GOOD NEWS? ADVANCING RELIGION THROUGH LITIGATION AGAINST THE PUBLIC SCHOOLS

by Cathie L. Fields*

There are higher stakes involved here relating to the freedom of all religious institutions. Those who urge further integration of state and church—even their symbolic merger—although well intended, unwittingly further denigration of the right to worship freely without state controls.[1]

INTRODUCTION

America's public schools are considered the bedrock of our democracy. In a recent address to the Vermont-National Education Association convention, Bob Keeshan, popularly known to millions as Captain Kangaroo, noted:

> In a very real sense it is public education, the education of all its citizens, which has set this nation apart and engendered undreamed of economic prosperity and great social advances. Public education is the rock upon which this nation and its greatness have been built. Upon this rock we shall build our nation.[2]

Yet American public schools are under attack from many sides. In several states, vouchers are available to enable parents to send their children to private schools with public funds. New federally mandated achievement levels appear unreachable, particularly as funding evaporates. Unregulated charter schools siphon off state funding from traditional schools. The teaching of science is constantly scrutinized by non-scientist pedants, including some in Congress, who insist on including "intelligent design" in textbook discussions of the origins of life.

*Senior Associate, The Law Offices of Margaret A. Chidester & Associates, Tustin, California.

[1] *Ceniceros by & Through Risser v. Board of Trustees*, 106 F.3d 878, 892 (9th Cir. 1997) (Lay, J., dissenting).

[2] VERMONT-NEA TODAY (Nov. 2002).

While many still believe the goal of public schools is education, myriad non-school groups vie for access to the captive audience of nearly 50 million American schoolchildren. Whether those groups are entitled to such access, and more, has become the subject of costly and widespread litigation against the schools. This article explores the impact of litigation by one nationwide group, Child Evangelism Fellowship, and the changing tenor of courts' First Amendment analysis when faced with challenges to the separation of religious organizations and the public schools.

CONSTITUTIONAL BACKGROUND

The First Amendment to the U.S. Constitution reads in its entirety:

> 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.[3]

The framers of the Constitution thus gave freedom from government establishment of religion the most prominent position in the Bill of Rights (the first ten amendments to the Constitution). The Bill of Rights was adopted, along with the body of the Constitution, in 1789, and the language of the First Amendment has not altered since that time. More than 200 years later, however, federal jurisprudence concerning the religion and free speech clauses continues to develop.

It is generally recognized that Thomas Jefferson, in an 1802 letter, first coined the term "a wall of separation of church and state."[4] Then-President Jefferson wrote to the Danbury Baptist Association to answer their inquiry why he would not proclaim national days of fasting and thanksiving, as had been done by Presidents Washington and Adams before him. Jefferson's letter stated, in part:

> Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that <u>their</u> legislature should make no law

[3] U.S. CONST. Amend. I.

[4] Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins and Stephen S. Nelson, a committee of the Danbury Baptist Association in the state of Connecticut, January 1, 1802. Library of Congress, Manuscript Division, Thomas Jefferson Papers.

> respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and state.[5]

Jefferson's "wall of separation" did not reach its full stature until the mid-twentieth century, as the U.S. Supreme Court considered a variety of challenges to government sponsorship of, or "entanglement with" religion.[6]

Controversy surrounding the appropriate role, if any, of prayer, religious materials, and theology in the public schools made its way to the United States Supreme Court during roughly the same time period as other issues of civil rights and civil liberties, such as freedom of speech and privacy. At the same time schools were being ordered to integrate following centuries of segregation,[7] the right to speak out against the actions of government was further expanding,[8] and various unremunerated rights that fell within the "penumbra" created by the Bill of Rights, such as the right to use birth control, were newly recognized.[9]

---

[5] *Id.* (emphasis in original). While the phrase "wall of separation" appears to have been coined by Jefferson, James Madison likewise referred to "separation" of church and state in a number of writings. *See, e.g., Letter to Robert Walsh*, Mar. 2, 1819 ("total separation of the church from the State"); *Detached Memoranda*, circa 1820 ("Strongly guarded as is the separation between religion & Gov't in the Constitution of the United States the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history"); *Letter to Edward Livingston*, July 10, 1822 ("perfect separation between the ecclesiastical and civil matters, is of importance").

[6] While the wall of separation is primarily understood to protect public life from undue religious influence, it cuts both ways. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 210, 902 S. Ct. 1526 (1972) ("Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence").

[7] *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954).

[8] *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710 (1964) (establishing "actual malice" requirement in defamation actions by public officials and declaring "that debate on public issues should be uninhibited, robust, and wide-open"); *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963) (recognizing First Amendment right to peaceful protest and assembly); *Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894 (1949) ("The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.").

[9] *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (invalidating state law forbidding the prescription or use of contraceptives).

RELIGION IN THE SCHOOLS: A JUDICIAL OVERVIEW

The Supreme Court has typically addressed the topic of religion in the public schools in the contexts of state-sponsored prayer,[10] official distribution or posting of religious materials, such as the Bible and, more specifically, the Ten Commandments,[11] curricular treatment of issues such as evolution,[12] religious speakers at graduation exercises,[13] student-initiated publications,[14] and public funding of parochial education.[15]

The U.S. Supreme Court first addressed the issue of prayer in schools in *Engel v. Vitale*.[16] Students in a New York public school district were required to read a 22-word nondenominational prayer as part of a daily devotional program in public school classrooms. The Court held the drafting and sponsorship of the prayer by school authorities violated the Establishment Clause: "It is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government."[17] The Court found it irrelevant that the prayer was nondenominational or that students who objected could be excused from the devotional exercises or chooses not to recite the prayer.

---

[10] *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) (holding that daily reading by students of prescribed nondenominational prayer violated the Establishment Clause).

[11] *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980) (invalidating Kentucky requirement that a copy of the Ten Commandments be posted in each public school classroom).

[12] *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266, 270 (1968) (striking down state law that prevented teaching the theory of evolution in public schools).

[13] *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) (striking down, in a 5-4 decision, school board policy that allowed school principals to invite clergy to offer prayers at graduation ceremonies).

[14] *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995) (upholding, under free speech principles, public university funding of student organization publishing religious newspaper).

[15] *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504 (1947) (upholding New Jersey's practice of spending tax-raised funds to pay bus fares of parochial school pupils); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 106 S. Ct. 748 (1986) (upholding state aid to blind student attending religious college); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S. Ct. 2462 (1993) (upholding use of state funds to provide interpreter for deaf students in Catholic school).

[16] 370 U.S. 421, 82 S. Ct. 1261 (1962).

[17] *Id.* at 425.

One year after deciding *Engel v. Vitale*, the Court addressed two statutes providing for Bible readings or the Lord's Prayer to be broadcast over school intercom systems at the opening of each school day.[18] In *Abington Township v. Schempp*, the Court employed explicitly for the first time the "purpose or effect" test that would later come to constitute the first prong of the well-known "*Lemon* test."[19] In 1985, the Court struck down an amendment to an Alabama statute that added "or voluntary prayer" to an authorized period of silence "for meditation" in the public schools, finding the amended statute was motivated entirely by a religious purpose.[20] Justices Powell and O'Connor concurred in the judgment, indicating they would uphold a true "moment of silence" statute, but that the Alabama statute as amended was unconstitutional.[21]

Federal circuit courts of appeals have held in various contexts that prayer *in the classroom*, whether led by a teacher or a student, is unconstitutional.[22] Likewise, use of schools' public address systems to lead prayers or recite religious messages has been held to violate the Establishment Clause.[23] Finally, courts have struck down the practice of prayers during school graduation ceremonies, whether led by school officials, outside clergy, or students, given the element of coercion

---

[18] *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963).

[19] *See Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971).

[20] *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985).

[21] *Id*. at 62, 67.

[22] *See*, *e.g.*, *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd without opinion*, 455 U.S. 913 (1982) (striking down Louisiana statute requiring school boards to permit teachers to inquire whether any student wished to offer a prayer at beginning of each school day, and if no student volunteered, to lead a prayer themselves); *Holloman v. Harland*, 116 Fed. Appx. 254, 2005 U.S. App. LEXIS 27591 (11th Cir. 2004) (holding teacher's practice of beginning the school day by asking students if they had prayer requests, then holding a moment of silence saying "Let us pray" violated Establishment Clause); *Doe v. School Board of Ouachita Parish*, 274 F.3d 289 (5th Cir. 2001) (striking down amendment deleting the word *silent* from state statute requiring school boards to permit "a brief time in prayer or meditation" at the start of each school day).

