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**OF PERMISSION SLIPS AND HOMOPHOBIA:  
PARENTAL CONSENT POLICIES FOR SCHOOL  
CLUB PARTICIPATION AIMED AT GAY-  
POSITIVE STUDENT GROUPS**

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Gay-positive student groups, often called “Gay-Straight Alliances” (“GSAs”), have become more and more common in the nation’s high schools in recent years. They are a way for all students to show their commitment to equality and their acceptance of others, regardless of their sexual orientation. They may also function as a support group for gay, lesbian, bisexual, and questioning youth trying to come to terms with the intolerance they face from peers, family members, and their broader communities. The need for such support is vividly shown by the strident opposition from parents and social conservatives that often accompanies students’ efforts to form GSAs. One way schools react to attempts by students to form such clubs is by requiring that parents consent before students can participate in school clubs. These parental consent policies are facially evenhanded in that they apply to all clubs and do not single out GSAs. The context of their adoption, however, usually reveals that they are uniquely directed at the gay-positive groups, whose founding motivated the policies. Despite their evenhandedness, parental consent policies can be challenged under the federal Equal Access Act of 1984, which requires that student groups get “equal access” to school resources.<sup>1</sup> These policies can also be challenged as violating students’ constitutional rights of association, equal protection, and privacy.

Although there are surely some who oppose gay-positive student clubs expressly because of animus toward gays and lesbians or out of a belief that homosexuality is morally wrong, one distinct argument frequently made against GSAs is that students should not participate in clubs that are based on sex. School officials sometimes argue, for example, that GSAs violate schools’ abstinence-only policies.<sup>2</sup> Because this argument is fundamentally misguided and potentially distracting from the issues that form the focus of this article, it must

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<sup>1</sup> 20 U.S.C. §§ 4071–4074 (2006).

<sup>2</sup> See, e.g., *Gonzalez v. Sch. Bd. of Okeechobee County*, 571 F. Supp. 2d 1257, 1263 (S.D. Fla. 2008) (examining and rejecting school board’s argument that recognizing GSA “would compromise its abstinence only program”).

be dismissed at the outset. GSAs are not groups devoted to having sex or discussing sex; they are devoted to acceptance of human differences, specifically differences in sexual orientation.<sup>3</sup> Associations based on sexual orientation are already commonplace and uncontroversial in high schools: dating between boys and girls is ubiquitous, tolerated, and even officially sanctioned at many schools with homecoming king and queen competitions, for example. Opposite-sex dating is founded upon a shared heterosexuality, but it does not necessarily involve having sex, talking about sex, or even thinking about sex. Similarly, while GSAs are founded upon, *inter alia*, a shared tolerance of homosexuality, they need not involve sex at all. Thus, the fear of children engaging in sexual activity is a red herring in controversies over GSAs: the real issues are children's right to associate around shared values and the hostility toward homosexuality that motivates community opposition to such groups.

Part I of this article describes some parental consent policies at the local and state level. Part II discusses the Equal Access Act and argues that parental consent policies violate that law. Parts III and IV argue that parental consent policies violate children's First Amendment rights to expressive and intimate association, respectively. Parts V and VI set out arguments based on the privacy and equal protection rights of children. Finally, Part VII examines whether the constitutional rights discussed herein are weaker for children than they would be for adults. I leave this question until the end so as not to confuse the

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<sup>3</sup> Each student group of course controls its own mission and activities, so this statement is necessarily a generalization. The Gay, Lesbian and Straight Education Network (GLSEN), which provides resources for GSAs across the nation, gives the following mission statement as an illustrative example in its guide to starting a GSA:

Our mission is to work toward a more accepting environment for all people, regardless of sexual orientation or gender identity, through education, support, social action and advocacy. We believe that schools can be truly safe only when every student is assured of access to an education without fear of harassment or violence. The GSA welcomes lesbian, gay, bisexual and transgender persons, questioning youth, and their heterosexual allies.

THE GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, THE GLSEN JUMP-START GUIDE PART 1, 8, [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/000/974-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/000/974-1.pdf) (last visited Oct. 21, 2009). The by-laws of a GSA that was prevented from meeting until the school board lost a lawsuit read as follows:

- A. To promote tolerance and equality among students of all sexual orientations and gender identities through educational efforts and awareness-building.
- B. To inform members and the student body of issues and events effecting [sic] the lives of lesbian, gay, bisexual, transgender, and straight ally youth.
- C. To create a safer, more respectful learning environment for all students.
- D. To work in coalition with administration and other on-campus clubs to expose and dismantle oppressions and prejudice in all of their expressions.
- E. To create a safe, welcoming space for LGBT and Straight Ally students to socialize and talk together about issues they hold in common.

*Gonzalez*, 571 F. Supp. 2d at 1262.

analysis of each of the rights in question as they are discussed in their respective sections.

### I. PARENTAL CONSENT POLICIES

In recent years there has been a flurry of activity in school boards and state legislatures directed at student groups in grade schools. The pattern is clear: when one or more GSA or other gay-positive group tries to form as a school club, social conservatives object. The relevant legislative body, whether it is the administration of the school or the district school board, cannot legally ban only gay-positive groups on the basis of the content of their speech, so it creates a policy that applies to all clubs. These policies generally take one of two forms: either an opt-out policy that informs parents about all the clubs at their children's school and lets them prevent their children from joining certain clubs, or a permission slip policy that requires written consent by the parent before students can participate in any club.

In Hillsborough County, Florida, the school board considered a proposal by the Superintendent requiring parental permission to join student clubs after a GSA formed at a school in the county.<sup>4</sup> The school board rejected that proposal by a vote of four to two.<sup>5</sup> In its place, they unanimously adopted an opt-out policy that allows parents to prevent their children from joining certain clubs and limit the number of clubs children can join.<sup>6</sup> Also in Florida, the formation of a GSA in a Nassau County high school caused the school board to temporarily halt the activity of all clubs in the school district and require parental permission for all club participants once they were allowed to meet again.<sup>7</sup> The new rules were issued just days after the American Civil Liberties Union ("ACLU") contacted the school board regarding the GSA and the shutting down of school clubs.<sup>8</sup> One school board member, however, denied that the changes were intended to prevent the GSA from meeting.<sup>9</sup> Even under the permission-slip regime, the school board tried to stop the GSA, at least so long as it was

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<sup>4</sup> Letitia Stein, *Plan Allows Parents to Veto Clubs*, ST. PETERSBURG TIMES, Feb. 1, 2007, at 1B, available at 2007 WLNR 2010255.

<sup>5</sup> *Id.*

<sup>6</sup> Compare Letitia Stein, *Teachers Lash Out at Board Meeting*, ST. PETERSBURG TIMES, Feb. 14, 2007, at 1B, available at 2007 WLNR 2940480 (permission slips required for Okeechobee County, Florida students to attend club meetings), with Rachel Simonsen, *Name Change Could Solve Gay Club's Lawsuit*, PALM BEACH POST, Nov. 16, 2007, at 1B (not clear whether permission is required for all clubs or only GSA).

<sup>7</sup> Mary Kelli Palka, *ACLU: We'll Sue Nassau if Gay Club Nixed*, FLORIDA TIMES-UNION (Jacksonville), Dec. 11, 2008, at B-1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ("Nassau County School Board member Muriel Creamer . . . said the change was not made to prevent forming a Gay-Straight Alliance at Yulee High. 'No, I don't feel that way,' she said. 'I feel we're trying to be fair to everybody.'").

called a “Gay-Straight Alliance.”<sup>10</sup> Before the school district settled the AC-LU’s lawsuit against it, it argued that the GSA’s name violated the school’s abstinence-only policy and would be disruptive.<sup>11</sup> The litigation resulted in a permanent injunction from a federal district court requiring the school to allow the GSA to meet under its desired name.<sup>12</sup>

In Farmington, New Mexico, the school board considered eliminating all extracurricular clubs in all of the schools in the district in order to prevent a proposed GSA from meeting.<sup>13</sup> The board decided to keep school clubs and allow the GSA to form, but enacted a policy requiring permission slips and enabling preemptive parental opt-outs.<sup>14</sup> The board also initiated a resolution asking the state legislature to “forbid clubs from forming that discuss sexual matters.”<sup>15</sup> After community objections to a GSA in Currituck County, North Carolina, the superintendent implemented “a requirement that students have parental permission to join [extracurricular] groups.”<sup>16</sup> The school board in Norwalk, Iowa, considered a policy requiring permission slips for non-curricular clubs after a GSA was started by high school students.<sup>17</sup> In Irmo, South Carolina, the formation of a GSA caused the high school’s principal to resign, saying that the club conflicted with his “professional beliefs and religious convictions.”<sup>18</sup> Afterward, the school district considered a policy for all non-academic and non-sports-related clubs under which they “could be banned from using the school’s name, require parental permission or participation and be

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<sup>10</sup> Michael Parnell, *YHS Gay-Straight Alliance Gets Legal OK*, FERNANDINA BEACH NEWS-LEADER, Aug. 12, 2009, available at <http://www.fbnewsleader.com/articles/2009/08/12/today/web%20wed.txt> (“[A]fter one meeting, [the GSA was] told the school board would only allow them to form the club if they changed the name to drop the word ‘gay.’”).

<sup>11</sup> Mary Kelli Palka, *Partial Final Order Entered in Yulee Gay-Straight Alliance Case*, FLORIDA TIMES-UNION (Jacksonville), Aug. 10, 2009, at A-1.

<sup>12</sup> *Id.*

<sup>13</sup> Cory Frolik, *Gay-Straight Alliance Club Hangs in the Balance*, FARMINGTON DAILY TIMES (N.M.), Oct. 10, 2007.

<sup>14</sup> Cory Frolik, *Gay-Straight Club Gets an OK: Board Votes to Uphold Policy*, FARMINGTON DAILY TIMES (N.M.), Oct. 11, 2007.

<sup>15</sup> *Id.*

<sup>16</sup> Hattie Brown Garrow, *An Alliance of Acceptance*, VA. PILOT & LEDGER-STAR (Norfolk), Nov. 8, 2007, at 10, available at 2007 WLNR 22026568.

<sup>17</sup> Sara Sleyster, *Students Say Permission Slips Unfairly Target Gay-Straight Alliance*, DES MOINES REGISTER, May 20, 2009 (“Some of the reaction district officials have received from parents about the GSA did cause the board to look specifically at that policy, Norwalk Superintendent Denny Wulf said.”).

<sup>18</sup> *The Principal’s Letter*, COLUMBIA STATE (S.C.), May 22, 2008, available at 2008 WLNR 9614607. The principal revealed his confusion regarding the purpose of the GSA, stating: “I feel the formation of a Gay/Straight Alliance Club at Irmo High school implies that students joining the club will have chosen to or will choose to engage in sexual activity with members of the same sex, opposite sex, or members of both sexes.” *Id.*

forced to raise money off campus, among other things.”<sup>19</sup> The permission slip requirement was approved.<sup>20</sup> In 2003, the Klein Independent School District, near Houston, Texas, settled an ACLU lawsuit challenging its attempt to keep a GSA from forming.<sup>21</sup> The permission slip policy that had been instituted after the GSA applied for permission to meet on campus remained intact after the settlement.<sup>22</sup> There is no reason to think this short list of examples of local policies is exhaustive.

Two states, Georgia and Utah, have written parental consent policies into their statutes. Georgia enacted an opt-out statute in 2006 that allows a parent to “decline permission for his or her student to participate in a club or organization.”<sup>23</sup> The law requires that school boards distribute information about each club’s name, purpose, faculty advisor, and planned activities at the beginning of the school year and provide a form for parents to designate which clubs their children may not participate in.<sup>24</sup> Students must also obtain written permission to participate in clubs formed after the beginning of the school year.<sup>25</sup> This law “was seen as an attempt by conservative lawmakers to thwart support clubs for gay and lesbian students.”<sup>26</sup> The Christian Coalition supported the passage of the law.<sup>27</sup> Its chairperson said, “[T]here are some clubs that may fly in the face

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<sup>19</sup> Joy L. Woodson, *District 5 to Vote on Clubs Today*, COLUMBIA STATE (S.C.), June 9, 2008, at a1, available at 2008 WLNR 10835669. As in other cases, school board officials made clear that the permission slip policy was not the preferred reaction to a GSA, but that the board’s options were constrained by the law. *See id.* (“‘The law does not permit us to do what a lot of the community would like,’ board member Roberta Ferrell said at a recent meeting—meaning, banning only the Gay-Straight Alliance.”).

<sup>20</sup> *Parental Permission Required for ‘Gay’ Club*, WORLD NET DAILY, June 25, 2008, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=68006>.

