# Protecting Public Elementary School Children from Emotional and Psychological Harm By Outside Groups

**Eric W. Cernyar***

## Abstract

In 2001, the Supreme Court gave the Good News Club equal access to Milford Central School to teach elementary students after-school religious "moral and character" lessons. Today, there are over 4,000 Good News Clubs in America's public schools, telling 5-12 year-olds that they are sinful from birth, deserve to die and go to Hell, to not become close friends with their non-Christian classmates, and to be afraid of thoughts, beliefs and scientific facts that displease God. Can schools do anything to stop it?

Yes and no. Public schools cannot deny equal access to groups merely because they are religious. But the principle of neutrality works both ways. Religious groups must play by the same rules—including not harming children—as any other group. Schools can—through the careful drafting and application of religiously neutral policies—act to protect the psychological, emotional, and intellectual well-being of their elementary schoolchildren.

To plot the legal authority guiding public school regulation of after-class forums, this article surveys caselaw on public forums, student speech, other special categories of speech, church autonomy, and equal access statutes. This article also provides guidelines for drafting a child-protective facility use policy and proposes a model facility use policy.

*Eric W. Cernyar is a 1997 *summa cum laude* graduate of the University of Texas School of Law. As a child, he attended the Good News Club. As a teenager, he asserted his right under the Equal Access Act to start a Bible Study club at his public high school. As an adult, he co-drafted *amicus* briefs to the Third and Fourth Circuits arguing that under the First Amendment, Good News Clubs had equal access rights to the schools' communication forums, including backpack-flyer distribution programs, Back-to-School tables, and bulletin boards. After becoming a father, Mr. Cernyar reviewed the Good News Club curriculum and recognized its contribution to his own childhood and subsequent struggles with poor self-esteem, melancholy, and depression. With this article, he hopes to steer the focus in this sensitive discussion to the well-being of children.

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# 1 Introduction

Most public schools make their facilities available to extracurricular student, youth development and community groups. In secondary schools, student-led groups, such as Rotary clubs, Future Business Leaders of America clubs, and chess clubs (just to name a few) are common. At the elementary level, adult-led groups such as the Boy Scouts and youth sports leagues are common. By opening its facilities to such uses, schools provide students with valuable after-school activities, develop important bonds with the community and parents, and significantly enrich the quality of public education and community life.

In the 1970s, courts began addressing the rights of college and high school students to form evangelical and Bible study clubs on campus on an equal basis with other non-curricular groups. In 1984, Congress, with the passage of the Equal Access Act, guaranteed the equal access rights (and rightly so, in the author's opinion) of religious middle and high school students to meet on campus.

In the 1990s, the context shifted to elementary schools, as courts began addressing the rights of adults to start and run evangelical clubs at public elementary schools. Most of these cases involved Child Evangelism Fellowship's (CEF's) Good News Club ("Club"), a five-year series of fundamentalist Bible lessons taught by adults to children from preschool age to age 12.

Inexorably, courts began applying equal access concepts from the college and high school contexts to the elementary school context. In 2001, the Supreme Court held that Milford Central School engaged in viewpoint discrimination when it denied the Club's request to use the school's facilities to reach elementary students immediately after the closing bell. Milford had opened the facility to other youth "moral and character development" groups, such as the Boy Scouts. But Milford excluded the Club on the basis that it was quintessentially religious. The Court held that this exclusion violated the Club's Free Speech rights, and that Establishment Clause concerns did not justify the Club's exclusion.[1]

By 2004, three federal circuits extended these equal access benefits to school flyer distribution programs, bulletin boards, and back-to-school tables.[2] And so the respectable concept of college and high school student "equal access" to a school's facilities was transformed—unwittingly, it seems—into *equal access to children*.[3] The children became the forum, open to peddlers of every persuasion.

Today, there are over 4,000 Clubs—run by CEF-partnering churches—operating in the nation's public schools. CEF's ambition is to operate a Club in each of the nation's approximately 67,000 elementary schools.[4]

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[1] *See infra* § 4.2.

[2] *See infra* § 4.3.7.

[3] In 2007, CEF filed a preliminary injunction motion pleading that "CEF faces the very real prospect of completely losing *initial access to children* in the District who will make choices to attend other after school programs." *CEF of Alabama v. Gadsden City Sch. Dist.*, CV-07-PT-1417-M (M.D. Ala.), Docket No. 2, ¶ 7 (emphasis added). The district quickly settled.

[4] *See* http://nces.ed.gov/fastfacts/display.asp?id=84 (identifying over 67,000 elementary public schools) (last visited April 29, 2013).

Neither *Milford* nor its progeny ever discussed the dark side of the Club's curriculum. This is likely due to the lack of public information about the composition of the curriculum, its copious size (five years and over 700,000 words of materials), the cost-conscious underdevelopment of the factual records of the cases, and the immense cultural and judicial taboos against scrutinizing or questioning religious teachings.

As discussed in more detail in the next section, the Club curriculum relentlessly undermines child self-esteem, conditioning a child's worth on agreement with the Club's beliefs. Children are repeatedly told that they deserve to be punished, with death and Hell, for not only their sins but also their sinful nature. Obedience is emphasized to authoritarian extremes: one lesson describes Saul's refusal to fully execute God's genocidal command against the Amalekites to underscore God's expectation of complete obedience. The curriculum includes *thousands* of references to obedience and punishment, and *hundreds* of references to Hell. The curriculum also undermines the educational mission[5] of the school by attacking scientific evidence on origins, encouraging disrespect for the teachers who teach it, and actively intimidating children from critical thinking. Invidiously, the curriculum discourages students from becoming close friends with their nonbelieving classmates.

These facts, which were never developed as part of the underlying factual record in *Milford*, underscore a troubling reality. Equal access was founded on the notion—reasonable in the college and high school contexts—of a student-run *marketplace of ideas*. But in elementary schools across America, that notion is being co-opted to turn elementary school classrooms into *indoctrination camps*.

Can anything be done? Can a school deny access to its facilities on the grounds that the Club threatens the emotional, psychological, and intellectual well-being of children? If so, what kind of policy provisions and criteria would pass constitutional muster?

These questions raise a host of sensitive First Amendment issues, implicate several conflicting interests, and are difficult to answer. Here, compelling interests in protecting children in the public school setting clash with venerable concepts of free speech, official viewpoint neutrality, and judicial abstention from matters that implicate religious doctrine.

Making the task even more difficult is the relative dearth of on-point caselaw. Courts have never addressed these turbulent questions with respect to an adult-led club of *any* kind—much less a religious one—at a public elementary school. Indeed, there is very little legal caselaw *at all* on emotional or psychological abuse not connected with physical or sexual abuse. Religion—and the strong judicial and cultural aversion to confronting religious matters—only complicates the analysis.

Legal guidance and insight can only be found by casting a wide net. This article does that by surveying a wide swath of public forum, student speech, and other caselaw to answer these questions. Appendix A provides guidelines for drafting a child-protective facility use policy, including several alternative provisions. Appendix B proposes a Model Facility Use Policy.

[5] *But see infra* § 4.3.5.

## 2 The Good News Club curriculum

The Club's curriculum is a 5-year-long series of weekly Bible stories—about 120 in all—most of which are drawn from the Biblical books and/or characters of Genesis, Jesus, Paul, Moses, King David, Daniel, Joseph, Joshua, Esther, Elisha, Elijah, and Judges. Each 60-90 minute lesson is interwoven with presentations of the "Gospel" according to the so-called "Wordless Book." The "Wordless Book" refers to the colors gold, black, red, white, and green, which respectively symbolize heaven, the child's sin nature, Jesus's shed blood, righteousness, and growth. Each Bible story is divided into sections; and in between each section, the lesson draws a parallel between the preceding section of the Bible story and one of the "Wordless Book" themes. Most lessons also feature didactic exercises, memory verse quizzes, songs, games and prizes, all designed to reinforce the lesson themes.

This section discusses the contents of the 21 lesson books of the Club's 2006-2011 curriculum cycle.[6] The Club's current curriculum cycle includes 18 of the same lesson books.[7]

### 2.1 Shame indoctrination

> *"Here I am, a fifty-one year old college professor, still smarting from the wounds inflicted by the righteous when I was a child. It is a slow, festering wound, one that smarts every day—in some way or another…. I thought I would leave all of that "God loves… God hates…" stuff behind, but no so. Such deep and confusing fear is not easily forgotten. It pops up in my perfectionism, my melancholy mood, the years of being obsessed with finding the assurance of personal salvation."*
>
> *Prof. James Alexander, commenting on the legacy of his childhood Good News Club experiences*

The Club's dominant theme is sin. Its 5-year curriculum includes over 5000 references to sin, compared to less than 2000 references to "love." Spread over 120 one-hour lessons, a child can expect to hear a reference to "sin" approximately every 90 seconds.

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[6] The lesson books and particular editions reviewed—in a few instances the latest edition was out of print—are as follows:

**Year 1:** Joyce Hatfield and Lynda Pongracz, *Beginnings* (2009); Lynda Pongracz, *Patriarchs* (2008); Lynda Pongracz, *Joseph* (2008); Lynn Herlein & Lora Strong, *Life of Christ 1* (2009); Lynda Pongracz, *Life of Christ 2* (2008).

**Year 2:** Lynda Pongracz, *Moses: Chosen Deliverer* (2010); Lynda Pongracz, *Moses: The Lawgiver* (2010); Lynda Pongracz, *Life of Christ 3* (2010); and Lynda Pongracz, *Life of Christ 4* (2010).

**Year 3:** Marjory Alexander & Lisa Deam, *Our Awesome God* (2001); Katherine Hershey, *Joshua: God's Warrior* (2010); Eleanor Harwood, *Judges: Disobedience and Deliverance* (2006); and Debra Frazier, *Big Questions About Prayer* (2001).

**Year 4:** Katherine Hershey, *David: A Man After God's Heart* (2011); Katherine Hershey, *David's Reign: Trials & Triumphs* (2011); Alan D. George, *The First Christians* (2011); and Alan D. George, *Paul: God's Servant* (2011).

**Year 5:** Lynda Pongracz, *Elijah: Prophet of the Living God* (2008); Lynda Pongracz, *Elisha: Prophet of the Faithful God* (2008); Lynda Pongracz, *Esther* (2008); and Lynda Pongracz et al., *Daniel: Strong in the Lord* (2008).

[7] Child Evangelism Fellowship (CEF) frequently rotates books in and out of successive curriculum cycles. The current 5-year curriculum cycle features two new lesson books: *God Cares When Children* (2012) and *Peter and Parables* (expected Nov. 2013). Dropped from the current rotation are: *Our Awesome God*; *Judges: Disobedience and Deliverance*; and *Big Questions About Prayer*.

Each lesson uses a black heart to vividly symbolize a child's inner self. The black heart impresses children with a deeply personal sense of their own inadequacy and sordidness. "You were born with darkness in your heart because of sin," says one lesson on blind Bartimaeus.[8] "Your heart (the real you) is sinful from the time you are born," exclaims a lesson on the golden calf. [9]

The Club frequently reminds children that they are "deceitful," "dishonest," and "desperately wicked."[10] A lesson on Cain and Abel warns: "your heart is very sinful…. You may think you're pretty good, but when God sees your heart He sees it is full of sin."[11] Another lesson on Jacob and Esau declares: "Others may think that you are a good person, but God knows what you're really like on the inside. He knows that deep down you are a sinner—you were born that way."[12] "God says none of us are good," explains a lesson on God's omniscience.[13] Even the concept of redemption is used to deprecate children. "As Jesus hung on the cross, God punished him for your sin *and your deceitful heart*."[14]

In one curriculum exercise, a teacher hangs a sign labeled "SIN" around a child's neck. The teacher explains, "[s]ome children try to deny their sin. They say they never do wrong things. But is that true?" No, the children reply. The teacher continues, "He may not think it's there, but God says it and you can be sure that other people see it too!"[15]

The Club also challenges the worth and dignity of children. "Even the good things you do aren't good enough. The Bible says those things are like filthy (dirty) rags…. *Filthy rags either need to be thrown away or washed*."[16] According to the Club, children deserve to be punished for who they are, apart from anything they have ever done: "*Since you were born as a sinner*, you deserve to be punished by being apart from God forever."[17] The curriculum also frequently repeats the meme that "[y]ou *don't deserve* God's love," although you can get it if you believe.[18]

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[8] *Life of Christ 2*, Lesson 5 ("Bartimaeus Receives His Sight"), p 35.

[9] *Moses: The Lawgiver*, Lesson 2 ("The People Turn to Idolatry"), page 17.

[10] *Beginnings*, Lesson 3, page 28; *Patriarchs*, Lesson 4, page 33; *Joseph*, Lesson 2, page 19; *Life of Christ 1*, Lesson 5, page 34; *Moses: Chosen Deliverer*, Lesson 1, page 10; *Life of Christ 3*, Lesson 6, page 41; *Our Awesome God*, Lesson 4, page 31; *Big Questions About Prayer*, Lesson 6, page 41; *David's Reign: Trials and Triumphs*, Lesson 3, page 27; *Esther*, Lesson 4, page 30.

[11] *Beginnings*, Lesson 3 ("Cain and Abel"), page 28.

[12] *Patriarchs*, Lesson 4 ("The Birthright and the Blessing"), page 33.

[13] *Our Awesome God*, Lesson 3 ("God is Omniscient"), page 24.

[14] *Patriarchs*, Lesson 4 ("The Birthright and the Blessing"), page 35.

[15] *Joseph*, Lesson 3 ("Joseph's Temptation"), page 24.

[16] *Moses: The Lawgiver*, Lesson 2 ("The People Turn to Idolatry"), page 17 (emphasis added); *see also Moses: Chosen Deliverer*, Lesson 2 ("God Calls Moses"), page 15 (same); *Elijah: Prophet of the Living God*, Lesson 2 ("Elijah and the Prophet of Baal"), page 18 (similar); *Life of Christ 3*, Lesson 4 ("Jesus Heals the Lepers"), page 29 and Lesson 5 ("Jesus Challenges a Rich Young Ruler"), page 35 (similar).

[17] *Elijah: Prophet of the Living God*, Lesson 1 ("God Provides for Elijah"), page 12 (emphasis added).

[18] *Elisha: Prophet of the Faithful God*, Lesson 6 ("Believe the Good News"), pages 46-47 (appending the quoted language with "…but He gives it freely to you") (emphasis added); *see also Life of Christ 3*, Lesson 5 ("Jesus Challenges a Rich Young Ruler"), page 35 ("Grace means that *instead of punishing you*, God wants to forgive you

The Club risks planting seeds of suicidal ideation that could germinate later in a child's tempestuous teenage years. "***You deserve death***," one lesson rages, "because of your sin."[19] A Christmas-season lesson, on the *Three Wise Men*, likewise insists: "***You deserve to die*** and be separated from Him forever because of your sin."[20]

In one "Life of Christ" lesson exercise, a teacher hands a child an envelope, stating: "I've got something for you, (*child's name*). You've earned this…. Let's see what you've earned by sinning." The child opens the envelope and pulls out a slip labeled "DEATH." "You have earned death," the teacher continues, "separation from God forever in a terrible place of punishment."[21]

The Club's assault on self-esteem is ideological and systematic. In an essay attacking "humanistic psychology," CEF asserts that "it is not Biblical to present 'self' as something you esteem…."[22] According to the essay, Job's expression in Job 42:6—"I abhor myself and repent in ashes"—models how children should see themselves. Teaching children "to develop their potential," by contrast, "enslaves the person in selfish and sinful habits" and "is against God."[23] Summing up CEF's view of children, the essay pontificates: "The Bible gives a true picture of the child. May we see children as the Lord sees them; they are sinners, who need a saviour. They are guilty in the sight of God."[24]

## 2.2 Fear indoctrination

> *"You may wonder why a writer about fundamentalism is interested in all of this. As a child I attended a Child Evangelism Fellowship Bible Club. It was full of five to nine- year olds. Every week, we sang songs, did crafts, all kinds of fun stuff. Then they got out the heavy guns. We were sinners and God had a place for sinners. We were all going to Hell. If we didn't know what that was, well they made sure they told us. What impact does it have on a six- year old to be told that s/he is so bad s/he is worthy of Hell?"*
>
> *David Webb, www.parentingguru.com*

The Club's curriculum features over 250 references Hell—including 52 explicit uses of the word "Hell." One lesson bellows: "Because you have sinned, you don't deserve to go to Heaven. Instead ***you***

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*even though you don't deserve it*.") (emphasis added); *Patriarchs*, Lesson 4 ("The Birthright and the Blessing"), page 34 ("God loves you even though *you don't deserve it*…. Even though *you don't deserve it*, God loves you.") (emphasis added); *Joseph*, Lesson 5 ("Joseph Forgives His Brothers"), page 41 ("Even though *you don't deserve it*, God has shown His love and kindness to you.") (emphasis added); *The First Christians*, Lesson 3 ("God Works through the Christians"), page 25 ("Explain that even though you didn't deserve it, God loves you and gave you everlasting life through Jesus").

[19] *Moses: The Lawgiver*, Lesson 2 ("The People Turn to Idolatry"), pages 21 & 22.

[20] *Life of Christ 1*, Lesson 3 ("Wise Men Worship the King"), page 23.

[21] *Life of Christ 1*, Lesson 4 ("Jesus Obeys His Heavenly Father"), page 28.

[22] Source document kept on file.

[23] *Id.* (quoting Proverbs 22:15).

[24] *Id.*

***deserve to go to Hell*** and be separated from God forever."[25] Another lesson berates: "[Y]ou deserve to be kept away from God forever in a place of darkness and suffering because you are a sinner."[26]

According to the Club's understanding of divine justice, even trivial offenses—like pouting or slamming the bedroom door—warrant Hell:

> When you complain about the meals you are given instead of being grateful, you sin. When you pout because you can't have your own way or slam your bedroom door so everyone knows you're angry, you sin. God says sin must be punished and the punishment is separation from God forever in a terrible place called Hell. God hates your sin....[27]

Sinful thoughts also warrant Hell. "[Y]ou have sinful thoughts," one lesson on Joseph warns, and "God says the punishment for sin is to be separated from Him forever in a place of darkness called Hell."[28]

Warnings of Hell are mixed with explicitly coercive messages. The curriculum includes over 150 uses of the phrase "you must" in reference to becoming saved. Examples include: "**You must agree** with God that what you've done is sin—it is hateful in His sight,"[29] "**You must agree** with God that you are a sinner deserving punishment."[30] "**You must believe** that the Lord Jesus died on the cross for you,"[31] "**You must choose** to let Him be your Savior,"[32] and "**You must come** to God His way."[33] The curriculum directs instructors to ask the following of preschool children: "What is your punishment for sin if you don't get saved?" The preschoolers are prompted to give the following scripted answer: "Being away from God forever; not going to Heaven."[34] Another lesson chastens: "Unless you follow his plan, you will be punished."[35]

## 2.3 Thought control

*"[A] young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable."*

*Plato, Republic*

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[25] *Elisha: Prophet of the Faithful God*, Lesson 1 ("Elisha's Authority Established By God"), page 10.

[26] *Life of Christ 4*, Lesson 4 ("Jesus is Crucified"), page 31.

[27] *Moses: The Lawgiver*, Lesson 5 ("Moses Lifts Up the Brazen Serpent"), page 38.

[28] *Joseph*, Lesson 4 ("Joseph Rewarded"), page 34.

[29] *Life of Christ 4*, Lesson 3 ("Jesus Faces His Accusers"), page 26

[30] *Daniel: Strong in the Lord*, Lesson 6 ("Daniel in the Den of Lions"), page 48.

[31] *Beginnings*, Introduction, page 3.

[32] *Beginnings*, Introduction, page 3.

[33] *Beginnings*, Lesson 3 ("Cain and Abel"), pages 25, 29.

[34] *Moses: The Lawgiver*, Lesson 4 ("Moses Sins Against God"), page 35.

[35] *Moses: Chosen Deliverer*, Lesson 2 ("Moses Sees God's Power"), page 29.

The Club curriculum warns children that God "knows all your thoughts," and that "[t]hinking wrong thoughts … is sin."[36] A Club mantra—memorized by the students—is that "sin is *anything you think*, say or do that displeases God."[37]

The worst sin of all is unbelief. "It is a sin to refuse to believe God and sin must be punished," states one lesson from Joshua explaining the Israelites' forty years of wandering following their liberation from Egypt.[38] "Take heed," importunes a Club memory verse, "lest there be in any of you an *evil heart of unbelief*, in departing from the living God."[39] "When you refuse to believe in God or in the Lord Jesus, His Son," one lesson hectors, "you are sinning," and "in danger of being separated from God forever."[40] Those who refuse to believe, cautions another lesson, are "condemned."[41]

The sin of unbelief is manifested by doubting anything in the Bible. "Perhaps you have heard these things in the Bible before, but you have refused to believe that they are true. God calls that unbelief sin."[42] "Sin," the Club drives the point further, is "*believing what you want to believe*—instead of going God's way."[43]

The Club informs children that when people doubt parts of the Bible, it is because they are defiant and foolish. "There are people today who foolishly defy (go against) God. They are interested in what God has said or done—they don't believe God's Word is true."[44] Such people are fools, the Club inveighs, in danger of Hell's eternal torments. "Only a foolish person would not believe in the living God and defy His power."[45]

The long-term consequence of not believing God's Word is Hell: "If you die without having your sin forgiven, God says you will be separated from Him forever in a terrible place of punishment. God wants you to believe His Word is true…."[46]

God's intolerance of disbelief is illustrated in lessons about the slaughter of the Amalekites, the fall of Jericho, and the Flood. In each case, the Club explains to children that the cities—men, women,

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[36] *Our Awesome God*, Lesson 3 ("God Is Omniscient"), page 24 (immediately thereafter warning children that they deserve Hell).

[37] *Judges: Disobedience and Deliverance*, Lesson 2 ("Deborah and Barak Deliver Israel"), page 16. Variations of the mantra include ending "anything you think, say or do" with "that breaks God's laws," "that is wrong," and "that makes God sad and disobeys His Word."

[38] *Joshua*, Lesson 1 ("God's Leader"), page 10.

[39] *Moses: The Lawgiver*, Lesson 3 ("Spies Examine Canaan"), page 23.

[40] *Beginnings*, Lesson 5 ("Noah"), pages 40-41.

[41] *Life of Christ 2*, Lesson 2 ("Nicodemus Hears the Good News"), page 18.

[42] *Beginnings*, Lesson 1 ("Creation"), page 16.

[43] *Beginnings*, Lesson 1 ("Creation"), page 16.

[44] *Elisha: Prophet of the Faithful God*, Lesson 1 ("Elisha's Authority Established by God"), page 12.

[45] *Elisha: Prophet of the Faithful God*, Lesson 1 ("Elisha's Authority Established by God"), page 12.

[46] *Beginnings*, Lesson 1 ("Creation"), page 16.

children, and babies included—were killed because they "**refused to believe**" in the one true God.[47] Likewise, the thief who scorned Jesus at his crucifixion died and went to Hell because "he refused to believe."[48]

The Club tells children to "ask[] God to **protect your mind from wrong beliefs** and to help you think about His Word instead."[49]

At the opposite polarity, the Club attributes non-Christian ideas to Satan. Satan, the Club warns, "does not want you to have faith in the Lord Jesus Christ or in God's Word, the Bible."[50] "Your doubts and fears come from your enemy Satan, who doesn't want you to trust God."[51] "The Bible tells us there is an enemy of God who does not want us to understand or believe the truth. Do you know who this is? (*Satan*)…. He tries to hide the truth of God and get us to believe his lies instead…."[52] Those who don't believe have been "trick[ed]" by Satan's "lies."[53] And the very "biggest lie of Satan," the Club insists in a blunt attack on pluralism, is "that there are many ways to Heaven."[54]

The Club admonishes children in the strongest terms to resist those ideas. "[W]e must decide whom to believe—God or Satan."[55] When "the devil puts thoughts in your mind," remember that it is sin, and that "[t]here are consequences when you choose to sin."[56] But "God can help you say no to … thinking wrong things."[57] To do so, "you must fill yourself with truth. You can do that by reading, studying and memorizing verses from the Bible" and avoiding contrary information in "magazines, TV and the Internet."[58] "If you want to say yes to God's truth and no to Satan's lies, you must study God's Word until you think God's thoughts."[59]

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[47] *Joshua: God's Warrior*, Lesson 2 ("The Red Cord in the Window"), page 30 ("God declared His judgment on the people of Jericho because they had sinned and refused to believe in Him. God was going to punish them that very day."); *Beginnings*, Lesson 5 ("The Flood"), page 43 (God drowns everyone in a great flood because "they refused to believe."); *David: A Man After God's Heart*, Lesson 2 ("Saul's Disobedience"), pages 17-18 (discussed in § 2.6).

[48] *Daniel: Strong in the Lord*, Lesson 3 ("The Fiery Furnace"), page 24.

[49] *Daniel: Strong in the Lord*, Lesson 3 ("The Fiery Furnace"), page 28.

[50] *Joseph*, inside back cover ("Teaching the Song"), page 46.

[51] *Moses: Chosen Deliverer*, Lesson 3 ("Moses Delivers God's Message"), page 24.

[52] *Our Awesome God*, Lesson 6 ("God is Truth"), page 45.

[53] *Beginnings*, Lesson 2 ("Adam and Eve"), page 21.

[54] *Our Awesome God*, Lesson 6 ("God is Truth"), page 46.

[55] *Our Awesome God*, Lesson 6 ("God is Truth"), page 45.

[56] *Joshua: God's Warrior*, Lesson 5 ("Achan's Hidden Sin Revealed"), page 35.

[57] *Joseph*, Lesson 3 ("Joseph's Temptation"), page 24.

[58] *Our Awesome God*, Lesson 6 ("God is Truth"), page 45.

[59] *Our Awesome God*, Lesson 6 ("God is Truth"), page 45.

## 2.4 Attacks on science education

*"Or maybe at school when your teacher talked about evolution, claiming it to be true, you've tried to speak up for what you believe but the teacher stopped you. People who aren't Christians often serve Satan without even knowing it."*

*Paul: God's Servant, Lesson 3, ("Paul Becomes a Missionary"), at page 27*

The Club encourages its instructors to teach young-earth Creationism. "Since the theory of evolution is freely taught in schools, take this opportunity to help children see the problems with this theory and the logic of the biblical account."[60] But the Club's materials do not engage the evidence behind scientific observations, theories, and conclusions on origins and life. Rather, the Club's materials mock the science, engage in ad hominem attacks, and instill fear that belief in science is Satanic, sinful and could lead to Hell.

The Club suggests that only non-theists dispute Creationism: "Some who do not believe in God, the Creator, say that the universe just happened. They say that certain gases came together and an explosion occurred, flinging the stars and planets into place."[61] "[I]t took God only six days to create the world, not billions of years like some people say,"[62] as if the evidence for an old universe were based on nothing more than hearsay.