[23] *See*, *e.g.*, *Hall v. Board of School Commissioners of County*, 656 F.2d 999 (5th Cir. 1981) (holding reading of devotionals by students over public address system unconstitutional); *Meltzer v. Board of Public Instruction of Orange County, Florida*, 548 F.2d 559 (5th Cir. 1977), *aff'd in part and rev'd in part en banc*, 577 F.2d 311 (5th Cir. 1978) *cert. denied*, 439 U.S. 1089 (1979) (holding school board resolution calling for 5- to 7-minute prayer and Bible reading exercise over public address system by students or teachers violated Establishment Clause).

involved when students must be exposed to religious speech if they choose to attend this significant event.[24]

THE EQUAL ACCESS ACT

During the Reagan administration, in the early heyday of post-Vietnam, post-Watergate conservatism, Congress passed the Equal Access Act ("EAA"), guaranteeing secondary public school students the right to conduct meetings regardless of religious, political, or philosophical viewpoint.[25] The Supreme Court had held, in 1981, that when state universities make their facilities generally available for use by registered student groups, they may not single out religious groups and prevent them from meeting.[26]

Though the presence of religious groups raised concerns about possibly violating the separation of church and state, the Court found that the religious speech and association rights of a Christian group at the University of Missouri at Kansas City were protected by the First Amendment. Under an "equal access" policy, the Court found, a school is not endorsing any particular viewpoint, either for or against religion in general or for or against any particular religion.[27] The Court did not decide whether *high schools* as well as

---

[24] *See Lee v. Weisman*, *supra* n.13; *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (striking down school board policy that allowed senior class officers to poll graduating class to determine whether seniors wanted prayer included in graduation exercises); *Cole v. Orville Union High School District*, 228 F.3d 1092 (9th Cir. 2000) (upholding school principal's decision to disallow students' proposed explicitly sectarian presentations at graduation ceremonies); *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003) (upholding principal's requirement that student remove proselytizing references from proposed graduation speech, while allowing student to distribute copies of the original draft outside the ceremony); *Committee on Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (D.C. Ct. App. 1997) (invalidating D.C. statute permitting nonsectarian, non-proselytizing student-initiated voluntary prayer during graduation ceremonies and other school-related events); *Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999) (invalidating school board policy that permitted senior class to choose by secret ballot whether to include, and select from a list of volunteers students to deliver, invocation and benediction in graduation exercise); *compare Doe v. School District of City of Norfolk*, 340 F.3d 605 (8th Cir. 2003) (no Establishment Clause violation where school board member, acting as a private citizen and parent, recited a prayer at his child's graduation ceremony).

[25] 20 U.S.C. § 4071(a).

[26] *See Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981).

[27] *Id.* at 270-76.

universities were prevented from excluding certain student groups on the basis of the content of their speech.[28]

In the 1984 Equal Access Act, Congress extended the rule in *Widmar* to public high schools. The EAA applies to public secondary schools (high schools and, arguably, junior high schools) that have established a "limited open forum." A "limited open forum" exists "whenever [a] school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[29] The EAA in turn defines noninstructional time as "time set aside by the school before actual classroom instruction begins or after classroom instruction ends."[30]

The Supreme Court in *Board of Education of Westside Community Schools v. Mergens*[31] noted that the EAA reflects "a broad legislative purpose,"[32] and repeatedly defined the purpose of the Act in broad terms.[33] In *Mergens*, a high school student sought to form a religious club "to permit the students to read and discuss the Bible, to have fellowship, and to pray together."[34] School officials denied the request because the club did not, and could not, have a faculty sponsor, and because recognizing such a club would violate the Establishment Clause.[35]

The Supreme Court upheld the EAA against the school board's argument that the statute violated the Establishment Clause. Relying on *Widmar* and the EAA, the Court determined the high school in *Mergens* created a limited public forum by permitting noncurricular student groups to meet and therefore could not deny Mergens's request to form a Christian club under the same terms.[36]

---

[28] *Id*. at 274.

[29] 20 U.S.C. § 4071(b).

[30] 20 U.S.C. § 4072(4).

[31] 496 U.S. 226, 110 S. Ct. 2356 (1990).

[32] *Id.* at 239.

[33] *See*, *e.g.*, *id.* at 238 ("The purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other"); *id.* at 241 ("Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech"); *id*. at 249 ("Congress' avowed purpose [was] to prevent discrimination against religious and other types of speech").

[34] *Id.* at 232.

[35] *Id.*

[36] *Id.* at 247.

The Court that decided *Mergens* was deeply divided. In his opinion concurring in the four-justice plurality decision, Justice Kennedy, joined by Justice Scalia, based his analysis on his reading of the statute that limited meetings to times "while school is not in session."[37] Although the meetings in *Mergens* occurred only after school, Justice Marshall, joined by Justice Brennan, discussed the "substantial risks" of subtle coercion associated with allowing student religious groups to use public school facilities and emphasized that the EAA should be construed "to avoid the risk of endorsement [by the school]."[38] Finding that the EAA "avoids the problems of . . . 'mandatory attendance requirements'" by requiring meetings to be held during noninstructional time,[39] the plurality opinion held:

> [A] school that permits a student-initiated and student-led religious club to meet *after school*, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion.[40]

In *Ceniceros by & Through Risser v. Board of Trustees*,[41] a high school student sued the Board of Trustees of the San Diego School District for declaratory and injunctive relief and damages. Her complaint alleged that, by denying her religious club the opportunity to meet during the lunch period as other clubs were allowed to do, her school violated her rights under the EAA and the Free Speech and Free Exercise Clauses of the Constitution. The Ninth Circuit Court of Appeals agreed, after finding that at Ceniceros's high school, the lunch break was indeed "noninstructional time."[42] In keeping with the Supreme Court's imposition of a "broad reading" of the EAA, the court held:

> Only by interpreting "noninstructional time" to include lunch periods can we adhere to the Supreme Court's instruction and have our interpretation be "consistent with Congress' intent to provide a low threshold for triggering the Act's requirements."[43]

---

[37] *Id.* at 261 (Kennedy, J., concurring in part and concurring in the judgment).

[38] *Id.* at 269 (Marshall, J., concurring in the judgment).

[39] *Id.* at 251.

[40] *Id.* at 252, emphasis added.

[41] 106 F.3d 878 (9th Cir. 1997).

[42] *Id.* at 883.

[43] *Id.* at 881 (citing *Mergens*, *supra* n.31 at 240).

The court noted that Ceniceros's religious student group could meet in school classrooms during the lunch period only if other noncurricular student groups were permitted to use classrooms during that time.[44] The court also left school districts with the option of prohibiting *all* student group meetings during lunch, a rule which would encompass the religious group meetings the school district found objectionable.[45] Finally, the court clarified that its interpretation does not "prevent a school from making affirmative statements to dispel any mistaken impression of its endorsement of the religious club."[46]

Significantly, the court also held that students' rights under the EAA "exceed, and therefore supersede, those under the California Constitution."[47] The California Constitution's "no preference clause" guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference."[48] Noting it is "axiomatic that 'states cannot abridge rights granted by federal law,'" the court agreed with its 1993 decision in *Garnett v. Renton School District No. 403*, holding the EAA "does not permit schools to bar religious meetings on the basis that use of school for religious meetings would violate [the] state constitution."[49]

Judge Lay in dissent in *Ceniceros* distinguished *Rosenberger* and *Widmar*, both of which arose in the university setting:

> Obviously, the university environment is much more open and less structured than that existing in a secondary school during the regular school day; university attendance is not compulsory; university students are more mature than secondary school students; and, in sharp contrast to high school students, university students are generally autonomous of their parents. Thus, the facts in *Rosenberger* and *Widmar* are clearly distinguishable from those in this case.[50]

---

[44] *Id.*

[45] *Id.*

[46] *Id.* (citing *Mergens*, *supra* n.31 at 270 (Marshall, J., concurring) (arguing that school has affirmative duty to disclaim endorsement of religious club); Douglas Laycock, *Equal Access and Moments of Silence*, 81 NW. U. L. REV. 1, 18 (1986) (suggesting school can explain open forum policy to avoid confusion about school endorsement of religious groups)).

[47] *Id.* (citing *Garnett v. Renton School District No. 403*, 987 F.2d 641, 645-46 (9th Cir. 1993)).

[48] CAL. CONST., art. I, § 4.

[49] 106 F.3d at 883 (describing California Constitution's "no preference clause" as "more potent than the federal Constitution's Establishment Clause").

[50] *Id.* at 889 (Lay, J., dissenting).

The dissent also distinguished *Mergens*,[51] based on the issue of whether the clubs met during instructional or noninstructional time.[52] According to Judge Lay, holding religious exercises during the lunch hour, "whether attendance is deemed voluntary or not," raises the same issue of "indirect coercion" identified by the Supreme Court in 1992 when it struck down an invocation and benediction in the form of a prayer during graduation ceremonies:[53]

> Allowing religious speech and meetings to take place during the lunch break, as Ceniceros wishes, is fraught with the dangers of subtle coercion, misperception, and endorsement described above, much more so than the after-school meetings allowed in *Mergens*. . . . It seems quite easy for members of the community to identify religious activity with the machinery of the school (and the State) when such activity occurs on school property during the school day.[54]

NON-RELIGIOUS CLUBS AND THE EAA

If Congress intended to expand the practice of student religious meetings and activities through passage of the EAA,[55] some unintended consequences may have resulted. The protection of "political" and "philosophical" speech along with religious expression has led student groups such as the Gay-Straight Alliance to successfully seek court intervention when their meetings or club constitutions were denied equal access to school facilities.[56]

---

[51] 496 U.S. 226, 110 S. Ct. 2356 (1990).

[52] *See* 106 F.3d at 889-891.

[53] *Id.* at 890 (citing *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992)).

[54] *Id.* at 890-91.

[55] *See Mergens, supra* n.31 at 249 ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law"); *Colin ex rel. Colin v. Orange Unified School District*, 83 F. Supp. 2d 1135, 1142 (D. Cal. 2000) ("The Act was *intended to counteract perceived discrimination against religious speech in public schools* and overturn two appellate court decisions that had held that allowing student religious groups to meet on campus before and after classes would violate the Establishment Clause.").