<sup>21</sup> Lucas Wall, *Gay Club ‘a Matter of Law,’* HOUSTON CHRONICLE, Mar. 6, 2003, at A21, available at 2003 WLNR 16442694. The district’s superintendent made clear that he opposed allowing the GSA to meet but recognized that banning only the GSA would be illegal. *Id.* (“‘From my perspective, it was very simple: We didn’t need any club based on sexuality,’ Superintendent Jim Surratt told reporters at a news conference.”).

<sup>22</sup> “[The policy] also prohibits any club that ‘promotes, encourages, or condones, directly or indirectly, participation in any conduct by students that is classified as a criminal offense under Texas law, or that poses a risk to their health, safety, or welfare (including, but not limited to, sexual activity by minors).’” *Id.* (quoting the policy). Since this policy was adopted before *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down the Texas law making sodomy a crime), it is likely that the policy’s language was drafted out of concern that the GSA’s activities would involve the promotion of sodomy.

<sup>23</sup> GA. CODE ANN. § 20-2-705(b) (2006).

<sup>24</sup> *Id.*

<sup>25</sup> GA. CODE ANN. § 20-2-705(c) (2006).

<sup>26</sup> Linda Jacobson, *Georgia: Aid, Social Issues Top Education Agenda*, EDUC. WEEK, June 14, 2006, at 16, available at 2006 WLNR 10903608.

<sup>27</sup> Bridget Gutierrez, *Legislature 2006: Concession on School Club Rules Perdue Gets*

of traditional family values and parents have the right to know.”<sup>28</sup>

Utah enacted an extensive school clubs law in 2007 that requires “written parental or guardian consent for student participation in all curricular and noncurricular [sic] clubs.”<sup>29</sup> The law also requires schools to deny access to clubs as necessary to “maintain the boundaries of socially appropriate behavior” and where “a significant part of their conduct or means of expression . . . involve[s] human sexuality.”<sup>30</sup> The law’s co-sponsor said “he saw the need for the measure after parents from a high school in Provo, Utah, protested the formation of a gay-straight club in 2005.”<sup>31</sup> That legislator seems to think that the “boundaries of socially appropriate behavior” language would allow GSAs that meet for anything other than “friendship” to be kept out of schools altogether.<sup>32</sup>

In 2007, state legislatures across the country considered bills that would require parental permission or give parents opt-out control over their children’s participation in student groups. Legislators in Missouri introduced a bill requiring written parental permission for students to join clubs or participate in extracurricular activities.<sup>33</sup> Both permission slip bills and opt-out bills were also introduced in Tennessee.<sup>34</sup> A permission slip bill introduced in Texas would prohibit student clubs from “engag[ing] in activity involving human sexuality.”<sup>35</sup> In Oklahoma, a bill was introduced that would require that school boards notify parents of student clubs and “provide [them] with an opportunity to withhold permission for a student to join or participate in one or more clubs or organizations.”<sup>36</sup> A bill that would require school boards to adopt either an opt-out or permission slip policy was passed overwhelmingly by the Virginia House of Delegates but died in committee in the state’s senate.<sup>37</sup>

## II. EQUAL ACCESS ACT

The Equal Access Act of 1984<sup>38</sup> (“EAA”) prohibits the denial of equal ac-

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*Bill on Permission Slips*, ATLANTA J. & CONST., Apr. 1, 2006, at E6, available at 2006 WLNR 5465915.

<sup>28</sup> *Id.*

<sup>29</sup> UTAH CODE ANN. § 53A-11-1210 (Lexis 2006 & Supp. 2008).

<sup>30</sup> UTAH CODE ANN. § 53A-11-1206 (Lexis 2006 & Supp. 2008).

<sup>31</sup> Kirk Johnson, *Utah Sets Rigorous Rules for Clubs, and Gay Ones May Be Target*, N.Y. TIMES, Mar. 17, 2007, at A10, available at 2007 WLNR 5065508.

<sup>32</sup> *See id.*

<sup>33</sup> H.B. 35, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007).

<sup>34</sup> S.B. 1133/H.B. 905, 105th Gen. Assem., 1st Sess. (Tenn. 2007); S.B. 2079/H.B. 868, 105th Gen. Assem., 1st Sess. (Tenn. 2007).

<sup>35</sup> H.B. 1017, 80th Leg., Reg. Sess. (Tex. 2007).

<sup>36</sup> H.B. 1569, 51st Leg., 1st Sess. (Okla. 2007).

<sup>37</sup> H.B. 1727, 2007 Leg., Reg. Sess. (Va. 2007); Bill Tracker, Virginia General Assembly Legislative Information System, <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+HB1727H2>.

<sup>38</sup> 20 U.S.C. §§ 4071–4074 (“It shall be unlawful for any public secondary school which

cess to students wishing to conduct a meeting within any limited open forum at a school that receives federal funds where that denial is based on the content of the speech at the meeting.<sup>39</sup> The original motivation behind the EAA was to protect the rights of religious student groups to meet in schools, but the act protects student groups' access from being restricted because of the "political, philosophical, or other content" of their speech, as well.<sup>40</sup> Federal courts have found that gay-positive student groups, such as GSAs, are protected by the EAA.<sup>41</sup> The question for my purposes is whether a policy that is evenhanded in its application to all student groups but is based on discriminatory animus, or that creates special hardship for certain groups, can violate the EAA.

The EAA proscribes three actions by schools. A school may not: (1) deny equal access to, (2) deny a fair opportunity to, or (3) discriminate against students trying to meet based on the content of their speech.<sup>42</sup> I will examine each prohibition in turn.

#### A. *Equal Access*

The EAA does not define "equal access."<sup>43</sup> The Supreme Court said very little about the phrase in its sole decision interpreting the act, *Board of Education of the Westside Community Schools v. Mergens*.<sup>44</sup> However, in line with its command that the EAA be interpreted broadly,<sup>45</sup> the Court did require that schools give all clubs the same official recognition, including access to bulletin boards and the public address system.<sup>46</sup>

receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”).

<sup>39</sup> *Id.* at § 4071.

<sup>40</sup> 20 U.S.C. § 4071; *see also* 130 CONG. REC. 19,221 (1984) (statement of Sen. Leahy) (“Religious speech will not be singled out for separate treatment . . . . Under the [EAA], a limited open forum is available to young people to meet and discuss religious, political, philosophical, and other ideas.”).

<sup>41</sup> *E.g.*, *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003) (finding EAA violation where school officially banned all clubs but allowed certain clubs not including GSA in practice); *Gonzalez v. Sch. Bd.*, 571 F. Supp. 2d 1257, 1263–66 (S.D. Fla. 2008) (collecting cases).

<sup>42</sup> 20 U.S.C. § 4071(a); *see Prince v. Jacoby*, 303 F.3d 1074, 1080 (9th Cir. 2002) (“The disjunctive prohibition renders the denial of equal access *or* fair opportunity *or* discrimination unlawful. The use of the disjunctive ‘or’ suggests that ‘equal access’ and ‘discriminate against’ have meaning independent of ‘fair opportunity.’”).

<sup>43</sup> *See* 20 U.S.C. §§ 4071–4072 (defining several terms, but not “equal access”).

<sup>44</sup> *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226 (1990).

<sup>45</sup> *See id.* at 239 (“A broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes.”).

<sup>46</sup> *Id.* at 247.

The Second Circuit interpreted “equal access” in *Hsu v. Roslyn Union Free School District*.<sup>47</sup> In *Hsu*, an after-school Bible club wanted to require that its officers be Christians.<sup>48</sup> The school district refused to allow the requirement, arguing that it conflicted with the district’s anti-discrimination policy.<sup>49</sup> The court found that the EAA required the school district to allow the club to discriminate on the basis of religion in choosing some of its leaders, since that discrimination was essential to the club’s religious, sectarian speech.<sup>50</sup>

There were two steps to the *Hsu* court’s application of the EAA.<sup>51</sup> First, before it could inquire into the application of the Act’s equal access provision, the court had to examine whether the school district’s refusal to recognize the club was based on the religious content of the club’s speech.<sup>52</sup> The court found that the club’s exclusionary policy constituted “speech” because it was “reasonably designed to assure that a certain type of religious speech will take place at the Club’s meetings.”<sup>53</sup> This is because group leaders were responsible for leading the group in prayer and “safeguarding the ‘spiritual content’ of the meetings.”<sup>54</sup> The court also reasoned that the EAA “contains an implicit right of expressive association when the goal of that association is to meet for a purpose protected by the Act.”<sup>55</sup> Therefore, the constitutional jurisprudence on the right to exclude as part of the right to free association is relevant to the club’s free association rights under the EAA.<sup>56</sup> The court warned, however, that the constitutional right to free association is not absolute, and a statutory right to associate in a public school might be weaker.<sup>57</sup>

The second step in the statutory analysis was to ask whether the school district had denied “equal access” to the club.<sup>58</sup> Most important for present purposes, the Second Circuit held that the evenhandedness of the school district’s nondiscrimination rule was not sufficient to guarantee the equal access required by the EAA.<sup>59</sup> The court gave the following example: “A rule against wearing hats in the school building, perfectly and consistently enforced, might deprive Jewish students of equal access to after-school facilities for shared religious

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<sup>47</sup> *Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996).

<sup>48</sup> *Id.* at 849.

<sup>49</sup> *Id.* at 850–51.

<sup>50</sup> *Id.* at 872–73. The court found that the plaintiffs were likely to succeed on their EAA claim and remanded for the issuance of a preliminary injunction allowing the club to apply the requirement to some of its leaders. *Id.*

<sup>51</sup> *See id.* at 856, 859.

<sup>52</sup> *Id.* at 856 (quoting 20 U.S.C. § 4071(a)).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 858.

<sup>55</sup> *Id.* at 859.

<sup>56</sup> *See id.* at 858–59 (citing, *inter alia*, *NAACP v. Alabama*, 357 U.S. 449 (1958)).

<sup>57</sup> *See id.* at 859.

<sup>58</sup> *Id.* at 859–62.

<sup>59</sup> *See id.* at 860.



observance.”<sup>60</sup> Letting the club discriminate on the basis of religion would not give it special rights, since every club can choose its officers based on criteria relevant to the subject matter of the club. And since the “program and purpose [of this club] are religious and sectarian, the requisite level of commitment and belief is quite naturally expressed in terms of religious belief.”<sup>61</sup> Consequently, equal access means letting the club have a religious test for leadership, notwithstanding the school’s nondiscrimination policy.<sup>62</sup> Again, the court ended its discussion of this point with a warning: The EAA’s “mandate of equal access can be trumped by the School’s responsibility for upholding the Constitution, for protecting the rights of other students, and for maintaining ‘appropriate discipline in the operation of the school.’”<sup>63</sup>

The *Hsu* court’s reasoning is enormously helpful to understanding why parental consent policies violate the EAA. First, the court brought expressive association principles to bear on the right to speech under the Act.<sup>64</sup> That analysis led the Second Circuit to conclude that the EAA gives student groups a right to exclude, but it also supports the proposition that the EAA gives students a right to privacy in their associations.<sup>65</sup> The requirement that students have their parents’ permission for club participation is based on the content of students’ speech because the right to “speech” includes the right not to disclose one’s associations.<sup>66</sup> That is, parental consent policies prevent students from engaging in a particular kind of speech: associations that are not known to their parents. Therefore, parental consent policies violate the EAA by infringing on students’ rights to keep their associations from their parents.<sup>67</sup> *A fortiori*, parental consent policies infringe on students’ free association rights by allowing parents to prevent students from engaging in certain kinds of expressive association altogether.

Of course, the constitutional right to privacy in one’s associations can be overcome by a compelling governmental interest.<sup>68</sup> And, as the *Hsu* court pointed out, the right to associate under the EAA may be weaker because it derives from a statute and because it applies in public schools, where speech rights are generally weaker.<sup>69</sup> Below, I make a sustained argument that ad-

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 860–61.

<sup>62</sup> *See id.* at 861.

<sup>63</sup> *Id.* at 862 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

<sup>64</sup> *See id.* at 859.

<sup>65</sup> *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (finding a vital relationship between freedom to associate and privacy in one’s associations).

<sup>66</sup> *See id.* at 462.

<sup>67</sup> *See id.*; *Hsu*, 85 F.3d at 859–62.

<sup>68</sup> *E.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

<sup>69</sup> *See Hsu*, 85 F.3d at 859.

addresses the balance of government and individual interests in the sections about the constitutional right to associate.

