

FIRST AMENDMENT: EXTENDING EQUAL ACCESS TO ELEMENTARY EDUCATION IN THE AFTERMATH OF *GOOD NEWS CLUB v. MILFORD CENTRAL SCHOOL*

*Dan Mbulu**

I. INTRODUCTION

Since the United States Supreme Court's decision in *Good News Club v. Milford Central School*,¹ scholars, pundits, and critics have commented on the crumbling wall of separation between church and state.² Some critics derided the Court's terrible mistake.³ Others have even suggested that because school boards can no longer exclude groups they consider too religious, the decision is ostensibly an alternative route to reintroducing religion into elementary schools.⁴

Although decisions of this magnitude have long-term benefits or repercussions, the effect in the short run cannot in any way be described as detrimental. Public schools have not become bastions of religion since

* Dan N. Mbulu, Esq., CPA, Legal Editor, The Bureau of National Affairs (BNA); J.D., American University Washington College of Law (2000); BBA, University of D.C. (1985) (Cum Laude); Certified Public Accountant (1987); Member, Florida Bar; Member, American Bar Association; Member, American Institute of Certified Public Accountants; Articles Editor, American University Journal of Gender, Social Policy and the Law (1999); Vice President, Christian Legal Society, American University (1999-2000); Author, *Affordable Housing: How Effective are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?* 8 AM. U. J. GENDER, SOC. POL'Y & L. 387 (2000); Independent Auditor / CPA (1987-1991); Controller, Humana-Randmark Health Plans (1991-1996); Controller, Delta Dental Plans (1996-1997); Accounting Manager, Kennedy Institute (1997-1998); Law Clerk, HUD Legal Enforcement Center (1998).

All worship, glory, and adoration belong to my Lord, Jesus, for His loving kindness, grace and mercies upon my life and career. I appreciate my wife, Chichi and my children (Bryan, Michael, David) for their constant support and endless love. I am grateful to Lovette and Charles Ego for their unwavering stand for God's truth and justice. Many thanks to the African Christian Fellowship (ACF), USA and Igbo Development Union (IDU) for their support. Special thanks to my pastors, David Kofi Afriyie and Gabriel Boateng for their prayers. Thanks also to my brethren, Isaac Larbi, Chuk Apugo and Dale Mackenzie Gross for their support and encouragement. Lastly, I wish to express my gratitude to my constitutional law professor, Jamin Raskin of American University for his insightful comments on a draft of this article.

¹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

² Mary Leonard, *Supreme Court's Rulings Weaken Church-State Wall*, B. GLOBE, June 17, 2001, at A16.

³ *See id.*

⁴ *Id.*

*Milford and Culbertson v. Oakridge School District No. 76*⁵ opened the doors of these schools to religious organizations in the same manner as other community groups. At the very least, religious organizations no longer feel the effects of discrimination when accessing these public fora.

Regardless of the effects, the *Milford* decision depicts the Court's willingness to extend speech rights to elementary school pupils and the Court's ability to distinguish liberally previous school prayer and other First Amendment cases from recent public access cases. Moreover, it is not far-fetched to imagine that arguments proffered in *Milford* and other recent access cases will be advanced in the impending discourse on access to school facilities during non-instructional times. There is now a yearning for the extension of *Milford* not only to Christian groups discriminated against for after-school access, but also to all religious organizations receiving disparate treatment for access during non-instructional periods when other civic clubs are allowed to meet.⁶

II. BACKGROUND

In 1937, a group of Christians formed Child Evangelism Fellowship (CEF) as a vehicle for winning boys and girls to Jesus Christ.⁷ Today, CEF operates in all fifty states and over 142 foreign countries.⁸ CEF provides leadership, training, and materials to local chapters.⁹ In addition, CEF encourages individual "Good News Clubs" (Club), such as those involved in *Milford and Oakridge School District No. 76*.¹⁰ At Club meetings, adult instructors lead children ages six to twelve in Christian songs and prayer, assist in Scripture memorization, and teach Bible lessons.¹¹

⁵ *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061 (9th Cir. 2001) (affirming injunction compelling school district to make public school facility available, after school hours, to religious group on same basis as other community groups).

⁶ *See Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003) (challenging school district's refusal to distribute summer camp brochure that contained proselytizing materials during instructional and non-instructional periods) (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 99-101 (2001)).

⁷ *See A Brief History of Child Evangelism Fellowship*, at <http://www.gospelcom.net/cef/about/history.php> (last visited Oct. 8, 2003) [hereinafter *A Brief History*] (providing background information about CEF and the Good News Club).

⁸ *Id.*; *see also* Respondent's Brief at 3-4, *Milford* (No. 99-2036).

⁹ *See A Brief History*, *supra* note 7; Respondent's Brief at 3-4, *Milford* (No. 99-2036).

¹⁰ *See* Respondent's Brief at 3-4, *Milford* (No. 99-2036); *see also* *Culbertson v. Oakridge Sch. Dist. No. 76*, No. 96-6216-TC, 1999 U.S. Dist. LEXIS 23037 (D. Or. Jan. 5, 1999) (holding that Oakridge School District must provide the Club with same access, and treat the Club's activities in the same manner as those of other community groups), *aff'd*, 258 F.3d 1061 (9th Cir. 2001).

¹¹ Respondent's Brief at 3-4, *Milford* (No. 99-2036); *A Brief History*, *supra* note 7.

In 1996, Reverend Stephen Fournier and his wife Darleen, Milford district residents and sponsors of the local Club, sought permission to hold its weekly afternoon meetings in the school.¹² The Fourniers explained the format of the Club's meetings and its basic purpose of teaching morals and values from a Christian perspective. As they later testified,

to [the] children who know Christ as Savior, [they] would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ as Savior, [they] would say, you need Christ as your Lord and Savior so that you might overcome these . . . feelings of jealousy or overcome the desire to do bad things to those who somehow hurt you.¹³

The Club's request was denied on the justification that the proposed use amounted to religious worship and ran afoul of the "community use" policy.¹⁴ The community use policy permitted district residents to use the school for "instruction in any branch of education, learning or the arts."¹⁵ Residents could also use the school for "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community . . . [provided that such] uses shall be non-exclusive and shall be open to the general public."¹⁶ As a result of the denial, the Club filed a suit under 42 U.S.C. § 1983 (which allows civil actions for deprivations of constitutional rights) alleging that the denial violated its free speech rights under the First and Fourteenth Amendments.¹⁷

The district court granted the school district summary judgment because it determined that the Club's subject matter was religious in nature, not merely a permissible discussion of secular matters from a religious perspective.¹⁸ Moreover, because the school district had not allowed other groups providing religious instruction to use the forum in question, the court held that the school could deny the Club access without engaging in unconstitutional viewpoint discrimination. In affirming, the Second Circuit held: (1) the school policy limiting use of its facilities was reasonable; and (2) the Club was engaged in religious

¹² *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001).

¹³ Respondent's Brief at 7-8, *Milford* (No. 99-2036).

¹⁴ *Milford*, 533 U.S. at 103. According to the school district, the community use policy that prohibited the use of school facilities by an individual or organization for religious worship foreclosed the Club's activities. *Id.*

¹⁵ N.Y. EDUC. LAW § 414(1)(a) (McKinney 2000).

¹⁶ § 414(1)(c).

¹⁷ *Milford*, 533 U.S. at 98.

¹⁸ *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147 (N.D.N.Y. 1998), *aff'd*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001).

instruction and prayer.¹⁹ Thus, the school district's exclusion of the Club was viewpoint neutral and did not violate the Free Speech Clause.²⁰

In the parallel case of *Oakridge School District No. 76*, Mae Culbertson, a CEF instructor not affiliated with the Oakridge School District (OSD) of Oregon, requested permission for a Club to meet after school hours at Oakridge Elementary School. Culbertson also asked that the school distribute parental permission slips to students.²¹

In compliance with its facilities access policy,²² OSD initially granted the Club's request for meeting space. OSD generally opened the school after hours for use by community organizations. These groups included 4-H, Upper Willamette Youth sports programs, the Birth-to-Three program, Boy Scouts, Girl Scouts, and Cub Scouts.²³ Only those children who had obtained permission slips from their parents were allowed to attend the meetings. The school distributed the parental permission slips to students to take home as it did for other community groups.²⁴

In October 1995, Culbertson received from the OSD Superintendent a copy of a memorandum sent to principals specifically denying the Club's use of the school's facilities for meetings.²⁵ The memorandum banned the use of elementary school facilities for any religious club activities.²⁶ In this context Culbertson and parents of the affected children sued OSD seeking injunctive relief to allow use of school facilities.²⁷ The district court granted a permanent injunction against

¹⁹ *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001).

