongly used to compel the students to profess a belief contrary to their true opinions. *Id.* at 641-42. The Court emphasized the point by saying that, "freedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id.*

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exercising their free speech rights by participating in extra-curricular religious clubs in schools' limited public forums.[62]

Beyond students' right to free speech exist other constitutional rights that travel with students through the schoolhouse door. Namely, students' First Amendment free religious exercise rights and freedom of assembly rights are implicated when students wish to form or join extra-curricular religious clubs on school property. First Amendment rights are "guaranteed without qualification, the object and effect of which is to put them in a category apart and make them incapable of abridgment by any process of law."[63] Students' free exercise rights are "first and foremost the right to believe and profess whatever religious doctrine one desires."[64] To deny students' First Amendment freedoms of speech, religious exercise, and assembly merely because those rights are exercised to further religious conviction is a violation of students' protected constitutional rights.[65] These rights extend beyond classrooms to all areas of the school where students are allowed.[66] They, along with the right of parents to direct the education of their children, should be of paramount importance balanced against a perceived violation of the Establishment Clause. However, the interests of public schools must also be taken into account.

Public schools have both rights and duties. Schools possess the right to curtail students' freedoms to further their pedagogical mission.[67] Schools also have the duty imposed by the Establishment Clause and state laws providing for universal education.[68]

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[62] Widmar v. Vincent, 454 U.S. 263 (1981). The Court dealt with the free speech rights of university students to participate in a religious club under the schools limited public forum. *Id.* at 273. In holding for the students, the Court concluded that the primary effect of allowing the group to meet would not be the advancement of religion. *Id.* The Court reasoned that the religious group received the same benefits as other student groups, which were merely incidental benefits. *Id.* at 274-75. The Court sardonically noted, "If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Id.* (quoting Roemer v. Md. Pub. Works Bd., 426 U.S. 736, 747 (1976) (plurality opinion)).

[63] Associated Press v. NLRB, 301 U.S. 103, 135 (1937) (Sutherland, J., dissenting). *See generally* Whitehead, *supra* note 52, at 1 (tracing the history of the Free Exercise Clause of the First Amendment).

[64] Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

[65] *See* Scoville v. Board of Educ., 425 F.2d 10, 13 n.5 (7th Cir. 1970) (extending *Tinker* rationale to high schools). *But see* Healy v. James, 408 U.S. 169, 187-88 (1972) (stating that a school may ban such speech that is obscene or slanderous).

[66] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969).

[67] *See generally* Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 288-90 (E.D. Pa. 1991) (discussing the ability of the school to regulate student speech).

[68] *See, e.g.*, Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) (prohibiting a professor from discussing his religious views on a subject matter during class and during an optional, voluntary class); Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990)

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The public education system seeks to educate and to inculcate "fundamental values necessary to the maintenance of a democratic political system . . . ."[69] Pursuant to these pedagogical goals, schools may make academic judgments "to determine for [themselves] on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[70] Schools may limit the free speech rights of students in several ways to effectuate those rights and duties. First, schools may place restrictions on the forum in which students could exercise those rights.[71] Second, schools may restrict content, itself, in certain circumstances.

In *Tinker v. Des Moines Independent Community School District*,[72] the Supreme Court balanced students' free speech rights with the "need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[73] The Court created a bright line rule upholding students' free speech rights unless the exercise of those rights either materially disrupted the education process or collided with the rights of fellow students "to be secure and to be let alone."[74]

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(preventing an elementary school teacher from reading the Bible silently to himself during a free reading period); Webster v. New Lenox Sch. Dist., 917 F.2d 1004 (7th Cir. 1990) (forbidding a teacher to teach a creationist viewpoint). The reluctance to allow the appearance of State endorsement of a particular religious viewpoint or political idea has its roots in a mistrust of governmental power. *Compare* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that states lack the authority to standardize children by forcing them to accept instruction by public teachers to "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion"), *with* JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 95 (1948) ("A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government.").

69 Ambach v. Norwick, 441 U.S. 68, 77 (1979); *see also* WHITEHEAD, *supra* note 30, at 15-24 (providing a brief history of the purposes and tensions that exist in the American public educational system).