Second, the *Hsu* court's broad reading of "equal access" makes clear that evenhanded school policies can violate the EAA when they interfere with students' ability to speak. Because some students who want to participate in a gay-positive club would be chilled or completely prevented from doing so by a parental consent policy, such policies restrict student speech.<sup>70</sup> In addition to the inherent interest in privacy for all associations,<sup>71</sup> gay-positive groups have a special interest in privacy because of the special significance that "coming out" has for gay and lesbian youth.<sup>72</sup> This means that an evenhanded parental notice or consent rule constitutes a denial of equal access to gay-positive clubs.

Just as the *Hsu* court recognized that Christian students "might reasonably expect that the prayers at a Club meeting led by non-Christians would be different than the prayers led by Christians,"<sup>73</sup> gay-positive clubs can reasonably expect that the essential activities of a group dedicated to tolerance and acceptance would be different if its membership were limited by parental disapproval. Furthermore, the *Hsu* court took note of the fact that "religious groups have historically been the object of hostility and persecution" and that the students' concern about their ability to engage in the kind of expression they wanted to under the school's policy was "enough to chill their speech."<sup>74</sup> Without downplaying the history of religious persecution, I have to point out that the idea that a Christian club on Long Island would face anything that could meaningfully be called "hostility and persecution" is hard to take seriously.<sup>75</sup> Gay and lesbian students and the groups they form, on the other hand, face hostility and persecution to a degree that most people would likely be ashamed to admit still happens in our society.<sup>76</sup> And, as I have argued, parental notice and consent

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<sup>70</sup> In this passage, I focus on the application of the EAA to gay-positive clubs. Some of these considerations apply equally to other student groups, membership in which students have an interest in keeping private from their parents. Other kinds of clubs may also have unique privacy concerns that would make parental notice or consent policies violate their EAA rights.

<sup>71</sup> The interest in privacy in group association is stronger where the group espouses dissident beliefs. See *NAACP v. Alabama*, 357 U.S. at 462.

<sup>72</sup> See Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interests for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1076 (2008) ("Regardless of age, the 'coming out' process creates unique stressors for queer youth because they must learn to understand and integrate a stigmatized identity, generally without support from family or friends and usually with little accurate information or resources.").

<sup>73</sup> *Hsu*, 85 F.3d at 860.

<sup>74</sup> *Id.* at 861.

<sup>75</sup> *Id.*

<sup>76</sup> For example, the uproar around the formation of a GSA in Kentucky included students using "anti-gay epithets" and throwing things at fellow students who were observing a National Day of Silence, "students in . . . class stating that they needed to take all the fucking

polices are highly likely to chill the speech of students who want to participate in gay-positive groups.

### B. *Fair Opportunity*

The EAA establishes a set of five criteria that a school must satisfy in order to offer a “fair opportunity.”<sup>77</sup> The Ninth Circuit has said that the list of “fair opportunity” criteria does not describe schools’ affirmative obligations, but actually constitutes a limit on how far schools may go in accommodating religious groups without violating the Establishment Clause.<sup>78</sup> It is not clear from the statutory language whether the fair opportunity criteria operate as requirements on schools or as a safe harbor within which schools are not in danger of violating the Establishment Clause, but the Supreme Court in *Board of Education v. Mergens* seemed to treat the “fair opportunity” criteria as setting out requirements.<sup>79</sup>

Two of the criteria are potentially relevant to parental consent policies. First, supporters of parental consent polices might argue that Section 4071(c)(4) of the EAA justifies such policies, because without a parental consent provision, the presence of gay-positive student groups would “materially and substantially interfere with the orderly conduct of educational activities at the school” by inviting parent protests.<sup>80</sup> However, it seems unlikely that even vehement parent protests would constitute such interference. Even if protests would interfere with educational activities, that is not necessarily a permissible basis on which to regulate groups’ activity. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court rejected the restriction of student speech based on the hostile reaction of others.<sup>81</sup> One federal court has held that the “heckler’s veto” of hostile reaction to a gay-positive student group is not a

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faggots out in the back woods and kill them,” and the GSA faculty advisor receiving “threatening notes from students” and having her car keyed. *See Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 670 n.1, 672–74 (E.D. Ky. 2003).

<sup>77</sup> *See* 20 U.S.C. § 4071(c). The five requirements are:

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) non-school persons may not direct, conduct, control, or regularly attend activities of student groups.

<sup>78</sup> *Prince v. Jacoby*, 303 F.3d 1074, 1081–82 (9th Cir. 2002).

<sup>79</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 236 (1990); *see also id.* at 259–60 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>80</sup> 20 U.S.C. § 4071(c)(4).

<sup>81</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

permissible reason to deny access to the group under the EAA.<sup>82</sup> The court said that only the group's own disruptive activities, not disruption caused by the group's opponents, could be a basis for denying them access under the EAA and *Tinker*.<sup>83</sup>

Second, Section 4071(c)(5) of the EAA provides that "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups."<sup>84</sup> Arguably, a parent's veto of his or her child's involvement in a student group constitutes "control" over the group. If so, and if the list in Section 4071(c) sets out requirements on schools, parental consent policies violate the EAA. One obvious response to this argument is that a parent cannot control a group through control over a nonmember, which a student without parental consent to join the group is, *ex hypothesi*. However, the EAA is expressly directed at *meetings* rather than groups per se.<sup>85</sup> So the preexistence of a defined group with specified members is not crucial—the ability of students (any students) to meet is what matters. If a student wants to attend and participate in meetings but is prevented from doing so by a parent's refusal to consent or the student's unwillingness to ask permission, then the school policy has given the parent control over the "activities" of the group. The activities of the group are, among other things, meetings that the student would attend were it not for his or her parent's control.

### C. Discrimination

The EAA prohibits schools from discriminating against student groups on the basis of the content of the speech at their meetings.<sup>86</sup> The EAA does not define "discriminate."<sup>87</sup> There are different evidentiary showings required to prove discrimination in different areas of federal law. Establishing a violation of the Equal Protection Clause requires a showing of discriminatory intent.<sup>88</sup> On the other hand, prohibitions on discrimination in certain federal statutes encompass classifications that have disparate impact, regardless of a lack of proof of discriminatory intent.<sup>89</sup>

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<sup>82</sup> *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 688–91 (E.D. Ky. 2003).

<sup>83</sup> *Id.* at 690.

<sup>84</sup> 20 U.S.C. § 4071(c)(5).

<sup>85</sup> *See* 20 U.S.C. § 4071(a).

<sup>86</sup> *See id.*

<sup>87</sup> *See* 20 U.S.C. § 4071 (defining several terms, but not "discriminate").

<sup>88</sup> *See Washington v. Davis*, 426 U.S. 229 (1976) (requiring a showing of discriminatory purpose for a finding of equal protection violation in police department hiring and promotion policies that allegedly discriminated against African Americans).

<sup>89</sup> *See, e.g., Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003) (holding that an employer's subjective intent to discriminate need not be shown to prove discrimination under Americans with Disabilities Act); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (finding a violation of Title VII command of equality in employment opportunities

Pointing to legislative history, the Ninth Circuit has said that the discrimination prohibition in the EAA should be interpreted to require a showing of discriminatory intent.<sup>90</sup> The Senate Judiciary Committee stated in its recommendation for passage of the bill:

Simply to bar discrimination against voluntary religious groups would not assure protection to those groups when the motive for excluding them is to avoid controversy or potential lawsuits [because, i]n determining whether discrimination has taken place, courts have often required that there be a demonstration of invidious animus toward the target.<sup>91</sup>

If equal protection principles give content to the meaning of “discriminate” in the EAA, then students challenging parental consent policies should have the chance to show that there is discriminatory intent under the circumstantial evidence test of *Village of Arlington Heights v. Metropolitan Development Corporation*.<sup>92</sup> In *Arlington Heights*, the Supreme Court held that disparate impact, though not sufficient on its own, was relevant to the showing of discriminatory intent required to find an equal protection violation.<sup>93</sup> It set out a non-exhaustive list of factors that would tend to show intent to discriminate based on race:

- (1) a clear pattern, unexplainable on grounds other than race;
- (2) the historical background of the decision;
- (3) the specific sequence of events leading up to the challenged decision;
- (4) departures from the normal procedural sequence; and
- (5) [s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.<sup>94</sup>

In places where the legislative history of a parental consent policy makes clear that it was instituted in reaction to the presence of a gay-positive student group, the facts may make a finding of discriminatory intent possible on these factors.

In Farmington, New Mexico, for example, the school board considered getting rid of all non-curricular groups after students tried to form a GSA.<sup>95</sup> The board apparently considered banning only the GSA but was convinced, possibly in part by statements from the state ACLU affiliate, that doing so would violate the EAA.<sup>96</sup> The board decided to adopt a parental consent policy for all

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even in the absence of discriminatory intent by employer); *Hanson v. Veterans Admin.*, 800 F.2d 1381 (5th Cir. 1986) (holding that a showing of significant discriminatory effect, not necessarily intent, is sufficient to establish a violation of the Fair Housing Act of 1968).

<sup>90</sup> See *Prince v. Jacoby*, 303 F.3d 1074, 1081 (9th Cir. 2002).

<sup>91</sup> S. Rep. No. 98-357, at 39 (1984), as reprinted in 1984 U.S.C.C.A.N. 2348, 2385.

<sup>92</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

<sup>93</sup> *Id.* at 264–65.

<sup>94</sup> *Id.* at 266–68.

<sup>95</sup> See Frolik, *supra* note 1313.

<sup>96</sup> See Frolik, *supra* note 1414.

clubs.<sup>97</sup> Statements by board members at the time of the decision make clear that the decision was made in response to the GSA club.<sup>98</sup> One member said, “I do not want to throw the baby out with the bath (water),”<sup>99</sup> the “bathwater” being the GSA, and the “baby” being all the other clubs. The board apparently departed from its normal procedures by accepting more public input than usual.<sup>100</sup> The board also decided to send a resolution to the state legislature asking for “a law that would forbid clubs from forming that discuss sexual matters.”<sup>101</sup>

The statements by legislators, sequence of events leading up the decision, and departures from usual procedure all indicate that the facially neutral policy was directed at the GSA and, specifically, its character as a gay-positive group.<sup>102</sup> The real reason the board wanted a parental consent policy was to give parents the power to keep their children out of the GSA. That reason would amount to a substantive departure if it could be shown that the board would not think parental consent was warranted for other student clubs. Therefore, it is possible that parental consent policies violate the EAA’s proscription on discrimination even if the act includes an intent requirement.

It would be easier, of course, to show a violation of the EAA’s proscription of “discrimination” if that term were interpreted to reach cases of disparate impact in which discriminatory intent has not been established. It is true that the Ninth Circuit has reasoned that a finding of discrimination under the EAA requires showing discriminatory motive,<sup>103</sup> but that conclusion can be resisted. The legislative history the court depended on for that conclusion is less than unequivocal on the point. The Senate Report says, “[i]n determining whether discrimination has taken place, courts have *often* required that there be a demonstration of invidious animus toward the target,” and notes that “[t]he motive of the school . . . *could be* important to a finding of discrimination.”<sup>104</sup> Since courts *always* require proof of intent in equal protection cases and *never* do in discrimination cases under certain statutes, the use of the word “often” in the legislative history indicates that Congress did not make a clear choice as to which discrimination paradigm ought to be applied to discrimination under the EAA.

Furthermore, as the Ninth Circuit pointed out shortly before its discussion of the Senate Report, a court must “presume that Congress, in enacting the Act, was aware of the settled judicial construction of [‘discriminate against’].”<sup>105</sup>

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<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> *Prince v. Jacoby*, 303 F.3d 1074, 1081–82 (9th Cir. 2002).

<sup>104</sup> S. Rep. No. 98-357, at 39 (1984), as reprinted in 1984 U.S.C.C.A.N. 2348, 2385 (emphasis added).

<sup>105</sup> *Prince*, 303 F.3d at 1080.

Since there are two different settled judicial constructions of “discrimination,” the legislative history is not instructive on the question of whether intent is required unless it explicitly resolves the ambiguity in one direction or the other.<sup>106</sup>

If this argument prevails and intent is not required for a finding of discrimination under the EAA, then the discrimination jurisprudence under statutes like Title VII would guide interpretation of the EAA. In the Title VII context, “facially neutral employment practices that have significant adverse effects on protected *groups* have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.”<sup>107</sup> Under that approach, the adverse effects on gay students of parental notice or consent policies could be enough to warrant a finding of discrimination under the EAA. Note that the Supreme Court has applied Title VII principles to other statutes: in *Franklin v. Gwinnett County Public Schools* the Court imported the Title VII principle that sexual harassment is sex discrimination into its Title IX reasoning about a teacher sexually harassing a student.<sup>108</sup> This indicates that it is possible to use the evidentiary model for discrimination under Title VII to show discrimination under the EAA.