²⁰ *Id.*

²¹ *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061, 1063 (9th Cir. 2001) (noting that club meetings are designed primarily for children ages 4 through 12, although anyone is welcome); *Culbertson v. Oakridge Sch. Dist. No. 76*, No. 96-6216-TC, 1999 U.S. Dist. LEXIS 23037, at *2-*4 (D. Or. Jan. 5, 1999), *aff'd*, 258 F.3d 1061 (9th Cir. 2001).

²² OR. REV. STAT. § 332.172 (2001). The state of Oregon permits local school districts to open up their facilities for "civic and recreational purposes," which include "discussion of all subjects and questions which in the judgment of the residents may relate to the educational, political, economic, artistic and moral interests of the residents, giving equal rights and privileges to all religious denominations." *Id.* Article VIII of Oakridge School District's policy guidelines permits school district buildings to be used as a center for the community, for community use, for educational and recreational purposes. The building may be made available on a cost basis for non-profit community activities. Community Relations Policy, art. VIII, § 810 (2002).

²³ *Culbertson*, 258 F.3d at 1063.

²⁴ *Id.* at 1063-64; *Culbertson*, 1999 U.S. Dist. LEXIS 23037, at *2-*4.

²⁵ *See Culbertson*, 1999 U.S. Dist. LEXIS 23037, at *2-*3 (explaining that Club activities were disrupted and members highly inconvenienced by the resulting search for a new location).

²⁶ *Id.* at *2.

²⁷ *Id.* at *2-*4.

this exclusionary policy and summary judgment in plaintiffs' favor.²⁸ Appeal to the Ninth Circuit ensued.

In yet another parallel case, *Sherman v. Community Consolidated School District 21*, opened its doors during non-instructional periods to various community groups.²⁹ A recalcitrant parent, however, petitioned the school district to ban the student Cub Scout program from using the elementary schools' facilities.³⁰ Because the Cub Scouts ritually require every member to promise to do his duty to God, the parent claimed that permitting the Scouts access would violate the Establishment Clause. The parent argued that elementary school children are too impressionable to know that the school itself did not in fact endorse or sponsor the Scouts' activities.

Given the confusion and numerous incidents of conflict in this area of law, the school districts and society as a whole will be better served if clearer guidelines are established for extending equal access to elementary schools. Clarity will provide a needed solution to the present constitutional and social imbroglio. This article provides both constitutional and policy justifications for extending freedom of speech and religion to elementary school students.

III. ARGUMENTS

It is by now a settled principle in First Amendment law that religious viewpoints must be given equal access to fora for speech in public facilities, including high schools, colleges, and universities.³¹ There is growing disagreement, however, about whether such constitutionally required access extends to elementary schools. Some would argue that the First Amendment stops at the elementary schoolhouse door because children are not mature enough to handle a robust First Amendment regime. This argument, however, proves to be weak upon inspection. Careful analysis reveals that the elementary school is a natural setting for the operation of the First Amendment in its full meaning and scope.

A. Constitutional Guarantees of Children's First Amendment Rights

The Constitution declares in universal and non-age specific terms, "Congress shall make no law respecting an establishment of religion, or

²⁸ *Id.* at *4-*5.

²⁹ *Sherman v. Cmty. Consol. Sch. Dist. 21*, No. 92C6674, 1993 WL 57522, at *1 (N.D. Ill. Mar. 4, 1993) (holding that a school district's policy allowing the Boy Scouts to hold meetings in the school does not advance or inhibit religion), *aff'd*, 8 F.3d 1160 (7th Cir. 1993).

³⁰ *Id.*

³¹ See generally *Widmar v. Vincent*, 454 U.S. 263 (1981); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

prohibiting the free exercise thereof; or abridging the freedom of speech . . .”³² Like the Bill of Rights as a whole, the First Amendment is not for adults alone.³³ “Minors, as well as adults, are protected by the Constitution and possess (albeit modified) constitutional rights.”³⁴ Nor is there a particular age when constitutional rights vest (except in the case of voting, which is explicitly provided for in the Constitution).³⁵ Logically, First Amendment rights should apply equally to both elementary and secondary school students.

Of course, the constitutional rights of children cannot be equated with those of adults in all situations,³⁶ but the discrete issue of equal access to speech fora does not necessarily implicate those situations. The sole basis for a juvenile exception to constitutional rights is that sometimes children are not able, by reason of age or maturity, to handle a particular experience or decision. Elementary school children are not asked to make any critical decisions beyond their years when they exercise their right to use school facilities for religious club meetings. Similarly, a student is no less vulnerable when he listens or reads from the so-called cultural, civic, or community group announcements and brochures than from religious messages by the student-run club.³⁷ With respect to constitutional protection against deprivation of liberty or property interests, the Court has concluded that a child’s constitutional right is “coextensive with that of an adult.”³⁸ Given that juveniles under state custody are entitled to due process rights, the rights of pupils, equally under state (in this case, specifically public school) custody, should not be capriciously violated. Since the Fourth, Fifth, and

³² U.S. CONST. amend. I. Although the First Amendment originally applied to the federal government, the Supreme Court has ruled that the Fourteenth Amendment incorporates its provisions to encompass state action equally. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8, 14-15 (1947) (establishing the core establishment principle of strict governmental neutrality toward religion).

³³ See *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979) (plurality) (noting that a child is not beyond the protection of the Constitution).

³⁴ *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

³⁵ *Id.* (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”); see U.S. CONST. amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

³⁶ See *Bellotti*, 443 U.S. at 634 (determining that children’s vulnerability, the importance of parental role in child rearing, and children’s inability to make critical decision in an informed, mature manner justify the inequality in constitutional rights).

³⁷ See *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (finding that granting a religious organization permission to use school facilities would no more commit the school to religious goals than it is already “committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,” and other eligible civic and social clubs) (quoting *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980)).

³⁸ *Bellotti*, 443 U.S. at 634.

Fourteenth Amendments apply to elementary school children, the First Amendment by implication does as well.³⁹ We must recall that the First Amendment guarantees liberty of human expression in order to preserve in our nation a robust “free trade in ideas.”⁴⁰

B. Implications for Freedom of Speech and Expression

In analyzing the nature of freedom of speech protections within a public school context, the Supreme Court has observed that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴¹ It is also axiomatic that speech is not “less protected because it is religious in nature.”⁴² The Court in *Widmar v. Vincent* stated that “religious worship and discussion . . . are forms of speech and association protected by the First Amendment.”⁴³

1. Limited Open Forum

Of course, the mere fact that speech is involved and that the Free Speech Clause is triggered does not require the government to open its facilities as a public forum to anyone desiring to use them.⁴⁴ The Court has stressed that the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”⁴⁵ Like other property owners, the state or school district has the authority to close traditionally non-public facilities as a forum for advocacy.⁴⁶ Therefore, the primary factor in determining whether state-owned or

³⁹ Children in juvenile delinquency proceedings are entitled to adequate notice, assistance of counsel, opportunity to confront their accusers, and may assert the privilege against self-incrimination even though these are civil matters like those implicated in the First Amendment’s domain. *Id.* at 634-35.

⁴⁰ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁴¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Given that children spend most of the useful part of their day in school, and that public schools are vitally important to a child’s upbringing, public schools are most important “in the preparation of individuals for participation as citizens” and for “inculcating fundamental values necessary to the maintenance of a democratic political system.” *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 564 (3d Cir. 1984) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). It would be reasonable for Christian children to organize their own club (like all others) to discuss religious matters that have been passed down from their parents. *See id.* at 546. “[I]t would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth.” *See id.* at 564 (noting “schools must play an essential [sic] role in preparing their students to think and analyze and to recognize the demagogue”) (quoting *James v. Bd. of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972)).

⁴² *Bender*, 741 F.2d at 545.

⁴³ *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

⁴⁴ *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46-48 (1983).

⁴⁵ *United States Postal Serv. v. Greenburgh Civic Ass’n*, 453 U.S. 114, 129 (1981).