Mocking evolution, another lesson states: "[s]ome people say this world evolved—it just formed out of some chemicals somewhere."[63] Evolution is false, the Club assures, "because God's Word, the Bible," teaches otherwise.[64] The question boils down to a simple He (as in "God") said/she (as in science) said: "God knows how He created man and the world and He tells us in the Bible. Who do you think has the right answer—man, who thinks he knows, or God, who knows? *(God)*."[65] There is no need, then, to learn the evidence behind the science. Rather, students should speak up—in ignorance—if their teachers teach evolution as fact,[66] cynically aware that their teachers may be serving Satan.

Belief in young-earth creationism is an issue of loyalty and faithfulness to God. God "wants us to believe what He says about how the world was created,"[67] the Club entreats, before leading children in a recitation of Hebrews 11:3. And, on the flip-side, scientific belief is a form of rebellion: "These people refuse to believe God's Word by faith. They want to reason things out in their own minds so they can do without God."[68] Such scientists, the Club declares, are "fools."[69]

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[60] *Beginnings*, Lesson 1 ("Creation"), page 16 (sidebar).

[61] *Beginnings*, Lesson 1 ("Creation"), page 16.

[62] *Our Awesome God*, Lesson 5 ("God is Omnipresent"), page 37.

[63] *Judges*, Lesson 1 ("Israel's Broken Promise"), page 9.

[64] *Judges*, Lesson 1 ("Israel's Broken Promise"), page 9.

[65] *Our Awesome God*, Lesson 3 ("God is Omniscient"), page 23.

[66] *Paul: God's Servant*, Lesson 3 ("Paul Becomes a Missionary"), at page 29; *Daniel: Strong in the Lord*, Lesson 3 ("The Fiery Furnace"), page 28.

[67] *Beginnings*, Lesson 1 ("Creation"), page 15.

[68] *Beginnings*, Lesson 1 ("Creation"), page 16.

The Club transitions briskly from attacking science to reminding children that unbelief can send them to Hell. Less than 200 words after impugning scientists for "refus[ing] to believe God's Word by faith," the Club warns children that such unbelief is "sin," and that "[i]f you die without having your sin forgiven, God says you will be separated from Him forever in a terrible place of punishment. God wants you to believe His word…."[70]

## 2.5 Diminishing nonbelievers

> *"Without warning, [my son] ran into the house yelling. 'Mom, Jamal's crying. Come talk to him.' 'What's the matter?' 'We were telling him about heaven and hell, and he started crying because his dad isn't going to heaven.' I felt inadequate. [My children] must have put too much emphasis on hell and not enough on heaven—that was it. What could I possibly tell the child? Jamal was curled up tightly in a lawn chair sobbing. How could I comfort him without compromising the truth? Jamal's father was Muslim. If he didn't come to God through Christ, he wasn't going to heaven. I couldn't deny that basic fact. 'Jamal,' I said finally, 'God loves your parents very much. He doesn't want them to go to hell. If they will believe in Jesus, they can be forgiven and go to heaven.' That afternoon was painful for each of us. Months afterward, however, while leading a Good News club, I learned the significance of Jamal's tears. 'How many of you have already asked Jesus into your hearts?' I asked the children who had assembled on the grass. Jamal's hand was the first one up. Following class, I talked to him privately. He told me that he had received Christ and did believe in Him. I was thrilled. Then I remembered the day that I had been so upset about Jamal's concern for his dad… [My children] had led Jamal to Christ that day, but … I hadn't even realized it."*
>
> *Jessica Reynolds Shaver Renshaw, jessicareynoldsshaverrenshaw.blogspot.com*

The Club promotes a deeply divided view of humanity, one split between believers and the "world." Most people are going to Hell, the Club confidently asserts: "[H]ow many people are on the narrow way leading to life forever with God in Heaven? (*Few*). I would much rather be with the smaller group of people, wouldn't you?"[71]

This divisive view of humanity is fueled by the curriculum's repeated admonitions about punishment and Hell and its multiple lessons about the horrible fate that befell those who "refused to believe." Given the intense focus of the curriculum on these themes, children who regularly attend the Club can scarcely help but categorize their classmates as either saved, potentially savable, or damned.

Added to this, the Club expressly counsels children not to become close friends with their nonbelieving classmates. The "world," the curriculum cautions, tries to "draw us away from God."[72] "People who aren't Christians often serve Satan without even knowing it,"[73] the Club warns.

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[69] *Beginnings*, Lesson 1 ("Creation"), page 16; *see also Our Awesome God*, at Lesson 3, page 23 ("Don't let anyone fool you" with evolution).

[70] *Beginnings*, Lesson 1 ("Creation"), page 16.

[71] *Esther*, Lesson 2 ("Mordecai Stands True"), page 17.

[72] *Joshua: God's Warrior*, Lesson 5 ("Achan's Hidden Sin Revealed"), page 35.

[73] *Paul: God's Servant*, Lesson 3 ("Paul Becomes a Missionary"), page 27.

To underscore the importance of separation from nonbelievers, one lesson describes God's rebuke of the Israelites for becoming "close friends with people who did not believe in Him."[74] The Israelites "were to get rid of them"[75]—their differently-believing neighbors, that is—but the Israelites had failed to carry out this command.

The Israelites' command to destroy their neighbors served a critical purpose: "God knew that if the people became close friends with those who did not believe in Him they would begin to doubt God too."[76] Applying that Old Testament principle to the present, the lesson dissuades children from "[c]hoosing those who don't know Jesus as your best friends."[77] Twice more the lesson importunes children: "Don't become close friends with those who do not love and serve God."[78] "Will you read and obey God's Word," the lesson asks, "and choose as your best friends others who are loyal to God?"[79]

## 2.6 Authoritarian conditioning

> *"At the end of the week, the evening before you all departed for home [from Camp Good News], you had a lovely 'fire and brimstone' sermon, just for old-times sakes. You and your fellow campers were assembled around a huge bond fire. Its heat was intense. One could hear the wood popping as it cracked. You imagined that wood as your bones in the first of hell, which was no coincidence as these Christian child psychologists knew exactly what they were doing! They knew the effect these sermons and this fire would have on your young, impressionable minds as they were experts in the uses of fear. Nothing communicated more effectively to you and your fellow campers the horror of hell fire."*
>
> *Dr. William Hart, Univ. of North Carolina-Greensboro*

In addition to its more than 5000 references to sin, the Club's curriculum features over 1100 references to obedience and over 1000 references to punishment. The Club's emphatic preoccupation with obedience and retribution contrasts its near phobic avoidance of the Golden Rule (a single reference) and the Royal Law (again, a single reference).

The Club's selection of Bible stories also reflects its fiercely authoritarian outlook. One lesson describes—with a touch of vengeful pleasure[80]—how God sent two bears to maul 42 youth for their juvenile taunts of God's servant.[81] According to the Club, the moral of the lesson is to always respect

[74] *Judges: Disobedience and Deliverance*, Lesson 1 ("Israel's Broken Promise"), pages 10-11.

[75] *Judges: Disobedience and Deliverance*, Lesson 1 ("Israel's Broken Promise"), page 11.

[76] *Judges: Disobedience and Deliverance*, Lesson 1 ("Israel's Broken Promise"), page 11.

[77] *Judges: Disobedience and Deliverance*, Lesson 1 ("Israel's Broken Promise"), page 11.

[78] *Judges: Disobedience and Deliverance*, Lesson 1 ("Israel's Broken Promise"), page 11.

[79] *Judges: Disobedience and Deliverance*, Lesson 1 ("Israel's Broken Promise"), page 12.

[80] "Perhaps they laughed at Elisha but suddenly they stopped laughing and mocking him. Two mother bears came charging out of the woods and attacked them. The laughing and mocking of the young men turned into screams for help." *Elisha: Prophet of the Faithful God*, Lesson 1 ("Elisha's Authority Established by God"), page 13. The Club's sadistic humor also comes out in a Bible story about Jael's taking a tent peg and hammering it through a fleeing enemy general's head. The Bible story concludes, in pitiless humor inappropriate for 5-year olds, "and that was the end of him!" *Judges: Disobedience and Deliverance*, Lesson 2 ("Deborah and Barak Deliver Israel"), p 18.

[81] *Elisha: Prophet of the Faithful God*, Lesson 1 ("Elisha's Authority Established by God"), pages 8-14.

God's worker.[82] Another lesson describes the stoning of Achan and his entire family for disobedience,[83] including how Achan's pre-execution apology fell on deaf ears.[84] One patriarchal lesson describes Queen Vashti's disobedience of King Ahasuerus' command to exhibit herself in front of his guests, following it with this take-away point: "God wants you to obey Him because His plans are best. You may not always understand why God gives a certain command or rule for you to obey…."[85] Other lessons describe the slaughter of 3000 men "who refused to obey God,"[86] God's sending of snakes to bite thirsty Israelites for grumbling,[87] God's use of Samson to randomly kill and terrorize Philistines to "keep[] [them] under control,"[88] and the killings of Ananias and Sapphira for exaggerating their giving.[89]

The most desensitizing lesson of all comes from *David: A Man After God's Heart*. Lesson 2 draws from I Samuel 15 to describe the divinely instructed genocide—men, women, children, and infants included—of the Amalekites.[90] The Club's lesson not only spares little of the Biblical detail, but also cites the Amalekites' unbelief as justification for the genocide:

> Samuel was careful to explain exactly what God wanted Saul to do. "You are to go and completely destroy the Amalekites – people, animals, every living thing. Nothing shall be left," Samuel instructed him. That was pretty clear, wasn't it? The Amalekites had heard about Israel's true and living God many years before, but they refused to believe in Him…. God is pure and holy so he must punish sin. The Amalekites refused to believe in God and God had promised punishment. Now was God's time for that punishment.[91]

Faithful to the original Biblical narrative, the script describes how Saul righteously carried out God's command, killing everyone—except for King Agag.[92] In this crucial respect, Saul failed. Samuel confronted Saul with the bad news that God would strip Saul of his kingdom.[93]

The moral of this story—a story used by preachers to encourage the slaughter of native Americans and Tutsis, among others[94]—is that God "expects your complete obedience" and you must

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[82] *Elisha: Prophet of the Faithful God*, Lesson 1 ("Elisha's Authority Established by God"), pages 11-12.

[83] *Joshua: God's Warrior*, Lesson 5 ("Achan's Hidden Sin Revealed"), pages 33-38.

[84] *Joshua: God's Warrior*, Lesson 5 ("Achan's Hidden Sin Revealed"), pages 37.

[85] *Esther*, Lesson 1 ("Esther Becomes Queen"), page 10.

[86] *Moses: The Lawgiver*, Lesson 2 ("The People Turn to Idolatry"), pages 16-22, with quote at page 20. The context of the lesson is God's punishment for the Israelites' worship of a golden calf. The Levites were commanded, in Exodus 32:27-28 (NIV), to "[g]o back and forth through the camp from one end to the other, each killing his brother and friend and neighbor."

[87] *Moses: The Lawgiver*, Lesson 5 ("Moses Lifts Up the Brazen Serpent"), at pages 36-42.

[88] *Judges: Disobedience and Deliverance*, Lesson 5 ("God Chooses Samson"), page 36.

[89] *The First Christians*, Lesson 4 ("God is Dishonored by Deceptive Christians"), pages 28-34.

[90] 1 Samuel 15:2-3 (NIV) records Samuel commanding Saul: "Now go, attack the Amalekites and totally destroy everything that belongs to them. Do not spare them; put to death men and women, children and infants…."

[91] *David: A Man After God's Heart*, Lesson 2 ("Saul's Disobedience"), page 17.

[92] *David: A Man After God's Heart*, Lesson 2 ("Saul's Disobedience"), page 18.

[93] *David: A Man After God's Heart*, Lesson 2 ("Saul's Disobedience"), page 19.

"obey completely."[95] Ironically, the memory verse that accompanies the lesson is James 4:17—"To him that knoweth to do good, and doeth it not, to him it is sin."[96]

The "Review Questions" section reinforces the full import of the genocidal imperative. Review Question #3 asks: "How did King Saul only partly obey God when he attacked the Amalekites?" The lesson script provides the expected answer: "He did not completely destroy them as God had commanded; he kept the king and some of the animals alive."[97]

## 2.7 Deceptive marketing

> *"I've been to the Good News Club and it's all simple. God sent his son to die on the cross for our sins because he was the PERFECT sacrifice. And yeah, they use sin and death a lot because the Bible teaches us about Hell. God doesn't want us to go there. That's why it's mentioned so much. Good News Club uses it so much to emphasize… [that] God loves us and doesn't want anything bad to happen to us, worse to go to Hell…."*
>
> *Rachel Bartley*

Parents not already familiar with the Club have no reason to suspect the Club's dark emphasis. The Club's colorful marketing materials characterize the Club in exclusively positive terms. "The Good News Club provides *positive* fun for the children,"[98] states one selling point that recurs throughout the Club's marketing materials. "Learning Bible stories, songs and verses is made fun through games, visuals, and dramatic teaching. A snack and small 'goodie bag' is also provided each week," it continues. The Club's marketing materials do not discuss sin, obedience, punishment, or Hell The Club even markets itself as promoting "self-esteem" and mentoring children "toward a path of self-sufficiency."[99] The Club also styles itself as "interdenominational" and "nondenominational," concealing the fact that it actively prefers some denominations (e.g., evangelical) while excluding others (e.g., mainline Protestant or Catholic).[100]

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[94] *See, e.g.,* John Corrigan, "Amalek and the Rhetoric of Extermination," THE FIRST PREJUDICE: RELIGIOUS TOLERANCE AND INTOLERANCE IN EARLY AMERICA, page 70 (Beneke et al., ed., 2011) ("New England Puritans … condemned Indians as Amalekites [and] wrote and preached excitedly about blotting them out."); Christ Mato Nunpa, "A Sweet Smelling Sacrifice: Genocide, the Bible, and the Indigenous Peoples of the United States: Selected Examples," CONFRONTING GENOCIDE: JUDAISM, CHRISTIANITY, ISLAM, page 55 (Steven Leonard, ed., 2010) (quoting Plymouth County's William Bradford on the 1637 Mystic Massacre of a Pequot village: "It was a fearful sight to see them thus frying in the fire and the stream of blood quenching the same…but the victory seemed a sweet sacrifice…."); Philip Jenkins, LAYING DOWN THE SWORD: WHY WE CAN'T IGNORE THE BIBLE'S VIOLENT VERSES, page 141) (2011) (describing how a Hutu pastor preached on I Samuel 15 to stir his flock to violence against the Tutsis).

[95] *David: A Man After God's Heart*, Lesson 2 ("Saul's Disobedience"), page 18.

[96] *David: A Man After God's Heart*, Lesson 2 ("Saul's Disobedience"), page 15.

[97] *David: A Man After God's Heart*, Lesson 2 ("Saul's Disobedience"), page 20.

[98] Ten Reasons Why Schools Want a Good News Club" (source kept on file).

[99] Tina Vasquez, Things to do Today, *Corpus Christi Times Caller*, November 15, 2012 (http://m.caller.com/news/2012/nov/15/things-do-today-111512/) (last visited April 29, 2013).

[100] *See, e.g.,* Child Evangelism Fellowship, "Maximize the Essentials—Adopt-A-School Good News Clubs," Step 1: Research Your Area, page 2 ("Understand the denominations in your area. It is especially helpful to contact the Southern Baptist Convention in your area as CEF has an endorsement from Dr. Frank Page, a former SBC

Court opinions granting the Club access to public school children mirror the Club's polished self-descriptions. One Third Circuit decision recites the Club's "stated objectives" as including:

> Instilling or cultivating "self-esteem, character, and morals in children," providing children with a "positive recreational experience," providing a community where "children feel loved, respected, and encouraged," teaching children "life skills and healthy lifestyle choices," teaching children to "encourage and lead other children" to the same sorts of choices, improving "memory skills, grades, attitudes, and behavior at home," improving relations among the races, instructing children to "overcome feelings of jealousy" and to treat others as they want to be treated themselves, teaching children to be "obedient and to respect persons in authority," and instructing children to "follow the numerous other moral and other teachings of Jesus Christ."[101]

More recently, a district court declared that the Club "promotes the same values and ideas" as the Boy Scouts, including "moral values, character qualities, respect for authority, relationships, character development, and important community issues."[102]

## 3 Introduction to Free Speech issues

This article evaluates what public schools can do to protect children from threats—by the Club and by others, whether religious or secular—to their psychological, emotional, and intellectual well-being. The thesis of this article is that the Club *can* and *should* be stopped from harming children on the basis of religiously neutral child-protective criteria.

More than any other source, free speech jurisprudence governs whether, how and how much a public school can act to protect its students from verbal and emotional abuse.

Freedom of speech is not absolute, and not all speech is of equal First Amendment importance.[103] Disfavored categories and exceptions to Free Speech include incitement to imminent lawless action,[104] speech integral to criminal conduct,[105] threats,[106] fraud,[107] fighting words,[108] false statements of fact

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President."); page 3 ("Research and map the evangelical churches that are likely to agree with CEF's Statement of Faith."); page 7 ("Look for specific affiliations (Southern Baptist, Bible churches, etc.).") (source kept on file).

[101] *CEF of New Jersey Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514, 521-22 (3d Cir. 2004).

[102] *CEF of Minnesota v. Elk River Area Sch. Dist. #728*, 599 F.Supp.2d 1136, 1138, 1141 (D. Minn. 2009).

[103] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U. S. 749, 758 (1985).

[104] *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Schenck v. United States*, 249 U.S. 47 (1919); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[105] *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

[106] *Virginia v. Black*, 538 U.S. 343 (2003) (holding that cross-burning paired with intent to intimidate could be a criminal offense); *Watts v. United States*, 394 U.S. 705 (1969) (true threats).

[107] *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748 (1976).

[108] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

(e.g., false commercial advertising),[109] obscenity,[110] child pornography,[111] copyright and trademark violations,[112] misappropriation of the right of publicity,[113] and campaign expenditures.[114] There is also a limited right "to be left alone" in situations where a person cannot be expected to avoid distressing speech.[115] Remedies for defamation, libel, and other dignitary torts have also existed alongside the First Amendment from the time it was ratified.[116]

The United States nevertheless boasts the world's most robust free speech tradition, and the trend of the Supreme Court's jurisprudence has been one of expanding—not limiting—the protections of the First Amendment's free speech guarantee. Major Supreme Court rulings have protected flag desecration,[117] protests of slain soldiers' funerals,[118] wearing a "f___ the draft" jacket in a courthouse,[119] caustic political hyperbole,[120] neo-Nazi marches,[121] cross burnings,[122] *virtual* child pornography that is not produced using minors,[123] violent video games marketed to minors,[124] the depiction of animal cruelty,[125] falsely claiming to have a congressional medal of honor,[126] and publications of classified information.[127]

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[109] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Peel v. Attorney Reg. & Discip. Comm'n*, 496 U.S. 91 (1990).

[110] *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973).

[111] *New York v. Ferber*, 458 U.S. 747 (1982).

[112] *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985).

[113] *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

[114] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[115] *Schenck v. Pro-Choice Network*, 519 U.S. 357, 383 (1997); *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (ordinance against picketing of a single residence); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (sound trucks).

[116] *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding that the First Amendment prohibits awards of damages to public figures to compensate for speech that intentionally inflicts emotional distress, leaving open the possibility of recovery by private figures).

[117] *See Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

[118] *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

[119] *Cohen v. California*, 403 U.S. 15 (1971).

[120] *Watts v. United States*, 394 U.S. 705 (1969) (reversing conviction of protestor who told an Army investigator that "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.").

[121] *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977).

[122] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down ordinance that criminalized symbolic speech reasonably known to "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

[123] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

[124] *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011).

[125] *United States v. Stevens*, 130 S. Ct. 1577 (2010).

[126] *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

[127] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The general rule is that the government has no power to restrict expression because of its message, ideas, subject matter, or content.[128] In the absence of a categorical exception to maximal free speech protection (e.g., obscenity, fighting words, or commercial speech) or where public forum analysis applies (see § 4), the government must prove that it has a compelling interest in a restriction, that the restriction is narrowly drawn to serve that interest, and that the restriction is necessary to solve an actual problem.[129] Even when the government's interest is sufficiently compelling to justify a restriction—circumstances the Supreme Court cautions are "rare"[130]—a wide variety of other available facial and as-applied challenges, including invalidity for vagueness,[131] overbreadth,[132] and underinclusiveness,[133] are possible.

The remainder of this article focuses on several threads of constitutional jurisprudence relevant to the evaluation of public school facility use policies, particularly as applied to the Club. First, this article reviews public forum caselaw, the traditional framework that courts have used for evaluating facility use policies. Next, this article reviews student speech caselaw, relevant because of the school context and the solicitude expressed for the emotional and psychological well-being of children. Third, this article reviews several excludable categories of speech—including fighting words, obscenity and child pornography—that are accorded little or no protection at all. Following that, this article discusses the federal Equal Access Act (EAA) and Boy Scouts of America Equal Access Act (BSA). Last, this article discusses relevant Religion Clause cases. Finally, this article ties these threads together.

## 4 Public forum doctrine

The **dominant First Amendment framework** governing state regulation of speech on public property is public forum caselaw. This section provides a basic overview of public forum law, followed by six pivotal Supreme Court cases involving university and public school forums. The lengthiest—and possibly most important—section summarizes how public forum law has been applied to a wide variety of public forum regulations.

### 4.1 General guidelines

[128] *Alvarez*, 132 S. Ct. at 2544.

[129] *Brown*, 131 S. Ct. at 2738.

[130] *United States v. Playboy Entertainment Group*, 529 U.S. 803, 822 (2000).

[131] *See FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way…. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.").

[132] *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("To render a law unconstitutional, the overbreadth must be 'not only real but substantial in relation to the statute's plainly legitimate sweep.'").

[133] *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2740 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.")

### 4.1.1 Forum categories

Not all forums are created equal. "[T]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."[134] Government-owned places and facilities can be classified either as *public forums*[135] or *nonpublic forums*.[136] Public forums are areas such as streets, sidewalks, and parks historically associated with or generally open to the public for assembly, debate and discussion.

Nonpublic forums are places or facilities to which the government provides selective access (e.g., certain groups or the discussion of certain topics).[137] The government, like a private individual, has the right to dedicate property to specific uses and the "power to preserve the property under its control for the use to which it is lawfully dedicated."[138] A defining characteristic of a nonpublic forum is that "the State may 'reserv[e] them for certain groups'"[139] as well as for the discussion of specific subject matters or topics. But the State may not limit the individual viewpoints on the allowed subject matter,[140] and courts will consider whether restrictions are "in reality a facade for viewpoint-based discrimination."[141] Notable examples of nonpublic forums include airport terminals,[142] the federal government's Combined Federal Campaign (CFC) charity drive,[143] and an interschool mailing system.[144]

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[134] *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

[135] Many cases describe two categories of public forums—traditional public forums and designated public forums—but the same framework of strict scrutiny applies to both.

[136] **Note:** Older Supreme Court cases used the phrase "limited public forum" interchangeably with "designated public forum." In contemporary Supreme Court cases, the phrase "limited public forum" commonly takes the place of "nonpublic forum." Some circuits use these phrases to refer to four—or more—discrete types of forums. The proliferation of categories and their inconsistent nomenclature is a frequent and significant source of confusion. For most purposes, it is sufficient to focus on the level of scrutiny that applies: strict scrutiny, which applies to "traditional" and "designated" public forums; and intermediate scrutiny, which applies to limited public forums (as contemporarily understood) and nonpublic forums.

[137] *See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2984 & n11. (2011); *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1995); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

[138] *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

[139] *Martinez*, 130 S. Ct. at 2985 (citation omitted).

[140] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995); *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 800 (1985).

[141] *Cornelius*, 473 U.S. at 811; *see also Crawford v. Bd. of Education of Los Angeles*, 458 U.S. 527 (1982) ("[A] law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose."); *see also Martinez*, 130 S. Ct. at 3017-18 (Alito, J., dissenting) (citing Hastings' shifting policies, timing, lack of documentation, and non-enforcement as evidence that its policy was a pretext for viewpoint discrimination); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996) ("A facade for viewpoint discrimination…requires discrimination behind the facade (i.e., some viewpoint must be disadvantaged relative to other viewpoints).").

[142] *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

[143] *Cornelius*, 473 U.S. 788 (1985) (holding that the CFC, which gives federal employees the opportunity to withhold money from their paychecks to fund various charities, was reasonably limited to tax-exempt nonprofit charities

It is important to understand that forum analysis—and indeed the Free Speech Clause itself—***does not apply*** to pure government speech. When speaking for itself, the government can, provided that it neither expresses favoritism nor hostility toward religion, "say what it wishes" and "select the views that it wants to express."[145] Of course, the line between private speech and official speech is not always clear-cut. School-sponsored speech, for example, falls in a region between private speech and official speech. Varying circumstances—for example, privately donated monuments,[146] Adopt-A-Highway signs,[147] specialty license plates,[148] class fundraisers[149] and valedictorian prayers[150]—generate recurring disputes over the public versus private character of speech.[151] Distinctions between private and public speech, however, fall outside the scope of this article.

### 4.1.2 Content (subject matter) and viewpoint restrictions

Public forum doctrine also makes a distinction—albeit a blurry and frequently contested one[152]—between "content" and "viewpoint" discrimination.

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that provided direct health and welfare services to individuals or their families, and reasonably excluded legal defense and political advocacy organizations).

[144] *Perry*, 460 U.S. 37 (1983) (holding that a school board reasonably limited access to an interschool mailing system to the teachers' elected exclusive bargaining representative, excluding a competing union).

[145] *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009).

[146] *Pleasant Grove City*, 555 U.S. 460 (holding that city's refusal to erect in a public park a permanent religious "Seven Aphorisms" monument donated by a non-Christian religious group was a legitimate exercise of governmental speech).

[147] *See Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004) (holding that Missouri's Adopt-A-Highway program was private speech and upholding the right of the Ku Klux Klan to participate in it).

[148] *See Choose Life Ill., Inc. v. White*, 547 F.3d 853, 855 n.1 (7th Cir. 2008) (noting conflict in circuits over whether specialty plates constitute private or government speech).

[149] *See, e.g., Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636 (S.D. Tex. 2010) (school engaged in impermissible viewpoint discrimination when it excluded Matthew 1:21 as an available preset message from a holiday art card order form used in an art class fundraiser).

[150] *See, e.g., A.M. v. Taconic Hills Central Sch. Dist.*, 2013 U.S. App. LEXIS 2440 (2d Cir. 2013) (holding that school permissibly required 8th grade class co-president to remove the last line of her speech—an Old Testament blessing—because the line was "purely religious speech" and not just a religiously-informed viewpoint on an otherwise secular subject matter and the speech was school-sponsored); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (holding that school permissibly disciplined valedictorian for giving evangelical speech, because school had a legitimate pedagogical interest in associating the school with any position other than neutrality on matters of controversy).

[151] *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that where school policy authorized student elections to determine whether to have an invocation and if so, who would deliver them, student led prayer prior to school football games was public speech); *see also generally* Joe Dryden, "The Religious Viewpoint Antidiscrimination Act: Using Students As Surrogates to Subjugate the Establishment Clause," 82 MISS. L.J. 127 (2013) (discussing cases).

