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ACCESS TO PUBLIC SCHOOL FACILITIES FOR RELIGIOUS EXPRESSION BY STUDENTS, STUDENT GROUPS AND COMMUNITY ORGANIZATIONS: EXTENDING THE REACH OF THE FREE SPEECH CLAUSE

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I. INTRODUCTION

Until Congress' passage of the Equal Access Act (EAA)[1] in 1984 and the Supreme Court's later decision in *Lamb's Chapel v. Center Moriches Union Free School District*,[2] public school districts had few constraints on prohibiting religious expression in their schools. In the EAA, Congress took the first step toward opening public schools to religious expression by creating a limited open forum in schools where non-curriculum-related student groups were permitted to meet during non-instructional time.[3] In creating a statutory right of expression, Congress, in effect, reversed two earlier federal circuit decisions that had denied a constitutional right of expression.[4] The Supreme Court's upholding of the constitutionality of the EAA in 1990 against a strong Establishment Clause challenge[5] presaged the Court's unanimous decision[6] three years later in *Lamb's Chapel*, which recognized that constitutional rights of free

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1. 20 U.S.C. § 4071 (1988). The EAA provides that once a secondary school has created a "limited open forum," the school must permit all "noncurriculum related student groups" to meet "during noninstructional time" regardless of the groups' "religious, political, philosophical, or other speech content." *Id.*

2. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.* 508 U.S. 384 (1993) [hereinafter *Lamb's Chapel*].

3. 20 U.S.C. § 4071 (1988).

4. *See Brandon v. Bd. of Educ. of Guilderland C. Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980) (holding that the Establishment Clause trumped the free exercise and free speech rights of student religious groups to meet on school premises); *Lubbock Civ. Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982).

5. *Bd. of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990).

6. While all Justices concurred in the judgment, two separate concurring opinions were also generated involving three Justices.

speech expression applied to the K–12 level.[7]

Although *Lamb's Chapel* dealt with the expressive rights of a community organization (an evangelical church) as opposed to individual students or student groups,[8] the ice of resistance to religious activity in public schools had been broken. In *Lamb's Chapel*, the Court unanimously held that once a school district had permitted a non-religious viewpoint on the subject of child rearing on its premises, it could not discriminate against a church's presentation of a religious viewpoint on the same subject.[9] By prohibiting viewpoint discrimination, the Court created a constitutional floor of protection for religious expression. In the decade since *Lamb's Chapel*, the pressure on school boards from religious claimants to treat all religious expression the same as non-religious expression has been unrelenting. The purpose of this article is to examine how courts, in their more recent decisions, have addressed the religious speech claims of individual students, student groups, and community organizations.

II. THE RANGE OF RELIGIOUS CLAIMS BEFORE PUBLIC SCHOOLS

Both individuals and groups can make religious claims on public schools. Individual claims by students can involve a wide range of issues, such as religious meetings during non-instructional time,[10] wearing religious clothing or symbols,[11] making speeches,[12] or distributing

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7. *Lambs Chapel*, 508 U.S. at 396–97. Twelve years prior to *Lamb's Chapel*, the Court, in *Widmar v. Vincent*, 454 U.S. 263 (1981), held that a state university that made its facilities generally available to registered student groups could not deny the use of its facilities (vacant classrooms and the student union) to a student religious group. The Court held that a limited open forum "does not confer any imprimatur of state approval" on a religious group for purposes of the Establishment Clause, and refusal to recognize a religious group based on the content of its message is a violation of free speech. *Id.* at 274. The fact that twelve years had to intervene before free speech was applied to religious speech at the K–12 level reflects the tenacity of the judicial mindset that religion could be treated differently at the K–12 level.

8. *See Lamb's Chapel*, 508 U.S. at 384. *In Lamb's Chapel*, the Court held that a church could show a six-part film series from Dr. James Dobson that approached child rearing from a Christian perspective during after-school hours at a high school, based on its finding that the school board had created a free speech limited public forum by permitting other perspectives of child rearing to be presented on its facilities. *See Lamb's Chapel*, 508 U.S. at 388 n. 3, 392 n. 5.

9. *Lamb's Chapel*, 508 U.S. at 396–97.

10. *See e.g. Ceniceros v. Bd. of Trustees of San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997) (entitling students to meet for religious purposes during lunch).

11. *See e.g. Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (finding that Sikh student was entitled to wear a religious ceremonial knife).

12. *See e.g. Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) (finding that a principal's denial of a valedictorian's use of religious proselytizing comments in his speech was not a violation of free speech).

literature.[13] Students can make claims through their religious organizations as well. Those claims most frequently involve meeting space in school facilities,[14] availability of resources,[15] and distribution of religious materials.[16] Community religious organizations also make demands of school officials, but their demands have been limited to asking for meeting space on school premises[17] and requesting distribution of religious materials.[18]

Religious claims concerning public schools raise three legal issues. These three issues represent the precarious balance between the Free Speech (and, occasionally, the Free Exercise) Clause and the Establishment Clause. First, what religious practices should be allowed under free speech? Under *Lamb's Chapel*, a school that permits subject matter expression from a non-religious perspective during non-school hours cannot refuse a religious organization's viewpoint on the same subject.[19] In other words, unless the school wants to prohibit all expression on a particular subject, it is required by free speech to allow a religious viewpoint where other viewpoints have been permitted.[20]

Second, what religious practices are prohibited by the Establishment Clause? Some religious expression, such as school-organized or sponsored prayer at graduations[21] or football games,[22] are not permissible

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13. *See e.g. Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (holding that an elementary student is not entitled to distribute candy canes with religious messages during classroom activities).

14. *See e.g. Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993) (holding that students are entitled to form a religious club under EAA and meet on school premises like other student clubs).

15. *See e.g. Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003) (holding that a student religious club is entitled under free speech to the same resources available to other student clubs).

16. *See e.g. Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003) (finding that students were entitled to distribute religious messages attached to candy canes).

17. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) [hereinafter *Good News*] (holding that the school district was required to permit a religious community club to meet on school premises immediately after school).

18. *See C.E.F. v. Stafford Township Sch. Dist.*, 233 F. Supp. 2d 647 (D. N.J. 2002) (holding that a religious community organization was entitled to distribute materials, post items on school walls, and have table space at back-to-school-nights).

19. *Lamb's Chapel*, 508 U.S. at 396–97.

20. *See also Rosenberger v. Rector and Visitors of U. of Va.*, 515 U.S. 819 (1995) (finding that the publication of a student religious organization is entitled to funding on the same basis as other publications from differing viewpoints).

21. *See Lee v. Weisman*, 505 U.S. 577 (1992) (holding that school organized graduation prayers violated the Establishment Clause).

22. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that student initiated and student led prayer before football game violated the Establishment Clause).

because, under the Establishment Clause's endorsement[23] and psychological coercion[24] tests, a school would be perceived as sponsoring religion and coercing participation in a religious activity.

Third, what religious practices, even if not required under the free speech clause, are permissible because they do not violate the Establishment Clause? School graduations are controlled by school boards and school officials and are, essentially, non-public fora. However, school boards could choose to give control over the content of graduation speeches to the students. To the extent that school officials are willing to create what would be a limited public forum for student speeches during an otherwise school-controlled graduation, case law suggests that a student's speech with religious content might be permissible.[25]

III. COMMUNITY ACCESS TO SCHOOL PREMISES

In 2001, the Supreme Court followed up on *Lamb's Chapel* with *Good News Club v. Milford Central School.*[26] Invoking the same New York statute at issue in *Lamb's Chapel,*[27] the Milford School Board denied the Good News Club, a private Christian club for children between the ages of six and twelve, permission to hold meetings immediately after school at an elementary school, even though other community groups, such as the scouts and 4–H club, had been granted such permission.[28] In finding a free speech violation, a strongly divided Court[29] held that the

23. *See Lynch v. Donnelly,* 465 U.S. 668, 687–94 (1984) (O'Connor, J. concurring) (articulating her two-part endorsement test for the first time).

24. *See Lee,* 505 U.S. at 577 (articulating for the first time Justice Kennedy's psychological coercion test to invalidate graduation prayer).

