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AFTER-SCHOOL USE OF PUBLIC ELEMENTARY AND JUNIOR HIGH SCHOOL FACILITIES BY STUDENT RELIGIOUS GROUPS

> *The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.*[1]

> *The purpose of the Good News Club is to develop a positive peer group among students so that if/when the drug and other tough dilemmas come just around the corner, it will be easier for kids to stand together for what is right with a common foundation of Biblical principles and a personal relationship with God, rather than trying to stand alone.*[2]

This Recent Development explores the ability of public elementary and junior high schools to remain religion-neutral after school hours. Part I explores the dilemma public schools[3] face in confronting the

1. McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

2. September 1991 promotional for Good News/Good Sports Club Kick-Off for academic year 1991-1992 at Ladue Junior High School, Ladue, Missouri.

3. This Recent Development focuses on public elementary and junior high schools and examines the proper relationship between religious and secular activities in public facilities.

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inherent tension between the Establishment and Free Speech clauses of the First Amendment.[4] Part II explains the constitutional principles governing public schools' control over use of their facilities for religious speech and related activities. Part III then focuses on the Eighth Circuit's recent rejection of a school district's use-of-premises policy as a violation of the First Amendment in *Good News/Good Sports Club v. School District of Ladue*.[5] Part IV concludes with a discussion of that decision's impact on the educational mission of public schools.

I. INTRODUCTION

Few issues cause more debate than the place of religion in the public schools. The public school system inculcates students with societal values and norms that school officials believe will transform children into responsible and productive citizens.[6] Recognizing the dangers of school-endorsed religion, the Supreme Court has interpreted the Establishment Clause as prohibiting organized prayer and other forms of religious activity involving school personnel during school hours.[7]

It also provides a brief review of the Equal Access Act as it applies to senior high schools. *See infra* notes 80-87 and accompanying text. For a more thorough discussion of the Equal Access Act, see Michael D. Rouse, Comment, *The Equal Access Controversy: A Battle for Freedom of Religious Speech in Public Secondary Schools*, 17 FLA. ST. U. L. REV. 369 (1990).

4. This Recent Development examines the duty of public secondary schools to exclude religious groups from school facilities to avoid endorsing — or appearing to endorse — a particular religious group or set of beliefs. It also proposes a framework for determining when students' rights to associate for worship and religious discussion prevail over the school's interest in avoiding a violation of the Establishment Clause.

The constraints placed on public schools by the Free Exercise Clause are beyond the purview of this Recent Development. For a discussion of the relationship between the Free Exercise and Establishment Clauses, see Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989).

5. 28 F.3d 1501 (8th Cir. 1994).

6. *See, e.g.*, Bethel School Dist. v. Fraser, 478 U.S. 675 (1986). In *Bethel*, Chief Justice Burger stated that "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized order." *Id.* at 683. *See generally* Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1271 (1991) (discussing the competing views of the educational mission of public schools).

7. *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a statute forbidding teaching of evolution theory unless creationism was also taught); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating a statute requiring a moment of silence at the start of the school day); Stone v. Graham, 449 U.S. 39 (1980) (prohibiting posting of the Ten

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While most religious activities may not take place during school hours, the Court has interpreted the Free Speech Clause as requiring public schools to allow religious groups to meet on school property after school hours if the school facilities are open to other similar groups.[8] Recognizing its secular, educational mission, however, a public school might choose to remain completely neutral to religion, yet allow a few nonreligious groups to use school facilities. The Eighth Circuit's decision in *Good News/Good Sports Club v. School District of Ladue*[9] severely curtails a public school's ability to provide such a religion neutral forum after school hours.[10]

II. PRINCIPLES GOVERNING THE EXCLUSION OF RELIGIOUS SPEECH FROM PUBLIC SCHOOLS

The Establishment Clause of the First Amendment states "Congress shall make no law respecting an establishment of religion . . ."[11] This

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Commandments in a classroom); School Dist. of Abbington Township v. Schempp, 374 U.S. 203 (1963) (prohibiting Bible reading in the public schools); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating practice of reciting prayer at the beginning of the school day); McCollum v. Board of Educ., 333 U.S. 203 (1948) (denying use of public classrooms for religious instruction during school hours); *cf.* Zorach v. Clausen, 343 U.S. 306 (1952) (approving the practice of releasing students for religious instruction off campus).

8. Students might also challenge denial of access to public school facilities for worship or religious discussions under the Free Exercise Clause. For a comparison of free speech to free exercise claims, see John D. Thompson, Note, *Student Religious Groups and the Right of Access to Public School Activity Periods*, 74 GEO. L.J. 205 (1985).

9. 28 F.3d 1501 (8th Cir. 1994).

10. In this Recent Development, the term "religion neutral" denotes a forum completely free of symbols, imagery, or ideas of any religious, or antireligious, creed or sect. Presumably, in such a forum, the government neither encourages nor discourages students' religious beliefs. *But see* Michael D. Baker, Comment, *Protecting Religious Speakers' Access to Public School Facilities: Lamb's Chapel v. Center Moriches School District*, 44 CASE W. RES. L. REV. 315 (1993) (suggesting that a religion-free forum demonstrates antireligious bigotry).

11. The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. *School Dist. of Abbington Township*, 374 U.S. at 253-58 (Brennan, J., concurring).

