Religious Clubs and Non-Secondary Public Schools: Expanding the Scope of the Equal Access Act After *Good News Club*

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Introduction

The discussion of religion in public schools remains a controversial topic which often evokes fervent debate. Many people passionately support and rigorously defend their stance, either in support of or against, religion in these schools. The current state of the law ensures that school administrators are faced with the constant challenge of protecting free speech while maintaining regulatory control over religious speech.[1] A particular controversy deals with religion based clubs' use of public school facilities. In *Widmar v. Vincent*, the Supreme Court decided that a public university may not prohibit students from using school facilities to hold voluntary religious meetings and conduct general discussion on religious topics, when it grants other groups the same opportunities to conduct similar meetings on the school's campus.[2] The decision in *Widmar* led Congress to codify the Court's ruling in the Equal Access Act, intending to prevent similar discrimination against voluntary student led religious groups who held meetings during non-instructional time at secondary public schools, when those schools permitted other non-curricular groups to meet and utilize school facilities.[3] After *Widmar* was decided and the Equal Access Act was passed, it became clear that religious groups could meet at public universities and secondary schools, but

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[1] *See* Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1017-19 (1995)(proposing and defending the guidelines developed by the American Center for Law and Justice, the purpose of which is to guide public school administrators in regulating speech. This article states, "our hope is that the Model Guidelines will assist public school officials...in a way that allows them to maintain appropriate control over student discipline and conduct but that protects all student speech, including religious speech, consistently with the First Amendment Free Speech and Establishment Clause."). 2 SENTENCE PARENTHETICAL

[2] *See Widmar v. Vincent*, 454 U.S. 263 (1981)(rejecting the University of Missouri's open forum policy which, generally allowed registered student organizations to use university facilities, but excluded the use of those facilities for religious teaching).

[3] *See* Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984).

elementary and other non-secondary schools were left with no guidance. Instead, these schools were exposed to lawsuits when they either allowed religious clubs to meet[4] or prevented them from meeting.[5]

This confusion led to several opinions which, subsequently, resulted in more uncertainty as to what is permissible in public non-secondary schools. This note will first address the current state of the law and how it guides public universities and secondary schools in balancing free speech and religious activity. Then it will discuss the implications of extending the Equal Access Act to non-secondary schools and the arguments for and against such extension, concluding with suggestions for the successful extension of the Equal Access Act to non-secondary schools.

The Establishment Clause

The Establishment Clause of the First Amendment states that, "Congress shall make no law respecting an establishment of religion."[6] This Clause has become the focal point for much of the litigation involving religion and public schools; it provides the basis on which most suits are brought.[7] In its Establishment Clause jurisprudence, the Supreme Court has established two separate tests to evaluate the legality of various religious activities in public schools,[8] the endorsement test and the coercive test.[9] The advocates of the

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[4] See *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996), where the school district was successfully sued for offering classes based on Bible study.

[5] See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), where a Christian club for children successfully sued the school district, under the premise that failure to allow the club to use the school facilities violated its free speech rights.

[6] U.S. CONST. amend. I (declaring that Congress shall make no law prohibiting the free exercise of religion).

[7] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)("[s]tudents and their parents filed a § 1983 action against the school district, alleging that district's policies and practices, including policy of permitting student-led, student initiated prayer before football games, violated Establishment Clause."); *Sherman v. Cmty. Consolidated Sch. Dist. 21 of Wheeling Twp.*, 8 F.3d 1160, 1162 (7th Cir. 1993)("[t]he Shermans allege that the Boy Scouts' use of a public school's facilities and distribution of flyers on school grounds constitute an unconstitutional establishment of religion and deny them equal protection of the laws."); *Peck v. Upsher County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998)("[a]n action was brought challenging school board policy permitting non-students to disseminate Bibles and other religious materials in public schools during school hours.").

[8] *See* James L. Underwood, *The Proper Role of Religion in Public Schools: Equal Access Instead of Official Indoctrination*, 46 VILL. L. REV. 487, 528 (2001)(citing *Lee v. Wiseman*, 505 U.S. 577 (1992)).

endorsement test propose that it captures the true purpose of the Establishment Clause.[10] It provides guidance by allowing the Court to look beyond a particular form of religious support for an action and instead focus on the effect that action has on the community.[11] The goal of the endorsement test is to ensure that the government action at issue does not result in the "effect of communicating a message of government endorsement or disapproval of religions."[12]

Justice Kennedy outlined the coercion test in his dissent in *County of Allegheny v. American Civil Liberties Union*.[13] Under this test the government would not violate the Establishment Clause unless it provides direct aid to a religion that would tend to establish a state church, or coerces individuals to support or participate in a religion against their will.[14] The coercion test provides the courts with a more stringent standard, which in turn gives the government more leeway in its regulation of religious practices.

Many activities which have been found to violate the Establishment Clause on endorsement grounds are often accompanied by issues of coercion, however, courts have struck down religious programs at schools for separately violating either test.[15] Furthermore, in *Wallace v. Jaffree* the Supreme Court

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[9] *See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989):

> [o]ur cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to a religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'

Id. (Kennedy, J., concurring in part and dissenting in part, discussing a dual test for Establishment Clause violations).

[10] *See id*. at 631. Justice O'Connor, in her concurrence, stated, "no alternative test has been suggested that captures the essential mandate of the Establishment Clause as well as the endorsement test does, and it warrants continued application and refinement." *Id.*

[11] *See* Elizabeth A. Harley, *Freiler v. Tangipahoa Parish Board Of Education: Squeeze the Lemon Test Out of Establishment Clause Jurisprudence*, 10 GEO. MASON L. REV. 299, 315 (2001).

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

[13] *See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. at 655-64.

[14] *See id*. at 654-56.

[15] *See Books v. City of Elkhart*, 235 F.3d 292, 294-307 (7th Cir. 2000) (holding that a city's display of a monument inscribed with the Ten Commandments violated the endorsement test and was therefore unconstitutional); *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1480 (3d Cir. 1996) (finding, a student-led prayer at

explained how a law could constitute an endorsement but not be coercive.[16] On the other hand, the Court has held that certain activities may be coercive and violate the Establishment Clause, while maintaining that those same activities do not constitute endorsement.[17] In *Lee v. Wiseman* the Court struck down a program involving prayer at high school graduation ceremonies, notwithstanding the fact that both engaging in prayer and attendance at the ceremony were voluntary because attendance was essentially obligatory due to the social importance of the event and this constructive obligation was unconstitutionally coercive.[18]

Santa Fe Independent School District v. Doe

On occasion the Court has determined that certain practices have violated both tests as outlined above. In *Santa Fe Independent School District v. Doe*, the Court held that a program, initiated by students, allowing a high school's football game to include pre-contest prayer ceremonies, violated both the endorsement and coercion tests; even though student elections determined both the decision to have the prayer and the speaker, whom would deliver the invocation.[19] The school district argued that coercion was not an issue because the choice to have prayers was freely made by the students, additionally, due to the lack of an attendance requirement and extra-curricular nature of football games there is no concern of endorsement.[20] In addressing the coercion argument, the Court recognized the distinction between the peer pressure to attend athletic contests as being less than

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high school graduation, "the objector's presence at his or her graduation compels participation in the religious observance… this, the Constitution does not allow.").