⁴⁶ *Perry*, 460 U.S. at 46; *Widmar*, 454 U.S. at 266-67.

state-controlled property is a public forum is how the locale is actually used.⁴⁷ Unlike public streets and parks, an elementary school is not by definition a traditional forum for free public expression.⁴⁸

Nonetheless, in defining a "limited open forum," the Court held in *Board of Education v. Mergens*⁴⁹ that a school's equal access obligation is triggered even if such a school allows only one "non-curriculum related student group" to meet.⁵⁰ The Club qualifies as a non-curriculum related student group because it does not directly relate to any body of courses offered by the school. The Court held that, when a state decides on its own accord to open its facilities for use as a "limited forum" for particular purposes, it assumes a responsibility to explain its exclusion of a qualified group under applicable constitutional criteria.⁵¹ The school may not exclude expression that fits within whatever objective limitations it has set.⁵² The free speech right of access to a limited forum extends to activities "of similar character."⁵³ The Club, for example, was a recognized student organization that satisfied the objective standards that the school district had set. Because the Club was an approved student organization that promoted the welfare and intellectual growth of students,⁵⁴ it was of similar character to other student clubs. Hence, free speech rights extend to the Club, and the school must justify its exclusion with a compelling interest. Once a state opens a limited forum, it must respect the lawful boundaries it has established.⁵⁵ Moreover, if a state school (elementary, secondary, or post-secondary) allows a student-initiated non-curriculum club access to its facilities during non-instructional or activity periods, it must equally permit a student-

⁴⁷ *Int'l Soc'y for Krishna Consciousness v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 160 (3d Cir. 1982).

⁴⁸ *Perry*, 460 U.S. at 46.

⁴⁹ *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

⁵⁰ *Id.* at 235 (defining the phrase to mean any student group that does not directly relate to the body of courses offered by the school).

⁵¹ *Perry*, 460 U.S. at 47-48. Moreover, "[a]lthough a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* at 46. The school board must perform all its functions "within the limits of the Bill of Rights." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

⁵² *Perry*, 460 U.S. at 47-48.

⁵³ *Id.* at 48.

⁵⁴ *See Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 549 (3d Cir. 1984) (concluding that religious discussions, Bible study and prayer "promote the intellectual and social welfare of students"), *vacated by* 475 U.S. 534 (1986).

⁵⁵ *See Perry*, 460 U.S. at 48 (holding that under the "limited forum" doctrine, the state assumes a responsibility to explain its exclusion of a particular group under applicable constitutional criteria).

initiated religious club access to its facilities unless the school has sufficiently compelling reasons not to do so.⁵⁶

2. Analyzing Content / Viewpoint Discrimination in Equal Access Cases

In the past few decades, the Court has carefully delineated certain reasons that it considers non-compelling and constitutionally unjustifiable. First, states may not regulate speech based on its content or the message it conveys.⁵⁷ In *Widmar*, as in *Oakridge School District No. 76* and *Milford*, the Court concluded that the school's reasons for denying a religious student group's access to school facilities were content-based. The schools stressed their compliance with the law by acknowledging that their regulations prohibited the use of school facilities for religious worship or teachings. The Court, however, held that the school must show that the regulation serves a compelling state interest and that it is narrowly drawn to achieve that end.⁵⁸

Although content discrimination may be permissible if it preserves the purposes of that limited forum, viewpoint discrimination is impermissible when directed against speech otherwise within the forum's limitations. In *Rosenberger v. University of Virginia*,⁵⁹ the Court determined the university engaged in unconstitutional viewpoint discrimination toward "Wide Awake," a Christian student organization publication, when the school denied the group's request for student activity funds.⁶⁰ This fact pattern is similar to denial of access to facilities in *Milford*. Both instances involve denial of benefits to recognized student clubs. Moreover, both exclusions are based on explicitly religious grounds. Because viewpoint discrimination is the paradigm case of a First Amendment violation, religious groups, like the Club, cannot be excluded simply because their activities include a religious message.⁶¹

⁵⁶ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (noting that a state may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum).

⁵⁷ See *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972); see also *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

⁵⁸ *Widmar*, 454 U.S. at 269-70; see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107, 112-13 (2001) (requiring that the speech restriction be reasonable in light of the forum's purpose).

⁵⁹ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

⁶⁰ *Id.* at 829-31; see also *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (holding that a school district discriminated on the basis of viewpoint when it permitted the 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 Christian perspective).

⁶¹ See *Milford*, 533 U.S. at 111-12. "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of

Furthermore, a plurality of the Court in *Board of Education v. Pico*⁶² rejected a local school board's attempt to remove vulgar books from the school library as an effort to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."⁶³ Since conservative school boards cannot censor books they consider dangerous, *a fortiori* liberal school boards should not get away with the same.

Moreover, in *Tinker v. Des Moines*,⁶⁴ the Court struck down a school regulation prohibiting students from self-expression. The regulation did not require school authorities, prior to curtailing speech, to prove facts that might reasonably forecast material interference with school activities, nor did it require them to prove that speech-related disturbances actually occurred on campus.⁶⁵ The Court also concluded in *Heffron v. International Society for Krishna Consciousness*⁶⁶ that any "time, place or manner" restriction on religious speech must be content neutral.⁶⁷ These holdings make it illogical to exclude elementary students' speech that is already permissible within the limited forum. Religious speech by an elementary school Christian club that is already within the forum's scope of permissible speech cannot be excluded, but must be granted equal access.

C. The Federal Equal Access Act

Even though the Federal Equal Access Act⁶⁸ (Act) applies to secondary schools only, it presents a useful, basic framework for extending equal access of diverse (including religious) viewpoints to elementary education. The Act makes it unlawful for any high school receiving federal financial assistance and possessing a limited open forum to deny equal access to any student who wishes to conduct a meeting within that forum on the basis of religious speech at such

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.

⁶² *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality).

⁶³ *Id.* at 854 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In *Pico*, the school board justified its decision to remove certain books it disliked from the library by declaring that the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," and concluded that it is the board's "duty . . . [and] moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers." *Pico*, 457 U.S. at 857. *Pico*, like *Widmar*, *Mergens*, and a host of other equal access cases, does not intrude into the classroom, or into compulsory courses taught there. *Id.* at 862. The criteria for removing books must not be erratic, arbitrary and freewheeling; rather, they should be narrowly defined and tailored to meet board's compelling objectives. *Id.* at 871-72.

⁶⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁶⁵ *Id.* at 513-14.

⁶⁶ *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981).

⁶⁷ *Id.* at 647-48.

⁶⁸ 20 U.S.C. § 4071 (2000).

meetings.⁶⁹ The Act applies solely to student clubs in public school settings, and is akin to the circumstances found in both *Oakridge School District No. 76* and *Milford*. In addition, the Act declares that a public secondary school is a limited forum *whenever* it grants an “opportunity for one or more non-curriculum related student groups to meet on school premises during noninstructional time.”⁷⁰ Because of the positive historical and case law precedents outlined below, this article recommends that Congress amend the Equal Access Act to include public elementary schools receiving federal financial assistance.

D. Establishment Clause Analysis

Finding few if any loopholes under the Free Speech Clause that would allow discrimination against religious speech, some school districts have resorted to the Establishment Clause as a way to curtail children’s free speech rights.⁷¹ In *Milford*, as in *Widmar*, the Court noted that a state may justify content-based discrimination only if its interest in avoiding an Establishment Clause violation can be fairly “characterized as compelling.”⁷² In constitutional terms, a state’s interest is compelling only if the restriction or prohibition is necessary to accomplish a legitimate state purpose. Although the Court has held that a school district’s interest in avoiding an Establishment Clause violation may be sufficiently compelling to justify *content-based* discrimination, it has not ruled unequivocally that such an interest may justify *viewpoint* discrimination. A school district’s interest in not violating the Establishment Clause must outweigh a religious club’s interest in gaining access to school facilities in order to pass constitutional muster. In other words, school districts may deny access based on a possible Establishment Clause violation only when it serves a compelling government interest.⁷³

⁶⁹ § 4071(a). The Act defines “fair opportunity” criteria to be:

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, government, or its employees or agents;
- (3) employees or agents of the school or government are present at religious meetings only in non-participatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

§ 4071(c).

⁷⁰ § 4071(b).

⁷¹ See *supra* text accompanying notes 1-30.

⁷² *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-13 (2001); see also *Widmar v. Vincent*, 454 U.S. 263, 269-71 (1981).

⁷³ See *Milford*, 533 U.S. at 112-13.