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constitutional mandate means that the State cannot endorse, or appear to endorse, religion or a particular religious viewpoint.[12] Thus, the Establishment Clause prohibits both favoritism and hostility toward religion.[13]

The First Amendment also states that "Congress shall make no law . . . abridging the freedom of speech . . ."[14] Known as the Free Speech Clause, this clause protects the free exchange of ideas, promotes intelligent self-government, and provides "the freedom to think as you will and to speak as you think."[15] In the public school context, the Free Speech Clause protects students' right to associate for the purpose of engaging in religious worship and discussion.[16]

A. *The First Amendment in the Public School Setting*

When applying both the Establishment and Free Speech Clause mandates of the First Amendment to public schools, most courts are mindful of the public school system's role in society.[17] Public schools are charged with inculcating democratic ideals into the nation's youth. Attendance is mandatory, making school children a captive audience.[18]

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12. In *Everson v. Board of Educ.*, the Supreme Court explained the Establishment Clause as follows:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

330 U.S. 1, 15-16 (1947).

13. *See* Nadine Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143, 143 n.6 (1985).

14. U.S. CONST. amend. I; *see supra* note 11 for the full text of the First Amendment.

15. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 8-5, at 576-78, § 8-6, at 578-79 (2d ed. 1988).

16. *See* Rouse, *supra* note 3, at 392-96.

17. *See* Epperson v. Anderson, 393 U.S. 97, 104-05 (1968) (stating that courts should not needlessly intervene in public education, which is traditionally committed to the control of state and local authorities).

18. In addition to compulsory attendance laws, a student is a captive audience in that he or she has no effective control over what he or she studies. Unlike in a university, a primary or secondary school student's course of study is limited to the curriculum and activities sanctioned by school administrators. *See, e.g.*, Board of Educ. v. Pico, 457 U.S.

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Students, especially younger students, emulate teachers and look to them as role models. In addition, students are susceptible to peer pressure.[19] Incorporating religion or prayer into curricular, and in some cases noncurricular, activities creates a potential for divisiveness and exclusion of those students who adhere to no religious beliefs.[20]

The Supreme Court has repeatedly recognized that public school students' First Amendment rights are not necessarily as extensive as adults' rights.[21] In *Hazelwood School District v. Kuhlmeier*,[22] the Court emphasized that schools must be able to remain neutral on controversial issues in order to fulfill their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[23] The necessity of public schools remaining neutral constrains the students' First Amendment right of expression.

B. *The Public Forum Doctrine and Viewpoint Discrimination*

To evaluate restrictions on expression, including those curtailing student religious expression, the Supreme Court applies the public forum

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853, 914 (1982) (Renquist, J., dissenting).

19. Some courts question whether participating in religious activities is truly voluntary in the school setting, given children's tendency to succumb to peer pressure. *See* Wallace v. Jeffree, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring) (noting children's propensity for imitation and distaste for nonconformity); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982).

20. *See* Bender v. Williamsport Area School Dist., 741 F.2d 538, 553-54 (3rd Cir. 1984).

21. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1987) (citing Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

22. 484 U.S. 260 (1994). *Hazelwood* involved students' claims that school officials violated their First Amendment rights by deleting two pages from the student newspaper which included articles on teenage pregnancy and divorce. *Id.* at 262. The Court found the principal's decision to delete the pages reasonable and therefore consistent with the First Amendment. *Id.* at 276.

23. *Id.* at 272. (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)). The Court noted that educators need greater control over student activities that bear the imprimatur of the school such as school-sponsored publications or productions. *Id.* at 271. The Court differentiated student speech that the First Amendment affirmatively requires schools to promote and student speech that the First Amendment requires schools to tolerate. *Id.* at 270-71. Parents and students have greater reason to believe that the school endorses views espoused during student activities promoted by the school.

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doctrine[24] as set out in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[25] Under the public forum doctrine, the extent to which the government can limit access to public property depends on the character of the property.[26] Property that "by long tradition or by government fiat [has] been devoted to assembly and debate,"[27] such as a sidewalk, park, or street, is considered a traditional public forum.[28] In a public forum, the government cannot impose a content-based exclusion unless the restriction is necessary to achieve a compelling state interest and is narrowly tailored to achieve that interest.[29] Public schools are rarely considered public forums.[30]

Property that is neither by tradition nor by designation a forum for public communication is a "nonpublic forum."[31] In a nonpublic forum, the government may exclude certain subjects and groups if the restrictions are reasonable and are viewpoint neutral.[32] Under this more

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24. For a history of the public forum doctrine, see Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from Lamb's Chapel*, 24 N.M. L. REV. 1 (1994).

25. 460 U.S. 37 (1983). In *Perry*, the Court found that a school mailbox and delivery system was not open to the public. *Id.* at 47. Organizations could use the mailboxes to communicate with teachers by permission only, which was not granted as matter of course. *Id.* The Court concluded that such selective access was inconsistent with a public forum. *Id.*

26. *Perry Educ. Ass'n*, 460 U.S. at 44; Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 797 (1985). The *Cornelius* Court described public forum analysis as balancing the Government's interest in limiting the use of its property against the speaker's interest in using the property for another purpose. *Cornelius*, 473 U.S. at 800. The Court factors in the type of property, its intended use, and the disruption likely to be caused by the speaker. *Id.* *See* Salomone, *supra* note 24, at 13 (noting a shift in the public forum doctrine from a concept protecting the rights of individual speech to rigid rules protecting government discretion).

27. *Perry Educ. Ass'n*, 460 U.S. at 45.

28. The court described traditional public fora as places which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

29. *Perry Educ. Ass'n*, 460 U.S. at 45.

30. The Supreme Court has indicated that it might consider a school to be a public forum when its property is heavily used by a wide variety of organizations. Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2146-47 (1993).

31. *Perry Educ. Ass'n.*, 460 U.S. at 46, 49.

32. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (citing *Perry Educ. Ass'n.*, 460 U.S. at 49).

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deferential review, the Court considers reasonableness[33] in light of the forum's purpose and the surrounding circumstances.[34] Even if a restriction is reasonable, a regulation that discriminates on the basis of viewpoint violates the First Amendment.[35]

Property that the State intentionally designates as a public forum, such as a school or municipal theater, in some cases,[36] is a "limited public forum."[37] The State may limit the purposes for which the forum may be used[38] and may close the forum when it chooses.[39] While the forum remains open, however, the government is subject to the standard that applies in the traditional public forum: a restrictive regulation must be necessary and narrowly tailored to the compelling state interest.[40] The property, however, remains a nonpublic forum for all unspecified uses.[41] As in a nonpublic forum, the exclusion of uses must only be reasonable and viewpoint neutral.[42]

Because courts generally find schools to be either limited public

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33. The government's restrictions need not be the most reasonable or the only reasonable limitations. *Id.* at 808.

34. *Id.* at 809. In *Cornelius*, the Court concluded that a charity drive conducted in the federal workplace was a nonpublic forum. *Id.* at 804-06. The Court found the Government's practice and policy in running the charity drive inconsistent with a desire to create a public forum for the use of all charitable organizations. *Id.* at 805. Specifically, government officials limited participation to groups that met certain criteria, which represented only a fraction of all charitable organizations. *Id.*

35. *Id.* at 811 (citations omitted).

36. *See* Brian S. Black, Note, *The Public School: Beyond the Fringes of Public Forum Analysis?*, 36 VILL. L. REV. 831, 840 (1991).

37. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). To determine if public officials intentionally created a public forum, the Court examines both policy and practice. *Perry Educ. Ass'n*, 460 U.S. at 47.

38. *Perry Educ. Ass'n*, 460 U.S. at 46 n.7. Such limited purposes include use by certain groups and discussion of certain subjects. *Id.*

39. *Id.* at 46.

40. *Id.* (citing Widmar v. Vincent, 454 U.S. 263, 269-70 (1981)); *see supra* notes 24-30 and accompanying text (discussing restrictions on public forums).

41. *Id.* at 48.

42. *Perry Educ. Ass'n*, 460 U.S. at 46; *see supra* notes 31-35 and accompanying text (discussing restrictions on nonpublic forums).

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forums or nonpublic forums,[43] viewpoint discrimination takes central importance in analyzing a school's use-of-premises policy.[44] Impermissible viewpoint discrimination occurs when public officials exclude speakers in order to suppress their views on subjects otherwise open to discussion in the forum.[45] Thus, to avoid abridging free speech, a school's use-of-premises policy must allow speakers with religious viewpoints to address any subject matter that speakers with nonreligious viewpoints would be allowed to address.[46] This analysis is fact-intensive and the ultimate result may turn on the court's characterization of the subject matter being addressed.[47]

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43. Schools may be public forums only if school authorities have, by practice or policy, opened the forum for indiscriminate use by the general public or student groups or both. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).

44. In both limited public forums and nonpublic forums, an exclusion of religious uses must be reasonable and viewpoint neutral. *See infra* text accompanying note 46.

45. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 478 U.S. 788, 806 (1985).

46. Some commentators question whether the viewpoint neutrality requirement should apply to public schools that necessarily must select certain views and exclude others in setting a curriculum that reflects societal values. *See* Salomone, *supra* note 24, at 16.

47. In *Good News/Good Sports Club v. School Dist. of Ladue*, the Eighth Circuit expansively defined the subject matter of the sole included speaker, the Boy Scouts, as "moral character and youth development." 28 F.3d 1501, 1506 (8th Cir. 1994). Consequently, the court found that the school district discriminated on the basis of viewpoint for excluding the Good News Club, which sought to address the same issue from a religious perspective. *Id.*

C. *The Establishment Clause Defense*

Once a court determines that a school district has impermissibly excluded speakers from the limited public forum or nonpublic forum, the district may attempt to justify its restrictions by arguing that a compelling state interest exists for the exclusion. Interests offered by school districts include preventing public unrest[48] and avoiding an Establishment Clause violation.

The Supreme Court has recognized that adherence to the Establishment Clause's mandate of separation of church and state might be a compelling interest justifying an abridgement of speech that otherwise would violate the First Amendment.[49] Traditionally, the Court has examined such claims under the heavily-criticized test[50] announced in *Lemon v. Kurtzman*.[51] Under the *Lemon* test, a government action does not violate the Establishment Clause and is not an impermissible endorsement of religion when it (1) has a secular

48. In *Cornelius*, the Court explained that "government need not wait until havoc is wreaked" to prohibit disruptive conduct. 473 U.S. at 810. More recently, in *Lamb's Chapel*, the Court found no evidence that allowing the church to use school facilities would lead to public unrest and rejected this argument as a compelling justification for excluding religious groups from school facilities. Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2148 (1993).

49. *Lamb's Chapel*, 113 S. Ct. at 2148.

50. Both commentators and Justices alike have expressed dissatisfaction with the *Lemon* test. Recent Supreme Court decisions mark increasing dissatisfaction with the *Lemon* test and suggest that the Court may soon endorse a more flexible test. In *Lee v. Weisman*, 112 S. Ct. 2649 (1992), the Court avoided the use of the *Lemon* test but did not overrule the decision. In *Lamb's Chapel*, the Court relegated the *Lemon* test to the final two sentences of its terse Establishment Clause analysis. 113 S. Ct. at 2148. Justice Scalia, concurring in the judgment, responded with a plea to end the intermittent use of the *Lemon* test:

> 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 . . . .
>
> Over the years . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so.

