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Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from Lamb's Chapel

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PUBLIC FORUM DOCTRINE AND THE PERILS OF CATEGORICAL THINKING: LESSONS FROM *LAMB'S CHAPEL*

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INTRODUCTION

In recent years, the intersection of the Religion and Speech Clauses of the First Amendment[1] has become increasingly controversial particularly in the context of public schooling. Religious group meetings, the distribution of religious literature, the discussion of religious themes, and the recitation of prayers at graduation ceremonies have all forced the courts to weigh and re-weigh the right to individual speech against the responsibility of the state to stay within the bounds of Establishment Clause doctrine. Several legal and political factors have fueled this debate. Although the Supreme Court has reaffirmed on several occasions the unconstitutionality of organized prayer in the schools,[2] the question of other forms of religious speech remains open. In addition, the Court's shift since the early 1980s toward greater religious accommodation, together with a nationwide swing toward political conservatism, have created a more comfortable climate in which both students and non-students have asserted the right to use public school facilities for the exercise of religious speech.[3] Passionate religion and speech claims have generated

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1. U.S. CONST. amend. I. The First Amendment states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." The first two, the Religion Clauses, are commonly referred to as the Establishment and Free Exercise Clauses respectively. The last is referred to as the Speech Clause.

2. *See* Engel v. Vitale, 370 U.S. 421 (1962) (holding the recitation of a prayer composed by the New York Board of Regents as violating the Establishment Clause); Abington Township v. Schempp, 374 U.S. 203 (1963) (declaring unconstitutional Bible reading and the recitation of the Lord's Prayer in public schools); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down as unconstitutional a state statute authorizing a daily period of silence in public schools for meditation or voluntary prayer); Lee v. Weisman, 112 S. Ct. 2649 (1992) (declaring unconstitutional the inclusion of invocations and benedictions in the form of prayer at graduation ceremony of public school).

3. Between September 1992 and August 1993, there were a total of 247 incidents of church-state conflicts in the states, up from 196 the previous year. Of these, there were 111 incidents in 38 states related to religion in the schools, 46 incidents in 31 states concerning free exercise disputes, 47 incidents in 28 states regarding public funding of religious organizations, and 43 incidents in 30 states related to state endorsement of religion. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, 1993 ANNUAL REPORT ON CHURCH-STATE CONFLICT IN THE UNITED STATES 5 (1993).

local political controversy, defied administrative resolution, and have found their way into the federal courts.[4]

In addressing these religion and speech claims, courts have wound through a maze of First Amendment doctrine over the past two decades against the backdrop of a Supreme Court in ideological flux. The Religion and Free Speech Clauses have generated sharp interpretive disagreements among Supreme Court Justices. It is not surprising, therefore, that the question of religious speech has proven particularly problematic, setting the First Amendment on an internal collision course. During the 1992 Supreme Court term, the case of *Lamb's Chapel v. Center Moriches Union Free School District*[5] challenged the Justices to develop coherent theories of both Establishment Clause and Free Speech interpretation. Unfortunately, the Court failed on both counts.[6]

In *Lamb's Chapel*, a unanimous Supreme Court upheld the right of an outside religious group to use public school facilities after school

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4. *See, e.g., infra* notes 85-99 and accompanying text; *see also* Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991), *appeal dismissed*, 972 F.2d 1331 (1992) (upholding teacher's refusal to permit fifth grade student to distribute survey asking students about their views on God as well as oral presentation on God); DeNooyer v. Livonia Public Schools, 799 F. Supp. 744 (E.D. Mich. 1992) (upholding school's restriction on student's showing videotape of herself singing and proselytizing religious song to second grade class during show and tell). The issue of graduation prayers has recently attracted national attention and caused turmoil in school districts across the country. The debate has escalated since the Supreme Court's 1992 decision in Lee v. Weisman, 112 S. Ct. 2649 (1992) (holding that a public school's inclusion of "nonsectarian" prayer in a school graduation ceremony constituted an impermissible establishment of religion under the Establishment Clause), together with the Fifth Circuit's opinion in Jones v. Clear Creek Indep. School Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) (upholding a policy permitting high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at graduation ceremonies). Following *Weisman*, the American Center for Law and Justice, a Washington-based public interest law firm founded by the evangelical minister Pat Robertson, sent letters to 15,000 school districts and 300,000 "concerned citizens" informing them of the Fifth Circuit's decision in *Jones* and the group's understanding that *Weisman* does not prohibit students from "initiating and leading prayer" at commencement exercises. The American Civil Liberties Union countered with a mailing to 15,000 school superintendents, informing them that *Jones* is unconstitutional in that the decision permits a student election on the prayer issue, allows school officials to approve the prayer, and designates a time for it during official ceremonies. According to the ACLU, students may organize prayer ceremonies before and after graduation programs only if the prayers are voluntary, organized without the input of school authorities, and held off the school grounds. Henry J. Reske, *Graduation Prayers, Part II*, A.B.A. J., July 1993, at 14, 16. Appearing on the June 8, 1993 edition of Pat Robertson's "700 Club" following the Supreme Court's denial of certiorari in the *Jones* case, the American Center for Law and Justice Chief Counsel inaccurately referred to the Court's action as an "affirmance" and further asserted that the action opened the door to organized school prayer and religious testimonials by students. Americans United for Separation of Church and State countered with a mailing to 50 state education departments, similar to the ACLU statement, clarifying the importance of Lee v. Weisman, the dangers of "endorsement" that flow from the *Jones* decision, and the significance of a denial of certiorari as not an affirmance of a lower court decision. GRADUATION PRAYER UPDATE (Americans United for Separation of Church and State), July 1993.

5. 113 S. Ct. 2141 (1993).

6. At least three other circuits had upheld a First Amendment right to equal access under policies that were of comparable or even narrower scope than the state statute in question in *Lamb's Chapel*. *See infra* note 9 and accompanying text. *See also* Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989); Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 253 (1990); Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991).

hours where school officials had previously granted access to similar speakers and subjects. From a doctrinal perspective, the Court achieved consensus at the cost of specificity and clarity. *Lamb's Chapel*, in fact, may be remembered better for what the Court failed to say than for what the opinion actually said. The thin reasoning of Justice White's majority opinion, an unsatisfactory attempt to finesse the Establishment Clause issue, and the analytic leaps and gaps in the Court's discussion of the Free Speech Clause all combine in a troublesome decision that generates more questions than answers.

This commentary focuses on the speech aspects of *Lamb's Chapel*. The decision appears, at first glance, to represent a victory for religious speech but that victory is narrowed by the Court's reliance on the public forum doctrine,[7] a doctrine which utilizes a categorical approach that carries broad implications for religious and non-religious expressive rights in schools. In addition, the commentary addresses the development of the public forum doctrine through a discussion of modern case law and the shortcomings of public forum analysis as viewed through the lens of *Lamb's Chapel* and other recent school-related cases. Finally, an alternative theoretical framework at the end of this commentary builds on a contextual approach that appears to have gained increasing support among the Supreme Court Justices.

LAMB'S CHAPEL: THE LOWER COURTS' VIEW

In 1988, a pastor of an evangelical Christian Church sought permission to use the Center Moriches High School auditorium to show a film series entitled "Turn Your Heart Toward Home" featuring James Dobson, president of a group called Focus on the Family. The series would be offered to the general public once per week over a five-week period in the evening, free of charge. The stated purpose of the series was "to share some practical insights about the family."[8] The school district denied Mr. Dobson's request, relying on a state law that permits local school boards to open public school facilities to the community for certain enumerated uses including "social, civic and recreational meetings and entertainments and other uses pertaining to the welfare of the community."[9] The statute makes no mention of religious uses of public school

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7. Public forum doctrine is a framework developed by the Supreme Court for analyzing the permissibility of speech on public property as weighed against government's interest in limiting the use of its property. The doctrine divides government property into three categories: the traditional public forum, the designated or limited public forum, and the non-public forum. The degree of permissible government restrictions on speech is measured by the character, i.e., the category of the forum in question. *See infra* notes 55-63 and accompanying text.

8. In the film, Dr. Dobson, an expert on family life, "reminds parents of society's slide toward humanism—the undermining influences of radio, television, films, and the press—which can only be counterbalanced by a loving home where Christian values are instilled from an early age." 959 F.2d 381, 384 (2nd Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

9. N.Y. EDUC. LAW § 414(1)(a-j) (McKinney 1992) sets out ten purposes for which the use of school facilities may be granted throughout the State including "social, civic and recreational meetings."

facilities. The district also relied on its own local rules which make physical facilities available during non-school hours, for "social, civic, recreational and other activities" by members of the community, but provide that "school premises shall not be used by any group for religious purposes."[10] The district, in fact, opened its doors on prior occasions to a broad range of uses, some appearing to be religion-related, including a Salvation Army Band benefit concert with invocation and religious music, a gospel music concert with religious songs and hymns, and a lecture series entitled "Psychology and the Unknown" that included Hindu concepts and "spiritual effusion."[11] The school district never denied the use of its facilities to outside groups prior to its denial of the Lamb's Chapel application.