[152] *See, e.g., Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) ("The line between an acceptable subject matter limitation and unconstitutional viewpoint discrimination is not a bright one."); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. Ill. 2008) (holding that Illinois' exclusion of the entire subject of abortion from its

In a *public forum*, non-neutral restrictions on the content—that is, the subject matter or topic—are subject to strict scrutiny. Such restrictions will stand only if they are necessary and narrowly drawn to serve a compelling interest.[153]

In a *nonpublic forum*, non-neutral content restrictions are subject only to intermediate scrutiny. The government may restrict the subject matter and speaker identity if the restrictions are reasonable in light of the purposes served by the forum.[154]

But viewpoint restrictions are *always* subject to strict scrutiny, and always presumptively unconstitutional, regardless of the type of forum.[155] Restricting or disfavoring private speech to suppress a particular ideology, opinion, or perspective[156] is regarded as an "egregious form of content discrimination."[157] However, as explained later in section 6, the prohibition against viewpoint discrimination is not absolute in the school setting. The Supreme Court and lower courts have recognized exceptions to the requirement of viewpoint neutrality when student speech is school-sponsored or likely to be substantially disruptive.[158]

Once a nonpublic forum is created, entities of similar character may not ordinarily be excluded unless there is a permissible basis for making a status distinction between those entities.[159] If there is no legitimate status distinction, then the purpose of the limited forum in question is the touchstone for determining whether proposed uses are of similar character.[160] The "essence of viewpoint discrimination" is a "governmental intent to intervene in a way that prefers one particular viewpoint in

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specialty-plate program was a reasonable content-based, and not viewpoint-based, restriction); *Perry v. McDonald*, 280 F.3d 159, 169 (2d Cir. 2001) (holding that Vermont's restrictions on scatological terms on license plates was viewpoint neutral and reasonable); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 970-71 (9th Cir. 2002) (discussing factors in identifying line between subject and viewpoint; concluding courthouse rule banning "biker" attire was viewpoint-based); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996) ("Motive becomes keenly relevant in cases that involve content discrimination because the line between viewpoints and subjects is such an elusive one…. [The] inherent manipulability of the line between subject and viewpoint has forced courts to scrutinize carefully any content-based discrimination.").

[153] *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

[154] 555 U.S. at 470.

[155] *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

[156] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

[157] *Rosenberger*, 515 U.S. at 828.

[158] *See, e.g., Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 746 (5th Cir. 2009) (holding that regulations of the content or viewpoint of student expression is governed by the *Tinker* standard); *Morgan v. Swanson*, 659 F.3d 359, 379 (5th Cir. 2011) ("No matter how 'axiomatic' the generalized rule against viewpoint discrimination may be, we cannot neglect that this case arises in the public schools, a special First Amendment context, which admits of no categorical prohibition on viewpoint discrimination."); *Hardwick v. Heyward*, 711 F.3d 426, ___ (4th Cir. 2013) ("*Tinker* … stands for the proposition that school officials may not target a specific viewpoint *unless* they can predict that the speech would be likely to cause a substantial disruption.") (emphasis added).

[159] *Goulart v. Meadows*, 345 F.3d 239, 251-53 (4th Cir. 2003); *see Perry Educ. Ass'n*, 460 U.S. at 48 (indicating the importance of determining whether "other entities of similar character").

[160] *Goulart*, 345 F.3d at 252.

speech over other perspectives on the same topic."[161] However, the fact that a regulation falls disproportionately on people and groups expressing a particular viewpoint does not render it viewpoint based.[162]

One test for whether a restriction is neutral is this: "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[163] On the other hand, if the object of the restriction is to avoid upsetting people, the restriction may be deemed a content- or viewpoint-based restriction.[164]

### 4.1.3 Time, place & manner restrictions

In both public and nonpublic forums, the government may impose reasonable content- and viewpoint-neutral time, place, and manner restrictions. "The nature of a place [and] 'the pattern of its normal activities' dictates the kinds of regulations of time, place and manner that are reasonable."[165] Moreover, in a traditional public forum, time, place and manner restrictions must be narrowly tailored to serve a significant governmental interest, avoid burdening substantially more speech than is necessary to achieve that interest, and leave open ample alternative channels for communication.[166]

Some notable examples of upheld time, place, and manner restrictions include bans on signs on public utility poles;[167] a state fair regulation restricting a religious organization's distribution of literature to an assigned location;[168] time- and place-limited prohibitions against pickets of funerals, burial ceremonies,[169] and worship services;[170] prohibitions against demonstrations within a short distance of

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[161] *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004).

[162] *Hill v. Colorado*, 530 U.S. 703, 715 (2000); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2994 (2010).

[163] *Martinez*, 130 S. Ct. at 2994 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). In *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), the Supreme Court characterized a zoning ordinance prohibiting adult movie theaters from being located within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park or school as "content-neutral" because it was aimed at the *secondary effects* of such theaters on the surrounding community. *Id.* at 47. Because the zoning ordinance was deemed content-neutral, the city only needed to show that it served a substantial governmental interest and allowed for reasonable alternative avenues of communication. *Id.* at 50. The type of secondary effects the Court had in mind, however, does not include the listeners' reactions or the emotive impact of the speech on the audience. *R.A.V.*, 505 U.S. at 394.

[164] *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (in distinguishing *Renton*, explaining that if the city's purpose in passing the zoning ordinance had been "to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate"); *Madsen*, 512 U.S. at 773 (striking portion of injunction banning "images observable to . . . patients inside the Clinic" on the ground that "the only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable").

[165] *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

[166] *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[167] *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

[168] *Heffron v. International Soc'y. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981),

[169] *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 683 (8th Cir. 2012).

clinic doorways, parking lot entrances, driveways, and driveway entrances;[171] and the creation of short floating buffer zones around clinic customers.[172]

Notable examples of invalid time, place, and manner restrictions include absolute bans on leafleting in streets and alleys;[173] a requirement that all door-to-door advocates of causes obtain a permit from the mayor's office;[174] and an ordinance prohibiting homeowners from displaying any signs on their property except "residence identification" signs, "for sale" signs, and signs warning of safety hazards.[175]

### 4.1.4 Procedural safeguards

In regulating the time, place, and manner of speech in a public forum, the government cannot confer unbridled discretion on government officials.[176] Furthermore, a permitting scheme for use of a public forum cannot condition a permit on the "appraisal of facts, the exercise of judgment, and the formation of an opinion" with respect to the content or quality of the speech.[177] Courts will also carefully consider any evidence that a standard has not been applied consistently in a viewpoint-neutral manner.[178]

The Supreme Court's prior restraint cases hold that prepublication licenses require significant procedural safeguards. In *FW/PBS, Inc. v. Dallas*,[179] a controlling plurality of the Court held that an adult business licensing program could only impose a prior restraint "for a specified brief period during which the status quo must be maintained," make "expeditious judicial review of that decision … available," and "bear the burden of going to court to suppress the speech and … bear the burden of proof once in court."

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[170] *See Survivors Network of Those Abused By Priests, Inc. v. Joyce*, ___ F. Supp.2d ___ (E.D. Mo. April 19, 2013) (upholding constitutionality of the House of Worship Protection Act, which prohibited "profane discourse, rude or indecent behavior, or noise either within the house of worship or so near it as to disturb the order and solemnity of the worship services").

[171] *See Madsen*, 512 U.S. at 769-70, 774 (upholding 36-foot fixed buffer zone but striking down 300-foot fixed buffer zone); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (upholding 15-foot fixed buffer zone).

[172] *Compare Hill v. Colorado*, 530 U.S. at 726 (2000) (upholding 8-foot floating bubble zone because it allowed protestors to speak at a "normal conversational distance"), *with Shenck*, 519 U.S. at 377 (invalidating 15-foot floating buffer zone).

[173] *Schneider v. State*, 308 U.S. 147 (1939).

[174] *Watchtower Bible & Tract Society v Stratton*, 436 U.S. 150 (2002) (invalid as applied to religious proselytizing, anonymous political speech, and the distribution of handbills).

[175] *City of Ladue v. Gileo*, 512 U.S. 43 (1994).

[176] *See, e.g., Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 764 (1988) (invalidating ordinance requiring annual newsrack permits because it gave the mayor boundless discretion to determine whether to grant a permit application).

[177] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975).

[178] *See, e.g., Alpha Delta Chi-Delta Chptr v. Reed*, 648 F.3d 790, 803-04 (9th Cir. 2011) (rejecting facial challenge to non-discrimination policy but remanding for trial on whether administrators had refrained from applying the policy to other groups).

[179] 493 U.S. 215, 227 (1990).

First Amendment concerns are at their zenith—and the corresponding safeguards needed are at their most stringent—when the government has the opportunity to completely censor speech, including private speech on private property, as the notable example of adult businesses illustrates. Less stringent safeguards may satisfy provisions applying to the regulation of public forums.[180] But such procedures are still necessary. In *Forsyth County v. Nationalist Movement*,[181] the Court faulted a parade permit ordinance that allowed an administrator to charge a fee without providing any explanation for his decision, without providing for review, and without preventing the official "from encouraging some views and discouraging others through the arbitrary application of fees."

The Supreme Court has not determined whether—and if so, the extent to which—procedural safeguards and substantive constraints on prepublication licenses are required in nonpublic forums or with respect to student speech.[182] But there is ample authority that more discretion is permitted in a nonpublic than a public forum,[183] and that schools have more administrative flexibility, especially in elementary public schools, than officials do outside of the school context.[184]

While "more official discretion is permissible in a nonpublic forum than would be acceptable in a public forum,"[185] vesting unbridled discretion in an administrator is still fatal.[186] Prudence cautions that pre-approval criteria for granting or restricting access to a nonpublic or limited public forum *should*—as in the non-school context—be in writing and based on narrowly drawn, reasonable, definite, and

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[180] *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002) ("We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*.") (referring to *Freedman v. Maryland*, 380 U.S. 51 (1965), involving prior restraint licensing scheme for motion pictures).

[181] 505 U.S. 123, 133 (1992).

[182] *See Taylor v. Roswell Indep. Sch. Dist.*, ___ F.3d ___, ___ (10th Cir. April 8, 2013) (discussing procedural safeguards and substantive constraints).

[183] *CEF of Maryland v. Montgomery County Pub. Sch.*, 457 F.3d 376, 387 (4th Cir. 2006) (because "discretionary access is a defining characteristic of the nonpublic forum," this "suggests that more official discretion is permissible in a nonpublic forum than would be acceptable in a public forum," but that does not "insulate" restrictions on nonpublic or limited public forums "from an unbridled discretion challenge.") (quoting *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir. 2002)).

[184] *See Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 337 (8th Cir. 2011) ("Neither the Supreme Court nor this court has ever applied a stringent, facial standard of judicial oversight to the discretionary decisions of school officials administering a nonpublic educational forum."); *see also Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996) (prior restraints of student speech are not unconstitutional in nonpublic forum); *Henerey v. City of St. Charles*, 200 F.3d 1128, 1132 (8th Cir. 1999) (same); *Perry v. McDonald*, 280 F.3d 159, 171 (2d Cir. 2001) (same); *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002) ("[I]n particular circumstances, grants of discretion in nonpublic fora have been upheld—*despite the absence of substantive standards or procedural safeguards*—when such discretion is necessary to preserve the function and character of the forum.") (emphasis added).

[185] *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir. 2002).

[186] *See also CEF of South Carolina v. Anderson Sch. Dist. Five,* 470 F.3d 1062 (4th Cir. 2006) (district's "best interest" provision gave officials unbridled discretion without any constraining standards to prevent viewpoint discrimination; the lack of any definition for "school organizations" likewise gave principals unbridled discretion to decide which groups qualified).

objective standards.[187] Procedural safeguards, including documentation of any denial with objective, standards-based reasons for that denial and procedures for review, are also warranted.[188]

### 4.2 Seminal Supreme Court cases involving universities and public schools

This section reviews six seminal Supreme Court cases involving access to college or public school facilities. Of these cases, half involve access by enrolled students to those facilities, implicating not only standard public forum doctrine, but also the free speech and associational rights of those students. The other half involve access rights by outside groups and adults, implicating public forum doctrine but not, in any significant sense, student speech and associational rights.

- ***Healy v. James (1972)***

In *Healy v. James*,[189] Central Connecticut State College (CCSC) refused to grant official recognition to a chapter of Students for a Democratic Society (SDS). Across the nation, SDS chapters had been a "catalytic force" in organizing "widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson."[190] Official recognition would have allowed the group to meet in campus facilities; announce meetings, rallies, and other activities in the student newspaper; and use campus bulletin boards.[191]

The Court held that CCSC could not disadvantage the SDS chapter based on disagreement with its philosophy of "violence and disruption."[192] "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" where "vigilant protection of constitutional freedoms is [especially] vital."[193] CCSC could, however, exclude the SDS chapter if it incited lawless action, infringed reasonable campus rules, interrupted classes, or substantially interfered with the opportunity of other students to obtain an education.[194] CCSC could also condition official recognition on the SDS chapter's affirmation that "they intend to comply with reasonable campus regulations."[195] A college "may expect that its students adhere to generally accepted standards of conduct."[196]

[187] *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

[188] *See Taylor*, ___ F.3d at ___.

[189] 408 U.S. 169 (1972).

[190] 408 U.S. at 171.

[191] 408 U.S. at 177.

[192] 408 U.S. at 187.

[193] 408 U.S. at 180.

[194] 408 U.S. at 188-89.

[195] 408 U.S. at 193.

[196] 408 U.S. at 192 (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (8th Cir. 1969)).

- ***Widmar v. Vincent (1981)***

In *Widmar v. Vincent*,[197] the University of Missouri at Kansas City prohibited student groups from using University buildings or grounds "for purposes of religious worship or religious teaching." Cornerstone, an evangelical student group, successfully challenged the prohibition. The University had created a public forum, providing facility access to over 100 officially recognized student groups. The Supreme Court held that religious worship and teaching were protected under the Free Speech and Association clauses. By excluding the group, the University had engaged in content discrimination.[198] The University's "interest in maintaining strict separation" did not provide a compelling basis for excluding the student group because it was not necessitated by the Establishment Clause. A policy of nondiscrimination, by contrast, served a secular purpose, avoided entanglement with religion, and did not have the primary effect of advancing religion.

- ***Lamb's Chapel v. Center Moriches Union Free School District (1993)***

In *Lamb's Chapel v. Center Moriches Union Free School Dist*.,[199] an evangelical church sought permission to show a filmed lecture series by Focus on the Family's James Dobson at a high school between the hours of 7:00 p.m. and 10:00 p.m. The district refused access because it had a rule prohibiting uses "for religious purposes." The church challenged the rule and won. The district had created a limited forum that was broadly open to "social or civic" purposes. Because the Dobson films discussed family issues and child rearing, they fell within the ambit of the social and civic purposes permitted by the district. The district's ban constituted unconstitutional viewpoint discrimination because it banned religious viewpoints on subject matters to which the district had opened its facilities.

- ***Rosenberger v. Rector and Visitors of University of Virginia (1995)***

In *Rosenberger v. Rector and Visitors of Univ. of Va.*,[200] the Supreme Court held that the University of Virginia engaged in viewpoint discrimination when it denied student funds to a student group's religious publication under a university policy that reimbursed "student news, information, opinion, entertainment, or academic communications media groups."[201]

- ***Good News Club v. Milford Central School (2001)***

*Good News Club v. Milford Central School*[202] is the leading case on equal access in the public elementary school context. Milford School, a rural K-12 school in Milford, New York, had a policy that opened the school to any group that pertained "to the welfare of the community," including promoting the "moral and character development of children."[203] In 1996, the school denied the Club's request to

[197] 454 U.S. 263 (1981).

[198] In *Christian Legal Society v. Martinez*, 130 S. Ct. at 2988, the Supreme Court recharacterized the form of discrimination at issue in *Widmar* as "viewpoint" discrimination.

[199] 508 U.S. 384 (1993).

[200] 515 U.S. 819 (1995).

[201] *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

[202] 533 U.S. 98 (2001).

[203] 533 U.S. at 108.

access the facilities, citing its "quintessentially religious" nature. But the Supreme Court held that it was viewpoint discrimination to deny the Club access to the facility on that ground.

*Milford* was a bellwether case. The Supreme Court granted certiorari to resolve the conflict over "whether speech can be excluded from a limited public forum *on the basis of the religious nature of the speech*."[204] The Court's answer was no,[205] at least to the extent that the speech was within the ambit of the forum's subject matters and not just "mere religious worship."[206]

Accordingly, a key question was whether the Club—disregarding the religious nature of its speech—qualified under Milford's facility use policy. Just as the Boy Scout held meetings at Milford "to influence a boy's character, development and spiritual growth,"[207] the Club taught "morals and character development to children."[208]

Because the Club fell within the subject matter ambit of Milford's limited public forum, the Club could not be excluded on the basis of its religious nature. "[F]or purposes of the Free Speech Clause," the Court observed, there is "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."[209]

Indeed, it mattered not that "the activities 'fall outside the bounds of pure 'moral and character development,'"[210] or that the Club was "quintessentially religious,"[211] "decidedly religious in nature,"[212] or "the equivalent of religious instruction itself."[213] Even the Club's inclusion of *some* "religious worship" was not disqualifying, because "the Club's activities do not constitute *mere* religious worship, *divorced from any teaching of moral values*."[214]

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[204] 533 U.S. at 105-06 (emphasis added).

[205] 533 U.S. at 107 (holding that the "exclusion of the Good News Club *based on its religious nature"* constituted viewpoint discrimination) (emphasis added).

[206] 533 U.S. at 112 n.4.

[207] 533 U.S. at 108; *see also The Good News/Good Sports Club v. Ladue*, 28 F.3d 1501, 1505 (8th Cir. 1994) (a use policy that specifically referenced the Scouts as an eligible group effectively opened the forum up to groups discussing issues related to moral character and youth development, a subject matter for which the Club was eligible).

[208] 533 U.S. at 108.

[209] 533 U.S. at 111.

[210] 533 U.S. at 105, 111.

[211] 533 U.S. at 105, 109, 111.

[212] 533 U.S. at 111.

[213] 533 U.S. at 104.

[214] 533 U.S. at 112 n.4.

*Milford* did *not*, however, hold that a faith-based group is automatically entitled to access a limited public forum when the religious group's activities bear a minimal, or no, relation to the forum.[215]

- ***Christian Legal Society v. Martinez (2010)***

In *Christian Legal Society v. Martinez*,[216] the Supreme Court upheld a Hastings College of the Law policy that conditioned "Registered Student Organization" (RSO) status and its attendant benefits on compliance with a nondiscrimination policy that barred discrimination "on the basis of race, color, religion, age, sex or sexual orientation."[217] Under Hastings' interpretation of its policy, RSOs had to allow any student to participate, become a member, or seek leadership positions, regardless of the student's status or beliefs.[218] The Christian Legal Society (CLS) challenged the policy on Free Speech, Free Exercise, and Free Association grounds. CLS required members and officers to sign a "Statement of Faith" which excluded from affiliation anyone who held discordant religious convictions or engaged in "unrepentant homosexual conduct."[219]

The Court rejected CLS's challenges, holding that the policy was reasonable and viewpoint neutral. "A college's commission," the Court held, "is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process."[220] Hastings, the Court said, could reasonably decide that the educational experience was best promoted by an all-comers policy[221] that "brings together individuals with diverse backgrounds and beliefs, [and] 'encourages tolerance, cooperation, and learning among students.'"[222]

The Court concluded that the policy was viewpoint-neutral because it drew no distinction between groups based on their message or perspective.[223] The "policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior."[224]

Hastings' policy, moreover, merely "dangl[ed] the carrot of subsidy"[225]—the use of school funds, free and prioritized use of facilities, channels of communication, and Hastings' name and logo—without

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[215] *Cf. Westside Community Schools v. Mergens*, 496 U.S. 226, 238 (1990) (suggesting that one test for whether a student group was "curriculum related" would be whether it had "a more direct relationship to the curriculum than a religious or political club would have").

[216] 130 S. Ct. 2971 (2010).

[217] 130 S. Ct. at 2979.

[218] 130 S. Ct. at 2979.

[219] 130 S. Ct. at 2980.

[220] 130 S. Ct. at 2988-89.

[221] 130 S. Ct. at 2989.

[222] 130 S. Ct. at 2990.

[223] 130 S. Ct. at 2993.

[224] 130 S. Ct. at 2994; *see also Alpha Delta Chi-Delta Chptr. v. Reed*, 648 F.3d 790, 800-01 (9th Cir. 2011) (rejecting challenge to a more limited anti-discrimination policy that required recognized student organization leadership positions to be open without regard to "basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition" even though it was not an all-encompassing "all-comers" policy).

"wielding the stick of prohibition"[226] against CLS. CLS could still meet in Hastings' facilities (although possibly for a fee) and it could still advertise events on generally available bulletin boards.[227]

**Comment:** Several broad principles emerge from these cases. First, one of the bedrock principles of the Religion and Free Speech Clauses is the requirement of government neutrality toward religion. Second, the Establishment Clause is strong with respect to official or government-sanctioned speech, but weak with respect to private speech. Third, the fact that a prohibition against all religious speech applies equally to all faiths and religious perspectives does not render the prohibition "viewpoint neutral." Fourth, the flip side of the Constitution's general mandate of religious neutrality is the neutral applicability of regulations. Religious student groups have to abide by the same generally accepted standards of conduct and rules—including non-discriminatory leadership and membership policies—as other student groups.

### 4.3 Regulating the forum

This section focuses on several different types of inclusionary and exclusionary criteria with which state authorities have attempted to define and regulate nonpublic forums.

#### 4.3.1 Other "religious nature" based limitations: proselytizing, prayer, etc.

Since *Milford*, some districts have attempted to exclude the Club on the basis that the Club proselytizes[228] (although there is some authority that schools can refuse to distribute flyers that proselytize[229]), includes prayer,[230] is divisive or controversial,[231] or represents a special interest.[232] Such

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[225] 130 S. Ct. at 2986; *see also id.* at 2991 (stating that the availability of substantial alternative channels for CLS's communication rendered Hastings' policy "all the more creditworthy").

[226] 130 S. Ct. at 2986; *see also id.* at 2991 (stating that the availability of substantial alternative channels for CLS's communication rendered Hastings' policy "all the more creditworthy").

[227] 130 S. Ct. at 2991; *see id.* at 3006 (Alito, J., dissenting) (noting that Hastings merely allowed CLS access on the same basis that Hastings offered access to community groups: sometimes on a pay basis, and only after priority was given to registered organizations); *id.* at 3008 (same).

[228] *See, e.g., CEF of New Jersey Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004) ("To proselytize means both 'to recruit members for an institution, team, or group' and 'to convert from one religion, belief, opinion, or party to another.' The record shows that Stafford does not reject groups that proselytize in the sense of recruiting members.") (citation omitted); *see also CEF v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1001 (8th Cir. 2012); *CEF of Northwest Maryland v. Montgomery County Public Schools*, 373 F.3d 589, 593 (4th Cir. 2004).

[229] *Hills v. Scottsdale Unified Sch. Dist., No. 48*, 329 F.3d 1044 (9th Cir. 2003).

[230] *CEF v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d at 1001.

[231] *CEF of New Jersey Inc. v. Stafford Township Sch. Dist.*, 386 F.3d at 527; *cf. Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001) (holding that "non-controversial" criterion for screening art gallery submissions was unconstitutional).

[232] *CEF of New Jersey Inc. v. Stafford Township Sch. Dist.*, 386 F.3d at 527.

grounds for exclusion have consistently failed.[233] Such arguments frequently trigger such a strong judicial reaction, they are practically *taboo*. School districts would do well to avoid making them.

### 4.3.2 Forum *speaker* limitations: identity and status distinctions

The state has the right to limit access to a nonpublic forum based on speaker status distinctions if those distinctions are reasonable and viewpoint neutral.[234] A school district may, for example, bar access to outsiders or limit access to faculty member or student group invitees.[235] But cautious drafting and consistent application are essential.

In *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*,[236] the school district crafted a written policy that allowed it to "approve for distribution" flyers "from" or "sponsored by" groups in five defined categories: (1) the school district itself, (2) government agencies, (3) PTAs, (4) licensed daycare providers, and (5) nonprofit organized youth sports leagues.[237] The policy, however, provided that MCPS "retain[ed] the right to withdraw approval" for flyers that "would undermine the intent of the policy."[238] This provision reserved to MCPS "unbridled discretion to permit or deny access to any person for any reason it chooses."[239] The Fourth Circuit held that to withstand constitutional scrutiny, an access policy "must provide safeguards sufficient to ensure viewpoint neutrality."[240] Giving MCPS "unbridled discretion," without any "guidelines" on the exercise of that discretion or any "meaningful restraints" against viewpoint discrimination, risked allowing "arbitrary application" of the policy to "suppress[] a particular point of view."[241]

In *Child Evangelism of South Carolina v. Anderson School District Five*,[242] another school district crafted a policy that waived fees for "school organizations," which were defined to *include*: (1)

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[233] *See also Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 776 (7th Cir. 2011) (holding that university could not refuse to reimburse student organization on the ground that its programs constituted "worship, proselytizing [or] religious instruction").

[234] *See, e.g., Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133 (2d Cir. 2004) (government welfare agency could reasonably exclude persons without official business with the agency from its waiting rooms, including advocacy groups who engaged in disruptive speech); *Rowe v. City of Cocoa*, 358 F.3d 800 (11th Cir. 2004) (upholding city council rule restricting right of non-residents to speak at council meetings because they furthered city's significant governmental interest in conducting orderly, efficient meetings).

[235] *See Gilles v. Blanchard*, 477 F.3d 466, 470 (7th Cir. 2007) (upholding university's anti-solicitation policy, adopted after an evangelist entered the campus uninvited and preached on the library lawn, that limited access to persons invited to speak by a faculty member or student group); *but compare Miller v. City of Cincinnati*, 622 F.3d 524 (6th Cir. 2010) (political advocacy groups were likely to succeed in challenge to city-official "sponsorship or collaboration" requirement for access to city hall because it was not reasonably related to the purpose of the forum).

[236] 457 F.3d 376 (4th Cir. 2006).

[237] 457 F.3d at 379.

[238] 457 F.3d at 380.

[239] 457 F.3d at 389.

[240] 457 F.3d at 386.

[241] 457 F.3d at 386-88.

[242] 470 F.3d 1062 (4th Cir. 2006).

governmental bodies or agencies, (2) PTOs, (3) district organizations, (4) band and athletic booster clubs, (5) SADD, (6) 4-H clubs, (7) FFA and FHA organizations and other similar organizations; and (8) uses resulting from joint business/education partnerships with the district. The Fourth Circuit also found flaws with this policy. First, the policy lacked a closed definition of a "school organization." Second, the policy included a fatal best-interest catch all: "The district reserves the right to … waive any or all charges as determined to be in the district's best interest."[243] These flaws gave the district "unfettered discretion," "guided only by their own ideas of what constitutes the good of the community," so the policy failed.[244]

The court also rejected a revised policy that substituted the "best interest" catch-all in the policy with a "longstanding user" provision that gave free use to groups who had used the facilities for at least 20 years. The court rejected this revised policy because it still failed to provide a closed definition of a "school organization."[245] Second, the revised policy continued to unfairly privilege groups on the basis of the favorable treatment they received under the original policy.[246]

A contrasting case was *Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 School District*.[247] There, the school district refused to give the "Victory Through Jesus Sports Ministry Foundation" access to its flyer distribution forum. The school district's policy listed 17 groups and categories of groups eligible to use the forum.[248] The policy also provided that "[c]ommunity youth organizations such as Boy Scouts and Girl Scouts" would be provided a single opportunity to distribute program flyers at the beginning of school.[249]

The Eighth Circuit found no evidence that Victory's exclusion from the list was based on viewpoint discrimination. Victory was excluded "because of its status as an organization outside the District's community that had no special or longstanding relationship with the District."[250] The superintendent chose groups that had longstanding ties or strong reciprocal relationships to the District, and Victory, a newcomer, was not one of them. In reaching its holding, the Eighth Circuit expressed disagreement with

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[243] 470 F.3d at 1065.