70 Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

71 *See* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (holding that a school may require time, place, and manner restrictions on student groups to meet or distribute literature).

72 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). *Tinker* centered upon three students, one a junior-high student, who wore armbands to protest the Vietnam conflict. *Id.* at 504. The school subsequently issued a rule requiring students to remove the armbands or face suspension. *Id.* When the students refused to remove the armbands, they were summarily suspended and sent home. *Id.* The Supreme Court held that wearing the armbands was political speech in protest of Vietnam and protected by the First Amendment. *Id.* at 513-14. *See generally*, Whitehead & Crow, *supra* note 7, at 189-92 (providing a detailed analysis of *Tinker*).

73 *Tinker*, 393 U.S. at 507.

74 *Id.* at 508.

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In order to limit students' free speech, schools must demonstrate that the speech has caused an actual disruption.[75] Because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"[76] the school must show that the decision to limit the speech is based on the need to preserve order to further its pedagogical goals, not simply to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[77]

Parents have the right to direct the upbringing of their children. Children have a variety of rights as students including freedom of speech, freedom of religion, and freedom of assembly. Schools have a duty to provide learning environments that do not violate the Establishment Clause. Courts should require schools to respect the rights of parents and students in deciding to form extra-curricular religious clubs as long as the exercise of those rights does not infringe upon the functioning of the learning environment. Because the exercise of those rights will not normally cause a disruption or infringe upon other students' rights, schools should not practice viewpoint discrimination by preventing the formation of extra-curricular religious clubs by pre-high-school students.

Even the recognition of those rights by courts may not fully protect the interests of parents and students because nothing "in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[78] While courts may decide that schools that open limited public forums to discuss morals must allow religious groups to meet in the forums to discuss morals from a religious perspective, nothing currently prevents schools

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[75] *Id.* at 509 (holding that schools may prohibit lewd, indecent, or slanderous student speech that disrupts the mission of the school); *see* Bethel Cmty. Sch. Dist., No. 43 v. Fraser 478 U.S. 675, 685 (1986); *see also* Healy v. James, 408 U.S. 169 (1972) (holding that a school may ban speech that is obscene or slanderous); Scoville v. Bd. of Educ., 425 F.2d 10, 13 n.5 (7th Cir. 1970) (extending the *Healy* rationale to high schools); Frasca v. Andrews, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979) (holding that a school can suppress student-published literature that is "libelous, obscene, disruptive of school activities or likely to create substantial disorder, or which invades the rights of others"). *See generally* Whitehead & Crow, *supra* note 7, at 192-94 (giving a detailed analysis of *Bethel*). Student religious speech will normally fall outside of the lewd or slanderous categories. Schools may only limit such speech if it disturbs the schools' pedagogical mission and the schools' decision to prohibit the speech is "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 394 U.S. at 509.

[76] *Tinker*, 394 U.S. at 508.

[77] *Id.* at 509.

[78] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799-800 (1985) (plurality opinion).

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below the high school level from simply removing morals or religion as a viable topic. Schools can allow chess teams, football teams, or Young Republican clubs to meet and still exclude the discussion of morality in the forums. The rights of parents and students become slaves to the whims of schools who have the power not only to open and close forums, but to limit the content of those forums. Only by extending the EAA to the pre-high-school setting can those parents' and students' rights be better protected. Extending the EAA to pre-high-school students prevents a school from practicing content-based discrimination by precluding moral or religious topics from being discussed by student groups but allowing other non-curriculum clubs to meet, while the balance of rights concept prevents viewpoint discrimination by precluding discussion of moral topics by religious student groups because of Establishment Clause concerns.

