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Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141 (1993)

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RECENT DEVELOPMENT

Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141 (1993): A Critical Analysis of the Supreme Court's First Amendment Jurisprudence in the Context of Public Schools

I. INTRODUCTION

The First Amendment to the United States Constitution provides the primary foundation for the protection of several individual rights, including free speech and religious autonomy.[1] At times, how-

1. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

ever, efforts to protect these rights appear to conflict with competing restraints on state action.[2] The drafters of the First Amendment's Religion Clauses,[3] for example, sought to guarantee religious freedom while maintaining a separation between church and state.[4] The goal

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or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. Const., Amend. I.

2. Legislative attempts to satisfy the mandates of the Free Exercise Clause may be viewed as preferring religion in violation of the Establishment Clause. See, for example, *Sherbert v. Verner*, 374 U.S. 398, 414-15 (1963) (Stewart, J., concurring) (concluding that congressional measures to immunize certain religious groups from general regulation may violate restraints on state action); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11 (1985) (holding that state law that prohibits dismissal of Sabbath observers for refusal to work on their chosen Sabbath constitutes impermissible establishment of religion); *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 263-64 (1990) (Marshall, J., concurring) (noting the inherent tension that exists between a committment to religious autonomy and the goal of state neutrality towards religion); *Abington School Dist. v. Schempp*, 374 U.S. 203, 296 (1963) (Brennan, J., concurring) (stating "[t]here are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment") (footnote omitted). See generally Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1 (1961); Paul Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 Duke L. J. 1217; Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753 (1984); Walter F. Murphy, James E. Fleming, and William F. Harris II, *American Constitutional Interpretation* 1004-05 (Foundation, 1986).

Despite these concerns, it is possible to read the two Religion Clauses as serving the same ultimate goal, protecting the individual's freedom of religious belief and practice. The Free Exercise Clause forbids encroachment into religious freedom through the imposition of penalties, while the Establishment Clause prohibits "inhibitions on individual choice that arise from governmental aid to religion." Gorald Gunther, *Constitutional Law* 1501 (Foundation, 12th ed. 1991). Commentators have suggested that the absence of conflict between the two clauses must be presumed, and that the actual debate is not over what to do when one clause requires what the other forbids. Rather, the proper inquiry focuses on interpreting the two clauses so as to render their mandates compatible. See generally Michael W. McConnell, *Accomodation of Religion*, 1985 Sup. Ct. Rev. 1; Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 Cornell L. Rev. 905 (1987).

The Supreme Court has recognized, at least in theory, the compatible nature of the Free Exercise and Establishment clauses. See, for example, *Lee v. Weisman*, 112 S. Ct. 2649, 2665 (1992) (stating "[t]he First Amendment encompasses two distinct guarantees . . . both with the common purpose of securing religious liberty") (footnote omitted); *Everson v. Board of Educ.*, 330 U.S. 1, 40 (1947) (Rutlegde, J., dissenting) (recognizing that "'[e]stablishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom").

3. The First Amendment contains two references to religion: the Establishment Clause (prohibiting laws "respecting an establishment of religion"), and the Free Exercise Clause (forbidding laws "prohibiting the free exercise thereof"). U.S. Const., Amend. I. The absolute language of each suggests an inherent conflict between the two clauses. *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) (holding that "the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other"). Some commentators have suggested that the Religion Clauses are, in fact, internally contradictory. See Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 Sup. Ct. Rev. 123, 124 (stating that a broad interpretation of both clauses makes it impossible to read them as entirely consistent).

4. Perhaps the best decription of the Framers' desire to separate the government from the realm of organized religion was articulated by the Court in *Everson v. Board of Education*,

of separation becomes very problematic in the context of public schools, however, where education, state action, and individual rights combine.[5]

Throughout its history, the United States Supreme Court has utilized a variety of tests to determine when a particular government action violates the Establishment Clause.[6] In *Lemon v.*

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330 U.S. 1 (1947). As Justice Black noted, the established pattern of religious organizations exercising political supremacy

> became so commonplace as te shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes te pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. . . . [James Madison argned that] a true religion did not need the support of law; . . . that the hest interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.

Id. at 11-12 (footnotes omitted). This idea likewise was acknowldedged by the Court in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, Justice Jackson emphasized that the merger of church and state "invades the sphere of intollect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." Id. at 642. See also *Schempp*, 374 U.S. at 295 (Brennan, J., concurring) (noting the dangers that exist in the interaction of church and state "which the Framers feared would subvert religious liberty and the strength of a system of secular government"). It is from this basic understanding of the conflict inherent in church-state interaction that the Supreme Court has attempted to fashion a coherent and consistent Establishment Clause doctrine.

See also Laurence H. Tribe, *American Constitutional Law* § 14-3 at 1160 (Foundation, 2d ed. 1988) (stating that the Establishment Clause "assume[s] that the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state").

5. The Court repeatedly has addressed the issue of organized religion in public schools in an attempt to achieve the appropriato balance between principles of free speech and religious autonomy and Establishment Clause concerns. At the same time, however, the Court also has recognized the unique risks that religion presents in the context of state-financed education. See Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 Yale L. J. 1647, 1655-67 (1986); David de Andrade, Note, *The Equal Access Act: The Establishment Clause v. The Free Exercise and Free Speech Clauses*, 33 N.Y. L. Sch. L. Rev. 447, 462-67 (1988). See also *Wolman v. Walter*, 433 U.S. 229 (1977); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Engel v. Vitale*, 370 U.S. 421 (1962); note 16 and accompanying text.

6. This Recent Development focuses on the Supreme Court's unquestionable failure to delineate and consistently apply any single Establishment Clause test. What can hardly be labeled Establishment Clause jurisprudence reflects more the Court's preference for elastic case-by-case adjudication and ends-based reasoning rather than a coherent standard by which to evaluate church-state interaction.

Early Supreme Court cases suggested an absolute barrier between church and stato, relying primarily on Thomas Jefferson's "wall of separation" metaphor as a means of delineating the constitutional relationship between government and religion. See, for example, *Reynolds v. United States*, 98 U.S. (8 Otte) 145, 164 (1879) (justifying the wall of separation because "religion is a matter which lies solely between man and his God"); *McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (stating that "[s]eparation means separation, not something less"); *Everson*, 330 U.S. at 18 (recognizing that "[t]he First Amendment has erected a wall between church and state . . . that must be kept high and impregnable"); *Engel*, 370 U.S. at 425 (1962) (recognizing that "it is no part of the business of government" to become involved in religious affairs). The famous "wall of separation" language comes from Thomas Jefferson's correspondence with the Danbury Baptist Association, in which he stated: "I contemplate with

Kurtzman,[7] the Court established a three-prong inquiry to determine when the Establishment Clause requires a separation of church and state.[8] Even under the *Lemon* framework, however, the Supreme Court has declined to limit itself to a single test,[9] or even a primary guideline,[10] in deciding church-state issues. The members of the Court often have expressed dissatisfaction with the *Lemon* test,[11] and frequently have reformulated it to resemble something less than the

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sovereign reverence that act of the whole American people which declared that the legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), in Merrill D. Peterson, ed., *Thomas Jefferson: Writings* 510 (Viking, 1984). Later cases tempered the absolute "wall of separation" rhetoric and focused instead upon the role which religion traditionally had played in American culture. See, for example, *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952); *Lynch v. Donnelly*, 465 U.S. 668, 674-78 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989). In still other cases, the Court has applied a strict historical or case-by-case approach without really articulating a cohesive test. See *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983); *Walz v. Tax Commission*, 397 U.S. 664, 667-72 (1970).

7. 403 U.S. 602 (1971).

8. In order to pass constitutional scrutiny under the *Lemon* test, governmental practices must: (1) have been adopted with a secular purpose; (2) have the principal or primary effect of neither advancing nor inhibiting religion; and (3) not result in excessive government entanglement with religion. Id. at 612-13. See notes 109-39 and accompanying text.

9. See *Lyneh v. Donnelly*, 465 U.S. 668, 679 (1984) (displaying the Court's "unwillingness to be confined to any single test or criterion in this sensitive area").

10. See *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (declaring the *Lemon* tri-part test "'no more than [a] helpful signpost' in dealing with Establishment Clause challenges"); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 789-90 (1973) (holding that "constitutional analysis is not a 'legalistic minuet in which precise rules and forms must govern'").