[244] 470 F.3d at 1068-70.

[245] 470 F.3d at 1073.

[246] 470 F.3d at 1074; *see also CEF of Virginia v. Williamsburg-James City County Sch. Bd.*, 2008 U.S. Dist. LEXIS 61392 (E.D. Va. 2008) (rejecting policy that waived rental fees for (1) local gov't agencies and affiliated groups; (2) school division groups and school-sponsored activities; (3) Boy Scouts Equal Access Act groups; (4) specific events run by local charitable organizations; and (5) activities sponsored by school partners where there is a written partnership agreement" because there were no written requirements for any of the categories, and no explanation why CEF didn't qualify as an affiliated group, a school division group, a patriotic organization, or the "specific" events of a charitable organization).

[247] 640 F.3d 329, 336 (8th Cir. 2011).

[248] The groups were: (1) Lee's Summit Educational Foundation; (2) PTA; (3) Lee's Summit Chamber of Commerce; (4) Lee's Summit Symphony Orchestra; (5) Lee's Summit Parks and Recreation; (6) Greenwood Sports Association; (7) Lee's Summit Cares; (8) Longview College for Kids; (9) D.A.R.E.; (10) Jackson County; (11) LS Girls' Softball Ass'n; (12) LS Baseball Ass'n; (13) LS Football Ass'n; (14) LS Soccer Ass'n; (15) LS Junior Basketball; (16) Downtown Lee's Summit Main Street; (17) each R-7 school, its Partners in Education, and its Booster Clubs. 640 F.3d at 333.

[249] 640 F.3d at 333.

[250] 640 F.3d at 336.

the Fourth Circuit's rejection, in *Anderson*, of a longstanding user provision discussed a few paragraphs up.[251]

In *Child Evangelism Fellowship v Elk River Area School District # 728*,[252] the Elk River Area School District had a policy to distribute materials only from congressionally chartered "*patriotic* youth organizations" as defined in the Boy Scouts of America Equal Access Act (BSA). (For a discussion of the BSA, see § 8.2). Although the Club is not congressionally chartered, a Minnesota district court held—in a dubious finding—that the Club was entitled to equal access to the forum because it was also "patriotic" and promoted "the *same* values and ideas" as the Boy Scouts. The school, by opening its forum to congressionally chartered youth organizations, was required to further open it to the Club.[253]

In summary, status-based distinctions—if viewpoint neutral, reasonable, and consistently applied—provide a basis for limiting access to a public school forum.

### 4.3.3 Forum *topic* limitations: education, culture, recreation, history, literature

The state has the right to positively limit a nonpublic forum to the discussion of certain topics.[254] The state also generally has the right to categorically *exclude* certain topics;[255] but—as *Lamb's Chapel*, *Rosenberger*, and *Milford* hold (§ 4.2)—religion is not one of them. Accordingly, this section discusses cases in which the state imposed positive subject matter limitations.

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[251] 640 F.3d at 337 n.5.

[252] 599 F Supp.2d 1136 (D. Minn. 2009).

[253] The Eighth Circuit's subsequent *Victory* holding (discussed above) casts significant doubt on the validity of the *Elk River* holding (the Eighth Circuit's jurisdiction encompasses Minnesota). Other considerations also raise doubts about the *Elk River* holding. Significantly, the district court impugned Congress with viewpoint discrimination in granting Congressional charters to various organizations, without any evidence that Congress actually engaged in viewpoint discrimination. *See* 599 F Supp.2d at 1141 ("[E]ven though [Elk River] has not discriminated on the basis of viewpoint, Congress has done so by classifying certain organizations as patriotic. This classification endorses a certain patriotic viewpoint while leaving other viewpoints, *that may be equally patriotic*, off the list.") (emphasis added). This characterization reflected far less deference to acts by the legislative branch than other Supreme Court decisions. *See, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569, 582 (1998) (holding that a "decency and respect" clause was not an impermissible viewpoint restriction, and noting that "[i]n cases where we have struck down legislation as facially unconstitutional, the dangers were both more evident and more substantial"). Also tenuous was the district court's imputation of Congress's supposedly invidious motives to the school district. 599 F Supp.2d at 1141.

[254] *See, e.g., Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534 (2d Cir. 2002) (upholding policy limiting expression in the Lincoln Center Plaza to events having an artistic or performance-related component, although it resulted in a prohibition on political rallies, demonstrations, and leafleting).

[255] *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 790 (1985) (upholding CFC restriction disqualifying groups that "seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974) (upholding bar against political advertising on city-owned buses); *Goulart v. Meadows*, 345 F.3d 239 (4th Cir. 2003) (upholding prohibition on use of county community centers by homeschooling groups because it was reasonable for the county to limit use of the community centers to recreational and community enrichment activities); *Cogswell v. City of Seattle*, 347 F.3d 809 (9th Cir. 2004) (upholding restriction that a candidate's statement in voters' pamphlet "shall not discuss the opponent").

The Supreme Court's decisions have not resolved how closely related religious expression must be to a forum topic to qualify for the forum. Because religion by definition offers a comprehensive view of everything, it is easy for a faith-based group to assert that it qualifies for a wide range of liberal arts forum topics.[256]

At least two cases have found the Club qualifies under different topics besides Milford's youth "moral and character development" criterion. In *Culbertson v. Oakridge Sch. Dist. No. 76*,[257] the Ninth Circuit held that the Club was "educational" because it taught religion and the Bible. Likewise, in *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools*,[258] the Fourth Circuit characterized the Club as relating to "educational, cultural, and recreational activities." And in *Hills v. Scottsdale Unified Sch. Dist. No. 48*,[259] the Ninth Circuit found that a high school Bible club would qualify under the topics of history and literature.

A case providing an interesting contrast is *Illinois Dunesland Preservation Society v. Illinois Department of National Resources*.[260] There, a state park refused to make room in its display racks—intended to provide tourist information—for a non-profit's scary two-page pamphlet entitled "Tips for Avoiding Asbestos Contamination at Illinois Beach State Park." In an uproarious opinion, the court upheld the park's action, sweeping aside the arguable relevance of the plaintiff's message to the forum topic.[261]

In summary, religious uses frequently fall within the ambit of liberal arts subjects such as education, culture, recreation, history, or literature. The Appendix, however, suggests ways in which schools can restrict that ambit by limited uses to those that relate to the curriculum, school programs, or school competitions (see Appendix A: Defining the Forum).

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[256] In one case evaluating the comparative relevance of the Key Club and a Bible club to a high school curriculum, the Third Circuit held that the Bible club was *more* relevant:

> [T]he Bible relates generally to subjects taught in high school… [N]o single book has had a greater influence on Western civilization, history and thought than has the Bible. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."); Jacob Needleman, *The Heart of Philosophy* 27 (1982) (teachings of Plato and the Bible account for ninety percent of Western philosophical thought). So too, the Bible's teachings on concern for the poor are at least as related to the History and Humanities curriculum as is participation in the Key Club's food and toy drives. In addition, in its King James translation, the Bible remains a veritable monument of our English prose, and its phrases, allegories, similes and metaphors are firmly embedded in common English usage. It remains the most quoted work in The Oxford Dictionary of Quotations (3d ed. 1980).

*Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1253-54 (3d. Cir. 1993) (citations shortened).

[257] 258 F.3d 1061 (9th Cir. 2001).

[258] 373 F.3d 589, 594 (4th Cir. 2004).

[259] 329 F.3d 1044 (9th Cir. 2003).

[260] 584 F.3d 719, 725 (7th Cir. 2009) (Posner, J.).

[261] 584 F.3d at 725 ("The message of the publications in the display racks is: come to the park and have a great time on the sandy beaches. *The message of the plaintiff's pamphlet is: you think you're in a nice park but really you're in Chernobyl, so if you're dumb enough to come here be sure not to step on the sand because that would disturb or agitate it, and to scrub under your fingernails as soon as you get home*.") (emphasis added).

### 4.3.4 Forum *topic* limitations II: extensions of traditional classroom subjects

It is fairly probable—but by no means certain—that the Club would *not* qualify under a consistently-applied policy that clearly limited the forum to **extracurricular extensions of traditional classroom subjects**. But such a policy could—like the Equal Access Act's curriculum/noncurriculum distinction (§ 8.1)—be tricky to apply.

In *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*,[262] the Fourth Circuit suggested, in dicta, that CEF's exclusion from its forum would have been permissible had the school district both "embrace[d]" and consistently enforced a limiting construction of its facility use policy to allow only "groups whose mission is to support school district schools and to groups that are extracurricular extensions of traditional classroom subjects."[263] While the schools "usually" sponsored activities "that directly relate[d] to the curriculum of the individual grades and to the mission of their schools," principals had unfettered discretion in making that judgment, and there were no guidelines constraining their decisions.[264] Besides, the district's policy of allowing the Republican and Democratic parties free use of school facilities undermined its argument that its policy was effectively limited to school organizations or extensions of traditional classroom subjects.[265]

In *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*,[266] the Fourth Circuit held that nothing in the record supported the lower court's finding that MCPS reasonably limited its forum to "groups whose announcements involve 'themes of traditional educational relevance.'"[267] In the court's view, day care providers and sports leagues—which MCPS's policy explicitly allowed—seemed to have no more "educational relevance" than the other groups.[268]

The Supreme Court's decision in *Westside School District v. Mergens*[269] (discussed in § 8.1) interpreting the meaning of "non-curriculum related" under the Equal Access Act, would provide insight on the administration of a "traditional classroom subjects" forum restriction.

### 4.3.5 School mission-based limitations

School districts sometimes argue that a requested use of its facilities would be inconsistent with its basic educational mission. In *Hazelwood Sch. Dist. v. Kuhlmeier*[270]—discussed in § 6.1—the Supreme Court stated that: "A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."

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[262] 470 F.3d 1062 (4th Cir. 2006).

[263] 470 F.3d at 1072-1073 ("Fatally, school officials declined to embrace this or any other limiting construction.").

[264] 470 F.3d at 1073.

[265] 470 F.3d at 1071.

[266] 457 F.3d 376 (4th Cir. 2006).

[267] 457 F.3d at 383, 388.

[268] 457 F.3d at 383 n.4.

[269] 496 U.S. 226 (1990).

[270] 484 U.S. 260, 266 (1988).

But few invocations of the "educational mission" argument have succeeded in justifying a group's exclusion from a public school forum. In *Gregoire v. Centennial School District*,[271] the Third Circuit rejected one school district's argument that its policy restricted access "to those groups whose purpose is consistent with the educational mission of the school."[272]

> While it disavows an intent to create an open forum Centennial has, in reality, opened its doors to those groups *substantially outside what is commonly thought of as the educational mission of the school* and has gerrymandered Student Venture out of Centennial facilities solely on the basis of the religious content of its program.[273]

Even had the school credibly and consistently enforced an "educational mission" consistency subject matter limitation, the limitation would be void for vagueness:

> The definition of the groups falling within the "educational mission of the school" is so vague that Centennial has virtually unlimited discretion in deciding which groups qualify and which do not.[274]

In *Morse v. Frederick*,[275] Justice Alito—joined by Justice Kennedy—wrote a concurring opinion strongly rejecting the argument that the First Amendment allows a public school to censor *student speech* that interferes with its educational *mission*: "This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs."[276] For example, in the *Tinker* era (see § 6.1), a school could have defined its mission as including "solidarity with our soldiers" and banned Tinker's black armbands. Alternatively, it could have defined its mission as including "world peace" and banned troop-supporting buttons. "The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." In Justice Alito's view, only special characteristics of the school setting—not the school's "educational mission"—would justify limiting student speech on campus.[277] An argument can be made, however, that a school has more discretion in limiting its own nonpublic forum to uses consistent with its educational mission than it does in restricting student speech.

The "educational mission" argument has come up in Equal Access Act litigation involving Gay Straight Alliance (GSA) student groups. In *Caudillo v. Lubbock Independent School District*,[278] the court held that the school district lawfully refused to allow the Lubbock Gay Straight Alliance ("LGSA") to meet

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[271] 907 F.2d 1366 (3d Cir. 1990).

[272] 907 F.2d at 1374.

[273] 907 F.2d at 1375 (emphasis added); *see also id.* at 1372 (noting that Centennial permitted religious courses in its adult education program, offering instruction in many areas including metaphysics and meditation, psychic abilities, tarot, and parapsychology).

[274] 907 F.2d at 1374-75.

[275] 551 U.S. 393 (2007).

[276] 551 U.S. at 423 (Alito, J., concurring).

[277] 551 U.S. at 423 (Alito, J., concurring).

[278] 311 F. Supp.2d 550 (N.D. Tex. 2004).

at Lubbock High School, to post its flyers or to allow the LGSA to make announcements over its PA system.[279] The high school principal reviewed LGSA's website—the address of which the flyers advertised—prior to denying their requests. He found links from LGSA's website to other sites that included explicit articles on sexual matters such as safe sex, how to use a condom, masturbation, and various forms of sex.[280] The court held that the school legally denied access to the LGSA. The linked materials were obscene and indecent. Furthermore, LGSA's stated goals included discussing safe sex with students.[281] The court held that the school had a compelling interest in shielding its minors from explicit sexual subject matter[282] and excluding student speech that undermined the school's abstinence-only policy.[283]

After *Caudillo*, other school districts—in an effort to exclude GSAs—adopted policies that attempted to exclude "sex-based" clubs or organizations. The following is an example:

> To assure that student clubs and organizations do not interfere with the School Board's abstinence only sex education policy and the School Board's obligation to promote the well-being of all students, no club or organization which is sex-based or based upon any kind of sexual grouping, orientation, or activity of any kind shall be permitted.[284]

These efforts failed. In *Gonzalez v. School Board of Okeechobee County*,[285] a Florida high school excluded a GSA on the basis of the quoted policy. The school argued the policy was necessary to maintain the integrity of the abstinence-only program, avoid the premature sexualization of students, and protect the "well-being" of students. The district court rejected all three arguments. However—in a concession of sorts—the court stated that the school could require the GSA to "avoid topics of sexual education reserved for instruction by qualified teachers in a classroom environment and … ensure that the GSA adheres to its stated purpose of promoting tolerance."[286]

In summary, an appeal to a school's undefined "educational mission," without more, provides a readily challengeable basis for excluding a group from a forum.[287] With the exception of *Caudillo*—which further specified the mission as abstinence[288]—bare invocations of a school's "educational mission" have fallen short.

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[279] 311 F. Supp.2d at 556-57.

[280] 311 F. Supp.2d at 557.

[281] 311 F. Supp.2d at 563.

[282] 311 F. Supp.2d at 561 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)).

[283] 311 F. Supp.2d at 563 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

[284] *Gonzalez v. School Board of Okeechobee County*, 571 F. Supp.2d 1257 (S.D. Fla. 2008).

[285] 571 F. Supp.2d 1257 (S.D. Fla. 2008).

[286] 571 F. Supp.2d at 1268.

[287] *See also Healy v. James*, 408 U.S. 169, 176 & 187 (1972) (rejecting assertion that "[t]he published aims and philosophy of the Students for a Democratic Society, which include disruption and violence, are contrary to approved policy….").

[288] *Caudillo* was also an exception to most federal courts' vindication of the equal access rights of GSAs. *See, e.g., Straights and Gays for Equality v. Osseo Area Schools—District 279*, 471 F.3d 908 (8th Cir. 2006); *Gay-Straight*

### 4.3.6 Harm-based limitations: denigrating, disparating, debasing or demeaning speech

In some circumstances, the state can exclude demeaning and disparaging speech from a nonpublic forum, provided that those limitations are viewpoint neutral. Most of the relevant caselaw is in the student speech context, which this article addresses in section 6. There is also some informative caselaw in the non-student-speech public forum context.

In *Ridley v. Massachusetts Bay Transportation Authority*,[289] a church sought to run an advertisement on MBTA's transit facilities that stated: "The whole world is going to hell if they do not turn from their ungodly ways."[290] The MBTA refused to run the ad because of its text and the content of a website the ad cited.[291] The MBTA's guidelines barred ads that demeaned or disparaged an individual or group of individuals.[292] The MBTA's guidelines also provided criteria for determining a violation:

> For purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of, an individual or group of individuals.[293]

The First Circuit upheld the MBTA's policy. After characterizing the transit system as a limited public forum,[294] the court held that the MBTA's policy was viewpoint neutral:

> [U]nder the MBTA's current guideline, all advertisers on all sides of all questions are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks. No advertiser can use demeaning speech: atheists cannot use disparaging language to describe the beliefs of Christians, nor can Christians use disparaging language to describe the beliefs of atheists. Both sides, however, can use positive language to describe their own organizations, beliefs, and values. Some kinds of content (demeaning and disparaging remarks) are being disfavored, but no viewpoint is being preferred over another. The "reasonable person" referenced in the MBTA's guidelines of course does not belong to any particular religious group, and would protect minority, as well as majority, religious beliefs from language

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*Alliance of Yulee High Sch. v. School Board of Nassau County*, 602 F. Supp.2d 1233 (M.D. Fla. 2009); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Education Of Boyd County*, 258 F. Supp.2d 667 (E.D. Ky. 2003).

[289] 390 F.3d 65 (1st Cir. 2004).

[290] 390 F.3d at 75.

[291] 390 F.3d at 74 & n.1.

[292] 390 F.3d at 74-75.

[293] 390 F.3d at 75.

[294] *Cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (holding that city transit authority had "discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles").

> that would "demean or disparage" them. The MBTA's current guideline neither intends nor has as a significant effect the tilting of the playing field for speech.[295]

The court also held that the policy was "eminently reasonable" and consistent with the MBTA's "Courtesy Counts" program.[296] Finally, the court rejected the church's vagueness and overbreadth challenges, holding that precision was not required (particularly in a limited public forum), that "some degree of interpretation, and some reliance on concepts like 'prevailing community standards,' is inevitable," and finding "words like 'demean' or 'disparage' have reasonably clear meanings."[297]

### 4.3.7 Ancillary benefits: take-home flyers, back-to-school tables, and busing programs

Several lower court decisions have extended *Milford* to grant the Club equal access to ancillary benefits made available to similarly situated groups, including take-home flyers distributed by teachers during school hours,[298] flyers posted on school walls,[299] the staffing of tables at Back-to-School nights,[300] snacks,[301] and busing programs.[302] Also, one circuit held that an elementary school teacher had a free speech right to participate in and teach an after-school Club, even though it included some of her students.[303]

### 4.3.8 Time slots: after-school versus evening

A school cannot restrict when a religious group can meet during non-instructional time merely because it is religious. In *The Good News/Good Sports Club v. Ladue*,[304] CEF successfully challenged a facility use policy that closed the school buildings between 3 and 6 pm to all community groups except the Scouts and athletic groups, and also barred religious speech between 3 and 6 pm. Because both the Club and the Scouts were concerned with "the moral development of the youth," the Eighth Circuit held that the Club was entitled to use the school's facilities at the same time.[305] In *Milford*, the Supreme Court eliminated any doubt in a footnote. Brushing aside Milford's argument "that the Club's meeting

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[295] 390 F.3d at 67-68.

[296] 390 F.3d at 71-72.

[297] 390 F.3d at 80.

[298] *CEF of Northwest Maryland v. Montgomery County Public Schools*, 373 F.3d 589, 595-96 (4th Cir. 2004); *see also Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 422 (6th Cir. 2004) (holding that religious flyers had no coercive effect on children because the events that they advertised did not take place on school grounds and were not school-sponsored); *but see Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061 (9th Cir. 2001) (holding, albeit with little explanation, that distribution of Good News Club permission slips would violate the Establishment Clause).

[299] *CEF of New Jersey Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514, 519 (3d Cir. 2004).

[300] 386 F.3d at 519.

[301] *CEF v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d at 1002.

[302] 690 F.3d at 1002.

[303] *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004).

[304] 28 F.3d 1501 (8th Cir. 1994).

[305] 28 F.3d at 1505.

time directly after the schoolday is relevant to its Establishment Clause concerns," the Court held that "the school could not deny equal access to the Club for any time that is generally available for public use."[306]

### 4.3.9 Charging different fees to different types of groups

Many school districts have fee schedules that charge different fees for different categories of groups and uses. The constitutional limitation, however, is that such fee schedules must be content and viewpoint neutral. In *Rosenberger*, the Supreme Court held that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."[307]

In *Child Evangelism of South Carolina v. Anderson Sch. Dist. Five*,[308]—discussed above—CEF successfully challenged the neutrality of a school district's policy for waiving fees.[309] Also, in *Prince v. Jacoby*,[310] the Ninth Circuit held that charging a Bible club advertising fees to appear in the yearbook, while permitting other noncurricular groups to appear there for free, was viewpoint discrimination.

### 4.3.10 Limiting the forum to democratically-selected groups

The state cannot limit a group's access to a forum or its ancillary benefits based on popular vote. In *Board of Regents of Univ. of Wis. System v. Southworth*,[311] the university had a rule permitting defunding of RSOs by student referendum. The Court held that the rule was defective "[t]o the extent the referendum substitutes majority determinations for viewpoint neutrality."[312] A similar rationale was cited in the Establishment Clause context to invalidate a program that granted students the power to decide whether to have an invocation before high school games.[313]

### 4.3.11 Limiting the forum to "school-sponsored" groups

There are reported cases in which school districts have attempted to deny equal access to Bible clubs by adding the requirement that extracurricular school clubs be school sponsored, without closing the forum completely. In the context of the Equal Access Act (EAA) (§ 8.1), those efforts have failed.

In *Mergens*, school officials required school clubs to have a faculty sponsor and goals and objectives that were consistent with the school district's policies, missions, and goals.[314] In *Prince v.*

[306] 533 U.S. 98, 114 n.5 (2001).

[307] 515 U.S. at 828-29.

[308] 470 F.3d 1062 (4th Cir. 2006).

[309] *See also CEF of Virginia v. Williamsburg-James City County Sch. Bd.*, 2008 U.S. Dist. LEXIS 61392 (E.D. Va. 2008) (holding that policy gave superintendent unfettered discretion to decide who benefits from rental fee waivers).

[310] 303 F.3d 1074 (9th Cir. 2002).

[311] 529 U.S. 217, 224-225 (2000).

[312] 529 U.S. at 235.

[313] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000).

[314] *Mergens*, 496 U.S. at 231-33.

*Jacoby*,[315] Washington state regulations provided that in order to qualify for certain benefits, student groups required the approval of, and operated subject to the control of, the school board. In *Pope v. East Brunswick Board of Education*,[316] the school board adopted a policy limiting all extracurricular student activities to school board-sponsored, rather than student-initiated, organizations.

But none of these circumstances justified excluding a Bible club. In *Mergens*, the Equal Access Act (EAA) (§ 8.1) compelled the school district to exempt the Bible club from its faculty sponsorship requirement, rather than excluding the club altogether.[317] More generally, the EAA required that school officials avoid "sponsorship" of any meetings, meaning "that school officials may not promote, lead, or participate in any such meeting."[318] Applying similar reasoning, the Ninth Circuit held that the application of Washington state's regulations in *Prince v. Jacoby* would not violate the Establishment Clause because they would not result in school officials "promoting, leading, or participating" in the Bible club's meetings.[319] Also, assuming that such regulations did create an Establishment Clause issue, then—under the EAA—"it is the regulations that must give way, not the District's obligation to provide equal access."[320] And in *Pope*, the Third Circuit held that once any extracurricular activity—sponsored or not—triggered the provisions of the EAA, its protections applied.

### 4.3.12 Closing the forum

Public schools have the option of closing the forum by excluding all noncurriculum-related groups.[321] Under the EAA, the meaning of "noncurriculum-related groups" is strictly applied.[322] (See §

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[315] 303 F.3d 1074, 1083 (9th Cir. 2002).

[316] 12 F.3d 1244 (3d Cir. 1993).

[317] *See also Prince v. Jacoby*, 303 F.3d 1074, 1082 (9th Cir. 2002) ("[I]f a public school required student participation in or itself participated in or sponsored religious meetings on the high school campus, it would bump squarely into Establishment Clause jurisprudence prohibiting such government sponsorship of religion.").

[318] 496 U.S. at 252-53.

[319] 303 F.3d at 1083-84.

[320] 303 F.3d at 1084.

[321] *See Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993) (school "remain[ed] free to wipe out all of its noncurriculum related student groups and totally close its forum. . . . [This option] is the burden that Congress imposed on school districts that do not wish to allow religious and other student groups equal access to their facilities."); *accord Straights & Gays for Equal. v. Osseo Area Sch.–Dist. No. 279*, 471 F.3d 908, 913 (8th Cir. 2006); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 970 (9th Cir. 1999) ("Closing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access while avoiding the appearance of government endorsement of religion. . . . [It] does not constitute viewpoint discrimination."); *see also Gay Guardian Newspaper v. Ohoopee Regional Library Sys.*, 235 F. Supp.2d 1362 (S.D. Ga. 2002) (library designated table in its lobby for dissemination of community literature; after patron left copies of the *Gay Guardian* on table, the library restricted the forum to government-produced literature; the court dismissed the plaintiff's retaliatory closure claim).

[322] *See, e.g., Van Schoick v. Saddleback Valley Unified Sch. Dist.*, 87 Cal. App. 4th 522, 525-526 (Cal. App. 4th Dist. 2001) (after FCA sought recognition, school district unsuccessfully attempted to close forum and transform the Key Club and Girls' Club into "curriculum-related" clubs by requiring that all students either perform eight hours of community service or write a relatively lengthy research essay on community service in order to graduate); *Straights and Gays for Equality v. Osseo Area Schools—District No. 279*, 471 F.3d 908 (8th Cir. 2006) (although cheerleading and synchronized swimming, which lacked PE academic credit, were designated as "curriculum

8.1). Although the EAA's provisions apply only to secondary schools that receive federal funds, it is prudent to act on the assumption that courts would draw the same line when considering the free speech rights of the Club.

## 5 The State's interest in protecting children

The preeminent concern addressed in this article is the state's overriding interest in protecting children from emotional and psychological mistreatment, whether malicious or sincere. The following sections discuss several constitutional law threads illustrating the strength, and sometimes compelling nature, of that interest.