## V. PROPOSAL FOR LEGISLATION EXTENDING EQUAL ACCESS TO PRE-SECONDARY STUDENTS

The most effective way to ensure the equal-access rights of pre-high-school students is through legislation extending the EAA to those individuals because focusing on free-speech rights alone often overlooks other student rights as well as parental rights.[79] Public schools are not normally traditional public forums.[80] Schools may choose to designate a public forum, designate a limited public forum, or remain a nonpublic forum.[81] If schools choose to create a limited public forum, then they have the power to limit the speakers and content of the forum as long as the regulation is "reasonably related to legitimate pedagogical concerns."[82] If schools can limit speech categorically, they can certainly limit religious speech in particular, so long as any exclusions are reasonable and not based merely on viewpoint.[83] Whether schools choose to create limited public forums or to maintain their status as nonpublic forums, the rights of students are severely compromised. While schools may, in limited public forums, discriminate as to subject matter, they

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[79] *See supra* text accompanying notes 31-78 (discussing forum analysis and rights of students and parents); *see also* Gilbert A. Holmes, *Student Religious Expression in School: Is It Religion or Speech, and Does It Matter*, 49 U. MIAMI L. REV. 377, 389-90 (1994) (arguing that limiting religious issues in classrooms to only a "free speech argument" undermines students' freedom-of-religion rights).

[80] *See* Cheng, *supra* note 38; *see also, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (holding that "school facilities may be deemed to be public forums only if school authorities have 'by policy or practice' opened those facilities 'for indiscriminate use by the general public' . . . or by some segment of the public, such as student organizations").

[81] *See supra* text accompanying notes 38-45.

[82] *Hazelwood*, 484 U.S. at 273.

[83] *See* Cheng, *supra* note 37, at 385-86.

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may not discriminate as to viewpoint. The danger lies in the blurred distinction between the two.[84]

"Forum doctrine has been criticized as an approach that protects 'governmental discretion at the expense of individual speech,' and this area provides the perfect example, for government by defining a nonpublic forum 'in terms of *speakers* or *topics*,' can 'exclude[] *views* that [it] finds offensive or undesirable.'"[85] Leaving access rights at the mercy of forum doctrine allows speech to be censored by the government in a self-justifying manner.[86] Limited public forums can be closed by the government "without any reason whatever, or even because of hostility to speech."[87] As one commentator noted,

> [O]utside the traditional public forum, the only real protection is that exclusion of speech must be reasonable and not motivated by hostility to the views expressed. . . . [I]t makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will.[88]

The implications for religious speech are more troublesome when courts curtail parental and student rights because they feel such rights are "severely circumscribed by the Establishment Clause."[89] Although this effect may be limited by *Good News Club*, it is not unreasonable to assume that many schools will choose to exclude topics from limited public forums that may allow religious groups to congregate on school property if schools believe the threat of lawsuits by either side in the debate will result. Parents and students may perceive such restrictions on face value as governmental hostility to religion.

As noted earlier, "the religious rights of students however cannot simply rest upon a balancing of free speech concerns."[90] Relying simply on free speech constitutional protections limits the constitutional rights of parents and students.[91] Instead, congressional legislation should extend the EAA to pre-high-school students based upon the rights of the students[92] and the rights of the parents[93] in a neutral, non-coercive

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[84] *See id.* at 386.

[85] *See id.* at 386-87.

[86] *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 46-47 (1987).

[87] *Id.* at 46.

[88] *Id.* at 47 (citation omitted); *see also* Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from* Lamb's Chapel, 24 N.M. L. REV. 1, 11 nn.47-48 (1994) (listing numerous court opinions and scholarly articles criticizing forum doctrine).

[89] Cheng, *supra* note 37, at 358 (quoting Brandon v. Bd. of Educ., 635 F.2d 971, 980 (2d Cir. 1980)).

[90] Holmes, *supra* note 79, at 390.

[91] *Id.*

[92] *See supra* text accompanying notes 60-68 (discussing student rights).

government environment.[94] Legislation would correct prophylactic "over enforcement"[95] by focusing on an equal-access theory that emphasizes the neutrality of government by looking at who is speaking, not where they are speaking.[96]

### *A. Historical Background to the Equal Access Act*

Congress passed the EAA partly in response to lingering doubts left by previous Supreme Court rulings on the issue of allowing religious student groups to meet on school grounds.[97] Specifically, lower courts varied on whether precedent applied to primary and secondary schools,[98] with most courts staking a position against the extension.[99] The underlying rationale was then, as it is now, that some young students, because of their age, are unable to distinguish between government support of, and government neutrality toward, religion.[100] This lingering doubt, coupled with the inadequacies of forum analysis, led to an almost insurmountable obstacle for student groups to gain access.[101] The EAA is a congressional response to allow student-led, extra-curricular religious groups to meet on school grounds.