[16] *Wallace v. Jaffree*, 472 U.S. 38, 56-62 (1985)(holding that an Alabama meditation statute permitting a daily moment of silence period was unconstitutional as an endorsement of religion devoid of secular purpose, notwithstanding the fact that students were simply to remain silent and not required to recite any specific religious invocation that could be considered coercive.)

[17] *See Lee v. Weisman*, 505 U.S. at 590 (1992) ("[t]hese concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject").

[18] *See id*. at 593.

[19] *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 298 (2000).

[20] *Id*. at 311 ("[t]o assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is formalistic in the extreme.").

the social pressure to attend graduation ceremonies,[21] nevertheless, the Court held that there is immense social pressure for a student to attend varsity football games to get a complete educational experience.[22] With regard to the prayer being an official endorsement of religion by the school, the Court held that although a student vote elected to have prayers, the ultimate endorsement was officially from the school because the decision to have the election was made by the school administration.[23] In the Court's opinion, the school district erred in declaring individual student participation in the election process a "circuit-breaker"[24] capable of converting public speech to private speech and thereby escaping endorsement violations under the Establishment Clause.[25]

The cases discussed above demonstrate that the application of the Establishment Clause via the endorsement and coercion tests provide a malleable analysis where, on occasion, an activity permitted by the Establishment Clause under one test may become impermissible under another.[26] Furthermore, certain practices may even be found to have violated both tests.[27] When applying the Establishment Clause to religious clubs the key determination becomes whether

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[21] In conceding that the pressure to attend sporting events is not as intense as the pressure to attend a graduation ceremony, the Court recognizes past cases where prayer at high school graduation has been deemed to violate the Establishment Clause. *Lee*, 505 U.S. 577. The plaintiffs in this case were hoping that by differentiating between graduation day and football games, the Court would determine that prayer at the latter did not violate the Establishment Clause. *Id.*

[22] *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311 (recognizing that traditions surrounding home football games create a sense of community and bolster the overall high school experience).

[23] *See id*. at 314-15.

[24] *See id*. at 298:

> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation.

Id. In that case, the school argued that election process would eliminate state endorsement because the students had to decide whether or not to have a prayer and then elect who would lead the prayer, this type of dual election served as a safety mechanism and alleviate state participation.

[25] *See id*. at 309 (The school district argued that the pre-game prayer ceremony at issue differed from the concerns of coercion and endorsement in *Lee* because the electoral process involved two steps: first deciding to have the prayer and second deciding who would lead the ceremony, this dual step electoral process would effectively convert the invocation from public speech to private speech satisfactorily passing the endorsement test).

[26] *See Wallace*, 472 U.S. at 56-62, where the practice failed the endorsement test, discussed supra; *see also*, *Lee*, 505 U.S. at 590, where the practice failed the coercion test discussed supra.

[27] *See Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.

there are any facets of the non-curricular religious club that would be perceived as an endorsement by the state through either the school district or the school, or on the other hand, that would tend to employ the pressures of coercion compelling students to join a particular club involuntarily.

Current State of the Law

Widmar v. Vincent

Widmar v. Vincent is the landmark Supreme Court case, which decided that public universities and colleges must open their facilities to religious clubs if they permit those facilities to extracurricular secular clubs.[28] The University of Missouri's claim was simple; the school could not allow religious clubs to use their facilities without violating the Establishment Clause of the Constitution.[29] The Court held that that because the school had created a forum which was open to various student groups, "in order to justify discriminatory exclusion from a public forum based only on the religious content of a group's intended speech,"[30] the school "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[31] In this decision the Court paved the way for religious clubs in public universities and colleges,[32] and led Congress to pass legislation, which would expand the rights of religious clubs in public high schools.

The Equal Access Act and Secondary Schools

[28] *See Widmar*, 454 U.S. 263.
[29] *See id*. at 270. The Court also recognized the University's compelling interest to comply with its obligations under the Constitution. *Id.*
[30] *See id*. at 274.
[31] *See id*.
[32] *See id*. at 271-74 (recognizing that "university students are of course, young adults. They are less impressionable than younger students and should able to appreciate that the University's policy of allowing religious groups is one of neutrality toward religion.").

In 1984, Congress passed the Equal Access Act[33] to prevent public secondary schools from engaging in unlawful discrimination against student-led, non-curricular clubs based on the content of speech associated with that club.[34] After the enactment of the Equal Access Act, when a secondary public school avails its facilities to any student-led, non-curriculum related group[35], it must uniformly allow for the meeting of all such student run, non-curricular groups, regardless of the religious, political or philosophical orientation of these groups.[36] The Act specifically applies to group meetings and activities occurring during non-instructional periods, which is interpreted as the time period before or after actual classroom instruction commences.[37]

The Equal Access Act also requires that the school have a "limited open forum" to fall under the purview of the Act.[38] Furthermore, the Act provides that a school will be in compliance with the law if it extends to the club a fair opportunity, defining fair opportunity according to five criteria: First the meeting must be voluntary;[39] second there can be no sponsorship[40] of the meeting by the school,

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[33] 20 U.S.C. §§ 4071 (A), (B):

> The Equal Access Act in pertinent part states: It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited access forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.

Id.

[34] See *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 234 (1990), where high school students brought suit against the school district to require it to give equal access to a Christian Club. The Court held that the diving club, chess club, and service club working with special education classes were non-curriculum related student groups, triggering the district's obligations under the Equal Access Act, and that the Act does not violate the Establishment Clause. *Id.*

[35] *See Mergens*, 496 U.S. at 241-42 (holding, "even if only one non-curriculum related student group meets, the Act's obligations are triggered and the school may not deny other clubs access on the basis of the content of their speech.").

[36] *Id*.

[37] *Id*.

[38] *See* 20 U.S.C. § 4071(b)(declaring that, a "limited open forum" exists when a public secondary school "grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time.").

[39] *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311 ("Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pre-game prayer has the improper effect of coercing those present to participate in an act of religious worship.").