11. See, for example, *County of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part) (noting the impropriety of "advocating, let alone adopting, [the *Lemon*] test"); *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (advocating elimination of the purpose prong of the test); *Aguilar v. Felton*, 473 U.S. 402, 426-31 (1985) (O'Connor, J., dissenting) (questioning the propriety of the entanglement prong); *Wallace v. Jaffree*, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting) (concluding that the test lacks historical basis in the First Amendment); *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in the judgment) (reasoning that the entanglement prong is unnecessarily confusing in its application). Several commentators also have questioned the viability of the *Lemon* test. See, for example, Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 17-23 (1978); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 127-34 (1992); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L. J. 409, 450 (1986) (asserting that "[t]he three-part test has been so elastic in its application that it means everything and nothing").

original inquiry.[12] The ultimate result has been a confusing and unstable body of Establishment Clause analysis.[13]

In *Lamb's Chapel v. Center Moriches Union Free School District*,[14] the Supreme Court unanimously struck down a complete prohibition against the after-hours use of public schools by religious groups.[15] The *Lamb's Chapel* decision represents a continuing trend by the Supreme Court to reduce the force and effect of the Establishment Clause by weakening considerably the previously strict limitations placed on the presence and role of organized religion in public schools.[16]

In *Lamb's Chapel*, the Court was presented with a unique opportunity to clarify the existing constitutional models of church-state interaction and free speech. Rather than seize this opportunity,

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12. See, for example, *Lynch*, 465 U.S. at 690-92 (O'Connor, J., concurring) (framing Establishment Clause inquiry as whether government has "endorsed" religion); *Wallace*, 472 U.S. at 69-70 (O'Connor, J., concurring) (noting the constitutional clarity that the endorsement model provides); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (expanding the "endorsement" analysis); *County of Allegheny*, 492 U.S. at 658-67 (Kennedy, J., concurring in the judgment in part and dissenting in part) (setting forth a "coercion" analysis). See also notes 170-85 and accompanying text.

13. See, for example, *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting) (stating "[o]ur cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional"); *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting) (stating that "[t]he three-part test has simply not provided adequate standards for deciding Establishment Clause cases," and has produced "unworkable" constitutional precedents).

14. 113 S. Ct. 2141 (1993).

15. Id. at 2149.

16. The Supreme Court consistently has denied organized religion a place in the public schools. In fact, until recently, the Court appeared committed to a rigorous enforcement of the "wall of separation" metaphor in public schools. See generally *Stone v. Graham*, 449 U.S. 39, reh'g denied, 449 U.S. 1104 (1980) (invalidating posting of the Ten Commandments in public school classrooms despite alleged secular purposes); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (prohibiting the employment of public school teachers to teach secular subjects in parochial schools); *Edwards*, 482 U.S. 578 (forbidding the teaching of "creation science" in public schools); *Wallace*, 472 U.S. 38 (declaring unconstitutional legislation authorizing silent prayer in the public school setting); *Meek v. Pittenger*, 421 U.S. 349 (1975) (invalidating a state program that offered guidance and testing by public employees on parochial school property); *Schempp*, 374 U.S. 203 (holding unconstitutional daily readings of Bible verses and the Lord's Prayer in public schools); *Weisman*, 112 S. Ct. 2649 (declaring unconstitutional invocations and benedictions at public school graduation ceremonies).

The rationale behind this vigorous refusal to allow any activity that could be construed as government endorsement of religion in public schools was articulated by Justice Brennan:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

Edwards, 482 U.S. at 584 (footnote and citations omitted).

however, the Court blindly reaffirmed the controversial *Lemon* test, which seemed all but dead following the decision in *Lee v. Weisman*,[17] and decided *Lamb's Chapel* on questionable free speech grounds.

This Recent Development analyzes *Lamb's Chapel* and focuses on the Court's intense split over church-state issues as well as the lack of clarity concerning the appropriate test to use in Establishment Clause and free speech cases. Despite invoking *Lemon* to strike down a policy that prohibited church access to school property for after-hours use,[18] the *Lamb's Chapel* decision fails to clarify the Court's controversial *Lemon* test for determining when public school policies violate the Establishment Clause.

Part II of this Recent Development discusses the facts and procedural posture of the *Lamb's Chapel* decision. Part III sets forth the legal background and appropriate framework of analysis, emphasizing the various mandates of the First Amendment and the primary Establishment Clause standards formulated by the Supreme Court in cases preceding *Lamb's Chapel*. Part IV summarizes the opinions of the majority and concurrences in the instant case. Part V analyzes the Court's decision and suggests that it is inherently flawed because it fails to provide adequate guidance to educational systems regarding what types of religious activities are permissible, and because it continues to rely on the viability of the much-maligned *Lemon* test.

II. FACTS AND PROCEDURAL POSTURE

The plaintiffs, Lamb's Chapel, an Evangelical Christian Church in the New York community of Center Moriches, and its pastor, brought suit against the Center Moriches School District (the "District"). The church alleged that the district violated its constitutional rights by refusing its request to use school facilities to show a religiously oriented film series on family values and child

17. 112 S. Ct. 2649. The Court in *Weisman* struck down as unconstitutional the practice of nonsectarian prayer at public school graduation ceremonies. Although the Court arguably reached the proper result in *Weisman*, it expressly declined to "reconsider [its] decision in *Lemon v. Kurtzman*," choosing instead to rely on Justice Kennedy's "coercion" analysis. Id. at 2655. For a discussion of the coercion test, see notes 177-86 and accompanying text.

18. Although it seemed doubtful that the *Lemon* test would survive the Court's decision in *Weisman* (see notes 186-89 and accompanying text), the Court in *Lamb's Chapel*, with Justice White delivering the opinion, applied the test and stated without question that "*Lemon*, however frightening it might be to some, has not been overruled." *Lamb's Chapel*, 113 S. Ct. at 2148 n.7.

rearing.[19] Specifically, the plaintiffs argued that this denial constituted an impermissible "violation of the Freedom of 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."[20] Prior to bringing suit, the plaintiffs unsuccessfully petitioned the district for permission to use the school facilities in connection with the film series.[21] Pursuant to established state law,[22] the district had in place rules and regulations regarding the use of school property when the property was not in use for school purposes. Consistent with judicial interpretation of existing state law,[23] the district regulations expressly prohibited the use of school property for religious purposes.[24] Due to the admittedly religious content of the film series, therefore, the district denied these requests.[25]

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19. The six-part film series contained lectures by Dr. James Dobson, a licensed psychologist and best selling author in the area of family issues. Specifically, "the film series would discuss Dr. Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Lamb's Chapel*, 113 S. Ct. at 2144.

20. Id. at 2145.

21. Prior te the first request, the church applied for permission to use school facilities for its Sunday morning services and for Sunday School. Id. at 2144 n.2.

22. Section 414 of the New York Education Law authorizes school boards to adopt reasonable regulations for the use of school property for ten specific purposes when the property is not in use for school purposes. Among the permitted uses is the holding of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public." N.Y. Educ. Law § 414(1)(c) (McKinney 1988). Religious use is not among those activities enumerated in the statute. Religious use is not the only exclusion, however, because the use of public school facilities for partisan political rallies and commercial enterprises is also proscribed unless authorized by a district meeting or board of education vote. Id. § 414(1)(d)-(e).

23. A New York appellato court ruled that local school boards lacked statutory authority to permit student Bible clubs to meet on school property because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414 of the Education Law." *Trietley v. Board of Educ. of City of Buffalo*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978). Moreover, in *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 83-84 (2d Cir. 1991), the Court of Appeals for the Second Circuit accepted *Trietley* as an authoritative interpretation of state law. The Attorney General of New York also supported the *Trietley* decision as the appropriate approach to proposed religious use of school property. *Lamb's Chapel*, 113 S. Ct. at 2144. Consequently, according to state law, the Board of Education was not authorized to grant Lamb's Chapel's request to use school property for religious activities.

24. *Lamb's Chapel*, 959 F.2d 381, 383 (2d Cir. 1992).

25. In summarily rejecting the church's request, the district responded that the films "appear to be church related and therefore your request must be refused." *Lamb's Chapel*, 113 S. Ct. at 2145. The religious content of tbe film series was not debated at the lower court level, and admittedly the film series was comprised of "family oriented movie[s] from a Christian perspective." *Lamb's Chapel*, 736 F. Supp. 1247, 1248 n.1 (E.D.N.Y. 1990). Lamb's Chapel even conceded at the preliminary hearing that the film series was religious in nature and was intended to convey a religious message. Id. at 1248.