In 1990, the Church brought suit in federal court against the school district, raising among other constitutional claims that its freedom of speech under the First Amendment had been violated.[12] Church officials argued that the school district had opened the facilities for use by the general public. The exclusion of religious speech, therefore, under prevailing public forum doctrine, could only be enforced if the exclusion met the same standards that apply in a traditional public forum where content-based restrictions must be "necessary to serve a compelling state interest" and must be "narrowly drawn" to serve that purpose.[13] The school district on the other hand, denied that it had created an open forum and further claimed that it had a "compelling interest" in protecting elementary and secondary students from proselytizing religious ideas of various religious groups and entities. Without a compelling interest, the school district's action would violate the Establishment Clause of the First Amendment.[14] The district court granted summary judgment for the school district.[15]

Lamb's Chapel appealed the district court's decision to the United States Court of Appeals which affirmed the entry of summary judgment against the Church.[16] The court of appeals' decision discussed the public forum doctrine as well as arguments advanced by both sides concerning

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10. Rules and Regulations for Community Use of School Facilities, Nos. 7, 10, as cited in Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2144 (1993).

11. 113 S. Ct. 2141, 2146 n.5 (1993).

12. The Church challenged the denial as a violation of the Free Speech and Assembly Clauses, the Free Exercise Clause, and the Establishment Clause of the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment. Providing legal representation were lawyers from the Center for Law and Justice, *see supra* note 4.

13. Perry Education Ass'n v. Perry, 460 U.S. 37, 45 (1983).

14. U.S. CONST. amend. I.

15. Lamb's Chapel v. Center Moriches School Dist., 770 F. Supp. 91, 92 (E.D.N.Y. 1991). The previous year, the district court had denied *Lamb's Chapel*'s motion for preliminary injunction. 736 F. Supp. 1247 (E.D.N.Y. 1990). The Church initially appealed the denial to the Second Circuit but subsequently withdrew the appeal and returned to the district court to allow the court to reconsider the case in light of Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) (granting equal access to high school student religious groups under the federal Equal Access Act, 20 U.S.C. §§ 4071-74 (1988)).

16. Lamb's Chapel v. Center Moriches Union Free School Dist., 959 F.2d 381 (2d Cir. 1992).

the applicability of § 414 of the New York Education Law[17] and the school district's Local Rule No. 7.[18] The court concluded that "the school property in question falls within the subcategory of 'limited public forum', the classification that allows it to remain non-public except as to specified uses."[19] Although the court admitted that whether the school district had opened its facilities to religious uses and purposes presented a close question, it held that "none of the prior uses pointed to by the appellants were for religious purposes . . . . Incidental references to religion or religious figures, the occasional use of religious terms, and the performance of music with religious overtones do not convert a secular program into a religious one."[20] In other words, the school district could permissibly create a religion-free forum for private speakers on school property as long as it consistently excluded all such speakers.

The court distinguished the facts of *Lamb's Chapel* from prior case law relied upon by the appellants. In *Widmar v. Vincent*,[21] the Supreme Court held that a state university could not deny access to university facilities to students conducting religious meetings on campus where access had been granted to other student groups. In *Board of Education of the Westside Community Schools v. Mergens*,[22] the Court held that a high school created a limited open forum by allowing non-curriculum related groups to use the school facilities and therefore could not deny access to students for religious group meetings without violating the federal Equal Access Act.[23] According to the appeals panel, "*Widmar* involved the use of university property by student groups in a situation where a number of such groups had been afforded access, to the point where, as to the students, a 'generally open forum' was created."[24] The court found that *Mergens*, on the other hand, was decided "purely on statutory

17. *Supra* note 9.

18. *Supra* note 10. The appeals court held that religious uses were nowhere permitted in the enumeration of ten permissible uses under state law, that all the uses specified were subject to local school board regulation, and that Center Moriches had prohibited religious uses under Local Rule No. 7. Relying on prior case law, the court concluded that the "use of New York school facilities is confined to non-religious purposes and thereby ascertained the state's intent to create a limited public forum . . . ." 959 F.2d at 387 (citation omitted) (citing Deeper Life Christian Fellowship v. Bd. of Educ., 852 F.2d 676, 680 (2d Cir. 1988) [*Deeper Life I*]). However, even in a limited public forum where "government is free to impose a blanket exclusion on certain types of speech," the court held, "once it allows expressive speech activities of a certain genre, it may not selectively deny access for other activities." *Id.* at 387 (citing Travis v. Owego-Appalachian School Dist., 927 F.2d 688, 692 (2d Cir. 1991)). The only remaining question was whether "Center Moriches has opened its facilities to religious uses and purposes." *Id.* at 387.

19. 959 F.2d at 386.

20. *Id.* at 388.

21. 454 U.S. 263 (1981). The exclusion was based on a regulation adopted in 1972 by the University of Missouri at Kansas City that prohibited the use of "University buildings or grounds . . . for purposes of religious worship or religious teaching." *Id.* at 265 n.3.

22. 496 U.S. 226 (1990).

23. 20 U.S.C. §§ 4071-74 (1988). The Act states: It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

24. 959 F.2d at 388-89 (quoting Widmar v. Vincent, 454 U.S. 263, 267 (1981)).

grounds."[25] In both cases, "religious use of the property was sought by students, who have a greater claim on the use of school property than outsiders, especially when the property generally is open to student groups."[26] Classifying the property as a non-public forum, the Church's requested use of the school facility in *Lamb's Chapel* could be denied as long as the denial was "reasonable" and viewpoint neutral.

The court of appeals in *Lamb's Chapel* apparently assumed the reasonableness of the school district's decision without suggesting any governmental interest. The court did not even address the issue of viewpoint neutrality. Its distinction between religious and non-religious speech was based on content-discrimination in the context of the limited public forum rather than on religion as a perspective or point of view on otherwise eligible subject matter. Nor did the court explain why, in the context of "religion as subject matter," the film series in question was not of the same "genre" as social, civic, recreational, or other permitted uses.

THE SUPREME COURT TURNAROUND

Lamb's Chapel subsequently petitioned and was granted review by the United States Supreme Court. The United States Department of Justice filed a friend-of-the-court brief on behalf of the Church. The American Civil Liberties Union, and People for the American Way and the Union of American Hebrew Congregations joined Americans United for Separation of Church and State in a second brief.[27] Americans United here broke rank from other separationist groups, including the Anti-Defamation League and the Committee for Public Education and Religious Liberty (PEARL), which joined an *amicus* brief written by the New York State and National School Boards Associations in support of the school district.

The Supreme Court, in addressing Lamb's Chapel's claim, took the interpretive path of least resistance. The scope and reasoning of Justice White's majority opinion stands in stark contrast to that of the appeals court. The appeals court had concluded that the school district had created a "limited public forum" open only for designated purposes, a "classification that allows it to remain non-public except as to specified uses."[28] Religious uses were not among those permitted as evidenced by district policy and practice and, therefore, the court had applied the reasonableness standard governing the non-public forum. The Supreme Court, on the other hand, avoided any discussion of the limited public forum and leap-frogged into a non-public forum analysis. Unlike the appeals court, however, which found the Local Rule No. 7 prohibition

25. *Id.* at 389.

26. *Id.*

27. *Amicus Curiae* Brief for the American Civil Liberties Union, Americans United for Separation of Church and State, New York Civil Liberties Union, People for the American Way, and Union of American Hebrew Congregations, Lamb's Chapel v. Center Moriches Union Free School Dist., (No. 91-2024), 113 S. Ct. 2141 (1993). Americans United for Separation of Church and State typically takes a far stricter stand on church-state separation than their position in *Lamb's Chapel.*

28. 959 F.2d at 386.

against religious speech to be reasonable and viewpoint neutral on its face, the Justices failed to address the facial validity of a blanket prohibition on religious speech, opting instead for an "as applied" approach.[29]

Beyond the fundamental analytic distinctions between the appeals court and Supreme Court opinions, the Supreme Court worked its way to a different result essentially by focusing on the appropriate label to be attached to the ban on religious speech as embodied in Local Rule No. 7. Was the appeals court correct in concluding that this was subject-matter discrimination, permissible within the designated public forum as long as it was consistently applied to all religious speech? Or was this discrimination based on a particular point of view, here a religious one, and impermissible even in the non-public forum? The answer to this question lay in the interpretation of the facts of the case. In *Lamb's Chapel*, the Court concluded that the film series on child rearing and family values "dealt with a subject otherwise permissible under Rule 10," which allowed the school property to be used for "social or civic purposes."[30]

The appeals court had concluded that prior permitted uses of the school property did not fall under the topic or subject of religion and the school district, by practice, had not established religion as a permissible subject for purposes of access to the forum. The Supreme Court, on the other hand, viewed the critical subject as one of family issues and child-rearing, characterizing religion as a particular point of view on an otherwise permissible topic.