Id. at 2149-50 (Scalia, J., concurring). In Footnote 7 to the opinion of the Court, however, Justice White both reaffirmed the *Lemon* test and suggested that it might soon be put to rest: "While we are somewhat diverted by Justice Scalia's evening at the cinema, . . . we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." *Id.* at 2148 n.7.

51. 403 U.S. 602 (1971).

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purpose,[52] (2) does not have the primary effect of advancing or inhibiting religion,[53] and (3) does not foster an excessive entanglement with religion.[54]

Applying the *Lemon* test, courts have found that the policies of public universities or secondary schools that provide for equal access by all groups do not violate the Establishment Clause.[55] However, several decisions have held that these policies violate the primary effect prong if they contain certain factors held to amount to viewpoint discrimination.[56] Factors that indicate official support by the school[57]

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52. The secular purpose prong ensures that the government is not motivated by religious considerations. Bender v. Williamsport Area School Dist., 741 F.2d 538, 551 (3rd Cir. 1984). Acceptable secular purposes include providing an open forum for the free exchange of ideas, *Widmar v. Vincent,* 454 U.S. 263, 271 (1981), and encouraging extracurricular activities, *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1980).

Purposes may still be considered secular even when some of the ideas that are exchanged, or several of the extracurricular groups that meet, are religious. *But see* Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982). In *Lubbock*, the court found an impermissible secular purpose because the district policy authorized students to meet after school hours for religious purposes. *Id.* at 1045. However, the *Lubbock* holding can be limited by the court's stress on two particular factors: (1) the impressionability of secondary and primary age school children; and (2) the implicit approval by school officials, as evidenced by the religious meetings being held at the end of the school day. *Id.*

53. *See infra* notes 56-59 and accompanying text for a discussion of the primary effect prong of the *Lemon* test.

54. The Supreme Court has noted that denying equal access to religious groups creates entanglement problems in that the school is required to monitor meetings to prevent religious speech. Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981). Moreover, the Court has held that custodial oversight to ensure good behavior does not create an excessive entanglement. Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 252-53 (1990).

55. *Widmar*, 454 U.S. 263 (university); *Mergens*, 496 U.S. 226 (secondary schools); Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993) (nonstudent religious group at a secondary school).

56. *See infra* part II.D.

57. In *Widmar*, the Court noted that, unlike university students, younger students might not perceive a difference between the state merely accommodating diverse viewpoints and the state affirmatively endorsing the views of groups using its facilities. 454 U.S. at 274 n.14. In *Mergens*, the Court backed away from this position in upholding Congress's determination that secondary school students are likely to appreciate the distinction. 496 U.S. at 250.

Courts disagree on the age at which children can perceive the difference between accommodation and endorsement. Most lower courts have found that even high school students cannot appreciate the subtle distinction between accommodation and endorsement.

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include the proximity between instructional hours and the religious meeting[58] and the involvement of school officials.[59]

In contrast, involvement of a religious group composed of members of the community at large, as opposed to students,[60] or a district policy that permits a broad spectrum of activities to be conducted extracurricularly in school facilities,[61] militates against a finding that the school endorses religious activities occurring in its facilities. When such factors are present, a court is less likely to find a violation of the Establishment Clause based on viewpoint discrimination.

D. *Supreme Court Analysis of Public Schools' Denial of Access to Religious Groups*

In *Widmar v. Vincent*,[62] the Supreme Court held that a state university providing an open forum for student activities cannot close the

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Bender v. Williamsport Area School Dist., 741 F.2d 538, 552 (3rd Cir. 1984) (noting that high school students are less able to appreciate that permission for religious groups to meet resulted from neutrality toward religion and not accommodation); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1045 (5th Cir. 1982) (noting impressionability of children in secondary and primary schools as factor in finding a primary effect of encouraging religion).

58. Garnett v. Renton School Dist. 874 F.2d 608, 612 (9th Cir. 1989) (finding prayer meetings before school too closely associated with the highly structured school day); *Lubbock Civil Liberties Union*, 669 F.2d at 1045 (stating that allowing religious meetings in close proximity to the beginning or end of the school day carries the message of implicit approval); Brandon v. Board of Educ., 635 F.2d 971, 978-79 (2nd Cir. 1980) (commenting that the appearance of official support diminishes when religious organizations use the school building at night).

Even when religious meetings take place before or after school hours, students remain a captive audience and under control of the school from the moment they board the bus until the moment they disembark in the afternoon. Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1406 (10th Cir. 1985).

59. The mere presence of a school official or even a parent at an activity, whether participating or not, necessarily lends the impression that the school endorses the activity. *Bender*, 741 F.2d at 552.

60. In *Lamb's Chapel*, for instance, the Court found no danger that the community would associate the school with a religious meeting not sponsored by the school and attended by church members and the general public. 113 S. Ct. at 2148.

61. Widmar v. Vincent, 454 U.S. 263, 274-75 (1981). In *Mergens*, the Court somewhat limited its holding that the equal access policy did not advance religion when it explicitly noted the absence of evidence that religious groups would dominate the forum. 496 U.S. at 252.

62. 454 U.S. 263 (1981).