One particularly famous Supreme Court case is *Prince v. Massachusetts*.[323] There, Massachusetts prosecuted a Jehovah's Witness for child labor law violations in having her 9-year old niece distribute religious pamphlets on public streets. Upholding the conviction, the Supreme Court cited the potential emotional and psychological injury that street preaching could cause a young child, and rebuked the idea that parents or guardians had a right to make "martyrs" of their children:

> The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and *wholly inappropriate for children, especially of tender years, to face*. Other harmful possibilities could be stated, of *emotional excitement and psychological or physical injury*. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, *to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves*.[324]

The Court also expressed the limits of parental authority:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.
>
> But … neither the rights of religion nor the rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.... The right to practice religion freely does not include the liberty to expose ... the child to .. ill health.... [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.[325]

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related groups," they were noncurriculum related groups under the EAA; the GSA was likely to succeed on its EAA claim).

[323] 321 U.S. 158, 166 (1944).

[324] 321 U.S. at 169-170.

[325] 321 U.S. at 166-67.

Since then, the Supreme Court has restated the government's "compelling interest in protecting the physical and psychological well-being of minors."[326]

One interesting recent application of *Prince* is *Pickup v. Brown*,[327] where a federal district court upheld California's ban on sexual orientation reparative therapy of minors by licensed mental health professionals. Citing *Prince* and holding that the state had reasonably determined reparative treatment to be harmful to minors, the court rejected claims that the ban violated the rights of parents who wanted to subject their children to such therapy.[328]

The *Prince* decision has its most frequent application in family law and child protection cases. Many courts have cited *Prince* in upholding state actions removing children from abusive situations. "[P]roof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establishes a compelling state interest sufficient to permit state interference with parental rights."[329]

Courts have also held that "religious neutrality does not preclude the admission of evidence in a child custody proceeding of a party's religious beliefs or practices which are likely to result in physical or emotional harm to the child."[330] Such evidence may—*if* shown to be reasonably likely to cause future harm to the child's physical or mental development[331]—include practices such as proselytizing and door-to-door solicitation,[332] isolation from nonbelievers,[333] and "beliefs that persons 'who do not accept Jesus Christ . . . are destined to burn in hell.'"[334]

## 6 Student speech cases

The most salient line of cases illustrating the state's interest in protecting students within the public school environment is the student speech line of cases. This section discusses four seminal Supreme Court student speech cases. Following that is a discussion of several lower court decisions on peer evangelism and bullying. While these cases involve student speech, they shed light on the extent

[326] *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (but holding that a statute banning indecent commercial telephone messages was overbroad because it denied adults access).

[327] 2012 U.S. Dist. LEXIS 172034 (E.D. Cal. 2012), *appeal pending.*

[328] 2012 U.S. Dist. LEXIS 172034 at *59-*72. The holding was also consistent with an earlier Supreme Court decision holding that parents did not have absolute discretion, without the support of independent and periodic psychiatric evaluations, to institutionalize their children in mental facilities. *Parham v. J.R.*, 442 U.S. 584, 600-604 (1979).

[329] *In the Interest of E.L.M.C.*, 100 P.3d 546, 558 (Colo. App. 2004).

[330] *In re Marriage of Short*, 698 P.2d 1310, 1312 (Colo. 1985).

[331] 698 P.2d at 1313 (citing cases).

[332] *See Morris v. Morris*, 412 A.2d 139, 146 (Pa. 1979).

[333] *Short*, 698 P.2d at 1311 (discussing facts of case).

[334] *Kendall v. Kendall*, 687 N.E.2d 1228, 1231 (Mass. 1997).

to which public schools can regulate on-campus speech by other private parties.[335] There is also no area of law more relevant to protecting students' emotional and psychological well-being than student speech cases. Finally, a number of peer-evangelism student speech cases illustrate not only the sharp line many courts draw between instructional and non-instructional time, but also the intensity with which religious conflict is defining student speech jurisprudence.

## 6.1 Supreme Court cases

- ***Tinker v. Des Moines Independent Community School District (1969)***

In *Tinker v. Des Moines Independent Community School District*,[336] several high school students were suspended for wearing black armbands protesting the Vietnam War. The Supreme Court held that the school district violated the students' free speech rights. The Court famously stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[337] To justify prohibition of a particular expression of opinion, a school must show that it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "collid[e] with the rights of others."[338] The Court observed that the students were merely engaged in a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance."[339] The school's "undifferentiated fear or apprehension of disturbance"[340] or "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" provided no justification for the schools' discipline.[341]

- ***Bethel School Dist. v. Fraser (1986)***

In *Bethel School Dist. v. Fraser*,[342] a school district did not violate the First Amendment when it suspended a middle school student for mildly sexually suggestive humor he made in a nomination speech for a fellow student.[343] Public education, the Court wrote, must inculcate habits and manners of

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[335] Arguably, public schools can regulate outsider speech more than captive student speech because outsiders have other places to express themselves, whereas captive students have no other place, during school hours, to express themselves.

[336] 393 U.S. 503 (1969).

[337] 393 U.S. at 506.

[338] 393 U.S. at 513.

[339] 393 U.S. at 508.

[340] 393 U.S. at 508.

[341] 393 U.S. at 509.

[342] 478 U.S. 675 (1986),

[343] This is the text of Fraser's speech:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

civility, including sensitivity to the sensibilities of others.[344] "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[345] "Surely it is a highly appropriate function of public school education," the Court wrote, "to prohibit the use of vulgar and offensive terms in public discourse."[346] A public school, the Court emphasized, need not tolerate student speech that is inconsistent with its "basic educational mission,"[347] and it "may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech."[348]

The Court also expressed concern about the effects on the girls and the youngest members of the audience. "By glorifying male sexuality … the speech was acutely insulting to teenage girl students."[349] Moreover, "[t]he speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."[350] Schools therefore could act "in *loco parentis*, to protect children" "from exposure to vulgar and offensive spoken language."[351]

- ***Hazelwood School Dist. v. Kuhlmeier (1988)***

In *Hazelwood School Dist. v. Kuhlmeier*,[352] a high school refused to publish two articles in a student newspaper. One article described three students' experiences with pregnancy. Another discussed the impact of divorce on students at the school.[353] The Court distinguished the case from *Tinker*, holding that the school paper was not merely student speech, but "school-sponsored" student

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> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.

[344] *Bethel Sch. Dist. v. Fraser*, 478 U.S. at 681.

[345] 478 U.S. at 681.

[346] 478 U.S. at 683.

[347] 478 U.S. at 685, *quoted approvingly in Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

[348] 478 U.S. at 683.

[349] 478 U.S. at 683.

[350] 478 U.S. at 683.

[351] 478 U.S. at 684.

[352] 484 U.S. 260 (1988).

[353] 484 U.S. at 263.

speech. The student paper was a production of two for-credit school courses on journalism,[354] and as such might reasonably be perceived as "bear[ing] the imprimatur of the school."[355] The Court held that schools could "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns."[356] The school had a reasonable interest in protecting the privacy of the students and their families, and with protecting 14-year old freshmen from overly "frank talk" about teen sexuality.[357]

It is important to note that school-sponsored speech falls in a region between pure private speech and pure government speech, the latter not being subject to the Free Speech Clause. The circuits are split over whether school regulation of school-sponsored speech under *Hazelwood* must be viewpoint neutral. The First and Tenth Circuits have concluded that there is no such requirement.[358] The Second, Ninth, and Eleventh Circuits have concluded that there is.[359]

- ***Morse v. Frederick (2007)***

In *Morse v. Frederick*,[360] the Supreme Court held that a school did not violate the First Amendment when it confiscated a "BONG HiTS 4 JESUS" banner from a high school student holding it across the street, or when it suspended the student. Writing for a 5-4 majority, Chief Justice Roberts explained: "[W]e hold that schools may take steps to safeguard those entrusted to their care from

[354] 484 U.S. at 268.

[355] 484 U.S. at 271.

[356] 484 U.S. at 273.

[357] 484 U.S. at 273-75. The Court also stated: "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272 (internal quotation and citation omitted)).

[358] *See Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 926-28 (10th Cir. 2002) (when school invited students to create artwork for tiles that would be permanently installed in the school's hallways, it could permissibly restrict religious messages).

[359] *See Searcey v. Harris*, 888 F.2d 1314, 1319 n. 7, 1322, 1325 (11th Cir. 1989) (applying viewpoint neutrality analysis to Career Day participation regulation barring participants from "criticiz[ing] or denigrat[ing] the career opportunities provided by other participants"); *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005) (viewpoint discrimination analysis applied where school censored kindergartner's poster depicting Jesus kneeling and raising hands to sky and the phrases "the only way to save our world," "prayer changes things," "Jesus loves children," "God keeps his promises," and "God's love is higher than the heavens" created for exercise asking students to make an environmental poster depicting ways to save the environment), *further proceedings at* 2008 U.S. Dist. LEXIS 76361 (N.D.N.Y. 2008) (concluding that censorship was not based on viewpoint discrimination but rather its irrelevance to the exercise's subject matter); *Planned Parenthood of S. Nev., Inc. v. Clark Co. Sch. Dist.*, 941 F.2d 817, 830 (9th Cir. 1991) (holding that school's refusal to publish Planned Parenthood advertisements was viewpoint neutral); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999) (holding that district's decision to exclude subjects disruptive to educational purposes—including the posting of the Ten Commandments as a paid advertisement on a high school baseball field fence—was a legitimate, permissible viewpoint-neutral content-based limitation).

[360] 551 U.S. 393 (2007).

speech that can reasonably be regarded as encouraging illegal drug use."[361] The Court held that the school's interest in deterring drug use was an "important–indeed, perhaps compelling interest" because of the severe and permanent damage drug use could cause to the health and well-being of children.[362]

**Comment:** Some general principles emerge from the student speech line of cases. First, the rights of students in public schools are not automatically coextensive with the rights of adults, or even of the students themselves in other settings. Referring to its famous case vindicating the First Amendment rights of a man convicted for wearing a jacket decorated with "f___ the draft" in a courthouse building,[363] the Supreme Court explained that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[364] But the Supreme Court also noted that while a school could discipline a student for lewd speech made in a school setting, that same speech made in a non-school public forum would have been protected.[365]

Second, *Tinker*'s substantial-disruption test provides the default framework for reviewing student speech. But *Fraser*, *Kuhlmeier*, and *Morse* illustrate three exceptions—all involving what one court has called "vital interests"[366]—in which schools need not demonstrate a substantial disruption: when the student speech is (1) lewd or vulgar; (2) school-sponsored; or (3) promotes illegal drug use. The circuit courts differ over whether lower courts can recognize further exceptions to *Tinker*'s substantial-disruption test.[367]

Third, as a general rule, the younger the students, the more control a school may exercise. "In conventional elementary school activities, the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise."[368] "[A] school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting."[369] "If a high school can suppress speech to protect 14-year-olds from sexual innuendo at a voluntary school assembly…, and if it can delete entire pages from a school newspaper because they touch on 'sensitive topics' … it follows that a public elementary school can shield its five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development."[370]

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[361] 551 U.S. at 396.

[362] 551 U.S. at 407.

[363] *See Cohen v. California*, 403 U.S. 15 (1971).

[364] *Bethel*, 478 U.S. at 682.

[365] *Morse*, 551 U.S. at 405.

[366] *K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, ___ (3d Cir. 2013).

[367] *Compare, e.g., Hardwick v. Heyward*, 711 F.3d at ___ n.11 ("While the Supreme Court is free to create exceptions to or even abandon *Tinker's* substantial disruption test, we must continue to adhere to the *Tinker* test in cases that do not fall within any exceptions that the Supreme Court has created until the Court directs otherwise."), *with K.A.*, 710 F.3d at ___ (suggesting that other "vital interests," if demonstrated, could justify an exception to the *Tinker* substantial disruption test).

[368] *Walz v. Egg Harbor Township Bd. of Education*, 342 F.3d 271, 276 (3d Cir. 2003).

[369] *S.G. v. Sayreville Bd. of Education*, 333 F.3d 417, 423 (3d Cir. 2003).

[370] *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996).

## 6.2 Lower court cases

Lower courts have applied the Supreme Court's student speech cases to a growing body of cases involving peer evangelism, harassment codes, racist and homophobic speech, and online bullying.

### 6.2.1 Peer evangelism cases

At least three circuits have concluded that schools can restrict elementary students from distributing religious literature to their classmates during instructional time, at class parties (if they are regarded as instructional or part of the curriculum),[371] or as part of class exercises.[372] One rationale for such restrictions is that the school has a valid interest in avoiding "having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home."[373] For similar reasons, some courts have barred districts from inviting or allowing the Gideons to distribute Bibles in their elementary schools.[374]

But the Fifth Circuit has concluded that schools cannot restrict peer evangelism by elementary school students during school-sponsored parties, even if they occur in between classes.[375] The Fifth Circuit's rationale is that "what one child says to another child is within the protection of the *First Amendment* unless one of the narrow exceptions [defined by the Supreme Court's student speech cases] applies."[376]

This subsection examines four of these cases.

- ***Muller v. Jefferson Lighthouse School (7th Cir. 1996)***

In *Muller v. Jefferson Lighthouse School*,[377] a fourth grader requested permission to hand out his church's AWANA club to his entire class during non-instructional times. The principal denied the request, citing a school policy that allowed the principal to prevent distribution of literature that was

[371] *See Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003).

[372] *See Curry v. Hensinger*, 513 F.3d 570 (6th Cir. 2008) (fifth grader not entitled to attach religious cards to hand-made candy canes sold as part of class exercise on marketing).

[373] 513 F.3d at 579 ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.") (citing *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)).

[374] *See Roark v. South Iron R-1 Sch. Dist*., 573 F.3d 556 (8th Cir. 2009) (upholding injunction); *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (enjoining distribution in elementary schools but allowing it in secondary schools as part of public forum).

[375] *See Morgan v. Swanson*, 659 F.3d 359, 410-12 (5th Cir. 2011) (Elrod, J., in portion of opinion writing for the majority).

[376] 659 F.3d at 412.

[377] 98 F.3d 1530 (7th Cir. 1996).

"insulting to any group or individuals" or would "greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others."[378]

The parents brought both facial and as-applied challenges the school's policy. The parents prevailed on its as-applied challenge,[379] for the invitations were neither "insulting" nor disruptive. The school **could not censor the invitations merely because they were religious**.[380]

But the court rejected the parents' *facial* challenge to the policy of screening student-sponsored literature for *insulting* messages:

> In a public forum, the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian he is not one of God's chosen, no matter how that may hurt. But it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say the same thing to his classmate, no matter the impact. Racist and other hateful views can be expressed in a public forum. But an elementary school under its custodial responsibilities may restrict such speech that could crush a child's sense of self-worth.[381]

The court also rejected the parents' facial challenge to the policy as an unlawful prior restraint:

> Certainly racially and religiously bigoted materials can be intercepted before they damage children and the school environment. Educators have the discretion to decide that anything promoting hate or violence will not be allowed to contaminate the (nonpublic forum) atmosphere of a public school. Where public school children are involved there is no practical way to protect students from materials that can disrupt the educational environment or even severely traumatize a child without some form of prior restraint…. Children in public schools are a captive audience that school authorities acting in loco parentis may protect.[382]

Finally, the court rejected the parents' facial challenge to the policy as impermissibly vague:

> [W]e reject the Mullers' implication that a school must spell out in intricate detail precisely what is "libelous or obscene language" or an incitement "to illegal acts" or an insult "to any group or individuals" or which materials "will greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others…." [Schools'] duties and responsibilities are primarily custodial and tutelary and thus discretionary in nature, not legalistic. An education in manners and morals cannot be reduced to a simple formula; nor can all that is uncivil be precisely defined. What is insulting or rude very often depends on contextual subtleties…. If the schools are to

[378] 98 F.3d at 1534 n.2.

[379] 98 F.3d at 1535, 1545.

[380] 98 F.3d at 1538, 1545.

[381] 98 F.3d at 1540.

[382] 98 F.3d at 1541 (citations omitted).

perform their traditional function of "inculcating the habits and manners of civility…" they must be allowed the space and discretion to deal with the nuances.[383]

- ***Walz v. Egg Harbor Township Bd. of Educ. (3d Cir. 2003)***

In *Walz v. Egg Harbor Township Bd. of Educ.*,[384] a teacher confiscated religious candy cane gifts that Daniel, a preschooler, had given to his classmates at a holiday classroom party.[385] Six months later, the school board adopted a written policy that "no religious belief or non-belief shall be promoted in the regular curriculum or in district-sponsored courses, programs or activities, and none shall be disparaged."[386] The school also maintained an unwritten policy that "items with political, commercial, or religious references were not allowed to be distributed in class during school hours."[387] Over the next two years, the school stopped Daniel from distributing the religious candy canes at class parties, but permitted him to distribute them in the hallway, at recess, and after school as students were boarding buses.[388]

Daniel's parents sued. The Third Circuit upheld the school's policy and actions as being consistent with its legitimate educational goals. "As a general matter," the court held, "the elementary school classroom, especially for kindergartners and first graders, is not a place for student advocacy. To require a school to permit the promotion of a specific message would infringe upon a school's legitimate area of control."[389] "Furthermore, in an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred, not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically-based goals."[390]

The Court indicated that different facts—such as expressing one's religious identity in a "show and tell" or by wearing a cross or a necklace—would compel a different result.[391]

- ***Morgan v. Swanson (5th Cir. 2011)***

In *Morgan v. Swanson*,[392] the Fifth Circuit reached a different conclusion. Several evangelical parents sued the school district and school officials over sensational incidents in which elementary

[383] 98 F.3d at 1542-43.

[384] 342 F.3d 271 (3d Cir. 2003).

[385] 342 F.3d at 273.

[386] 342 F.3d at 273.

[387] 342 F.3d at 273.

[388] 342 F.3d at 274.

[389] 342 F.3d at 277.

[390] 342 F.3d at 277.

[391] 342 F.3d at 278-79.

[392] 659 F.3d 359 (5th Cir. 2011).

school children were stopped—with litigious parents hovering nearby—from distributing religious candy canes and church function tickets.[393]

In one of the incidents, third-grader Jonathan was stopped from distributing his "Legend of the Candy Cane" bookmark and ink pen gift to his classmates during a school-sponsored winter break party.[394] In the other incidents—which escalated into ugly confrontations between parent and principal—second grader Stephanie was stopped from distributing church passion play tickets and religious pencils to her classmates.[395]

In an en banc decision, the Fifth Circuit held that the principals—though protected by qualified immunity—had violated the students' free speech rights. The principals' actions, the court held, constituted viewpoint discrimination, which could only be justified under *Tinker* where the student speech is substantially and materially disruptive.[396]

Subsequent to these incidents, the Plano school district adopted a narrower policy that limited literature distribution to 30 minutes before and after school; three annual parties; recess; and only passively at designated tables during school hours. Materials that were obscene, vulgar or otherwise age-inappropriate or that contained hate speech were banned. A separate Fifth Circuit panel rejected the parents' facial challenge to the new policy, finding it content- and viewpoint-neutral.[397]

- ***K.A. v. Pocono Mountain School District (3d Cir. 2013)***

In *K.A. v. Pocono Mountain School District*,[398] a fifth grade student sought to hand out church Christmas party invitations, before class, to her classmates. The school district, however, disallowed the invitations on the basis of a policy that barred promotional materials from being sent home with students unless they promoted student interests primarily.

The Third Circuit held that the restriction, as applied to student speech, was governed not by nonpublic forum analysis but rather by student speech caselaw. Under that framework, *Tinker*'s substantial disruption test applied unless a school could show that vital interests were at stake.[399] The court found that no such showing was made with respect to the invitations. "[A]ge-related developmental, disciplinary and educational concerns specific to elementary school students" did not

[393] The complained-of incidents were sensational—in a troubling way—because the way the parents, in apparent concert with some cause-oriented attorneys, manipulated their young children to stage a legal battle. *See Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944) ("The zealous though lawful exercise of the right to engage in propagandizing the community …. create[s] situations … wholly inappropriate for children, especially of tender years, to face….").

[394] 659 F.3d at 365-68.

[395] 659 F.3d at 368-370.

[396] 659 F.3d at 407.

[397] *Morgan v. Plano Independent School District,* 589 F.3d 740, 743 & n.2 (5th Cir. 2009).

[398] 710 F.3d 99 (3d Cir. 2013).

[399] 710 F.3d at ___.

"present the type of vital interests to school administration that render *Tinker* analysis inapplicable."[400] Because the school district could not show that K.A.'s invitations were likely to be disruptive or interfere with other students' rights, the school district was enjoined from enforcing its policy.

**Comment:** Peer evangelism in the elementary school setting highlights the tension between an elementary student's rights to share her faith—and not feel the shame of a teacher's reprimand for doing so—with the interests of other children to be shielded from insecurity about their own senses of self, belonging or eternal destiny.

The cases discussed provoke more questions: does an elementary school, as *Muller* states, have a vital interest in protecting the emotional, psychological, and intellectual well-being of children? Or, taking *K.A.*'s logic another step, is that interest too undifferentiated to justify a restriction on an elementary student's speech? If a school defined that interest more specifically, would it satisfy the court's evolving expectations?

### 6.2.2 Racially inflammatory and anti-gay speech

- ***Sypniewski v. Warren Hills Reg'l Bd. of Educ. (3d Cir. 2002)***

In *Sypniewski v. Warren Hills Regional Board of Education*,[401] the Third Circuit held that "[t]here is no constitutional right to be a bully"[402] and that "[s]tudents cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school."[403]

The school district had a history of racial tension and strife fueled by, among other things, the distribution of racist jokes and students wearing blackface and clothing bearing the Confederate flag.[404] To counter these tensions, the school enacted a racial harassment policy that provided that "student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs [or] wearing or possession of items depicting or implying racial hatred or prejudice."[405] The policy also prohibited the possession of written material "that is racially divisive or creates ill will or hatred."[406]

The court upheld the policy with the exception of the "ill will" provision. The court explained that "[a]lthough mere offense is not a justification for suppression of speech, schools are generally permitted to step in and protect students from abuse."[407]

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[400] 710 F.3d at ___.

[401] 307 F.3d 243 (3d Cir. 2002).

[402] 307 F.3d at 264.

[403] 307 F.3d at 264.

[404] 307 F.3d at 247.

[405] 307 F.3d at 249.

[406] 307 F.3d at 249.

[407] 307 F.3d at 264.

Many other courts have upheld school bans on Confederate flag clothing where the factual record demonstrates a history of racial problems.[408]

- ***Harper v. Poway Unified School District (9th Cir. 2006)***

In *Harper v. Poway Unified School District*,[409] Tyler Chase Harper, a high school sophomore, was stopped from wearing a T-shirt in class that read "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front, and "HOMOSEXUALITY IS SHAMEFUL Romans 1:27" on the back. A Ninth Circuit panel vindicated the school's proscription, holding that children are "vulnerable to cruel, inhuman, and prejudiced treatment by others,"[410] and that "speech capable of causing psychological injury" may well impinge on the rights of other students:[411]

> Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses…. [S]tudents have the right to "be secure and to be let alone." Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.[412]

Citing studies demonstrating that verbal abuse damaged not only students' psychological health and well-being but also their educational development, the court held that "[t]hose who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development."[413]

The court also held that evidence of actual harm was not required. "[W]e can certainly take [judicial] notice that it is harmful to gay teenagers to be publicly degraded and called immoral and shameful."[414]

Shedding insight on where it drew the line between free speech and harassment, the court compared Harper's T-shirt to shirts—all of which could be proscribed—"labeling black students inferior,"

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[408] See, e.g., *Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013) (finding school justified in prohibiting a student from wearing various shirts featuring the Confederate flag and protest messages in view of a history of racial incidents in area schools); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2009); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8th Cir. 2009); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000); compare *Castorina ex rel. Rewt v. Madison County School Board*, 246 F.3d 536, 540-44 (6th Cir. 2001) (reversing the district court's grant of summary judgment to the school officials because of lack of evidence suggesting that a ban on the Confederate flag was needed to prevent disruptions and the school's tolerance of other potentially divisive racial symbols).

[409] 445 F.3d 1166 (9th Cir. 2006).

[410] 445 F.3d at 1176.

[411] 445 F.3d at 1177-78.

[412] 445 F.3d at 1178 (citations omitted).

[413] 445 F.3d at 1179.

[414] 445 F.3d at 1180.

"saying that Jews are doomed to Hell,"[415] reading "Jews are Christ-Killers," asserting that "All Muslims are Evil Doers," and displaying a swastika or Confederate Flag.[416] The court contrasted Harper's T-shirt to shirts proclaiming "Young Republicans Suck," "Young Democrats Suck," or that denigrated the President, all of which the First Amendment would protect.[417]

Finally, the court rejected the notion that the school's proscription constituted impermissible viewpoint discrimination. Under *Tinker*, "a school may prohibit speech, even if the consequence is viewpoint discrimination, if the speech violates the rights of other students or is materially disruptive."[418] Also, citing *Fraser*'s discussion of the mission of public education, the court declared that "public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred."[419]

Judge Reinhardt's passionately-worded opinion triggered a significant reaction. The Ninth Circuit denied rehearing en banc, with five judges dissenting.[420] The Supreme Court granted certiorari, but then dismissed the case as moot because Tyler had graduated. The Court did more than dismiss the case; it also vacated the Ninth Circuit's opinion in order "to clear the path for future relitigation of the issues … and to eliminate a judgment, review of which was prevented through happenstance."[421] *Harper*, therefore, is not precedential. It is, however, indicative of the polarizing nature of the constitutional, cultural and psychological issues.

- ***Nuxoll v. Indian Prairie School District #204 (7th Cir. 2008)***

A subsequent court of appeals panel in the Seventh Circuit reached a conclusion consistent with *Harper* on a similar set of facts. In *Nuxoll v. Indian Prairie Sch. Dist. #204*,[422] a group of students sought relief from anticipated discipline for wearing T-shirts expressing strong disapproval of homosexuality as part of an anti-homosexuality "Day of Truth" campaign. A school rule banned "derogatory comments," oral or written, "that refer to race, ethnicity, religion, gender, sexual orientation, or disability." Moreover, the school had previously banned a shirt that said "Be Happy, Not Gay."[423]

The Seventh Circuit upheld the school's anti-bullying rule but held that banning the phrase "Be Happy, Not Gay" was unjustified. The anti-bullying rule was sound because it prohibited only derogatory comments on unalterable or otherwise deeply rooted personal characteristics about which

[415] 445 F.3d at 1181.

[416] 445 F.3d at 1185-86.

[417] 445 F.3d at 1182.

[418] 445 F.3d at 1184.

[419] 445 F.3d at 1185.

[420] 455 F.3d 1052, 1054 (O'Scannlain, J., dissenting).

[421] 549 U.S. 1262 (2007) (internal citation, quotation marks, and brackets omitted).

[422] 523 F.3d 668 (7th Cir. 2008), further proceeding at *Zamecnick v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874 (7th Cir. 2011) (upholding award of damages to students for prohibitions against wearing of "Be Happy, Not Gay" shirt).