The Court held that the district had permitted at least one other use of a similar character,[31] and concluded that the "exhibition was denied solely because the film dealt with the subject from a religious standpoint."[32] In other words, this situation was not discrimination based on subject matter or speaker identity which is permissible in the non-public forum, but rather discrimination against a viewpoint that comes from a religious perspective.[33] Since viewpoint discrimination is impermissible even in the non-public forum, the Court did not have to reach the question whether the district had created a limited or designated forum in this case as the lower courts had done.

The Court then debated the school district's main defense; to permit school property to be used for religious purposes would constitute an

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29. Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2147 n.6 (1993).

30. *Id.* at 2147. The Court found "particularly interesting and relevant to the issue" the first item on a sample list of uses permitted under Rule 10 in 1987 and 1988, i.e., "a lecture series by the Mind Center, purportedly a New Age religious group." *Id.* at 2146 n.5 (quoting Lamb's Chapel v. Center Moriches Union Free School Dist., 770 F. Supp. 91, 93 (E.D.N.Y. 1991)). As described by the Court of Appeals, "the lecture series, 'Psychology and the Unknown,' by Jerry Huck . . . a psychotherapist . . . discussed such topics as parapsychology, transpersonal psychology, physics and metaphysics." *Id.* (quoting *Lamb's Chapel*, 959 F.2d at 388).

31. *Id.* at 2147.

32. *Id.*

33. Between 1987 and 1990, at least 80 different groups had engaged in a total of over 955 uses of the school facilities. Reply Brief for Petitioners at 3, Lamb's Chapel v. Center Moriches Union Free School Dist., (No. 91-2024), 113 S. Ct. 2141 (1993).

establishment of religion violative of the First Amendment.[34] Although it is not the intent of this commentary to address this issue in detail, the Court's failure to provide a thoroughly reasoned analysis on the First Amendment issue is important to note. Why did the majority avoid a more affirmative application of Justice O'Connor's "endorsement test" which has garnered some support among the Court members over the past decade?[35] While the majority drew support from *Widmar*, it is unclear why it failed to elaborate on the dangers of endorsement which were more severe in *Widmar* or why Justice White failed to distinguish his position here from that taken in *Widmar*.[36] In *Widmar*, university facilities were used by students, arguably for religious worship during university operating hours (including "prayer, hymns, Bible commentary, and discussion of religious views and experiences")[37] as compared with *Lamb's Chapel* where the school premises would be used after school hours by outsiders for a showing of a film without any aura of direct government involvement. It is perplexing why Justice White framed his majority opinion using the language of "endorsement" when he seems

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34. Here the Court, relying on *Widmar*, concluded that there would have been "no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Lamb's Chapel*, 113 S. Ct. at 2148. "The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." *Id.* The majority resurrected the "three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." *Id.* In a caustic separate opinion, Justice Scalia joined by Justice Thomas sharply criticized the majority's invocation of the *Lemon* test despite "no fewer than five of the currently sitting Justices" having, "in their opinions, personally driven pencils through the creature's heart." *Lamb's Chapel*, 113 S. Ct. at 2150 (Scalia, J., concurring). Justice Kennedy, in a separate opinion agreed with Justice Scalia that "the Court's citation of *Lemon v. Kurtzman* is unsettling and unnecessary." *Id.* at 2149 (Kennedy, J., concurring in part and concurring in the judgment). He further criticized the phrase "endorsing religion" as not "consistent with our precedents and our traditions." *Id.*

35. In a series of opinions dating from the mid-1980's, Justice O'Connor has refined the three-part test originally articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971) into a two-part inquiry: "whether government's purpose is to endorse religion and whether the statute (or action) actually conveys a message of endorsement." Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor J., concurring). The test is "whether an objective observer, acquainted with the text, legislative history, and implementation of the (challenged action) . . . would perceive it as a state endorsement of (religion)." *Id.* at 76. *See also* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), *reh'g denied*, 466 U.S. 994 (1984); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring).

36. 454 U.S. 263 (1981). It should be noted that Justice White wrote a dissenting opinion in *Widmar* in which he rejected the majority's upholding the student group's right to equal access to university facilities "for the purposes of worship and the practice of their religion." *Id.* at 289 (White, J., dissenting). Primarily, Justice White rejected the majority's proposition that religious worship is a form of speech and thereby protected under the Free Speech Clause. On the contrary, he viewed the right asserted by the students as arguably grounded in the Free Exercise Clause but rejected this claim as the regulation merely placed a minimal burden on their "ability freely to exercise their religious beliefs and practices." *Id.* at 288. In view of Justice White's analysis in *Widmar*, his willingness to rely on the Free Speech Clause in *Lamb's Chapel* can only be explained by drawing a distinction between the religiously-related conduct represented in the two cases; *Widmar* was arguably more akin to religious *worship* per se while *Lamb's Chapel* was more akin to *speech* on a general theme but from a religious perspective.

37. *Id.* at 265 n.2.

to have repudiated that standard in favor of Justice Kennedy's "test of coercion."[38]

Moreover, Justice White failed to mention *Mergens*[39] in which the use of school facilities during school hours for religious group meetings run by students would pose an even greater danger that both the public and students might perceive official endorsement of religion. The Court's distinction in *Mergens* between public and private speech, that is, between "government speech endorsing religion which the Establishment Clause forbids, and private speech endorsing religion which the Free Speech . . . Claus[e] protect[s],"[40] could have provided support for the majority's conclusions under the Establishment Clause in *Lamb's Chapel*. The government's denial of access to private speech endorsing religion demonstrates "hostility" toward religion. As the Court stated in *Mergens*, "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[41] Surely neither students nor the public will likely interpret private religious speech by a non-school related group during non-school hours as officially endorsed religious speech.

The Court's near summary disposition of the Establishment Clause defense in *Lamb's Chapel* warrants further discussion than the scope of this analysis permits.[42] Perhaps the interpretive perspectives among the

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38. Justice Kennedy has articulated a narrower inquiry based on two principles. The first principle precludes the government from giving "direct benefits to religion in such a degree that it in fact establishes a [state] religion or, religious faith or tends to do so." Mergens v. Westside Community Bd. of Educ., 496 U.S. 226, 260 (1991) (Kennedy J., concurring) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). The second principle is that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). As of 1989, Justices Kennedy, White, and Scalia and Chief Justice Rehnquist agreed that coercion should be the "sole touchstone" of Establishment Clause violations, "for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion." County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part). More recently, however, the latter three along with Justice Thomas have questioned the details of the test, particularly the "psychocoercion" spin placed upon it in Justice Kennedy's opinion for the Court in *Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting). On the other side in *Weisman*, Justices Blackmun, Souter, Stevens, and O'Connor rejected the coercion test. *Id.* at 2664 (Blackmun, J., concurring) ("Proof of government coercion is not necessary to prove an Establishment Clause violation"); *Id.* at 2672 (Souter, J., concurring) ("Our precedents . . . simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim"). Justice Souter went so far as to maintain that "a literal application of the coercion test would render the Establishment Clause a virtual nullity." *Id.* at 2673. Nevertheless, while Lee v. Weisman appeared to signal the "death of *Lemon* and the adoption of a coercion test" (*see* Suzanna Sherry, Lee v. Weisman: Paradox Redux, 1992 SUP. CT. REV. 123, 131), both *Lamb's Chapel* and *Zobrest* seem to defy that conclusion.

39. 496 U.S. 226 (1991).

40. *Id.* at 250.

41. *Id.* An explicit distinction between the facts of *Lamb's Chapel* and those of *Mergens* would have further permitted Justice Stevens, the sole dissenter in *Mergens*, to implicitly reconcile his differing positions in the two cases. In *Mergens*, he criticized the majority for discussing Establishment Clause concerns too lightly and for getting "perilously close to an outright command to allow organized prayer . . . on school premises." *Id.* at 287 (Stevens, J., dissenting).