### *B. The Requirements of the Equal Access Act and the Framework for Its Extension*

Congress should extend the EAA to pre-high-school students to protect their equal-access rights. The advantage would be two-fold. First, because the Supreme Court upheld the constitutionality of the EAA, the

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[93] *See supra* text accompanying notes 50-59 (discussing parental rights).

[94] In the absence of legislation, courts should balance the rights of students and parents with the duties of schools. *See* Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 545 (3d Cir. 1984) (balancing the free-speech rights of the students with the duties of the school to avoid establishment of religion).

[95] Cheng, *supra* note 37, at 363; *see, e.g.*, Raines v. Bd. of Educ., No. 4:94-CV-755 CEJ (E.D. Mo. 1994) (discussing a 10-year old elementary school student who was put on detention several times for "trying to bow his head and pray silently before meals").

[96] *See* Cheng, *supra* note 37, at 363-64.

[97] *See id.* at 358-59.

[98] *See supra* note 62. Specifically, the lower courts grappled over whether to extend the holding of Widmar v. Vincent, 454 U.S. 263 (1981), to non-college students.

[99] *See* Cheng, *supra* note 37, at 357; *see also, e.g.*, *Bender*, 741 F.2d at 560; Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); Brandon v. Bd. of Educ. , 635 F.2d 971, 980 (2d Cir. 1980).

[100] *See Widmar*, 454 U.S. at 274 n.14 (1981) (hypothesizing that high-school students, because of their youth and impressionability, may be unable to distinguish between government neutrality and government endorsement of religion).

[101] *See* Cheng, *supra* note 37, at 358-59.

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extension of the Act would be presumptively constitutional and binding throughout the nation, not just a particular circuit or district.[102]

Second, the practical advantage to legislating an extension is that the rationale and effects of the EAA are part of the constitutional jurisprudence espoused in *Board of Education v. Mergens*.[103] Therefore, definitions such as "curriculum-related" are already adequately defined.[104] Schools need guidance. Teachers and school administrators, by their very nature, are rule-lovers. They dislike uncertainty about where to draw the line between the rights of parents and students and the obligations of the schools. Because they are already familiar with the EAA, problems with over-enforcement would be minimal.

The EAA generally forbids "any public secondary school which receives Federal financial assistance and which has a limited open forum" from denying equal access to similar student groups "on the basis of the religious, political, philosophical, or other content of the speech at [their] meetings."[105] The Act defines a "limited open forum" as existing "whenever [a] school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[106] The *Mergens* Court noted that "limited open forum" was a congressionally created term of art distinguishable from the Court's forum analysis.[107] A limited open forum compels secondary schools with the mere presence of one student group to extend access to all student groups.[108]

The EAA does impose some limits on student groups. First, they must meet during non-instructional time.[109] Second, the meetings must be both voluntary and student-initiated.[110] These requirements were joined with the prohibition of school sponsorship[111] or direct supervision.[112] Such provisions ensure that schools treat religious student groups in a neutral manner in relation to other student groups

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[102] *See infra* Part V.C. (discussing Bd. of Educ. v. Mergens, 496 U.S. 226 (1990), and the constitutionality of the Equal Access Act).

[103] *Mergens*, 496 U.S. at 226.

[104] *See id.* at 244-47.

[105] Equal Access Act, 20 U.S.C. § 4071(a) (1999).

[106] § 4071(b).

[107] *See* Laycock, *supra* note 86, at 35-51 (analyzing the historical context and meaning behind the term "open public forum").

[108] *Mergens*, 496 U.S. at 235-36, 242-43.

[109] 20 U.S.C. § 4071(b).

[110] § 4071(c)(1).

[111] § 4071(c)(2) ("there is no sponsorship of the meeting by the school, the government, or its agents or employees").