[40] *See id*. at 311-12 (reasoning that a policy of mandatory prayer before public school football games, with school sponsorship of religion, the Court noted that some students must attend these

the government, or its agents or employees; third employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;[41] fourth the meeting does not materially and substantially interfere with the orderly conduct of educational activities;[42] and finally non-school persons may not direct, conduct, control, or regularly attend activities of student groups.[43] Despite the Act's valiant attempt to provide guidance to public secondary schools it has created confusion and criticism due in part to its failure to define "non-curriculum related student group", consequently, this has been the source of much debate.[44] Many school districts defend their denial of access on this basis, which in turn created litigation and opportunity for refinement by the courts. In *Mergens*, the Supreme Court determined the scope of the Equal Access Act required schools to allow religious clubs access to all accommodations available to other groups including bulletin boards, school newspapers, and public address

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games due to seasonal commitments); *see also* 20 U.S.C. § 4072(2) (stating, "the assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.").

[41] See *generally*, *Sease v. Sch. Dist. of Philadelphia*, 811 F. Supp. 183 (E.D. Pa. 1993) where the Equal Access Act's ban on school employee sponsoring and participating in a religious organization's meeting at a school applied to the school secretary's sponsorship and participation in the school's gospel choir. Evidence established that the secretary held herself out as a school employee when fulfilling her duties for the gospel choir and her claim that her role as leader of the choir was after school hours and thus outside of her employment did not exempt her conduct from violating the Act. *Id.*

[42] See *Ceniceros v. Bd. of Trustees*, 106 F.3d 878 (9th Cir. 1997), where a student brought an action against the school district seeking damages, alleging that her high school violated her rights under the Equal Access Act, and Free Speech and Free Exercise clauses of the Constitution, by denying her religious club permission to meet during lunchtime, as other clubs were allowed to do so. The Court of Appeals held that if the school allowed other clubs to meet during lunchtime they had to let the religious club meet; the lunch period qualified as "non-instructional time" within the meaning of the Act, and allowing such meetings would not violate the Establishment Clause. *Id.*

[43] 20 U.S.C. §§ 4071(c)(1)–(5), defining fair opportunity criteria.

[44] See *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake Sch. Dist.*, 30 F. Supp. 2d 1356 (D.Utah 1998), where the court stated that a qualitative analysis was required to determine whether a student organization is non-curricular and entitled to protection under the Equal Access Act. *Id.* The Court found that,

> [i]f at least part of a club's activities enhance, extend, or reinforce the specific subject matter of a class in some meaningful way, then the relationship between club and class is more than tangential or attenuated, and the club may be 'directly related' to the class in terms of its subject matter…where that is not the case, club and class have 'meaningfully diverged,' and the club may be 'non-curricular.'

Id. at 1360.

systems, in addition to permitting informal meetings during non-instructional time.[45]

However, the permissibility of non-secondary school students, such as elementary school or middle school students, to hold religious meetings during non-instructional time is not within the scope of the Act.[46] Congress failed to extend the Equal Access Act to cover these types of schools, but the Supreme Court has outlined a context in which middle and elementary schools could permit religious clubs to utilize school facilities without violating the Establishment Clause.

Good News Club v. Milford School District

In *Good News Club* the parents of a child attending Milford District Elementary School were also sponsors of a local Good News Club, which is a Christian organization.[47] The Milford School Board adopted a policy allowing district residents use of school facilities "for instruction in any branch of education, learning the arts, or for social, civic and recreational activities."[48] The plaintiffs, two school district residents, requested use of the school facilities to conduct religious meetings with children from the school district, which was subsequently denied by the administration based on the claim that such meetings would violate the Establishment Clause exposing the school district to unwanted liabilities.[49] The Supreme Court disagreed with the Establishment Clause

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[45] *See Mergens*, 496 U.S. at 247 (holding that, "official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.").

[46] 20 U.S.C. § 4072(1) defines secondary school as a public school, which provides secondary education as determined by state law. *Id.* Most states recognize secondary schools as "high schools." *High Schools*, WordNet.Princeton.edu, *available at* http://wordnet.princeton.edu/perl/webwn?s=highschool.

[47] *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001). The Good News Club is a private organization for children aged five to twelve years old, teaching children Biblical stories and games. Child Evangelism Fellowship Website, http://www.cefonline.com/ministries/goodnews.php.

[48] *Good News Club*, 533 U.S. at 100-01, where the Court stated that, "in 1992 Milford Central School enacted a community use policy adopting seven of [N.Y. Educ. Law] § 414's purposes for which its building could be used after school."

[49] *Id*. at 112-13 (explaining how the school argued "that even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the facilities.").

argument.[50] The Court decided in favor of the Plaintiffs holding that: the school created a limited open forum whereby its exclusion of the Christian Club from using the facilities violates the Free Exercise Clause of the Constitution,[51] and the school was unable to justify its denial of access as a requirement to comply with the Establishment Clause.[52]

The first issue addressed by the Court examined whether Milford violated the free speech rights of the Good News Club in failing to allow the Club access to the school's facilities.[53] The Court recognized that the school district is not required to allow every type of speech.[54] In considering whether or not the school district violated the Free Speech Clause, the Court applied the test for viewpoint discrimination and reasonable restriction based on the holdings of *Rosenberger v. Rector & Visitors of the University of Virginia*[55] and *Cornelius v. NAACP Legal Defense and Education Fund, Inc*.[56] The Court decided that Milford School District was discriminating against the Club based on view point,[57] therefore they

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[50] *Id.*

[51] *Id.* at 112 (deciding that excluding the Club from school facilities resulted in impermissible viewpoint discrimination).

[52] *Id* at 113-14 (holding that the school has no valid Establishment Clause interest).

[53] *Id*. at 100-01. The Club sought access to school facilities for general meeting and instruction purposes, all of which was to occur after school hours. *Id.* Accordingly, the Club was well within the non-instructional time period required by the Equal Access Act. *Id.; see generally* 20 U.S.C. §§ 4071(a),(b) (1984).

[54] *Good News Club*, 533 U.S. at 106-07 (assuming that Milford School District operated a limited public forum, and that "when the state establishes a limited public forum, it is not required to and does not allow persons to engage in every type of speech" and holding that the "State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 at 829 (1995)).

[55] *Good News Club*, 533 U.S. at 106-07 (concluding that the State's power to restrict speech is not without limits, and the restriction cannot discriminate against speech on the basis of viewpoint (citing *Rosenberger*, 515 U.S. at 829)).

[56] *Good News Club*, 533 U.S. at 106-07 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985) the restriction must be "reasonable in light of the purpose served by the forum.").