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forum to students who want to use university facilities for religious worship or teaching.[63] The University of Missouri at Kansas City routinely allowed over 100 registered student organizations to use its facilities for meetings.[64] The University denied access to a registered religious group[65] based on a regulation prohibiting the use of university buildings or grounds for religious worship or teaching.[66]

The Court found that the University had created a public forum through its policy of generally accommodating student meetings.[67] The University argued that the regulation excluding groups based on the religious content of their speech was necessary to serve the compelling state interest of avoiding an Establishment Clause violation.[68] The Court applied the *Lemon* test and rejected the University's argument, holding that the free access policy did not violate the Establishment Clause.[69]

After briefly noting that two prongs of the *Lemon* test were easily satisfied,[70] the Court examined whether the policy had the primary effect of advancing religion.[71] The Court found that an equal access policy would not have the primary effect of advancing religion and that any benefits to religious groups would be only incidental.[72] First, the Court found that an open forum at a university does not create an

63. *Id.* at 273.

64. *Id.* at 265.

65. The organization, "Cornerstone," was a nondenominational Christian group that met to pray, sing hymns, study the Bible, and discuss religious views and experiences. *Id.* at 265 n.2.

66. *Id.* at 265. The regulation provided: "No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups . . . ."
Id. at 265 n.3.

67. *Widmar*, 454 U.S. at 267.

68. *Id.* at 270-71.

69. *Id.* at 271.

70. The equal access policy had the secular purpose of providing a forum for the free exchange of ideas. *Id.* at 271-72 n.10. Further, not only did the Court fail to find excessive entanglement, it also commented that greater entanglement with religion would arise from efforts to police the no-religion proviso. *Id.* at 272 n.11.

71. *Id.* at 272-75. The Court emphasized that the proper inquiry was whether a forum open to all groups — including religious ones — had the effect of advancing religion. *Id.* at 273.

72. *Id.* at 273.

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"imprimatur of state approval,"[73] because university students are mature enough to appreciate that the University remains neutral to religion although religious groups may use its facilities. Second, the Court noted that in this case the university forum was available to both nonreligious and religious groups.[74] This equality of access decreased the likelihood that students would infer university support of religion.[75] Moreover, by providing facilities, the University merely extended general benefits to religious groups.[76] The Court, however, indicated that it might reach a different result if the religious groups dominated the university's open forum.[77]

In *Board of Education of the Westside Community Schools v. Mergens*,[78] the Supreme Court applied the principles of *Widmar* to public secondary schools.[79] The Court held that the senior high school violated the Equal Access Act[80] when it refused a student Christian club access to school premises on the same terms as other noncurricular groups.[81] After concluding that the Equal Access Act prohibited the school's exclusion of the student religious group, the Court rejected the

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73. *Id.* at 274. The Court suggested a possible distinction between college students, who are young adults, and younger students, who are more impressionable and less likely to appreciate a policy's neutrality toward religion. *Id.* at 274 n.14.

74. *Id.* at 274.

75. *Id.* at 274 n.14.

76. *Id.* at 274. The Court compared the University's extension of the use of public school buildings to religious groups to the provision of fire and police service to churches. *Id.* at 274-75.

77. *Id.* at 275.

78. 496 U.S. 226 (1990). For an in-depth analysis of the *Mergens* decision, see Leah Gallant Morgenstein, Note, *Board of Education of Westside Community Schools v. Mergens: Three "R's" + Religion = Mergens*, 41 AM. U. L. REV. 221 (1991).

79. *Mergens*, 496 U.S. at 235. The Christian club wished to meet to read and discuss the Bible, to have fellowship, and to pray together. *Id.* at 232.

80. The Equal Access Act provides, in relevant part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open 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 the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (1988).

The Court noted that, in passing the Equal Access Act, Congress intended to extend *Widmar's* reasoning to secondary schools. *Mergens*, 496 U.S. at 235.

81. *Mergens* 496 U.S. at 246-47.

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school's alternative claim that the Act violated the Establishment Clause.[82]

As in *Widmar*, the Court found that the Equal Access Act satisfied the secular purpose and entanglement prongs of the *Lemon* test.[83] Applying a more detailed analysis to the primary effect prong, the Court held that the Act did not have the primary purpose of advancing religion.[84] The Court reasoned that secondary school students are likely to understand that because a school provides access to religious groups on the same terms as nonreligious groups, it does not indicate that the school endorses or supports religion.[85] The Court emphasized that the Act expressly limits participation in religious groups by school officials, thereby decreasing the chance that students would perceive that the school endorses religion.[86] Finally, the Court noted that the broad spectrum of clubs at the high school decreased the likelihood that students would associate the school with the religious club.[87]

In *Lamb's Chapel v. Center Moriches Union Free School District*,[88] the Supreme Court struck down a New York school district regulation that prohibited the use of school property for after-school activities by a religious group.[89] Lamb's Chapel, a community church, sought access to school facilities to show a film series on childrearing and family values from a religious perspective.[90] School district

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82. *Id.* at 247-53.

83. Congress' declared secular purpose was the prevention of discrimination against religious and other types of speech. *Mergens*, 496 U.S. at 249. Additionally, the Court noted that oversight by school employees for custodial purposes did not impermissibly entangle the government in the administration of religious activities. *Id.* at 253. In fact, the Court cautioned that greater entanglement problems could arise "in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur." *Id.*

84. *Id.* at 249-52.

85. *Id.* at 250.

86. *Id.* at 251. Moreover, the Court emphasized that the school can control the students' perception by making clear to them that the school's official recognition of the Christian club is not an endorsement of the group's ideas or activities. *Id.*

87. *Id.* at 252. Another factor mentioned by the Court was that the students were free to start additional clubs. *Id.* Again, this factor appeared to mitigate against a finding that the school appeared to endorse religion or a particular religious belief.

88. 113 S. Ct. 2141 (1993).

89. *Id.* at 2143-44.

90. *Id.* at 2144-45.