25. *Compare Jones v. Clear Creek Indep. Sch. Dist.,* 977 F.2d 963 (5th Cir. 1992) (upholding school board resolution permitting high school volunteers to deliver nonsectarian, non-proselytizing invocations at their graduation ceremonies) *with ACLU v. Black Horse Regl. Bd. of Educ.,* 84 F.3d 1471 (3d Cir. 1995) (enjoining school board from permitting prayer at graduation based on senior votes on prayer or no prayer). *See also Doe v. Madison Sch. Dist. No. 321,* 147 F.3d 832 (9th Cir. 1998), *decision withdrawn,* 177 F.3d 789 (9th Cir. 1999) (Prior to withdrawal of its decision, the court had upheld the school board's policy permitting four students with the highest GPAs to deliver a graduation speech that could take the form of "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." *Id.* at 834.).

26. *Good News,* 533 U.S. at 98.

27. N.Y. Educ. L. § 414 (McKinney 2000) (This statute authorizes local school boards to adopt reasonable regulations for the use of school property for ten specified purposes, including the holding of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." In interpreting this law, the school districts in both *Lamb's Chapel* and *Good News* prohibited the use of their schools for religious purposes.).

28. *Good News,* 533 U.S. at 136 (Souter & Ginsburg, JJ., dissenting).

29. Although the vote was 6–3 to reverse the Second Circuit decision that had, in turn, reversed the federal district court's granting of summary judgment to the school district, Justice

school had violated the free expression rights of the Good News Club by refusing it permission to meet.[30] The reasoning of the majority and dissenting opinions in the case[31] mirror in a broader perspective the fundamental differences among the Justices regarding the role of religion in public education.

Justice Thomas, reflecting a religious accommodationist position, found that once the school had allowed other groups addressing morals and character development to use school facilities after school, "it [was] quite clear that Milford engaged in viewpoint discrimination when it excluded the [Good News] Club from the afterschool forum."[32] More importantly, characterizing the Club as "quintessentially religious" or "decidedly religious in nature" did not exclude it from free speech protection.[33] The school district lacked an Establishment Clause defense because "the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent . . . ."[34] In interesting free speech dictum, the majority refused to permit use of a Heckler's Veto type argument by those desirous of restricting equal access simply because the youngest members of the audience might perceive the Club's presence on school premises as endorsement of religion.[35]

Breyer's concurring opinion was barely a vote with the majority. Justice Breyer essentially reversed the court of appeals decision because the district court's summary judgment had been appealed and, thus, no decision on the merits had yet been made. He found that sufficient evidence existed to conduct an evidentiary hearing as to whether the Good News Club's presence at the school would satisfy the Establishment Clause's endorsement test. In other words, Justice Breyer voted with the majority only on procedural grounds. Because five votes existed to decide the case on the merits, (Justice Thomas, with Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy), one cannot be certain how Justice Breyer would have voted if the case had been re-appealed to the Court on the merits.

30. *Good News*, 533 U.S. at 109.

31. Justice Thomas wrote for the majority, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. Justice Scalia also filed a concurring opinion. Justice Breyer filed an opinion concurring in part. Justice Stevens filed a dissenting opinion, as did Justice Souter, in which Justice Ginsburg joined.

32. *Good News*, 533 U.S. at 109.

33. *Id.* at 111.

34. *Id.* at 113.

35. *Id.* at 118–19. The concept of the Heckler's Veto owes its origin to *Terminiello v. City of Chi.* 337 U.S. 1 (1949), where the Court refused to limit the rights of expression in a public forum because of the nature of opposition to the views expressed. *See also Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and concurring in judgment) (In protecting the right of the KKK to display a cross on state property operated as a public forum, Justice O'Connor observed that, "because our concern is with the political community [at] large . . . the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort . . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].").

On the other hand, Justice Stevens, taking a religious separationist position in his dissenting opinion, argued that a school district could choose to allow student meetings that discuss topics from a religious point of view while, at the same time, prohibiting meetings that engage in "proselytizing or inculcating belief in a particular religious faith."[36] This latter kind of meeting, "designed to convert children to a particular religious faith," he saw as "tend[ing] to separate young children into cliques that undermine the school's educational mission."[37] Justice Stevens' position was echoed in Justice Souter's dissent, where he opined that because the Club was holding "an evangelical service or worship calling children to commit themselves in an act of Christian conversion,"[38] access to school facilities was outside the school's limited public forum.

Despite its decision for the religious club, the *Good News* majority left three issues unresolved. First, the Supreme Court in *Good News* (and *Lamb's Chapel*, as well) did not determine whether the school districts had created limited public fora. In both cases, the parties had stipulated the existence of a limited public forum, thus obviating the need for the Court to determine whether one, in fact, had existed.[39] As a result, one is left to speculate as to what the elements of a limited public forum might be. One possibility is that the requirements for a free speech limited public forum parallel those of an EAA limited open forum. The reasoning would be that, just as even one non-curriculum-related club is sufficient to invoke a limited open forum under the EAA,[40] so also would even one non-religious viewpoint be sufficient to invoke free speech protection for a religious viewpoint.[41] Although the Supreme Court has yet to address the merits regarding the elements of a limited public forum in a viewpoint discrimination case, several lower federal courts, as will be seen below, have begun making connections between the EAA and free speech.[42]

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36. *Good News*, 533 U.S. at 130 (Stevens, J., dissenting).

37. *Id.* at 132.

38. *Id.* at 138 (Souter, J., dissenting).

39. *Lamb's Chapel*, 508 U.S. at 391–92; *Good News*, 533 U.S. at 106.

40. *See e.g. East High Gay/Straight Alliance v. Bd. of Educ. Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (D. Utah 1999) (holding that a school board operated a limited open forum under EAA by permitting non-curriculum related groups to meet, and therefore, the high school would have to recognize the gay/lesbian group).

41. *See Lamb's Chapel*, 508 U.S. at 391 n. 5 (identifying, for purposes of determining whether a limited open forum had been created by the public school, only one speech by a psychologist on the subject of human development); *Good News*, 533 U.S. at 108 (focusing on use of the premises by the Boy Scouts for character and moral development).

42. *Prince*, 303 F.3d 1074 (discussed *infra* Part V); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003) (discussed *infra* Part V).

Second, can school boards prohibit groups that engage in religious worship from using their facilities? The Court in *Good News* sidestepped this question because, even though the Good News Club engaged in activities that were "quintessentially religious," it also engaged in instructive functions that were decidedly similar to those of the Boy Scouts, a non-religious group permitted to meet on school premises.[43] The Good News Club was clearly not a church, temple or synagogue that might engage in worship services proselytizing in nature, but since even the most religious of organizations is likely to engage in activities that have secular components, such as helping the poor, one wonders whether it will be easy for courts to draw clear lines between religious and secular. As a practical matter, one can query whether public school district officials can, or should, engage in dissecting the religious and secular functions of religious organizations to determine whether these organizations may have access to school district property.[44]

Third, is the *Good News* majority suggesting that the distinction between viewpoints and subject matter in *Lamb's Chapel* has disappeared or, at least, is less apparent? In *Lamb's Chapel*, the Court held that once a public school district has opened its premises to particular subject matter (childrearing in *Lamb's Chapel*, and character and moral development in *Good News*), the district cannot discriminate against a viewpoint on that subject simply because it is religious.[45] In blunting the school district's argument and the Court of Appeals reasoning in *Good News* that viewpoint discrimination did not apply to "quintessentially religious" uses, the Supreme Court came tantalizingly close to suggesting that every viewpoint, even one involving proselytizing worship services, might be protected under free speech.[46]

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43. *Good News*, 533 U.S. at 108. (In comparing the Good News Club to the Boy Scouts, the Court observed that "no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way.").

44. *See Bronx Household of Faith v. Community Sch. Dist. No. 10*, 331 F.3d 342 (2d Cir. 2003) [hereinafter *Bronx II*]. (The Second Circuit noted that the federal district court, in granting injunctive relief to a church permitting it to hold religious services in a public school building on Sunday, had held that "the distinction between worship and other types of religious speech [is] one that cannot meaningfully be drawn by the courts." *Id.* at 354. However, the appeals court, in upholding the injunction, nonetheless "decline[d] to review the trial court's . . . determination that . . . the distinction between worship and other types of religious speech cannot meaningfully be drawn by the courts." *Id.* at 354–55.).

45. *Lamb's Chapel*, 508 U.S. at 396–97.

46. *Good News*, 533 U.S. at 111.