[423] 523 F.3d at 670.

most people are highly sensitive.[424] "Such comments," the court explained, "can strike a person at the core of his being,"[425] and interfere with his ability to concentrate on schoolwork. But the school's application of the rule against the phrase "Be Happy, Not Gay" went too far. While the school could punish comments such as "homosexuals are going to Hell," "blacks have lower IQs," or "a woman's place is in the home,"[426] "Be Happy, Not Gay" was only tepidly negative, not derogatory or demeaning.[427]

**Comment:** These student "hate speech" cases illustrate that schools can protect high school students from deeply derogatory or inflammatory remarks,[428] but those regulations cannot sweep so far as to cover merely uncivil or offensive expression. The Third Circuit case of *Saxe v. State College Area School District*[429] reinforces the need to narrowly tailor high school student speech regulations. There, the court struck down a sweeping anti-harassment policy that prohibited, among other things, "negative" and "unwelcome" comments—including mere teasing and name calling—about others' race, religion, origin, gender, sexual orientation, values, appearance, clothing, and social skills that "offends … an individual."[430] The policy was overbroad because it covered speech that (1) merely "ha[d] the purpose of" interfering with a student's educational performance;[431] or (2) merely created a "hostile or offensive environment," even if such speech did not pose a realistic threat of substantial disruption.[432]

### 6.2.3 Online bullying cases

The Supreme Court has yet to settle whether schools can discipline students for speech they make online or in off-campus settings. Citing concerns over the effects of bullying, most courts—though some disagree[433]—have concluded that *Tinker* applies to off-campus student speech when it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.[434]

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[424] 523 F.3d at 671.

[425] 523 F.3d at 671.

[426] 523 F.3d at 674.

[427] 523 F.3d at 676; *see also Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (school prohibited student from wearing shirt with messages "Homosexuality is Shameful" and "I will not accept what God has condemned"), *vacated and remanded by Harper v. Poway Unified Sch. Dist.*, 127 S. Ct. 1484 (2007).

[428] *See also Sapp v. School Board of Alachua County* (N.D. Fla. Sept, 30, 2011) (school sent students home for wearing shirts with the slogan "Islam is of the Devil").

[429] 240 F.3d 200 (3d Cir. 2001).

[430] 240 F.3d at 210, 215.

[431] 240 F.3d at 217.

[432] 240 F.3d at 217.

[433] *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, 620 (5th Cir. 2004) (holding that *Tinker* does not apply to students' off-campus speech); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936 (3d Cir. 2011) (Smith, J., concurring) (in a concurrence joined by four other justices, arguing that the *Tinker* standard never extends to off-campus speech).

[434] *D.J.M. v. Hannibal Public School Dist. #60*, 647 F.3d 754, 766 (8th Cir. 2011); *see also Tinker*, 393 U.S. at 513 ("[C]onduct by [a] student, *in class or out of it*, which for any reason … materially disrupts classwork or involves

- ***Kowalski v. Berkeley County Schools (4th Cir. 2011)***

In *Kowalski v. Berkeley County Schools*,[435] a high school student created a MySpace discussion group webpage dedicated to sexually degrading ridicule of a fellow student. The student invited about 100 people of her friends to join the group. About two dozen of her high school friends joined the group. After the victim's parents complained, the school suspended the student for violating the school's anti-bullying policy. The Fourth Circuit vindicated the school because the student had "used the Internet to orchestrate a targeted attack on a classmate … in a manner that was sufficiently connected to the school environment."[436]

The court also said that public schools "have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."[437] The court noted that student bullying "can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide."[438] "[J]ust as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use," the court further explained, "schools have a duty to protect their students from harassment and bullying in the school environment."[439]

- ***S.J.W. v. Lee's Summit R-7 School district (8th Cir. 2012)***

In *S.J.W. v. Lee's Summit R-7 School District*,[440] two students created a website with blog posts that included offensive and racist comments and sexually explicit and degrading comments about particular female classmates.[441] When news about the posts spread through campus, some classes were disrupted, parents began contacting the school, and local media arrived on campus to report on the commotion.[442] The school suspended the students. The Eighth Circuit held that even though the speech occurred off-campus, the school's discipline was justified. *Tinker*'s substantial-disruption test applied because the speech was targeted at the school.[443]

**Comment:** The growing jurisprudence involving student bullying, both on campus and online, reflects a growing judicial awareness of the link between bullying and significant student distress,

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substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.") (emphasis added); *but see Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, 620 (5th Cir. 2004) (holding that *Tinker* does not apply to students' off-campus speech).

[435] 652 F.3d 565 (4th Cir. 2011).

[436] 652 F.3d at 567.

[437] 652 F.3d at 572.

[438] 652 F.3d at 572.

[439] 652 F.3d at 572.

[440] 696 F.3d 771 (8th Cir. 2012).

[441] 696 F.3d at 773.

[442] 696 F.3d at 774.

[443] 696 F.3d at 777.

including suicide. Also, to the extent that courts have split over online bullying cases, the split is generally drawn between off-campus and on-campus (or on the bus or at a school event) speech, not between non-instructional and instructional speech. To state it another way, a school's protective jurisdiction extends beyond instructional classroom time to all student speech on campus. But, in on-campus settings, there is no reason that a school should be limited in protecting its students' ears from speech that comes from other students. In that domain, adults can be expected to behave at least as well as other students.

## 7 Special categories of speech

The Supreme Court's jurisprudence has also carved out several categories of speech—many of them morally opprobrious—that have little or no protection because of their "slight social value" compared to a greater "social interest in order and morality."[444] These include obscenity, fighting words, and child pornography.

This article surveys selected Supreme Court cases on disfavored categories of speech because of their relevance—not to religious speech[445]—but to emotionally and/or psychologically abusive speech directed toward children. But the Court has cautioned against the notion that there is "any freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[446] Rather, the Court will only entertain creating a new categorical free speech exception—one where "no process of case-by-case adjudication is required"[447]—if there is "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[448] Moreover, the trend over the last several decades has been to "narrow[] the categories of unprotected speech."[449] Regardless, mounting scientific evidence as well as international norms compel enhanced sensitivity to the emotional and psychological well-being of children.

### 7.1 Obscenity

One famous category of disfavored speech is obscenity. Under *Miller v. California*,[450] obscenity pertains to works which, as defined by local contemporary community standards, "appeal to the prurient interest in sex," "portray sexual conduct in a patently offensive way" and which, "taken as a whole, do not have serious literary, artistic, political, or scientific value."[451]

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[444] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (quoting *Chaplinsky*, 315 U.S. at 572)).

[445] *Cf. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (Scalia, J., plurality portion of Court's opinion) ("It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives, see *Cohen v. California*, 403 U.S. 15, 26 (1971), than to private prayers.") (emphasis in the original).

[446] *Alvarez*, 132 S. Ct. at 2547 (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010)).

[447] *New York v. Ferber*, 458 U.S. at 783-64.

[448] *Alvarez*, 132 S. Ct. at 2547 (internal quotation marks and citation omitted).

[449] *R.A.V.*, 505 U.S. at 428 (Stevens, J., concurring).

[450] 413 U.S. 15 (1973).

[451] 413 U.S. at 24.

While much pornography is not legally obscene to the extent that adults consume it, the state may require protection for minors.[452] In *Ginsberg v. New York*,[453] the Supreme Court upheld a conviction for the sale of two "girlie" magazines to a 16-year-old boy, holding that the state's interest in protecting children was compelling:

> Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.[454]

The statute prohibiting the sale of such materials to minors was also justified by the state's interest in supporting parents who wished to shield their children from such materials.[455] Parents who so desired were free to purchase such magazines for their children.[456]

In *FCC v. Pacifica Foundation*,[457] the Court famously upheld the FCC's reprimand of a radio station for broadcasting comedian George Carlin's monologue "Seven Words You Can Never Say on Television." The Court held that in other contexts, Carlin's monologue may well be entitled to First Amendment protection. But broadcasting it over the airwaves when children could hear it was different.[458] The state's dual interests in protecting children's well-being and supporting parents who wished to protect their children from such language justified the proscription:

> We held in *Ginsberg v. New York*, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.[459]

In this context, the FCC was not required to demonstrate that the language was "obscene" under the *Miller* test.[460]

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[452] *See Ginsberg v. New York*, 390 U.S. 629, 636 (1968); *but see Rabeck v. New York*, 391 U.S. 462 (1968) (holding that a companion provision that "any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes . . . ." was unconstitutionally vague); *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968) (holding that standard for determining whether film portrayed "sexual promiscuity" was unconstitutionally vague in ordinance requiring motion picture ratings).

[453] 390 U.S. 629 (1968).

[454] 390 U.S. at 636.

[455] 390 U.S. at 639.

[456] 390 U.S. at 639.

[457] 438 U.S. 726 (1978).

[458] 438 U.S. at 746-47.

[459] 438 U.S. at 749-50 (citation omitted).

[460] 438 U.S. at 750-51.

**Comment:** Because of the First Amendment interests at stake, legal obscenity is defined very narrowly. But the state can do more to protect children. The state can, within limits,[461] guard minors from "indecent" materials—ones that are not legally obscene but still prurient—and, over the FCC-regulated broadcast spectrum, even certain expletives. The primary rationale for these free speech carve-outs is to protect youth from moral corruption. What makes these cases at least peripherally relevant to the Club is the state's interest in protecting a child from severe emotional and psychological harm. Such an interest is much more compelling than shielding his eyes from an issue of *Playboy* magazine. The public school campus, at least, should be a sanctuary from those who would inflict such harm.

### 7.2 Child pornography

In *New York v. Ferber*[462] and *Osborn v. Ohio*,[463] the Supreme Court upheld statutes that prohibited the distribution and possession, respectively, of material depicting children engaged in sexual conduct regardless of whether it was obscene. Rejecting challenges that New York's statute was underinclusive and overbroad, the Court held that states had "greater leeway in the regulation of pornographic depictions of children."[464]

The Court reiterated that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."[465] The surpassing interest underlying child pornography statutes was not avoiding "appeal[ing] to the prurient interest of the average person" or the "patently offensive" reaction normal adults might have to it, but rather protecting children from the physical and psychological harm resulting from the production of the work.[466] Moreover, even assuming such material could have some literary, artistic, political or social value, "it is irrelevant to the [abused] child."[467]

But in *Ashcroft v. Free Speech Coalition*,[468] the Supreme Court struck down as overbroad a federal statute that barred *virtual* child pornography that was not legally obscene. Because it "prohibits speech that records no crime and creates no victims by its production,"[469] the state's interest in prohibiting it was significantly attenuated.

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[461] See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) ("the Government cannot ban speech fit for adults simply because it may fall into the hands of children."); *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 814 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative").

[462] 458 U.S. 747 (1982).

[463] 495 U.S. 103 (1990).

[464] 458 U.S. at 756.

[465] 458 U.S. at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

[466] 458 U.S. at 761.

[467] 458 U.S. at 761.

[468] 535 U.S. 234 (2002).

[469] 535 U.S. at 250.

**Comment:** The Court's child pornography cases reflect the judgment that protecting children from severe harm—physical, sexual, and psychological—is, at times, more compelling than an adult's conflicting First Amendment interests.

### 7.3 Fighting words

Another category of disfavored speech is fighting words or epithets. In *Chaplinsky v. New Hampshire*,[470] Mr. Chaplinsky distributed Jehovah's Witness literature on the streets of Rochester, New York, while denouncing religion as a "racket."[471] A crowd gathered around and became restless, and a disturbance occurred. As a police officer escorted Chaplinsky to police headquarters, Chaplinsky shouted to the town marshal "You are a God-damned racketeer" and "a damned Fascist." Chaplinsky was convicted for violating a statute stating that "[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place…."[472] The Court upheld the conviction, holding that in-your-face epithets that an ordinary person would consider to be likely to cause a fight were not protected.[473]

But in *Gooding v. Wilson*,[474] the Supreme Court struck down a Georgia statute prohibiting the use of "opprobrious words or abusive language, tending to cause a breach of the peace." Georgia's courts had not imposed a narrowing construction on the statute—like the New Hampshire Supreme Court had imposed on the *Chaplinsky* statute—limiting its application to words that had a direct tendency to cause acts of violence by the person to whom the remark was addressed.[475] The statute, as construed by Georgia's courts, swept too broadly, enough that it encompassed merely offensive, harsh, and insulting words.

The Supreme Court imposed a content-neutral requirement for fighting words proscriptions in *R.A.V. v. St. Paul*.[476] A St. Paul ordinance made it a misdemeanor "to place on public or private property a symbol, object, appellation, characterization, or graffiti—including a burning cross—which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."[477] Some teenagers were convicted under the ordinance for burning a cross inside the fenced yard of a black family. The Supreme Court struck down the statute because it prohibited otherwise permitted speech solely on the basis of the subjects—i.e., race, color, creed, religion, or gender—that the speech addressed.[478]

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[470] 315 U.S. 568 (1942).

[471] 315 U.S. at 569-70.

[472] 315 U.S. at 569.

[473] 315 U.S. at 573.

[474] 405 U.S. 518, 519 (1972).

[475] 405 U.S. at 524.

[476] 505 U.S. 377 (1992).

[477] 505 U.S. at 380.

[478] 505 U.S. at 385-86; *see also Am. Freedom Def. Initiative v. Metro Transp. Auth.*, 880 F. Supp.2d 456, 475-76 (S.D.N.Y. 2012) (invalidating MTA's no-demeaning-ad regulation because it "differentiates among speech based on the target of the speech's abuse and invective" by barring only those ads that were demeaning based on "race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation.").

Juxtaposed against *R.A.V.* is *Virginia v. Black*,[479] where the Supreme Court partially upheld a Virginia statute that prohibited cross-burning "with the intent to intimidate," where intimidation was defined as putting a victim in fear of bodily harm or death.[480] The statute's targeting of cross-burning, compared with other forms of symbolic speech, was justified in light of cross burning's long and pernicious history as a signal of impending violence: "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[481]

**Comment:** There are many more things that can be said to a 5-year old, without provoking a fight, than to another adult. Telling an adult that "[y]ou deserve to die," for example, might be just cause—under *Chaplinsky*—for a right hook to the left cheek. But it's a standard part of the Club's curriculum (see § 2.1), and children are far more likely to internalize such messages than lash out against their messengers. If the state can criminalize fighting words directed against an adult, it should be able—at least on school campus— to protect a child from words that crush their sense of self-worth.

### 7.4 Dignitary torts

Another important, although sketchy, thread of Supreme Court cases involves dignitary torts. In *New York Times v. Sullivan*,[482] the Supreme Court held that public figures could not recover any damages for libel unless they proved actual malice—that the defendant defamatory statement was with knowledge of its falsity or reckless disregard of whether it was false or not. Public figures include famous people, persons that have voluntarily thrust themselves to the forefront of a public controversy, and persons who become public figures through no purposeful action on their own but have drawn into a public controversy. In *Gertz v. Robert Welch, Inc.*,[483] the Supreme Court held that the actual malice standard also applied to the recovery of presumed or punitive damages by a nonpublic figure. In *Hustler Magazine v. Falwell*,[484] the Supreme Court extended the actual malice standard to intentional infliction of emotional distress claims.

In *Snyder v. Phelps*,[485] the Supreme Court rejected emotional distress claims against the infamous Westboro Baptist Church for picketing a fallen soldier's funeral. The Court said that its holding turned on the distinction between speech on "matters of public interest" and "purely private matters," which requires examination of the "content, form, and context" of the speech as a whole.[486] "Speech deals with matters of public concern," the Court explained, "when it can 'be fairly considered as relating to any manner of political, social, or other concern to the community,' or when it 'is a subject of legitimate

[479] 538 U.S. 343 (2003).

[480] 538 U.S. at 360.

[481] 538 U.S. at 361-62 (citation omitted).

[482] 376 U.S. 254 (1964).

[483] 418 U.S. 323 (1974).

[484] 485 U.S. 46 (1987).

[485] 131 S. Ct. 1207 (2011).

[486] 131 S. Ct. at 1215-16.

news interest; that is, a subject of general interest and of value and concern to the public.'"[487] Examples of speech concerning only private concerns, by contrast, include information about a person's credit report and videos of an employee's sex acts.[488]

Applying this standard, the Court observed that "the overall thrust and dominant theme of" Westboro's speech was directed toward "matters of public import." Signs such as "God Hates the USA," "God Hates Fags," and "Priests Rape Boys" related to "the political and moral conduct of the United States and its citizens, the fate of our nation, homosexuality in the military, and scandals involving the Catholic clergy."[489] Only a few of the signs—such as "You're Going to Hell" and "God Hates You"—did not, because they were arguably directed to Matthew Snyder or the Snyders.[490] Because the dominant theme of Westboro's demonstration spoke to broader public issues, it could not be held liable because its speech was "outrageous." In matters of public debate, the Court reiterated, the First Amendment protects vehement, caustic, unpleasant, insulting, and outrageous speech.[491]

**Comment:** Dignitary torts have been used from the dawn of the nation's history to vindicate the sensitivities (e.g., dignity, reputation, and honor) of *adults* from the humiliation and aspersions of their peers. While the Supreme Court's free speech jurisprudence has restricted the availability of that remedy, particularly with respect to public figures, remedies are still available for outrageous speech on purely private matters. Children matter as much as—if not more than—adults. For the same reason that courts remedy dignitary torts against adults, courts should favorably consider reasonable, carefully-crafted dignitary provisions in facility use policies to protect children from attacks on their self-esteem.

### 7.5 Captive audience cases

The Supreme Court sometimes justifies restrictions on speech that intrude on unwilling listeners. *Frisby v. Schultz*[492] upheld an ordinance prohibiting picketing "before or about" any individual's residence. *Kovacs v. Cooper*[493] upheld an ordinance prohibiting the use of sound trucks to broadcast loud and raucous noises and public streets.

*Rowan v. Post Office Department*[494] upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home. Important to the Court's decision was the fact that minor children might get the mail:[495] the householder should not "have to risk that offensive material come

[487] 131 S. Ct. at 1216 (citations omitted).

[488] 131 S. Ct. at 1216.

[489] 131 S. Ct. at 1216-17.

[490] The Court also rejected Snyder's intrusion on private seclusion claim because Westboro Baptist notified authorities in advance of their protest and staged their demonstration where the police asked them to stage it, adjacent a public street, and in a space that traditionally occupies a "special position in terms of First Amendment protection." 131 S. Ct. at 1219-20.

[491] 131 S. Ct. at 1219.

[492] 487 U.S. 474, 484-485 (1988).

[493] 336 U.S. 77, 86-87 (1949).

[494] 397 U.S. 728, 736-738 (1970).

[495] 397 U.S. at 732.

into the hands of his children before it can be stopped."[496] Based on the same rationale, *FCC v. Pacifica Foundation*[497]—discussed above—upheld restrictions on expletive-laced radio broadcasts.

The Supreme Court has also frequently referred to public school children as "captive audiences." In *Bethel School Dist. No. 403 v. Fraser*[498]—discussed above in § 6.1—the Court relied on the notion that high school students were a "captive audience" to justify a school's efforts to protect them "from exposure to sexually explicit, indecent, or lewd speech." In *Lee v. Weisman*,[499] Justice Souter's concurring opinion described high school students and their parents as "captive audience[s]" to formal graduation ceremonies where clergy members offered invocations and benediction prayers.

But the Supreme Court applies the "captive audience" sparingly because "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[500] In *Public Utilities Commission v. Pollak*,[501] the Court rejected the contention that a transit company's broadcast of radio programs violated the passengers' rights not to hear the programming. In *Erznoznik v. Jacksonville*,[502] the Court struck down an ordinance prohibiting showing films containing nudity on drive-in movie theater screens that were visible from a public street or place.[503] And in *Snyder v. Phelps*, the Supreme Court rejected Snyder's argument that he was a captive audience to Westboro Baptist Church's protests.[504]

**Comment:** With respect to the Club, the notion that attendance is voluntary and after the end of classes weakens any captive audience rationale.[505] But in many cases, elementary students attend at the will of their parents, who—unless already familiar with the club—are likely unaware of the Club's dark message and coercive persuasion (§ 2.7). And to the extent that the parents give their children the choice, the children lack the capacity to consent to the Club's emotional maltreatment. Other students who do not attend, and who are not interested in attending, are still captive to the Club's relentless salesmanship. All of these circumstances raise captive audience concerns that are of comparable weight to those that governed the *Rowan* and *Pacifica Foundation* decisions.

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[496] 397 U.S. at 738.

[497] 438 U.S. 726, 748-749 (1978)

[498] 478 U.S. 675, 684 (1986).

[499] 505 U.S. 577, 630 (1992).

[500] *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

[501] 343 U.S. 451, 463 (1952).

[502] 422 U.S. 205 (1975).

[503] The Court suggested, however, that if the ordinance were rewritten to be limited to obscenity "as to youths," e.g., "sexually explicit nudity," it might survive constitutional scrutiny. *Id.* at 217 n.15. But as written, the ordinance swept beyond obscenity as to youth to include innocent and educational nudity, including "a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous." *Id.* at 211, 213.

[504] 131 S. Ct. at 1220. The Court noted that Westboro stayed well away from the memorial service, and Snyder could see no more than the tops of the signs when driving to the funeral.

[505] *See Milford*, 533 U.S. at 115 ("To the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings.").

## 8 Pertinent statutory authority

The development of a public school facility use policy should take into account the Equal Access Act, 20 U.S.C. §§ 4071-74, the Boy Scout Equal Access Act, 20 U.S.C. § 7905, the Supreme Court's *Milford* case, any applicable state law, and the complex interactions that may arise between these different sources of authority.

### 8.1 1984 Equal Access Act

In 1984, Congress passed the Equal Access Act (EAA). The purpose of the EAA Congress's was to end many school districts' practices of forbidding religious student groups from meeting on campus.[506]

The EAA requires public secondary schools that have "limited open forum[s]" to provide equal access to "any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[507] Under the EAA, a "limited open forum" exists "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[508] The equal access guarantee is limited to student-led and directed groups: "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups."[509] Beneficiaries of the EAA are still subject to the school's authority "to maintain order and discipline on school premises" and "to protect the well-being of students and faculty."[510]

In *Westside School District v. Mergens*,[511] the Supreme Court upheld the constitutionality of the EAA. The Court also defined "noncurriculum related student group" under the EAA as follows:

> [W]e think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.[512]

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[506] *See Truth v. Kent Sch. Dist.*, 542 F.3d at 646-47 (discussing legislative history); *see, e.g., Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 552-55 (3d Cir. 1984) (holding that allowing high school Bible student club to meet would have violated the Establishment Clause), *vacated on other grounds*, 475 U.S. 534 (1986); *Brandon v. Guilderland Bd. of Ed.*, 635 F.2d 971, 978-79 (2d Cir. 1980) (same).

[507] 20 U.S.C. § 4071(a).

[508] *Id.* § 4071(b).

[509] *Id.* § 4071(c)(5).

[510] *Id.* § 4071(f).

[511] 496 U.S. 226 (1990).

[512] 496 U.S. at 239-40.

The EAA shields school bible clubs from anti-discrimination rules to the extent that such rules would apply to the clubs' leadership.[513] Under the EAA, religious clubs are also entitled to equal access to student funds and access to the school's public address system (to the extent that it does not include proselytizing), bulletin boards, the yearbook, school auctions, and craft fairs.[514]

### 8.2 Boy Scouts of America Equal Access Act

In 2001, Congress passed the Boy Scouts of America Equal Access Act (BSA) to prevent public schools with anti-discrimination policies from barring access to the Boy Scouts.[515] The BSA bars any public school receiving federal funds that has a limited open forum from denying equal access or a fair opportunity to meet to the Boy Scouts of America and any other Title 36 "youth group."[516] In particular the BSA bars schools from denying access to such groups "*for reasons based on the membership or leadership criteria* or *oath of allegiance to God* and country."[517] The purpose of the BSA was to "address access to and use of school facilities by the Boy Scouts of America or of other groups that prohibit the acceptance of homosexuals, or individuals who reject the Boy Scouts' or the youth group's allegiance to God and country."[518]

The BSA applies to schools that allow "one or more outside youth or community groups to meet on school premises or in school facilities before or after the hours during which attendance at the school is compulsory."[519]

Title 36, subtitle II, part B lists about 100 congressionally chartered organizations. The Act does not identify which Title 36 organizations have "youth groups." A federal register notice and the *Elk River* case indicate that the list includes, at least, the following: Big Brothers-Big Sisters of America, Boys & Girls Club of America, Future Farmers of America, Girl Scouts of America, Little League Baseball, and the

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[513] *See Hsu by & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 858 (2d Cir. 1996) (holding that under the Act, school had to exempt Bible club from school's policy against religious discrimination with respect to leadership positions); *Truth v. Kent School District*, 542 F.3d 634, 648 (9th Cir. 2008) (holding that EAA only protected religious club from anti-discriminatory provisions to the extent that they applied to leadership positions; all clubs were subject to the school's anti-discriminatory membership provisions).

[514] *See Prince v. Jacoby*, 303 F.3d 1074, 1085-87 (9th Cir. 2002).

[515] 20 U.S.C. § 7905(b)(1) ("Notwithstanding any other provision of law, no public elementary school, secondary school, local education agency, or State education agency that has a designated open forum or a limited public forum and that receives funds made available through the Department shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in Title 36 of the United States Code (as a patriotic society), that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America or of the youth groups listed in Title 36 of the United States Code….").

[516] *Id.* (defining "youth group" as "any group or organization intended to serve young people under the age of 21.").

[517] *Id.*

[518] H.R. Rep. No. 107-334, at 1600 (2001) (Conf. Rep.).

[519] 20 U.S.C. § 7905(d)(2).

Society of American Florists and Ornamental Horticulturists.[520] Because of this ambiguity, a school district may require that any group seeking equal access under the Act inform the covered entity whether the group is officially affiliated with the Boy Scouts or with any other Title 36 youth group.[521]

Given the Boy Scouts' theistic and heterosexual-only leadership policies, a school district would be prudent to institute more narrowly tailored requirements than Hastings School of Law did to avoid losing funds under that act.

The BSA and first amendment law can interact in unanticipated ways. *Child Evangelism Fellowship v Elk River Area School District # 728*,[522] discussed in § 4.3.2 of this article, is a cautionary example. There, the district court held that a school district that created a forum for congressionally chartered youth organizations had to provide the Club equal access to that forum. So, if *Elk River* is good law,[523] a school that opens up its forum to an adult sports league, for example, must—according to the BSA[524]—provide equal access to BSA youth groups *and must also*—according to *Elk River*—provide equal access to the Club as well. Even though the Club would bear no similarity to the adult sports league, the Club would be entitled to equal access—by this runaway logic—with the original adult sports league.

There are two ways around that problem. First, to the extent that a school creates a limited open forum for purposes of the BSA, it could define the forum according to specific subject matters.[525] The school could, for example, limit the forum to community service groups, outdoor skills programs, horticultural skills programs, and agricultural skills programs, with the further requirement that any group's uses bear a substantial and predominant relationship with one or more of these categories (see Appendix A: Defining the Forum). Such a provision would, in most areas, encompass every congressionally chartered youth organization.

Second, the school could compel all such groups to refrain from psychological and emotional abuse. In response to a comment asking whether the Boy Scouts "would be exempt from bullying and nondiscrimination rules," the Department of Education responded that "[n]either the [BSA] nor the implementing regulations ... affect the obligations of members of the Boy Scouts to comply with a public school's rules pertaining to the conduct of members of groups using school premises or facilities...."[526] Accordingly, "student members of the Boy Scouts must comply with a public school's code of student conduct in the same manner as all other students subject to those policies."[527]

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[520] 71 Fed. Reg. 14993, 14996 (Mar. 26, 2006); *Elk River*, 599 F. Supp.2d at 1140.