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regulations provided that school facilities could be used for social, civic, and recreational purposes, as well as by public organizations.[91] However, the regulations specifically denied use by any group for religious purposes.[92]

The Court determined that excluding religious speech in this situation was not reasonable or viewpoint neutral.[93] The Court found that the school district policy discriminated on the basis of viewpoint by allowing all viewpoints about family issues and children except those from a religious perspective.[94] The Court believed that a lecture or film about childrearing and family values was a social or civic use permitted by school district regulations.[95] The Court then concluded that the district denied the Church's request based solely on the film's religious perspective.[96]

In a terse analysis, the Court applied the *Lemon* test and rejected the district's Establishment Clause defense.[97] In this case, a broad range of private organizations used the school facilities, the religious film would be shown after school hours, and the meeting would be open to both church members and the public.[98] Therefore, the Court saw no danger that the community would perceive that the school endorsed religion or a particular creed.

Widmar, Mergens, and Lamb's Chapel have established that public universities and high schools must allow religious groups to use school facilities if the school generally allows open access to other groups. Yet

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91. *Id.* at 2143-44.

92. *Id.* at 2144. Despite the district's stated policy of excluding religious groups, a few arguably religious groups, including the Salvation Army Youth Band, a New Age religious group, the Southern Harmonize Gospel Singers, and the Hampton Council of Churches' Billy Taylor Concert, had already used school facilities. *Id.* at 2146 n.5. Although it did not rule on the issue, the Court questioned whether the school district had in fact opened the property for religious uses. *Id.* at 2146-47.

93. *Id.* at 2145. The Court assumed, without deciding, that the courts below correctly found that religious uses were excluded from the limited public forum created by the school district. *Id.* at 2147.

94. *Id.* at 2147.

95. *Id.*

96. *Id.*

97. *Id.* at 2148. A mere two sentences comprised the Court's entire application of the *Lemon* test.

98. *Id.*

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these opinions also suggest that in certain circumstances public schools may restrict students' free speech rights to worship and discuss religious issues on school property.[99] The Eighth Circuit recently addressed whether Free Speech Clause concerns required the inclusion of religious groups when a junior high school[100] granted limited access to two nonreligious groups.[101]

III. *GOOD NEWS* AND THE EXCLUSION OF STUDENT RELIGIOUS ACTIVITIES AFTER SCHOOL

In *Good News/Good Sports Club v. School District of Ladue*,[102] the Eighth Circuit Court of Appeals struck down the Ladue School District's use-of-premises policy because it discriminated against a Christian club's religious viewpoint.[103] The policy prohibited the use of school district facilities from three p.m. to six p.m. on school days by all community groups except for athletic groups and Scouts.[104] Further, the policy specified that the Scouts' meetings could not contain religious speech or activities.[105]

The Good News/Good Sports Club was a nondenominational community group composed of students and parents in the school

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99. For a discussion of the circumstances when public schools may restrict students' free speech rights to worship and discuss religious issues on school property, see *supra* part II.B.

100. For a discussion of the Establishment Clause consequences of allowing religious groups in elementary or junior high schools, see *supra* notes 78-99 and accompanying text.

101. *See infra* part III for a discussion of the Eighth Circuit case.

102. 28 F.3d 1501 (8th Cir. 1994).

103. *Id.* at 1503.

104. *Id.* The school district policy provided:

> Permission for use of school facilities after instructional time ends on school days will be granted to Community Groups: (1) for use of District's athletic facilities, provided that the use is limited exclusively to athletic activities; and (2) for meetings of Scouts (Girl, Boy, Cub, Tiger Cub, and Brownies), provided that such meetings shall be limited exclusively to the scout program and shall not include any speech or activity involving religion or religious beliefs.

Id.

105. *Id.* The district court had held that the Good News/Good Sports Club lacked standing to assert the alleged First Amendment violation of the Scouts' rights to freedom of speech. Good News/Good Sports Club v. School Dist. of Ladue, 859 F. Supp. 1239, 1248 (E.D. Mo. 1993).

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district.[106] The club's purpose was to teach Christian religious beliefs and moral values to junior high school students.[107] Club meetings included prayers, Bible readings, and Christian songs.[108] After receiving complaints about proselytizing by the club,[109] the Ladue School District terminated its use-of-premises policy allowing equal access to all groups and instituted the policy limiting use to the Scouts and athletic groups.[110] Subsequently, the school district denied the Good News/Good Sports Club's request to continue meeting at the junior high school immediately after school.[111]

Parents and students who participated in the club sued the school district, charging that the school district violated their First Amendment right to practice religion.[112] They argued that the Ladue use-of-premises policy constituted impermissible viewpoint discrimination because the policy was not neutral in purpose or effect toward religion.[113] The district court rejected this argument, holding that the Ladue School District's policy excluding religious groups was permissible because the school was a nonpublic forum.[114] In addition, the court found that the school district had expressed a valid fear of violating the Establishment Clause if the Good News/Good Sports Club

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106. Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501, 1502 (8th Cir. 1994).

107. *Id.*

108. *Id.*

109. In February of 1992, two parents complained to the school board about the Good News/Good Sports Club's recruitment of their children to attend meetings. *Good News/Good Sports Club*, 859 F. Supp. at 1242.

110. The district amended its policy after receiving its attorney's opinion that the policy in effect might violate the Establishment Clause. *Id.*

111. *Id.* A former school board member founded the club in the late 1970s, and the club traditionally met once a month after school at a private home. *Id.* at 1241-42. The Good News Club met at Ladue Junior High School from December of 1988 through spring of 1992. *Id.* The prior policy permitted any community or student group whose application was approved to use school district facilities if space was available. *Id.*

112. *Id.* at 1241.