It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other

Although the *Good News* majority never had to resolve this issue, one can speculate that if every religious expression is entitled to free-speech-viewpoint protection, then the reason for determining the subject matter on which a viewpoint is based has ceased to exist. In essence, even "religious worship could not be treated as an inherently distinct type of activity . . . [and must be viewed as] comparable to other activities involving ritual and ceremony, such as Boy and Girl Scout meetings."[47] In a recent post-*Good News* Second Circuit Court of Appeals decision, *Bronx Household of Faith v. Board of Education of City of New York*, (*Bronx II*)[48] the court, in reversing its earlier decision denying a church access to public school premises for Sunday worship services,[49] cogently reflected the viewpoint/subject matter dichotomy yet unanswered by the Supreme Court:

> Would we be able to identify a form of religious worship that is divorced from the teaching of moral values? Should we continue to evaluate activities that include religious worship on a case-by-case basis, or should worship no longer be treated as a distinct category of speech? How does the distinction drawn in our earlier precedent between worship and other forms of speech from a religious viewpoint relate to the dichotomy suggested in Good News Club between "mere" worship on the one hand and worship that is not divorced from the teaching of moral values on the other?[50]

IV. COMMUNITY DISTRIBUTION OF MATERIALS IN PUBLIC SCHOOLS

School boards frequently permit community groups to distribute brochures or fliers advertising their activities or programs to students in schools, usually at the end of the day when students are leaving.[51] While this distribution presents an inexpensive way for community organizations to promote programs of interest to children, brochures advertising religious programs invite Establishment Clause challenges.

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foundations for thought or viewpoint do not. We, however, have never reached such a conclusion.

Id.

47. *Bronx II*, 331 F.3d at 353–54.

48. 331 F.3d 342 (2d Cir. 2003) (considering the *Good News* decision to have reversed its earlier decision treating worship services as a subject not protected by viewpoint discrimination).

49. *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997) [hereinafter *Bronx I*] (upholding school district policy prohibiting use of its premises for religious purposes as not being viewpoint discrimination because worship services were a subject different from presentations from a religious perspective protected under *Lamb's Chapel*).

50. *Bronx II*, 331 F.3d at 355.

51. *See e.g.*, *Rusk v. Crestview Local Schs.*, 220 F. Supp. 2d 854, 855 (N.D. Ohio 2002).

However, because the Supreme Court has not addressed the distribution of religious materials, lower federal courts are left to apply *Lamb's Chapel* and *Good News* as best they can.

The Ninth Circuit Court of Appeals, in *Hills v. Scottsdale Unified School District*,[52] addressed whether a school district that permitted non-profit organizations to distribute literature through its schools could prohibit distribution of a summer camp brochure that included, among the nineteen courses offered, two classes on "Bible Heroes" and "Bible Tales."[53] The school district's policy was to permit distribution of literature that promoted events and activities of interest to students, but not flyers of a "commercial, political or religious nature."[54] In addition to the Bible courses, the brochure contained the following language: "Did you know that if a child does not come to the knowledge of JESUS CHRIST and learn of the importance of Bible reading by the age 12 chances are slim that they ever will in this life? We think it is important to start as young as possible!"[55]

After initially permitting the brochure to be distributed, school district officials stopped the distribution, and then allowed it to resume with a disclaimer.[56] The district then changed course and refused to permit distribution, even with the disclaimer, then permitted distribution again with the disclaimer, and finally rescinded its permission to distribute the brochure altogether. School officials informed the organizer of the camp that he could resubmit the brochure if he would modify the brochure by "remov[ing] descriptions of the Bible classes, chang[ing] the spelling of "Sonshine" to "Sunshine," omit[ting] graphics of the Bible, cross and dove, and incorporate[ing] the disclaimer into the brochure."[57]

After electing not to modify the brochure, the camp organizer filed suit, alleging violations of free speech, free exercise, equal protection, and due process.[58]

Citing to both *Lamb's Chapel* and *Good News*, the Ninth Circuit, in reversing the federal district court's summary judgment for the school district, found that the district had created a limited public forum for free

52. *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir. 2003).

53. *Id.* at 1047–48.

54. *Id.* at 1047.

55. *Id.* at 1048.

56. *Id.* (The disclaimer language was: "The Scottsdale Unified School District neither endorses nor sponsors the organization or activity represented in this document. The distribution of this material is provided as a community service.).

57. *Id.* at 1048.

58. *Id.*

speech purposes.[59] The school, in this case, intentionally opened what had been a nonpublic forum "to certain groups or topics," [60] and because the forum created had "a broad purpose" of providing a "community service"[61] to notify students and parents of extra-curricular events, the school district could not "refuse to distribute literature advertising an off-campus summer program because it is taught from a Christian perspective."[62] As a result, "[i]f an organization proposes to advertise an otherwise permissible type of extra-curricular event, it must be allowed to do so, even if the event is obviously cast from a particular religious viewpoint . . . ."[63]

The *Hills* court found no Establishment Clause problem because the brochures were sent home to parents who would make decisions regarding participation, and the distribution of the brochures at the end of the school day took them outside the part of the day devoted to "teacher's instruction and curriculum."[64] Thus, without an Establishment Clause issue, the court was able to sidestep whether a school district's prohibiting the use of its facilities for religious use under the Establishment Clause constituted a compelling interest to offset a free speech viewpoint discrimination claim.[65]

In *C.E.F. v. Stafford Township School District*,[66] a federal district court in New Jersey reached a result similar to *Hills* by ordering two elementary schools[67] to permit Child Evangelism Fellowship (CEF), a community religious organization, to hang brochures and posters on school walls (but not on bulletin boards), to permit teachers to distribute flyers and permission slips, and to permit the group access to tables at the school's Back-to-School Night.[68] The court described the flyers as "lighthearted in tone, emphasizing that children will learn 'biblical principles, moral values, character qualities, [and] respect for authority' through Bible lessons, missionary stories, singing, and other activities."[69]

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59. *Id.* at 1048–49.

60. *Id.* at 1049.

61. *Id.* at 1051.

62. *Id.* at 1054.

63. *Id.* at 1052.

64. *Id.* at 1054.

65. *Id.* at 1056 ("Because the District has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse the District's viewpoint discrimination.").

66. 233 F. Supp. 2d 647 (D. N.J. 2002).

67. *Id.* at 651. The two schools at issue were attended by students ages three to seven and ages eight to ten respectively. *Id.*

68. *Id.* at 668.

69. *Id.* at 651.

Even though some of the flyers were directed at children, the CEF required parent permission to participate in club activities, and, therefore, the court considered that "parents, not children, are the relevant audience."[70]

The school district's written distribution policy in *Stafford* was that all distributed materials "should relate to school matters or community activities," and had to be "directly associated with the children who are enrolled" in the district. All materials were supposed to be approved by the superintendent, but certain organizations, such as the Boy Scouts, Girl Scouts, and the Four-H Club, had been granted permission by the school board to distribute materials without review.[71]

In granting a preliminary injunction for the CEF, the court in *Stafford* held that the limited public forum analysis applied not only to school facilities, but also "to school personnel and communications systems to reach students."[72] Although the court did not address the merits of the case, it nonetheless observed that "the school district's distribution, school-wall, and Back-to-School-Night fora [were] likely limited public fora"[73] with the result that "it [was] likely that the school district discriminated against the CEF based upon religious viewpoint."[74] Because the school district had permitted other groups that advertised activities "to promote character building and moral and social development,"[75] the district could not prohibit expression by the CEF, even though its speech involved "bible instruction or 'quintessentially religious programs.'"[76]

Concerning the Establishment Clause, the *Stafford* court, like the Supreme Court in *Good News*, ultimately "found unpersuasive the argument that elementary school children would misperceive a state endorsement of religion or feel coercive pressure to participate in religious activities."[77] Even though the CEF material was distributed by teachers to students while they were still in school, the court found that the limited public forum analysis applied because the distribution did not occur during the "instructional component of the school day."[78] Similar to the Supreme Court's observation in *Good News*, the *Stafford* court

70. *Id.* at 651 n. 2.
71. *Id.* at 652.
72. *Id.* at 656 n. 7.
73. *Id.* at 659.
74. *Id.* at 660.
75. *Id.*
76. *Id.* (quoting *Good News*, 533 U.S. at 108).
77. *Stafford*, 233 F. Supp. at 663–65.
78. *Id.* at 664.

refused to find endorsement of religion where "[i]t is the parents who choose whether their children will attend."[79] Finally, the court followed the lead of *Good News* by rejecting a modified Heckler's Veto argument that "a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."[80]

The district court in *Stafford*, similar to the Ninth Circuit in *Hills*, also found that the school district lacked a defense under the Establishment Clause to justify its refusal to permit distribution of religious materials.[81] Without such an Establishment Clause defense, the *Stafford* court had no basis for considering whether a compelling interest existed to justify the school district's decision and whether that compelling interest was sufficient to trump the CEF's free speech claim.