Given that the Court is unprepared to sanction viewpoint discrimination by school districts, it must determine whether a law or practice offends or adheres to the confines of the Establishment Clause by applying the traditional *Lemon*-modified Endorsement test. First enunciated in *Lemon v. Kurtzman*,⁷⁴ the test inquires whether: (1) the school's actual purpose in performing or permitting the challenged action is to endorse or to disapprove of religion; (2) the school's action is likely to be perceived by a reasonable observer as an endorsement or disapproval of religion; and (3) the action fosters an excessive entanglement between government and religion.⁷⁵

1. Secular Purpose: Does the Speech Promote a Non-Sectarian Purpose?

On its face, an equal access policy is evenhanded and does not favor religious groups over secular ones or deny access to any group based on content of speech.⁷⁶ A school district's equal access policy would: (1) provide meeting space and recreation facilities during non-instructional periods to (a) community groups operating in that town, or (b) recognized student groups;⁷⁷ and (2) require that the student group promote the intellectual and social welfare of students.⁷⁸ In *Bender v. Williamsport Area School District*,⁷⁹ the court concluded that religious "discussion, religious study, and even prayer fall within the articulated qualification that student organizations promote the intellectual and social welfare of students."⁸⁰

⁷⁴ *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

⁷⁵ *Bd. of Educ. v. Mergens*, 496 U.S. 226, 235 (1990).

⁷⁶ *Sherman v. Cmty. Consol. Sch. Dist. 21*, No. 92C6674, 1993 WL 57522, at *1 (N.D. Ill. Mar. 4, 1993), *aff'd*, 8 F.3d 1160 (7th Cir. 1993). In *Sherman*, an atheist fifth grader requested that the school board prohibit the Cub Scouts from using the school's facilities because of the Scouts' policy of excluding avowed atheists from participating in the Cub Scouts' program. *Id.* at *1-6.

⁷⁷ *See Widmar*, 454 U.S. at 263 (stating that it was permissible for Club meetings to be held after regular school hours); *see also Mergens*, 496 U.S. at 226 (holding that, in accordance with the school's access policy, a Christian Club should not be denied access if it met after school hours on school premises).

⁷⁸ *See Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 549 (3d Cir. 1984), *vacated by* 475 U.S. 534 (1986).

⁷⁹ *Id.*

⁸⁰ *Id.* Religious speech should be placed in its proper perspective, and not in the same context as pornography or obscenity. Christianity promotes good morals, love, orderliness, hard work and peace. It helps to transform and emancipate children from societal decadence by inculcating good moral precepts early in life. Children engaged in serious religious endeavor are less likely to engage in gambling, truancy, sexual immorality, and irregular eating or sleeping habits. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 175 (1944) (Murphy, J., dissenting). Moreover, the dangers of abuse and exploitation embedded in pornographic magazines are nonexistent in Christian literature and brochures. Neither the Bible nor Christian practices constitute a threat to the state or to the health, morals, or welfare of a child. *See Bd. of Educ. v. Barnette*, 319 U.S. 624, 639

In *Widmar*, the Court rejected any distinction between religious worship and other religious speech for several reasons: (1) the distinction lacks intelligible content; (2) even if the distinction could be specified, the government would be incompetent to administer it; (3) there is no support for the distinction in First Amendment policy or principle; and (4) any attempt at enforcement of such a distinction would require a censor to monitor meetings in the most intrusive way.⁸¹ Subject matter and viewpoint are so closely linked in the case of religion that it is nearly impossible to distinguish religious speech that expresses viewpoints on matters of secular significance from religious speech that does not.⁸²

In an equal access arena, the school prohibits teachers and faculty members from participating in religious club meetings.⁸³ In *Lynch v. Donnelly*, the Supreme Court concluded a non-secular purpose may not be inferred lightly.⁸⁴ In accordance with *Mergens* and *Widmar*, a public school's equal access policy is neutral in design.⁸⁵ Finally, the Court in *Milford* disagreed with the Second Circuit's view that a program that is "quintessentially religious or decidedly religious in nature cannot be characterized properly as the teaching of morals and character development from a particular viewpoint."⁸⁶ In the Court's opinion, what matters for Free Speech Clause purposes is that there is "no logical difference in kind between the invocation of Christianity by the [c]lub and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."⁸⁷ Therefore, an elementary school's access policy that accommodates a religious club that fits within the above parameters would pass constitutional muster.

(1943). In fact, an innocuous Christian message of love can do no less than soothe those innocent souls. Obscenity, on the other hand, is not protected expression and may be suppressed without a showing of the circumstances that lie behind the phrase, "clear and present danger" in its application to protected speech. See *Ginsberg v. New York*, 390 U.S. 629, 641 (1968) (upholding a New York statute that prohibited the sale of harmful obscene materials to minors under seventeen). Similarly, for the reasons enumerated in *New York v. Ferber*, the Supreme Court granted states great leeway in the regulation of pornographic depiction of children. *New York v. Ferber*, 458 U.S. 747 (1982).

⁸¹ See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 56-57 (1986) (elaborating on all four points).

⁸² See *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996); *DeBoer v. Vill. of Oak Park*, 86 F. Supp. 2d 804, 810-11 (N.D. Ill. 1999).

⁸³ See *Sherman v. Cmty. Consol. Sch. Dist. 21*, No. 92C6674, 1993 WL 57522, at *7 (N.D. Ill. Mar. 4, 1993), *aff'd*, 8 F.3d 1160 (7th Cir. 1993).

⁸⁴ *Lynch v. Donnelly*, 465 U.S. 668, 679-82 (1984).

⁸⁵ See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248-52 (1990) (plurality); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981).

⁸⁶ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001).

⁸⁷ *Id.*

2. Primary Effect: Would Granting Elementary Religious Clubs Access Advance or Inhibit Religion?

The next question is whether a policy extending equal access to elementary school children advances or inhibits religion. The Court has determined that granting a religious group permission to use school facilities would no more commit the school to religious goals than it would be to the goals of other student organizations.⁸⁸ The Court also noted that an equal access policy benefiting a broad spectrum of groups is an important indication of a secular effect.⁸⁹ In some schools (the schools in *Rosenberger* and *Mergens* being prime examples), there are as many as ten to thirty secular clubs with only one or two religious ones. These religious clubs are benefited no more or less than their secular counterparts. Thus, an equal access policy cannot fairly be described as advancing religion.

a. Application of the neutrality principle

Government programs must be neutral toward religion to ensure that “we do not inadvertently prohibit . . . [a school board] from extending its general State law benefits to all its citizens without regard to their religious belief.”⁹⁰ The Establishment Clause does not justify, much less require, a refusal to recognize the free speech rights of religious speakers who participate in broad-reaching government programs that are neutral in design.⁹¹ The Court in *Mergens* noted that “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which both the Free Speech and Free Exercise Clauses protect.”⁹² Community or student-initiated religious clubs are private, not state, actors; hence, religious club speech is private speech that the First Amendment protects. *Widmar* ruled that religion is neither favored nor established if incidental benefits that accompany official recognition accrue to a religious club.⁹³ Consequently, a religious club should not be denied equal access merely because it benefits from a

⁸⁸ See *Widmar*, 454 U.S. at 274 (concluding that allowing a religious group to meet on campus would not violate the Establishment Clause).

⁸⁹ *Id.*

⁹⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947) (permitting the reimbursement of parents for transporting their children, on public transportation, to and from schools, including nonprofit private and parochial schools).

⁹¹ See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248, 250-52 (1990) (plurality); *Widmar*, 454 U.S. at 274-75.

⁹² *Mergens*, 496 U.S. at 250 (plurality).

⁹³ *Widmar*, 454 U.S. at 273-74; see also *Mergens*, 496 U.S. at 260 (Kennedy, J., concurring).

general government program. This situation parallels the University of Virginia's "Wide Awake"⁹⁴ organization, whose religious activities were not grounds for revoking its equal funding opportunity. After all, these students' parents or guardians are taxpayers, and they pay equally to support those government programs. It would be grossly unfair to deny the children access to a public forum just because they belong to an active religious group.

The Court's insistence on government neutrality toward religion explains why it has consistently held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all.⁹⁵ "Withholding access would leave an impermissible impression or perception that religious activities are disfavored '[I]f a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.'"⁹⁶ The Court reached a similar conclusion in *Board of Education v. Grumet*: "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion."⁹⁷ Therefore, because an elementary school's equal access policy falls within the spectrum set by the Supreme Court, such a policy would have no religious objective.