The plaintiffs filed the instant action in the District Court for the Eastern District of New York seeking injunctive relief.[26] The district court denied this request and granted the district's motion for summary judgment upon reconsideration.[27] The plaintiffs argued, among other things, that the total exclusion of Lamb's Chapel from school property violated the Free Speech Clause of the First Amendment.[28] In rejecting the plaintiffs' free speech claim, the court emphasized that the district's facilities constituted a limited public forum that consistently was closed for religious purposes.[29] The court considered this denial to be viewpoint-neutral, and therefore not violative of the Free Speech Clause.[30] The plaintiffs asserted that Supreme Court precedent gave Lamb's Chapel the right to utilize school facilities,[31] but the district court ruled that these cases were distinguishable from the case at bar.[32] The district court found, moreover, that Congress did not intend to force schools to allow nonstudent use of their facilities.[33]

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26. *Lamb's Chapel*, 736 F. Supp. 1247 (E.D.N.Y. 1990).

27. Id. at 1254 (denying preliminary injunctive relief to plaintiffs); *Lamb's Chapel*, 770 F. Supp. 91, 99 (E.D.N.Y. 1991) (granting summary judgment to school board). Following the district court's denial of declaratory and injunctive relief, Lamb's Chapel immediately appealed to the Second Circuit. The appeal was later withdrawn, however, and the case subsequently was returned to the district court for final disposition on the issue of injunctive relief. Id. at 92.

28. *Lamb's Chapel*, 736 F. Supp. at 1249.

29. *Lamb's Chapel*, 770 F. Supp. at 98-99 (relying on previous findings regarding the issue of religious use of school property).

30. Id. at 99.

31. The plaintiffs asserted that *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990), gave them authority to use the school facilities. *Lamb's Chapel*, 959 F.2d at 388. In *Widmar*, the Court held unconstitutional as violative of the free speech guarantees of the First Amendment a university policy which prohibited the use of school facilities by religious groups. *Widmar*, 454 U.S. at 266. According to the Court, once a public school unilaterally has opened its doors for use by student groups, it thereafter cannot exclude other groups because of the underlying content of their speech. Id. at 277. Similarly, in *Mergens*, the Court struck down a school policy that unconditionally denied access to school facilities for religious purposes. The Court held that since the school had allowed various student groups to meet on school premises, it could not, within the confines of the Equal Access Act, deny access to religious student groups solely because of the religious nature of the organizations. *Mergens*, 496 U.S. at 229.

32. According to Judge Wexler, the *Mergens* decision was "readily distinguishable" from the instant case. *Lamb's Chapel*, 770 F. Supp. at 97. The district court found the *Widmar* decision appropriately limited to "persons *entitled* to be [on the campuses of state universities]," and likewise, *Mergens* addressed only student access to school facilities. Id. (quoting *Widmar*, 454 U.S. at 258). The Second Circuit likewise accepted this distinction and emphasized that students "have a greater claim on the use of school property than outsiders." *Lamb's Chapel*, 959 F.2d at 389. These cases, therefore, provided no authority for the plaintiffs' position since the representatives of Lamb's Chapel were "*not* students." *Lamb's Chapel*, 770 F. Supp. at 97.

33. This reasoning was based on the terms of the Equal Access Act, which forbids secondary schools receiving federal funds from denying students the opportunity to meet on school property because of the political or religious nature of their speech. 20 U.S.C. § 4071(a) (1988). Because Congress did not include the term "limited public forum" in the Equal Access Act, the

The district court further rejected the plaintiffs' various constitutional claims.[34] The court determined that the district's policy was neither hostile toward religion nor designed to advance nonreligious organizations.[35] The court also found that since the state had not imposed substantial restraints upon the observance of religion, the Free Exercise Clause was inapplicable in the instant case.[36] Significantly, the court found no constitutional requirement that schools allow religious groups to use school property once reasonable and content-neutral regulations have been adopted.[37]

The Second Circuit upheld the district court's decision "in all respects."[38] Not unlike the district court, the Second Circuit found that the public school constituted a limited public forum that had not been utilized by religious groups in the past.[39] The court reasoned

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Supreme Court concluded that Congress "intended to establish a standard different from the one established by our free speech cases." *Mergens*, 496 U.S. at 242. Consequently, the district court determined that "[n]either Congress nor the Supreme Court [had] seen fit to require a school district to open its doors to nonstudents who wish to use school facilities for the purpose of conducting religious activities within a school." *Lamb's Chapel*, 770 F. Supp. at 98.

34. *Lamb's Chapel*, 770 F. Supp. at 98.

35. *Lamb's Chapel*, 736 F. Supp. at 1247, 1253.

36. Specifically, the court determined that the Free Exercise Clause had not been violated because this was "neither a situation where the state has asserted coercive restraints on religious observation nor a situation where special circumstances require the state to accommodate the plaintiffs' religious needs." Id. at 1253. Despite evidence that the school district had allowed other religious organizations such as the Salvation Army and a Christian musical group to utilize school facilities, the court nevertheless refused to hold that the District had observed "a practice of permitting use by any organization for religious purposes." Id. According to the district court, Lamb's Chapel was, therefore, not denied the free exercise of religion because the school did not owe it any duty to use its facilities. Moreover, even if the district had allowed other religious organizations to use school property in the past, those uses were consistent with Section 414 of the New York Education Law which permitted social, civic, and recreational purposes, but not religious use. N.Y. Educ. Law § 414(1)(c). According te the defendant school district, morecver, it had not granted access to any organization that sought to use the facilities for religious purposes. Brief for Respondents, 1992 WL 512049 at *22.

37. *Lamb's Chapel*, 736 F. Supp. at 1254 (stating that "[t]he Constitution does not require a public school district to open its school buildings te indiscriminate use where the state has by policy and practice circumscribed availability through reasonable and viewpoint-neutral regulations"). The district court also held that since no religious group previously had been granted access to school facilities, the plaintiffs' equal protection argument lacked any merit. Id. at 1253 (citing *Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir. 1980)).

38. *Lamb's Chapel*, 959 F.2d at 389.

39. The plaintiffs once again argued that the school could not deny access to Lamb's Chapel because it had allowed similar religious groups to utilize the school facilities in the past—a Salvation Army Band benefit concert, a gospel music concert, and a lecture series entitled "Psychology and the Unknown." Id. at 387-88. With respect to the Salvation Army concert, the Second Circuit refused te accept the notion that a joint concert with the high school band was "religious." Id. at 387 (reasoning that such action "hardly can be described as any kind of religious use of school district property"). Similarly, since the purpose of the gospel music concert was to support the black student scholarship fund, and because the music could be enjoyed "by people of all religious beliefs as well as people of no religious beliefs," that activity was conducted in a "non-religious context and had a non-religious purpose." Id. at 388.

that such property can remain nonpublic "except as to specified uses,"[40] and reasoned that since the district regulations were content-neutral[41] and based on legitimate government concerns,[42] the school could not be compelled to grant access to Lamb's Chapel.[43] The court went on to note that, to be upheld, even restrictions which limit access based upon subject matter or speaker identity need only be reasonable and not discriminate on the basis of the *viewpoint* expressed.[44] The Second Circuit found it constitutional for the district to exclude all religious speakers from school property even though other nonreligious speakers previously were granted access. As the lower courts' holdings were inconsistent with prior Supreme Court decisions, the Court granted certiorari.[45]

III. LEGAL BACKGROUND

A. The Free Exercise of Religion

The Free Exercise Clause of the First Amendment generally prohibits governmental intrusion into religious practices.[46] Since the

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Finally, with respect to the lecture, the Second Circuit relied upon the testimony of Jerry Huck, the psychotherapist who gave the lecture. Id. According to Mr. Huck, any religious reference was merely "a fascinating sideline," and "was not the purpose of the [lecture]." Id. As a result, the court denied that use by these groups indicated that the school facilities had been used for religious purposes, reasoning that "incidental references to religion . . . and the performance of music with religious overtones do not convert a secular program into a religious one." Id.

40. Id. at 386 (recognizing 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") (citation omitted).

41. The court of appeals believed that the district regulations were content neutral because they consistently had been applied to preclude access to school facilities for all religious organizations. *Lamb's Chapel*, 113 S. Ct. at 2147. According to the Second Circuit, Section 414 of the New York Education Law rendered the district facilities "a limited public forum from which religious uses would be excluded." *Lamb's Chapel*, 959 F.2d at 387.

42. The court held that if the district regulations "reflect[ed] a legitimate government concern and [did] not suppress expression merely because public officials oppose[d] the speaker's view," the restriction on religious groups must be upheld. *Lamb's Chapel*, 959 F.2d at 386 (quoting *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)). Accordingly, since the court held the restriction to be content-neutral, it did not invalidate the restriction. *Lamb's Chapel*, 113 S. Ct. at 2147.

43. *Lamb's Chapel*, 959 F.2d at 388.

44. Id. at 387.

45. *Lamb's Chapel*, 113 S. Ct. 51 (1992). The Court found the Second Circuit's holding "questionable under our decisions." *Lamb's Chapel*, 113 S. Ct. at 2145.