42. The Court's reluctance or institutional inability to develop a coherent Establishment Clause

Justices are so diverse that the majority was straining to find a common denominator among them. Perhaps the Court was exercising jurisprudential restraint, fearful of spinning analytic threads that courts and litigants might subsequently weave into the fabric of related cases. An elaborate discussion by the Court of *Widmar* and particularly *Mergens* could have had broad implications for the right claimed by students to engage in religious speech on school grounds, an issue that has become increasingly controversial in school districts across the country. The strong ideological and doctrinal disagreements among the Justices on Establishment Clause doctrine, together with the complexity and political volatility of church-state issues, the broad implications of religious speech on school premises, and the unsettled thematic permutations that are working their way up through the lower federal courts are all factors that obviously weighed on the side of caution, brevity, and ambiguity.

PUBLIC FORUM DOCTRINE: THE PERILS OF CATEGORICAL THINKING

The lower courts and the Supreme Court in *Lamb's Chapel* all relied on public forum doctrine in reaching divergent conclusions. The Supreme Court's obvious and curious avoidance of the "limited public forum" concept, as well as its strained and arguably result-oriented effort to uphold the free speech claims asserted within the framework of existing

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theory was evidenced in Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993), decided less than two weeks following *Lamb's Chapel*. The 5-4 opinion written by Chief Justice Rehnquist relies only implicitly on the *Lemon* test and avoids any direct discussion of the more recently refined "endorsement test" or the "coercion test." Here the Court upheld the proposition that the Establishment Clause does not prevent a school district from furnishing a disabled student enrolled in a religiously affiliated school with a sign-language interpreter. The majority particularly relied on Mueller v. Allen, 463 U.S. 388 (1983) (upholding tuition tax deductions) and Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986), *reh'g denied*, 475 U.S. 1091 (1986) (upholding vocational education assistance, as part of a general state program, to a blind student enrolled in a private Christian college in preparation for the ministry). The key factors drawn from these cases included the broad spectrum of beneficiaries and the fact that the funds would become available to sectarian schools only through private choices of aid recipients. *Zobrest*, 113 S. Ct. at 2467. In a dissenting opinion joined by Justice Souter and in part by Justices Stevens and O'Connor, Justice Blackmun distinguished both *Mueller* and *Witters* from the facts at hand ("Those cases dealt with the payment of cash or a tax deduction, where governmental involvement ended with the disbursement of funds or lessening of tax"). *Id.* at 2474 (Blackmun, J., dissenting). Justice Blackmun avoided explicit reliance on *Lemon* or any other "test" although the language of the opinion appears to draw from a refined *Lemon* test. *Supra* notes 34-35. His discussion of the dangers of religious indoctrination which flow from the state provision of a human being as compared to mere funds echoes more recent cases applying elements of Justice O'Connor's "endorsement" test. ("But the graphic symbol of the concert of church and state that results when a public employee or instrumentality mouths a religious message is likely to 'enlist—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school'") (quoting Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985)). "[T]he union of church and state in pursuit of a common enterprise is likely to place the imprimatur of governmental approval upon the favored religion, conveying a message of exclusion to all those who do not adhere to its tenets." *Zobrest*, 113 S. Ct. at 2474 (Blackmun J., dissenting). Justice O'Connor, in a separate dissent, agreed with Justice Blackmun that the case should be remanded for consideration of threshold statutory and regulatory problems but she declined to address the Establishment Clause issue which she deemed as "hypothetical" given the alternative grounds for decision. *Id.* at 2475 (O'Connor, J., dissenting).

law, highlight some of the limitations inherent in public forum analysis.

To understand those limitations, a brief discussion of the doctrine's theoretical underpinnings and its evolution through case law would prove useful. The public forum doctrine is a theoretical construct which has grown over six decades and far out of proportion to its original scope or intent. The concept of the public forum originated in the 1930s. In *Hague v. Committee for Industrial Organization*,[43] Justice Roberts recognized that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[44] The phrase "public forum" itself is attributed to Harry Kalven's classic article, "The Concept of the Public Forum: *Cox v. Louisiana*."[45] According to Kalven:

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process . . . they are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.[46]

Initially, the concept of the public forum was intended to be speech protective. Whether the concept was intended to establish a system of categorizing public property in order to define access rights for expressive purposes is less certain. Nevertheless, over the past fifty years, the Court has traveled a winding course that has ultimately led to its current articulation of a doctrine that has attracted widespread criticism and concern among legal commentators[47] and among various Justices.[48]

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43. 307 U.S. 496 (1939).

44. *Id.* at 515.

45. 1965 SUP. CT. REV. 1 (1965).

46. *Id.* at 11-12

47. David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 145, 202 (1992) ("Although the Supreme Court's 'public forum doctrine' was once a speech-protective methodology, the Burger and Rehnquist courts have converted it into a speech-restrictive methodology . . . [t]he problem is that the Court's application of the modern forum doctrine blindly trusts the intentions of governmental officials. This is a fatal flaw."); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 980 ("[I]n this area, the Court's analytic machinery has broken down . . . ."); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 987 (2d ed. 1988) ("[M]any recent cases illustrate the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification."); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987) ("The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property."); Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return to Formalism*, 7 CARDOZO L. REV. 335, 341 (1986) ("The Court's current approach produces incoherent results untouched by the interplay of considerations that should inform its decisionmaking under the first amendment."); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) (Public forum doctrine as a conceptual approach, yields "an inadequate jurisprudence of labels . . . ." In its application, "free speech values tend to be minimized or ignored; government interests tend to be emphasized and exaggerated."); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1223 (1984)

Throughout the 1960s and 1970s, in particular, the Court gradually developed the public forum doctrine, advancing and retreating on its course.[49] One Supreme Court case is particularly noteworthy for its influence on later development of the public forum doctrine. In *Grayned v. City of Rockford*,[50] Justice Marshall, speaking for the majority, proposed a unified approach that has gained popularity among a number of commentators.[51] According to the *Grayned* Court, "the right to use a public place for expressive activity may be restricted only for weighty reasons." Although government can impose "reasonable time, place and manner regulations" on *all* public property, such regulations must further

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("Even when public forum analysis is irrelevant to the outcome of a case, the judicial focus on the public forum concept confuses the development of first amendment principles.")

48. *See infra* notes 100-107 and accompanying text. For earlier criticism, *see* Greer v. Spock, 424 U.S. 828, 859, 860 (1976) (Brennan, J., dissenting) ("[T]he notion of 'public forum' has never been the touchstone of public expression, for a contrary approach blinds the Court to any possible accommodation of First Amendment values . . . . [T]here is a need for a flexible approach."); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) ("In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or non-public."); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 820 (1985) (Blackmun, J. dissenting) ("[T]he public forum, limited-public-forum, and non-public forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity. The interests served by the expressive activity must be balanced against the interests served by the uses for which the property was intended and the interests of all citizens to enjoy the property."); *Id.* at 833. (Stevens, J., dissenting) ("I am somewhat skeptical about the value of this analytical approach in the actual decisional process . . . . At least in this case, I do not find the precise categorization of the forum particularly helpful in reaching a decision."); U.S. v. Kokinda, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) ("I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand.").

49. *See* Adderley v. Florida, 385 U.S. 39 (1966), *reh'g denied*, 385 U.S. 1020 (1967) (upholding the convictions of students who had been arrested for trespass on the grounds of a county jail.) The Court seemingly distinguished between the proprietary and non-proprietary control of government property: "The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Id.* at 48; Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (declaring that advertising space on public transportation facilities was not a public forum and therefore access could be denied to political advertisements). Justice Blackmun, in a plurality opinion, stated that access to public property depends on "the nature of the forum and the conflicting interests involved . . . ." *Id.* at 302; Greer v. Spock, 424 U.S. 828 (1976) (upholding the denial of a request by political candidates to distribute campaign literature and hold meetings in the public areas of a military post). The Court stated that "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false." *Id.* at 838.

50. 408 U.S. 104 (1972) (upholding a municipal ordinance prohibiting "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of a school class while "on public or private grounds adjacent to any building in which a school or any class thereof is in session . . . ." *Id.* at 107-08).

51. *See* Werhan, *supra* note 47, at 378-84, 423-24; Barbara S. Gaal, Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 143-51 (1982); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93-94 (1987); Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1317-18 (1979); Kenneth L. Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 261-62 (1976); Marianne Elizabeth Dixon, Comment, *International Society for Krishna Consciousness, Inc. v. Lee: The Failure of the Public Forum Doctrine to Protect Free Speech*, 37 ST. LOUIS U. L.J. 437, 462 (1993).