The federal courts in *Bronx II*, *Hills*, and *Stafford* have taken their lead from the Supreme Court in *Good News* in avoiding a direct confrontation between the Free Speech and the Establishment Clauses. The prominence of free speech analysis is evident even where a religious claim is denied. For example, in *Stafford*, in addition to the school walls and Back-to-School tables, the school district also had three bulletin boards designated for use by the PTA, the teacher's union (STEA), and area hospitals to which the CEF wanted access to post its materials. In upholding the school's refusal to permit the CEF access to the bulletin boards, the court used forum analysis and reasoned that the CEF was "not akin to the PTA, the STEA, or a local hospital"[82] and, thus, the district had a "legitimate interest in preserving the property for the use to which it is lawfully dedicated."[83] In other words, the school's designated forum for these three groups did not involve moral and character development and, thus, were closed to the CEF without the court having to consider whether providing access to the bulletin board would have violated the Establishment Clause.

This designated forum approach is supported by the Fourth Circuit Court of Appeals in a non-religion-related decision, *Goulart v. Meadows*,[84] where the court upheld a County Board of Commissioners' "Use Policy" that restricted use of its community centers for recreational and community activities but not "activities associated with meeting the

79. *Id.*

80. *Id.* (quoting *Good News*, 533 U.S. at 119).

81. *Stafford*, 233 F. Supp. at 665.

82. *Id.* at 661.

83. *Id.* (quoting *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 50–51 (1983)) (upholding denial of access by a non-bargaining union to interschool mail use of faculty boxes where a union contract had granted exclusive use to the bargaining union, using a designated forum theory).

84. *Goulart v. Meadows*, 345 F.3d 239 (4th Cir. 2003).

State requirements for elementary or secondary education."[85] Over a facial challenge to the board's "Use Policy" by home schooling groups who were excluded from using the centers for teaching courses to home schooled students for state educational credit, the Fourth Circuit held that "[i]t is reasonable for the Board to limit use of the community centers to recreational and community enrichment activities, and formal private education is not a use that is consistent with those purposes."[86] Pursuant to its understanding of *Good News*, the court in *Goulart* found no free speech violation because the plaintiffs offered no evidence that their proposed private home schooling instruction "contained a particular or unique viewpoint . . . in any . . . area that they might wish to offer classes."[87] Consistent then with the result in the preceding paragraph concerning the three bulletin boards in *Stafford*, *Goulart* found that "the government may limit a designated or limited public forum to certain purposes, and exclude topics of speech or classes of speakers that are inconsistent with that purpose."[88]

Stafford, unlike *Goulart*, involved a religious viewpoint; but even if religious viewpoints are at issue, not every federal court may choose to ignore the Establishment Clause as a limitation on such viewpoints. In *Rusk v. Crestview Local Schools*,[89] a school board had a policy permitting distribution of non-profit community group flyers, including religious flyers, at the end of the school day, as long as they publicized activities and did not promote the benefits of religion.[90] At issue in *Rusk* were non-proselytizing flyers advertising "events at Christian churches that [featured] religious activities such as Christian fellowship, Bible stories, and 'songs that celebrate[d] God's love.'"[91] The school board's policy required the principal to review all materials to make certain they came

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85. *Id.* at 242. The entire "Use Policy," as pertaining to private education contained the following prohibited uses:

> d) Instructional, educational and related enrichment activities of the type usually offered in the public schools to children of school age, including activities in English language arts (such as reading, writing, and spelling), mathematics, science, social studies, art, music, health and physical education are prohibited, it being intended that the community centers not be used for such activities associated with meeting the State requirements for elementary or secondary education. This prohibition does not apply to activities conducted by any agency of the Calvert County Government, the Calvert County Public Library or the Calvert County Board of Education.

Id. at 242. n. 2.

86. *Id.* at 242.

87. *Id.* at 257.

88. *Id.* at 259.

89. *Rusk*, 220 F. Supp. 2d at 854.

90. *Id.* at 855.

91. *Id.* at 855–56.

from non-profit organizations, and then to pass them on to teachers for placement in students' homeroom mailboxes for retrieval at the end of the school day.[92] Although the court found the school board's policy "relatively neutral,"[93] it invoked the *Lemon v. Kurtzman*[94] tripartite test to find that the policy advanced religion in violation of the Establishment Clause.[95] The court found that, because proselytization occurred at events advertised in the flyers,[96] the non-proselytizing nature of the flyers did not keep their distribution from violating the Establishment Clause.[97] Despite what appeared to be the Establishment Clause trumping the religious organization's right of access to the school to distribute its flyers, the court wavered in the end and reasserted the preeminence of *Good News'* viewpoint discrimination and free speech right of access. "Forbidding religious organizations from advertising activities at which proselytization will occur in an elementary school does not equate to denying access to an organization based on its viewpoint."[98]

For school districts affected by *Rusk* (the northern district of Ohio), the difficult task has become determining whether religious organizations have any right of access at all to distribute flyers.[99] Religious organizations that have as part of their mission the impartation

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92. *Id.* at 855.

93. *Id.* at 859.

94. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). With *Rusk*'s resurrection of the *Lemon* test, one is reminded of Justice Scalia's satiric comment in *Lamb's Chapel*:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.

Id. at 398 (Scalia, J., concurring).

95. *Rusk*, 220 F. Supp. 2d at 856–59. The three prongs of the *Lemon* tests are: "whether a statute, practice, or policy (1) has a legitimate secular purpose; (2) has a primary effect of advancing or inhibiting religion; and (3) fosters an excessive entanglement between government and religion." *Id.* at 856 (citing *Lemon*, 403 U.S. at 612–13).

96. *See Rusk*, 220 F. Supp. 2d at 860 ("[t]he flyers that Steve Rusk has submitted urge attendance at events that clearly involve an element of proselytizing.... Given the religious overtones of the activity, the age of the target audience and the heightened possibility that due to their youth the children may not appreciate the neutral stance that the school claims to take with regard to these activities, the practice of distributing these materials to elementary school students fails to pass the endorsement test."). The only evidence presented to this effect were two flyers "advertis[ing] events at Christian churches that feature[d] religious activities such as Christian fellowship, Bible stories, and 'songs that celebrate God's love.'" *Id.* at 855–56.

97. *Id.* at 859–60.

98. *Id.* at 860.

99. The school district's confusion is reflected in *Rusk v. Crestview Local Sch. Dist.*, 2002 WL 31506166 (N.D. Ohio 2002). In that case, Crestview Local School District sought clarification as to what religious materials might be permissible under the judge's injunction. Ultimately, the judge rather obtusely determined that nothing was confusing in his order and, if it were, the school could submit flyers to the court on an ad hoc basis for a decision as to their appropriateness.

of their religion-based values to young persons attending their events would seem to be foreclosed by the Establishment Cause from access to the public school forum. Whether the *Rusk* court has found a method of prohibiting religious access under the Establishment Clause, while maintaining the facade of free speech right of access and viewpoint discrimination, remains to be seen.[100]

Using the same *Lemon* test as the *Rusk* court, another federal district court in the Sixth Circuit, in *Daugherty v. Vanguard Charter School Academy*,[101] refused to invalidate a school practice permitting distribution of religious materials to elementary students in their "Friday folders" which students took home with them at the end of the day.[102] The court in *Daugherty* found the school's policy of "allow[ing] community groups to distribute information that may be relevant to the students and parents regarding community activities and events"[103] to be neutral under the Establishment Clause.[104] In reaching this conclusion, the court in *Daugherty* saw the balance between the Establishment Clause and free speech in a way quite different from *Rusk*. *Daugherty* relied on a Fourth Circuit decision, *Peck v. Upshur County Board of Education*,[105] where the *Peck* court had reasoned that,

> to require the [School] Board to exclude religious literature as such from the forum it has created to further the schools' educational mission by exposing the county's students to a variety of age appropriate private speech would evince the hostility toward religious speech that the Establishment Clause does not require and that the Free Exercise and Free Speech Clauses forbid.[106]

Daugherty, like *Bronx II*, *Hills*, and *Stafford*, avoided a direct confrontation between Free Speech and the Establishment Clauses, preferring instead to find no viable Establishment Clause claim.[107] *Rusk* notwithstanding, the access arguments of community religious organizations have prevailed primarily because treating these organizations differently from others would evidence viewpoint discrimination prohibited by the Free Speech Clause. In the absence of

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100. The *Rusk* court's aversion to anything religious is reflected in its comment that "advertisements promoting a food drive sponsored by a local church or temple to benefit the poor of the community, or even a youth sports league . . . would pass the constitutionality tests as I interpret them." *Rusk*, 220 F. Supp. 2d at 860.