[56] The number of Gay-Straight Alliance groups is on the rise. A St. Louis newspaper reported in 2005 that "about 18 schools in the area" have such clubs, while "[o]nly a

In *Colin v. Orange Unified School District*,[57] the school board denied high school students' application for official recognition of their Gay-Straight Alliance club. The students sought injunctive relief. The federal district court for the Central District of California determined that (1) a high school, by allowing other noncurriculum related clubs to meet, had established a limited open forum; (2) the Gay-Straight Alliance was a noncurriculum related club; (3) the Gay-Straight Alliance was not controlled by nonschool persons; and (4) the Gay-Straight Alliance was denied access to the limited open forum and the accompanying benefits of being a school-recognized club; and (5) the plaintiffs would be irreparably injured absent preliminary relief.[58] Accordingly, the court granted the Gay-Straight Alliance's request for an injunction requiring the school district to recognize the club and permit it to meet.[59]

As the federal court in *Colin* noted, "Due to the First Amendment, Congress passed an 'Equal Access Act' when it wanted to permit religious speech on school campuses. It did not pass a 'Religious Speech Access Act' or an 'Access for All Students Except Gay Students Act' because to do so would be unconstitutional."[60]

Indeed, the EAA has had the effect of expanding access for a variety of student groups, not merely those of a religious bent.[61] Its primary effect, however, has been to permit student religious groups the same access to school facilities as other noncurriculum-related student groups enjoy. Courts generally have not accepted school districts' reliance on Establishment Clause concerns to deny access to religious clubs.[62] Religious clubs have even been granted *more* protection than secular clubs in certain cases, as where a religious club's charter

---

handful of schools in the region had such programs four years ago." Carolyn Bower, *More Schools Have Groups For Gays*, ST. LOUIS POST-DISPATCH (March 21, 2005).

[57] 83 F. Supp. 2d 1135 (C.D. Cal. 2000).

[58] *Id.* at 1145-46.

[59] *Id*. at 1151.

[60] *Id.* at 1142.

[61] *See, e.g., Student Coalition for Peace v. Lower Merion School District Board of School Directors*, 776 F.2d 431, 433 (3d Cir. 1985) (student group dedicated to "world peace through nuclear disarmament*"); Boyd County High School Gay Straight Alliance v. Board of Education*, 258 F. Supp. 2d 667 (D. Ky. 2003); *Franklin Central Gay/Straight Alliance v. Franklin Twp. Cmty. School Corp.*, 2002 U.S. Dist. LEXIS 24981 (D. Ind. 2002); *East High School PRISM Club v. Seidel*, 95 F. Supp. 2d 1239 (D. Utah 2000) ("People Recognizing Important Social Movements" club).

[62] *See, e.g., Mergens*, *supra* n.31; *Donovan v. Punxsutawney Area School Board*, 336 F.3d 211 (3d Cir. 2003); *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002).

providing that only Christians could serve as club officers was held to be protected by the EAA, despite the school's prohibition on religious discrimination by student groups.[63]

Again, the EAA applies *exclusively* to "public *secondary* schools" that receive federal funding.[64] It further applies only to student-initiated, student-led groups.[65] School employees are expressly prohibited from participating in anything but an *advisory* role in religious groups formed pursuant to the EAA.[66] The EAA does not require elementary schools to permit *student groups* to meet without regard to their religious, political, or philosophical viewpoint.

Nonetheless, elementary schools are not closed or non-public fora, according to the most recent federal decisions.[67] "Government restrictions on speech in both limited and non-public fora must be *viewpoint neutral* and reasonable in light of the purpose served by the forum."[68] In the elementary schools, therefore, the tension between the Establishment Clause and free speech rights becomes greatest not as applied to students or school officials, but as applied to the activities of outside groups that seek access to the schools' fora. Child Evangelism Fellowship ("CEF") is one such group.

STATE CIVIC CENTER LAWS

Many states permit civic, community, and youth organizations to use school facilities during noninstructional time, to further community relations and make maximum use of public property. Common uses include meetings of the Boy Scouts and Girl Scouts of America, athletic practices and events sponsored by interscholastic groups, PTA meetings, and the like. Several federal courts of

---

[63] *Hsu by & Through Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 608 (1996).

[64] 20 U.S.C. § 4071(a).

[65] 20 U.S.C. § 4071(c).

[66] *Id.*; *but see Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807 (8th Cir. 2004) (holding district's refusal to permit elementary school teacher to participate in after-school Good News Club meeting violated teacher's First Amendment rights).

[67] *See Child Evangelism Fellowship of N.J. v. Stafford Twp. School District*, 233 F. Supp. 2d 647, 659 (D.N.J. 2002), *aff'd*, 386 F.3d 514 (3d Cir. 2004) (school district's distribution, school-wall, and Back-to-School-Night fora "are likely limited public fora"; however, restriction on school-bulletin-board forum "was both nondiscriminatory and reasonable").

[68] *Id.* at 660 (emphasis added) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46, 103 S. Ct. 948 (1983); *Good News Club v. Milford Central School*, 533 U.S. 98, 105-112, 121 S. Ct. 2093 (2001)).

appeals have held that school facilities made available for social, civic, and recreational use by outside groups are "designated public fora" subject to the strict standards governing public fora.[69]

The U.S. Supreme Court addressed the issue of outside organizations' use of school property for religious purposes in *Lamb's Chapel v. Center Moriches Union Free School District*.[70] In that case, a state law authorized school boards to adopt reasonable regulations for the use of school property for ten specified purposes when the property is not in use for school purposes.[71] Among the permitted uses was the holding of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public."[72] The list of permitted uses did not include meetings for religious purposes. A New York appellate court had previously held that local boards could not allow student Bible clubs to meet on school property because "religious purposes are not included in the enumerated purposes for which a school may be used under section 414."[73] The Court of Appeals for the Second Circuit later accepted the appellate division's *Trietley* decision as an authoritative interpretation of state law.[74]

A local evangelical church applied to the school district for permission to use school facilities to show a six-part film series containing lectures by Dr. James Dobson.[75] The district had recently denied the same church's request to

---

[69] *See, e.g., Grace Bible Fellowship, Inc. v. Main School Administrative District No. 5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990), *cert. denied*, 498 U.S. 899 (1990); *National Socialists White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978); *Knights of the Ku Klux Klan v. Martin Luther King, Jr. Worshipers*, 735 F. Supp. 745 (M.D. Tenn. 1990); *Wallace v. Washoe County School District*, 701 F. Supp. 187 (D. Nev. 1988); *Country Hills Christian Church v. Unified School District No. 512*, 560 F. Supp. 1207 (D. Kansas 1983).

[70] 508 U.S. 384, 113 S. Ct. 2141 (1993).

[71] New York Educ. Law § 414 (McKinney 1988 & Supp. 1993).

[72] *Id.* at § 414(c).

[73] *Trietley v. Board of Education of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (App. Div. 1978).

[74] *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 83-84 (1991).

[75] "A brochure provided on request of the district identified Dr. Dobson as a licensed psychologist, former associate clinical professor of pediatrics at the University of Southern California, best-selling author, and radio commentator. The brochure stated that the film series would discuss Dr. Dobson's views on the undermining influences of

use school facilities for Sunday morning services, citing the state law and the district's rule based thereon. The church sued in federal court, alleging violation of the Free Speech, Free Assembly, Free Exercise, and Establishment Clauses of the First Amendment. The district court rejected all of the constitutional claims.[76] While it characterized the district's facilities as a "limited public forum," the court noted the state law's enumerated purposes for access to school facilities did not include religious worship or instruction, the district's rule explicitly proscribed using school facilities for religious purposes, and the church had conceded that its showing of the film series would be for religious purposes.[77]

The district court opined that once a limited public forum is opened to a particular type of speech, selectively denying access to other activities of the same genre is forbidden.[78] Because the district had not opened its facilities to organizations similar to Lamb's Chapel for religious purposes, its denial in that case was viewpoint neutral and hence not a violation of the Free Speech Clause. Although the Second Circuit Court of Appeals affirmed the judgment "in all respects,"[79] the Supreme Court reversed:

> That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates *on the basis of viewpoint* to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.[80]

Because the film series "dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint," the denial discriminated on the basis of viewpoint in violation of the First Amendment.[81]

Significantly, the Court rejected the school districts

---

the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id.* at 387-88.

[76] 770 F. Supp. 91, 92 (E.D.N.Y. 1991).

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

[78] *Id.* at 99.

[79] 959 F.2d 381, 389 (2d Cir. 1992).

[80] 508 U.S. at 393 (emphasis added).

[81] *Id.* at 394.

Establishment Clause defense. Noting that the decision in *Widmar v. Vincent* "suggested . . . that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment,"[82] the Court went on: We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As in *Widmar*, *supra*, at 271-272, permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971): The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.[83]

RESTRICTIONS ON USE OF SCHOOL FACILITIES

Certain restrictions may apply to the use of public school property under state laws. In California, for example, the "Civic Center Act"[84] dates back at least to the former School Code of the 1930s. California's Civic Center Act then included a requirement that users of school facilities attest that they do not "advocate" the overthrow of the state or federal government.[85] As early as 1946, the California Supreme Court struck down that aspect of the law:

> The state is under no duty to make school buildings available for public meetings. (See 86 A.L.R. 1195, 47 Am.Jur. 344.) If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. (*Missouri*

[82] *Id.*

[83] *Id.* at 395.

[84] Cal. Educ. Code §§ 38130-38139.