The analog of employment discrimination in the context of parental consent policies for student groups is the inability of students to participate in the activities of whichever groups they want to. Such a result would violate the EAA if it is based on the content of the student group meetings.<sup>109</sup> Students are often blocked from participating in gay-positive groups by negative parental reactions to their children’s discussion of issues related to sexuality. Thus, the decreased ability to participate is based on the content of the meetings. This reasoning is buttressed by the history of parental consent policies; when they are instituted in direct response to the formation of a gay-positive group, there is a clear inference that the policies are intended to allow parents to prevent their children from participating in such groups because of the content of their meetings.

An obvious objection to the analogy to Title VII discrimination looms. “Title VII does not prohibit discrimination” based on sexual orientation,<sup>110</sup> so importing Title VII principles would mean that discriminatory impact against gay-positive groups is not an EAA violation. This objection cannot stand up to either of two simple counterarguments. First, gay-positive groups are not homosexual groups. As names like “Gay-Straight Alliance” indicate, these

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<sup>106</sup> In addition to these arguments, textualist arguments that the legislative history should not be given weight could serve to undercut the Ninth Circuit’s requirement of intent.

<sup>107</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986–87 (1988).

<sup>108</sup> *Franklin v. Gwinnett County Public Sch.* 503 U.S. 60, 75 (1992).

<sup>109</sup> 20 U.S.C. § 4071(a).

<sup>110</sup> *E.g.*, *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (citing *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (1989)).

groups are for everyone who wants to discuss issues surrounding sexual orientation and tolerance, not only those with a certain sexual orientation. Gay-positive groups come together not because of the sexual orientation of the members, but because of the subject matter of the groups' speech. Since the EAA prohibits discrimination based on the content of meetings, it protects discussion of sexual orientation regardless of the sexual orientation of the discussants.<sup>111</sup> Second, the Title VII evidentiary model applies the same way regardless of the basis of discrimination, as long as that basis is recognized under the Act (that is, whether the discrimination is based on gender, race, national origin, etc.).<sup>112</sup> So there is no reason to take the enumerated list of protected classes along when one imports the evidentiary model; the two facets of Title VII are independent of one another. The EAA has been held to protect gay-positive groups, a result demanded by the plain text of the statute.<sup>113</sup> Importing the Title VII evidentiary model should not change the scope of the protection provided by the EAA.

#### D. *Exceptions to the EAA*

I have offered arguments to the effect that parental consent policies violate all three prohibitions in the EAA. But the EAA has a provision that has been interpreted as an exception: "Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."<sup>114</sup> Schools may argue that, even if parental consent policies are prohibited by the EAA's positive provisions, they are allowed under the exception because they are necessary to either "maintain order and discipline" or "protect the well-being of students and faculty."<sup>115</sup>

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<sup>111</sup> I argue here that discrimination against gay-positive groups is discrimination based on the content of their speech, as opposed to discrimination based on sexual orientation. However, parental consent and notice policies may also constitute discrimination based on sexual orientation, which may be prohibited by sources of law other than the EAA.

<sup>112</sup> 42 U.S.C. § 2000e-2.

<sup>113</sup> *Gonzalez v. Sch. Bd. of Okeechobee County*, 571 F. Supp. 2d 1257, 1267 (S.D. Fla. 2008).

<sup>114</sup> 20 U.S.C. § 4071(f).

<sup>115</sup> See *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004) (finding that school's refusal to allow GSA to post fliers on campus falls within exception to EAA where GSA website contains sexually explicit material and school has abstinence-only curriculum). *Caudillo* also interprets § 4071(c)(4) as an exception. That provision says that "[s]chools shall be deemed to offer a fair opportunity" if (*inter alia*) "the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school . . ." But the *Caudillo* court seems to think this exception is coextensive with the "order and discipline" exception in § 4071(f). Furthermore, the Ninth Circuit has convincingly interpreted § 4071(c) as a safe harbor describing what access a school *may* give to



In *Gernetzke v. Kenosha Unified School District No. 1*, the Seventh Circuit interpreted the “order and discipline” language in Section 4071(f) to mean that expression may be suppressed “on the basis of the angry reaction that it may generate.”<sup>116</sup> This construction of the statutory language is arguably dicta; it is at best an alternative ground for the holding, the other ground being that the school did not discriminate against the plaintiffs because it denied similar requests by other groups.<sup>117</sup> In *Gernetzke*, the school refused to allow a club to include a cross in a mural because it “might invite a lawsuit and incite ugly conflicts among students.”<sup>118</sup> The court reasoned that the “order and discipline” language in the statute means that the “heckler’s veto” principle in First Amendment cases does not carry over to the EAA context.<sup>119</sup>

In a Texas case, *Caudillo v. Lubbock Independent School District*, the District Court held that Section 4071(f) of the EAA allowed a school to keep a GSA from meeting on campus.<sup>120</sup> The school district had an abstinence-only curriculum and claimed that the group’s goals, which included educating the “willing” about “non-heterosexuals,” “safe sex,” and AIDS, interfered with the school’s educational mission.<sup>121</sup> In a sad irony, the court also found that the school’s responsibility to protect students from harassment based on sexual orientation justified the decision to ban the GSA under the EAA’s “order and discipline” exception.<sup>122</sup>

On the other hand, the Second Circuit in *Hsu* held that First Amendment principles do carry over into the EAA: “The Equal Access Act strikes the same balance that the Supreme Court has struck between First Amendment free speech rights and a public school’s right to maintain order . . . .”<sup>123</sup> According to the Second Circuit, the EAA incorporates the “protection provided in the *Tinker* line of cases.”<sup>124</sup> *Tinker v. Des Moines Independent Community School District* and its progeny permit “public schools to restrict free speech rights when student speech ‘materially and substantially interferes’ with the school,”<sup>125</sup> and the “school’s conclusory statement that prayer meetings will substantially and materially impede the orderly conduct of the school is an

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a religious student group without violating the Establishment Clause. *Prince v. Jacoby*, 303 F.3d 1074, 1080 (9th Cir. 2002). If that interpretation is correct, then § 4071(c)(4) provides no exception to the affirmative requirements of the EAA.

<sup>116</sup> *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467 (7th Cir. 2001).

<sup>117</sup> *Id.* at 466.

<sup>118</sup> *Id.* (citation omitted).

<sup>119</sup> *Id.* at 467 (citing *Terminiello v. City of Chi.*, 337 U.S. 1, 3–5 (1949)).

<sup>120</sup> *Caudillo*, 311 F. Supp. 2d at 550.

<sup>121</sup> *Id.* at 568.

<sup>122</sup> *Id.* at 568–70.

<sup>123</sup> *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 870 (2d Cir. 1996).

<sup>124</sup> *Id.* at 867 n.28.

<sup>125</sup> *Id.* at 867.

insufficient weight in the balance struck by the [EAA].”<sup>126</sup> The idea that First Amendment principles inform the application of the EAA is supported by the fact that the statute is a codification and extension of the Supreme Court’s First Amendment jurisprudence.<sup>127</sup>

The Second Circuit’s interpretation is the better one. The Seventh Circuit’s position, which allows fear of litigation to excuse noncompliance with the positive requirements of the EAA, makes the exception swallow the rule. The EAA was passed out of concern for the rights of religious groups to meet in school. Since there are many parties—such as the ACLU—that sue for apparent Establishment Clause violations when religion enters public schools, the fear of litigation excuse would allow schools to prohibit virtually all religious groups from meeting, making the EAA superfluous. And the *Caudillo* court’s position allowing a heckler’s veto ignores the important connection of the EAA and the First Amendment, which does not tolerate a heckler’s veto. Just as important, it ignores the plain text of the statute, which prohibits the restriction of student group activity “on the basis of the . . . *content* of the speech” of the group.<sup>128</sup> Because hostile audience reactions are motivated by the content of speech (anti-gay picketing happens in reaction to gay-positive student groups), restricting student groups because of people’s potential reactions is as clear a violation of the statute as there could be. The “order and discipline” exception cannot warrant restrictions based on hostile reaction without swallowing the rule of the EAA.

The decision in *Caudillo* was partly dependent on the fact that the school district had an abstinence-only policy, “a curriculum that is void of discussing sexual conduct.”<sup>129</sup> But the district court must be wrong in its reasoning that the abstinence-only policy justifies denying access to groups that discuss sexuality under the “order and discipline” exception to the EAA. Attempting to apply this argument to religious groups makes the problem crystal clear. Many schools have curricula that are free of any mention of religion. Indeed, because of the Establishment Clause, no public school may have a curriculum that endorses religion. But it would make a mockery of the EAA to say that the absence of religion in schools’ curricula allows them to deny access to religious student groups. The fact that the subject matter of a group’s speech is not covered in the school’s curriculum simply cannot be a reason for denying the group access under the EAA.

In addition to the “order and discipline” language, the EAA also allows schools to “to protect the well-being of students and faculty.”<sup>130</sup> The *Caudillo*

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<sup>126</sup> *Id.* at 872.

<sup>127</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 235 (1990) (stating that EAA codifies and extends *Widmar v. Vincent*, 454 U.S. 263 (1981)).

<sup>128</sup> 20 U.S.C. § 4071(a) (emphasis added).

<sup>129</sup> *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 568 (N.D. Tex. 2004).

<sup>130</sup> 20 U.S.C. § 4071(f).

court found that the school could restrict the GSA's access where the group's proposed fliers included the address of the group's website, which linked other websites that included content about anal sex, oral sex, the use of contraceptives, and sexually transmitted diseases.<sup>131</sup> The court found that "students should not be exposed to the type of material that was available on the group's website."<sup>132</sup> The school district's compelling interest in students' well-being included protecting them from "the harms associated with exposing minors to sexual subject matters."<sup>133</sup> But here again, the court has used the exception as a way of avoiding the EAA altogether. Surely it is not enough for a school to say that the subject matter of a student group's speech harms students' well-being.<sup>134</sup> That allows precisely what the EAA is designed to prohibit: denial of access based on content of speech. The statute must require the school to make some kind of showing of a threat to well-being. The school's argument in *Caudillo* should not have been enough: the court apparently allowed concerns with teen pregnancy and sexually transmitted diseases to justify the restriction on a group whose website linked to information about how to *avoid* those problems.<sup>135</sup> However, the result in *Caudillo* was also driven by the court's finding that obscene material was available on the group's website, so the decision may stand merely for the proposition that student groups that intend to engage in obscene speech are not protected by the EAA.

Parental consent policies, despite their evenhandedness, violate all three prohibitions of the EAA. The argument is neatest for "equal access." The argument for "fair opportunity" involves the question as to whether the criteria listed in Section 4071(c) operate as requirements on schools; if they do, parental consent policies can be depicted as failing those requirements. The "discrimination" argument is perhaps the trickiest, since it involves the question of whether intent is required, and if so, whether discriminatory intent can be shown in the history of a given policy. But arguments can be made that parental consent policies constitute discrimination either way. Finally, I have argued

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<sup>131</sup> *Caudillo*, 311 F. Supp. 2d at 557, 561. The court found the content accessible from the group's website to be "lewd," "indecent," and "obscene." *Id.*

<sup>132</sup> *Id.* at 571.

<sup>133</sup> *Id.*

<sup>134</sup> *Cf. Gonzalez v. Sch. Bd. of Okeechobee County*, 571 F. Supp. 2d 1257, 1267 (S.D. Fla. 2008) ("[The school board] is obligated to take into account the well-being of its non-heterosexual students in assessing whether acknowledging the GSA as a noncurricular student group inures to the well-being of students. [The school board] has failed to demonstrate that recognition of the GSA, a noncurricular student group promoting tolerance towards non-heterosexual students, would jeopardize the well-being of students.").

<sup>135</sup> The Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968), allowed the restriction of pornography to minors on the assumption that sexually explicit material is harmful to minors. I discuss a *Ginsberg*-type argument against children's participation in gay-positive groups below. Suffice it to say here that gay-positive groups whose speech is not sexually explicit do not fall under the reasoning of *Ginsberg*.

that the exceptions to the EAA do not exclude GSAs from protection under the act and therefore do not allow schools to institute parental consent policies.