101. *Daugherty v. Vanguard Charter Sch. Academy*, 116 F. Supp. 2d 897 (W.D. Mich. 2000).

102. *Id.* at 911–12.

103. *Id.* at 911.

104. *Id.* at 911–12.

105. *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998).

106. *Daugherty*, 116 F. Supp. 2d at 911, quoting *Peck*, 155 F.3d at 284.

107. *Daugherty*, 116 F. Supp. 2d at 911–12.

preferential treatment for religious community organizations,[108] courts seem disposed to let a kind of evenhandedness prevail in free speech access cases.[109]

V. STUDENT ACCESS TO SCHOOL FACILITIES

Student religious access issues in public schools provide a greater stress on the relationship between the Free Speech and Establishment Clauses, primarily because the issue involves students interacting with other students during the school day, when state compulsory attendance laws require them to be in school.[110] If students can conduct religious meetings or distribute religious literature during the school day, when students are required to be at school, the circuit breaker defense used in *Hills* and *Stafford*, namely that the materials are really being sent home at the end of the school day for the parents, does not work. Not only might parents be unaware that their children are receiving and reading religious literature at school in this situation, but they might also be oblivious that their children are attending religious meetings. To the extent, then, that students interacting with other students on religious issues in the relatively closed school environment invokes concerns about peer pressure to change religious views, what constraints, if any, should courts impose on student religious access issues?

Perhaps surprisingly, courts have been fairly protective of student religious access. With its decision in *Prince v. Jacoby*,[111] the Ninth Circuit has taken the lead in this area, as it had with community organizations in *Hills*, by protecting students' right of religious access at school under the

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108. *See e.g. id.* at 911 ("If [the school board] manipulated the facially neutral policy so as to give preferential access to religious literature or certain religious literature, then an Establishment Clause violation might be made out.") (quoting *Daugherty*, 116 F.3d at 284); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (Although not a community organization case, the *Santa Fe* court invalidated a school policy permitting students to vote on whether to have a prayer before football games, except where the past history of the school district had included considerable identification with religion including having a school chaplain.).

109. The concept of evenhandedness as a definition of neutrality has arisen in government aid to religion cases, where it has not received wide acceptance among members of the Supreme Court. *See Mitchell v. Helms*, 530 U.S. 793, 838–40 (2000) (O'Connor, J., concurring) (disputing the concept as defining neutrality); *id.* at 876–77 (Souter, J., dissenting). Notwithstanding, evenhandedness has more affinity with free speech, where viewpoint discrimination is already embedded in the understanding of neutrality.

110. *See Ill. ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign County*, 333 U.S. 203 (1948). In striking down the district's permitting clergy to hold religious meetings on school premises during the school day, the Court found relevant that "[t]he operation of the state's compulsory education system . . . assist[ed] and [was] integrated with the program of religious instruction carried on by separate religious sects." *Id.* at 209.

111. *Prince*, 303 F.3d at 1074.

Free Speech Clause. In *Prince*, the court addressed a high school student's claim that her school district's refusal to recognize World Changers, a religious club to which she belonged, as an Associated Student Body club (ASB), constituted a violation of the Equal Access Act (EAA) and Free Speech Clause.[112] The high school operated a dual student group recognition system, Associated Student Body and Policy 5225 (Policy). Recognition as an ASB club brought a significant number of benefits to its members. ASB groups, for example, shared funds from the sale of ASB cards, and were permitted to sell crafts at the school's craft fair, to participate in the ASB auction, and to engage in other fundraisers. In addition, ASB groups could meet during student/staff time during the school day (10:10–10:40 a.m.), where attendance was taken, had access to school supplies, audio/visual equipment, and the PA system, were given free inclusion of the club's picture in the yearbook, and were permitted to use school vehicles.[113] Policy groups, on the other hand, received none of the above benefits and could meet only if they satisfied rules requiring that their meetings: (1) be voluntary and student-initiated; (2) not be sponsored by the school or its staff; (3) be held at times that did not interfere with the school; (4) be the responsibility solely of students for conduct; (5) have student participation that was voluntary; (6) not use school funds; (7) not compel staff to attend; and, (8) respect the constitutional rights of all students.[114]

The Ninth Circuit decided that the school district, in denying World Changers' ASB recognition and benefits, did not violate the EAA because the meetings would not occur during non-instructional time.[115] However, denying World Changers' ASB recognition and benefits did violate the Free Speech Clause. The court reasoned that the student/staff meeting time and the provision of school supplies and equipment were required under the Free Speech Clause because the district had created

> a limited public forum in which student groups [were] free to meet during student/staff time, as well as to use school vehicles for field trips, to have priority for use of the AV equipment, and to use school supplies

112. *Id.* at 1077.

113. *Id.* at 1078.

114. *Id.* at 1077. The EEA, contains similar language in its definition of "fair opportunity criteria." 20 U.S.C. § 4071(c).

115. The court determined that EAA did not apply to the student/staff meeting time; since it occurred during the school day and attendance was taken, it did not qualify as "noninstructional time." *Prince*, 303 F.3d at 1087–89; 20 U.S.C. § 4071(b). Regarding participation in the craft fair, school auction, fund raising, and free appearance in the yearbook, the court held that EAA was not applicable because the funding came from the sale of ASB cards, not school district funds. *Prince*, 303 F.3d at 1085.

such as markers, posterboard, and paper.[116]

Providing these services to World Changers would not violate the Establishment Clause because providing the services would be done on "a neutral basis [that] . . . is secular in content," essentially meaning that all groups would have equal access to the materials and vehicles.[117]

Worth noting in *Prince* is the court's interpretation of the Establishment Clause as requiring only neutrality, a kind of evenhandedness "providing equal access to a 'service' that happens to be paid for by public funds."[118] The court dispelled any notion that students might perceive a religious club meeting during school hours as being endorsed by the school because "the School District here can dispel any 'mistaken inference of endorsement' by making it clear to students that a club's private speech is not the speech of the school."[119]

Prince is the third Ninth Circuit decision[120] addressing religious groups meeting on school premises and represents the farthest reach of the Free Speech Clause yet into public schools. After *Prince*, at least within the Ninth circuit, a limited public forum can exist during a period of the school day, even if attendance is taken, as long as other student groups are permitted to meet.

The Third Circuit, in *Donovan v. Punxsutawney Area School Board*,[121] reached a result similar to *Prince*, relying both on EAA and free speech to require that a student religious club, FISH, have the same opportunity to meet as secular student clubs.[122] The court in *Donovan*, however, pressed the application of the EAA further than the Ninth Circuit had been willing to do in *Prince*. While the Ninth Circuit had

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116. *Prince*, 303 F.3d. at 1091.

117. *Id.* at 1094.

118. *Id.* The *Prince* Court looked to *Mitchell v. Helms*, 530 U.S. 794 (2000), for support. *Prince*, 303 F.3d at 1093–1094. In *Mitchell*, the Court upheld the loan of supplies and materials to religious schools as long as they were neutral, that is, secular in content. *Mitchell*, 530 U.S. at 835–36.

119. *Prince*, 303 F.3d at 1094, (quoting *Mergens*, 496 U.S. at 251). In *Mergens*, the Court had declared more broadly that:

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

496 U.S. at 251 (emphasis added).

120. The first two decisions were *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993), where the court held that the EAA applied to a religious groups meeting before school at a time when other groups could meet, and *Ceniceros v. Bd. of Trustees of San Diego Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997), where the court held that EAA applied to lunch where no classroom instruction occurred and the school operated an open campus during lunchtime.