[57] *Good News Club*, 533 U.S. at 106-07 (comparing its previous holdings in *Rosenberger* and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), the Court found that Milford's basis for excluding the Club was analogous to the arguments previously advanced by these two cases and subsequently rejected by the Court, stating that in Lamb's Chapel the Court held that a school district violated the Free Speech clause by excluding a group from presenting films at the school based solely on the film's religious perspective on family values (citing *Rosenberger* the Court held that a university violated the Free Speech clause in failing to fund a student publication addressing issues from a religious perspective)).

did not need to determine if the restriction was reasonable.[58] The Court's examination of Milford's violation of the Free Speech clause relies on the notion that if a public school allows discussion of a particular topic from a non-religious basis, it must also allow those same discussions from a religious basis.[59] Having concluded that Milford Central School violated the Free Speech Clause of the First Amendment, the Court then turns its focus to whether or not a state's interest in protecting the Establishment Clause justifies viewpoint discrimination.[60]

The heart of Milford's argument focused on the coercion and endorsement prongs of the Establishment Clause test.[61] First the Court examined the coercive prong of the test to determine if the students would feel pressure to join the club or attend its meetings because they were being held at the children's school.[62] Milford argued that the children's age is a critical factor in determining whether or not they could be coerced.[63] The Court decided that coercion was not an issue because the children needed signed parental permission to join the club and attend meetings.[64] Essentially the Court was unwilling to allow the Establishment

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[58] *Good News Club*, 533 U.S. at 106-07 ("Because the restriction is viewpoint discriminatory we need not decide whether it is reasonable in light of the purposes served by the forum.").
[59] *Id*. at 110 ("What matters for the purposes of the Free Speech clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.").
[60] *Id*. at 111. The Court states Milford's claim that by restricting the Club's access to school facilities it was attempting to comply with the Establishment Clause.
[61] *Id*. at 112 (citing Milford's position that "[elementary school] children will 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.").
[62] *Id*.
[63] *Id*. at 113. The Court recognized the dangers, citing *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) (stating that "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."). However, the Court still held that,

> [W]hatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during non-school hours merely because it takes place on school premises where elementary school children may be present.

Id.
[64] *Good News Club*, 533 U.S. at 113:

> To the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children. . . Because the children cannot attend

Clause to trump fair access. The Court was unconvinced that coercion would present an issue.[65] Likewise, the Court found that Milford's argument that the children would view the club as being endorsed by the school was not viable.[66] In applying this prong of the test the Court compared the dangers of perceived viewpoint discrimination to that of perceived endorsement, concluding that the former is equally as important as the latter.[67] In the end the Court held that Milford could not deny the Club access to school facilities during any time period that is available to other groups.[68] It seems as if the Court is willing to conclude that maturity plays a small role in the determination of free exercise rights.[69]

The holding in *Good News Club* provided precedent for the future, resulting in the extension of facilities access to religious clubs during school time as well. In *Prince v. Jacoby*,[70] the Ninth Circuit relied on *Good News Club* and held that a school which opens facilities to other secular groups during "instructional" time, defined as a free period where attendance is taken, has a constitutional obligation beyond the scope of the Equal Access Act, to make the

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> without their parents' permission (permission slips), they cannot be coerced into engaging in the Good News Club's religious activities.

Id.

[65] *Id*. at 119-20. Justice Scalia, in his concurrence, distinguished the present element of peer pressure in this case from the pressure felt in *Santa Fe* to conclude that the coercion argument advanced by Milford was invalid as simple "peer pressure" and did not violate the Establishment Clause, unlike the pressure felt by the students in *Santa Fe. Id*. (Scalia, J., concurring)("Peer pressure…is…one of the attendant consequences of a freedom of association that is constitutionally protected.").

[66] *Good News Club*, 533 U.S. at 118-19.

[67] *Id*. The Court suggests that an elementary school child that is capable of perceiving the Club's use of school facilities as an endorsement may possibly perceive the exclusion of that club from accessing school facilities as viewpoint discrimination. *Id.* The Court holds that "there are countervailing Constitutional concerns related to rights of other individuals in the community. . . in this case those countervailing concerns are the free speech rights of the Club and its members." *Id*.

[68] *Id*. at 114 n.5 (stating that the Court will remain consistent with *Lamb's Chapel* and *Widmar*, concluding that the Good News Club cannot be excluded from using the facilities based on its religious instruction if those same facilities are generally available to the public).

[69] *See generally,* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 265 (1999)(recognizing that "the Supreme Court has accepted the notion that even elementary school children can develop deeply held religious beliefs that command respect under the Constitution.").

[70] *Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2001). Prince was a junior at Spanaway Lake High School who, along with other classmates, established a bible club to discuss issues facing high school students from a religious perspective. *Id.*

same facilities available to religious based groups.[71] This case presented a new issue; whether religious based clubs must be given equal access to facilities that meet during the school day.[72] The court concluded that "instructional" time would encompass any time period during the school day where instruction was available and attendance mandatory.[73] A few years later the Third Circuit would face the arduous task of defining "non-instructional" time. In *Donovan v. Punxsutawney Area School Board*, the court held that an "activities" period during school hours constituted "non-instructional" time.[74] Consequently the "activities" period should also be made available to religious clubs, or face a claim based on religious viewpoint discrimination.[75] Even though both of these cases relied on *Good News Club* to clarify and expand religious access in public high schools, they represent an important line of precedent and a willingness to allow broader interpretations of free speech in public schools. The *Good News Club* case is unique because it explored for the first time, religious freedom of speech in elementary schools. The Supreme Court's holding is important on many levels, most significantly it demonstrated that concern for free speech trumps that of immaturity, endorsement and coercion.[76]

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[71] *Id*. at 1091 (explaining that the school was not required to allow access to facilities under the Equal Access Act because the time period in question was "instructional," however when the school allowed other clubs and organizations to utilize the facility it must allow the World Changers Club the same access). The Court ruled that after allowing such access "it cannot deny access to some student groups because of their desire to exercise their First Amendment rights without a compelling government interest that is narrowly drawn to achieve that end," holding the issue to a standard of strict scrutiny.

[72] Benjamin Dowling-Sendor, *A Question of Equality: When it Comes to Student Clubs, What's Fair?*, AMERICAN SCH. BD. JOURNAL, Feb. 2003, at 2.

[73] Benjamin Dowling-Sendor, *Keeping it Simple: A Pennsylvania Case Asks 'What is Instructional Time?,'* AMERICAN SCH. BD. JOURNAL, Jan. 2004, at 1.

[74] *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003). This case represents a shift away from the traditional view that religious clubs should not be permitted to meet during school hours because "instructional" time commences when attendance is taken, and students are compelled to remain in school until the last bell rings. Instead, the court adopts a broad definition of "non-instructional" time, holding that such time may include the availability for instruction, but such availability does not automatically render the period "instructional." *Id.* at 223.

[75] *Id*. at 226 (ruling that "school officials denied the club equal access to meet on school premises during the activity period solely because of the club's religious nature…. [W]e hold that the exclusion constitutes viewpoint discrimination.").