Recently, the Court has applied the principle of neutrality as an essential ingredient in its evaluation of Establishment Clause challenges to school programs. For instance, in *Milford*⁹⁸ the Court cited *Mitchell v. Helms*,⁹⁹ where it used the neutrality principle to distinguish between state and private indoctrination. If in the course of furthering some legitimate secular purpose, the government "offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid accruing to a religious recipient only has the effect of furthering that secular purpose."¹⁰⁰

⁹⁴ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 843-44 (1995).

⁹⁵ *Lamb's Chapel*, 508 U.S. at 392-97; *Widmar*, 454 U.S. at 265-70.

⁹⁶ *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring) (quoting *Mergens*, 496 U.S. at 248 (plurality)).

⁹⁷ *Bd. of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part).

⁹⁸ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (holding that Milford's insinuation that "granting access to the [Good News] Club would do damage to the neutrality principle defies logic").

⁹⁹ *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality).

¹⁰⁰ *Id.* at 810; *Milford*, 533 U.S. at 114.

A religious speaker like the Club¹⁰¹ seeks nothing more than to be treated neutrally and given access to speak about the same topics as other groups or speakers.¹⁰² “[G]uarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”¹⁰³ Therefore, allowing a religious speaker to speak on school grounds would ensure, rather than threaten, neutrality.

Furthermore, in considering whether government aid is awarded to a religious institution “only as a result of the genuinely independent and private choices of individuals,” the Court linked the principles of neutrality and private choice, examining their relationship to each other.¹⁰⁴ The Court further “viewed as significant whether the ‘private choices of individual parents’ as opposed to the ‘unmediated’ will of the government determine what schools ultimately benefit from the governmental aid, and how much.”¹⁰⁵ The Court held the statute in *Zobrest v. Catalina Foothills School District*¹⁰⁶ ensured that a government-paid interpreter would be present in a sectarian school only due to the private decision of individual parents.¹⁰⁷ Private choice also assists in securing neutrality by curbing “the preference for pre-existing recipients that is arguably inherent in any governmental aid program.”¹⁰⁸ Similarly, in other recent equal access cases, the relationship between parents’ private choices and neutrality is quite

¹⁰¹ The same principle would apply to Zachary Hood. See *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000). This was a § 1983 claim brought by Zachary Hood’s mother, as guardian ad litem of her elementary school child against the school board, the Commissioner of Education, and New Jersey Department of Education. The First Amendment claim emanated from the following episode: In the spirit of the Thanksgiving holiday, Zachary Hood’s teacher asked the pupils to produce a poster of what they were thankful for. Zachary presented a poster of Jesus. Although Zachary’s poster was initially posted along with all others in the hallway, it was later removed by unknown school officials because of its religious theme. *Id.* at 201. Citing the Eleventh Amendment bar, the Third Circuit dismissed the claim against the Department of Education for lack of jurisdiction. The court further held that the school board can be held responsible for a teacher’s constitutional violation only if the violation occurred as a result of a policy or custom approved, encouraged, or engendered by the board. *Id.* 201-02.

¹⁰² *Id.*

¹⁰³ *Milford*, 533 U.S. at 114 (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995)).

¹⁰⁴ *Helms*, 530 U.S. at 810 (quoting *Agostini v. Felton*, 521 U.S. 203, 226 (1997)).

¹⁰⁵ *Id.* (quoting *Sch. Dist. v. Ball*, 473 U.S. 373, 395 n.13 (1985) (citation omitted)).

¹⁰⁶ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

¹⁰⁷ *Helms*, 530 U.S. at 810-11 (citing *Zobrest*, 509 U.S. at 10 (upholding governmental provision of a sign-language interpreter to a deaf student at a Catholic high school)).

¹⁰⁸ *Id.* at 810 (citing George Gilder, *The Revitalization of Everything: The Law of the Microcosm*, HARV. BUS. REV., Mar.-Apr. 1988, at 49).

prominent. First, a child may only attend religious meetings with a parent's permission slip. Second, parents usually have a host of choices from which they can make their selection. Third, there is neither an incentive nor a deterrent in selecting any of the programs. Fourth, an equal access program offers aid that is secular in content—access to the forum so a religious speaker could be heard. Therefore, because of the similarity of the neutrality and choice factors inherent in equal access cases, an equal access program cannot be adjudged as advancing a religious purpose.

In *Widmar*, the Court concluded that allowing a religious group to meet on a public college campus would not violate the Establishment Clause.¹⁰⁹ The use of a university's facilities does not "confer any imprimatur of state approval on religious sects or practices."¹¹⁰ This would have settled the case for extending access to elementary schools except that the Court in *Widmar* noted that younger students might stand in a different position due to maturity and impressionability factors. In *Mergens*, however, the Court determined that equal access did not have the primary effect of advancing religion in high school, even though student group meetings were held under school aegis and state compulsion.¹¹¹ In both *Mergens*¹¹² and *Bender*,¹¹³ the Court concluded that the "difference in age between high school and college students [does not] justify departing from *Widmar*."¹¹⁴ It would also be erroneous to depart from *Widmar* in the case of elementary school students.

Religious activity during school hours is not a per se violation of the Establishment Clause. In other words, the presence of children around Club meetings does not render an otherwise constitutional activity unconstitutional. This argument is bolstered by the *Milford* decision where the Court held that it has "never extended Establishment Clause jurisprudence to foreclose private religious conduct . . . because it takes place on school premises where elementary school children may be present."¹¹⁵ The Court emphasized that a state does not establish

¹⁰⁹ See *Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

¹¹⁰ *Id.*

¹¹¹ See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249-50 (1990) (plurality) (holding that secondary school students are mature enough to recognize an endorsement when they see one); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹¹² *Mergens*, 496 U.S. at 250 (plurality).

¹¹³ *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 556 (1986) (Powell, J., dissenting).

¹¹⁴ See *Mergens*, 496 U.S. at 250-51 (agreeing with the legislature that students below the college level can distinguish "between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other hand") (quoting *Bender*, 475 U.S. at 556 (Powell, J., dissenting)) (alteration in original).

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

religion simply by allowing a religious group to meet on school premises on a nondiscriminatory basis.¹¹⁶

b. Addressing the impressionability question

The Court's doctrine in this field would be marred by inconsistency and irrationality if it now departs from its understanding in *Widmar* and *Mergens* that "custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities."¹¹⁷ Furthermore, in *Pierce v. Society of Sisters*¹¹⁸ the Court held that the parental right to guide one's child in the area of religious instruction is a most substantial part of the liberty and freedom of the parent.¹¹⁹ In *Herdahl v. Pontotoc County School District*, a district court expanded upon this principle, declaring that a parent has even more authority.¹²⁰ *Herdahl* stated, "Having the authority to act in the stead of a child, a parent's maturity and ability to discern the difference between faculty supervision and implicit endorsement of the religious ideals expressed at the meeting is imputed to the child."¹²¹ The court determined, therefore, that in an opt-in before or after school program like those in *Milford* or *Oakridge School District No. 76*, where elementary students can attend only with parental consent, such consent places the "elementary students on equal footing with high school students, who the Supreme Court has held are mature enough to differentiate between sponsorship and mere custodial oversight."¹²² *Herdahl* further explained that "[t]he risk of the appearance of improper state involvement is significantly [more] diminished in an opt-in" program than in the opt-out classroom prayer practices, which are considered burdensome to non-participating students.¹²³ In the opt-out situations, students who do not want to participate in the religious activities are made to leave the classroom. In the opt-in cases, students who wish to participate in devotionals during non-instructional periods actively seek involvement in the activity without the effect of mandatory

¹¹⁶ *Id.* at 114-16.

¹¹⁷ *Mergens*, 496 U.S. at 253 (plurality).

¹¹⁸ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

¹¹⁹ *See id.* at 534-35 (striking down an Oregon law mandating that every parent send their children to public school).