[85] Stats. 1939, p. 2419, ch. 837; *see now* Cal. Educ. Code § 38136.

> *ex rel. Gaines v. Canada*, 305 U.S. 337, 349 [59 S. Ct. 232, 83 L.Ed. 208]; see *Marsh v. Alabama*, 326 U.S. 501 [66 S. Ct. 276, 280].) Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property.[86]

The current version of the Civic Center Act no longer outlaws mere advocacy, but makes it a misdemeanor to *use* school property to commit an act intended to further the violent overthrow of the government.[87] Applicants must still attest under penalty of perjury, however, that the organization proposing to use school facilities "does not . . . advocate the overthrow of the government of the United States or of the State of California by force, violence, or other unlawful means, and that . . . it is not a Communist action organization or Communist front organization required by law to be registered with the Attorney General of the United States."[88] Given its facial constitutional infirmities, it is unlikely this requirement is widely followed.[89]

Another limitation under California's statute applies to meetings of religious groups.[90] Under Education Code section 38131(b), school facilities may be used for:

> The conduct of religious services for temporary periods, on a one-time or renewable basis, by any church or religious organization that has no suitable meeting place for the conduct of the services, provided the governing board [of the school district] charges the church or religious organization using the school facilities or grounds a fee as specified in subdivision (d) of Section 38134.

---

[86] *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 545-546, 171 P.2d 885 (Cal. 1946).

[87] Cal. Educ. Code § 38135, added Stats. 1996, ch. 277 § 5 (S.B. 1562), operative Jan. 1, 1998.

[88] Cal. Educ. Code § 38136.

[89] See *American Civil Liberties Union v. Board of Education*, 55 Cal. 2d 167, 10 Cal. Rptr. 647 (Cal. 1961) (issuing peremptory writ of mandate allowing group to use school facilities without providing statement).

[90] Cal. Educ. Code § 38131(b)(3).

The California Attorney General recognized the evolving jurisprudence in this area in a 1993 opinion that concluded the Civic Center Act established a "designated public forum" in the public schools, "thereby permitting the state to allow religious organizations which lack suitable facilities limited access to public school facilities for use on Sunday, or other non-instructional time, so long as the organization is charged an amount at least equal to the school district's direct costs."[91]

The Attorney General determined the Civic Center Act "is a valid expression of a secular legislative purpose," and disapproved its own 1964 opinion that concluded the Act (in predecessor section 16068 of the Education Code) impermissibly *favored* religious use of school facilities because sectarian users paid less than commercial users, albeit more than noncommercial, nonsectarian activities.[92] Thirty years later, the Attorney General described that opinion as "misguided" and applying "an impermissibly narrow approach to statutory construction."[93]

The 1993 opinion also disapproved a 1971 Court of Appeal decision[94] as "infirm" in light of the U.S. Supreme Court's holding in *Mergens*. The Court of Appeal had held that school sponsorship of a school hour used by a Bible study group violated the establishment clauses of the U.S. and California Constitutions, as well as Article XVI, section 5 of the California Constitution.[95] Article XVI, section 5 has been interpreted to "ban any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes."[96] It does not, however, "require government hostility to religion, nor . . . prohibit a religious institution from receiving

[91] 76 Ops. Cal. Atty. Gen. 52 (1993).

[92] *See* 43 Ops. Cal. Atty. Gen. 62 (1964).

[93] 76 Ops. Cal. Atty. Gen. 52, *supra* n.91.

[94] *Johnson v. Huntington Beach Union High School District*, 68 Cal.App.3d 1, 137 Cal. Rptr. 43 (1971.)

[95] Article XVI, section 5 prohibits the Legislature or any county, city, school district or municipal corporation from making an "appropriation" or paying from any public fund or granting "anything to or in aid of any religious sect, church, creed, or sectarian purpose, or to help support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church or sectarian denomination whatever . . . ."

[96] *California Teachers Association v. Riles*, 29 Cal. 3d 794, 806, 176 Cal. Rptr. 300 (1981).

indirect, remote, and incidental benefits from a statute which has a primary purpose."[97]

The Civic Center Act, the Attorney General concluded, does not violate the establishment clauses of the federal or state Constitutions, or the provisions of the California Constitution prohibiting sectarian aid, "if religious organizations lacking suitable housing are permitted equal access to such [school] facilities because the resulting benefit to the religious organization is merely incidental to a primary public purpose."[98]

Three years later, the Attorney General had the opportunity to refine that conclusion. Finding that Education Code section 40041[99] "imposes a requirement peculiar to religious organizations alone [in that] they must first prove a lack of another suitable meeting place in order to rent a school facility," and thereby "excludes from a school's civic center any religious organization that has another suitable meeting place for the conduct of its services," the Attorney General declared the section "constitutionally infirm."[100] No "compelling state interests" justified the limitation imposed by the section. Accordingly, the Attorney General concluded a religious organization "need not establish that it lacks another suitable meeting place for the conduct of its services in order to rent a school facility under the provisions of [Education Code] section 40041."[101]

The Michigan Court of Appeals recently held a school district did not violate the Establishment Clause by permitting the Boy Scouts of America to use its facilities under the state civic center law, or by permitting Boy Scout representatives to distribute and post literature in the schools and to visit classrooms during school hours.[102] A parent who objected to the Scouts' "declaration of religious principle" sued the Boy Scouts and the Mt. Pleasant Public Schools; however, the schools' neutral application of the civic center policy precluded an Establishment Clause violation.[103]

---

[97] 76 Ops. Cal. Atty. Gen. 52 (citing *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 605, 116 Cal. Rptr. 361 (1974)).

[98] *Id.*

[99] Repealed and recodified as § 38133 by Stats. 1996, ch. 277 § 6 (S.B. 1562), operative Jan. 1, 1998.

[100] 79 Ops. Cal. Atty. Gen. 248 (1996).

[101] *Id*.

[102] *Scalise v. Boy Scouts of America*, Mich. Ct. App. No. 244883 (Jan. 20, 2005).

[103] The Michigan Court of Appeals also rejected the plaintiffs' argument that the Boy Scouts and school system violated the Equal Protection Clause and the state's civil rights law guaranteeing equal access to public accommodations. *Id*.

USER FEES UNDER THE CIVIC CENTER ACT

California's Civic Center Act provides for school districts to recover their costs from those who use school facilities outside of school hours.[104] The statute requires a school district to charge at least the amount of its "direct costs" if it authorizes the use of school facilities for "religious services for temporary periods."[105] "Direct costs" include "those costs of supplies, utilities, janitorial services, services of any other district employees, and salaries paid school district employees necessitated by the organization's use of the school facilities and grounds of the district."[106]

By contrast, certain users must pay a "fair rental value" for the facilities, including groups holding events where admission fees are charged or contributions solicited, and where "the net receipts are not expended for the welfare of the pupils of the district or for charitable purposes."[107] The "fair rental value" is defined as "the direct costs to the district, plus the amortized costs of the school facilities or grounds used for the duration of the activity authorized."[108]

The California Constitution prohibits "gifts of public funds," that is, public expenditures for which the state receives no consideration.[109] A well-established exception to this constitutional prohibition has been recognized by the courts where, although private parties are benefited, the expenditure serves a direct and substantial public purpose.[110] The California Constitution also prohibits any "aid" to any religious organization or "sectarian purpose"[111] and the appropriation of any public money "for the support of any sectarian or

[104] Cal. Educ. Code § 38134(c).

[105] *Id.*

[106] Cal. Educ. Code § 38134(g).

[107] Cal. Educ. Code § 38134(e).

[108] Cal. Educ. Code § 38134(h).

[109] CAL. CONST. Art. XVI, § 6 ("The Legislature shall have no . . . power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever . . . .").

[110] 85 Ops. Cal. Atty. Gen. 123 (2002) (citing *California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 583, 131 Cal. Rptr. (1976)).

[111] CAL. CONST. Art. XVI, § 5.

denominational school, or any school not under the exclusive control of the officers of the public schools."[112]

Accordingly, school districts and their legal counsel have typically determined that, while religious groups and activities must be permitted access to school facilities under the Civic Center Act, the Act and the state Constitution unquestionably require payment of a fee at least equal to the "direct costs" incurred by the school district as a consequence of such use.

At the same time, school districts have commonly waived user fees for certain groups if neither the Civic Center Act nor the California Constitution mandates a fee, such as the Boy Scouts, Girl Scouts, parent-teacher associations, and groups affiliated with the districts themselves. As discussed further below, these distinctions have resulted in litigation against a number of California school districts.[113]

CHILD EVANGELISM FELLOWSHIP AND THE GOOD NEWS CLUBS

According to its own promotional materials, Child Evangelism Fellowship is in the business of "Bringing the Good News Back into Our Public Schools."[114] "Good news" is a reference to the story of Christ, translated from the word *gospel*.[115] CEF's literature describes the plight of a "lost generation" of children:

> God has been crowded out or forcibly removed from nearly every aspect of life. Possessions, New-Age ideology and illicit "pleasures" have moved into the vacuum. In this political and spiritual climate we find a tremendous mission field right in our own backyards—today's children.[116]

CEF lays the blame for this deplorable state of affairs at the feet of education visionary John Dewey, criticized in CEF literature as an "avowed humanist," "one of the founders of the American Civil Liberties Union," and a

---

[112] CAL. CONST. Art. IX, § 8.

[113] A comparison of civic center laws and school district practices in other states is beyond the scope of this article.