[521] 34 CFR § 108.5.

[522] 599 F Supp 2d 1136 (D. Minn. 2009).

[523] *Supra* note 253 (describing significant flaws in the *Elk River* holding).

[524] 20 U.S.C. § 7905(d)(2) (a "limited public forum" under the BSA exists "whenever the school involved grants an offering to, or opportunity for, one or more outside youth *or community* groups to meet on school premises or in school facilities….") (emphasis added); *see also* 71 Fed. Reg. at 14996 (noting that an adult sports league that met at school would trigger the BSA's protection, even if the league did not serve students).

[525] *See* 71 Fed. Reg. at 14999 (confirming that a school could limit its communication forum to specific subject matter categories, such as notices about meetings, without violating the BSA).

[526] 71 Fed. Reg. at 14997.

[527] *Id.*

## 9 Do the Religion Clauses shield on-campus religious clubs from official scrutiny?

As earlier sections of this article have explored, the Free Speech clause is most vigorous in guarding against attempts to suppress a particular ideology, philosophy, opinion, or perspective.[528] Accordingly, courts are sometimes reluctant to review, in any depth, the content of proposed speech.[529] But there is no Free Speech bar to such examination. It routinely occurs in the public school context—as *Milford*,[530] *Caudillo*,[531] and *Gonzalez*[532] all demonstrate—because the limited nature of such fora often requires at least a superficial review of the subject matter of the group.

But reviewing the Club's curriculum would involve another area of constitutional concern. In a long line of cases, the judiciary has refused to inquire into religious belief. But courts have not yet decided whether this policy of abstention applies to faith-based child mistreatment on public school campuses. In the context of equal access, does this mean that faith-based groups—such as the Club—can use the concepts of religious and viewpoint neutrality as a *sword* to get into public schools, and the concept of non-entanglement as a *shield* from otherwise generally applicable monitoring and oversight? Or does the logic of religious neutrality work both ways, so that faith-based groups have to play by the same rules?

### 9.1 Excessive entanglement

One of the prongs of the Supreme Court's *Lemon* test for Establishment Clause violations is avoiding excessive governmental entanglement with religion. In *Lemon v. Kurtzman*, the Supreme Court struck down statutes that reimbursed or supplemented parochial school teacher salaries for expenses related to "specified secular subjects."[533] To ensure compliance with its restrictions, the states would have to employ "comprehensive, discriminating, and continuing surveillance."[534] This, the Court held, was impermissible. But the Court's subsequent cases soon undercut this rationale for non-entanglement. In *Bowen v. Kendrick*,[535] the Court upheld state funding of faith-based organizations' programs even though monitoring was needed to ensure that funds were not spent on "inherently religious" activities such as religious worship, instruction, and proselytization.

The interest in avoiding entanglement has maintained full force in contexts where the state intrudes into the church's own sphere. Religious organizations are exempt from many types of regulations that would intrude into their internal affairs.[536] Also, courts often shield churches and

[528] *See supra*, note 156.

[529] *See supra,* note 177.

[530] *See supra*, note 202.

[531] *See supra*, note 278.

[532] *See supra*, note 285.

[533] *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971).

[534] 403 U.S. at 619.

[535] 487 U.S. 589, 605, 615-616 (1988).

[536] *See, e.g., Hosanna-Tabor Evangelical Lutheran Ch. and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (recognizing the existence of a "ministerial exception" grounded in the First Amendment that shields religious institutions from

ministers from tort liability for disciplinary actions and dignitary torts toward church members.[537] This judicial abstention is called by varying names, most commonly "ecclesiastical abstention" and "church autonomy."

A closely related blend of Establishment Clause and Free Exercise Clause concerns protects the faithful from criminal statutes that would put them "to the proof of their religious doctrines."[538] In *United States v. Ballard*,[539] the Supreme Court reversed a fraud conviction of a cult leader who claimed to be a "divine messenger" who met Jesus and had the power to heal disease. The Court held: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[540] "Man's relation to his God," moreover, is "no concern of the state."[541]

**Comment:** The caveat against entanglement is founded on the notion that church and state inhabit different spheres, a notion betrayed when school classrooms are transformed into Sunday Schools. If the logic of religious and viewpoint neutrality dictates that church groups have equal access, then that same logic dictates that they submit to the same standards of conduct, regulation, and oversight that apply to their secular counterparts. More generally, an aversion to entanglement is a bad reason for the state to retreat from regulating its *own* facilities. "The objective" of the anti-entanglement doctrine, after all, "is to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other."[542] Faith-based groups subject themselves to supervision and monitoring when they avail themselves of government benefits. If the need to protect children creates a problem of excessive entanglement in public school facilities, then it is the religious group—not the state's efforts to protect children—that must yield or retreat.

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regulations concerning employment relationships with ministers); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (holding that the NLRB could not assert jurisdiction over Catholic school lay teachers, because of the danger that it would require an inquiry into whether the clergy-administrators' "challenged actions were mandated by their religious creeds."); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding constitutionality of religious organization exemption from Title VII's prohibition against religion-based employment discrimination); *compare Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 291-92 (1985) (holding that the Establishment Clause entanglement concerns did not require that religious organizations be exempt from record-keeping and reporting provisions of the Fair Labor Standards Act (FLSA)); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (holding that the application of the IRS's anti-discrimination requirements to Bob Jones University "avoid[ed] the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief").

[537] *See, e.g., Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F2d 875, 881 (9th Cir. 1987) (holding that the First Amendment protected the Jehovah's Witnesses' practice of shunning and that allowing plaintiff to recover damages on claims for outrageous conduct, defamation, and invasion of privacy "would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings"); *Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1180 (9th Cir. 2012) ("A church is entitled to stop associating with someone who abandons it. A church may also warn that it will stop associating with members who do not act in accordance with church doctrine.").

[538] *United States v. Ballard*, 322 U.S. 78, 86 (1944).

[539] 322 U.S. 78 (1944).

[540] 322 U.S. at 86.

[541] 322 U.S. at 87.

[542] *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

Regardless, there are ways to mitigate entanglement concerns in the school public forum. First, public schools can review a program's material, curriculum, and pedagogy with viewpoint-neutral criteria that separate the program's message from its religious or theological trappings. For example, the Club's message "you deserve to die *because of your sin*" should be as much as possible stripped of its theological trappings, becoming—simply—"you deserve to die." The public school should also disregard any theological justification—such as the doctrine of Original Sin—that the Club might offer for such a declaration. Second, public schools should focus on the psychological and emotional *effects* of harmful speech or curricula without declaring the underlying beliefs to be wrong or weighing in on their philosophical validity.

## 9.2 Emotional damage claims by teenage victims against churches

Tort claims arising out of acts against teenage victim-members raise special concerns. The younger the victim, the less likely the victim effectively consented to the harm. Courts have nevertheless been reluctant—even under these circumstances—to consider tort claims that could implicate the propriety of religious beliefs.

- ***Murphy v. ISKCON (1991)***

In *Murphy v. ISKCON of New England, Inc.*,[543] the Massachusetts Supreme Court dismissed a judgment won by Susan Murphy and her mother against a Hare Krishna sect. Susan began attending Hare Krishna temple events at the age of 13, without her mother's knowledge. When she was 14, she ran away, with the sect's blessing, to cohabitate with an adult male Hare Krishna practitioner.[544] After Susan left the sect, she was diagnosed with PTSD, a low sense of self-esteem, and an inability to maintain healthy relationships.[545] Susan and her mother sued. During trial, scriptural text passages that "women are inferior to men" and "the female form is the form of evil" were read into the record.[546] Also, Susan's attorney argued, during closing argument, that "Susan was subjected at an early age to destructive teachings, teachings that were destructive to her personality, to her psyche, and ... she still suffers from it today."[547]

The court held that the judgment could not stand because the Hare Krishna sect was "forced to attempt to prove to a jury that the substance of its religious beliefs is worthy of respect."[548] "The defendant cannot be forced to choose between censoring its religious scriptures to remove material which may be offensive to contemporary society and paying tort damages for the privilege of maintaining unpopular religious beliefs."[549]

[543] 571 N.E.2d 340 (Mass. 1991).

[544] 571 N.E.2d at 342-43.

[545] 571 N.E.2d at 344.

[546] 571 N.E.2d at 346.

[547] 571 N.E.2d at 346-48.

[548] 571 N.E.2d at 348.

[549] 571 N.E.2d at 348.

- ***Pleasant Glade Assembly of God v. Schubert (2008)***

In *Pleasant Glade Assembly of God v. Schubert*,[550] the Texas Supreme Court dismissed Laura Schubert's emotional damage claims against a charismatic church for involuntary exorcisms conducted on her when she was 17 years old. The majority 6-3 opinion held that the church's beliefs in demon possession and the practice of "laying hands" were entitled to First Amendment protection, and that adjudication of Laura's claims would necessarily involve adjudication on the validity of religious beliefs. Also, although Laura's injury claims might theoretically have been tried without mentioning religion, the court feared that the imposition of tort liability "would have an unconstitutional 'chilling effect' by compelling the church to abandon core principles of its religious beliefs."[551] Moreover, the court reasoned, "religious practices that might offend the right or sensibilities of a non-believer outside the church are entitled to greater latitude when applied to an adherent within the church."[552]

**Comment**: The cases above illustrate the deference given churches for what happens under their roofs. But these cases—like the other church autonomy cases discussed in § 9.1—have no legitimate application to programs at public school facilities directed to public school children.

## 9.3 Deceptive recruitment practices

*Murphy* and *Schubert* are strongly protective of the concept of church autonomy. But other cases reveal its limits. In *Guinn v. Church of Christ of Collinsville*,[553] the Oklahoma Supreme Court held that a former parishioner could recover emotional injury and privacy damages for acts elders made subsequent to, but not before, her withdrawal from the church. "Parishioner's willing submission to the Church of Christ's dogma, and the Elders' reliance on that submission, collectively shielded the church's prewithdrawal, religiously-motivated discipline from scrutiny through secular judicature."[554] To the extent that the church maintained the right to discipline the parishioner through shame and public disrepute *after* her withdrawal, the church was "threatening to curtail *her* freedom of worship according to her choice."[555]

*Guinn* illustrates how a church's free exercise right to inflict harm must be weighed against a victim's free exercise right to avoid the infliction of such harm. As the next case illustrates, the issue of consent includes within it the further question of whether the victim's consent, if any, was effective.

- ***Molko v. Association for the Unification of World Christianity (1988)***

In *Molko v. Holy Spirit Association for the Unification of World Christianity*,[556] David Molko sued the Unification Church for fraud, intentional infliction of emotional distress, and restitution for

[550] 264 S.W.3d 1 (Tex. 2008).

[551] 264 S.W.3d at 10.

[552] 264 S.W.3d at 12.

[553] 775 P.2d 766 (Okl. 1989).

[554] 775 P.2d at 774.

[555] 775 P.2d at 777.

[556] 762 P.2d 46 (Cal. 1988).

deceptive recruitment practices and "an intense program of coercive persuasion or mind control."[557] Two church members invited Molko to a dinner without revealing that the purpose was to recruit him to into the Church. Then, at the dinner, they and other church members pressured Molko to travel with them to a rural getaway for "relaxation and pleasure," without telling him that it was "an indoctrination facility for the Unification Church."[558] At the camp, the schedule was tightly planned—with lectures about God and brotherly love, prayer, singing, group calisthenics and small group discussions—and Molko was given no time for himself.[559] The intense program of indoctrination continued for several weeks.

The court held that liability for fraudulent recruitment practices would only impose a marginal burden on the Church's free exercise rights: "At most, it potentially closes one questionable avenue for bringing new members into the Church."[560] In circumstances where there was no effective consent, the Church could also be held liable for coercive persuasion, because of its potentially harmful effects: "While some individuals who experience coercive persuasion emerge unscathed, many others develop serious and sometimes irreversible physical and psychiatric disorders, up to and including schizophrenia, self-mutilation, and suicide."[561] In view of such risks, "[t]he state clearly has a compelling interest in preventing its citizens from being deceived into submitting unknowingly to such a dangerous process."[562]

The court's decision turned upon both the fraud involved and the intense and relentless nature of the Church's programming. Stressing the limited nature of its holding, the court stated that a sermon that included "threats of divine retribution," by contrast, would be insufficient to support such tort claims.[563]

**Comment:** The Club also engages in deceptive recruiting practices (see § 2.7). Its colorful and engaging advertising and take-home flyers describe 60-90 minutes filled with fun, snacks, games, and prizes. But the flyers omit any disclosure about the severity of the curriculum, such as: how sin is referenced over 5000 times and obedience, punishment, and Hell thousands more; or how children are repeatedly told that they *deserve* to be "punished" for their sin—and sometimes that they "deserve to die"—and that Jesus died to take the punishment that *they* deserved. Some flyers make reference to the fact that the Club teaches lessons or values from a "biblical" perspective, but this is unrevealing. CEF's website is also vague. Its curriculum webpage features the picturesque covers of its Life of Christ 1 and 2 manuals, but does not reveal its contents. The webpage also states that the curriculum is "biblically-sound and Christ-centered," and that "the message of salvation is weaved through every part

[557] 762 P.2d at 53.

[558] 762 P.2d at 50.

[559] 762 P.2d at 50-51.

[560] 762 P.2d at 60.

[561] 762 P.2d at 60.

[562] 762 P.2d at 60.

[563] 762 P.2d at 61; *see also id.* at 64 (rejecting false imprisonment claim grounded on threats that he family "would be damned in Hell forever" if she left the community).

of our curriculum." But the webpage provides no information about the CEF curriculum cycle and no links to the textual materials presented.[564]

## 10 A brief comment on long-ago Establishment Clause concerns

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

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

This section briefly reviews what were—decades ago—Establishment Clause concerns with the Club being in public schools. This section is brief and far from comprehensive, because the issues have already been the subject of much scholarship. The issues, moreover, have largely been decided. Under prevailing jurisprudence, the Establishment Clause does not provide a basis for limiting access by the Club to an after-school limited public forum. This is notwithstanding the fact that the Club—as CEF's legal counsel Mat Staver is fond of saying—effectively brings "Sunday School to the public schools."[565]

In *Milford*, the Supreme Court dismissed the school's Establishment Clause concerns on both philosophical and factual grounds. As matters of principle, (1) giving equal access to the Club was neutral toward religion; (2) the Establishment Clause did not foreclose private religious conduct during nonschool hours because of the impressionability of elementary school children; and (3) the danger of children *misperceiving* endorsement of religion was no greater than the danger they would perceive hostility from the Club's exclusion. As matters of fact, (1) the Club took place after school hours; (2) children were permitted to attend only with parental consent, protecting them from being coerced into engaging in the Club's religious activities; (3) the Club's meetings were held in resource rooms, not in an elementary school classroom; (4) individuals who were not schoolteachers were giving the lessons; and (5) there was "simply no integration and cooperation between the school district and the Club."[566]

As noted in section 4.3.7, subsequent lower court decisions have eroded many of *Milford*'s factual distinctions. The Eighth Circuit held that schoolteachers could lead Clubs after class.[567] Other courts have held that schools must—on an equal basis with other groups—distribute the Club's promotional flyers and permission slips to children, even during class time, to students, post flyers on hallways, and allow the Club to man tables at Back-to-School nights.[568] And today, classes are regularly held in elementary school classrooms.

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[564] See http://www.cefonline.com/index.php?option=com_content&view=category&id=130&Itemid=100243 (last visited May 9, 2013). CEF's website does invite visitors to sign up, at another website, to review video demonstrations of the lessons. But CEF does not facilitate anonymous review of its materials.

[565] "Public School Good News Clubs by Child Evangelism Fellowship," YouTube, at http://youtu.be/DDsf2QY0V-U.

[566] 533 U.S. at 113-119 & n.6.

[567] *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004).

[568] *See supra* § 4.3.7.

Furthermore, the Club's aggressive promotional efforts—sometimes in concert with sympathetic or like-minded administrators—have eroded *Milford*'s philosophical foundations. The Club has honed several techniques to infiltrate the social fabric of the school, including:[569]

- Getting instructors to double as school volunteers, tutors, and mentors;
- Offering candies and/or snacks at each Club meeting;
- Giving newly visiting children—and the regularly-attending students that recruited them—extra prizes for visiting the Club;
- Sending flyers and permission slips to students' homes through backpack flyer distribution programs;
- Placing Club posters on school bulletin boards or in hallways;
- Announcing Club meetings through the school's PA system;
- Staffing snack-filled tables at Back-to-School-Night or School Registration events;
- Obtaining the school's database of students or student directory and use it to contact the students; according to one CEF document, "[t]he database is public information and according to the first amendment they have to give it to you";
- Distributing flyers near gates and bike racks and on sidewalks where parents are parking along street;
- Setting up signs—e.g., "Good News Club Today"— during each Club meeting by the school curb; and
- Writing articles for school newspaper about the Club.[570]

These kinds of efforts weave the Club into the school's social and cultural fabric and create pressures that may prove difficult for many students (or their parents) to resist. In *Santa Fe Independent School District v. Doe*,[571] the Supreme Court cited the "immense social pressure," and "truly genuine desire," to attend high school football games in rejecting the argument that its "extracurricular" and "voluntary" nature dissipated the Establishment Clause concerns.[572] Although the pressures to join the Club may well be just as great (and the degree of indoctrination certainly greater) for elementary students as they are for high school football fans, the Court is unlikely—any time soon—to directly retract *Milford*'s overconfidently-stated contrary determinations.

By further analogy, the temporal and physical proximity of the Club to regular school classes, and the fact that many parents rely on the school to care for their children until they get off work, create an environment that approaches—although it does not quite reach—a practice the Supreme Court stopped

[569] Child Evangelism Fellowship, "Adopt-A-School Program," Step 8: Club Promotion Overview, pages 1-2 (source kept on file).

[570] Sources kept on file; *see also* Amanda Ripley, "Saving the 7-Year Old," *Time Magazine*, June 4, 2001 (""To sustain interest in the club, leaders use every imaginable child enticement: colorful Jesus dolls, cheery songs and mountains of sugar. The Pleasant Gap session starts with a round of cookies. At another club nearby, kids who answer scriptural questions get pelted with candy fired out of a spring-loaded catapult. Children get $1 in fake money for coming and $2 for bringing a friend. Every few months, they can redeem the 'money' for--guess what?--more candy....").

[571] 530 U.S. 290 (2000).

[572] 530 U.S. at 311-12.

in *Illinois ex rel. McCollum v. Board of Education*:[573] allowing religious institutions to use public school classrooms to provide religious instruction to students during the school day.[574] Here, the only significant difference is that the instruction takes place immediately after the closing bell.

The current environment is aptly reflected in CEF President Reese Kaufman's recent remark that "in the public schools, we have more freedom to present the gospel than we did in the 1940s and 1950s."[575] Keynote speakers at CEF's 2010 Triennial Convention described the situation more boastfully, but no less truthfully: CEF is "kicking in the doors" of the nation's public schools.[576]

In many schools, CEF need not kick at all. In South Carolina, Florence School District 1 launched a "Faith-Based Initiative" to recruit mentors and tutors from faith communities and get them to establish Clubs in all 14 of the District's elementary schools.[577] Elementary schools have described their relationships with the Club and its sponsoring churches as "partnerships" and "collaboration[s]" along with not-so-subtle messages of endorsement such as "The Good News Club met weekly to equip children for a morally challenging world."[578] One school principal gave a keynote address at a CEF dinner, boasting of her disregard for Establishment Clause concerns:

> When I first started working with [CEF] and the Good News Club, some of the principals started going on about the separation of church and state… And honestly, I could care less about the church and state. You know, if I'm going to fired, fire me for that one…. I think it's my philosophy that as long as my children have … the opportunity to know Jesus and to learn Bible verses and sing songs then their education is going to be so much better... "[579]

While CEF supporters sometimes publicize such endorsements online, others are difficult to detect and even more difficult to remedy. Faced with an analogous difficulty in policing separation, the Supreme Court in *School District of Grand Rapids v. Ball*[580] invalidated a program that paid parochial school teachers to teach secular after-school programs at parochial schools. The risk was too great that the teachers' religious message would "infuse the supposedly secular classes they teach after school"[581]

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[573] 333 U.S. 203 (1948).

[574] *See also Milford*, 533 U.S. at 144 (Souter, J., dissenting) ("The timing and format of Good News's gatherings, on the other hand, may well affirmatively suggest the imprimatur of officialdom in the minds of the young children."). In *Milford*, the majority distinguished *McCollum* on the ground that the Club took place "after the time when the children were compelled by state law to be at school," and there was "no integration and cooperation" between the school district and the Club, and the Club was taught by individuals who were not schoolteachers to children permitted to attend only with parental consent. *Milford*, 533 U.S. at 117 & n.6.

[575] Reese Kauffman's address to the Dallas Theological Seminary chapel, February 20, 2007 (available at http://www.dts.edu/download/media/20070220.mp4) (last visited April 30, 2013).

[576] Katherine Stewart, THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT'S STEALTH ASSAULT ON AMERICA'S CHILDREN, page 39 (2012).

[577] Ellen Meder, "When School is Sunday School," SCNow.com, April 15, 2013; "Churches, mentors team up with schools," Florence News Journal, April 17, 2013.

[578] Sources kept on file.

[579] Source kept on file.

[580] 473 U.S. 373 (1985), *overruled in part by Agostini v. Felton*, 521 U.S. 203 (1997).

[581] 473 U.S. at 387.

without complaint or detection. In many parts of the country, there is an equally significant risk that administrative efforts to advance the Club would be welcomed, undetected, and/or unreported.

The Supreme Court has moved away from the strict separationism epitomized by the Warren court.[582] Under the weak separationism prevalent in modern jurisprudence, close cases are usually resolved in favor of religious speech. As construed by some courts (*see* §§ 4.3.7 & 4.3.8), the Establishment Clause offers only a thin line between the school and the Club: the closing bell, and only with respect to Club meetings, not Club announcements. But much has already been written analyzing, criticizing, and/or defending prevailing Establishment Clause jurisprudence. That is why this article adds little to that commentary.

## 11 Legal wrap-up: navigating the legal matrix

The severe pedagogy of Child Evangelism Fellowship's public elementary school Clubs (see § 2) provokes difficult constitutional questions involving the complex intersection of church, state, education, free speech, and child well-being. Existing public forum cases provide little guidance on what, if any, schools can do to protect the emotional and psychological well-being of children. But student speech cases do. The victim-protecting rationales behind those student speech cases—and the similar victim-protecting rationales that undergird the diminution of free speech protections for some categories of speech—support the right of schools to protect their students from emotionally or psychologically threatening on-campus speech, regardless of the identity of the speaker. Finally, although there is a rich body of church autonomy caselaw reflecting a prudential judicial avoidance of interfering with religious affairs, there is no place for such deference toward a program, at a public school facility, directed to the public school's students.

**Does the Free Speech Clause allow public schools regulate their forums to protect students from emotional and psychological harm?** Yes. The Supreme Court's *Prince v. Massachusetts* decision (§ 5) and cases involving student speech (§ 6), obscenity and indecency (§ 7.1) illustrate the compelling nature of the state's interest in protecting children—especially public school children—from emotional and psychological treatment.

The most significant body of relevant caselaw involves student speech (§ 6). While student speech cases turn in part on the fact that they involve speech by students—and the concomitant principle that the rights of children are not coextensive with those of adults—the state has an equally compelling interest to protect students from hostile and abusive speech by adults who infiltrate the school setting. Indeed, a stronger case can be made for regulating *invasive* adult speech than *captive* student speech. Courts regularly have to balance the free speech rights of captive students, who—though compelled to attend—do not "shed their constitutional rights at the school gate." Adults, by contrast, are free to choose a wide variety of alternative venues to exercise their free speech and free exercise rights. Any argument that adults have a special right—that students themselves lack—to foray into the school setting to emotionally mistreat children is not likely to succeed.

[582] *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (Scalia, J., plurality portion of opinion) ("By its terms that Clause applies only to the words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum.").

**From what kinds of speech can schools protect their students?** In student speech cases in the high school setting—and in the transit advertising case described in § 4.3.6—courts have distinguished between abusive speech and merely offensive or tepidly negative speech. Abusive speech is speech, for example, that is intimidating, derogatory, degrading, demeaning, racially divisive, or that causes students to question their self-worth and rightful place in society.

Schools can be more protective of their elementary students than their secondary students. In *Muller* (§ 6.2.1), the Seventh Circuit upheld a policy that protected students from materials that were "*insulting* to any group or individuals." Given that elementary and middle school students are less prepared than adults to respond constructively to insults and assaults on their self-esteem, most courts would likely agree that there is less latitude for offensive and potentially psychologically harmful speech in the elementary school context than there is in a high school context.

Appendix A recommends that emotional and psychological abuse be defined using widely cited criteria set forth in the professional literature and that the definition be applied using objective professional community standards.

**What other options do schools have?** With proper care (see §§ 4.3.2-4.3.5 and Appendix A: Defining the Forum), schools can narrowly define the subject matter of the forum. A school can also potentially "freeze" its forum (§ 4.3.2) so that it is open only to those with a longstanding relationship to the school. Finally, a school can also close the forum (§ 4.3.12).

**Wouldn't the Club be able to defeat a revised facility use policy as a façade or pretext for viewpoint discrimination?** Possibly, if one of the following circumstances exist: (1) the revised policy redefines the forum in a way that does not relate to the purposes of the forum; (2) the school provides oral and/or written reasons for denying access to the Club that are not consistent with the policy; (3) or the school provides *judicially taboo* oral and/or written reasons for denying access to the Club, such as church-state separation or the fact that the Club is religious, evangelical, fundamentalist, divisive or that it proselytizes.

It cannot be overstated that the overarching goal of any facility use policy or its application is to promote child development *while protecting them from harm*. The Club is not harmful because it is religious. The Club is harmful because of its calculated effort to destroy a child's self-esteem, make him fearful, ashamed, and uncritically submissive to authority, divide him from his non-like-minded classmates, and make him reject science and critical thinking. If the Club is the only adult-directed group harming a school's students, it is entirely appropriate—and not viewpoint discriminatory—to target it. If there are other groups harming the school's students, it is equally incumbent that they be targeted too.

To overcome an attack that a facility use policy is merely a façade or pretext for viewpoint discrimination, a policy should be carefully drafted *and* consistently enforced using written explanations—by the same facility use coordinator, or even better, a school psychologist—that are viewpoint and religiously neutral.[583]

[583] *See ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1227 (11th Cir. 2009) (board's removal of book about Cuba for factual inaccuracies was justified because the book *was* factually inaccurate—albeit in arguably inconsequential ways—regardless of the fact the board members may have disliked the book for its halcyon description of Cuba).

## 12 Conclusion

While a school cannot single out religion for exclusion, a school's efforts to single out psychologically harmful and abusive programming, *regardless of the viewpoint expressed*, can (if implemented with proper care) pass constitutional muster, especially in the context of a public elementary school.