"significant government interests."[52] In determining reasonableness, the "crucial question" is one of "compatibility." That is, "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time . . . . [T]he regulation must be narrowly tailored to further the state's legitimate interest."[53]

The unitary approach in *Grayned* was at best an aberration from a straight line of cases drawing on categorization.[54] Two cases from the 1980s represent the Court's clearest articulation of the public forum doctrine as it is presently applied. The language of these cases and its subsequent application reveal a startling transformation of the public forum. The public forum evolved from a mere concept which recognized the important role played by public places in furthering First Amendment values to a rigidly applied set of categorical rules which cover not only *access* by the general public to government property, but also the *use* of government property for expressive purposes by those who already enjoy rightful access such as students. The doctrine, in its present form, also suggests how the original balance has shifted from protecting the rights of individual speech to the protection of governmental discretion.

The essential feature of the public forum doctrine established in *Perry Education Association v. Perry*[55] and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*[56] is a categorical framework for determining the extent of permissible governmental regulation of expressive activity on publicly owned property. Based upon the character of the property and its intended use, this test delineates three categories of government property. The first category is the "traditional" or "quintessential" public forum, that is, localities which "by long tradition or by government fiat [have] been devoted to assembly and debate"[57] such as streets, sidewalks, and parks. At these places government "may not prohibit all communicative activity" while it can "enforce a content-based exclusion" providing the exclusion is "necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end."[58] Reasonable time, place and manner restrictions are permissible so long as they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[59]

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52. 408 U.S. 104, 115.
53. *Id.* at 116-17.
54. The very same day that the Court decided *Grayned*, the Court did an abrupt about-face, applying the "public forum" concept in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). Here the Court declared unconstitutional a Chicago ordinance that prohibited picketing or demonstrating "on a public way" within 150 feet of any primary or secondary school building while the school was in session. The ordinance exempted "peaceful picketing of any school involved in a labor dispute." *Id.* at 92-93. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone." *Id.* at 96.
55. 460 U.S. 37 (1983).
56. 473 U.S. 788 (1985).
57. *Perry*, 460 U.S. at 45.
58. *Id.*
59. *Id.*

The second category of government property is the "designated" or "limited public forum" created when government has, by policy or practice,[60] purposefully opened property for use by the general public, for use by certain speakers, or for the discussion of certain topics.[61] Government is not required to create or to maintain access to this limited public forum. Once it does permit access, however, the government must afford the same protection as in the traditional public forum, but only as to speech that is of the same character as that originally designated for protection by the government. In other words, in the designated or limited public forum, government has broad discretion to grant access to certain speakers and topics among which it cannot discriminate as to the content of speech.

Other speakers and speech topics not designated for inclusion or access fall into the third category, the non-public forum. This category includes property that is not traditionally open for communicative purposes. With regard to such property, a standard of mere "reasonableness" is applied. Government restrictions on speech are permissible so long as they are "reasonable in light of the purpose served by the forum and are viewpoint-neutral."[62] Yet the government's decision need not be the "most reasonable or the only reasonable limitation."[63]

The public forum doctrine is a categorical or formulaic approach that the Court uses to reconcile constitutional rights and government interests. More specifically, it is a form of definitional balancing whereby the Court balances the weight of the right against the state interest at the

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60. *Cornelius*, 473 U.S. at 802. The original concept of what has been termed the "transformation principle" whereby government by an affirmative action may transform a non-public forum into a designated public forum was developed in two 1981 Court decisions: Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981), *remanded*, 311 N.W.2d 843 (Minn. 1981), and Widmar v. Vincent, 454 U.S. 263 (1981). In *Heffron*, the Court, applying the heightened scrutiny used to examine content-neutral regulations restricting access to the traditional public forum upheld the validity of a regulation requiring all persons seeking to use a fairgrounds to do so only from fixed locations. While the fairground was not a traditional public forum, the state's invitation to the general public to use it for certain purposes transformed it into a designated forum where heightened scrutiny would apply. The Court established this concept more clearly in *Widmar*. Having opened its facilities to student groups in general, the university could not deny access to religious groups absent a compelling governmental interest. Subsequently, the Court in *Cornelius* clarified the distinction between limited and non-public forums as turning on intent, looking to "the policy or practice of government" as well as the "nature of the property and its compatibility with expressive activity to discern the government's intent." 473 U.S. at 802. The *Cornelius* spin on the designated or limited public forum has been roundly criticized for eroding the strength of *Widmar*'s holding. *See Buchanan*, *supra* note 47, at 972. ("[I]n an accordion-like fashion, a government, if acting reasonably, may expand or contract at will the boundaries of the invited class on the basis of the subject matter of the proffered speech . . . . In this context, the transformation principle loses all conceptual force."); *The Supreme Court—Leading Cases*, 99 HARV. L. REV. 120, 206 (1985) ("The *Cornelius* decision is an unfortunate development in public forum doctrine because it will increase the amount of speech vulnerable to government regulation."); Post, *supra* note 47, at 1757 ("If a limited public forum is neither more nor less than what the government intends to be, then a first amendment right to access to the forum is nothing more than the claim that the government should be required to do what it already intends to do in any event.").

61. *Cornelius*, 473 U.S. at 802. In determining governmental purpose, the Court may also examine "the nature of the property and its compatibility with expressive activity." *Id.* at 802.

62. *Id.* at 806.

63. *Id.* at 808.

macro level and applies the result to all future cases.[64] Commonly used in First Amendment analysis, such formulaic approaches are considered to be generally speech protective. The formulas add objectivity and predictability to the decisionmaking process,[65] limiting the exercise of judicial discretion[66] while at the same time preserving individual and governmental interests in the context of the broader constitutional structure.[67]

Despite these apparent benefits, one need look no further than *Lamb's Chapel* and other recent school-related cases to discover the flaws in both the general approach and the specific public forum doctrine. Not only are free speech values undermined within such an analytic framework, but predictability and objectivity are achieved at the expense of specificity and fairness.[68] All government interests are uniformly treated as "vital" in all cases within a particular category.[69] While rules or categories may constrain judges from substituting their own preferences for those of government officials, they also dictate certain outcomes regardless of specific facts.[70] The Court gives primary consideration to the interests of governmental decisionmakers and assesses these interests independently of and prior to the resolution of a case itself.[71]

More fundamentally, as the category of "designated" or "limited public forum" so clearly indicates, rigid interpretations of constitutional rights have the dangerous potential of placing almost unbridled discretion in the hands of government officials when defining the limits of those rights. As *Lamb's Chapel* clearly demonstrates, where so much discretion is given to government officials, a forum can be defined ostensibly in terms of *speakers* or *topics* thus excluding *views* that government finds offensive or undesirable. This process defies constitutional doctrine and plain common sense. If the freedoms contained in the Bill of Rights are intended to serve as constraints on governmental abuse of authority, how can the Court justify a doctrine that permits government to decide whether it chooses to be subject to such constraint?[72]

There are numerous questions left unanswered by the Supreme Court's most recent wanderings through the labyrinth of the public forum doctrine. Should there exist, perhaps, a presumptive duty on the part of government to provide equal access for expressive purposes to property within its

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64. David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1556 (1992).

65. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

66. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 300 (1981); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 543 (1988).

67. Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 777 (1963).

68. C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other 'Special Contexts'*, 56 U. CINN. L. REV. 779, 837 (1988).

69. *Id.* at 785.

70. C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 388 (1988).

71. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 210 (1985).

72. Owen M. Fiss, *Silence on the Street Corner*, 55 ALB. L. REV. 713, 722-23 (1992).

control?[73] As *Lamb's Chapel* points out, is there a clear distinction between content-based discrimination which is permissible in the non-public forum and viewpoint discrimination which is impermissible. It is unclear under which rubric a blanket prohibition against religious speech would lie. Perhaps courts should not apply the public forum doctrine to cases involving student speech where the speakers do not seek *access* to the property but merely seek to *use* it for private or personal speech.[74] Or perhaps the applicability of public forum analysis should turn on the question of government sponsorship.

Is the concept of "viewpoint neutrality" applicable to public schooling where school officials regularly select certain views or perspectives that further the inculcation of societal and community values? Should school officials have discretion to discriminate against viewpoints in curriculum-related or school-sponsored activities while maintaining viewpoint neutrality with regard to "private" student speech that happens to occur on school grounds? Should this distinction be applied to religious viewpoints? Should all viewpoints be granted equal access even in the non-public forum or should religious viewpoints be afforded "preferred" status? What about speech that conveys views that are morally reprehensible to the larger society such as those espoused by the Ku Klux Klan or neo-Nazi groups? Or views that violate constitutional norms, such as those that promote racial or religious intolerance, or the subjugation of women? Is government permitted to favor a particular point of view on an issue of public concern, such as abstinence versus condom distribution or family planning services versus abortion counseling, when the context of the public issue is the allocation of public resources and not access to public property?[75] These are just a sampling of the questions left open for future debate on this topic.