113. *Good News/Good Sports Club*, 859 F. Supp. at 1241.

114. *Id.* at 1244. The district court found that the school facilities were a nonpublic forum from three p.m. to six p.m. because the facilities were not open to indiscriminate use by the public. *Id.* In the court's view, the selective access granted to the Scouts, who had a longstanding relationship with the school, and to community members wishing to use the athletic facilities did not convert the nonpublic forum into a limited public forum. *Id.*

were permitted to use school facilities.[115]

The Eighth Circuit Court of Appeals reversed.[116] First, the court found that the use-of-premises policy discriminated on the basis of viewpoint.[117] The court defined the purpose of both the Good News/Good Sports club and the Boy Scouts as "moral and character development."[118] The court then found that the use policy allowed the Scouts to express their viewpoints on moral and character development but prohibited the Club's religious viewpoint on this same subject.[119]

The Eighth Circuit also rejected the school district's Establishment Clause defense.[120] The school district argued that it had terminated the equal access policy and instituted its current policy because it feared an Establishment Clause violation.[121] The court held that the adoption of

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115. *Id.* at 1245.

116. Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501 (8th Cir. 1994).

117. *Id.* at 1507. The court's finding of viewpoint discrimination seems questionable in light of the district court's finding that the school district had not desired to censor the Club's point of view.

118. *Id.* at 1506. The Eighth Circuit defined the activities of the Boy Scouts too broadly. Consequently, it unnecessarily found an overlap between the activities of the Good News Club and the Boy Scouts.

119. *Id.* at 1506-07. The Court essentially found that the Boy Scouts, itself a Christian organization, presented a secular view on moral development. This peculiar result was due in part to the procedural history of the case. The plaintiffs below argued that the Boy Scouts were religious, while the defendants argued that they were primarily a secular organization. Moreover, the policy excluded religious discussion by the Scouts.

120. *Id.* at 1507-10; *see supra* part II.C (discussing the Establishment Clause defense).

121. 28 F.3d at 1507-10. The Ladue School District's argument that it was justifiably concerned about an Establishment Clause violation in changing its use-of-premises policy was apparently a secondary argument, located in Section VI of its brief. Appellee's Brief at 41, Good News/Good Sports Club v. School District of Ladue, 28 F.3d 1501 (8th Cir. 1994) (No. 93-2148 EM). The district's primary argument was that the school district could terminate the limited public forum created by the equal access policy at any time for any reason. *Id.* at 17.

Both the dissent and the district court found that the school district had lawfully terminated the limited public forum and created a nonpublic forum with the new policy. 28 F.3d at 1512-13 (Bright, J., dissenting); Good News/Good Sports Club v. School Dist. of Ladue, 859 F. Supp. 1239, 1249-50 (E.D. Mo. 1993). This rendered the Establishment Clause discussion unnecessary except to determine whether the restrictions on access were facially reasonable and whether they concealed a bias against the viewpoint of the excluded speakers. 28 F.3d at 1513-14 (Bright, J., dissenting) (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797, 812 (1985)).

In contrast, the Eighth Circuit majority believed it unnecessary to evaluate whether the

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the amended use policy was unwarranted under the Establishment Clause because the equal access policy satisfied the *Lemon* test.[122] The court found that the equal access policy had the secular purpose of ensuring a free exchange of ideas.[123] Similarly, the court reasoned that the equal access policy avoided excessive school district involvement because schools would not be required to distinguish between groups using its facilities.[124]

Finally, the court concluded that the equal access policy did not have the primary effect of advancing religion.[125] First, the court found that the number of nonreligious uses of the school district forum eclipsed the number of religious uses.[126] Second, the court reasoned that junior high school students were mature enough to understand that the school was not endorsing religion by allowing the club to meet.[127] Third, the court saw no danger in allowing the club to meet immediately after instructional hours.[128] Fourth, the court noted that the involvement of a former school board member in the Good News/Good Sports Club did not improperly associate the school district with the club.[129]

IV. *GOOD NEWS*' IMPACT ON PUBLIC SCHOOL'S ABILITY TO REMAIN RELIGION-FREE

In *Good News*, the Eighth Circuit extended the principles of *Lamb's*

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school facilities were a nonpublic forum between three and six p.m. on school days. 28 F.3d at 1503 n.3. Instead, the court adhered strictly to the structure of the Supreme Court's analysis in *Lamb's Chapel*, despite the factual differences in the cases. For further discussion, see *infra* notes 131-35 and accompanying text.

122. 28 F.3d at 1508-10. However, the Eighth Circuit ignored various factors that support an inference of state endorsement of religion. *See infra* note 138 and accompanying notes.

123. 28 F.3d at 1508.

124. *Id.* at 1510.

125. *Id.*

126. *Good News/Good Sports Club*, 28 F.3d at 1509. The court noted that the Good News Club used the forum eight times while the Boy Scouts and athletic teams used the forum 993 times. *Id.*

127. *Id.* at 1509.

128. *Id.* at 1509-10.

129. *Id.* at 1510. The court distinguished the involvement of a school board member from that of a teacher, finding that students might wish to emulate the latter but not the former. *Id.*

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Chapel by holding that the Ladue School District must allow a parent-led Christian club composed of sixth, seventh, and eighth grade students to meet after school even when the forum was open to only two other nonreligious student groups.[130] In so doing, the court restricted a public school's ability to remain religion-neutral immediately after school hours.