Significant portions of Good News Club's curriculum threaten the emotional and psychological well-being of elementary public school system. Provided such pedagogy is excluded regardless of its political, ideological or religious basis, such speech can be lawfully excluded from public schools. "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[584]

The fact that the Club has theological reasons for such behavior does not justify such conduct on public school grounds.[585] The Club gained access to the nation's public schools on the *logic of religious neutrality*. Should schools protect elementary public schoolchildren from groups that threaten their psychological, emotional, or intellectual well-being, the same *logic of religious neutrality* justifies regulating the Club on an equal basis with other groups:

> The government must be neutral both in its own speech and in its treatment of private speech. It may not take a position on questions of religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers.[586]

Public elementary schools should be safe places that guard their schoolchildren from threats—whether or not religiously motivated—to their psychological, emotional, or intellectual well-being.

***The legal information provided in this document does not constitute legal advice or legal representation.***

[584] *Virginia v. Black*, 538 U.S. 343, 361-62 (2003) (citation omitted).

[585] *Nuxoll v. Indian Prairie School Dist. #204*, 523 F.3d 667, 671 (7th Cir. 2008) (a T-shirt emblazoned with "homosexuals go to Hell" could "be prohibited despite" its "arguable theological support").

[586] Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. Rev. 1, 3 (1986).

# Appendix A:
# Guidelines for a child-protective facility use policy

This Appendix provides general guidelines for drafting a child-protective facility use policy. A facility use policy:

- Must be religiously neutral;
- Must be viewpoint neutral on its *face* and in its *application*;
- Must be reasonably related to the purposes of the forum;
    - E.g., the provisions should not be pretextual;
- Must impose substantive constraints on official discretion;
- Should provide persons of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits;
    - E.g., intelligible criteria or articulated standards spelling out what is forbidden;
- Should avoid overbreadth, where a substantial number of its applications would be unconstitutional, judged in relation to the policy's plainly legitimate sweep; and
- Should have procedural safeguards, such as:
    - Providing for prompt approval or disapproval;
    - Specifying the effect of a failure to act promptly;
    - Requiring a factual explanation for decisions; and
    - Providing an adequate and prompt appeals procedure.

**Important Note:** Many states have statutory provisions that shape and/or regulate their public schools' facility use policies. State constitutional provisions protecting the freedoms of speech and religion may also have a different scope than their federal counterparts. The evaluation and application of such provisions go beyond the scope of this article.

## ➢ Preamble

*The following preamble frames the facility use policy with principles drawn from Supreme Court cases.*

> The District has the right, consistent with fundamental constitutional safeguards, to prescribe and control conduct in its schools. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 507 (1969). This includes advancing its educational mission; protecting the physical, emotional, and psychological wellbeing of children; and proscribing activities that would materially and substantially disrupt the work and discipline of the school. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986). The District seeks to inculcate in its students fundamental values necessary to the maintenance of a democratic political system, including promoting understanding, tolerance, and respect for the diverse beliefs and values and the universal and shared dignity of all people. *Id.*; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). Therefore Applicants—whether students or adults—shall honor boundaries of socially appropriate behavior and avoid the use of demeaning, vulgar or abusive language. *Bethel Sch. Dist.*, 478 U.S. at 682, 683.

## ➢ Good Behavior Provisions

*The following Good Behavior provision fences out groups that engage in physical, emotional, or psychological maltreatment. The provision imposes substantive constraints on and objective criteria for the identification of emotional or psychological maltreatment by reference to professional community standards[587] and professionally recognized forms of maltreatment. Preferably, a determination that a group violates the maltreatment provision would be made by a school psychologist.*

> Good Behavior Requirement. No person, group or organization shall be permitted to use a district facility if a reasonably prudent person, applying prevailing community or professional standards, would find that the group's activities, curriculum or practices:
>
> a. engage in physical, emotional, or psychological maltreatment of students; ….
>
> Criteria for establishing emotional or psychological maltreatment. Emotional or psychological maltreatment is defined as acts or statements that would, when applying an objective professional community standard, be considered damaging to children, and that fall into one or more of the following categories:
>
> 1) *Degrading:* undermining a child's sense of self-worth, social competence, self-confidence, or development of self (including age-appropriate autonomy and self-determination);[588]
> 2) *Rejecting:* instilling a fear of abandonment or denying the legitimacy of the child's needs;
> 3) *Terrorizing:* threatening a child with severe or sinister punishment or deliberately developing a climate of fear or threat;
> 4) *Ignoring:* depriving a child of essential stimulation and responsiveness or stifling emotional growth and intellectual development;
> 5) *Isolating:* cutting off a child from normal social experiences, preventing the child from forming friendships, or making the child feel alone in the world;
> 6) *Corrupting:* encouraging a child to develop false social values that reinforce antisocial or deviant behavioral patterns, such as aggression, criminal acts or substance abuse; or

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[587] *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65, 74-75 (1st Cir. 2004) (upholding provision that referenced "prevailing community standards" to determine whether a proposed ad demeans or disparages a person or group of persons); *see also Hopper v. City of Pasco*, 241 F.3d 1067, 1080 (9th Cir. 2001) ("This is not to say that community standards of decency have no place in the regulation of government property; our cases merely insist that such standards be reduced to objective criteria set out in advance.")

[588] *Cf.* "What is Child Abuse and Neglect," *United States Department of Health & Human Services Child Welfare Information Gateway* ("Emotional abuse (or psychological abuse) is a pattern of behavior that impairs a child's emotional development or sense of self-worth. This may include constant criticism, threats, or rejection, as well as withholding love, support, or guidance.") (https://www.childwelfare.gov/pubs/factsheets/whatiscan.cfm); Model Code on Education & Dignity: Presenting a Human Rights Framework for Schools (Aug. 2012), at p. 18 ("In order to ensure that every child receives a high quality education, schools must create healthy, respectful climates for learning where the fundamental dignity of students and all members of the school community is protected and nurtured. A school climate that protects human dignity exists when students feel socially, emotionally and physically safe, when there is mutual respect between teachers, students, parents or guardians, and when students' self-expression and self-esteem are supported.").

7) *Exploiting/trauma bonding:* manipulatively alternating between any of the foregoing forms of maltreatment and affirmation in order to maintain a relationship or exert control.

Application of this standard should account for the severity and repetitiveness of the violations. Either a substantial violation or a sustained and repetitive pattern of mild violations[589] will violate this standard. Factors relevant in determining the severity of a violation include the age of the child or children affected and whether:

1) it is deliberate and concerted;
2) singles a child or group of children out (e.g., by being personally insulting or socially stigmatizing);
3) relates to something the child did versus the child's basic identity (e.g., race, gender, sexual orientation);
4) the length of the incident;
5) the tone and hyperbole, if any, used; and
6) whether it is followed by other mitigating conduct (e.g., an apology).

*The following subparts to the Good Behavior Requirement add criteria drawn from Ridley (§ 4.3.6), Muller (§ 6.2.1), Morgan (§6.2.1), Harper (§ 6.2.2), Nuxoll (§ 6.2.2), Kowalski (§ 6.2.3), and S.J.W. (§ 6.2.3), without capturing within its scope merely offensive speech.*

Good Behavior Requirement. No person … shall be permitted to use a district facility if … the group's activities, curriculum or practices…

b. bully, ridicule, abuse, debase, or degrade students or cause them to question their self-worth;
c. are calculated to traumatize students or make them feel excluded, ashamed or unacceptable because of their lack of a shared core identifying characteristic, such as race, religion or sexual orientation;

*The following subpart to the Good Behavior Requirement promotes the core mission of public schools—to educate and encourage critical thinking and prepare students to become flourishing self-sufficient adults—and excludes groups that directly undermine that goal by promoting a fear of science or learning or manipulating children into insular or hidebound thinking.*

Good Behavior Requirement. No person … shall be permitted to use a district facility if … the group's activities, curriculum or practices…

d. discourage students from critical and open thinking by employing shame, conditional affirmation, or fear;
e. are calculated to stifle students' expressive, creative, and/or intellectual individuality;
f. are calculated to create in students a sense of powerlessness, fear, and dependency;

[589] See Adam M. Tomison & Joe Tucci, "Emotional Abuse; the hidden form of maltreatment," *Issues in Child Abuse Prevention*, No. 8 (Spring 1997) ("Emotional abuse is characterized by a sustained and repetitive pattern of behaviors occurring over time.").

*The following subparts to the Good Behavior Requirement add Fraser's obscene and vulgar speech limitations (§ 6.1) and Tinker's substantial disruption test (§ 6.1).*

> Good Behavior Requirement. No person … shall be permitted to use a district facility if … the group's activities, curriculum or practices…
>
> g. are directed to students and are obscene, vulgar or otherwise age-inappropriate;[590]
> h. substantially disrupt or interfere with the work, order, or discipline of the school;
> i. collide with the rights of other students, including interfering with their educational development…

*The following subparts to the Good Behavior Requirement draw upon Article 13 of the United Nations Convention on the Rights of the Child and Principal 2 of the United Nations Declaration of the Rights of the Child (1959).*

> Good Behavior Requirement. No person … shall be permitted to use a district facility if … the group's activities, curriculum or practices…
>
> j. are calculated to deprive a student—through shame, terror, intimidation, conditional approval, or other attempts at milieu control—the freedom to think openly and to seek, receive and impart information and ideas of all kinds; or
> k. are calculated to deprive a student from developing a moral, social, and/or spiritual identity in conditions of freedom and dignity.

## ➢ Defining the forum

*The provision immediately below would make the forum open to a wide range of uses and activities. The alternative provision that follows would limit the forum from the closing bell to 6 pm. to a closed set of exemplary categories.*

*Broad Forum Definition:*

> The District may make school facilities available for student and community-related activities and programs which are educational, cultural, social, recreational or civic in nature, primarily for the benefit of district students and residents and consistent with the District's educational mandate and all applicable state laws. Use of school facilities shall be subject to the following requirements….

[590] *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding NEA's substantial discretion to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants because of the NEA's educational mission).

*Public forum caselaw calls for extreme care (see especially §§ 4.3.3-4.3.5) in defining the school forum.*[591] *In the Narrow Forum Definition offered below, one of the approved categories would be student-led clubs, as defined by the Equal Access Act. Four of the categories would be community service, outdoor skills, and agricultural and horticulture skills groups, which would include most, if not all, Congressionally-chartered youth groups covered by the Boy Scouts Equal Access Act (§ 8.2). Another category would be—as suggested by CEF v. Anderson School District Five (§ 4.3.4)—extracurricular extensions of traditional classroom subjects. In view of the cases discussed in § 4.3.3, liberal arts programs are limited to those that are curricular, school program related (e.g., a school play or musical production), or that represent the school in competition. This alternative provision concludes with a requirement that the use bear a substantial and predominant relationship to one or more of the listed categories.*

*This alternative provision is also drafted in a way that accommodates a more open forum on evenings and weekends.*

*Narrow Forum Definition:*

> The District may make school facilities available between the closing bell and 6 p.m. for any of the following approved uses:
>
> 1) middle and high school student groups within the scope of the Equal Access Act, 20 U.S.C. § 4071, that are directed, conducted and controlled by students, and whose meetings are not regularly attended by non-students;
> 2) extracurricular extensions[592] of traditional classroom subjects, including academic competitions and technical programs (e.g., math, science, engineering, technical, and/or computer skill development), and non-technical liberal arts programs (e.g., arts, crafts, literature, music, dance, drama, debate). Unless the program is a technical program, in order to qualify the program must either:
>    a) provide students with class credit;
>    b) be school-sponsored and produce programs promoted by the school; or
>    c) represent the school in individual or team competitions and that use, with the school's permission, the name, logos, and identity of the school;
> 3) competitive nonprofit youth sports leagues;

[591] A district should be prepared to justify its selection of different forum categories against the argument, expressed in *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990), that faith-based uses would be "gerrymandered" out of the facilities on the basis of their religious content.

[592] **Note**: The "extracurricular extension" provision was not drafted with the intent to disqualify *student-led* middle and high-school faith based clubs from equal access. Indeed, the immediately preceding EAA provision expressly allows such groups. Were a school to include *only* the "extracurricular extension" provision suggested above, it would not, under many circumstances, disqualify student-led middle and high school clubs from access under the Equal Access Act (EAA). Access under the EAA is governed by the statute's text and the Supreme Court's narrow four-category test in *Mergens*. *See supra* § 8.1. Although the "extracurricular extension" provision above is slightly broader than Mergens' four-category test, it would still narrow the scope of the forum sufficiently to disqualify some faith-based groups from the *elementary* context, because the EAA does not regulate access to elementary school forums.

4) community service groups;
5) agricultural skills programs;
6) horticulture skills programs; or
7) outdoor skills programs.

To be eligible, the proposed or actual use must bear a substantial and predominant relationship to one or more of the categories.

## ➢ Classifying uses by speaker, audience, and time-slots

*For brevity's sake, the Model Policy in Appendix B does not classify facility uses by speaker, audience, or time-slots. But different degrees of sensitivity are appropriate for high school and elementary students. For example, a high school sports program or JROTC program might employ shouting and mild humiliation to motivate its players or recruits—conduct that would be inappropriate toward young elementary students. Also, because a school district has more constitutional flexibility to protect its youngest students from verbal abuse, a tiered approach may be better able to weather a legal challenge. To facilitate the development of a tiered approach to dignitary protections, the definitions below classify different uses.*

Definitions.

a. Audience Classifications
   i. A student-targeted program is a program directed to students, advertised on school grounds or through school communications facilities to students, or where a majority of audience participants are students.
   ii. A general-audience program is a program that does not fall within the definition of a student-targeted program.

b. Speaker Classifications
   i. A faculty-based program is a program directed, conducted and controlled by two or more District faculty members.
   ii. An educator-based program is a program directed, conducted and controlled by two or more members of the community that are licensed by this state to teach primary or secondary education.
   iii. A community-based program is a program directed, conducted and controlled by residents of the District.

c. Program Classifications
   i. An Equal Access Act student group is a middle or high school student group within the scope of the Equal Access Act, 20 U.S.C. § 4071, that is directed, conducted and controlled by students, and whose meetings are not regularly attended by non-students;
   ii. A curriculum-related program or group is a program or group falling into one of the four classifications set forth in *Westside School District v. Mergens*, 496 U.S. 226

(1990): (1) whose subject matter is actually taught, or will soon be taught, in a regularly offered course; (2) whose subject matter concerns the body of courses as a whole; (3) whose participation is required for a particular course; or (4) whose participation results in academic credit.

iii. A **Congressionally-chartered youth group** is a youth group as defined under 20 U.S.C. § 7905(b)(1), meaning any group or organization intended to serve young people under the age of 21.[593]

d. Time Slot Classifications
   i. The **afternoon period** refers to school days and spans the time of the first closing bell to [set time] hours after the last closing bell for the school.
   ii. The **evening period** refers to school days and commences at the conclusion of the afternoon period.
   iii. **Non-school days** refer to non-school days.

*The following grid segregates uses according to program and time-slot classifications. Many other arrangements are possible. The distinction between categories must be reasonably related to the purposes of the forum and viewpoint neutral. Also, all uses within a given category should be treated equally.*

| | High School or Middle School Facilities | | | Elementary School Facilities | | |
|---|---|---|---|---|---|---|
| | Afternoon Period | Evening Period | Non-School Days | Afternoon Period | Evening Period | Non-School Days |
| curriculum-related program or group | Y | Y | Y | Y | Y | Y |
| noncurriculum-related student groups (including Equal Access Act student groups) | Y | Y | Y | Y | Y | Y |
| outside youth or community groups (including Congressionally-chartered youth groups) | N | Y | Y | N | Y | Y |
| other student-targeted programs | Y | Y | Y | N | Y | Y |
| other general-audience programs | N | Y | Y | N | N | N |

[593] The Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905, defines a "youth group" as "any group or organization intended to serve young people under the age of 21" which is also one of the approximately 100 organizations listed in Title 36, subtitle II. In a Federal Register notice, the Department of Education suggested analytical factors for determining whether an organization is a Title 36 youth group. *See* 71 FR 14994, 14996 (Mar. 24, 2006).

*Alternative: According to the Eighth Circuit case of Victory Through Jesus Sports Ministry Foundation (§ 4.3.2), a district could effectively "freeze" the forum by limiting uses to those with a longstanding, or strongly reciprocal, relationship with the district.*

## ➢ Inclusiveness provision

*The following provision imposes non-discrimination requirements (see Martinez case, § 4.2) on the use of school facilities. However, it exempts Equal Access Act student groups in view of cases holding that schools cannot apply religious nondiscrimination requirements to them (see footnote 513). And it exempts youth groups in view of the anti-nondiscrimination provisions of the Boy Scouts Equal Access Act (§ 8.1).*

> Inclusiveness Requirement. All meetings must be non-exclusive and open to the public. No group that restricts its membership, attendance, or leadership by reason of racial, ethnic, or national origin; sexual orientation; or religious identity or commitment may use District facilities, with the following exceptions:
>
> a. A youth group that primarily serves young people under age 21, including but not limited to youth groups defined in the Boy Scouts of America Equal Access Act, 42 U.S.C. § 7905, may restrict its membership and leadership and/or include an oath of allegiance to God and country.
> b. A non-curriculum related student group, as described in the Equal Access Act, 20 U.S.C. § 4071 may restrict its leadership and membership on the basis of shared religious, political, and philosophical views if the group is led, directed, and controlled by students.

## ➢ Promissory provision

*In Healy v. James (§ 4.2), the Supreme Court held that a college could require a radical leftist student chapter to affirm its intention to comply with reasonable campus regulations and adhere to generally accepted standards of conduct. The following provision requires applicants to affirm in writing that they will refrain from behavior that abuses or demeans students or promotes disrespect for teachers. Applicants must agree to respect the inherent dignity and rights of each student, of people generally, regardless of their core identity, and—in a nod to the rights of children to be free from both physical and mental violence—to indemnify the district for any violation of a child's rights.*

> Promissory Requirement. Each group that applies for a facility use permit will affirm in writing that they will:
>
> a. refrain from behavior that abuses, degrades, demeans, humiliates, or bullies students;

b. refrain from provoking disrespect for, or imputing improper motives to, the District's teachers and employees in any program directed to students;[594]
c. respect the inherent dignity and rights of each student, and of people generally, regardless of race, color, religion, creed, ancestry, age, sex, sexual orientation, physical handicap or national origin;[595] and
d. fully indemnify the District from any claims that may arise out of any violation of a child's rights.

## ➢ Transparency provision

*The following provision imposes transparency requirements, requiring the submission of organizing and governing documents and any curricular materials.*[596]

Transparency Requirement. Any group that applies for a facility use permit must submit the following documents, in searchable electronic form if available:

a. the organizing documents (e.g., articles of incorporation, by-laws, and charter, if any) of the organization;
b. any governing document setting forth requirements or prerequisites for leadership or membership;
c. any curricular materials for any program directed primarily toward students; and
d. any and all changes to previously submitted documents listed above.

## ➢ Procedural safeguards

*The following model provision—taking note of the strict scrutiny applied to speech restrictions in public forums (§ 4)—imposes a broad swath of procedural safeguards. Although the extent to which such procedural safeguards are required in a limited public forum is uncertain, the prudent course is to implement them.*

Viewpoint neutrality. The District facilities coordinator shall administer this Policy in a manner that does not discriminate based on viewpoint.

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[594] *See Bethel Sch. Dist.*, 478 U.S. at 682 ("The Rules of Debate applicable in the Senate … provide that a Senator may be called to order for imputing improper motives to another Senator…. Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?").

[595] *See* Model Code on Education & Dignity § 1.1(B)(1) (stating that one of the aims of education is to "develop[] understanding, peace and respect among all people").

[596] *See CLS v. Martinez*, 130 S. Ct. 2971, 2980 (2010) (noting and not objecting to the fact that Hastings's application process required CLS to submit the set of bylaws mandated by CLS-National); *Good News Club v. Milford Central School*, 533 U.S. 98, 137-38 (2001) (Stevens, J., dissenting) (describing a sample lesson from the Club's curriculum).

Application Review Process

a. A qualifying request for a new facilities use must be filed at least 12 weeks in advance and be accompanied by a complete Application.
b. Applications to renew an existing facility use must be filed every year at least 4 weeks in advance of the requested use, and must include, if not provided previously, the information set forth in § [insert section].
c. An Application for a new facilities use or to renew an existing use is not a qualifying application if the Applicant has had an Application denied or revoked in the previous 2 years.
d. The District facilities coordinator (DFC) will review and approve or provisionally deny the Application. The DFC may delegate some or all of the review to a school psychologist. The DFC may ask the Applicant to provide information to facilitate the review. Failure to provide the requested information shall be treated as a withdrawal of the Application.
e. If the DFC finds that an Applicant is disqualified because of noncompliance with this Policy, then the DFC will provide the Applicant with notice of a denial of the Application along with a written explanation identifying the Policy provisions breached and the materials or incidents breaching those provisions.
f. In the case of a denial or revocation of a facilities use application, the applicant or existing permit holder may, within 2 weeks, request a review by the School Board. The Applicant may also request a hearing before, and present evidence to, the Board. The Board will render a decision with written findings.
g. If the DFC or the Board does not issue a decision on a timely and complete Application at least 1 week before the requested use, then the Application will be treated as approved until and if the Board revokes the approval.
h. A parent of a District student may request review by the School Board to revoke a facility use permit for noncompliance with this Policy. Such a request must be accompanied by a notarized statement that explains the facts pertaining to the alleged noncompliance.

# Appendix B:
# Model Facility Use Policy

The District may make school facilities available for student and community-related activities and programs which are educational, cultural, social, recreational or civic in nature subject to the following requirements:

1. Good Behavior Requirement. No person, group or organization shall be permitted to use a district facility if a reasonably prudent person, applying prevailing community or professional standards, would find that the group's activities, curriculum or practices:
    a. engage in physical, emotional, or psychological maltreatment of children;
    b. bully, ridicule, abuse, debase, or degrade students or cause them to question their self-worth;
    c. are calculated to traumatize students or make them feel excluded, ashamed or unacceptable because of their lack of a shared core identifying characteristic, such as race, religion or sexual orientation;
    d. discourage children from critical and open thinking by employing shame, conditional affirmation, or fear;
    e. are directed to students and are obscene, vulgar or otherwise age-inappropriate;
    f. substantially disrupt or interfere with the work, order, or discipline of the school; or
    g. collide with the rights of other students, including interfering with their educational development.

2. Criteria for establishing emotional or psychological maltreatment. Emotional or psychological maltreatment is defined as acts or statements that would, when applying an objective professional community standard, be considered damaging to children, and that fall into one or more of the following categories:

    1) *Degrading:* undermining a child's sense of self-worth, social competence, self-confidence, or development of self (including age-appropriate autonomy and self-determination);
    2) *Rejecting:* instilling a fear of abandonment or denying the legitimacy of the child's needs;
    3) *Terrorizing:* threatening a child with severe or sinister punishment or deliberately developing a climate of fear or threat;
    *4) Ignoring:* depriving a child of essential stimulation and responsiveness or stifling emotional growth and intellectual development;
    5) *Isolating:* cutting off a child from normal social experiences, preventing the child from forming friendships, or making the child feel alone in the world;
    6) *Corrupting:* encouraging a child to develop false social values that reinforce antisocial or deviant behavioral patterns, such as aggression, criminal acts or substance abuse; or
    7) *Exploiting/trauma bonding:* manipulatively alternating between any of the foregoing forms of maltreatment and affirmation in order to maintain a relationship or exert control.

Application of this standard should account for the severity and repetitiveness of the violations. Either a substantial violation or a sustained and repetitive pattern of mild violations will violate this standard. Factors relevant in determining the severity of a violation include the age of the child or children affected and whether:

1) it is deliberate and concerted;
2) it singles out a child or group of children (e.g., by being personally insulting or socially stigmatizing);
3) it relates to something the child did (e.g., a misdeed) versus the child's basic identity (e.g., race, gender, sexual orientation);
4) the length of the incident;
5) the tone and hyperbole, if any, used; and
6) whether it is followed by other mitigating conduct (e.g., an apology).

3. Inclusiveness Requirement. All meetings must be non-exclusive and open to the public. No group that restricts its membership, attendance, or leadership by reason of racial, ethnic, or national origin; sexual orientation; or religious identity or commitment may use District facilities, with the following exceptions:
    a. A youth group that primarily serves young people under age 21, including but not limited to youth groups defined in the Boy Scouts of America Equal Access Act, 42 U.S.C. § 7905, may restrict its membership and leadership and/or include an oath of allegiance to God and country.
    b. A non-curriculum related student group, as described in the Equal Access Act, 20 U.S.C. § 4071 may restrict its leadership and membership on the basis of shared religious, political, and philosophical views if the group is led, directed, and controlled by students.

4. Promissory Requirement. Each group that applies for a facility use permit will affirm in writing that they will:
    a. refrain from behavior that abuses, degrades, demeans, humiliates, or bullies students;
    b. refrain from provoking disrespect for, or imputing improper motives to, the District's teachers and employees;
    c. respect the inherent dignity and rights of each child, and of people generally, regardless of race, color, religion, creed, ancestry, age, sex, sexual orientation, physical handicap or national origin; and
    d. fully indemnify the District from any claims that may arise out of any violation of a child's rights.

5. Transparency Requirement. Any group that applies for a facility use permit must submit the following documents, in searchable electronic form if available:
    a. the organizing documents (e.g., articles of incorporation, by-laws, and charter, if any) of the organization;
    b. any governing document setting forth requirements or prerequisites for leadership or membership;

c. any curricular materials for any program directed primarily toward students; and
d. any and all changes to previously submitted documents listed above.

6. Administration. The use of all facilities in the district during non-school hours must be approved by the District facilities coordinator, who will schedule the use of school facilities, ensure that economical and efficient use is made of the time and space available, and issue permits.

7. No Viewpoint Discrimination. The District facilities coordinator shall administer this Policy in a manner that does not discriminate based on viewpoint.

8. Application Review Process
   a. A qualifying request for a new facilities use must be filed at least 12 weeks in advance and be accompanied by a complete Application.
   b. Applications to renew an existing facility use must be filed every year at least 4 weeks in advance of the requested use, and must include, if not provided previously, the information set forth in § 5.
   c. An Application for a new facilities use or to renew an existing use is not a qualifying application if the Applicant has had an Application denied or revoked in the previous 2 years.
   d. The District facilities coordinator (DFC) will review and approve or provisionally deny the Application. The DFC may delegate some or all of the review to a school psychologist. The DFC may ask the Applicant to provide information to facilitate the review. Failure to provide the requested information shall be treated as a withdrawal of the Application.
   e. If the DFC finds that an Applicant is disqualified because of noncompliance with this Policy, then the DFC will provide the Applicant with notice of a denial of the Application along with a written explanation identifying the Policy provisions breached and the materials or incidents breaching those provisions.
   f. In the case of a denial or revocation of a facilities use application, the applicant or existing permit holder may, within 2 weeks, request a review by the School Board. The Applicant may also request a hearing before, and present evidence to, the Board. The Board will render a decision with written findings.
   g. If the DFC or the Board does not issue a decision on a timely and complete Application at least 1 week before the requested use, then the Application will be treated as approved until and if the Board revokes the approval.
   h. A parent of a District student may request review by the School Board to revoke a facility use permit for noncompliance with this Policy. Such a request must be accompanied by a notarized statement that explains the facts pertaining to the alleged noncompliance.