¹²⁰ *See Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 590 (N.D. Miss. 1996) (upholding a school's practice of allowing elementary students with written parental permission slips to attend religious devotion on school premises before commencement of the school day).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 590-91.

attendance policies that are indicative of subtle coercive pressures.¹²⁴ Thus, the requirement of parental permission obliterates any concern that impressionable children will attend club meetings due to peer pressure or a mistaken belief that the school has endorsed the club. As a consequence, allowing the club to meet will not offend the *Pierce* or *Edwards v. Aguillard*¹²⁵ Courts' Establishment Clause-based principle that school districts must respect the wishes of individual parents with regard to their child's religious upbringing.¹²⁶

(1) Peer pressure—inevitable but constitutional

Although some children may feel pressure from their peers to attend religious club meetings, such peer pressure, by itself, is constitutionally permissible. The Court has recognized this possibility but discounted its effect where parental authorization is involved and school officials do not actively participate. In so doing, the Court noted, "To be sure, the possibility of student peer pressure remains, but there is little, if any, risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate."¹²⁷ As the *Milford* Court succinctly declared, it has never "foreclose[d] private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present."¹²⁸

Again, it is pertinent to note that when religious and secular clubs are granted equal access during non-instructional periods, the children cannot attend such club meetings without their parents' permission. The critical fact is that *unless a parent so desires*, elementary school students cannot act on that pressure and thereby participate in inherently religious activities. The parents are presumably mature enough to discern right from wrong, and good from bad. In this regard, the parents who choose whether their children will attend club meetings are the relevant community in deciding whether anyone will feel the coercive pressure to engage in religious club activities.¹²⁹ The parents would probably not be confused about whether the school was endorsing religion.¹³⁰ Consequently, such children are not coerced into engaging in the club's religious activities. Given this scenario, therefore, the question of impressionability becomes less pressing.

¹²⁴ *Id.*

¹²⁵ See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating a Louisiana statute requiring schools to teach creation science if they taught evolution).

¹²⁶ *Id.* at 581-84.

¹²⁷ See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (plurality).

¹²⁸ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001).

¹²⁹ *Id.*

¹³⁰ *Id.*

Similarly, in *Sherman v. Community Consolidated School District 21*,¹³¹ the Seventh Circuit held that despite its religious connotation, a public elementary school may require students to recite the Pledge of Allegiance daily without violating the pupils' First Amendment rights so long as they were free not to participate.¹³² The court noted that the social pressures that remain despite "the lack of penalties or efforts by teachers to induce pupils to recite" should not be equated with deleterious legal pressures. Those pressures do not amount to coercion. Yet, the Pledge not only acknowledges religion but endorses it.¹³³ In 1954, Congress amended the Pledge of Allegiance to add the words "under God."¹³⁴ Additionally, the House Report on the legislation amending the Pledge explicitly stated, "the purpose of the amendment was to affirm the principle that 'our people and our Government [are dependent] upon the moral directions of the Creator.'"¹³⁵ This purpose, therefore, is not secular but religious. Consequently, the courts and the schools have allowed this recitation in public schools, and nothing hinders extending similar religious viewpoints to the same schools.

The *Sherman* court advanced the argument that the state is entitled to promote the virtues and values that justify its survival even though some students might be offended by those teachings. "Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught."¹³⁶ The court further noted that, "[t]he diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons."¹³⁷ In light of the above, it is safe to conclude that peer pressure is inevitable but constitutional.

Granted, younger children are more impressionable than older children but "common sense dictates that . . . [younger children] must

¹³¹ *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992).

¹³² *Id.* at 443-44.

¹³³ *Id.* at 443-45.

¹³⁴ See *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring in the judgment) (suggesting that the Court would uphold a statute that merely protects every student's right to engage in voluntary prayer, during appropriate moment of silence, during the school day).

¹³⁵ *Id.* at 88 n.3 (Burger, C.J., dissenting) (quoting H.R. REP. NO. 83-1683, at 2 (1954)).

¹³⁶ *Sherman*, 980 F.2d at 444.

¹³⁷ *Id.* (noting that a "pupil who takes exception to the prescribed curriculum of the school . . . is asserting a right to accommodation of his political or religious beliefs. Humane government[s] . . . [provide such] accommodation; programs such as tuition vouchers serve this interest without offending other constitutional norms"). *Id.* at 444-45 (citing *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986)).

first perceive a message before their tender years take on special significance.”¹³⁸ The expert testimony of Dr. Peter Fink, a child psychiatrist, offers keen insight into the question of impressionability.¹³⁹ He testified that “for children of Cub Scout age to get a message of endorsement, they would need to have some kind of direct explicit statements or behavior on the part of the endorsing agency.”¹⁴⁰ Since there no teachers or faculty members participate, it is difficult to foresee any school or government endorsement. “Furthermore, although the possibility of student peer pressure is omnipresent in any school environment, ‘there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate.’”¹⁴¹ In addition, the problem of students emulating teachers as role models and mandatory attendance requirements are avoided because the club meetings would be held during non-instructional times.¹⁴² Since the student club or community group meets during non-instructional times, the possible coercion problem is avoided.¹⁴³

(2) Religious discrimination equates with racial segregation

In fact, denying elementary school children equal access because of religious belief is equivalent to the segregation of children in public schools on the basis of race. They are equivalent mainly because of what is lost as a result of such classifications. The psychological effect of being excluded or rejected is equally devastating to children in the race relationship as in equal access fora. Access denial is also similar to segregation because the findings in *Brown v. Board of Education*¹⁴⁴

¹³⁸ *Sherman v. Cmty. Sch. Dist. 21*, No. 92C6674, 1993 WL 57522, at *5 (N.D. Ill. Mar. 4, 1993), *affd.*, 8 F.3d 1160 (7th Cir. 1993). *But see generally* *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002) (holding that the words “under God” are a violation of the Establishment Clause). The United States Supreme Court recently granted certiorari to determine whether the Ninth Circuit’s opinion is valid. *Elk Grove Unified Sch. Dist. v. Newdow*, 2003 U.S. LEXIS 7434 (Oct. 14, 2003).

¹³⁹ *Sherman*, No. 92C6674, 1993 WL 57522, at *5.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (plurality)).

¹⁴² *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *see also* *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 209-10 (1948) (invalidating a school’s release time program which released the students from their legal obligation to attend school upon the condition that they attend religious classes). The Equal Access Act defines “non-instructional time” as “time set aside by the school before actual classroom instruction begins or after classroom instructions end.” 20 U.S.C. § 4072(4).

¹⁴³ *See* *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Kennedy, J., concurring in part) (explaining that government may not coerce anyone to participate in religious activity).

¹⁴⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

applied equally to children in elementary and high schools.¹⁴⁵ (Indeed, Linda Brown herself was an elementary school student.) This equivalence between high school and elementary school becomes relevant because the Court applies strict judicial scrutiny to race classification as well as classifications that burden the exercise of fundamental rights like freedom of expression and religion. In *Brown*, the Court stressed that educational opportunities become unequal due to an invidious classification.¹⁴⁶ Differential treatment destroys inherent qualities that are incapable of objective measurement but make for greatness in a school.¹⁴⁷ The intangible considerations include

[the] "ability to study, to engage in discussions and exchange views with other students . . ." To separate them from others of similar age and qualification . . . generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . "The impact is greater when it has the sanction of the law A sense of inferiority affects the motivation of a child to learn. [Classification] . . . has a tendency to [retard] the educational and mental development of . . . children."¹⁴⁸

When children with religious convictions are treated as second-class citizens in the schools, they too experience a feeling of loss, inferiority and disorientation.

a. Establishment of a civic religion

The Establishment Clause was intended to safeguard against government officials prescribing 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."¹⁴⁹ The Court held that states may not go beyond the teaching of civic knowledge and skills to the actual teaching of civic virtues that "stand on a right of self-determination in matters that touch individual opinion and personal attitude."¹⁵⁰

What public school officials cannot do lawfully through the direct indoctrination of students during the school day, however, may not be accomplished indirectly by granting preferential access to their school facilities for the training of children in a generally moral or ethical, rather than a specifically religious, belief system. The Court has held that the government may not establish "an official or civic religion as a

¹⁴⁵ *Id.* at 493-94.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 493-95 (quoting *McNaurin v. Okla. State Regents*, 339 U.S. 637, 641 (1950) (alteration in original)).

¹⁴⁹ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁵⁰ *Id.* at 631.

means of avoiding the establishment of a religion with more specific creeds.”¹⁵¹

Organizations such as the Boy Scouts, Girl Scouts, and 4-H Clubs may engage in “pure” moral and character development through “the discussion of secular subjects from a religious viewpoint.”¹⁵² On the other hand, religious organizations are denied access to discuss “religious material through religious instruction and prayer.”¹⁵³ This dichotomy has the appearance of creating a government religion and ostensibly favoring its viewpoint over the others. The *Milford* court determined that it is erroneous to classify the teaching of morals and character development from a secular standpoint as different and distinct from the teaching of morals and character development from a religious viewpoint.¹⁵⁴

The Court’s rulings in *United States v. Seeger*¹⁵⁵ and in *Welsh v. United States*¹⁵⁶ denote that training children in deeply held moral or ethical beliefs is just as religious as training children in *Christian* moral or ethical beliefs. In *Seeger*, the Court expansively defined the term “religious training and belief” to include “belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.”¹⁵⁷ The claimant, Seeger, cited only famous philosophers like Aristotle, Plato, and Spinoza as support for his ethical belief in intellectual and moral integrity “without belief in God, except in the remotest sense.”¹⁵⁸ Yet the Court approved Seeger’s military service exemption as a conscientious objector despite his not belonging to an orthodox religious sect because it found Seeger’s belief to be sincere, honest, and made in good faith, and his conscientious objection to be based upon individual training and belief.¹⁵⁹

¹⁵¹ *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

¹⁵² *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 510 (2d Cir. 2000), *rev’d*, 533 U.S. 98 (2001).