121. *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003).

122. *Id.* at 214.

found the EAA inapplicable to a staff/student meeting period during the school day, the Third Circuit held that a half-hour activity period at the beginning of the school day constituted "non-instructional time" for purposes of EAA.

The *Donovan* court reasoned that, even though attendance was taken during the activity period (as had been the case in *Prince*), academic instruction did not begin at the school until 8:54 a.m. when the activity period ended. Using a picturesque metaphor, the Third Circuit quaintly observed that "[j]ust as putting a 'Horse' sign around a cow's neck does not make a bovine equine, a school's decision that a free-wheeling activity period constitutes actual classroom instructional time does not make it so."[123] Invoking the Supremacy Clause,[124] the Third Circuit ignored the school district's argument that the half-hour was used in calculating the state minimum number of hours by declaring that state law cannot frustrate rights under federal law.[125] In ruling against the school district on viewpoint discrimination grounds, the court held that "FISH . . . discusse[d] current issues from a biblical perspective and [that] school officials [had] denied the club equal access to meet on school premises during the activity period solely because of the club's religious nature."[126]

However, like the *Good News*, *Bronx II*, *Hills*, and *Stafford* courts before it, the Third Circuit in *Donovan* also refused to address whether an Establishment Clause violation might constitute a sufficiently compelling interest to overcome free speech protection.[127] As in the other cases, *Donovan* sidestepped a confrontation between the Free Speech and Establishment clauses because, citing to *Good News*, "allowing the Club to speak on school grounds would ensure neutrality, not threaten it."[128] Again, the court categorized neutrality as a kind of evenhandedness where the plaintiff in *Donovan* "merely [sought] an equal opportunity to express herself along with other like-minded students."[129]

Access issues for students include not only meeting times, but distribution of religious materials as well. A federal district court, in

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123. *Id.* at 224.

124. U.S. Const., Art VI, § 2 ("This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

125. *Donovan*, 336 F.3d at 224.

126. *Id.* at 226.

127. *Id.* (refusing to "confront this thorny issue" because the court determined that the school district had no valid Establishment Clause issue).

128. *Id.* (quoting *Good News*, 533 U.S. at 114).

129. *Donovan*, 336 F.3d at 227.

Westfield High School L.I.F.E. Club v. City of Westfield,[130] reached much the same result on the free speech issue of the distribution of candy canes with a religious message as did *Donovan* for meeting time for religious clubs. In *Westfield*, a school district superintendent had created a policy prohibiting the distribution of "non-school curriculum or activity related literature of any kind directly to other students on school grounds."[131] The school district's written policy also required that all materials to be distributed had to be approved in advance by the principal.[132]

Pursuant to this policy, members of a religious club (L.I.F.E.) presented a candy cane with an attached religious message for review by the high school principal. The message contained information about the religious club,[133] the text of a Bible verse,[134] an explanation of the religious significance of the red and white colors of the candy cane,[135] and an exhortation that "it is trusting Jesus Christ that saves you."[136] When the principal in Westfield read the religious message he prohibited its distribution because he found it to be "offensive."[137] Despite the religious club members not having permission to distribute the candy canes, they did so anyway and were penalized with a one-day, in-school suspension.[138] However, the suspensions were stayed pending parent appeal and were never served by the students.[139]

A federal district court, relying on free speech analysis, enjoined Westfield High School from enforcing its "non-curriculum related literature" policy, from enforcing any penalty on the students, from imposing a prior restraint on distributing literature with a religious message, and from prohibiting students' distribution of religious literature during non-instructional time or penalizing students who did so.[140] Using the strongest language possible, the court laid the responsibility for compliance with the free speech rights with the principal. When the principal defended his denying permission for

130. *Westfield*, 249 F. Supp. 2d at 98.

131. *Id.* at 104.

132. *Id.* at 103.

133. *Id.* at 104 (the meeting day, time and place for the religious club).

134. *Id.* at 105 ("And this is my prayer: that your love may abound more and knowledge and depth of insight, so that you may be able to discern what is best and may be pure and blameless until the day of Christ, filled with the fruits of righteousness that comes through Jesus Christ—to the glory and praise of God." Philippians 1: 9–11.).

135. *Id.* (The white represents the purity of Jesus and the red represents the blood that he shed on the cross.).

136. *Id.*

137. *Id.*

138. *Id.* at 106.

139. *Id.* at 107.

140. *Id.* at 129.

distribution of the religious messages because he did not understand that the students wanted only to distribute them during non-instructional time, the court responded with a stinging rebuke:

> A students' free speech rights should not hinge upon how he or she words the question ('Can I pass out candy canes?' versus 'Can I pass out candy canes during non-instructional time in a manner that will not cause any disruption or disorder within the school?'), especially when it is the school administrator who is more likely to possess a working knowledge of school policies and the law.[141]

Although the *Westfield* court, in granting the plaintiffs' motion for a preliminary injunction, never reached the merits of the case, the court's free speech analysis strongly suggests that plaintiffs would have prevailed on the merits. In the court's hierarchy of speech in school settings, the greatest degree of school control includes, at one end, "unfettered control over content" by school officials "of government speech (i.e., a principal speaking at a school assembly)," followed by "school sponsored speech (i.e., a teacher editing a curriculum-based newspaper that is a part of a journalism class)."[142] At the other end, however, is "private, school-tolerated speech (i.e., student speaking to another during lunch break)" which can be controlled by the school only "to the extent [that] it substantially disrupts or materially interferes with the school's disciplinary concerns."[143]

The court turned to *Tinker v. Des Moines Independent Community School District*[144] to determine whether the student's distribution of candy canes with their religious messages had been disruptive.[145] In *Tinker*, the Supreme Court had declared that restricting student speech in a school setting required

> something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint .... [It required a] finding ... that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'[146]

The *Westfield* court pointedly observed that,

> [t]here is nothing in the evidence before the Court to suggest that other students were not free to decline the candy canes, that the student

141. *Id.* at 112.

142. *Id.* at 114 n. 13.

143. *Id.*

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

145. *Westfield*, 249 F. Supp. 2d at 109.

146. *Id.* at 509.

> plaintiffs coerced others into accept [sic] their message, that the student plaintiffs invaded the rights of others not to receive literature by, for example, stuffing lockers, or that the student plaintiffs blocked other students from entering class, actions which could constitute even substantial interference and justify restricting distribution to a more reasonable time, manner, and place.[147]

In a sweeping indictment of the manner in which the school principal had handled the religious club's distribution of the candy canes, the court held that the plaintiff's constitutional rights were protected from the moment that she "walked onto the grounds of Westfield High School . . . [to share] candy canes and religious messages with her fellow students. . . ."[148] The school principal, in order to prove disruption under *Tinker*, had a higher standard to meet than his own personal offense to the religious message.[149]

The school district had further argued in *Westfield*, as almost a dying gasp, that the religious club was school-sponsored, and, as such, the district could control it under *Hazelwood School District v. Kuhlmeier*.[150] In *Hazelwood*, the Supreme Court found a principal's removal of two pages from a school newspaper, which had been prepared as part of a journalism class, to be constitutional, and upheld "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[151] In finding *Hazelwood* inapposite, the *Westfield* court observed that although "[a]ny student group meeting on school premises may arguably be characterized as school-sponsored[152] . . . [r]ather, for expressive activity to be school-sponsored, the school needs to take affirmative steps in promoting the particular speech."[153]

As the court observed in Westfi*eld*, the very distance that the high school had maintained between itself and the L.I.F.E. club, so as not to offend the Establishment Clause, assured that the school could never be considered as sponsoring the club for purposes of Hazelwood.

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147. *Westfield*, 249 F. Supp. 2d at 112.

148. *Id.* at 114 (citing *Tinker*, 393 U.S. at 506).

149. *See Westfield*, 249 F. Supp. 2d at 116. (In paraphrasing *Tinker*, the *Westfield* court observed that "a school's unsubstantiated apprehension of disruption is insufficient justification for suppressing students' rights to free speech . . . .").

150. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that a school needed only a reasonable basis for deleting material from a school newspaper prepared as part of a curriculum-related activity).