[76] Note, *Children as Believers: Minor's Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2206 (2002)(quoting *In re Gault*, 387 U.S. 1, 13 (1967)("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone[,]" and

Beyond the *Good News Club*

The decision in *Good News Club* complies with prior case law, and reconfirms that public schools, which open their doors to various groups in a "limited open forum," must allow the same access to religious clubs. Many critics of the decision cite the possible confusion and practical issues the holding will provoke.[77] Others see it as a detrimental blow to the separation of church and state as required by the Constitution.[78] Those who support the decision argue that it guarantees the triumph of free speech in similar situations.[79] It now appears as if the courts would be willing to extend equal access to religious programs based in elementary schools.

In *Child Evangelism Fellowship of New Jersey v. Stafford*, the Third Circuit would have an opportunity to rule whether or not religious based clubs are permitted in elementary schools.[80] However this case would focus on the distribution of recruitment materials.[81] Stafford operates four schools in New Jersey, two of which are considered elementary schools.[82] Stafford argues that it had the requisite authority to regulate the content of speech because the fora at issue were closed.[83] The court held that once Stafford decided to open up the fora

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Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976)("Constitutional Rights do not mature and come into being magically only when one attains the state-defined age of majority.")).

[77] Linda Greenhouse, *The Supreme Court: Religion and Free Speech; Top court Gives Religious Clubs Equal Footing in Grade Schools*, N.Y.TIMES, June 12, 2001, at A1(explaining the reaction to the decision as disconcerting forcing administrators to revisit current school policies to avoid liability).

[78] Ian Bartrum, *Paradise Lost: Good News Club, Charitable Choice, and the State of Religious Freedom*, 27 VT. L. REV. 177 (2002)("*Good News Club* is the latest in a long line of decisions that have slowly undermined the Constitution's limits on establishment such that what once stood for the idea of strict separation now promises something like equal inclusion.").

[79] Douglas W. Kmiec, *Good News Club from the Court*, FIRST THINGS, Oct. 2001, at 12 (stating that the Court decided that protected religious speech is as important as speech based on other viewpoints and cannot be excluded solely because it is too religious).

[80] *Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004).

[81] *Id*. at 522 (explaining that Child Evangelism wanted to distribute flyers throughout the elementary school and during a back to school night, inviting students to join their Good News Club, with flyers that specifically state, "[t]his is not a school sponsored activity.").

[82] *Id*. at 518 (stating that Ocean Acres Elementary School instructs children from pre-kindergarten through second grade and McKinley Avenue Elementary School instructs children in grades three and four).

[83] *Id*. at 526 ("Stafford had no constitutional obligation to distribute or post any community group materials or to allow any such groups to staff tables at Back-to-School nights.").

to certain groups for speech on a particular topic it created limited public fora.[84] The issue for the court then becomes simple; did Stafford engage in viewpoint discrimination?[85]

The court reasoned that Stafford's arguments were identical to those advanced by Milford in *Good News Club*.[86] The court cites the argument in *Good News Club* that there is no real difference between instruction based on religion compared to instruction based on other foundations.[87] Relying on language in *Good News Club*, the court rejects Stafford's argument that it did not engage in viewpoint discrimination.[88] It seems as if Stafford singled out Child Evangelism not just because of the religious nature of the club, but because of the specific values the Good News Club preaches. This conclusion is reached because Stafford allowed other organizations such as the Boy Scouts and Girl Scouts to distribute materials, despite their religious ties.[89] The court held that Stafford clearly engaged in viewpoint discrimination.[90]

Next, Stafford argues that if it did employ viewpoint discrimination, the actions were justified to prevent Establishment Clause violations.[91] It appears as if Stafford learned nothing from *Good News Club*.[92] The Establishment Clause

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[84] *Id*. ("But when it decided to open these fora to a specified category of groups, it established a limited public fora.").
[85] *See id.*
[86] *Id*. at 529 (explaining that the Supreme Court rejected a similar argument based on viewpoint discrimination). "The Court pointed out that the Good News Club sought "to address a subject otherwise permitted under [the school's rules], the teaching of morals and character, from a religious standpoint." *Good News Club*, 533 U.S. at 108-09. The Court rejected the Second Circuit's position that "something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." *Id*. at 111.
[87] *See Child Evangelism Fellowship*, 386 F.3d at 529.
[88] *See id*. (explaining that the holding "forecloses Stafford's argument" denying viewpoint discrimination).
[89] *Id*. at 529-30 (recognizing that the Boy Scouts' literature refers to duties to God and to respect personal religious beliefs, while Girls Scouts pledge to serve God according to their beliefs).
[90] *Id*. at 530. Stafford's counsel argued, "We were concerned that, what the Child Evangelism Fellowship teaches appears to be inconsistent with what we're obligated to teach, that being diversity and tolerance." Oral. Arg. Tr. At 10. The court declares this "indisputably viewpoint-based."
[91] *Id*.
[92] *Id*. (explaining that similar arguments for the avoidance of Establishment Clause violations were rejected by the Supreme Court in *Lamb's Chapel*, 508 U.S. at 394-97; *Rosenberger*, 515 U.S. at 845-46; and *Good News Club*, 533 U.S. 110-20).

cannot be violated by giving Child Evangelism equal access to the fora at issue.[93] This is in accord with prior Supreme Court precedent.[94]

Next Stafford raises concerns about the central issues opposing religion in non-secondary schools; endorsement and coercion.[95] A subjective and situation-specific eye is needed to determine if a particular practice endorses religion.[96] Stafford claims that permitting Child Evangelism to have equal access to facilities would result in an impermissible endorsement of religion.[97] The court disagrees, citing the holding in *Good News Club* that children are unlikely to perceive equal access as an endorsement.[98] Of equal concern, is the idea that children who may perceive this access as an endorsement may also perceive denied access as condemnation.[99] There is no unconstitutional issue regarding the endorsement of religion.[100] In reaching its conclusion, the court relied on the very same reasoning set forth in *Good News Club*, demonstrating that endorsement concerns are not paramount.

Likewise, allowing Child Evangelism equal access to school facilities would not present a coercion issue.[101] The court examines the issue of coercion from a "pressure to participate" standpoint.[102] Unlike the students in *Lee v. Weisman*, or *Santa Fe*, students at Stafford's elementary school felt little social

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[93] *See Child Evangelism Fellowship*, 386 F.3d at 530.
[94] *Id*. ("The Supreme Court has repeatedly 'rejected the position that Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.'" (quoting *Rosenberger*, 515 U.S. at 839)).
[95] *Child Evangelism Fellowship*, 386 F.3d at 530-31.
[96] *Id*. at 531 ("In order to determine whether a challenged practice 'constitutes an endorsement or disapproval of religion,' the practice must be 'judged in its unique circumstances.'"), *Allegheny County*, 492 U.S. at 624-25 (O'Connor, J., concurring)(quoting *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring))(emphasis in *Allegheny*)")(*Allegheny County*, 492 U.S. at 625).
[97] *Child Evangelism Fellowship*, 386 F.3d at 531.
[98] *Id*. (explaining that in *Good News Club* the Court held that allowing the Club, along with other community based organizations, to meet on school grounds would not be perceived as an endorsement of any organization's beliefs).
[99] *Id*.