46. U.S. Const., Amend. I provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." The Supreme Court has recognized that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

Supreme Court first applied the Free Exercise Clause to the individual states through the Fourteenth Amendment,[47] it has interpreted the provision to prohibit the government from exercising control over individuals' religious convictions,[48] from forcing individuals to accept particular religious tenets,[49] from punishing individuals because of their religious stance,[50] and from employing the taxing power of the state to advance or inhibit the dissemination of religious views.[51] As the Court has noted, the ideals embodied in the Free Exercise Clause reflect the diversity that traditionally has been respected in this nation.[52]

See also *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 113 S. Ct. 2217, 2225 (1993) (quoting *Thomas*, 450 U.S. at 714); *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) (recognizing that First Amendment protection is not dependent on "responding to the commands of a particular religious organization"). The Court has also noted, however, that not every asserted belief warrants protection. See *Thomas*, 450 U.S. at 715 (stating that "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause"). It has been suggested that the Court selectively defines religion in order to regulate certain conduct without violating the First Amendment. See *Zorach v. Clauson*, 343 U.S. 306, 318 n.4 (1952) (Black, J., dissenting) (recognizing the "governmental power to hinder certain religious beliefs by denying their character as such").

47. See *Hobbie v. Unemployment Appeals Comm'n.*, 480 U.S. 136, 139-40 (1987) (stating that the Free Exercise Clause is applicable to the states through the Fourteenth Amendment); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 215-16 (1963); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

48. See, for example, *Department of Human Resources v. Smith*, 494 U.S. 872, 876-77 (1990) (stating that the Free Exercise Clause precludes government regulation of religious beliefs); *Thomas*, 450 U.S. at 713-14; *Gillette v. United States*, 401 U.S. 437, 453-54 (1971).

49. See, for example, *Smith*, 494 U.S. at 876-77 (stating that the government may not compel affirmation of religious beliefs); *Gillette*, 401 U.S. at 453-54.

50. See, for example, *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 832-33 (1989) (holding that a state could not deny unemployment benefits to plaintiff who refused to work on the basis of religious beliefs, despite the absence of affiliation with a particular religious group); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (dismissing the conviction of a Jehovah's Witness that was based on the alleged exercise of religion); *United States v. Ballard*, 322 U.S. 78, 86-88 (1944) (stating that individuals may not be punished for religious beliefs); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (noting that the First Amendment protects both belief in and exercise of religion).

51. See, for example, *Murdock v. Pennsylvania*, 319 U.S. 105, 112-13 (1943); *Follett v. McCormick*, 321 U.S. 573, 577 (1944). The Supreme Court also has interpreted the Free Exercise Clause to forbid government from lending the instruments of its power to either side in controversies involving religious authority or dogma. See, for example, *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-52 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25 (1976).

52. The Supreme Court noted in *Zorach v. Clauson*, 343 U.S. 306 (1952):

> We are a religious people.... We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary [and we] sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

Generally, the Free Exercise Clause affords absolute protection against governmental control of religious beliefs and opinions.[53] The Supreme Court, however, has not extended the absolute protection against governmental control of religious beliefs to governmental regulation of religious conduct.[54] When conduct is at issue, the governmental interest in promoting the health and safety of the general public may outweigh the individual's interest in engaging in uninhibited religious practice.[55] This does not indicate, however, that religious conduct is totally unprotected by the First Amendment, but rather that it does not enjoy the absolute protection bestowed upon religious beliefs. The Court has, in fact, extended the general protection of the Free Exercise Clause to cover religious actions as well as religious beliefs.[56] This protection, however, is quite limited in certain circumstances.[57]

Id. at 313-14.

53. See *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (recognizing absolute protection of freedom of individual belief); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (stating that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such"). This protection is based on the idea that in our society, the freedom to think as one chooses is absolutely protected, provided that the exercise of that freedom does not conflict with the equally important rights of others. Justice Jackson argued, in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), that the freedom to believe as one chooses is the very foundation of the First Amendment:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 638-42.

54. See, for example, *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 166 (1878) (stating "[l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices"); *Department of Human Resources v. Smith*, 485 U.S. 660, 671 (1988) (holding that First Amendment protection does not extend to criminal conduct); *Cantwell*, 310 U.S. at 303-04 (observing that conduct must remain subject to regulation for the protection of society).

55. As the Supreme Court stated in *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972), "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."

In the instant case, therefore, Lamb's Chapel could not rest its claim exclusively on the fallacy that the Free Exercise Clause confers an unconditional and absolute right to utilize school facilities based exclusively on the Free Exercise Clause. While it is true that the state could not restrict the individuals associated with Lamb's Chapel from maintaining their beliefs, it could, consistent with constitutional mandates, restrict the conduct resulting from those beliefs. Id.

56. *Sherbert*, 374 U.S. at 402-03 (illustrating some degree of protection of religious actions under the Free Exercise Clause); *Yoder*, 406 U.S. at 219-20 (noting that there are areas of religious conduct protected by the Free Exercise Clause). As Justice Roberts suggested in *Cantwell v. Connecticut*, conduct, though subject to greater regulation than belief, is not wholly outside the scope of the First Amendment: "[Free Exercise] embraces two concepts,—freedom to

Religious groups and individual citizens often challenge state laws as violative of the Free Exercise Clause, alleging that the laws impose penalties upon them because of their particular religious beliefs.[58] In *Sherbert v. Verner*,[59] for example, the Court held that a Seventh-Day Adventist could not have his unemployment compensation conditioned upon his agreement to work on Saturdays.[60] In its reasoning, the Court noted that while the state had a legitimate interest in defining the class eligible for unemployment benefits, it could not deny those benefits to certain individuals because of their religious beliefs.[61]

The test has developed, therefore, that to prevail under the Free Exercise exemption doctrine,[62] a plaintiff must show either: (1) that the state has conditioned receipt of a government benefit upon activity that is inconsistent with a religious faith; or (2) that the state has denied a government benefit because of activities deemed essen-

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believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." 310 U.S. at 303-04.

57. See *Reynolds*, 98 U.S. at 166-68 (holding polygamy to be outside the protection of the Free Exercise Clause). Only laws which have more than an incidental effect on religious practice are violative of the Free Exercise Clause. See *Gallagher v. Crown Kosher Super Mkt.*, 366 U.S. 617, 630-31 (1961) (holding that a statute requiring store closure on Sundays was not violative of the free exercise of the Jewish faith); *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1983) (holding that plaintiffs must prove a burden on their exercise of religion in order to establish a claim under the Free Exercise Clause). In determining whether a regulation places more than an incidental burden on religious practice, courts will usually balance the severity of the restriction against the importance of the governmental interest served. See, for example, *Department of Human Resources v. Smith*, 485 U.S. 660, 669-70 (1988) (balancing the denial of unemployment benefits against the state's interest in public safety); *Hobbie*, 480 U.S. at 140-41 (holding that the state has no compelling interest in denying the plaintiff's unemployment benefits). In *Lamb's Chapel*, the lower courts held that the state had not placed a coercive restraint on the free exercise of religion, and found that the state had legitimate interests in restricting church access to school facilities. *Lamb's Chapel*, 959 F.2d at 389; *Lamb's Chapel*, 736 F. Supp. at 1253.

58. The typical scenario involves attempts by religious observers to exempt themselves from general laws by arguing that application of the laws, and the imposed penalties for noncompliance of those laws, violate the Free Exercise Clause. One commentator has suggested that Free Exercise litigation in modern jurisprudence has consisted almost entirely of "requests for exemption rather than for general invalidation of restrictive laws." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1413 (1990). It is precisely in these situations that the potential conflict between establishment and free exercise arises. See note 2. A legislative effort to accommodate religious believers by granting them an exemption from general laws is, arguably, an establishment of religion.

59. 374 U.S. 398 (1963).

60. The State Unemployment Commission rejected the petitioner's application for unemployment benefits because the South Carolina Unemployment Compensation Act denied benefits to those who had failed, without good cause, to accept suitable employment. Id. at 400-01.

61. Id. at 410.

62. The exemption doctrine relatos to attempts by individuals to exempt themselves from the scope of general laws based on their personal religious beliefs. See note 58.

tial to that religious faith.[63] Traditionally, once the plaintiff demonstrated that the law at issue encroached upon the free exercise of religion,[64] the burden shifted to the state to demonstrate that the law was necessary to serve a compelling secular objective and that the methods employed were the least restrictive means of achieving that objective.[65]

In a dramatic break with precedent, however, the Supreme Court abandoned the traditional compelling interest test previously applied in Free Exercise exemption cases.[66] In *Employment Division, Department of Human Resources of Oregon v. Smith*,[67] two members of the Native American Church were discharged from jobs at a drug rehabilitation center because they previously had ingested peyote as

63. See *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-20 (1981) (holding that state denial of unemployment benefits to a Jehovah's Witness who refused to work in a munitions factory violated the Free Exercise Clause).