151. *Id.* at 271.

152. *Westfield*, 249 F. Supp. 2d at 115.

153. *Id.* at 117.

> The school does not fund the Club; the Club's activities are not directly related to any subject taught in any course that the school offers; the school does not require any student to participate in the group; the school does not give club members academic credit for participation in the L.I.F.E. Club.[154]

As with the other cases discussed in this article, the court in *Westfield* did not have to address a conflict between Free Speech and the Establishment Clause. As the court observed, "the candy cane distributions [were] expressive activities" and, without any support for the school's sponsorship argument that "it [was] affirmatively promoting religion in violation of the Establishment Clause,"[155] the religious club's free speech claim prevailed because the school district had no viable Establishment Clause argument.[156]

Westfield raised the question about student club access/distribution during non-instructional time during the school day, particularly during the parts of the school day spent outside of the classroom. Still unanswered, however, is what free speech rights, if any, would (or, should) students have if distribution is to occur in the classroom?

The Third Circuit, in *Walz ex rel. Walz v. Egg Harbor Township Board of Education*,[157] addressed an issue similar to *Westfield*. In *Walz*, the court dealt with an elementary student's alleged free speech right to distribute candy canes with religious messages[158] during classroom parties.[159] In *Walz*, a parent of a pre-kindergarten student, in response to a Parent Teacher Organization request for "candy, pencils, whatever" for distribution to other students responded by sending pencils containing the message, "'Jesus [Loves] The Little Children' (heart symbol)."[160] The school district superintendent refused to permit the pencils to be distributed because the students' "parents might perceive the message as being endorsed by the school."[161] Six months later, the district's board of education adopted a policy that provided, in part, that "no religious belief or non-belief shall be promoted in the regular curriculum or in district-sponsored courses, programs or activities, and none shall be

154. *Id.* at 118. *Cf. Hazelwood*, 484 U.S. at 262–63, 268–69.

155. *Westfield*, 249 F. Supp. 2d at 120.

156. The *Westfield* court did observe, however, that had the religious club's speech been school-tolerated, it "would likely violate the Establishment Clause." *Id.* at 113.

157. *Walz*, 342 F.3d at 271.

158. The messages attached to the candy canes varied from "Jesus Loves the Little Children" to a longer religious story incorporating the red and white colors of the candy cane as "symbols for the birth, ministry, and death of Jesus Christ." *Id.* at 273–74.

159. *Id.* at 273–75

160. *Id* at 273.

161. *Id.*

disparaged."[162] At Christmastime shortly thereafter, when the student was a kindergartner, the parent sent candy canes with an attached message, virtually identical to that in *Westfield*, about the religious significance of the red and white colors. The student handed these to his classmates in the hallway, apparently without incident. A year later, when the student was a first-grader, he was prohibited from handing out similar candy canes at a classroom party, but was permitted by school officials "to distribute the candy canes in the hallway outside the classroom, at recess, or after school as students were boarding buses."[163]

At this point, the student, through his parent, filed suit against the school district alleging a violation of his First Amendment rights.[164] The Third Circuit, in upholding summary judgment for the school district, relied on the same *Hazelwood* decision that the *Westfield* court had considered inapposite to its set of facts. Citing to *Hazelwood*, the *Walz* court held that

> educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.[165]

In *Walz*, the school's curricular purpose, "to teach social skills and respect for others in a festive setting,"[166] prevailed over the individual student's candy cane distribution. As the court noted, "[t]here is a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a particular view."[167]

The student's allegation of "hostility toward religion,"[168] an allegation that had carried the day in *Daugherty*, went nowhere in *Walz*. The court found, instead, that where classroom activities with clearly defined curricular purposes are at issue, neutrality has another side. In this case, the school district was neutral toward religion because it "prohibit[ed] all endorsements of specific messages, including those with commercial, political, or religious undertones."[169] In other words, "by bringing gifts that promoted a specific religious message,"[170] the student was treated no

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162. *Id.*
163. *Id.* at 274.
164. *Id.*
165. *Id.* at 280–81 (quoting *Hazelwood*, 484 U.S. at 273).
166. *Walz*, 342 F.3d at 279.
167. *Id.* at 278–79.
168. *Id.* at 279 n. 6.
169. *Id.*
170. *Id.* at 280.

differently than would a student, presumably, who sought to hand out bumper stickers for a political candidate.

Unquestionably, the result in *Walz* was influenced by the age of the students. As the Third Circuit observed:

> [I]n an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred, not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically-based goals.[171]

Nonetheless, although the student in *Walz* lost in his free speech claim, the court made two significant comments regarding free speech in elementary schools that are worth noting. First, while the school permitted the student to distribute the candy canes in the school hallway after class and at recess, the court observed that "[t]his accommodation seems more than reasonable and perhaps even unnecessary."[172] Second, the court observed that, in an elementary classroom setting, "[i]ndividual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected."[173] The court went on to note, consistent with *Tinker*, that "individual student expression that is or is likely to be disruptive may be properly restricted."[174]

Although these two comments are dicta, they provide grist for the free speech mill. What implications might they have for future litigation? In the first comment, it is unclear what the court meant by its observation that a school may not need to accommodate an elementary student's request to hand out religious materials in other-than-classroom settings because it would be "unnecessary." Is accommodation unnecessary because elementary students are involved and elementary students are more impressionable,[175] or is the accommodation unnecessary only because the school has not created a limited public forum? While the Third Circuit observed that kindergarten and first

171. *Id.* at 277.

172. *Id.* at 280.

173. *Id.* at 279.

174. *Id.*

175. Courts tend to be protective of elementary students because of their impressionability. *See e.g. Wallace v. Jaffree*, 472 U.S. 38 (1985) (rejecting a state law authorizing a period of silence for voluntary prayer in a matter that involved a kindergarten student); *Hazelwood*, 484 U.S. at 272 ("[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech in potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.").

grade "children are most impressionable,"[176] one can argue that control over school curriculum by school officials should be limited only to the classroom.[177] Thus, *Walz* leaves open the possibility that, even in an elementary school, a limited public forum could be created for non-classroom areas, allowing distribution of religious material as long as school officials have permitted students to distribute non-religious materials in those areas.

The second comment regarding student expressive rights attendant to "a class assignment or activity" is more problematic. If the court is suggesting that students have some measure of free speech rights to religious expression with regard to class assignments or activities, that would be a dramatic turn of events. Whether the Third Circuit intended to create such a right might be doubtful in light of its earlier decision in *C.H. ex rel. Z.H. v. Oliva*[178] where an en banc court found no school board liability for an alleged free speech violation when an elementary student's religious artwork from a class assignment was taken from its original location in the school hallway and hung in a less visible place.[179] Other courts have found that free speech does not extend into the classroom either because school boards have considerable control over curriculum under *Hazelwood*[180] or because classrooms are non-public fora.[181] However, one must note that a vigorous dissent in the evenly divided *C.H.* case would have permitted the student to go to trial on the issue of viewpoint discrimination because

> public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that

176. *Walz*, 342 F.3d at 277. "As a general matter, the elementary school classroom, especially for kindergartners and first graders, is not a place for student advocacy. To require a school to permit the promotion of a specific message would infringe upon a school's legitimate area of control." *Id.*

177. *See Hazelwood*, 484 U.S. at 277.

178. *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc).

179. *Id.* at 200. *C.H.* represented an evenly divided Third Circuit where the opinion of the court was based on a finding of no liability because no evidence of a custom or practice of violating religious free speech had been presented, while the dissent found evidence of viewpoint discrimination. *Id.*

180. *See e.g. Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (upholding teacher's refusal for student to write a biography on Jesus Christ, even though the teacher made both errors of fact and law regarding religion).

181. *See Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996); *Miles v. Denver Pub. Schs.*, 944 F.2d 733 (10th Cir. 1991); *Murray v. Pittsburgh Bd. of Educ.*, 919 F. Supp. 838 (W.D. Pa. 1996).

the school's restriction on expression does not satisfy strict scrutiny.[182]

Because of the ambiguity of the *Walz* court's language, one will have to await further litigation to see whether the Third Circuit intends to move in the direction of adopting the *C.H.* court's dissenting views and introduce some measure of free speech into the classroom.