> [E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive hostility toward the religious viewpoint if the Club were excluded from the public forum.

Id. (quoting *Good News Club*, 533 U.S. at 117-18).
[100] *See Child Evangelism Fellowship*, 386 F.3d at 534.
[101] *Id*. at 535.
[102] *Id*.

pressure.[103] Child Evangelism simply distributed flyers detailing the Good News Club, and required parental permission to join.[104] The students at Stafford's elementary schools felt no social pressure to participate, therefore, coercion could not exist.[105]

In *Good News Club*, the Court determined that there is little substance to the argument that the age and immaturity of elementary and middle school children may result in Establishment Clause violations if religious clubs are allowed to meet at schools during non-instructional time.[106] The Third Circuit whole-heartedly agreed in *Child Evangelism*, if a public school allows non-curricular community based clubs access to facilities it must allow the same level of access to such clubs that are based on religious principles.[107] Other cases such as *Prince*[108] and *Donovan,*[109] suggest a willingness to allow religious clubs access to facilities during the school day provided it does not interfere with "instructional-time" in the high school setting. Nevertheless these cases represent an important trend toward expanding the access of religious clubs and suggest that any time comparable organizations are provided access, religious-based clubs must be afforded the same.

The States' Role in Equal Access Laws

Typically, a state is well within the scope of its powers to grant additional rights to its citizens above the minimum standards guaranteed by the Constitution. However, there are First Amendment issues that arise when a state attempts to expand the scope of rights concerning access for religious clubs.[110] The

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[103] *See id*. (discussing the pressure in *Lee* to attend a high school graduation ceremony where clergy led prayer was conducted (*Lee* 505 U.S. at 586)); *see also Santa Fe*, 530 U.S. at 311-12 (discussing the constitutionality of requiring student-athletes to attend a pre-game prayer meeting).
[104] *Child Evangelism Fellowship*, 386 F.3d at 535 (explaining that the distribution of information about the Good News Club was disseminated in the same manner as that of any other club, and that requiring parental permission would allow the parents to help a child decide if he or she wanted to join the club on a voluntary basis).
[105] *Id*. (explaining that the required permission slip and express voluntary nature of participation could never constitute coercion).
[106] *See Good News Club*, 533 U.S. 98.
[107] *Child Evangelism Fellowship*, 386 F.3d 514.
[108] *See Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2001).
[109] *See Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003).
[110] *See* Deborah M. Brown, *The States, the Schools and the Bible: The Equal Access Act and the State Constitutional Law*, 43 CASE W. RES. L. REV. 1021, 1061-62 (1993)(detailing federal preemption of state laws controlling religious activities in public schools).

expansion of rights for one group may violate the First Amendment resulting in the infringement on the rights of another. It has been recognized that the two First Amendment clauses, the Free Exercise Clause and Establishment Clause, are, on occasion at odds with one another.[111] The Free Exercise Clause endeavors to protect religious expression, while the Establishment Clause, in an attempt to ensure the separation of church and state, may place limits on that expression.[112] If a public school or school district grants rights beyond those contained in the Equal Access Act, there is a concern that the school may find itself in violation of the Establishment Clause under either the endorsement or coercion tests.[113] In addition, while the Establishment Clause permits content-based restrictions to a law that is neutral on its face, viewpoint restrictions definitively aimed at religious groups unavoidably offend rights under the Free Exercise Clause.[114]

The Court's ruling in *Good News Club* established that viewpoint discrimination is impermissible under the Constitution, and that state laws or regulations which conflict with the Equal Access Act are preempted and must yield to federal law.[115] Many cases involving the Equal Access Act confirm this. In *Garnett v. Renton School District*, the Ninth Circuit held that an Establishment Clause in the State of Washington's Constitution could not prevent schools from escaping their duties under the Equal Access Act.[116] Almost ten years later, in

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[111] *See Walz v. Tax Comm'r of N.Y.*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

[112] *See* Carolyn A. Deverich, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodation Argument for the Constitutionality of God in the Public Square*, 2006 B.Y.U. L. REV. 211, 215 (2006)("In addition, courts have also disagreed whether the Establishment and Free exercise Clauses are interrelated or mutually exclusive, at times treating the Religion Clauses as different sides of the same coin. . .and at others viewing the Clauses as universally irreconcilable.").

[113] *See generally* James E.M. Craig, *In God We Trust, Unless We Are a Public Elementary School: Making a Case For Extending Equal Access to Elementary Education*, 36 IDAHO L. REV. 529, 535 (2000)(suggesting that, in the alternative, Congress should simply extend the Equal Access Act to elementary schools thereby eliminating the burden of the states).

[114] *Good News Club*, 533 U.S. at 112-13 ("[A]voiding an Establishment Clause violation 'may be characterized as compelling' and therefore may justify content-based discrimination. . . . However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." (quoting *Widmar*, 454 U.S. at 271)).

[115] *Id*. at 98-99.

[116] *See Garnett v. Renton Sch. Dist.*, 987 F.2d 641 646 (9th Cir. 1993) (opining that "states cannot abridge rights granted by federal law. . . . The EAA provides religious student groups a federal

Prince v. Jacoby, the Ninth Circuit held that a Washington administrative regulation requiring the school to sponsor all extracurricular activities was in conflict with the Equal Access Act and therefore invalid.[117] The court explained that if the State Constitution must yield to the Act then the administrative regulations must do the same.[118]

As a result, recent case law suggests that the states' power to expand the rights of public school students in the realm of voluntary meetings in a limited open forum as defined by the Equal Access Act is minimal. The states are restricted in their ability to enact legislation that would enable student based religious groups to hold meetings, because of endorsement concerns under the Establishment Clause. A simple solution would be to deny access of school facilities to all non-curricular related groups. The Equal Access Act would be rendered inapplicable,[119] relieving the school districts of potential liability. This would also eliminate issues under the Free Exercise Clause because the school would not be demonstrating any hostility towards a specific religion, and the First Amendment would not be in play. A complete denial of access, although easy, does not seem like the right answer. The more common solution has been to simply deny any exercise of religion on school grounds.[120] However, it is important for the state to show neutrality towards religion. When balancing the children's perspective with the First Amendment it is important to consider both the implications of perceived hostility towards religion and possible endorsement

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right. State law must therefore yield." (citing *Northwest Central Pipeline v. Kansas Corp. Com.*, 489 U.S. 493, 509 (1989)).

[117] *Prince,* 303 F.3d at 1084 (holding that, "[I]f state regulations did require the School District to 'sponsor' the club as prohibited by the Act, then it is the regulations that must give way, not the District's obligation to provide equal access.").