[112] § 4071(c)(3) ("employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity").

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and that the limited open forum is not misused to let institutionalized prayer in through the back door.[113]

Those schools falling under the Act still have the power to determine whether to allow a limited open forum at all.[114] However, this right is much more limited than the right that the schools have under the designated public forum or the nonpublic forum standards. Once schools let in one non-curriculum-related student group, it cannot deny any student group access on the basis of content.[115] Schools retain the ability to limit student groups that "materially or substantially interfere with the orderly conduct of educational activities within the school."[116]

The prohibition against nonschool persons from "direct[ing], conduct[ing], control[ling], or regularly attend[ing] activities of student groups" should be removed from the Act as it relates to pre-high-school students.[117] Such a modification is necessary for practical reasons. Younger children are less mature and need more structure than older children. To set a room full of children loose to debate the existence of God would be more problematic the younger the children were. The problem is not unique in the religious-group context; the same can be said for a secular club. Surely nobody wants a pack of Cub Scouts practicing their knot-tying skills on each other. By allowing adults other than school employees to supervise such a club, schools would be treating religious clubs in a neutral manner, just as schools would similarly allow parents to be Boy Scout leaders in meetings on school property.

To acknowledge the need for adult supervision is not to admit that children are incapable of exercising their rights. It only recognizes that younger children need supervision and a structured environment if

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[113] § 4071(d)(1)-(7). This subsection of the Act states,

> Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof –
> (1) to influence the form or content of any prayer or other religious activity;
> (2) to require any person to participate in prayer or other religious activity;
> (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
> (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
> (5) to sanction meetings that are otherwise unlawful;
> (6) to limit the rights of groups of students which are not of a specified numerical size; or
> (7) to abridge the constitutional rights of any person.

*Id.*

[114] *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 240-41 (1990) (plurality opinion).

[115] *See id.* at 235-36, 242-43.

[116] 20 U.S.C. § 4071(c)(4); *see Mergens*, 496 U.S. at 240.

[117] § 4071(c)(5).

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student clubs are to mean anything. Such a modification is neutral and is the least restrictive way of assuring that the students' rights are fulfilled. The alternative is to have the school directly supervise the clubs, which would surely raise Establishment Clause concerns.

### C. Mergens *and the Constitutionality of the Original Equal Access Act*

In *Board of Education v. Mergens*,[118] the Supreme Court upheld the EAA against an Establishment Clause challenge.[119] Key to the Court's holding, as in *Good News Club*,[120] was the Establishment Clause's requirement of neutrality. Treating a religious group as any other group is neutral, not preferential, treatment. No reasonable observer would perceive an endorsement of religion because the school treated the religious group neutrally.[121] Several facts in *Mergens* evidenced this neutrality.

First, the speech involved was private speech by the students, not governmental speech by the school. This distinction highlights the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[122] Treating a religious student group similarly to other student groups is a neutral application of a congressional act. "[A] school does not endorse or support [private] student speech that it merely permits on a nondiscriminatory basis. . . . [S]chools do not endorse everything they fail to censor. . . ."[123] Opponents of equal access cannot construe silence on the part of the government and its equal treatment of similarly situated student groups as a basis for establishment.

Second, the presence of other student organizations, some with contradictory purposes, counteracted the perception of endorsement and informed any observer that the school was merely furnishing a marketplace of ideas.[124] "To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion."[125] If schools

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[118] *Mergens*, 496 U.S. at 226. The case involved a student suing a high school under the EAA for denying her request to form a religious student club. *Id.* at 232. Predictably, the Board of Education argued that the EAA violated the Establishment Clause because it mandated schools to open their facilities to religious student groups, thereby creating the perception that the school supported the clubs. *Id.* at 233.

[119] *Id.* at 247-58.

[120] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001).

[121] *See Mergens*, 496 U.S. at 250.

[122] *Id.*

[123] *Id.*

[124] *See id.* at 252.