64. For excellent critiques of the requisite "burden" on the free exercise of religion, see Michael W. McConnell and Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 38-45 (1989); Ira C. Lupa, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933 (1989). The rationale behind the benefit conditioning theory is that denials of important government benefits exert tremendous pressure on those excluded to forsake their own religious beliefs in an attempt to obtain the benefit. *Hobbie*, 480 U.S. at 141. As the Court noted in *Thomas*:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 U.S. at 717-18.

65. For analysis of the compelling interest test required in rebuttal by the stato, see Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. Rev. 917, 941-62 (1988) and McConnell and Posner, 56 U. Chi. L. Rev. at 45-54. See also *Thomas*, 450 U.S. at 718-19 (finding no compelling interest to justify withholding employment benefits from an individual who refused to work in a munitions plant for religious reasons); *Yoder*, 406 U.S. at 215 (holding state intrusion in universal education not compelling enough to justify compulsory education in direct conflict with beliefs of Amish faith); *Sherbert*, 374 U.S. at 406-07 (finding no compelling interest to justify denial of unemployment benefits to an individual who refused to work on Saturdays because of alleged religious convictions).

66. Prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court frequently had required the state to produce evidence of a compelling governmental interest in order to justify substantial infringements placed upon the free exercise of religion. See, for example, *Thomas*, 450 U.S. at 718 (emphasizing the familiar maxim that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Yoder*, 406 U.S. at 215 (reasoning that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion"); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (recognizing that the proper inquiry in free exercise cases is "whether a compelling governmental interest justifies the burden"); *Hobbie*, 480 U.S. at 141-44 (refusing to consider anything less than the vigorous standard of strict scrutiny for burdens on religious exercise).

67. 494 U.S. 872 (1990).

part of a religious ceremony.[68] These individuals subsequently were denied unemployment benefits because, according to the Oregon Department of Human Resources, they had been discharged for work-related "misconduct."[69] The Oregon Supreme Court rejected the arguments of the Employment Division[70] and found that the state failed to establish the requisite compelling interest to justify the substantial burden placed upon the plaintiff's free exercise of religion.[71]

On appeal, the United States Supreme Court vacated the Oregon Supreme Court's decision and remanded the case for a determination of whether religious use of peyote was lawful within the state.[72] The Oregon Supreme Court, believing that the legality of peyote use was not dispositive,[73] affirmed its previous decision.[74]

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68. Id. at 874. The Oregon Supreme Court noted the long history of ceremonial peyote use within the Native American Church and recognized the sincerity of the plaintiffs' belief in this faith. *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146, 147-48 (1988). The court also pointed to previous cases that exempted the religious use of peyote from generally applicable laws criminalizing its ingestion. Id. at 148 (citing *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813 (1964)).

69. *Smith*, 494 U.S. at 874. The Oregon unemployment compensation law disqualified any applicant discharged for work related misconduct. *Smith*, 301 Or. 209, 721 P.2d 445, 448 (1986).

70. *Smith*, 721 P.2d at 451. The claimants initially sought relief from the Oregon Court of Appeals. *Smith*, 75 Or. App. 764, 709 P.2d 246 (1985). The court of appeals reversed and remanded to the Oregon Employment Appeals Board for reconsideration. Id. The Oregon Supreme Court agreed with the court of appeals decision, but found that remand to the state board was unneccessary. *Smith*, 721 P.2d at 446.

71. *Smith*, 721 P.2d at 450-51. The Oregon Supreme Court accepted the construct presented in *Sherbert* and *Thomas* and thus held that in order to justify significant burdens on the free exercise of religion, the state must "demonstrate that the constraint on religious activity is the least restrictive means of achieving a 'compelling' state interest." Id. at 449 (citations omitted). Finding that the stato's "financial interest in the payment of benefits from the unemployment insurance fund" was not compelling "when weighed against the free exercise rights of the claimant[,]" the Oregon Supreme Court found that Smith was entitled to receive unemployment benefits. Id. at 450-51.

72. *Smith*, 485 U.S. at 674. As Justice Stevens noted, the Court granted certiorari because it disagreed with the Oregon Supreme Court's disposition concerning the legality of peyote use. Id. at 662.

73. Under Oregon law, the possession of peyote is a crime punishable by imprisonment for up to 10 years. Or. Rev. Stat. §§ 475.992(4)(a), 161.605(2) (1987). The Oregon Court of Appeals, moreover, previously determined that religious users of peyote were not exempt from criminal prosecution. See *State v. Soto*, 21 Or. App. 794, 537 P.2d 142, 144 (1975). Upon its initial consideration in *Smith*, the Oregon Supreme Court found that the legality of peyote use was not dispositive on the issue of denial of unemployment benefits. As the Oregon court stated:

> [T]he legality of ingosting peyote does not affect our analysis of the state's interest. The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote. . . . "[T]he legality of [claimant's] ingestion of peyote has little direct bearing on this case."

Smith, 721 P.2d at 450 (quoting the findings of the Employment Division).

The United States Supreme Court, however, found the legality of an outright ban on peyote relevant to the state's denial of employment benefits for misconduct. *Smith*, 485 U.S. at 670 (stating that "if a State has prohibited through its criminal laws certain kinds of religiously

The United States Supreme Court once again granted certiorari to determine whether a law prohibiting all uses of peyote was constitutional.[75]

The Supreme Court, while noting that the Free Exercise Clause protects both religious belief and religiously motivated conduct,[76] nevertheless refused to apply the compelling interest test announced in *Sherbert v. Verner*.[77] While distinguishing previous cases in which the Court arguably applied the compelling interest test,[78] Justice Scalia, writing for the majority, asserted that laws which do not specifically target religious conduct, yet incidentally

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motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct").

On remand from the United States Supreme Court, the Supreme Court of Oregon reiterated its previous position concerning the relevancy of peyote's lawful use and stated that "outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly and as interpreted by Congress." *Smith*, 763 P.2d at 148.

74. *Smith*, 763 P.2d at 150.

75. *Smith*, 489 U.S. 1077 (1989).

76. According to the Supreme Court, the First Amendment, in addition to guarding against government intrusion on religious beliefs, also protects to a certain extent the physical acts that accompany sincere religious beliefs:

> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true . . . that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Smith, 494 U.S. 872, 877 (1990). The Court then distingnished tbe present case by recognizing that the First Amendment does not immunize religious observers from criminal laws that do not specifically targot religious practice. Id. at 878. The Court, while not directly countoring its previous language concerning the belief/action distinction, went on to conclude that merely because religious belief is protected, the conduct accompanying that belief is not automatically exempt from regulation. Id. at 882 (recognizing that the First Amendment does not require protection for all religiously motivated conduct).

77. 374 U.S. 398 (1963). In *Smith*, the Supreme Court stated without question that the *Sherbert* test was "inapplicable" to requests for exemption from generally applicable criminal laws. *Smith*, 494 U.S. at 885.

78. Justice Scalia attempted to distinguish, perhaps inappropriately, a sizeable body of Supreme Court precedent which applied the *Sherbert* compelling interest test by noting that no law had ever been declared unconstitutional under this construct "except the denial of unemployment compensation." *Smith*, 494 U.S. at 883. Justice Scalia admitted that even in those rare contoxts where the test arguably was applied, the Court, in reality, failed to conduct a serious compelling interest inquiry. Id. (stating that "[a]lthough we have sometimes purported to apply the *Sherbert* test in contexts other than [unemployment compensation], we have always found the test satisfied") (citations omitted). It has been argued by some that the Court never applied a true compelling interest test even when it purportedly did so. Micbael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1127-28 (1990).

infringe upon its exercise, are constitutional if they are "neutral" and "generally applicable."[79]

Although supported by some,[80] the *Smith* decision produced a flood of criticism.[81] Responding to this criticism, Congress passed the Religious Freedom Restoration Act ("RFRA")[82] which, in effect, requires both state and federal governments[83] to provide a compelling interest to justify any law which substantially interferes with the free exercise of religion.[84] Although arguably outside the scope of legislative authority,[85] RFRA directly counters Justice Scalia's reasoning in

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79. In support of this contention, the Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). In an attempt to distinguish a line of cases in which generally applicable and neutral laws were declared unconstitutional, the Court noted that in each of these cases, the right of free exercise was not analyzed in isolation, but in connection with other constitutional protections, presenting a "hybrid" situation. Id. at 881-82. Some commentators have criticized the Court's attempt to distinguish *Smith* on this basis alone. See, for example, McConnell, 57 U. Chi. L. Rev. at 1122 (cited in note 78); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91, 97-100 (1991).