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73. Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 Nw. U. L. REV. 1137, 1205-06 (1983).

74. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. REV. 1, 48 (1986) ("[P]ublic forum analysis is irrelevant when access is not at issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak."). *But see* DeNooyer v. Livonia Public Schools, 799 F. Supp. 744, 752 (E.D. Mich. 1992), *aff'd*, 1 F.3d 1240 (6th Cir. 1993) (holding that the foregoing "commentator did not have *Hazelwood* available to him when he suggested the use/access distinction, and the Supreme Court's analysis in *Hazelwood* defies this categorization") (referring to Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), *cited infra* notes 77-99 and accompanying text).

75. In a 1991 case, Rust v. Sullivan, 111 S. Ct. 1759 (1991), the Court rejected the argument that 1988 regulations promulgated by the Department of Health and Human Services under Title X of the Public Health Service Act of 1970, 42 U.S.C. §§ 300-300a-41, discriminated on the basis of viewpoint. The regulations prohibited private health care organizations receiving Title X funds from providing "counseling concerning the use of abortion as a method of family planning," 42 C.F.R. 59.8(a)(1) (1989), nor could recipients engage in activities that "encourage, promote or advocate abortion as a method of family planning." 42 C.F.R. § 59.10(a). The Court here distinguished between the refusal to fund and the imposition of a penalty:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis

IMPLICATIONS FOR STUDENT SPEECH

Lamb's Chapel is not typically a "schools' case." In *Lamb's Chapel*, claims to expressive access were asserted by non-students seeking to use the facilities after school hours for non school-related purposes. The usual arguments touching on the mission of public schooling and curriculum-relatedness were irrelevant. Without the complicated "educational baggage" issue, the narrow fact pattern formed the basis of a good test case through which religious speech advocates could incrementally develop the right to religious expression on public school grounds from the public law litigation perspective. From a policy perspective, however, the case did not allow the Court the opportunity to address directly the various school-related issues of religious speech which are now facing lower courts and school administrators nationwide. Nevertheless, both the holding and rationale of *Lamb's Chapel* carry potentially serious implications for the exercise of religious and non-religious speech by students attending public schools.

The *Lamb's Chapel* Court's affirmation of *Widmar*'s holding that religious speech is protected under the First Amendment Free Speech Clause was good news to students seeking to engage in non school-sponsored religious expression. In fact, the *Lamb's Chapel* Court went beyond *Widmar* in holding that even in the non-public forum, at least when addressing a broad topic of general interest, the essential distinction between religious and non-religious speech is based on the speaker's viewpoint, and this viewpoint must be granted equal access. *Lamb's Chapel* also demonstrates that the Court as an institution may be leaning toward an accommodationist approach to religious speech under the Establishment Clause. The failure of the Justices to formulate a solid rationale supporting these propositions and the majority's thinly reasoned opinion leave open the question as to whether a different result might be achieved if, for example, the issue were voluntary non-sponsored student speech during the school day and outside the context of religious group meetings.

More fundamentally, the most troubling aspect of *Lamb's Chapel* is the Court's continued reliance on the public forum doctrine. As currently applied in the school setting, public forum analysis grants school authorities almost unrestricted discretion in defining the permissible parameters of student speech. Even if *Lamb's Chapel*'s prohibition against religious viewpoint discrimination were carried over to student speech, sponsored or not, there is a dark side to this. *Lamb's Chapel* is a case which addressed equal access and not access per se. The Court's decision granted religious speakers the right to express themselves so long as

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of viewpoint.

Rust, 111 S. Ct. at 1772. *But see* Justice Blackmun's dissent, "These [regulations] are clearly restrictions aimed at the suppression of 'dangerous ideas.'" *Id.* at 1781 (Blackmun, J., dissenting). The question remains as to whether *Rust* and *Lamb's Chapel* are reconcilable. The argument can be made that the "anti-abortion" position is generally associated with particular religiously affiliated groups so that the regulations in question favor a religious viewpoint over what may be considered a secular viewpoint on the topic of family planning.

government officials had granted such rights to similar speakers or topics. In other words, the right to engage in religious speech does not exist by itself, but rather is derivative of similar rights granted to non-religious speakers in the relevant forum.

In the limited public forum, school officials may still open or close the forum at will to a specific type of speaker or topic which they find disagreeable. The *Lamb's Chapel* opinion, therefore, may create built-in incentives for even well-intentioned school officials to further limit expressive rights. For example, school officials may decide to shut out certain "acceptable" speakers, topics, or perspectives in order to avoid "unacceptable" ones such as those grounded in religion, so that the school can maintain control over the ideas expressed on school property. The school may also decide to shut out speech to avoid controversy. If these scenarios were to occur, it would narrow the universe of permissible speech on government property and seemingly violate fundamental First Amendment values.[76] Moreover, in the non-public forum, which has proven to be the most commonly identified forum in public education cases, the doctrine will continue to invite courts to accept any pedagogically related justification for limiting speech.

In fact, public forum analysis has effectively disengaged the courts from the public dialogue over school governance, the permissible ends of public schooling, First Amendment values, and the interrelationship among these essential features underlying free speech claims in the school setting. The Court's failure to articulate a coherent theory of expressive use of government property, particularly school property, has sent the lower courts into a tailspin of confusion perpetuated by the *Lamb's Chapel* decision.

This confusion in school-related cases stems in part from *Hazelwood School District v. Kuhlmeier*,[77] the Court's 1988 decision upholding the authority of school officials to regulate the content of a student newspaper. In *Hazelwood*, the Court concluded that the school had not created a designated public forum in the school newspaper either by policy or practice. School officials could restrict "the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[78] The majority opinion, written by Justice White, also the spokesperson for the *Lamb's*

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76. Over the years, constitutional scholars have advanced a number of values that arguably underlie the First Amendment. Included among these are the search for truth (LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 577 (1st ed. 1978), quoting Justice Holmes dissent in Abrams v. United States, 250 U.S. 616, 630 (1919): "[t]he best test of the truth is the power of the thought to get itself accepted in the competition of the market"); the protection of intelligent self-government and political participation (ALEXANDER MEIKELJOHN, POLITICAL FREEDOM 27 (1960)); the promotion of self-realization and self-fulfillment (MARTIN H. REDISH, FREEDOM OF EXPRESSION 4-5 (1984); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47 (1989)); the promotion of tolerance and diversity (LEE C. BOLLINGER, THE TOLERANT SOCIETY 11 (1986)); and as a check on the abuse of governmental power (Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 527, 528).

77. 484 U.S. 260 (1988), *remanded*, 840 F.2d 596 (8th Cir. 1988). For a discussion of *Hazelwood* and its impact on students' expressive rights, see Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253 (1992).

78. *Hazelwood*, 484 U.S. at 273.

Chapel majority, opens with a reaffirmation of students' expressive rights as articulated more than two decades before in *Tinker v. Des Moines Independent Community School District*.[79] The *Hazelwood* opinion notes, however, the limitations placed upon First Amendment rights "in light of the special characteristics of the school environment."[80] Drawing a clear distinction between toleration and promotion of student speech, the Court held that, unlike the symbolic speech in *Tinker* which was also political in nature, the publication of student articles in *Hazelwood* required the school not merely to tolerate speech, but to "lend its name and resources to the dissemination of student expression."[81] The Court defined the distinction as follows:

> [Toleration] addresses educators' ability to silence a student's personal expression that happens to occur on the school premises . . . . [Promotion] concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[82]

The Court's sweeping language goes far beyond the narrow issue of newspaper censorship. The opinion grants school officials broad discretion to control or limit student speech, including situations where students are exposed to material that is "inappropriate for their particular maturity level," where students would be subjected to expression that could be "erroneously attributable to the school," and where the proposed speech is "ungrammatical, poorly written, inadequately researched, [or] biased or prejudiced."[83] Since *Hazelwood*, lower courts have struggled to apply its analysis to a broad range of student speech, both curricular and non-curricular. These permutations on *Hazelwood* underscore the limitations of the public forum doctrine, particularly when the doctrine is applied to the many activities represented in public schools.