[125] *Id.*

allow the formation of groups for Young Democrats as well as for Young Republicans, the schools are not endorsing the political ideas, which are mostly contradictory, of either group. By allowing equal access, schools teach their students that, in a democratic society, individuals have a right to believe in an ideal and profess that ideal in attempts to convert others. Equal access is of paramount importance in a school system serving a multi-cultural society where people with differing values must learn to agree to disagree on some topics.

Third, the school could have ensured that students understood its neutrality by less restrictive means than banning religious clubs—which itself may have signaled its hostility toward religion.[126] The school could have issued a disclaimer to the students that the school was not endorsing the purposes of the religious clubs, which would help the students "understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."[127]

The *Mergens* Court further recognized Congress's power to pass legislation recognizing that students possess sufficient maturity to understand the distinction between endorsement and neutrality.[128] Overall, "*Mergens* and the EAA are important because they state that even in a setting where Establishment Clause concerns of endorsement are arguably stronger, *individual* students retain rights of free expression, and that allowing individual student speech on campus is not the same thing as government speech supporting religion."[129]

## VI. THE CONSTITUTIONALITY OF EXTENDING THE EAA TO PRE-HIGH-SCHOOL CHILDREN

Although *Mergens* upheld the constitutionality of the EAA, the question remains whether its extension to pre-high-school students is constitutional. There is at least a presumption that any extension to younger students could be upheld under the same rationale.[130] Opponents of equal access extension are likely to argue that children below the high-school level would view any religious student club meeting on school property as an endorsement of religion. However, *Good News Club* answered this question by noting that the relevant community's perception is that of the parents, not the young students.[131]

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[126] *See id.* at 251.
[127] *Id.*
[128] *Id.* at 250-51.
[129] Cheng, *supra* note 37, at 362.
[130] *See Mergens*, 496 U.S. at 247-53.
[131] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001).

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Opponents may argue that the *Good News Club* decision involved a community club, not a student-formed, extra-curricular group, and that the meetings were after school hours, not during periods of the day established by school officials for extra-curricular groups to meet. While these distinctions are accurate, the principles of *Mergens* and *Good News Club* establish that when schools act neutrally toward religious groups, and where group participation is premised on approval by the parents, extension of the EAA to pre-high-school students does not violate the Establishment Clause.

Courts apply the *Lemon* test to determine whether governmental action violates the Establishment Clause.[132] The *Lemon* test, formulated in *Lemon v. Kurtzman*,[133] consists of three prongs, which are to determine whether the government has impermissibly established religion. The *Lemon* test requires that the governmental act in question "(1) reflect[s] a clearly secular purpose; (2) ha[s] a primary effect that neither advances nor inhibits religion; and (3) avoid[s] excessive government entanglement with religion."[134]

In equal access cases, governmental actions allowing student religious groups to meet on school grounds normally pass both the first and third prongs.[135] Opponents of extending equal access to pre-high-school students argue that the extension violates *Lemon*'s second prong by fostering "a close identification of its powers and responsibilities with

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[132] Lemon v. Kurtzman, 403 U.S. 602 (1971). The *Lemon* test seems to be increasingly out of vogue but is still the main establishment test used by the courts. However, since it was used in *Mergens* to uphold the constitutionality of the EAA and is the more stringent of the available tests, it will be the primary test used to analyze the constitutionality of an extension under the EAA. *Mergens*, 496 U.S. at 247-58. *But see* Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (criticizing the *Lemon* test); Aguilar v. Felton, 473 U.S. 402, 426-30 (O'Connor, J., dissenting); WHITEHEAD, *supra* note 30, at 49-64 (arguing that the First Amendment Religion Clauses should be interpreted and viewed historically as being in harmony with each other, requiring an affirmative accommodation of religion, and that the problem with the *Lemon* test is that it fosters the view that the two clauses are necessarily in tension with each other).

[133] *Lemon*, 403 U.S. at 602.

[134] Lee v. Weisman, 505 U.S. 577, 585 (1992) (clarifying the requirements of the *Lemon* test in simple terms for ease of application).