80. See William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 309-10 (1991).

81. The fundamental objection to the *Smith* decision is that by abandoning at least the appearance of strict scrutiny in free exercise exemption cases, the decision eliminates any realistic hope for the protection of uninhibited religious practice. See generally John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 Ind. L. Rev. 71 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1.

82. 42 U.S.C.A. § 2000bb (West Supp. 1994). The express purpose of the Act was "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where the free exercise of religion is substantially burdened by government." Id. § 2000bb(b)(1) (citations omitted).

83. Id. § 2000bb-3(a). The section provides: "This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."

84. The Act provides in part:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden te the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000bb-1(a)-(b).

85. At least one federal court has applied RFRA retroactively to give effect to Congress's desire to reinstate the compelling interest test in cases involving a substantial burden on the free exercise of religion. See *Lawson v. Dugger*, 844 F. Supp. 1538, 1542 (S.D. Fla. 1994).

Smith, which suggested that the fate of religious minorities is better left to the political process.[86]

Although the continued survival of the free exercise exemption has been questioned,[87] the focus of the debate is whether the Free Exercise Clause exists solely to prevent the government from singling out particular religious groups for disability,[88] or whether the clause protects religion against even the incidental effects of government action.[89]

In *Lamb's Chapel,* the plaintiffs asserted that the denial of access to school facilities constituted a violation of the Free Exercise Clause.[90] On appeal, the Second Circuit rejected this assertion. The court held that the government properly can impose a total restriction on certain types of speech, provided that the restriction does not

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86. In an interesting passage, Justice Scalia noted that in a democratic system, those whose religious freedoms are threatened must seek protection within the confines of the political process. *Smith*, 494 U.S. at 890. Justice Scalia then attempted to subvert the true role of the Supreme Court by arguing that the legislature, and not the Court, is better suited to decide issues of individual liberty:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the certainty of all religious beliefs.

Id.

87. According to one scholar, the Supreme Court has rejected every claim for an exemption since 1972, excluding the narrow cases involving unemployment benefits which are covered by *Sherbert*. McConnell, 103 Harv. L. Rev. at 1417 (cited in note 58). Moreover, members of the Court have expressed serious reservations about the necessity of judicially created exemptions from federal laws on the basis of religious beliefs. See *Thomas*, 450 U.S. at 723 (Rehnquist, J., dissenting) (stating "the Free Exercise Clause does not . . . require the State to conform that statute to the dictates of religious conscience of any group"); *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (agreeing that "there is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid . . . law that is entirely neutral in its general application"). See generally Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3 (1978).

88. Judge Bork approves of this "no-exemption" policy. He suggests that the purpose of the Free Exercise Clause could have been to guard against "laws that directly and intentionally penalize religious observance," and not to prevent indirect effects on religious practice. Robert H. Bork, *The Supreme Court and the Religion Clauses*, in *"Turning the Religion Clauses on Their Heads": Proceedings of the National Religious Freedom Conference of the Catholic League for Religious and Civil Rights* 83, 84 (Catholic League for Religious and Civil Rights, 1988). Under this construct, denying exemptions to all religious groups would ensure observance of the Free Exercise Clause, and religious observers could never challenge facially neutral legislation as violative of the Free Exercise Clause. McConnell, 103 Harv. L. Rev. at 1418-19.

89. According to scholarly commentary, the "exemptions" doctrine would also protect against the incidental and unintended effects of government action. McConnell states: "The remedy generally is to leave the government policy in place, but to carve out an exemption when the application of the policy impinges on religious practices without adequate justification." McConnell, 103 Harv. L. Rev. at 1418.

90. *Lamb's Chapel*, 113 S. Ct. at 2141.

discriminate within the class of speakers on the basis of the viewpoint expressed.[91] Accordingly, the lower court applied a restrictive view of the Free Exercise Clause and upheld the district's restrictions because it found that *all* religious groups similarly had been denied access.[92]

B. The Unstable Establishment Clause Jurisprudence

Although the drafters of the First Amendment sought to guarantee religious autonomy, they also attempted to create a balance between religious freedom and the separation of church and state.[93] The Establishment Clause,[94] applicable to the states through the Fourteenth Amendment,[95] prohibits governmental promotion of, or entanglement with, religion and forbids state discrimination toward individuals on the basis of their religious beliefs and practices.[96] The purpose of the Establishment Clause, as articulated by the Court, is to prevent active governmental involvement in religious affairs.[97]

Although the Establishment Clause's "opaque"[98] language provides the basis for church-state separation, the Supreme Court has yet to reach a consensus on how to interpret the language of the Clause itself.[99] Early Establishment Clause analysis advocated a total and distinct separation between the church and the state,[100] relying,

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91. The court of appeals held that in a "limited public forum," government may "impose a blanket exclusion on certain types of speech" provided that the exclusion does not "selectively deny access" among "expressive activities of a certain genre." *Lamb's Chapel*, 959 F.2d at 387.

92. Id.

93. See note 4.

94. The Establishment Clause mandates: "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const., Amend. I.

95. See, for example, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

96. See, for example, *County of Allegheny v. ACLU*, 492 U.S 573, 590-91 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 582 (1987); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 484-85 (1986); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985); *Mueller v. Allen*, 463 U.S. 388, 394 (1983); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-24 (1982); *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 654, 657 (1980); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Stone v. Graham*, 449 U.S. 39, 40 (1980); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971).

97. The Court held in *Walz v. Tax Commission.*, 397 U.S. 664, 668 (1970), that the purpose of the Establishment Clause is to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity."

98. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Chief Justice Burger noted in *Lemon* that the Establishment Clause produces a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Id. at 614.

99. See note 13.

100. See *Everson*, 330 U.S. at 15-16 (stating that "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'"); *McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) (noting that "the First Amendment . . . erected a wall between Church and State which must be kept high and

in part, on Thomas Jefferson's "wall of separation" metaphor.[101] This absolutist approach, however, was not universally accepted by the Court, even during the early phase of Establishment Clause analysis,[102] and formally was rejected by the Court in later cases.[103]

Upon rejection of the absolutist approach, the Court in *Zorach v. Clauson*[104] focused on an accommodation approach towards religious practices.[105] The critical distinction under this model is between the perceived and unconstitutional advocation of religion on one hand, and a permissible accommodation of religion on the other.[106] When governmental action is designed, not to promote one religious ideology over another, but to facilitate the uninhibited free exercise of religion,

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impregnable"); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (holding that a state's use of public schools to encourage daily prayer breached the constitutional wall between church and stato).

101. *Reynolds*, 98 U.S. at 164 (quoting Reply to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), in H.A. Washington, ed., 8 *The Writings of Thomas Jefferson* 113 (J.B. Lippincott & Co., 1869)). In several cases, the Court expressed dissatisfaction with tlie viability of this metaphor for constitutional analysis. Referring to the "wall of separation," Justice Reed argued tbat "[a] rule of law should not be drawn from a figure of speech." *McCollum*, 333 U.S. at 247 (Reed, J., dissenting). Later, Justice Stewart reasoned that in Establishment Clause cases, "the Court's task . . . is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation'. . . ." *Vitale*, 370 U.S. at 445 (Stewart, J., dissenting). Justice Rehnquist also stated: "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it." *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). Finally, Justice Kennedy argued that "[s]ubstantial revision of our Establishment Clause doctrine may be in order. . . ." *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, J.J., concurring in tbe judgment in part and dissenting in part).

102. Only one year after *Everson*, a case which articulated the wall of separation standard, Justice Roed, writing a dissenting opinion in *McCollum*, argued that the Establishment Clause could not be regarded as imposing

> an absolute prohibition against every conceivable situation where [church and state] may work togetber any more than the other provisions of the First Amendment—free speech, free press—are absolutes. . . . Devotion to tlie great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people.

McCollum, 333 U.S. at 256.

103. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court held that the First Amendment does not require absolute separation between church and state in every conceivable situation:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines tlie manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.

Id. at 312.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court clearly and unambiguously abrogated the idea of total separation, characterizing the absolutist approach as "simplistic" and impractical. Id. at 678.

104. 343 U.S. 306 (1952).