[114] BREAKING THE SILENCE: A SPECIAL REPORT BY CHILD EVANGELISM FELLOWSHIP INC. (2004) (hereafter BREAKING THE SILENCE).

[115] "The word *gospel* is derived from the Anglo-Saxon term *god-spell*, meaning 'good story,' a rendering of the Latin *evangelium* and the Greek *euangelion*, meaning 'good news' or 'good telling.'" ENCYCLOPÆDIA BRITANNICA (2005).

[116] BREAKING THE SILENCE at 3.

cosigner of the 1937 "Humanist Manifesto," described as "an Americanized version of Karl Marx's philosophies."[117]

The solution, according to CEF, is "bringing children to Jesus—the means of changing the world today and the world of the future."[118] CEF's motto is "Helping You Evangelize Children."[119] Merriam-Webster defines *evangelize* as "to preach the gospel to" or "to convert to Christianity."[120] The group's literature emphasizes the importance of expanding its influence and message to "reach" America's schoolchildren:

> Winning more than 50 cases and having 2,000 *Good News Clubs* in public school systems across the U.S. are great accomplishments. But consider that there are over 80,000 public elementary schools in the United States. There are many more doors waiting to be opened. [¶] This represents an awesome opportunity! [¶] If we could begin 1,000 new clubs this year, we could reach over 68,000 children with the Gospel!
> * * *
> For each court victory and out-of-court settlement there are countless children who will hear the life-changing message of Christ![121]

In legal documents, however, CEF downplays its evangelizing role and portrays the Good News Club as "addressing many of the same subjects addressed by Boy Scouts and Girl Scouts, except these subjects are addressed from a religious, and particularly a Christian, viewpoint."[122] The clubs' mission is described as teaching "morals and character development," not as proselytizing and spreading the gospel.[123] An amicus brief filed in support of CEF in its appeal to the Fourth Circuit in *Child Evangelism Fellowship of*

---

[117] *Id.* at 5.

[118] *Id.* at 8.

[119] This phrase appears in italics immediately below the group's trademarked name in its return address.

[120] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at 400 (10th ed. 2000).

[121] BREAKING THE SILENCE at 12.

[122] Complaint at 5, *Child Evangelism Fellowship Inc., High Desert Chapter v. Bear Valley Unified School District*, ED CV 04-01060 (C.D. Cal.), filed August 25, 2004.

[123] *Id.* at 3, 6, 9, 16.

Maryland, Inc. v. Montgomery County Public Schools[124] describes CEF as "an entity of similar character" to the Boy Scouts, Girl Scouts, YMCA, and Boys & Girls Clubs, among others:

> Like the other groups welcomed by [Montgomery County Public Schools], [CEF] provides recreational activities for children including singing and games. Like other groups welcomed by MCPS, the Good News Club invites children to join and it aspires to inculcate civic virtues and good character in them. Finally, by encouraging children to respect and obey their parents, teachers, and other authorities, the Club fosters attitudes that will improve their health and safety. The difference is that the Club seeks to ground these virtues in a biblically centered Christian faith.[125]

It should be emphasized that *prayer* is not, and has never been, "outlawed" in the public schools.[126] The U.S. Supreme Court made clear in 1969 that American schoolchildren "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[127] As CEF itself notes in an *amicus* brief:

> [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.[128]

Religious speech as *private speech*, rather than government speech, is at the core of CEF's legal arguments in support of its after-school religious clubs.

---

[124] 373 F.3d 589 (4th Cir. 2004).

[125] Brief of Amici Curiae Al and Rhonda Black, *et al.*, Appeal from the opinion of the United States District Court for the District of Maryland (June 10, 2003) (hereafter CEF Maryland Brief) (internal citations omitted).

[126] *See* BREAKING THE SILENCE at 6 ("In 1963 the Supreme Court outlawed prayer in public schools").

[127] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S. Ct. 733 (1969); *see also Wallace v. Jaffree*, 472 U.S. 38, 67, 105 S. Ct. 2479 (1985) (O'Connor, J., concurring) ("Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day").

[128] CEF Maryland Brief (quoting *Mergens*, *supra* n.31 at 250).

Despite CEF's inexplicable characterization of a nation where "God has been crowded out or forcibly removed from nearly every aspect of life," Americans are as religious as ever, and far more religious than their Canadian and European counterparts.[129] According to an ABC News/Beliefnet poll conducted in 2001, 83 percent of Americans identify themselves as Christians, with approximately half of respondents reporting that they attend church at least weekly.[130]

Interestingly, adult Catholics, particularly men, are *less* likely to attend church regularly than Protestants,[131] although Catholics are more likely to have attended parochial schools.[132] This disparity calls into question the common evangelical practice of decrying the "forcible removal" of God from the schools as the cause of societal ills.

CEF has racked up an array of federal court victories against schools in the years since the Supreme Court's *Good News Club* decision. In *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*,[133] the Good News Clubs were permitted, like other community groups, to hold after-school meetings in the district's elementary schools. Two schools permitted some organizations to distribute flyers and permission slips for students to take home to their parents, upon approval by the administration. The Good News Club sought permission to distribute a flyer through this forum to notify parents of the after-school meetings. The school district denied permission, citing concerns about church-state separation.[134] A federal district court in Maryland denied CEF's request for a preliminary injunction, finding CEF failed to demonstrate a likelihood of success on the merits of its claim.

On appeal, the Fourth Circuit Court of Appeals reversed. The school district conceded it had denied CEF access to its take-home flyer forum because "the group is evangelical and its predominate objective is proselytization."[135] The Fourth Circuit considered that concession to "virtually assure CEF of

---

[129] Gary Langer, *Poll: Most Americans Say They're Christian; Varies Greatly From the World at Large*, ABC NEWS ONLINE (July 18, 2001).

[130] Dalia Sussman, *Who Goes to Church?* ABC NEWS ONLINE (March 2002).

[131] *Id.*

[132] Catholic schools account for more than 48 percent of private-school enrollment in the U.S. Martha Alt and Katharin Peter, *Private Schools: A Brief Portrait* at 3, National Center for Education Statistics (U.S. Dept. of Education 2002).

[133] 373 F.3d 589 (4th Cir. 2004).

[134] *Id.* at 592.

[135] *Id.* at 594.

success on its claim that exclusion of the flyers from the take-home flyer program constitutes viewpoint discrimination."[136] Thus, the issue became whether the school district could demonstrate a "compelling interest" in denying access to the flyer program under the Establishment Clause.

The court acknowledged the distinction between the case before it and *Good News Club*, which had not addressed the distribution of religious materials through students of the public schools. Nonetheless, the court determined the principles enunciated in *Good News Club* and lower federal court decisions required reversal of the district court's denial of the injunction.[137] The court noted several facts that supported its determination, including: the distribution occurred during non-instructional time, and the flyers were not part of the curriculum or integrated into teachers' instruction;[138] permitting CEF to participate in the flyer forum did not single the group out for special benefit not afforded other similarly situated groups whose "diverse materials" were noncoercive;[139] nothing in the Good News Club flyer was "inherently religious" and the flyer contained "*no* evangelical or overtly religious language."[140]

The Fourth Circuit Court of Appeals thus implicitly recognized that inherently religious materials, particularly those that proselytize, might be constitutionally denied access to a public school's take-home flyer forum.[141] The court cited, among other federal decisions, the Ninth Circuit's ruling in

---

[136] *Id.*

[137] *See Hills v. Scottsdale Unified School District*, 329 F.3d 1044 (9th Cir. 2003) (distribution of religious summer camp brochure did not violate Establishment Clause); *Sherman v. Community Consolidated School District*, 8 F.3d 1160 (7th Cir. 1993) (permitting Boy Scouts to meet on school premises did not violate Establishment Clause); *Child Evangelism Fellowship v. Stafford Twp. School District*, 233 F. Supp. 2d (D.N.J. 2002), *aff'd*, 386 F.3d 514 (3d Cir. 2004) (distribution of Good News Club flyers would not violate Establishment Clause); *Daugherty v. Vanguard Charter School Academy*, 116 F. Supp. 2d 897 (W.D. Mich. 2000) (distribution of religious group's materials did not violate Establishment Clause).

[138] 373 F.3d at 597.

[139] *Id.* at 599.

[140] *Id.*

[141] In a 2004 article, Dr. Ralph D. Mawdsley suggested (1) limiting distribution of community materials to those that are *not proselytizing in content* and (2) limiting distribution of material to only religious organizations that *do not proselytize* were "two possible other degrees of separation" recognized by the courts in determining the constitutionality of a school district's decision to allow or disallow distribution. Ralph D. Mawdsley, *Access by religious community organizations to public schools: A degrees of separation analysis*, 193 ED. LAW REP. 633, 639 (Jan. 27, 2004).