### III. FIRST AMENDMENT: EXPRESSIVE ASSOCIATION

Parental consent policies implicate the First Amendment. The Constitution protects individuals' right to expressive association.<sup>136</sup> In *Boy Scouts of America v. Dale*, the Supreme Court used a three-step test to determine whether New Jersey's antidiscrimination law violated the Boy Scouts' freedom of expressive association.<sup>137</sup> First, the Court asked whether the organization was an expressive association.<sup>138</sup> Since it was, the Court asked whether the application of the law "would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."<sup>139</sup> Again, the answer was yes, so the Court went on to ask whether the state interests in applying the law to the Boy Scouts justified the burden on the group's freedom of expressive association.<sup>140</sup>

#### A. *Student Groups Are Expressive Associations*

To determine whether requirements of parental consent for student group participation violate the groups' freedom of expressive association, this three-step test should be applied. First, are student groups expressive associations? In *Dale*, the Court said that groups "must engage in some form of expression, whether it be public or private" to benefit from the constitutional protection of expressive association.<sup>141</sup> The *Dale* Court found the fact that the Boy Scouts' mission and activities were intended to "instill values in young people" sufficient to make that organization an expressive association.<sup>142</sup> The Court quoted Justice O'Connor's concurrence from *Roberts v. United States Jaycees*: "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."<sup>143</sup>

It is possible that *Dale* signals such a low standard for an organization to be an expressive association that all student groups would be considered such. If an intent to develop good morals and the like is all that is necessary, there does not seem to be any reason that the training that goes on in a chess club or glee

<sup>136</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

<sup>137</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

<sup>138</sup> *Id.* at 648 ("To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association.'").

<sup>139</sup> *Id.* at 650.

<sup>140</sup> *Id.* at 656–59.

<sup>141</sup> *Id.* at 648.

<sup>142</sup> *Id.* at 649.

<sup>143</sup> *Id.* at 650 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring)).

club should be less deserving than “the training of outdoor survival skills.”<sup>144</sup> But even if some clubs are not expressive associations, GSA-type student groups surely are. Groups whose professed goals are “to raise public awareness and promote tolerance by providing a safe forum for discussion of issues related to sexual orientation and homophobia” are clearly engaged in both public and private expression.<sup>145</sup>

B. *Parental Consent Policies Significantly Affect Student Groups’ Expression*

The second step in the *Dale* test is to ask whether parental consent policies “significantly affect [groups’] ability to advocate public or private viewpoints.”<sup>146</sup> There may be some kinds of student groups for which parental consent policies would not affect their ability to speak, but gay-positive groups are uniquely vulnerable to being silenced by such policies.<sup>147</sup> Gay-positive groups are formed in part to advocate acceptance of various forms of human sexuality—a key motivating factor in their creation is the unpopularity of this position. GSAs allow members to engage in private speech that is insulated and protected from anti-gay attitudes and to engage in public speech that resists anti-gay attitudes. Parental consent policies are implemented in order to allow parents’ disagreement with the groups’ position to prevent children from participating. These policies let precisely the attitudes that gay-positive groups align themselves against prevent the groups from advocating their viewpoints. A parental veto prevents some students from participating altogether and is a tangible government concession to anti-gay attitudes that powerfully counters the message gay-positive groups advocate.

*Dale* focused on the rights of the group and the level of intrusion into the group’s ability to advocate, since it concerned the Boy Scouts’ efforts to exclude an individual from membership. But of course, individuals have expressive association rights as well.<sup>148</sup> The intrusion on the associational rights of

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<sup>144</sup> *Id.*

<sup>145</sup> This language is taken from the mission statement for the proposed GSA at issue in *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1138 (C.D. Cal. 2000).

<sup>146</sup> *Dale*, 530 U.S. at 650.

<sup>147</sup> Those student groups that challenge such policies would have a thumb on their side of the scale, since the *Dale* Court pointed out: “As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.” *Id.* at 653. Given its protection of discriminatory exclusion, *Dale* is perhaps a dangerous precedent for civil rights advocates to extend. But its use here, protecting positive association and expression interests rather than exclusion, is on more solid First Amendment jurisprudential ground than the specific holding in *Dale* and is not an extension of that decision in a dangerous direction.

<sup>148</sup> *E.g.*, *Dawson v. Delaware*, 503 U.S. 159, 163 (1992) (“We have held that the First Amendment protects an individual’s right to join groups and associate with others holding similar beliefs.”).

individuals by parental consent policies is even clearer than the intrusion on the group, since the application of such policies can completely prevent individuals from associating with those with whom they share beliefs. Indeed, preventing an individual from participating in the group's activities is as severe an intrusion on associational rights as there can be. Therefore, parental consent policies "significantly affect" the expression of both student groups and the individuals who are prevented from joining them.

C. *State Interests Served by Parental Consent Policies Do Not Justify the Intrusion on Students' Freedom*

In the third *Dale* step, the state interests in parental consent policies must be weighed against the associational interests of student groups.<sup>149</sup> The state really has no independent interest in securing parental consent before allowing students to participate in school clubs. A state may claim to have an interest in students' well-being that requires it to protect them from certain extracurricular activities. But that interest is not served by a parental consent policy per se, since such a policy allows students to engage in dangerous activities if their parents give permission. Requiring a permission slip for a position on the football team does not make playing football safer; it merely protects parents' interest in controlling the safety risks their children face. Furthermore, an interest in safety cannot justify a parental consent policy for all student groups, since most clubs undoubtedly do not pose any safety risks.

There may be a state interest in the strength of parental authority or the cohesiveness of families. The state could argue that informing parents about student groups and involving them in the decision regarding which clubs their children will join increases intra-familial communication and brings families together. Also, strengthening parental authority may have a preventive effect on juvenile delinquency.<sup>150</sup> Ultimately, however, it seems that the real state interest at work is securing parental rights.<sup>151</sup> But this interest is a *state* interest only in a derivative sense; it is really a parental interest. Thus there are two potential state interests to balance against the associational interest that is burdened by parental consent laws: that of strengthening families and that of protecting parents' rights. Do these state interests justify the intrusion on student's freedoms? As *Roberts v. Jaycees* put it, infringements on the right to expressive association "may be justified by regulations adopted to serve compelling

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<sup>149</sup> *Dale*, 530 U.S. at 656.

<sup>150</sup> See *Johnson v. City of Opelousas*, 488 F. Supp. 433, 445 (W.D. La. 1980) ("[The] assumption that likelihood of criminal activity decreases as the amount of control exercised by parents over the activities of their children increases is not an unreasonable tenet."), *rev'd*, 658 F.2d 1065 (5th Cir. 1981).

<sup>151</sup> See, e.g., Tiffany Erickson, *Huntsman Signs Gay-Clubs Bill*, DESERET MORNING NEWS (Salt Lake City), Mar. 10, 2007, at B01 (quoting sponsor of Utah school clubs law saying that law makes statement that "parents' rights are paramount").

state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>152</sup>

1. The State Interest in Strengthening Families Does Not Justify Parental Consent Policies

I assume that the strengthening of families is a compelling state interest.<sup>153</sup> But the goal of increasing intra-familial communication is not served by parental consent policies. Giving parents a veto does not increase communication or trust between family members, as the Supreme Court has recognized in the context of parental consent for abortions: “It is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient’s pregnancy will serve to strengthen the family unit.”<sup>154</sup> On the other hand, the Court has also said that it is a “reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart.”<sup>155</sup> What these passages reveal is that, although the Court acknowledges that a parental veto does not strengthen family bonds, the abortion decision is one so momentous that children—at least those who are not sufficiently mature to make the decision on their own—will benefit from parental input *in making that decision*. But there is no reason to think that giving parents greater “do as I say” input into their children’s activities will make the family bond stronger. On the contrary, it may breed resentment and rebellion.

Parental *notice* policies would presumably increase the amount of information that parents have about children’s extracurricular options at school, but that is not the same as communication between family members. Communication strengthening familial bonds is a two-way street; forcing one party to give up information and submit to the other’s will does not foster good familial relationships. So it is doubtful that parental consent policies serve the state’s interest in strengthening families through greater communication and parental control. Regardless, it seems clear that this interest can be served through less restrictive means, so parental consent policies should fail the narrow tailoring test on this view of the state interest. Short of banning student clubs altogether,

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<sup>152</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

<sup>153</sup> *See Planned Parenthood of Central Mo. v. Danforth*, 392 F. Supp. 1362, 1370 (E.D. Mo. 1975) (“The state’s interest in safeguarding the authority of the family relationship would appear to this Court to be a compelling basis for allowing regulation of a minor’s freedom to consent to an abortion.”), *rev’d in part*, 428 U.S. 52, 75 (1976) (arguing that providing parent with veto power over a minor’s decision to terminate pregnancy will not strengthen family unit or enhance parental control).

<sup>154</sup> *Danforth*, 428 U.S. 52, 75 (1976).

<sup>155</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992) (holding statute requiring parental consent to minor’s abortion with judicial by-pass option constitutional).

the parental veto is as restrictive of associational freedoms as school policies can be. Again, notifying parents of the groups their children participate in would be less restrictive. But simply notifying parents of which groups are active at the school would serve the same ends and be still be less restrictive.<sup>156</sup>

Turning now to the possible link between juvenile delinquency and parental authority, the prevention of crime is certainly a compelling state interest.<sup>157</sup> But the link between the increase in parental authority that comes from parents being able to prevent children from joining certain student groups and juvenile delinquency is at best extremely tenuous. It is clear that there must be means of preventing criminal behavior in young people that are less restrictive of associational freedoms. Both the interest in strengthening families *per se* and the interest in doing so as a means to reduce juvenile delinquency have tailoring problems. Each seems to have only a tenuous relationship to parental consent policies, and each would be served by policies less restrictive of associational interests. Therefore, neither interest is adequate to justify the intrusion on students' associational rights that parental consent policies constitute.

## 2. The State Interest in Protecting Parental Rights Does Not Justify Parental Consent Policies

What about the state's interest in protecting parents' rights? Parental rights rhetoric figures prominently in debates over parental consent policies, so the argument that parents' rights justify these policies must be addressed.<sup>158</sup> First, we must distinguish between parental interests and parental rights. Some parents have an interest in controlling which school clubs their children join. Some parents are uninterested in such control. Some parents may even have an interest in *not* having such control, if they think a teenager having the freedom to choose their own activities is an important part of childrearing. The state cannot have a greater interest in furthering the interests of one of these classes of parents than in furthering those of another. The state is not in the business of giving certain people what they want for no reason other than that they want it.<sup>159</sup>

One response to this argument is that the state has a reason to further parental

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<sup>156</sup> See *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (finding disclosure of club participation intrudes on the right to "privacy in one's associations"); cf. *Circle Sch. v. Pappert*, 381 F.3d 172, 176–77 (3d Cir. 2004) (holding act requiring parental notification for children who do not recite Pledge of Allegiance invalid as viewpoint discrimination intended to chill students' exercise of their right not to speak).

<sup>157</sup> See *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (1998) (finding that the reduction of juvenile crime is an "undeniably compelling" state interest).

<sup>158</sup> E.g., GUTIERREZ, *supra* note 2727, ("[C]onservative groups championed [the Georgia statute] as a 'parental rights' issue.").

<sup>159</sup> See BLACK'S LAW DICTIONARY 1196 (8th ed. 2004) (defining police power as "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice"); Cf. *Keystone Bituminous Coal*



interests in this context: when children are in school, the state acts *in loco parentis*.<sup>160</sup> The state is a temporary custodian and bears a responsibility to care for children in accord with parents' wishes. But this contention misinterprets the meaning of *in loco parentis*. That doctrine means that the school acts like a parent—that is, the school makes the *kind* of decisions a parent might make—not that the school can only make the same choice a child's parent actually would make.<sup>161</sup> Thus, the doctrine of *in loco parentis* gives school authorities the power to make decisions otherwise reserved for parents but does not create an obligation to honor parents' wishes.

On the other hand, a parent's interest in controlling his or her child's participation in school clubs would be a reason for the state to act if the parent had a constitutional *right* to do so. Defenders of parental consent policies may argue that such policies are necessary to protect parents' Fourteenth Amendment rights to custody and control of their children. If their argument worked, it would mean that the Constitution requires parental consent policies. I argue here that the argument does not work. My position on this issue, by itself, only means that it is not the case that the state *must* implement a parental consent policy. But its place in my larger argument still moves us toward the conclusion that the state *may not* implement such policies. In this section, I am inquiring whether there are sufficient state interests to make schools constitutionally able to intrude on students' associative rights. Parents' rights are suggested as a reason for enacting these state policies.<sup>162</sup> By showing that parents do not have a constitutional right to veto children's school club membership, I can dismiss the argument that the protection of parents' rights is a state interest that justifies parental consent policies.