The tension between a student's interest in free speech, unfettered by viewpoint discrimination, and a school's interest in controlling its educational mission under *Hazelwood* came to a head in a recent Michigan federal district court decision, *Hansen v. Ann Arbor Public Schools*.[183] *Hansen* presents a different kind of access issue, namely the right of a student to present an unpopular religious point of view. In *Hansen*, as part of diversity week, a school permitted the school's Gay/Straight Alliance to organize a panel on Homosexuality and Religion that included local clergy with views favorable to homosexuality.[184] Although school officials had initially opened up participation on the panel to students, it ended up denying the request of a student member (plaintiff-Hansen) of a religious club, Pioneers for Christ, to be a member of the panel because of her views against homosexuality. A school principal later offered the student an opportunity to give a speech at an assembly on the topic, "What Diversity Means to Me," but, after submitting her speech to a principal, she was required by school officials to delete comments as to why she thought that homosexuality was wrong. Plaintiff filed suit against the school district and school officials under a number of legal theories, the most important being violations of Free Speech and the Establishment Clause. In granting the plaintiff injunctive, declaratory, and compensatory relief for violation of her rights under the Free Speech and Establishment Clauses, the court observed that school officials had

> censored Betsy's speech, finding objectionable that portion of her speech in which she expressed that she could not accept sexual orientation or religious teachings that she believes are wrong . . . [and their denial of her] representation on the Homosexuality and Religion panel was similarly motivated by their disagreement with [plaintiff] Betsy's viewpoint.[185]

Defendants' efforts to characterize the panel and assembly as

182. *C.H.*, 226 F.3d at 210 (Alito & Mansmann, JJ., dissenting). An example of school's compelling interest to restrict speech that would satisfy strict scrutiny would be "material and substantial interference with schoolwork or discipline . . . such as one espousing racial hatred." *Id.* at 212.

183. *Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780 (E.D. Mich. Dec. 5, 2003).

184. *Id.* at 785.

185. *Id.* at 800.

government speech under *Hazelwood* failed, for, as the court noted, "not a single school administrator or teacher conveyed any viewpoint or message at either forum."[186] The school district's other *Hazelwood* claim that it was furthering "pedagogical objectives" in "making students aware of minority points of view, creating a safe and supportive environment for gay and lesbian students"[187] was roundly rejected by the court. As the court observed, "it [was] not educational theory or practice that [school district] Defendants rel[ied] upon, but rather it [was] their specific disapproval of the message that [plaintiff] would have conveyed that underlies their decision."[188] In response to the school district's claim that they were advancing the goal of "acceptance and tolerance for minority points of view," the court's stinging response was that "their demonstrated *intolerance* for a viewpoint that was not consistent with their own is hardly worthy of serious comment."[189]

The connection between *Hazelwood* and free speech is the most instructive part of the decision. *Hansen* is the first federal court to hold that, even though "*Hazelwood* itself does not specifically mention viewpoint neutrality, it is implicit in the Court's holding."[190] Thus, school officials cannot cavalierly engage in viewpoint discrimination under the guise of controlling the school's educational environment. As the court pointedly noted, "Defendants fail[ed] to show why gays would be threatened or be made less 'safe' by allowing the expression of an opposing viewpoint, particularly when the panel included six clerics presenting the opposite view."[191]

Finally, the court invoked the same *Lemon* tripartite test that the *Rusk* court used to prohibit distribution of community organization religious material. In this case, however, the court found that the practice violated the Establishment Clause. In addition to the panel, with its clerics failing the first part of the test by having a non-secular purpose

and failing the second part of the test by having a preference for "a particular religious view,"[192] the court opined that the

> Defendants' level of involvement in this case in selecting the clergy for

186. *Id.* at 794.
187. *Id.* at 797.
188. *Id.* at 800.
189. *Id* at 801–02. (emphasis added).
190. *Id.* at 798.
191. *Id.* at 802.
192. *Id.* at 805. For the three parts of the *Lemon* test, *see supra*, n. 95.

> the panel, vetting the religious beliefs of the chosen clergy, recruiting the clergy, and providing school facilities and a captive audience of students for the clergy, and censoring and editing Betsy Hansen's speech based on its religious viewpoint, constitutes the kind of 'excessive entanglement with religion' found by the Supreme Court to be constitutionally impermissible.[193]

Hansen provides balance to *Walz* by confirming that the concept of neutrality, in the sense of evenhandedness, does have a place in free speech. While school districts have considerable authority in controlling their educational mission, they cannot create a limited public forum that only permits religious views favorable to them. Clearly, school officials in *Hansen* could have maintained control over diversity week and presented their views of diversity,[194] but once they opened the forum to outside religious speakers and other students, they crossed from *Hazelwood* to free speech viewpoint discrimination. At that point, they violated not only the Free Speech Clause, but the Establishment Clause as well.

VI. CONCLUSION

Community groups and individual students/student groups have convergent, yet separable, free speech issues regarding access to public schools. Whether the resistance of some public schools to religious expression belies an attitude that "bristles with hostility to all things religious"[195] may never be clear. What is more important, though, is that the free speech rights forged by the Supreme Court in *Lamb's Chapel* and *Good News* have served to level the playing field for religious claimants.

By merging the Free Speech Clause's concept of the limited public forum with the Establishment Clause's concept of neutrality, federal courts have infused free expression with the notion of evenhandedness. Access by religious claimants to public schools can still be restricted, and in some cases even prohibited, but the rules for governing access will now be defined under Free Speech, not under the misplaced Establishment Clause aphorism of a "wall of separation of church and state."[196]

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193. *Hansen*, 293 F. Supp. 2d at 806.

194. *See Downs v. L. A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (holding that a school could refuse to permit an individual teacher to post anti-homosexuality materials in response to the Los Angeles Unified School District's "Gay and Lesbian Awareness Month" posters and materials which were provided by the central office to schools within the district and posted on a school bulletin board which, pursuant to actual practice and policy, was under the direct control and oversight of the school principal).

195. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 318 (Rehnquist, CJ., dissenting).

196. *See generally* Daniel Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the*

Religious expression, as any other kind of expression, can be restricted and even prohibited if it becomes disruptive to the school environment, but only to the extent that the alleged disruption is, pursuant to *Tinker*, material and substantial and not the product of a school official's personal opinion. In addition, school districts are free to make educational choices about the district's mission and curriculum, but these choices, if *Hazelwood* is to apply, must be those of the school board and school officials. Once school officials look beyond the school and have the school district's choices championed by persons outside the school or by students selected for their points of view, the school runs the risk of violating free speech.

Religious groups afford unique challenges for school boards because such groups invariably have a viewpoint to present. To the extent that school districts want to prevent access by religious community groups to their schools, their options are somewhat limited. They can choose to prohibit all community groups from their schools, with whatever public relations impact that decision might have in the community. School boards also have the option, as boards did in *Stafford* and *Goulart*, of designating the uses of the forum; but as *Good News* and *Bronx II* suggest, boards cannot prohibit all religious uses while permitting non-religious ones. What remains, then, is the delicate dance between viewpoint discrimination, which is prohibited, and subject matter exclusions, which arguably may still be permissible under *Good News*.

Similarly, if school districts want to ban religious student organizations from their schools, they can close their schools under EAA to all but student organizations that are curriculum-related. Such a decision might not be popular with parents and students, but it invokes no free speech rights for non-curriculum-related groups. However, once a school permits a non-curriculum-related student group to meet on school premises, a cognizable argument can be made that the creation of a limited open forum under EAA automatically invokes a limited public forum under free speech. Once a school has passed over to a limited public forum, the school arguably has lost the force of *Hazelwood* to control the educational process, and is essentially left with only the disruptive restrictions from *Tinker* to limit the expression of religious content.

The expressive rights of individual students are more complicated by the limited public forum difference between classrooms and non-classroom areas. However, even here, school officials can close these

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First Amendment 124–27 (The Rutherford Inst. Rpt.: Vol. 5, Crossway Books 1987), for an effective refutation of the view that Thomas Jefferson intended the aphorism as the definition of the Establishment Clause to prohibit religious activity in the public sector.

non-classroom areas to student expression, in effect eliminating these areas as limited public fora. In the alternative, school officials can maintain these non-classroom areas as limited public fora, subject to the *Tinker* test for disruption. Free speech does not deprive school districts of their right to control their schools, but it does assure that this control will occur in a fair and evenhanded manner.