Hills v. Scottsdale Unified School District, which determined the removal, at the district's request, of proselytizing information from a religious summer camp brochure eliminated the district's Establishment Clause concerns.[142] As in the Fourth Circuit *CEF* case, the *Hills* court left undecided whether the school district could restrict or deny distribution of overtly proselytizing religious materials.[143] The lack of any judicial decisions on that point continues to leave school districts uncertain of their obligations under either free speech or Establishment Clause requirements.[144]

Justice Michael dissented from the Fourth Circuit's opinion in *CEF*, urging that "the distribution of CEF's flyers is a religious activity of high order," and that by engaging in the "demonstrative act" of carrying the flyers home, students were coerced into participating in a religious activity: "The students, in other words, will be coerced to participate in a religious activity in violation of the Establishment Clause."[145] The majority disagreed:

> To the extent that our friend in dissent seeks to characterize the students as "participating in" or "supporting" CEF's religious activity, i.e. distributing flyers with a religious purpose, this argument also fails. As support for this argument, the dissent relies exclusively on cases recognizing a religious group's Free Exercise right to distribute religious tracts and flyers. But none of the dissent's cases suggest, let alone hold, that a person "participates in" or "supports" "religion or its exercise," simply by receiving flyers and passing them on to another person. Indeed, any such argument would be foreclosed by *Mergens*. For there, students were also "coerced" to "participate in" or "support" a religiously motivated person's issuance of an invitation to attend an after-school religious club meeting. But,

[142] 329 F.3d 1044 (9th Cir. 2003).

[143] Joseph Hills, the plaintiff in the *Hills* case, filed an *amicus curiae* brief with the Fourth Circuit in support of CEF.

[144] Even the courts themselves reach facially conflicting decisions in these areas. *See, e.g., Culbertson v. Oakridge School District No. 76*, 258 F.3d 1061 (9th Cir. 2001) (holding the district created a limited public forum to which it may not deny access on the basis of religious viewpoint and content, and that use of an elementary school building after hours does not constitute an establishment of religion, but modifying lower court's judgment to the extent it required teachers to distribute parental permission slips.

[145] *CEF*, 373 F.3d at 605, 602 (Michael, J., dissenting).

> despite this, the Court found "little, if any, risk of official state . . . coercion."[146]

Deciding the matter on remand in March 2005, the federal district court for the District of Maryland held the school officials did *not* violate CEF's First Amendment rights. The court noted that, under modifications to its policies during the litigation, the school system offered other avenues for CEF to advertise its activities, including back-to-school nights and open houses, and display on school bulletin boards with permission.[147] The court rejected CEF's argument that the school system could change its policy back at any time to deny access.

The school system had also changed its flyer-distribution policy to grant or deny access to the forum based on subject matter and speaker identity, rather than the viewpoint of the flyer. CEF argued the revised policy continued to exclude Good News Club flyers. Quoting extensively from U.S. Supreme Court precedent involving nonpublic fora,[148] the district court concluded the school system had no intent to create a limited public forum in its school mail facilities, the vehicle through which the take-home flyer program operated. Therefore, the mail facilities were "a nonpublic forum subject only to a test of reasonableness," despite the Fourth Circuit's ruling that the policy (pre-revision) created a limited public forum.[149] The revised policy met the reasonableness test, since the school system "could properly choose to reduce the burgeoning number of organizations seeking to send home messages in students' backpacks" and could "limit the subject matter to activities of traditional educational relevance to students and the categories of speakers to organizations involved in those activities."[150] The forum was content neutral, despite its revision in response to the CEF litigation. Finally, CEF could have

---

[146] *Id.* at 600 n.7 (internal citations omitted) (citing *Mergens*, *supra* n.31 at 261 (Kennedy, J., concurring) (explaining that "enforcement of the [Equal Access Act] will [not] result in the coercion of any student to participate in a religious activity")).

[147] *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 2005 U.S. Dist. LEXIS 7608 (D. Md. 2005). The court denied CEF's motion for summary judgment, granted in part and denied in part CEF's renewed motion for a permanent injunction, and granted in part the school system's motion to dismiss.

[148] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983); *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 105 S. Ct. 3439 (1985).

[149] *Id.* at 21-23.

[150] *Id.* at 23.

access to the forum if any of the approved speaker groups was willing to sponsor or endorse its flyers.[151]

In *CEF* and the Ninth Circuit's *Hills* decision, the school districts sought to distance themselves from the religious activity announced in the materials submitted for distribution. The obverse situation presented itself to the federal district court for the Western District of Michigan in 2000. In *Daugherty v. Vanguard Charter School Academy*,[152] a parent challenged a public charter school's practice of *allowing* distribution of religious club flyers to students, among other practices, as endorsing religion in violation of the Establishment Clause and the Michigan Constitution. Vanguard allowed community groups, including religious groups, to distribute materials to students in "Friday folders" the students took home each week.[153]

The court in *Daugherty* relied on a pre-*Good News Club* decision of the Fourth Circuit Court of Appeals, *Peck v. Upshur County Board of Education*,[154] which upheld a school's practice, under a neutral policy, of permitting a private group to distribute Bibles to students outside of instructional time. As in *Daugherty*, parents in *Peck* challenged the practice and sought an injunction. The court in *Daugherty* likewise upheld the practice, determining the policy of distribution that evidenced no "favoritism or discrimination among community groups who wish to disseminate appropriate materials" did not violate the Establishment Clause.[155] There was no indication in *Daugherty* that the school reviewed the materials for proselytizing content or required that any disclaimer be attached.

The *Daugherty* court thus went a step further than *Hills* and *CEF*, suggesting that as long as schools treat religious and nonreligious materials identically, the Establishment Clause is satisfied. In 2004, the Sixth Circuit Court of Appeals came to a similar conclusion. In *Rusk v. Clearview Local Schools*,[156] the court reversed a lower court decision that invalidated the schools' distribution of religious flyers. The flyers advertised Good News Club meetings and required parent permission to attend, but contained no proselytizing language. They were placed in students' homeroom mailboxes for

---

[151] *Id.* at 24.

[152] 116 F. Supp. 2d 897 (W.D. Mich. 2000).

[153] As part of the school's overall "Moral Focus Curriculum" emphasis, a Moms' Prayer Group was also permitted to meet for 90 minutes each week during school time, a practice upheld by the district court, *id.* at 907-08.

[154] 155 F.3d 274 (4th Cir. 1998).

[155] *Id.* at 911-12.

[156] 379 F.3d 418 (6th Cir. 2004).

retrieval at the end of the school day. The district court, interpreting *Lemon v. Kurtzman*, determined the distribution impermissibly advanced religion.[157]

The Sixth Circuit reversed, concluding that distributing religious flyers about a meeting where proselytizing will occur does not create a perception of endorsement. The court rejected the lower court's concern that younger students might misperceive the distribution as endorsement; in fact, refusal to distribute religious flyers might cause students to "conclude that the school disapproves religion."[158]

The federal district court for the District of New Jersey similarly held in 2002 that Good News Clubs have the same right of access to the limited public fora created by the schools as other community organizations.[159] The fora included distribution of flyers at the end of the day, posters and brochures on school walls, and tables at back-to-school night. The materials did not proselytize, nor, according to the court, would elementary-age students "misperceive a state endorsement of religion or feel coercive pressure to participate in religious activities" via distribution following the instructional day.[160] The Third Circuit affirmed.[161]

School employees have also entered the fray. In 2004, the Eighth Circuit Court of Appeals held that an elementary schoolteacher could not be prohibited from participating in the after-school Good News Club at the school where she taught. The federal district court in South Dakota had denied her motion for a permanent injunction to the extent she requested to teach in the Good News Club meeting at her own school, but determined she must be allowed to participate in club activities at different schools in the district. The Eighth Circuit reversed in part, holding that no reasonable observer would mistake the teacher's participation, even at her own school, for school endorsement of religion. The court noted the club meetings occurred after the school day ended, and students needed parental permission to participate. Therefore, the Establishment Cause did not require a restriction on her participation in her own school's club, and such a restriction violated her First Amendment rights.

The *Wigg v. Sioux Falls* decision, while limited to the jurisdiction of the Eighth Circuit Court of Appeals, calls into doubt the Equal Access Act's prohibition on school employees' participation in religious clubs. If Barbara Wigg, an elementary school teacher, has a First Amendment right to participate in the Good News Club at her school, can the federal EAA constitutionally

---

[157] *Rusk v. Clearview Local Schools*, 220 F. Supp. 2d 854, 855 (N.D. Ohio 2002).
[158] 379 F.3d at 423.

[159] *Child Evangelism of New Jersey v. Stafford Twp. School District*, 233 F. Supp. 2d 647 (D.N.J. 2002).

[160] *Id.* at 664.

[161] 386 F.3d 514 (3d Cir. 2004).

prohibit secondary school teachers from participating in student religious clubs on their campuses? Ultimately, that question will fall to the U.S. Supreme Court to answer.

TEACHING VERSUS WORSHIP

A Difference Without a Legal Distinction In asserting the Good News Clubs' right of access to public school facilities, CEF typically argues the clubs teach character-building and "moral values," and are distinguishable from organizations such as the Boy Scouts and Girl Scouts only in that the Good News Clubs address these subjects from a religious perspective.

According to CEF's own literature, however, the activities of the Good News Clubs have one objective: "bringing children to Jesus."[162] The literature touts the Supreme Court's *Good News Club* decision as "a victory for the hundreds of other *CEF* teachers who faithfully tell boys and girls that Jesus died for them so they can have eternal life—they can receive forgiveness of their sins as they put their trust in Jesus as Savior."[163] A school counselor (identified only by initials) is quoted extolling the benefits of the Good News Club on campus:

> How thrilling it was to see our students listening intently to Bible stories, singing songs of praise to God, playing Bible games and learning about Jesus![164]

The distinction between these inherently religious activities and the morality- and character-building activities of secular organizations may be obvious, but has not altered the courts' analyses in Good News Club cases. The Supreme Court held that "quintessentially religious" activities could be "characterized properly as the teaching of morals and character development from a particular viewpoint."[165] The high court majority has not taken the opportunity to distinguish "worship services" from other "religious activities."