Unlike *Tinker*'s expansive view of student expressive rights on school grounds, *Hazelwood* focused on a more narrow unit of analysis, a school newspaper, and applied public forum analysis only to that "medium" of expression. Lower courts subsequently have adopted this approach and have continued to define the forum in question narrowly in terms of the "medium" of expression such as school-sponsored newspapers,

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79. 393 U.S. 503 (1969). In striking down a school's prohibition against students' wearing black armbands to protest the Vietnam War, the Court held that school officials may limit free expression only where it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

80. 484 U.S. 260, 266 (1988) (citing Tinker v. Des Moines, 393 U.S. 503, 506 (1969)).

81. *Id.* at 272-73.

82. *Id.* at 271.

83. *Id.*

"underground" newspapers, the school yearbook, or athletic programs. Courts have also defined the public forum in terms of the "locus" of expression, such as speech made in hallways, classrooms or the cafeteria. The debate and inconsistent results reached in the lower courts have revolved primarily around the question of whether the *Hazelwood* standard, with its reliance on the public forum doctrine, applies only to curriculum-related speech, to all school-sponsored speech, or to all speech by students on school facilities whether school-sponsored or not.

Several post-*Hazelwood* cases addressing the issue of religious speech, particularly the distribution of religious literature, demonstrate the disparate interpretations of *Hazelwood* rendered by the lower courts in addressing this question.[84] Although these cases have subtle factual distinctions, the degree to which each opinion embraces or rejects public forum analysis, the underlying rationale, the selection of relevant precedent, and the results are worthy of note.

The post-*Hazelwood* case law can be grouped into two categories. In the first category of cases, the lower federal courts have explicitly embraced public forum analysis. For example, in *Nelson v. Moline School District 40*,[85] students seeking to distribute a nondenominational newspaper called *Issues and Answers* challenged the school's policy. Here a district court in Illinois held that school hallways and classrooms were non-public fora. As a result, *Nelson* permits school officials to impose reasonable regulations that preserve the use for which the school has been lawfully dedicated, that is, teaching "fundamental values of public school education."[86] Distribution of the same publication provoked a similar controversy in *Hemry v. School Board*.[87] The court concluded that school

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84. For a discussion of this question outside the context of religious speech, *see* Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988). Here the Ninth Circuit focused on *Hazelwood*'s sponsorship standard in striking down a blanket policy requiring prior approval of all student written material prior to distribution on school premises or at school functions. Student editors of an unauthorized newspaper challenged the policy. The appeals panel drew the distinction, drawn by the Supreme Court in *Hazelwood*, between the school's *tolerating* student speech (as in *Tinker*) and the school's affirmatively *promoting* particular student speech (as in *Hazelwood*). *Id.* at 1158. The court applied the *Tinker* standard, concluding that school officials could not subject non school-sponsored material to regulation "on the basis of undifferentiated fears of possible disturbances or embarrassment . . . ." *Id.* at 1159. *But see* Planned Parenthood v. Clark County School Dist., 887 F.2d 935 (9th Cir. 1989), *aff'd* 941 F.2d 817 (9th Cir. 1991) (en banc). A different panel of the Ninth Circuit, the following year, applied public forum analysis to non-curricular related activities, upholding a school district's refusal to publish Planned Parenthood advertisements in the high school newspaper, yearbook, and athletic event programs. Citing *Hazelwood*, the court held that schools must be entitled to disassociate themselves from speech that is inconsistent with their mission, even when the program's purpose is extra-curricular. *Id.* at 943.

85. 725 F. Supp. 965 (C.D. Ill. 1989). The school's policy permitted students to distribute non-school-sponsored materials only in designated areas of the school (excluding the halls and classrooms), before and after school and during lunch, and anywhere between classes, provided the materials were first approved by the principal. Approval would be granted unless the materials were libelous, pornographic or obscene, or pervasively indecent or vulgar; invaded the privacy of others; or would cause material and substantial disruption.

86. *Id.* at 974.

87. 760 F. Supp. 856 (D. Colo. 1991). The policy prohibited the distribution of "any student publication which . . . [c]reates a material and substantial disruption of the normal school activity." *Id.* at 858. As applied by the principal, the policy prohibited the distribution of non-school-related

hallways were neither a public forum nor a limited public forum because the school had not designated the hallways to be used indiscriminately by the public. According to the court, the restriction was merely a reasonable time, place, and manner regulation that had been "applied equally to those seeking non-school related distribution" in the school.[88]

More recently, in *Hedges v. Wauconda Community Unit School District 118*,[89] an Illinois district court addressed the constitutionality of a school policy that imposed restrictions on the distribution of materials not primarily prepared by students as well as materials concerning "activities, or meetings of a non-school sponsored organization."[90] Here the court rejected the plaintiffs' argument that the applicability of public forum analysis after *Hazelwood* turns on the question of school sponsorship. According to the court, *Hazelwood*'s "very language suggests that the Court would have applied the forum test to a restriction on speech in any school facility." Relying on the *Hazelwood* opinion, the court held that, "school facilities may be deemed to be public forums only if school authorities have 'by policy or practice' opened those facilities 'for indiscriminate use by the general public, . . . or by some segment of the public, such as student organizations.'"[91] School sponsorship came into play "1) to determine the nature of the forum involved and 2) to explain why censorship was permissible in this closed forum."[92] The court stated that the junior high school was a closed forum. Nevertheless, the regulations in question were unreasonable.

These cases indicate a tendency on the part of the courts, since *Hazelwood*, to apply forum analysis even to non-school-sponsored speech. There exists a second, equally credible category of cases, however, that hold the opposite. In *Rivera v. East Otero School District*,[93] the court dismissed the application of public forum doctrine in a challenge to a policy that prohibited the distribution of all material that proselytized a particular religious or political belief. The court focused instead on the high level of protection generally afforded religious and political speech.

District courts in Pennsylvania and Texas have also applied a similar rationale in rejecting the applicability of public forum analysis to non school-sponsored religious speech. In *Slotterback v. Interboro School District*,[94] a secondary school student challenged a school district policy

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material in the school hallways in order to "facilitate the movement of students between classrooms." *Id.* at 862. Materials could be distributed outside the school or could be deposited at designated school locations.

88. *Id.* at 863.

89. 807 F. Supp. 444 (N.D. Ill. 1992).

90. *Id.* at 453.

91. *Id.* at 459 (quoting Hazelwood v. Kuhlmeier, 484 U.S. 260, 267 (1988), *remanded*, 840 F.2d 596 (8th Cir. 1988)).

92. *Id.*

93. 721 F. Supp. 1189 (D. Colo. 1989). Here students were suspended for distributing copies of *Issues and Answers* in violation of school policy. *Id.* at 1191.

94. 766 F. Supp. 280 (E.D. Pa. 1991).

that placed a ban on "unacceptable non-school written material(s)" including those that "proselytize a particular religious or political belief."[95] According to the court, public forum analysis was found to be inappropriate in a case of personal speech such as this. Drawing heavily upon *Hazelwood*'s distinction between promotion and toleration, the court held this fact pattern to be more akin to *Tinker* than to *Hazelwood*. It stated that restrictions on personal speech must be narrowly tailored to a compelling governmental interest.[96] A similar blanket ban on religious speech was struck down in *Clark v. Dallas Independent School District*[97] where the court applied the *Tinker* standard of "material and substantial disruption."[98] The court held that the restricted speech consisting of religious discussions, meetings, and the distribution of religious literature was "voluntary, student-initiated, and free from the imprimatur of school involvement."[99]

The first category of cases applying public forum analysis generally addresses time, place or manner regulations while the second category examines broad-based or blanket prohibitions on religious speech. The rationale underlying each of these decisions, however, indicates that this distinction is irrelevant to the utilization of public forum doctrine in each case. What is relevant is each court's interpretation of *Hazelwood* and the significance of school sponsorship. The unanswered questions left by *Hazelwood* and the fundamental interests at stake merit far more clarification than the Court yet has offered.

LOOKING BACK TO MOVE FORWARD

A "cautious center" developing on the Court has begun to espouse a less formalistic and more contextual approach to constitutional interpretation, including First Amendment analysis. Justice Kennedy has specifically criticized the Court's evolution of public forum doctrine as "a jurisprudence of categories rather than ideas"[100] stating: "It [public forum doctrine] leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area."[101] Justice Stevens has rejected the concept of "categories" as being "ultimately unsound" because it "fits poorly with the complex reality of expression" and fails to "take seriously the importance of context."[102] Justice Souter has criticized public forum analysis as:

> stultified not only by treating its archetypes as closed categories, but by treating its candidates so categorically as to defeat their identi-

95. *Id.* at 285.
96. *Id.* at 291. The court did not find the school district's interest in avoiding an Establishment Clause violation to be sufficiently compelling. *Id.* at 296.
97. 806 F. Supp. 116 (N.D. Texas 1992).
98. *Id.* at 120.
99. *Id.*
100. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711, 2715 (1992) (Kennedy, J., concurring).
101. *Id.* at 2716 (Kennedy, J., concurring).
102. R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2566 (1992) (Stevens, J., concurring).