105. See note 52.

106. Id.

the action is entirely consistent with the Establishment Clause.[107] In later cases, the accommodation approach, though based upon the traditional role which religion has played in society, was cited with approval by the Court.[108]

The modern test for evaluating whether a statute or state policy violates the Establishment Clause emerged in *Lemon v. Kurtzman*.[109] In *Lemon*, the Court ruled that a Pennsylvania statute allowing reimbursement for parochial school teachers' salaries and instructional materials, and a Rhode Island law mandating salary supplements for nonpublic school teachers of certain secular subjects violated the Establishment Clause.[110] In reaching its decision, the Court formulated a three-prong test for determining Establishment Clause violations.[111] To pass constitutional review under the *Lemon* test, government practices must: (1) "have a secular legislative purpose"; (2) have a "principal or primary effect . . . that neither advances nor inhibits religion"; and (3) "not foster 'an excessive government entanglement with religion.'"[112] A violation of any part of the *Lemon* test constitutes a violation of the Establishment Clause.[113]

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107. The Supreme Court has noted that accommodation of religion does not violate the Establishment Clause. This recognition derives from the inherent conflict between the Free Exercise and the Establishment clauses. See notes 2-3 and accompanying text. By allowing government to accommodate but not advocate religion, the state can satisfy the Free Exercise Clause without becoming overtly involved in religious affairs. As one commentator has noted:

> [A]ccommodation to religion is a practice undertaken specifically for the purpose of facilitating the free exercise of religion . . . "[for] individuals whose religious beliefs and practices would otherwise thereby be infringed, or [by creating] without state involvement an atmosphere in which voluntary religious exercise may flourish."

McConnell, 1985 Sup. Ct. Rev. at 3-4 (cited in note 2) (quoting *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring)).

108. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court cited the accommodation approach and recognized the role that religion traditionally has played in American society. In *Lynch*, the Court invoked the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life" in upholding the constitutionality of a Pawtucket, Rhode Island nativity scene. 465 U.S. at 674. Significantly, the Court in *County of Allegheny* drew a fundamental distinction between acknowledgment and advocacy of religious practice in striking down a Christmas creche placed on the county courthouse, holding that the government can acknowledge Christmas as a cultural holiday, but cannot suggest to people that it supports the underlying message of that holiday. 492 U.S. at 601. In dissent, Justice Kennedy suggested that the government should be given great latitude in recognizing the role of religion in society. Id. at 655-57. In any respect, the absolutist approach began to break down almost immediately following its inception, and the Court accepted that, based on tradition, the state should be afforded some degree of control over the accommodation/advocacy distinction. *McCollum*, 333 U.S. at 256.

109. 403 U.S. 602 (1971).

110. Id. at 624-25.

111. Id. at 612-13.

112. Id. (citations omitted). The three-prong test articulated in *Lemon* was, in reality, a combination of several cases that preceded the decision. The original source of the "purpose"

The first prong of the *Lemon* test requires that the law under review have a "secular legislative purpose."[114] Although the Court has varied the language of this requirement in different circumstances,[115] the general approach taken by the Court is that the government need only show a primary, and not an exclusive, secular purpose.[116] As a result, governmental action can have a "secular" purpose, even if motivated in part by religious objectives. On the other hand, laws may be deemed to serve a nonsecular purpose if they either promote religion in general,[117] or advance any specific religious doctrine.[118] In practice, however, the Court has been lenient in finding a secular purpose.[119]

Under the second prong of the *Lemon* test, the governmental conduct must, in effect, neither advance nor inhibit religion.[120]

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and "effect" prongs is *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). In *Schempp*, the Supreme Court held unconstitutional a Pennsylvania statute which authorized public schools to begin the school day with readings from the Bible. Id. at 222. In striking down the law, the Court stated that legislative action must have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion." Id. at 222 (citing *Everson v. Board of Educ.*, 330 U.S. 1 (1947) and *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). The final prong of the test, "excessive entanglement with religion," has its origin in *Walz v. Tax Commission.*, 397 U.S. 664 (1970), in which the Court upheld a tax exemption for religious groups on the ground that this exemption would prevent excessive entanglement hy the government in religious affairs. Id. at 674.

113. *Lemon*, 403 U.S. at 612.

114. Id.

115. See, for example, *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (stating that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion"); *Lynch*, 465 U.S. at 681 n.6 (observing that "[w]ere the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation [the] Court has approved in the past would have heen invalidated"); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that the "pre-eminent purpose" of a law must not be "plainly religious in nature"); *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987) (Powell, J., concurring) (stating that, in order to invalidate legislation, "[t]he religious purpose must predominate").

116. *Wallace*, 472 U.S. at 56; *Lynch*, 465 U.S. at 681 n.6; *Schempp*, 374 U.S. at 296-303 (Brennan, J., concurring).

117. *Edwards*, 482 U.S. at 585 (citing *Wallace*, 472 U.S. at 52-53).

118. Id. (citing *Stone*, 449 U.S. at 41, and *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)).

119. See *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 485-86 (1986) (labeling the analysis under the purpose prong "simple" in upholding state financing of disabled individuals training at a Christian college); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985) (finding "no dispute as to the first test" in a school time-sharing program); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (recognizing that "little time need be spent" on the purpose inquiry); *Larkin v. Grendsl's Den, Inc.*, 459 U.S. 116, 123 (1982) (stating that "there can be little doubt" that a law giving schools and churches authority to hlock issuance of liquor licenses within 500 feet of property "embraces valid secular legislative purposes"); *Widmar v. Vincent*, 454 U.S. 263, 271-72 (1981) (finding the first prong of *Lemon* "clearly met" in recognizing that religious student group access to university facilities does not violate the Establishment Clause); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (finding "no difficulty with the first prong of this three-part test" in evaluating a state law providing educational materials to nonpublic schools).

120. *Lemon*, 403 U.S. at 612.

Generally, the Court has required that the *principal* or *primary* effect of the conduct be to advance or inhibit religion before it would declare the governmental restriction unconstitutional under *Lemon*.[121] In *Committee for Public Education v. Nyquist*,[122] however, the Court expanded the "effects" prong of the test. The Court in *Nyquist* held that the "primary" language of *Lemon* did not automatically immunize governmental action from further review, reasoning that to force the Court to ascertain whether an effect was the law's "primary" one was inconsistent with past cases.[123] Moreover, the Court held that the impact on religious autonomy must be "direct and substantial" as opposed to "remote and incidental" for a law to run afoul of constitutional mandates.[124] State involvement in religion that creates a symbolic merger of church and state violates the "effects" prong of the *Lemon* test,[125] as does an appearance of state involvement in religious affairs,[126] an inference of government hostility toward religion,[127] and a government subsidy to religion.[128]

The primary focus of the final prong of the *Lemon* test is on procedural involvement in religious operations by the government.[129] Lower courts have held that continuous state monitoring or supervision of religious activity violates the "entanglement" prong.[130] The

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121. Id.

122. 413 U.S. 756 (1973).

123. Id. at 783 n.39 (reasoning "[w]e do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination").

124. Id.

125. In *Ball*, the Court struck down a program under which teachers, hired by the public school system, taught classes to nonpublic students, using resources from the public financial system. The Court held that the "symbolic union of church and state" created through the arrangement may convey the image that the State prefers one religion, or any religion, in violation of the Establishment Clause. 473 U.S. at 397.

126. The Court of Appeals for the Second Circuit held in *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1980), that "the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit."

127. *Lemon*, 403 U.S. at 612.

128. See *Ball*, 473 U.S. at 397.

129. *Lemon*, 403 U.S. at 613; *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976).

130. See, for example, *Garnett v. Renton Sch. Dist.*, 865 F.2d 1121, 1126 (9th Cir. 1989) (holding action necessary to ensure safety and discipline of students requires a level of state supervision that amounts to excessive entanglement), modified, 874 F.2d 608 (9th Cir. 1989); *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1406-07 (10th Cir. 1985) (finding that a policy of monitering content of all student meetings would amount to excessive entanglement when applied to religious groups); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1047 (5th Cir. 1982) (finding that the supervision of student prayer groups by school officials creates excessive entanglement in violation of the Establishment Clause); *Brandon v. Board of Educ.*, 635 F.2d 971, 979 (2d Cir. 1980) (finding that school supervision of student

state also becomes excessively entangled with religion through the expenditure of public funds to assist religious operations.[131] In these cases, the Court examines whether the expenditure is necessary to accommodate religion, or whether the funding amounts to an impermissible entanglement in religious affairs.[132] Generally, the Court is willing to accept some entanglement with religion if the policy has a secular purpose and effect.[133] Although some entanglement through accommodation may be accepted by the Court, any effect on religious activities still must satisfy the guidelines of *Lemon*.[134]

Although the framework provided by *Lemon* remains important in Establishment Clause cases,[135] from a practical standpoint, there is ample reason to doubt its continued viability. The language of *Lemon*, though precise, is not a "talismanic rule of law."[136] As the Court itself acknowledged, the line between permissible and impermissible government action should not, and cannot, be guided by any single formula.[137] Instead, the characterization of governmental action as violative of the Establishment Clause depends on the unique facts of each individual case.[138]

This Recent Development suggests that the Supreme Court has utilized *Lemon* only when a bright line rule best served expediency and a particular outcome. On other occasions, however, the

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religious organizations to ensure voluntary participation constitutes impermissible entanglement).