In *Good News Club*, the dissenting justices—Stevens, Souter, and Ginsburg—perceived the club's religious speech to be sufficiently different from that in *Lamb's Chapel* (a film on family life from a religious viewpoint) to require the opposite result. Justice Stevens identified three types of religious speech: (1) "religious speech that is simply speech about a particular topic from a religious point of view," such as the film in *Lamb's Chapel*; (2) "religious

---

[162] BREAKING THE SILENCE at 8.

[163] *Id.* at 11.

[164] *Id.* at 16.

[165] 533 U.S. at 111.

speech that amounts to worship, or its equivalent," and (3) an "intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith." The Good News Club's meetings, in his estimation, fell into the third or proselytizing category.[166]

Justice Souter opined that "Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion."[167] He emphasized that the club's intended activities included elements of worship that made the case as different from *Lamb's Chapel* "as night from day."[168] Justice Souter observed that the club's meetings opened and closed with prayer, and at the heart of each meeting was "the challenge," when the already "saved" children were invited to ask God for strength; and "the invitation," when the teacher would "invite" the "unsaved" children to "receive" Jesus as their "Savior from sin."[169] He criticized the majority's characterization of the activities as "teaching of morals and character, from a religious standpoint" as ignoring reality.[170]

The majority agreed with Justice Souter's description of the club's activities, but concluded those activities "do not constitute mere religious worship, divorced from any teaching of moral values."[171] The majority saw "no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys."[172] The Court determined that "what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in *Lamb's*
Chapel and Rosenberger."[173]

The Second Circuit Court of Appeals followed this reasoning when it

---

[166] *Id.* at 130, 133 (Stevens, J., dissenting).

[167] *Id.* at 138 (Souter, J., dissenting).

[168] *Id.* at 137.

[169] *Id.* at 137-38.

[170] *Id.* at 138-39.

[171] *Id.* at 112 n.4.

[172] *Id.*

[173] *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va., supra* n.14 (holding that a university's refusal to pay a third-party contractor for the printing costs of a student publication, based on the publication's religious editorials, was viewpoint discrimination)).

held in 2003 that the New York City Board of Education could not bar religious groups from using public school facilities to hold weekend worship services:[174]

> It cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values.[175]

A contemporaneous decision out of the Fifth Circuit illustrates this change in perspective following *Good News Club*. In 1998, Sally Campbell, the State Chairman of the Christian Coalition of Louisiana, requested approval for a meeting of her group at a local public school. The meeting would be open to the public and was described:

> The Louisiana Christian Coalition is planning a prayer meeting . . . . At our prayer meeting, we plan to worship the Lord in prayer and music. We also plan to discuss family and political issues, pray about those issues, and seek to engage in religious and Biblical instruction with regard to those issues.[176]

The St. Tammany Parish School Board denied the request, in relevant part because under its existing policy, "its facilities may not be used to conduct religious services or instruction."[177] The policy was originally struck down as unconstitutional by the district court, but that decision was reversed by the Fifth Circuit Court of Appeals and summary judgment granted to St. Tammany. The Fifth Circuit's decision, however, was vacated by the Supreme Court and remanded for further consideration in light of *Good News Club*. On remand, the federal district court granted summary judgment to Campbell. The court described the issue before it:

> The issues in dispute are whether Campbell's requested meeting concerned religion as a substantive activity itself or religion as a viewpoint. More specifically, the issue is whether religious services may be legally excluded from St. Tammany's forum when the service includes, as part of its program, speech that is legally protected.[178]

---

[174] *Bronx Household of Faith v. Board of Education*, 331 F.3d 342 (2d Cir. 2003).

[175] 331 F.3d 342, 354 (2d Cir. 2003).

[176] *Campbell v. St. Tammany Parish School Board*, 2003 U.S. Dist. LEXIS 13559 (D. La. 2003).

[177] *Id.* at *3.

[178] *Id.* at *21-22.

The court concluded that, "Campbell's disclaimers notwithstanding, her request was to hold a religious service at the public school."

> What is a "prayer meeting" other than a religious service? On original appeal, the Fifth Circuit found likewise, pointing out that Campbell "expressly requested" a school building for a use disallowed under the policy.

Fifth Circuit Judge John Gibson had also concluded Campbell's request was for a religious service, which St. Tammany could legally exclude.[179] Judge Gibson found that in *Good News*, *Rosenberger*, and *Lamb's Chapel*, the governmental decision-maker characterized the requested activity as being religious based on the applicant's viewpoint. In *Campbell*, no such characterization was necessary because Campbell herself identified the meeting as a religious service. Therefore, "This was not an otherwise eligible activity, which the school district decided to exclude because of the viewpoint from which ideas would be expressed."[180]

While agreeing with Judge Gibson, the district court noted, "The Supreme Court has not held that a religious service or religious worship may not be excluded from a limited forum."[181] Nonetheless, "simply because Campbell's proposed service was 'quintessentially religious' does not preclude it from being characterized as a discussion of family and political issues." Because "the proposed meeting was not 'mere religious worship,' but included a component within the permissible scope of the limited forum," it could not be excluded under the *Good News Club* analysis.[182]

The *Campbell* court relied in part on the Second Circuit's decision in *Bronx Household of Faith*, which was similarly remanded following the *Good News Club* ruling. In *Campbell*, the court expressly noted it shared "the caution and concern expressed by the Second Circuit:"

> The American experiment has flourished largely free of the religious strife that has stricken other societies because church and state have respected each other's autonomy. Religion and government thrive because each, conscious of the corrosive perils of intrusive entanglements, exercises restraint in making claims on the other. The beneficiaries are a diverse populace

[179] 300 F.3d 526, 529 (5th Cir. 2002) (Gibson, J., concurring).

[180] *Id.*

[181] 2003 U.S. Dist. LEXIS 13559 at *27.

[182] *Id.* at *28.

> that enjoys religious liberty in a nation that honors the sanctity of that freedom.[183]

Under *Good News Club*, then, the standard is not whether access to public school facilities is sought for inherently religious activities or worship services, but whether the activities constitute "*only* religious worship" or include some (unquantifiable) element of "teaching of moral values." Because virtually any religious service may be characterized as teaching moral values, under the current case law schools risk legal challenges if they deny access to organizations that engage in exclusively religious activities.

RENDERING UNTO CAESAR:[184] CEF CHALLENGES TO USER FEES

Having established the Good News Clubs' right to use elementary school facilities for after-hours religious activities under *Good News Club* and to distribute flyers advertising these activities under subsequent lower court rulings, CEF's next target objective became the ability (CEF would say the right) to use those facilities without charge.

In 2002, a federal district court in Los Angeles granted a preliminary injunction to CEF, ordering the Los Angeles Unified School District[185] to permit CEF to use the district's school facilities without charge.[186] The court reasoned that because the district's policy permitted other organizations, including the Boy Scouts, to use facilities free of charge, charging a fee to CEF constituted impermissible viewpoint discrimination. Like many districts in California, the LAUSD had relied on the Civic Center Act's imposition of a mandatory fee to churches or religious denominations.[187]

In 2004, CEF sued two smaller school districts in Southern California, again asserting the right to use their facilities free of charge for meetings of the Good News Club. The Upland Unified School District, with a student population of approximately 13,585, and tiny Bear Valley Unified School District, located in the mountain community of Big Bear Lake with a student

---

[183] *Id.* at *31-32 (quoting *Bronx Household of Faith*, *supra* n.174 at 355.)
[184] *See Matthew* 22:21.

[185] The LAUSD is the second-largest school district in United States, enrolling nearly 750,000 K-12 students. Cal. Dept. of Education, Educ. Demographics Unit, 2003-2004.

[186] Order of July 8, 2002 granting preliminary injunction, *Child Evangelism Fellowship, Inc., San Fernando Valley Chapter v. Los Angeles Unified School District*, Case No. CV 02-1329 MMM (C.D. Cal. 2002).

[187] Cal. Educ. Code §§ 38134(d), 38131(b).

population of approximately 3,400,[188] both in San Bernardino County, became defendants in separate federal lawsuits waged by out-of-state attorneys that have represented CEF in litigation around the country.[189] Neither district refused the Good News Clubs access to school facilities; however, both charged the clubs a fee under their civic center policies. As in the LAUSD lawsuit, CEF contends the school districts engage in impermissible viewpoint discrimination because they permit certain groups to use facilities free of charge, but require the Good News Club to pay a direct-costs fee.

In the LAUSD case, the federal district court determined that the matter raised serious questions regarding the constitutionality of Education Code sections 38131 and 38134, the statutes that require fees to be charged for "religious services." The court issued a minute order certifying the case to the California Attorney General "as an action in which the constitutionality of a state statute had been drawn into question," affording the State of California the opportunity to intervene. The Attorney General informed the court that the state declined to intervene in the case.[190] Notice was also provided to the Attorney General by counsel for the Upland and Bear Valley defendants; the

---

[188] Cal. Dept. of Education, Educ. Demographics Unit, 2003-2004.