The Supreme Court has recognized parents' rights in a number of cases. In 1923, the Court found a law prohibiting teaching in a language other than English unconstitutional because of, *inter alia*, parents' rights to bring up children and control them.<sup>163</sup> Two years later, the Court struck down a compulsory public education law, in part on the ground that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>164</sup> But the Court has limited parental rights as

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Ass'n v. DeBenedictis, 480 U.S. 470, 487–88 (1987) (distinguishing state acting to benefit private parties and police power to benefit the public in the takings context).

<sup>160</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–56 (1995).

<sup>161</sup> See *id.* at 655 (saying that school authorities acting *in loco parentis* have "the power and indeed the duty to 'inculcate the habits and manners of civility'" but nowhere mentioning a duty to do what the parent wants) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

<sup>162</sup> See, e.g., Tiffany Erickson, *Huntsman Signs Gay-Clubs Bill*, *DESERET MORNING NEWS* (Salt Lake City), Mar. 10, 2007, at B01 (quoting sponsor of Utah school clubs law saying that law makes statement that "parents' rights are paramount").

<sup>163</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>164</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

well: it upheld the application of a child labor law to prohibit a young Jehovah's Witness from selling religious magazines in accord with the dictates of her faith.<sup>165</sup> The state has the power to override parental authority for the health or safety of the child.<sup>166</sup>

However, these classic parental rights decisions are all, in a sense, irrelevant. They concern state action that *limits* parental authority, like a law that says parents cannot take their children out to sell magazines. In the context of parental consent policies, there is state action that increases parental authority, and an argument that inaction by the state (letting students join clubs without parental permission) would impermissibly limit parental authority. Of course, no school's clubs policy would really constitute state "inaction," since the school's recognition of and rulemaking for clubs is state action. Nevertheless, there is a real distinction from the classic parental rights cases. Those cases all involved state prohibitions on or requirements of children's activity. A school allowing student groups with no parental consent policy does not require children to do, or prevent them from doing, anything; indeed, it does not even prevent parents from keeping their children out of certain clubs.<sup>167</sup> But a school with a parental consent policy will prevent some children from participating in some clubs when parents withhold their consent. So the parental rights argument for such policies must be that parents have a positive right to control their children's club memberships, enforceable against the state whenever it allows school clubs to form. And the cases describing negative parental rights prohibiting the state from forcing children to engage in, or refrain from, certain activities regardless of their parent's wishes do not provide support for the existence of this putative, positive right.<sup>168</sup>

Defenders of parental consent policies may respond that, although there is no positive right to control children's club membership, the existence of constitutional rights to custody and control of children can serve to justify state action to increase parental control. The Supreme Court found that "parents' claim to authority in their own household to direct the rearing of their children" created a state interest justifying the prohibition of the sale of sex-related material to minors.<sup>169</sup> The Court justified this because "[t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws de-

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<sup>165</sup> See generally *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>166</sup> *Id.* at 166-67.

<sup>167</sup> *Cf. Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980) (distinguishing between the requirements and prohibitions at issue in the classic parental rights cases and school's establishing a "voluntary birth control clinic").

<sup>168</sup> *Cf. DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 195 (1989) (arguing that the Fourteenth Amendment does not impose affirmative obligations on the state).

<sup>169</sup> *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

signed to aid discharge of that responsibility.”<sup>170</sup> That case, *Ginsberg v. State of New York*, involved the availability of pornography to children, which was assumed to be harmful to children.<sup>171</sup> Parental consent policies cannot fit the *Ginsberg* mold, because student group participation is not *per se* harmful to children. Indeed, if it were, the state should ban it, not just ask for permission slips.

No doubt some supporters of parental consent policies would argue that gay-positive student groups are harmful to children.<sup>172</sup> Some people think that homosexuality is morally wrong and that GSAs “recruit” children to be homosexual.<sup>173</sup> But the Constitution demands more than suspicions about harm before expressive rights can be infringed. In *American Amusement Machine Association v. Kendrick*, the Seventh Circuit upheld a First Amendment challenge to an ordinance restricting minors’ ability to play violent video games.<sup>174</sup> The court found the common-sense suspicion that playing violent games psychologically harms children to be insufficient; it demanded that the state present “compelling and not merely plausible” grounds for thinking that violent games cause harm.<sup>175</sup> The court asked for pointed, relevant “social scientific evidence.”<sup>176</sup>

The *Kendrick* court distinguished *Ginsberg* on the grounds that *Ginsberg* involved sex-related material, while the video games involved only graphic violence.<sup>177</sup> So one might argue that *Ginsberg* is the more relevant precedent, because GSAs involve sex. This charge is misguided, however—GSAs are not about sex. As I argued at the outset, GSAs are about identities and acceptance. It is true that sexual orientation is relevant, but it is no more relevant to gay-positive associations than it is to the association of opposite-sex couples at school dances.

Furthermore, the Supreme Court has said in its equal protection jurisprudence that animus toward homosexuals cannot be a legitimate government interest sufficient to justify a law, even under mere rational basis review.<sup>178</sup> The idea that homosexuality is so terrible that children should not talk about it or

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<sup>170</sup> *Id.* at 639.

<sup>171</sup> *Id.* at 641–43.

<sup>172</sup> See, e.g., Cindy Yuth, *Farmington School Board Ponders Gay-Straight Club*, NAVAJO TIMES (Window Rock, Ariz.), Oct. 4, 2007, at A11, available at 2007 WLNR 21524437 (quoting teacher saying “[t]he day it was announced that this [GSA] was forming, there were kids out looking for sex”).

<sup>173</sup> E.g., Erin Stewart, *Senate Ed Panel OKs Measure on Gay Clubs*, DESERET MORNING NEWS (Salt Lake City), Feb. 21, 2006, at B01, available at 2006 WLNR 2965368 (mentioning legislative committee testimony by a parent whose niece was “targeted, recruited, and indoctrinated” by GSA).

<sup>174</sup> *American Amusement Mach. Assoc. v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001).

<sup>175</sup> *Id.* at 576.

<sup>176</sup> *Id.* at 578–79.

<sup>177</sup> *Id.* at 578.

<sup>178</sup> See *Romer v. Evans*, 517 U.S. 620, 632–35 (1996).

associate based on a shared commitment to acceptance of various sexual orientations constitutes bare animus.

I have argued that the protection of parental rights does not constitute a state interest sufficient to justify parental consent policies for two reasons. First, because parents have no positive constitutional right to control their children's school club membership. And second, because school club membership (generally or in gay-positive groups specifically) is not harmful, so the *Ginsberg* reasoning that those with "primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility"<sup>179</sup> does not apply. But there is a further weakness in the parental rights position.

Even if parental rights were a justification for policies requiring parental consent for student group membership, their application to gay-positive student groups arguably violates the principle set down in *Prince v. Massachusetts*, that the state may prevent parents from jeopardizing the health or safety of their children.<sup>180</sup> If being kept out of gay-positive student groups constitutes harm to children, then the state is constitutionally justified in allowing children to participate in those groups without (or even despite the lack of) parental consent.

Gay and lesbian youth face a dramatically higher suicide attempt rate than the general adolescent population.<sup>181</sup> Some have suggested that protecting gay and lesbian young people from demands to assimilate to a heterosexual norm and improving their self-esteem will help reduce the disproportionate suicide rate.<sup>182</sup> It seems likely that participation in gay-positive student groups would have a beneficial effect on the causes of the disproportionate suicide rate. Of course, suicide is not the only problem that gay and lesbian youth living in a hetero-normative world face. The pervasive hostile reactions to their identities result in increased likelihood of depression and other psychological problems, as well as behavior problems at school.<sup>183</sup> Gay-positive student groups focus-

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<sup>179</sup> *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

<sup>180</sup> See generally *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>181</sup> E.g., Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 333 (2007) ("Survey-based studies since 1990 have consistently shown that thirty to forty percent of gay and lesbian youth attempt suicide." (citing J. Stephen McDaniel et al., *The Relationship Between Sexual Orientation and Risk for Suicide: Research Findings and Future Directions for Research and Prevention*, 31 SUICIDE & LIFE-THREATENING BEHAV. 84, 87-96 (2001))).

<sup>182</sup> See *id.* at 334.

<sup>183</sup> See Miye A. Goishi, *Unlocking the Closet Door: Protecting Children from Involuntary Civil Commitment Because of Their Sexual Orientation*, 48 HASTINGS L.J. 1137, 1159-60 (1997). Goishi quotes the following passage: "Abusive treatment in schools often results in declining academic performance, absenteeism, or dropping out for gay and lesbian students. Internalized homophobia may act in concert with external abuse to heighten the victim's sense of differentness, helplessness, guilt, and shame. Severe anxiety, depression, and self-destructive acts may ensue." Gary Remafedi, *Fundamental Issues in the Care of Homosexu-*

ing on acceptance and providing peer support address these problems.<sup>184</sup>

As bad as the effects of hetero-normativity in general and in the school environment are, the harm to gay and lesbian children from parental rejection of their identities is likely even greater.<sup>185</sup> Parental consent policies bring that harm from the family environment into the school. They allow parental disapproval of homosexuality to cast a shadow over students' school activities, and they keep the children who may need peer support the most from benefiting from student group participation. There is good reason to believe, then, that letting parents keep their children out of GSAs is harmful to children's well-being. If so, the state is entitled to let children join such clubs notwithstanding a lack of parental consent. This means that, even if there were a parental right to control children's school club activity, that right can be constitutionally trumped by the state's interest in children's well-being.

Parental consent policies violate children's right to expressive association. Since student groups are expressive associations and parental consent policies affect their ability to engage in expression,<sup>186</sup> the state's interests must be balanced against the students' associative rights. The state interest in strengthening families does not justify the infringement on students' expressive freedoms because there are less restrictive means available. The protection of parents'

*al Youth*, 74 MED. CLINICS N. AM. 1169, 1172 (1990). See also *Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 671 (7th Cir. 2008) ("There is evidence, though it is suggestive rather than conclusive, that adolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school's expectations."); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179 (9th Cir. 2006) ("In short, it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students' health and welfare, but also to their educational performance and their ultimate potential for success in life.").

<sup>184</sup> See Camille Lee, *The Impact of Belonging to a High School Gay/Straight Alliance*, THE HIGH SCHOOL JOURNAL, Feb.–Mar. 2002, at 13 (finding that GSAs "positively impact academic performance, school/social/and family relationships, comfort level with sexual orientation, development of strategies to handle assumptions of heterosexuality, sense of physical safety, increased perceived ability to contribute to society, and an enhanced sense of belonging to school community"); see also Regina M. Grattan, Note, *It's Not Just for Religion Anymore: Expanding the Protections of the Equal Access Act to Gay, Lesbian, and Bisexual High School Students*, 67 GEO. WASH. L. REV. 577, 578 (1999) ("The presence of a group of peers that shares similar experiences and feelings is crucial to the physical and emotional well-being of gay, lesbian, and bisexual students.").

<sup>185</sup> See Sonia Renee Martin, *A Child's Right to Be Gay: Addressing the Emotional Mal-treatment of Queer Youth*, 48 HASTINGS L.J. 167, 174–78 (1996–97) (contending that effects of parental psychological abuse of gay and lesbian youth include suicide and running away from home, which can lead to homelessness, prostitution, drug use, and HIV infection).

<sup>186</sup> Simonsen, *supra* note 66, at 1B ("Rosenwald, [an ACLU lawyer for a GSA in Okeechobee County, Florida] said few students have come to club meetings because attendance requires a signed permission slip from a parent. Many students also fear taking part in a club 'while the school is making it so clear that the club is unwelcome,' he said . . .").

rights, often proffered as a reason for parental consent policies, fails as a sufficient state interest because parents have no constitutional right to control their children's school club membership.

#### IV. FIRST AMENDMENT: INTIMATE ASSOCIATION

In addition to expressive association, the First Amendment protects individuals' freedom of intimate association: "[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."<sup>187</sup> Relationships on the spectrum between clearly protected intimate relationships (like families) and clearly unprotected ones (like large business enterprises) are evaluated according to factors including "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."<sup>188</sup>

The Second Circuit evaluated a claim to intimate association by a college fraternity seeking official recognition from the school despite the fact that its exclusion of women violated the school's antidiscrimination policy in *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*.<sup>189</sup> The court said:

To determine whether a governmental rule unconstitutionally infringes on an associational freedom, courts balance the strength of the associational interest in resisting governmental interference with the state's justification for the interference. This will require an assessment of: (1) the strength of the associational interests asserted and their importance to the plaintiff; (2) the degree to which the rule interferes with those interests; (3) the public interests or policies served by the rule imposed; and (4) the tailoring of the rule to effectuate those interests or policies. The more important the associational interest asserted, and the more the challenged governmental rule burdens the associational freedom, the more persuasive must be the state's reasons for the intrusion, and the more precisely tailored the state's policy must be.<sup>190</sup>

The court found the fraternity's interest in intimacy to be weak.<sup>191</sup> Its small size (nineteen members) was due to the difficulties in recruiting on a commuter campus rather than a desire to maintain intimacy, and there was no upper limit on the number of members.<sup>192</sup> The fraternity was somewhat selective in choosing members, with an involved pledging process, but the fact that it pursued

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<sup>187</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

<sup>188</sup> *Id.* at 620.