[135] In relation to the first prong, the purpose of the school creating the forum is normally to further educational goals and not simply to promote religion. A secular purpose exists when the school has a neutral, open-forum policy that treats religious and non-religious groups alike. *See Mergens*, 496 U.S. at 248. The *Mergens* Court paved the way for a school to satisfy the third prong by noting that "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur." *Id.* at 253; *see also* Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981).

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those of any – or all – religious denominations . . . ."[136] However, the principles underlying *Good News Club* and *Mergens* refute any contention that such an extension of the EAA violates the Establishment Clause.

First, a constitutional analysis of an EAA extension should recognize that the Establishment Clause is a prohibition against governmental action and that the protections of the First Amendment are meant to guarantee the rights of individuals against the power of the government. Therefore, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private speech* endorsing religion, which the Free Speech and Free Exercise Clauses protect."[137] The religious speech involved is spoken by students, not by the government. Courts' focus should therefore be on the identity of the speakers, not the location of their speech.[138] "[T]he establishment clause concerns that prompted the [United States Supreme] Court's invalidation of public school religious expression when the school was acting as inculcator would not necessarily justify the invalidation of such expression when the school is serving as a marketplace of ideas."[139] Equal access allows religious student groups to profess individualized beliefs; it does not allow the government to profess its beliefs. By providing a marketplace of ideas, the school does not condone religious speech, but merely is neutral in allowing it to occur.

Second, one purpose of the Establishment Clause is to assure neutrality, which occurs when the government extends the same rights to religious student groups as those that are enjoyed by all other extracurricular student groups.[140] Schools need not give special benefits to religious student groups; they need only treat those groups as the schools treat any other student groups. Schools should protect the private speech rights of religious students meeting in clubs in the same way they protect the free speech rights of those in non-religious student groups.[141] This principle envisions schools that are both neutral in their treatment of private speech and neutral in their own speech.[142] Equally protecting speech that is political, apolitical, religious, anti-religious, or

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[136] Sch. Dist. v. Ball, 473 U.S. 373, 389 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[137] *Mergens*, 496 U.S. at 250.

[138] *See* Robert L. Toms & John W. Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3, 15-19 (1978).

[139] Nadine Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143, 147 (1985).

[140] *See* Cheng, *supra* note 37, at 373-74 (providing background on the neutrality principle).

[141] *See* Laycock, *supra* note 86, at 3.

[142] *Id.*

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sports-related is a more neutral course than singling out religious speech for special treatment or punishment.[143]

"What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[144] When the government acts in a non-neutral manner by categorically banning religious speech, it is in fact being hostile toward religion.[145] If the government acts in a neutral manner the combined rights of the parents and the students outweigh the interest of schools in avoiding the appearance of religious support.

Third, the court should look to what the parents, not the students, perceive as an establishment of religion.[146] The government "unconstitutionally endorse[s] religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices."[147] The "objective parent" standard is similar to the "reasonable person" standard in tort law. The reasonable person "'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"[148] A commitment to First Amendment rights should not be undermined because of a possible misunderstanding by fellow classmates.[149] "Student maturity goes to whether the school should create an open forum in the first place. It cannot justify excluding religion from a forum that a school voluntarily creates."[150]

Once schools establish a forum, the right of the parents to direct their children's education should outweigh possible student misperceptions of establishment. Where schools allow a limited open forum, they have sufficiently determined that students are mature enough to take part in it.

> It is inconsistent to accept . . . a level of intellectual sophistication among . . . students sufficient to consider and contribute to the exchange of controversial views and yet, on the other hand, to declare

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[143] *See id.* at 13.

[144] Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

[145] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-5, at 1175-76 (2d ed. 1988) ("A message of *exclusion* . . . is conveyed where the state refuses to let religious groups use facilities that are open to other groups. . . . [W]hen the state makes a facility available to *non*religious groups, it must give religious groups no less opportunity. To do otherwise would demonstrate not neutrality but hostility toward religion.").

[146] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001).

[147] Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991).

[148] Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)).

[149] *See Good News Club*, 533 U.S. at 119; Laycock, *supra* note 86, at 18.

[150] Laycock, *supra* note 86, at 52.