> fication with the archetypes . . . . The enquiry may and must relate to the particular property at issue and not necessarily to the precise classification of the property . . . . To find one example of a certain property type . . . that is not a public forum is not to rule out all properties of that sort.[103]

Justice O'Connor also has suggested a contextual approach, stressing that government restrictions on speech "must be assessed in light of the purpose of the forum and all the surrounding circumstances."[104]

In fact, all four Justices have endorsed a unitary standard as briefly adopted by the Court two decades ago in *Grayned v. City of Rockford*[105] but which has been subsequently abandoned. During the 1991 Term, the Court decided *International Society for Krishna Consciousness v. Lee*,[106] in which the four Justices concurred that the Court:

> should classify as a public forum any piece of public property that is "suitable for discourse" in its physical character, where expressive activity is "compatible" with the use to which it has actually been put . . . The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.[107]

It seems clear that at least four of the current Justices would most likely re-engage the Court in a more fact-sensitive balancing of expressive rights and governmental interests. Given the internal inconsistency in public forum doctrine, its inherent dangers in capturing too broad a range of speech in its restrictive grasp, the confusion evidenced in lower court attempts to apply the doctrine, and the concern expressed in recent years by a solid core of sitting Justices, the time may be ripe for the Court to abandon the public forum concept in favor of a standard that overcomes the rigidity of public forum analysis yet provides the maximum possible guidance for lower courts, individual speakers, and government officials.

As a basic premise, any theory must recognize that freedom of expression is a process for achieving additional goals.[108] Furthermore, expressive freedom must be framed in terms that reflect the realities of everyday life.[109] In other words, such a standard must promote a broad range of individual and societal values underlying the First Amendment while recognizing the responsibility of government officials to maintain public property for its intended purpose. The standard should be unified

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103. *Int'l Soc'y*, 112 S. Ct. at 2724 (Souter, J., concurring in part and dissenting in part).

104. *Id.* at 2712 (O'Connor, J., concurring) (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985).

105. 408 U.S. 104 (1972).

106. 112 S. Ct. 2711 (1992).

107. *Id.* at 2724.

108. *See* Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 907 (1963) ("Freedom of expression . . . is a basic element in the democratic way of life . . . . But it is not through this process alone that a democratic society will attain its ultimate ends. Any theory of freedom of expression must therefore take into account other values, such as public order, justice, equality and moral progress . . . .").

109. *Id.* at 917.

and apply to all content-based restrictions on government controlled property. It should eliminate the relevance of official intent in defining the scope of protected speech, as currently recognized in the limited public forum concept, and should diminish the distinction between content and viewpoint-based restrictions, recognizing both restrictions as violative of basic First Amendment principles.

In designing such an ideal standard, a look at prior First Amendment approaches, such as *Grayned*'s compatibility test[110] and *Tinker*'s presumption in favor of speech,[111] as well as methods and standards used by the Court in other areas of constitutional law will prove useful. One possibility would be a balancing test with a presumption in favor of speech. This approach would recognize the fundamental importance of speech to promote personal and democratic goals by shifting the burden to government officials to demonstrate that the restrictions imposed are narrowly tailored and necessary to promote "important" governmental interests as opposed to "reasonable" or "legitimate" interests. Courts should weigh in the balance the particularized governmental interests that are actually at stake rather than abstract or hypothetical interests such as the potential dangers of public unrest and violence as proffered by the school officials in *Lamb's Chapel* or the school's general responsibility to maintain discipline or inculcate societal values as suggested often in student speech cases. This approach would lessen the risk of impermissibly motivated restrictions by placing a greater burden on officials to justify their actions rather than allow them to hide behind the veil of "reasonableness."[112]

Such an approach would be more fact-sensitive, thus allowing flexibility in different contexts, e.g., the military or public schooling, where unique

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110. *See supra* notes 50-53 and accompanying text.

111. *See supra* note 79. The "material and substantial disruption" test of *Tinker* permitted the Court to examine independently whether the limitations on student speech were necessary to achieve the school's serious educational objectives. The mode of analysis here was similar to that of *Grayned*'s compatibility test. The Court assessed whether the potential consequences of the students' speech were incompatible with the normal functioning of the school. *See* Post, *supra* note 47, at 1773-74.

112. Motivational inquiry in a library book removal case was endorsed expressly by at least four of the Justices in Board of Educ. v. Pico, 457 U.S. 853 (1982). According to Justice Brennan's plurality opinion (joined by Justices Marshall and Stevens), school officials violate the First Amendment if they "*intended* by their removal decision to deny [students] access to ideas with which [the school board] disagreed, and if this intent was the decisive factor in [the] decision." *Id.* at 871. In a concurring opinion, Justice Blackmun agreed that "school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved." *Id.* at 879-80 (Blackmun, J., concurring). Inquiry into official motives or purpose has also been applied in Fourteenth Amendment equal protection analysis. *See* Washington v. Davis, 426 U.S. 229 (1976) ("[T]he basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240). *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) ("[T]he burden [is] properly placed upon [the plaintiff] to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' . . . in the [defendant's] decision . . . ." The defendant must then show that "it would have reached the same decision . . . even in the absence of the protected conduct."); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (Discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects . . . ."). First Amendment Establishment Clause doctrine under the *Lemon* test and its subsequent refinements have also used a standard of secular purpose. *Supra* note 34.

and complex institutional missions demand a special balancing of individual, societal, and governmental interests. Additionally, the suggested approach would permit courts to consider the function of the property and the compatibility of the speech with that function while at the same time searching the surrounding circumstances for evidence that officials were motivated solely or primarily by hostility toward the speaker or the message conveyed. In searching for impermissible motive, courts could inquire as to the events leading up to the decision to limit speech, whether the procedures departed from past practice,[113] and whether more speech protective alternatives were available to the decisionmakers.

This approach would also establish a legal and political framework that is not merely speech protective but also speech supportive. Although government officials probably would exercise greater caution in limiting expressive rights under such a standard, they might also exercise greater discretion in permitting speech than *Lamb's Chapel* allowed, especially when freed from the burden of the limited public forum concept. Government officials would no longer necessarily fear that opening a particular "locus" or "medium" of expression to one group would serve as a measure of intent and require granting access to all similar speakers or topics regardless of the views expressed. Each request for access would be examined individually in light of the surrounding circumstances, considering the function of the "locus" or "medium" and its compatibility with the speech exercised.

This model approach is not advanced as a panacea for all the problems inherent in current public forum doctrine. Issues remain unresolved, not the least of which are the problems associated with assessing official or institutional motive, the difficulty in determining which motives are permissible or impermissible in a given context, and the role of viewpoint-neutrality in certain settings such as schools.[114] Nevertheless, even though this approach perhaps lacks the objectivity of categorization for purposes of judicial review, this framework would permit courts to recognize that the strengths of competing interests may vary by context thus preventing courts from categorically dismissing certain speech claims simply because they fall within a particular set of exclusions.

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113. In the context of a Fourteenth Amendment race discrimination claim, the Court in Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266-68 (1977), listed the following factors that courts may consider in examining invidious discriminatory purpose: 1) the "impact of the official action;" 2) the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes;" 3) "[d]epartures from the normal procedural sequence;" 4) "[s]ubstantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached;" and 5) the "legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."

114. For a discussion of motivational theory in constitutional law, see John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205 (1970); Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); *Symposium on Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

CONCLUSION

Lamb's Chapel may well be remembered for what the Justices failed to say and what they could have said rather than what they actually did say. Nevertheless, the issue of religious speech which lies at the heart of *Lamb's Chapel* as well as the analytic framework of public forum doctrine within which the Court examined that issue are both sufficiently controversial and significant to merit close examination and continued attention. This commentary used the facts and reasoning of *Lamb's Chapel* to discredit the Court's reliance on public forum doctrine and more importantly to suggest an alternative framework for addressing individual rights to use governmental property for expressive purposes. Perhaps the Court's weak reasoning in *Lamb's Chapel* actually reflects a measure of caution on the part of the Justices, an institutional need to step back, move slowly, and avoid developing doctrine any further, at least until ideological lines are more clearly drawn and an alternative approach is agreed upon. Until such a majority coalition takes shape, however, lower courts will continue to tug and pull at the boundaries of a doctrine whose relevance and applicability remain questionable, particularly in the context of public schooling.