<sup>189</sup> 502 F.3d 136 (2d Cir. 2007).

<sup>190</sup> *Id.* at 143.

<sup>191</sup> *Id.* at 148.

<sup>192</sup> *See id.* at 145.

new members every year weakened the associational interest.<sup>193</sup> The group's purposes were "broad, public-minded goals that do not depend for their promotion on close-knit bonds."<sup>194</sup> The fact that fraternity brothers become close friends did not increase the organization's claim to intimate association.<sup>195</sup> Finally, the fraternity, by involving "non-members in several crucial aspects of its existence," was not sufficiently exclusive.<sup>196</sup>

The application of this analysis to a gay-positive high school student group would of course depend greatly on the specific facts. But applying the first factor of the test to the typical GSA, it seems that a high school student group would be similar enough to the fraternity in *Chi Iota* to be found to have a weak interest in intimate association. Student groups, because of the turnover in the school population, have to seek new members constantly. GSAs dedicate themselves to public-minded goals of tolerance. A group dedicated to acceptance is unlikely to be highly selective in choosing members.

Second, the *Chi Iota* court examined the degree of state interference in associational rights posed by the college's non-discrimination policy.<sup>197</sup> The court found a low level of interference despite the fact that the fraternity was completely barred from official recognition as long as it continued to exclude women.<sup>198</sup> This was because the school's refusal to recognize the fraternity did not prevent it from existing or excluding women.<sup>199</sup> The lack of official recognition had "consequences primarily for the Fraternity's non-intimate aspects": its ability to recruit strangers to become members.<sup>200</sup> *Chi Iota* did not show that the exclusion made it hard to find places to hold meetings.<sup>201</sup>

Again, it seems that the application of this reasoning to high school student groups would probably yield a similar result. While parental consent policies limit which students can join clubs and that obviously affects their ability to associate, the effect is on their ability to recruit new members, which does not interfere with intimacy. Besides, clubs could simply organize outside of school. On the other hand, student groups could argue that, as minors without their own homes or access to transportation, not being able to meet in school presents special hardships. Furthermore, GSAs, which have a mission that in-

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<sup>193</sup> *See id.*

<sup>194</sup> *Id.* at 146 (citing *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546–47 (1987) (finding that Rotary Club's purpose, "an inclusive fellowship for service based on diversity of interest . . . does not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment").

<sup>195</sup> *Id.* at 146.

<sup>196</sup> *Id.*

<sup>197</sup> *See id.* at 147.

<sup>198</sup> *See id.*

<sup>199</sup> *See id.*

<sup>200</sup> *Id.* at 147–48.

<sup>201</sup> *See id.* at 148.

volves activism within the school, have a special need for official recognition by the school.

Third, the court in *Chi Iota* found the state interest in ending gender discrimination to be compelling. I examined the state interests involved in parental consent policies above. Finally, the *Chi Iota* court found the college's policy of denying official recognition to fraternities that discriminate to be well tailored to the state interest in eradicating discrimination and making sure "that all its students have equal access to its resources."<sup>202</sup> As I argued above, parental consent policies are poorly tailored to the state interests at play.

The *Chi Iota* court found the fraternity's associational interests to be "relatively weak," the state interference to be "no great burden," the state interests to be important, and the policy to be well-tailored.<sup>203</sup> It is probable that a court applying this test to parental consent policies for school clubs would find the associational interests to be similarly weak, the state interference to be a similarly minor burden, the state interest in strengthening families to be important, but that the policy is poorly tailored. This would not make a violation of the right of intimate association especially likely. Student groups' claim to a violation of rights of intimate association may be aided by the fact that the test described in *Chi Iota* is not all-or-nothing.<sup>204</sup> Even a weak claim to intimate association may generate a constitutional demand for relatively persuasive state interests and relatively precise tailoring. But in the face of a weak intimate association interest, parental consent policies may be unlikely to justify a finding of a First Amendment violation.

The Second Circuit, in *Chi Iota*, distinguished a Fifth Circuit case, *Louisiana Debating and Literary Association v. City of New Orleans*, where social clubs facing a claim of racial discrimination under a city ordinance were held to be intimate associations constitutionally protected from application of the ordinance.<sup>205</sup> The *Louisiana Debating* court found the clubs to be intimate associations because they existed "exclusively for private, social purposes," they had very restrictive membership criteria and admissions processes, they were highly exclusive of non-members, and they were "relatively small in size."<sup>206</sup> Since

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<sup>202</sup> *Id.* at 149.

<sup>203</sup> *Id.*

<sup>204</sup> *See id.* at 143 ("The more important the associational interest asserted, and the more the challenged governmental rule burdens the associational freedom, the more persuasive must be the state's reasons for the intrusion, and the more precisely tailored the state's policy must be.").

<sup>205</sup> *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995).

<sup>206</sup> *Id.* at 1495–98 (contrasting the clubs with those the Supreme Court had found not to be intimate associations: "Obviously, the Clubs are not similar to the Jaycees or the Rotary. Relatively small in size, they seek to maintain an atmosphere in which their members can enjoy the comradery [sic] and congeniality of one another. Employing very restrictive guest and admission policies, they seek to remain isolated").



the clubs were intimate associations, the court applied strict scrutiny to the anti-discrimination ordinance and found that, despite serving a compelling state interest, the ordinance was not sufficiently tailored since it was not the “least intrusive on the Clubs’ and their members’ right of [intimate] association.”<sup>207</sup> Whether student groups are more like the clubs in *Louisiana Debating* or the Rotary and the Jaycees<sup>208</sup> is a fact-intensive question in each case. But it is unlikely that any student group in a secondary school will have membership criteria or admission processes comparable to the clubs in *Louisiana Debating*, especially given the high turnover of members that the school environment necessarily engenders. On the other hand, excluding non-members from group activities would help place student groups on the more intimate side of the spectrum of associations.<sup>209</sup>

The argument that parental consent policies violate student groups’ First Amendment rights of intimate association is not as strong as the expressive association argument—at least on my assumptions about the degree of exclusivity that student groups have. But it is possible, depending on the facts of each case, that a permission slip policy violates the right of some GSAs to intimate association.

## V. PRIVACY

Privacy rights may help buttress the above arguments that parental consent laws are unconstitutional. For one thing, the First Amendment guarantees a right to privacy in one’s associations.<sup>210</sup> This privacy right is essential to First Amendment protections: “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>211</sup> While not all student groups can be called “dissident,” gay-positive groups espouse an idea that can be highly unpopular. What is more, the disclosure of participation in a GSA to a child’s parent in the context of a parental consent policy serves the purpose of allowing the parent, with the state’s assistance, to prevent the child’s participation. That result is as direct a restriction on the exercise of associative freedoms as there can be: prevention of association altogether.

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<sup>207</sup> *Id.* at 1500.

<sup>208</sup> *See* Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). The Court found that application of anti-discrimination laws to both organizations did not violate their associational interests.

<sup>209</sup> *See* N.Y. State Club Ass’n v. City of N.Y., 487 U.S. 1,12 (1988) (explaining that the Court in *Roberts* and *Rotary* emphasized “the kind of role that strangers play in [the associations’] ordinary existence” and “the regular participation of strangers at meetings”).

<sup>210</sup> *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also* *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that disclosure of campaign contributions threatens privacy of association interest).

<sup>211</sup> *NAACP v. Alabama*, 357 U.S. at 462.

The test for whether the government can constitutionally require disclosure when associational privacy rights are implicated is a familiar one: "When facing a constitutional challenge to a disclosure requirement, courts . . . balance the burdens imposed on individuals and associations against the significance of the government interest in disclosure and consider the degree to which the government has tailored the disclosure requirement to serve its interests."<sup>212</sup> The state interest must be "compelling" and there must be a "substantial relation between the information sought" and that interest.<sup>213</sup> The application of this test to parental consent laws follows much the same analysis as that given for the right to expressive association, above.

Second, the right to privacy deriving from Fourteenth Amendment substantive due process may be relevant. *Lawrence v. Texas* recognized a right to privacy in intimate physical relationships that prevents the government from outlawing sodomy.<sup>214</sup> But the decision in *Lawrence* pointedly did not "involve minors,"<sup>215</sup> so its application to student groups is dubious. More importantly, participation in student groups constitutes neither physical intimacy nor "sexual practices common to a homosexual lifestyle."<sup>216</sup> That is how the opponents of GSAs depict them. Going down the road toward characterizing gay-positive student groups as sex-related in order to put them under the protection of substantive due process would not benefit students' associational rights. It might instead have the effect of validating the fears about young people engaging in sex that motivate opposition to gay-positive student groups. What happens in GSA-type student groups is expression, not sex, and that means that the substantive due process right recognized in *Lawrence* adds nothing to the protections that the First Amendment affords those groups.

Other substantive due process decisions have found that children have rights of privacy against their parents. The Supreme Court, in a plurality joined by four justices, said that minors have the right to get contraception without parental consent.<sup>217</sup> The Court has also said that a minor, if found to be sufficiently mature by a judge, has the right to get an abortion without parental consent.<sup>218</sup> Arguing by analogy with these decisions, gay-positive student groups could contend that they should be able to participate in student group activities where sexuality is discussed without needing their parents' consent.

This due process argument is buttressed by cases holding that the distribution of condoms to minors without parental consent does not violate parents' constitutional rights. In *Doe v. Irwin*, the Sixth Circuit held that parents' rights to

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<sup>212</sup> *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 176 (2003) (citing *Buckley*, 424 U.S. at 64–68).

<sup>213</sup> *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91–92 (1982).

<sup>214</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (plurality opinion).

<sup>218</sup> *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979).

custody and control of their children were not violated by the public health center's "practice of not notifying [parents] of their children's voluntary decisions to participate in the activities of the Center."<sup>219</sup> The Supreme Judicial Court of Massachusetts also upheld a voluntary condom distribution program that contained no parental consent provision against a challenge that the program violated parents' constitutional rights.<sup>220</sup> State laws that give minors the right to treatment for sexually transmitted diseases, substance abuse, or mental health problems without parental consent may also strengthen the due process argument.<sup>221</sup>

Nevertheless, courts are likely to be extremely hesitant, to say the least, to find a new dimension of the due process right to privacy. Due process principles may help support the First Amendment argument that parental consent policies are unconstitutional, but they are not sufficient on their own.

## VI. EQUAL PROTECTION

The Supreme Court held in *Romer v. Evans* that laws based solely on animus toward homosexuals violate equal protection.<sup>222</sup> *Romer* involved a classification that singled out homosexuals for a legal disability.<sup>223</sup> Parental consent policies are evenhanded and make no classifications among student groups. There is evidence that these policies are adopted in direct response to the presence of a GSA-type club and are intended to allow parents to keep their children out of GSAs.<sup>224</sup> But the *Romer* Court applied rational basis review, and actual legislative intent is not generally examined at that level of review.<sup>225</sup> Nevertheless, it is possible that the legislative history of a parental consent policy, combined with its disparate impact on GSAs (for example, the chilling effect on participation and possibly evidence that GSAs are the only clubs parents ever keep their children out of) would be enough to make out an equal protection violation. As I argued above in the context of the Equal Access Act's prohibition on discrimination, an equal protection argument can be made despite the evenhandedness of parental consent policies. This argument would be bolstered by the fact that First Amendment rights are at stake, which should

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<sup>219</sup> *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980).

<sup>220</sup> *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995).

<sup>221</sup> *See, e.g., Parents United for Better Sch., Inc. v. Sch. Dist. of Phila.*, 646 A.2d 689, 692 (Pa. Commw. 1994) (listing Pennsylvania statutes providing for procedures that do not require parental consent).

<sup>222</sup> *Romer v. Evans*, 517 U.S. 620, 632–35 (1996).

<sup>223</sup> *Id.* at 632.

<sup>224</sup> *See supra* text accompanying notes 4–22.