> them incapable of discerning the distinction between a school's creation of a public forum that may permit religious speech and an endorsement of such activity.[151]

Schools might argue that students have a high level of trust in their teachers and that any handouts that students receive are viewed as directives from the teachers to attend the religious student meeting. However, such an argument goes against logic and the facts of most cases. Assuming students do, in fact, view a teacher's distribution of an advertisement for the Good News Club as a requirement that attendance at the club was part of the educational process, it would seem logical that the classrooms would be filled with students attending the Good News Club because it was mandatory. Of course, the fact that every student does not, nor indeed do most students, show up at the Good News Club meetings provides evidence that children, or their parents who instruct them, realize that they are not required to attend the meetings.

Such an argument also assumes that children are raised in a vacuum – that they somehow take care of themselves during the sixteen hours a day they are not under school supervision. No doubt this idea is ludicrous, but schools often fail to recognize that parents have rights in rearing their children, as well. When children bring permission slips from school to attend after-school religious meetings or religious club meetings during lunch, average parents will ask questions about the program and will decide if their child may attend based upon whether they wish for their child to be exposed to those values. *Good News Club* rightly recognized, in shifting the focus of relevant observers from students to parents, who is best able to direct the development of children.

Fourth, the existence of other student organizations establishes neutrality.[152] However, the existence of numerous groups should be a factor, not a rule. Schools should not prevent students from forming an extra-curricular religious club because it is the sole group in the forum.[153] If schools are acting neutrally and non-coercively, then the fact that only a religious fellowship group exists should not matter. Religious students should not be penalized because there are not enough interested students to form a chess club or an atheist society.

Fifth, the least restrictive means to dispel any notion of endorsement is to provide appropriate disclaimers suitable for particular

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[151] Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 565 (3d Cir. 1984) (Adams, J., dissenting).

[152] *See* Laycock, *supra* note 86, at 18.

[153] *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 265, 268 (1990) (Marshall, J., concurring) (arguing that an endorsement of religion might occur in cases where the religious club is the sole group in the forum).

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age groups, not to prohibit the speech. Even if students improperly assume that schools are endorsing religious student groups, the least restrictive means of dispelling that notion is not to ban speech; it is to give students an appropriate disclaimer.[154] The free exercise of First Amendment rights should not depend on what other students or parents may subjectively assume when a less burdensome way to dissolve such assumptions is to provide statements from the schools explaining that they are not endorsing the religious groups' messages.[155]

## VII. CONCLUSION

The EAA should be extended to pre-high-school students. Currently, the rights of pre-high-school students to form religious clubs that meet on school property are severely limited. Those rights are held hostage by inadequate notions of forum analysis that create a paper framework to protect constitutional guarantees. This framework may not only be misinterpreted by well-meaning judges, but may be torn asunder by well-meaning administrators who do not want to deal with the hassle of possible litigation or screaming parents. The alternative they enforce too often is to neglect the rights of the students in the name of their duty to prohibit an establishment of religion.

While the government has duties derivative of the Constitution, the parents and students involved have guaranteed rights. These rights are not limited to freedom of speech, but include the freedom to believe in a particular religion, the freedom to assemble and associate with like-minded individuals to further their beliefs, and the right to direct the upbringing of their children. These are duties parents are legally and morally obligated to undertake.

Extending the EAA's limited open forum to schools below the high school level will make it more difficult for those schools to ban student-led, extra-curricular religious groups. While the schools may still choose to allow only those student groups that do not disturb their pedagogical mission, or none at all, the school will most likely protect the ability of students to form extra-curricular groups.

An extension of the EAA would also limit the interest of schools to those duties that the government has in the education process. The rights of parents and students would be respected to ensure that as long as the EAA guidelines were met, any inculcation of religious ideas would be the result of parental choice, not school pressure. A pre-high-school EAA would uphold the proposition that, on balance, the peaceable exercise of the rights of parents and students outweighs the interest

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[154] *See id.* at 251.

[155] *See* Laycock, *supra* at 86, at 18 (asserting that students "should not be bound by what the least informed student might assume without benefit of explanation").

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schools may have in protecting against the appearance of supporting religion by a neutral and non-coercive government.

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