[118] *Id*.

[119] *See* 20 U.S.C. §§ 4071-4074 (1984). The Equal Access Act requires that a limited open forum first be established to trigger the Act. If a school refuses to offer a limited open forum they would avoid any potential liability because the Act would never apply.

[120] *See* David Woodcock, *Too Young to Understand? Extending Equal Access to All Children in Public Schools Regardless of Age*, 13 ST. THOMAS L. REV. 491, 494 (2001)("[S]ome states and courts now sanction the exclusion of religious groups from elementary schools and other public forums simply because they are religious and only offer passing reference to the impressionability rationale.").

thereof equally.[121] The next section suggests a possible solution to the issues facing non-secondary public schools under the Equal Access Act.

Suggested Limitations for the Successful Implementation of Equal Access in Elementary and Non-Secondary Schools

The Court in *Good News Club* suggested that parental involvement plays an important role in maintaining accord with the Establishment Clause when considering religious clubs in non-secondary schools.[122] The main argument against allowing elementary and other schoolchildren, to conduct and participate in religious clubs focuses on their immaturity.[123] Those who are unwilling to extend the Equal Access Act based on immaturity cite two differences between elementary and middle school children compared to high school students. First, younger students are more impressionable and therefore more susceptible to endorsement concerns[124] and second, younger students are incapable of managing the meetings by themselves as required under the Equal Access Act.[125] In addition, the Supreme Court has recognized that age plays a role in free speech where students are concerned.[126] The Court has held that public elementary schools are permitted to protect their students from emotional and intellectual harm by limiting their free speech rights.[127] The purpose of school administration is to ensure that the educational process meets its defined goals with minimal

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[121] *See Good News Club*, 533 U.S. at 118-19.

[122] *Id.* at 100. The Court focuses on the requirement of parental consent to participate in most extra-curricular activities, including religious clubs. It is rarely questioned that parents are in a much better position to determine their child's involvement in religious activities.

[123] *See* Note, *Children as Believers: Minor's Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2207 (2002)(discussing the psychology of children's religious beliefs as it relates to First Amendment jurisprudence).

[124] *See Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1404-05 (1985)("Elementary schoolchildren are vastly more impressionable than high school or university students and cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on the part of a school administration.").

[125] *See* Craig, *supra* note 113, at 557-58.

[126] *See Wallace*, 472 U.S. at 81 (O'Connor, J., concurring) ("This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.").

[127] *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1545 (7th Cir. 1998) (opining that an elementary school student was "free to express himself on religious matters, in both written and spoken form, subject only to restrictions reasonably related to legitimate pedagogical interests.").

interference.[128] While this approach has merit, the major concerns regarding endorsement and the student's inability to conduct group meetings can be eliminated with the implementation of certain procedures.

Avoiding the appearance of school sponsored religious activity is important in the states' quest to maintain neutrality.[129] However, this does not require a school to deny religious clubs access to school facilities. Historically, the concept of endorsement has centered on the actions taken by a school.[130] Therefore, endorsement only becomes an issue when the state directs the religious activities in question.[131] One example of such control was discussed earlier in the case of *Santa Fe v. Doe* where pre-game ceremonies involving student led prayer were found to be the equivalent of endorsement of religion and therefore in violation of the Establishment Clause.[132] The Court declared that the pre-game prayers were not entirely voluntary because of the coercive social pressures at issue.[133] A key element of the Equal Access Act requires participation to be voluntary and led by the students.[134] The issue then becomes whether or not elementary school children have the capability to conduct such meetings. While there are obvious differences in the maturity levels of high school and elementary students, there is a solution to account for this difference. Parental control and consent along with certain modifications of existing law would help to eliminate the states' First Amendment concerns.

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[128] *Id*. ("The Code, including the provision requiring a statement disclaiming school endorsement which the district court found unconstitutional, is a facially reasonable tool for ensuring that student-sponsored publications do not interfere with the school's critical educational mission. It is therefore constitutional.").

[129] *See* Michael McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 149 (1986) ("Neutrality among religions and, when appropriate, between religion and non-religion, is a sound starting point for analyzing religious freedom issues.").

[130] *See Wallace*, 472 U.S. at 39 (opining that the state's enactment of a statute allowing daily prayer activities was an endorsement of religion and did not comply with the neutrality requirement of the Establishment Clause).

[131] Woodcock, *supra* note 120, at 515. The concept of impressionability as it relates to religion in elementary schools is only an issue when the state truly directs the religious activity. There is little concern where participation is voluntary.

[132] *See Santa Fe*, 530 U.S. at 316.

[133] *Id*. at 315 (recognizing that the social atmosphere of high school creates pressure to attend extracurricular events like football games, and that school programs allowing prayer at such events, despite being led by students, is not entirely voluntary).

[134] 20 U.S.C. §§ 4071(c)(1),(5)(defining criteria for equal access to require that meetings be voluntary, student initiated and prohibiting school employees from leading the meeting).

The Court has recognized a parent's right to control the religious education of their child.[135] Requiring parental consent to participate in religious meetings presents a valid solution to endorsement issues by imputing the parent's ability to determine neutrality to the child.[136] In *Herdahl*, the court explained how informed parental consent places elementary school students on equal footing with high school students whom it has already been determined are capable of discerning endorsement from general supervision.[137] If informed parental consent extends elementary students such status, the Equal Access Act should apply to them. The authority to allow children to participate in religious clubs vests with the parents.[138] Parental consent in the context of religious clubs is different because it requires voluntary participation[139] and does not affect students who choose not to participate.[140] Take for example, those students in *Santa Fe*, who had to choose not to participate in pre-game prayers, their decision was reactionary.[141] Students who choose to participate in religious clubs with the

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[135] *See Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972)(explaining that through its responsibility to provide education to the public the state has the power to impose the necessary regulations to control such education; however, "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.").

[136] *See* Craig, *supra* note 113, at 558,

> The Court in Herdahl v. Pontotoc County School District, discussing the inability of the elementary school children to recognize the difference between mere faculty and school endorsement, explained that through parental consent '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.'

Id. (quoting *Herdahl v. Pontotoc Cty. Sch. Dist.*, 933 F. Supp. 582, 590 (N.D. Miss. 1996)).

[137] *See Herdahl*, 933 F. Supp. at 590. The premise being the decision made by the parents eliminates any concerns of endorsement because they have made an informed decision on behalf of their child.

[138] *See Yoder*, 406 U.S. at 213-14.

[139] *Wallace,* 472 U.S. at 81 (O'Connor, J., concurring)("This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.").

[140] *See Herdahl*, 933 F. Supp. at 590 ("Furthermore, the court finds that no imprimatur of state involvement is exhibited in this practice as it relates to the non-participating students.").