[189] In the Bear Valley lawsuit, CEF is represented by Liberty Counsel of Longwood, Florida. Liberty Counsel or its attorneys have represented plaintiffs or *amici curiae* against school districts in many federal lawsuits involving religious issues, including *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992); *Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807 (8th Cir. 2004) (holding teacher could not be prevented from serving as private adviser to Good News Club); *Friedman v. Clarkstown Central School District*, 75 Fed. Appx. 815 (2d Cir. 2003) (affirming dismissal of claim arising from district's denial of plaintiff's application for a religious exemption to mandatory immunization for her school-aged son); *Campbell v. St. Tammany Parish School Board*, 300 F.3d 526 (5th Cir. 2002) (First Amendment challenge to school district's facilities use policy); *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (affirming that facially neutral policy permitting high school seniors to vote upon the delivery by a student of a message of that student's choosing as part of graduation ceremonies did not violate Establishment Clause); *Peck v. Baldwinsville School Board of Education*, 7 Fed. Appx. 74 (2d Cir. 2001) (reversing summary judgment to school board sued after teacher rejected kindergartner's "environmental poster" depicting Jesus praying); *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996) (upholding student's right to distribute flyers for religious club but declining to strike down school's policy requiring disclaimer); *Hsu by & Through Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996) (holding that under Equal Access Act, student club could require its officers to be Christians despite school's nondiscrimination policy); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003) (upholding student club's distribution of candy canes with religious messages); *Brock v. Boozman*, 2002 U.S. Dist. LEXIS 15479 (E.D. Ark. 2002) (dismissing parent challenge to immunization requirement on religious grounds); *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994) (invalidating school's requirement of prior review and approval of written materials).

[190] Order, *supra* n.186 at 7-8.

Attorney General declined to intervene in either lawsuit. The Upland case settled in February 2005;[191] the Bear Valley suit has not reached a dispositive result at the time of this writing.[192]

CONCLUSION

In 1980, the Supreme Court struck down a Kentucky law requiring that the Ten Commandments be posted in every elementary and secondary classroom.[193] Twenty-five years later, the lower federal courts remain in disarray as to the constitutionality of displaying the commandments on public property. In 2005, the Court heard arguments in two cases involving such displays.[194] Likewise, although the Court ruled in 2001 that the Good News Club may not be denied access to school facilities,[195] lower courts continue to struggle with variations on the extent and manner of that access. For every case that culminates in a published federal court decision, one may assume many more public school districts have agonized over these same questions.

Case law is clear on a few points: (1) if schools allow outside groups to use their facilities, they may not deny access based on the "viewpoint" of a particular group;[196] (2) an organization's inherently and exclusively religious

---

[191] Under the stipulated settlement, the district agreed to pay CEF $95 for reimbursement of rental fee charges and $55,000 in attorneys' fees and costs. Civil Docket, Case No. 5:04-cv-00839-VAP-SGL (Feb. 7, 2005).

[192] The California Constitution's prohibition on expenditure of public funds in aid of religion would appear to require public schools to charge at least a "direct-cost" fee to religious groups. Use of school facilities after school hours results in some cost, whether for electricity, custodial services, or simple wear and tear. If the same fee is charged to non-religious groups meeting on school premises, no *viewpoint* discrimination should result. Nonetheless, when the Bear Valley Unified School District amended its policy, after being sued by CEF, to charge the same direct-cost fee to all users not directly affiliated with the district, CEF continued to press its position that the Good News Club was entitled to use the facilities free of charge. CEF's complaint against Bear Valley includes allegations that the Civic Center Act and provisions of the California Constitution are unconstitutional.

[193] *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980).

[194] *See McCreary County v. American Civil Liberties Union of Kentucky*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004); *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004).

[195] *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S. Ct. 2093 (2001).

[196] *Id.*; *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141 (1993).

activity will be considered "teaching of morals from a religious perspective," regardless of the proportion of such teaching to activities such as prayer, Bible study, worship, and proselytizing;[197] (3) a school creates a limited public forum when it agrees to distribute outside literature of any kind, and must therefore distribute religious materials to the same extent and in the same manner as secular materials;[198] and (4) parental permission may (possibly must) be required for school children to participate in privately sponsored after school activities.[199] It also appears, under decisions such as *Hills v. Scottsdale Unified School District*,[200] that schools may require a disclaimer of sponsorship on the religious materials they agree to distribute.

Only one appellate court has held thus far that a schoolteacher must be permitted to participate in the Good News Club at the campus where she teaches.[201] That decision is directly at odds with the Equal Access Act's express prohibition on school employee participation in *student* clubs. Indeed, questions of employee rights and restrictions as to participation in these religious activities may create the next legal battleground for school districts.

Meanwhile, schools are left groping through a fog of esoteric forum analysis to make daily determinations about their obligations to religious groups. Even a decade ago, these decisions were relatively simple, and school attorneys could comfortably advise public schools to steer clear of religious activities and materials that might create an impression of sponsorship. For the most part, schools were considered nonpublic fora, where speakers could be excluded on the basis of identity or subject matter:

> [I]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purposes of the property.[202]

---

[197] *Good News Club*, *supra* n.195 at 111.

[198] *See Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004).

[199] *See id.* at 601; *Culbertson v. Oakridge School District No. 76*, 258 F.3d 1061, 1065 (9th Cir. 2001) ("Parental permission is important insulation against establishment concerns").

[200] 329 F.3d 1044 (9th Cir. 2003).

[201] *Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807 (8th Cir. 2004).

[202] *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958, 969 (9th Cir. 1999).

Today, school districts are likely to be sued for any number of actions taken in good faith: denying access to groups desiring to meet in school facilities for the express purpose of religious indoctrination; charging those groups a fair-use fee; withholding distribution of the groups' advertising materials to students; or *granting* access to such groups and materials, which commonly results in Establishment Clause challenges by parents and taxpayers who find the practice objectionable.[203]

Significantly, the meetings and literature of CEF do not comprise *student speech*, which is unquestionably protected under the First Amendment.[204] The free-speech protection of outside groups clamoring for access to publicly funded property and to the millions of children in compulsory attendance is a relatively recent phenomenon. By using public schools, classrooms, and teachers as pulpits and placards to advertise their religious activities, these groups blur the distinction between public and private speech. If, for example, representatives of the Boy Scouts of America may be permitted to address students during class time with invitations to meetings,[205] and CEF is recognized as an entity similar to the Boy Scouts,[206] will CEF next demand access to classrooms to directly proselytize students during instructional time?

The ultimate goal appears to be a church in every public school, using public property free of charge. As CEF pushes onward, from demanding free use of public facilities for after-school religious meetings to distribution of invitations to those meetings through public school employees and students, the wall of separation becomes less sturdy and more transparent. In this author's opinion, the courts have ignored the pressure on schoolchildren, particularly those in the elementary grades, to impress, appease, and please their teachers, not to mention their peers. Instead, courts have adopted the myopic view that young children who receive invitations to religious meetings in their school mailboxes or directly from their teachers will not perceive the school's sponsorship or endorsement of the activity.

---

[203] *See Elk Grove v. Newdow*, 124 S. Ct. 2301, 2324 (O'Connor, J., concurring) (noting "The citizens of this Nation have been neither timid nor unimaginative in challenging government practices as forbidden 'establishments' of religion" and citing examples).

[204] *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733 (1969).

[205] *See Scalise v. Boy Scouts of America*, Mich. Ct. App. No. 244883 (Jan. 20, 2005).

[206] *See Good News/Good Sports Club v. School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994) (holding unconstitutional a school use policy that prohibited Good News Club from meeting during times when the Boy Scouts could meet), *cert. denied*, 1995 U.S. LEXIS 4481.

For example, the court in *Daugherty v. Vanguard Charter School Academy* blithely addressed the issue of students' impressionability:

> What the student "audience" observes in this instance [while mothers engage in prayer] is simply the closed door of the parent room with knowledge that, during a ninety-minute period each week, some students' mothers may be praying behind that door. No student is confronted with an invitation to join in the prayer or even to observe it. No student is forced to assume special burdens to avoid the prayer.[207]

Likewise, in *Rusk v. Clearview Local Schools*, the court held that distributing flyers advertising religious activities did not send a message of "disfavor" to students who were "nonadherents" to the religion.[208]

The Supreme Court's rule that teachers may not lead or encourage their students in prayer has stood firmly for decades.[209] Yet those same teachers may now be required to distribute to their students invitations to an after-school prayer meeting, and may be permitted to actively participate in that same meeting. Multiple degrees of separation are lost under these circumstances.

Public schools engage in a constant balancing of rights, while attempting to minimize distraction from the overriding purpose of educating children, and to limit expenditures for legal fees and damage awards. These aggressive challenges hamper schools' efforts to maintain and improve education in the face of limited funding. More important, groups like CEF have found a path around the Establishment Clause to inculcate children with religion in their own schools.[210] Administrators, parents, and citizens who have relied on the Establishment Clause to protect against government endorsement of religion should rethink that assumption and redouble their vigilance. CEF, for its part, is confident in the future:

> "*We are currently reaching over 44,000 students but think how many more are waiting. . . .*"[211]

---

[207] 116 F. Supp. 2d at 908.

[208] 379 F.3d at 423.

[209] *See Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) (reading by students of prescribed nondenominational prayer violated the Establishment Clause).

[210] CEF's emphasis on children in the elementary grades (ages 5 through 12) is calculated to maximize the effect of indoctrination. *See* BREAKING THE SILENCE at 7 (describing childhood as a time "when the window of influence [is] wide open"), and 20 ("Statistics show that 85 percent of Christians come to Christ before age 14").

[211] *Id.* at 10 (italics in original).