¹⁵³ *Id.*

¹⁵⁴ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001) (finding no logical difference 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”).

¹⁵⁵ *United States v. Seeger*, 380 U.S. 163 (1965).

¹⁵⁶ *Welsh v. United States*, 398 U.S. 333 (1970) (plurality).

¹⁵⁷ *Seeger*, 380 U.S. at 165-66.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 187. Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958), exempted from combatant services in the armed services those who were conscientiously opposed to participation in war by reason of their religious training and belief. The Act defined the term “religious training and belief” as “an individual’s belief in a relation . . . but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.” *Seeger*, 380 U.S. at 164-65 (alteration in original).

A few years later, the Court granted another conscientious objector his military service exemption despite his irreligious status. Welsh, who had struck out the word "religious" throughout his exemption application, characterized his beliefs as having being formed "by reading in the fields of history and sociology."¹⁶⁰ The Court reasoned that although Welsh's moral and ethical views did not qualify as "religious" in the traditional sense, they were held "with the strength of more traditional religious convictions."¹⁶¹

In deciding the conscientious objector cases, the Court determined whether persons who adhered to purely moral or ethical belief systems could satisfy the statutory requirement of having a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."¹⁶² The Court held that moral and ethical codes occupy a position parallel to that filled by God in cases where such beliefs impose upon the individual a duty of conscience to do what is right and to refrain from doing what is wrong.¹⁶³ In *Rosenberger*, the Court stressed that such moral or ethical beliefs serve as the first principles of an ultimate reality to which the holder of such beliefs aspires.¹⁶⁴ The *Rosenberger* Court further required that the college policy prohibiting the use of student activity fees in support of "Wide Awake" also prohibits the use of the fees in support of "essays by hypothetical student contributors named Plato, Spinoza, and Descartes" who believed in atheistic ultimate reality.¹⁶⁵ By extension, if a school district posts the portraits of our Founding Fathers and national heroes in commemoration of Thanksgiving, then it would be consistent to allow the portraits of Moses or Jesus to be displayed as well, since some children may be as thankful for them as for non-religious figures.¹⁶⁶

Given the Court's aforementioned pronouncements and its even more recent decision in *Milford*,¹⁶⁷ many youth development organizations that train children in the context of deeply held moral and ethical beliefs arguably practice "religion" as defined by the Court in *Seeger* and *Welsh*. For instance, the Boy and Girl Scouts' goals include promoting personal growth and developing leadership skills. The Girl Scouts' third goal is to "develop meaningful values and ethics that will

¹⁶⁰ *Welsh*, 398 U.S. at 341.

¹⁶¹ *Id.* at 343 (quoting *Welsh v. United States*, 404 F.2d 1078, 1081 (1968), *rev'd*, 398 U.S. 333 (1970)).

¹⁶² *Welsh*, 398 U.S. at 346 (quoting the Universal Military Training and Service Act of 1948, 50 U.S.C.S. App. § 456(j)).

¹⁶³ *Id.* at 340.

¹⁶⁴ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 837 (1995).

¹⁶⁵ *Id.* at 836.

¹⁶⁶ *See C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000).

¹⁶⁷ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001).

guide their actions,” and empower them to act upon such values and convictions.¹⁶⁸ These are lofty and worthy goals. The children are unquestionably being instructed in ethical values and in a belief system that serves as first principles of an ultimate reality. If the state acquiesces in these set organizational values and beliefs, but rejects purely religious clubs for their religiosity, then it would be safe to conclude that the state sanctions, albeit in disguise, a civic form of religion. The Constitution abhors such a result, and the Court, as noted above, equates such establishment with moral and ethical codes that will eventually occupy the child’s religious subconscious.

b. Distinguishing access cases from school prayer cases

School policies conforming to recent equal access cases do not have the primary effect of advancing religion. Both in form and in substance, recent access cases are materially distinguishable from school prayer and other First Amendment cases that have some religious overtones. For instance, in *Lee v. Weisman*¹⁶⁹ and *Santa Fe Independent School District v. Doe*,¹⁷⁰ the Court concluded the government was pressuring students to participate in prayer. In *Lee*, the Court invalidated a Rhode Island school district’s practice of inviting local clergy to pray at school graduation ceremonies. By mandating a religious exercise at an event that students were, for all practical purposes, obliged to attend, the school district put those who objected to the prayers in the “untenable position” of choosing between appearing to participate and openly protesting.¹⁷¹ The Court held that the Establishment Clause forbids placing school children in such a position.¹⁷²

Applying the principles promulgated in *Lee*, the *Santa Fe* Court held that a Texas school district’s pre-game speech policy had “the improper effect of coercing those present to participate in an act of religious worship.”¹⁷³ Unlike an equal access program, in which students are not legally required to participate, the once-in-a-lifetime graduation ceremony in *Lee* or the weekly varsity high school football games in *Santa Fe* are more likely to result in coercive participation. The imposition of an opt-out religious condition on such popular events is one

¹⁶⁸ See *Girl Scouts*, at http://www.girlscouts.org/program/program_goals.html (last visited Aug. 24, 2003) (discussing the Girl Scouts’ four program goals).

¹⁶⁹ *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁷⁰ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

¹⁷¹ *Lee*, 505 U.S. at 590.

¹⁷² *Id.*

¹⁷³ *Santa Fe*, 530 U.S. at 312.

of the reasons why the practices in *Lee* and *Santa Fe* were in violation of the Establishment Clause.¹⁷⁴

Moreover, *McCullum v. Board of Education*¹⁷⁵ is distinct from the recent line of equal access cases. In *McCullum*, the Court struck down an Illinois school district's coordination of religious instruction on school property during compulsory time.¹⁷⁶ The school district did not open its doors to outsiders other than those offering religious instruction. The instructors were "subject to the approval and supervision of the superintendent of schools."¹⁷⁷ Students who signed up for, but failed to attend, religious classes were reported to their secular class teachers.¹⁷⁸ The *McCullum* Court held that the "close cooperation between the school authorities and the religious council in promoting religious education" violated the Establishment Clause.¹⁷⁹

In contrast, in a typical equal access case, the school district opens its facilities to other persons, clubs or organizations, while simultaneously denying such access only to religious speakers. Moreover, students are not coerced or required to attend the religious club meetings because: (1) only pupils with a permission slip may attend; (2) although religious club meetings may sometimes be held while students are present (i.e., during breaks, and before or after school) in the school premises, it should be stressed that the meetings are held concurrently with other secular club meetings; (3) students are not overtly or covertly punished or discriminated against for not joining or attending religious club meetings; and (4) school officials do not supervise or participate in religious club meetings. Hence, the close cooperation between school authorities and the religious council alluded to in *McCullum* is non-existent in an equal access situation. In light of the above considerations, the proposition that a school district provides a ready source of membership for a student-led religious club should be effectively dismissed.

3. Excessive entanglement: Religious speech versus state program/policy

In *Walz v. Tax Commission*,¹⁸⁰ the Supreme Court first announced the concept of excessive entanglement to inquire "whether a law or

¹⁷⁴ *Id.* at 294-301; *Lee*, 505 U.S. at 580-86.

¹⁷⁵ *Illinois ex rel. McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948).

¹⁷⁶ *Id.* "[T]he state's tax-supported public school buildings [are not merely] used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery." *Id.* at 212.

¹⁷⁷ *Id.* at 208.

¹⁷⁸ *Id.* at 209.