In *Good News*, the Eighth Circuit essentially held that *Lamb's Chapel* precludes a school district from changing its equal access policy.[131] This is plainly wrong. *Lamb's Chapel* dealt only with a denial of use contrary to the terms of an existing use-of-premises policy.[132] Unlike the school district in *Lamb's Chapel*, the Ladue School District terminated an equal access policy that provided a limited public forum and instituted a policy that created a nonpublic forum from three to six p.m.[133] The Supreme Court has repeatedly held that a government entity may close a limited public forum at any time.[134] Moreover, restrictions on a nonpublic forum must be only facially reasonable and not conceal a bias against the excluded speakers.[135]

The Eighth Circuit's analysis in *Good News* is troubling in other

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130. *Good News* involved a junior high school's policy excluding all religious uses of school property from three to six p.m. while allowing two types of student groups — the Boy Scouts and athletic groups — to use the facilities during that time. 28 F.3d at 1503. In contrast, the Supreme Court in *Lamb's Chapel* struck down a senior high school's exclusion of all religious groups based on a regulation allowing a broad range of community groups to use the facilities after school hours. Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993).

131. The dissenting judge in *Good News* recognized the majority incorrectly applied *Lamb's Chapel* as the controlling Supreme Court precedent. 28 F.3d at 1511. The more closely analogous cases are *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), both of which involved nonpublic forums.

132. In *Lamb's Chapel*, the Court found that the school district denied access to all religious groups contrary to its policy allowing any use for social, civic, or recreational purposes. 113 S. Ct. at 2143-44.

133. *See supra* note 121. The majority did not rule on the character of the property as a limited public or nonpublic forum. However, both the dissent and the district court found that the prior use-of-premises policy had created a limited public forum and the amended use policy created a nonpublic forum. *Good News/Good Sports Club*, 28 F.3d at 1512-13 (Bright, J., dissenting); Good News/Good Sports Club v. School Dist. of Ladue, 859 F. Supp. 1239, 1249-50 (E.D. Mo. 1993).

134. *See supra* note 39 and accompanying text.

135. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797, 812 (1985).

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ways. First, in its viewpoint discrimination analysis, the court expansively defined the subject matter included in the forum.[136] In the case of a nonpublic forum, the usual inquiry is only whether the exclusion is facially reasonable.[137] Second, in determining that an equal-access policy did not violate the Establishment Clause, the court overlooked or summarily dismissed a number of factors that increased the likelihood that the community would perceive Ladue Junior High School as encouraging Christian student activities.[138]

Other courts should avoid following the Eighth Circuit's lead. In determining whether a school has discriminated on the basis of viewpoint, courts should carefully define the categories of speech designated by school officials as appropriate for school facilities.[139] When school officials attempt to keep a nonpublic forum religion-neutral, the proper question is whether the school has attempted to suppress one religious point of view and to encourage another.[140] Furthermore,

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136. The majority opinion concluded that the Boy Scouts' speech at Ladue Junior High School involved "moral character and youth development" based on the "ideals of scouting" set out in a national scouting manual. 28 F.3d at 1505-06. The court did not cite any testimony regarding the activities of Scouts at their meetings at the junior high school. Moreover, the junior high school's use-of-premises policy limited the Scout's activities as a condition of using the forum. *Id.* at 1506.

137. For a discussion of this more deferential standard of review see *supra* notes 31-49 and accompanying text.

138. A variety of factors supported an inference that the school endorsed the Christian values of the club. A former school board member had initiated and led the Good News Club meetings. Good News/Good Sports Club v. School Dist. of Ladue, 859 F. Supp 1239, 1241-42 (E.D. Mo. 1993). The sixth, seventh, and eighth grade students at the junior high school were younger and more impressionable than high school students and less able to differentiate state accommodation and state endorsement of religion. Students were likely to infer that the school encouraged participation because the club held meetings immediately after school hours and before the late buses returned students to their homes. The inference of state endorsement was also strong because only two other groups used school facilities at the time the club met.

139. Some commentators question whether public forum analysis is appropriate in the public school context because schools necessarily engage in viewpoint discrimination in selecting curricula. *See* Salomone, *supra* note 24; Black, *supra* note 36.

140. In *Perry Education Ass'n*, the Court examined whether a public school had engaged in viewpoint discrimination by excluding all but a single union from using school mailbox and delivery systems. 460 U.S. 37, 48 (1983). The Court held that the school had based its policy on the status, not the views, of the unions because the chosen union was the exclusive bargaining representative for the teachers. *Id.* The Court emphasized the inherent need to limit activities in a nonpublic forum to those compatible with the forum's purpose. *Id.*

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courts should heed the Supreme Court's admonition that courts must be "particularly vigilant in monitoring the Establishment Clause in elementary and secondary schools."[141]

Under the Eighth Circuit's analysis, it is more difficult for school districts to disassociate from religious disputes among students and parents. To avoid these problems, a school might attempt to restrict after-school use of facilities to one or more carefully selected groups.[142] However, *Good News* leaves open only a single avenue for limiting access to religious groups while avoiding a First Amendment violation: close the school to all groups, either completely or for a limited time after school hours.

V. CONCLUSION

In *Good News*, the Eighth Circuit struck down a junior high school's attempt to allow two nonreligious student groups to use school facilities while keeping the forum religion-neutral. In so doing, the *Good News* court went too far in limiting public schools' ability to keep religious instruction a private concern. In light of the highly personal nature of religious beliefs, the divisiveness of religious issues, and the public school system's role in shaping impressionable young minds, the ability of elementary and junior high schools to remain neutral to religion must be preserved.

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141. Edwards v. Aguillard, 482 U.S. 578, 584-84 (1987).

142. However, as the Ladue School District learned, a court may disfavor such a policy even when the school acts with the best of intentions. *See supra* note 131 and accompanying text.

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