[141] *See generally*, *Santa Fe*, 530 U.S. 290. These students had to decide whether or not to participate in student-led prayer before each home football game. They did not seek out participation; instead they had to choose whether or not to participate amidst the social pressures of the high school environment.

consent of their parents proactively seek out such clubs; therefore endorsement concerns are practically eliminated.[142]

Next we turn to the requirement that groups be student-led.[143] It would undoubtedly be difficult for elementary aged schoolchildren to lead religious club meetings, or any other type of meetings. Perhaps the law needs to be amended to permit some level of adult involvement. Informed parental consent plays a crucial role here.[144] If parents are duly informed of the content and procedures of religious clubs there would be no harm in allowing these clubs to meet on public school premises.

Much of the early litigation surrounding the Equal Access Act focused on the concept of "non-instructional time" as defined by the Act.[145] The Act required groups to meet during non-instructional time to avoid interference with the educational process.[146] Many courts interpreted this time to include any period during the school day where no instruction was given, this included study halls and lunch periods.[147] In the elementary and non-secondary school context this would undoubtedly raise Establishment and Free Speech Clause concerns.[148] When groups are permitted to meet during the school day these students may certainly perceive clubs, which are permitted to do so endorsed and those that are not condemned. The simple solution is to narrowly define non-instructional time

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[142] *Herdahl*, 933 F. Supp. at 590 ("The risk of the appearance of improper state involvement is significantly diminished in an opt-in type of situation as exists here, as opposed to an opt-out situation.").

[143] *See* 20 U.S.C. §§ 4071 (c)(1).

[144] *See* Craig, *supra* note 113 (suggesting that informed consent "again. . .puts elementary children on equal footing with secondary school students, thus obviating the need for meetings to be student initiated and led."). Informed consent may not obviate this need but it does suggest a willingness to allow adult supervision if properly informed.

[145] 20 U.S.C. §§4072(4)(defining non-instructional time as time prior to or after actual classroom instruction).

[146] *See generally Donovan*, 363 F.3d. at 221 (attempting to offer a definition of non-instructional time consistent with preservation of the educational process).

[147] *See Ceniceros v. Bd. of Tr. of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997). In this case a high school lunch period was considered non-instructional time and the court held the school in violation of the Equal Access Act for failing to allow a religious club to meet when it allowed other non-curricular to conduct meetings during this time. *Id.*

[148] See generally Jennifer L. Specht, Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools, 91 CORNELL L. REV. 1313, 1325-26 (recognizing that the uniqueness of elementary school classrooms presents a difficult challenge in protecting and maintaining free speech).

as it pertains to non-secondary schools.[149] Instead of allowing clubs to meet any time class is not in session, the law would require these meetings to take place either before the first class of the morning or at the end of the day after school is dismissed. The Supreme Court seemed to recognize the possibility of adult involvement in religious and other club meetings at the elementary school level provided that the meetings occur during these times and were not led by teachers.[150] To successfully extend the Equal Access Act to non-secondary schools three requirements would have to be met. All clubs would only be permitted to meet before the school day begins or after the school day ends; participation should require informed parental consent; and adult involvement should be limited to non-school employees or qualified parents.[151] If these guidelines are followed, non-secondary schools can maintain neutrality and avoid issues of endorsement and hostility, which arise when certain groups are given access while others are denied.[152]

As mentioned earlier, those who oppose extending the Equal Access Act to non-secondary schools often cite Establishment Clause violations as a primary concern.[153] In *Good News Club*, the Supreme Court explained the importance of refraining from creating a hostile view towards religion.[154] If the Equal Access Act, with certain limitations, is extended to elementary and other non-secondary

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[149] *See Prince,* 303 F.3d at 1090-91. Here the court held that when a school makes facilities available to other secular groups at any time during the school day, the school creates an obligation beyond the Equal Access Act to allow religious clubs to meet.

[150] *Good News Club*, 533 U.S. at 117 ("[W]hen individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent, [Establishment Clause] concerns are not present.").

[151] *Id*. The Supreme Court found no perceived endorsement of a religious club's activities because the club meetings were not held in elementary school classrooms, the instructors were not school teachers, the students ranged in age, and the children who attended the club had obtained signed permission slips from their parents. *Id*.

[152] *See Mergens*, 496 U.S. at 252 (explaining that a "[b]road spectrum of officially recognized student clubs. . .and the fact that. . .students are free to initiate and organize additional student clubs. . .counteract any possible message of official endorsement of or preference for religion or a particular religious belief.").

[153] *See* discussion *supra* note 118.

[154] *See Good News Club*, 533 U.S. at 114 (citing *Rosenberger*, 515 U.S. at 839) ("[T]he guarantee 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.").

schools neutrality is accomplished.[155] Under these circumstances school districts are able to avoid endorsement and discrimination issues at the same time, and therefore escape Establishment Clause violations.[156] If this is true some form of Equal Access should be extended to non-secondary school religious clubs.

Conclusion

Religious activity in public schools will always be a source of controversy.[157] Those opposed to religion in schools will argue Establishment Clause violations. Those in favor typically seek the same opportunities afforded to other groups.[158] They do not wish to indoctrinate students through non-voluntary religious activities; they simply want to ensure that all groups are treated fairly. The state must walk a fine line, balancing perceptions of neutrality and hostility to maintain accord with the First Amendment. The Equal Access Act did little to help their cause.[159] The resulting confusion warrants another look by Congress. The Equal Access Act should be amended to expressly include elementary and other non-secondary schools. This amendment must include limitations. Any form of new law should consider the requirements of informed parental consent, a properly defined non-instructional time, and limited adult involvement. The Supreme Court's decision in *Good News Club* suggests the need for such change. An amended version of the Equal Access Act that includes specific guidelines for non-secondary schools is long over due.

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[155] *Good News Club*, 533 U.S. at 114 (The Court claims that the Good News Club's desire to be treated the same as other clubs is the essence of neutrality, in fact, "allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school district] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.").

[156] *See* Craig *supra* note 113. The author claims that prior decisions by various courts suggest that extending the Equal Access Act to elementary schools would not violate the Establishment Clause because they have considered the issues of endorsement, impressionability, and neutrality.

[157] *See* Woodcock, *supra* note 120, at 492-93. The author explains the difficulty of fulfilling the need to develop morals and character at an early age. Many parents want their children's values to be developed through religion; however there are several concerns that arise when religion intersects with public education.

[158] *See generally Good News Club*, 533 U.S. 98 (finding that the plaintiffs only asked that the same opportunities made available to other non-curriculum clubs be made available to them).

[159] *See generally* Aaron H. Caplan, *Stretching the Equal Access Act Beyond Equal Access*, 27 SEATTLE U. L. REV. 273 (2003)(arguing that, as currently constructed, the Equal Access Act creates confusion regarding its applicability in non-secondary schools).