¹⁷⁹ *Id.*

¹⁸⁰ *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

governmental practice engenders excessive involvement between church and state.”¹⁸¹ A balance of interests must materialize between an equal access policy that unduly interferes with religious activities, and one that contemplates an equally impermissible government endorsement of religious groups or institutions.¹⁸² As noted by Chief Justice Burger in *Walz*, repealing property tax exemptions for churches and other religious institutions would result in “excessive and indeed continuous entanglement when the tax collectors went to each church facility and examined it to determine the amount of assessment.”¹⁸³ In *Widmar*, the Court also concluded that the school would risk greater entanglement by attempting to exclude religious worship and speech.¹⁸⁴ Scrutinizing organizations based on the content of their speech would only invite excessive entanglement.¹⁸⁵

Although the *Milford* Court did not elaborate on the entanglement issue, it found that the Club’s quintessentially religious subject matter would not have caused excessive entanglement between the government and religion.¹⁸⁶ Again, extending equal access to elementary school pupils invokes only minimal entanglement between church and state. First, school officials are present at club meetings (religious and non-religious) only to preserve order. Clubs do not need the presence of an official. Second, the school exerts no influence over club policies and does nothing to indicate its approval or disapproval. Third, students are neither directly nor indirectly compelled to participate in any religious exercise. The permission slips distributed by the school contain no religious message whatsoever. They are like posters inviting students to attend a meeting; they do not smack of religion the way daily prayers or the Ten Commandments do. Nor do they evoke religion the way that handing out Bibles in the classroom would. Concurring in *Wallace v. Jaffree*,¹⁸⁷ Justice O’Connor stressed that minimal entanglement is both permissible and inevitable:

In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a

¹⁸¹ *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 568 (3d Cir. 1984) (Adams, J., dissenting) (citing *Walz*, 397 U.S. at 664), *vacated by* 475 U.S. 524 (1986).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981).

¹⁸⁵ *Id.*

¹⁸⁶ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001).

¹⁸⁷ *Wallace v. Jaffree*, 472 U.S. 38 (1985).

sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy.¹⁸⁸

The Court has held that scrutinizing organizations based on the content of their speech would only invite excessive entanglement.¹⁸⁹ In so doing, the Court rebuffed several governmental attempts to decide religious questions or to interfere in religious affairs.¹⁹⁰ In fact, neither the judiciary nor school officials are qualified to make the difficult distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer.¹⁹¹ Civil officials have no juridically intelligible method for resolving doctrinal disputes, gauging the degree of a claimant's religious fervor, or identifying theologically correct or incorrect positions. Permitting school officials to scour the organic charters, programs, lesson books, songs, games, and planned expression of religious speakers or clubs would again cast the government adrift in the same uncharted but rejected waters of the too-religious-versus-secular-enough test. Such invasive monitoring of speech by school officials may lead to excessive entanglement.¹⁹²

¹⁸⁸ *Id.* at 69-70 (O'Connor, J., concurring).

¹⁸⁹ *Widmar*, 454 U.S. at 272 n.11.

¹⁹⁰ For instance, the Court made clear that religious beliefs and practices are constitutionally protected whether or not they are "central" to a religious person's faith. *See, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-51, 457-58 (1988) (rejecting Free Exercise Clause test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance").

¹⁹¹ *See, e.g.*, *United States v. Lee*, 455 U.S. at 257 ("It is not within the 'judicial function and judicial competence' to determine whether appellee or the Government has the proper interpretation of the Amish faith; [courts] are not arbiters of scriptural interpretation."); *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) (rejecting non-preferentialism because its application "invite[s] the courts to engage in comparative theology"); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring in part and dissenting in part) (observing that the "Court is ill equipped to sit as a national theology board").

¹⁹² *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (plurality) (stating that denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"). The *Rosenberger* Court discussed this issue in great detail. It stated that the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so,

Moreover, the inquiry as to the religiosity of speech would force people seeking to use a public forum to water down their speech and hide the religiosity of their message to convince a school official that a proposed meeting is not really for religious purposes. Such a demeaning and disturbing exercise is neither mandated nor allowed by the Constitution. The Constitution in no way permits school officials to operate a checkpoint where religious people who hide their beliefs and intentions are permitted, while those who express their true beliefs and intentions are rejected.¹⁹³

The Court, in *Milford*, *Widmar*, and *Rosenberger*, has already indicated its support of religious club meetings in public schools and is thus willing to accept any minor entanglement or crossover in order to treat religion equally and fairly. As a cautionary note, the distribution of permission slips should be done by persons other than school officials or teachers, as suggested by the Ninth Circuit in its affirmance of *Oakridge School District No. 76*.¹⁹⁴ This effort would at least quell the inference of entanglement between the school and the pupils.

IV. CONCLUSION

In the equal access domain, religious activity among students is not traceable to any state law or school regulation.¹⁹⁵ Rather, a group of students gathers voluntarily, without a teacher's participation, to read the Bible,¹⁹⁶ pray,¹⁹⁷ and discuss religious matters.¹⁹⁸ They seek

for the State to classify them." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

¹⁹³ The Constitution is not "some sort of homogenizing solvent that forces . . . religious groups to choose between assimilating to mainstream American culture or losing their political rights." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring).

¹⁹⁴ *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061, 1065 (9th Cir. 2001) (opining that the act of teachers' distribution of permission slips "goes beyond opening access to a limited public forum," but rather crosses the fine "line between benevolent neutrality and endorsement," and "puts teachers at the service of the club"). *But see* *Sherman v. Cmty. Consol. Sch. Dist. 21*, 8 F.3d 1160, 1165-66 (7th Cir. 1993), *aff'g* *Sherman v. Cmty. Consol. Sch. Dist. 21*, No. 92C6674, 1993 WL 57522 (N.D. Ill. Mar. 4, 1993) (permitting the distribution of religious flyers to fifth graders and hanging of religious posters on school grounds where the religious organization whose materials were distributed and posted never had "the students' undivided attention to promote its religious message"); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055-56 (9th Cir. 2003) (permitting teachers to make religious flyers available to elementary school pupils where flyers contained express disclaimer that activity is not school-sponsored, and activity would not occur on school grounds).

¹⁹⁵ *See* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115-17 (2001); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 570 (3d Cir. 1984), *vacated by* 475 U.S. 534 (1986).

¹⁹⁶ *Milford*, 533 U.S. at 103-04. The act of sharing the Word of God in a school setting should be encouraged, rather than discouraged, because of the wondrous blessings

permission to do this while their classmates are attending scuba diving club, ski club, dance club or French club.¹⁹⁹ To deny these students the right to meet on the same basis as their fellow students is to ignore the fundamentally and constitutionally critical difference between self-initiated religious activity and top-down bureaucratic religious orders, which are undoubtedly anathema to secular and religious principles alike.²⁰⁰ Failure to extend the principles espoused in *Milford*,²⁰¹ *Rosenberger*,²⁰² *Mergens*,²⁰³ *Lamb's Chapel*,²⁰⁴ and *Widmar*²⁰⁵ to non-instructional and other elementary school settings would result in a per se rule against the participation of elementary students in any organized religious activities based solely on the required custodial oversight of the children. It would require school officials to inquire imprudently and even unconstitutionally into the religiosity of speech and thereby force the suppression of the children's religious beliefs, thought, and expression. Such a rule would not only unfairly inhibit religion but also would abridge the students' most fundamental free speech rights. In the equal access arena, the Free Speech Clause and the Religion Clauses do not conflict, but converge; they stand best when they stand together.

that attend the hearing of the word of God. For the entrance of the Word brings life. With Him there is hope of glory in eternity, and "fruit of the Spirit" for our earthly life. See *Galatians* 5:22-23 (King James) (declaring that "the fruit of the Spirit is love, joy, peace, longsuffering, gentleness, goodness, faith, [m]eekness, and temperance: against such there is no law").

¹⁹⁷ Likewise, prayer among elementary school children and Christian clubs should be a practice worthy of emulation and praise. The Bible teaches us to pray in season and out of season. Further, that in all things, by prayer and supplication with thanksgiving we should make our request known to God. *Philippians* 4:6 (King James).

¹⁹⁸ *Bender*, 741 F.2d at 569 (Adams, J., dissenting).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Milford*, 533 U.S. at 98 (holding school district in violation of religious Club's free speech rights).

²⁰² *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830-32 (1995) (finding viewpoint discrimination in university's denial of printing costs for student-initiated religious publication).

²⁰³ *Bd. of Educ. v. Mergens*, 496 U.S. 226, 247-53 (1990) (plurality) (holding that the Equal Access Act, which prohibits discrimination against religious speech at secondary schools, does not violate the Establishment Clause).

²⁰⁴ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (finding viewpoint discrimination against religious speech).

²⁰⁵ *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981) (finding content discrimination against religious speech).