<sup>225</sup> *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) ("To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.").

heighten the level of judicial review under the Fourteenth Amendment.<sup>226</sup>

There is also an argument that state action cannot be used to enforce parents' discrimination. Private discrimination cannot be constitutionally enforced by the state.<sup>227</sup> If a parent's desire to keep his or her child out of a GSA constitutes discrimination, then the state should not give that discrimination effect through the implementation of a parental consent policy. Making this argument would require a showing that the parent's decision is motivated by the sexual orientation or perceived sexual orientation of members of the group.<sup>228</sup>

Pursuing this line of argument would mean challenging the prevention of student participation in gay-positive clubs in the absence of parental consent as state action in violation of the Equal Protection Clause. That is, the argument depends on the premise that the parent's exercise of control over club membership pursuant to a parental consent policy is state action. In *Edmonson v. Leesville Concrete*, the Supreme Court examined whether a private litigant engaged in state action to determine whether its racially discriminatory use of peremptory challenges to jurors violated the Constitution.<sup>229</sup> The Court used a two-step analysis: the steps are "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor."<sup>230</sup> The second step is guided by three questions: "the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."<sup>231</sup>

A parent's veto over school club membership easily satisfies the first step, since the statute or school board rule creating the veto power constitutes state authority. The first question of the second step weighs in favor of state action, since the parent relies enormously on the government to set up schools and provide resources for extracurricular activities. The second question is not so clear: the parent engages in a traditional government function to the extent that determining who is allowed into which extracurricular activities is a government function. This function is not one of the traditional, essential government

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<sup>226</sup> See *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 797–98 (9th Cir. 2006) (“[T]he level of scrutiny that we apply to an equal protection claim varies depending on the nature of the right at issue. If Plaintiff’s [activity] is protected by the First Amendment, the City may only draw distinctions in the ordinance that are finely tailored to serve substantial interests.”).

<sup>227</sup> *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (finding that judicial enforcement of racially restrictive covenants violates Equal Protection Clause).

<sup>228</sup> *Romer*, 517 U.S. at 620 (holding discrimination based on sexual orientation can be unconstitutional).

<sup>229</sup> *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

<sup>230</sup> *Id.* at 620 (internal citations omitted).

<sup>231</sup> *Id.* at 621–22 (internal citations omitted).

functions. The third question weighs in favor of state action, since the injury of being kept out of a GSA in the school environment lends a governmental seal of approval to parents' homophobia, denies students the opportunity for organized association with others of like belief in the place they spend the majority of their day, and teaches children a message of intolerance of certain sexualities and mistrust of children to decide for themselves (uniquely harmful in schools because schools teach lessons about citizenship in the way they treat students).

This argument may be assisted by the decision in *In re Mary P.*, a New York Family Court case where a mother who wanted her fifteen-year-old daughter to get an abortion petitioned the court to "intervene to force compliance with the parental directive."<sup>232</sup> The court refused to enforce the mother's directive, reasoning that the abortion rights cases mean that Mary P. had a right to give birth, and therefore the parental command was "neither lawful nor constitutional."<sup>233</sup> Applying the principle of this case to parental consent policies, a child wanting to join a GSA can argue that her parents' directive not to join is unconstitutional, since it infringes her associational rights. School authorities should not enforce the command for that reason<sup>234</sup> and because it puts the state in the position of carrying out unconstitutional discrimination.

#### VII. CHILDREN DO NOT POSSESS THE SAME RIGHTS AS ADULTS

In the above discussions of constitutional rights that may be violated by parental consent policies, I have ignored the question of whether these rights are weaker because it is children who are being regulated, leaving that issue to this final section. The Supreme Court has repeatedly maintained that children have constitutional rights: "Minors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>235</sup> This includes First Amendment rights in school; students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>236</sup> But the Court has also repeatedly made clear that children's rights are not necessarily of the same magnitude as those of adults: "The state's authority over children's activities is broader than over like actions of adults."<sup>237</sup> In addition, children's rights may be lesser by virtue of the fact that they are in school: "The constitutional rights of students in public school are not automatically coextensive with the rights of

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<sup>232</sup> *In re Mary P.*, 444 N.Y.S.2d 545, 546 (N.Y. Fam. Ct. 1981).

<sup>233</sup> *Id.* at 547.

<sup>234</sup> See *Gathright v. City of Portland*, 439 F.3d 573, 576 n.2 (9th Cir. 1996) (treating private actor who obtained injunction preventing organizers of events from ejecting him as engaging in state action for First Amendment purposes).

<sup>235</sup> *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (holding that minors have Fourteenth Amendment abortion rights).

<sup>236</sup> *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>237</sup> *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

adults in other settings.”<sup>238</sup>

I have argued that students’ associational rights are violated by parental consent policies. One response points out that students have no right to be in school in the first place, since parents can homeschool them. Therefore, children cannot have rights against the state acting in concert with their parents. While it is true that children have no right to be in school independent of their parents’ decision to put them there, that should not mean that children in school have no rights. Minors have Fourth Amendment rights against school authorities, for example, despite the fact that they have no right to be in school.<sup>239</sup> Furthermore, it is important to keep in mind that parental consent policies are often attempts to keep gay-positive groups from associating. That makes these policies vulnerable to attack as *de facto* viewpoint-based discrimination, which is impermissible even if students have no right to be in school.

The argument that children’s lack of a right to be in school means they have no First Amendment rights while in school is a form of “greater includes the lesser” argument. The Supreme Court is not receptive to that kind of argument in its First Amendment jurisprudence. The Court rejected the idea that a city can ban hate speech as a subset of fighting words, even though the city could constitutionally ban all fighting words, because picking out only hate speech constitutes content discrimination.<sup>240</sup> The Court has also rejected the argument that the state can ban commercial speech because it could ban the activity that is the subject of the speech altogether. For example, the discredited argument would assert that a ban on advertisements for gambling is constitutional because banning gambling altogether would be constitutional.<sup>241</sup> In addition, the Court’s jurisprudence on the voluntarily-created public forum indicates that the First Amendment can constrain government’s restrictions on individuals whom it allows to speak on its property even when those individuals have no right to be there.<sup>242</sup> These decisions lend support to the idea that students’ not having a right to be in school at all should not justify their not having associational rights while they are in school.

In addition to the possibility of lesser rights because they are in school, potential school club members may also have lesser rights because they are mi-

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<sup>238</sup> Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

<sup>239</sup> Bd. of Educ. v. Earls, 536 U.S. 822 (2002). Students’ Fourth Amendment rights are greatly weakened by the special need of schools to guard against drug use by students, but the Court has never said that minor students have no Fourth Amendment rights. *Tinker* and its progeny establish the proposition for First Amendment rights.

<sup>240</sup> R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

<sup>241</sup> Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510–12 (1996) (“[T]he ‘greater-includes-the-lesser’ argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine.”).

<sup>242</sup> Widmar v. Vincent, 454 U.S. 269 (1981) (holding that university that created forum for student groups could not constitutionally restrict access to the forum based on the content of groups’ speech).

nors. In *Bellotti v. Baird*, a four-justice plurality explored the three reasons that a child's rights might be weaker than the corresponding rights of an adult: "[T]he peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."<sup>243</sup> I will examine how each of these reasons applies to the associative freedoms implicated in the debate over parental consent policies for school clubs. First, children's vulnerability would justify weaker associative freedoms if those freedoms somehow took advantage of children's vulnerability and harmed them. But association for expressive, intimate, or privacy-related purposes does not harm children. Some may argue that exposure to gay-positive associations harms children because they are vulnerable to being indoctrinated into thinking that homosexuality is morally acceptable. This is the *Ginsberg* argument that some things are uniquely harmful to minors and should be kept from them even though the same things cannot constitutionally be kept from adults. As I argued above, this argument's success should require some evidence of harm.

Second, children's lesser ability "to choose for themselves in the making of important, affirmative choices with potentially serious consequences" might justify lesser associative freedoms. But not if the high school students in question were mature enough to make decisions about which groups to associate with, which seems likely—especially given the long-standing tradition of secondary school extracurricular activities all over the country.<sup>244</sup> And the exercise of associative freedom does not risk "potentially serious consequences."<sup>245</sup> Joining a student club may change a child's life—especially in the case of GSAs, if they can be as helpful as I suggested earlier. But students can quit clubs easily without negative consequences. While club membership has the potential to change a child's attitudes, that fact does not justify restricting the child's ability to decide to take that risk unless the change is harmful. This brings us back to the *Ginsberg* argument discussed above.

Third, the importance of the parental role would justify children having lesser associational freedoms if the exercise of those freedoms threatened parental rights. I argued above that it does not. But a weaker argument can be made to the effect that the parental role affects the magnitude of children's rights. Parents have the right and duty to shape their children's "ethical, religious, [and] political beliefs."<sup>246</sup> That role is threatened when children are exposed to associations that espouse beliefs different from those of their parents. While this is true, its effect on the extent of children's associative freedom must be small. Surely it is not enough to justify giving parents a veto over school club membership, when parents can shape their children's beliefs in any num-

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<sup>243</sup> *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

<sup>244</sup> *Id.* at 633.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 638.

ber of ways without the state giving them power to keep their children out of certain clubs.

Generally, the Supreme Court has dealt with intrusions by the state on children that are greater than those on adults by demanding a state interest in the greater intrusion. For example, in *Planned Parenthood of Central Missouri v. Danforth*, after pointing out that the constitutional rights of children and adults are not always the same, the Court said “[i]t remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.”<sup>247</sup> Consequently, there must be a state interest specific to children to justify a greater infringement on children’s freedoms. And that state interest must be tested by the appropriate level of scrutiny. In *Carey v. Population Servs. Int’l*, a four-justice plurality, examining the above-quoted language from *Danforth* (“significant state interest”), speculated that the test for restricting minors’ right to abortion “is apparently less rigorous than the ‘compelling state interest’ test applied to restrictions on the privacy rights of adults.”<sup>248</sup> There is no reason to think that this plurality footnote from a Fourteenth Amendment context applies to the level of judicial scrutiny under the First Amendment, however.

The Fourth Circuit, reviewing a First Amendment challenge to a juvenile curfew law, held that the level of scrutiny appropriate to that case was intermediate scrutiny, demanding that the law be “substantially related” to “important” state interests.<sup>249</sup> Advocates challenging parental consent laws can argue that there is no reason that children’s associative freedoms are weaker than adults, which would result in the robust judicial review at which the constitutional arguments set out in the above sections are aimed. If that argument does not work and intermediate review is employed by courts, advocates’ arguments for a constitutional violation are substantially the same—the hurdle is higher, but not impossible.

### VIII. CONCLUSION

Advocates challenging parental consent policies face an uphill battle because of the policies’ facial evenhandedness. But the examples I have found show that legislators want to keep students out of gay-positive clubs and are not trying to disguise that fact. This intent cannot be ignored in a discussion about the legality of these policies. Discriminatory legislative intent must be con-

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<sup>247</sup> *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 75 (1976).

<sup>248</sup> *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693 n.15 (1977) (plurality opinion). Also possibly relevant is the weakness of the Fourth Amendment’s protections of students. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (holding that students participating in extracurricular activities have a diminished expectation of privacy against random drug testing).

<sup>249</sup> *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (1998).



stantly kept at the forefront of advocacy efforts against parental consent policies. I have argued that intent can be relevant to the analysis under the EAA. Intent is also relevant under the Constitution. Like those of the Equal Protection Clause, the First Amendment's prohibitions sometimes depend on the intent of government actors.<sup>250</sup>

Children need room to grow. The exercise of their rights of association is an essential part of the process of gathering the raw materials that help them grow. Restricting their ability to choose their extracurricular activities not only constrains their growth by potentially preventing them from finding activities that are fulfilling and beneficial it also teaches them the lesson that every decision they make is subject to parental veto. Children, especially high school students, should have some ability to decide for themselves how they want to spend their free time and round out their experiences.

The restriction on students' ability to choose their associations is all the more troubling when it is directed at gay-positive groups. Gay and lesbian youth may especially benefit from association in such groups. And singling them out, even if only by virtue of the fact that their existence is what motivates legislatures to institute facially evenhanded policies, violates the principles of freedom of expression and association that resound in the First Amendment and the Equal Access Act.

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<sup>250</sup> See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (“[A] more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive ‘certain ideas or viewpoints from the marketplace.’”); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (reasoning that intent to suppress ideas affects the constitutionality of legislation); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality opinion) (arguing that motivation behind removal of books from school library affects action's constitutionality). *But see* *United States v. O'Brien*, 391 U.S. 367, 383 n.15 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”).