131. See Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 Hastings Const. L. Q. 529, 576-77 (1985); *McCollum v. Board of Educ.*, 333 U.S. 203, 210 (1948).

132. See note 107 and accompanying text.

133. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 771 (1973) (stating "not every law that confers an 'indirect,' 'remote' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid"). See also Edwin G. West, *Constitutional Judgment on Non-Public School Aid: Fresh Guidelines or New Roadblocks?* 35 Emory L. J. 795, 808-14 (1986) (stating that laws which primarily serve secular purposes, but have incidental effects of advancing religion, are nevertheless valid).

134. *Lemon*, 403 U.S. at 613. This factor is one of the central criticisms of the entanglement analysis, in that it delegates virtually total discretion to judges to decide what constitutes "excessive" governmental involvement in religious affairs. Michael S. Paulsen, Lemon *Is Dead*, 43 Case W. Res. L. Rev. 795, 809 (1993).

135. See *Lamb's Chapel*, 113 S. Ct. at 2148 (employing the *Lemon* three-part test).

136. Daniel O. Conkle, Lemon *Lives*, 43 Case W. Res. L. Rev. 865, 867 (1993).

137. Referring to the "entanglement" inquiry, the Court in *Lemon* noted, "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S. at 614. See also *Meek v. Pittenger*, 421 U.S. 349, 359 (1975) (stating that the *Lemon* criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry").

138. *Lemon*, 403 U.S. at 614.

Court ignored the test entirely or altered the basic structure of the test to such an extent that it no longer resembled the original three-prong inquiry. In reality, the Court is unwilling to confine itself to any single test when confronted with the complexities of Establishment Clause issues.[139] Several members of the Court join in the criticism of *Lemon*, but they are unable to agree on a realistic replacement. Although *Lemon* may be inadequate, the Court's refusal or inability to articulate a cohesive and functional standard serves only to muddle the already confusing area of church-state interaction.

C. The Court's Malleable Lemon *Framework*

On more than one occasion, the Supreme Court simply ignored or briefly mentioned *Lemon* in an Establishment Clause case. In *Marsh v. Chambers*,[140] the Court rejected an Establishment Clause challenge to a state-financed opening prayer in the legislature without applying *Lemon*.[141] Writing for the majority, Chief Justice Burger conducted a historical analysis,[142] relying on the tradition and widespread existence of the practice since colonial times.[143] Finding a "unique history" of legislative prayer, the Court upheld the practice without conducting any substantive inquiry into Establishment Clause concerns.[144] In dissent, Justice Brennan argued that the state legislature's practice was irreconcilable with the *Lemon* test and thus could not be upheld.[145]

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139. See *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (holding that the Court is "unwilling[ ] to be confined to any single test or criterion in this sensitive area").

140. 463 U.S. 783 (1983).

141. Id. at 791.

142. In fact, several decisions by the United States Supreme Court interpreting the Establishment Clause have utilized historical analysis to discern the intent and purpose of the drafters. See *Engel v. Vitale*, 370 U.S. 421, 425-33 (1962) (noting that the practice of establishing government-composed prayers for religious services caused many colonists to leave England in search of religious freedom); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970) (emphasizing the importance of history in discovering underlying constitutional objectives). It is interesting to note some of the conflicting approaches of history formulated by the justices of the Supreme Court. In *Wallace v. Jaffree*, for example, Justice Rehnquist attempted to utilize an historical analysis to discredit the absolutist position, itself an historical approach once advocated by the Court. 472 U.S. 38, 92-107 (1985) (Rehnquist, J., dissenting).

143. *Marsh*, 463 U.S. at 791. The Court reasoned that the practice is "deeply embedded in the history and tradition" of the United States and is therefore permissible. Id. at 786.

144. Id. at 791. The Court did not examine the Nebraska legislature's practice under the traditional *Lemon* test, but instead, either purposely ignored the test or carved out an exception to it. Id. at 796 (Brennan, J., dissenting).

145. Id. at 795-96 (Brennan, J., dissenting).

The opinion in *Lynch v. Donnelly*[146] also illustrates the Court's selective application of *Lemon*. *Lynch* involved the question of whether a city could, within the limits of the Establishment Clause, include a nativity scene in its annual Christmas display.[147] Again writing for the majority, Justice Brennan applied the *Lemon* test only in form,[148] and concluded that the state practice satisfied the appropriate constitutional mandates.[149] The *Lynch* decision reflects the Court's continued indifference to the demise of *Lemon*.[150]

Perhaps the greatest and most recent indication of the Court's unwillingness to bring a level of consistency to its fragmented Establishment Clause doctrine came in *Board of Education of Kiryas Joel Village School District v. Grumet*.[151] In *Grumet*, the Court upheld a New York Court of Appeals ruling which struck down as unconstitutional a New York law creating a distinct and independent school district for a community of Hasidic Jews.[152] In 1989, the New York

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146. 465 U.S. 668 (1984).

147. Id. at 671-72.

148. The majority opinion sheds light on the real motivation for upholding the Christmas display and indicates that the Court was not guided by *Lemon*:

> We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

Id. at 686. See also Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 Cornell L. Rev. 905, 906-07 (1987).

149. *Lynch*, 465 U.S. at 685.

150. Several Supreme Court opinions simply do not focus on the Establishment Clause test set forth in *Lemon*. See *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (upholding a government program providing a state-financed interpreter to a handicapped student attending a Catholic school). Although the lower court found the law at issue inconsistent with *Lemon*, the Court in *Zobrest* ignored the three-prong test entirely in favor of basic "neutrality" rhetoric. Id. at 2466-69.

Similarly, in *Larson v. Valente*, 456 U.S. 228 (1982), the Court refused to apply *Lemon* in striking down a program which exempted certain religious organizations from compliance with a state charity law. Although recognizing that analysis under *Lemon* would produce the same result, the Court in *Larson* stated that "application of the *Lemon* tests is not necessary. . . ." Id. at 252.

151. 114 S. Ct. 2481 (1994).

152. Id. at 2494. The members of the Kiryas Joel community, a religious enclave of Satmar Hasidim, practice a very strict form of Judaism that mandates separatism and avoidance of all facets of the modern world. Writing for the Court, Justice Souter noted:

> The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways. . . .

Id. at 2485. The residents of the village of Kiryas Joel migrated to the Williamsburg section of Brooklyn after the Holocaust of World War II drove them from much of Europe. See Joseph Berger, *Public School Leadership Fight Tearing a Hasidic Sect*, N.Y. Times A15 (Jan. 3, 1994).

Legislature created the Kiryas Joel Village School District[153] in response to pressure from members of the Hasidic community to provide for the special needs of its handicapped children.[154] Various parties[155] challenged the law as an impermissible establishment of religion under both the national and state constitutions.[156] The trial court found in favor of the plaintiffs on this issue,[157] and both the

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The village was incorporated in 1977 and initially fell within the Monroe-Woodbury Central School District until a special statute "carved out a separate district, following village lines, to serve this distinctive population." *Grumet*, 114 S. Ct. at 2484.

153. The statute provides in full:

> Section 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.
>
> [Section] 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.
>
> [Section] 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

Grumet, 114 S. Ct. at 2486 n.1 (quoting 1989 N.Y. Laws ch. 748).

154. Most of the children from the village attend private schools where they receive education and training in compliance with the tenets of Satmar Hasidim. *Grumet*, 114 S. Ct. at 2485. Due to constrained budgets, these private schools do not offer any specialized services to handicapped children. Id. Under both state federal law, however, handicapped children within New York are entitled to these services even if they are enrolled in private schools. Id. See also Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1988); N.Y. Educ. Law §§ 4401-4449 (McKinney 1981 & Supp. 1994).

Initially, the Monroe-Woodbury Central School District provided the necessary handicapped classes and services to those students within the community who required them. *Grumet*, 114 S. Ct. at 2485. These services ended in 1985, however, when the Supreme Court ruled that public school teachers could not work in parochial schools. Id. (citing *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985)). Consequently, children of the village were forced te attend public schools located outside of the isolated village. Several parents within the Kiryas Community, believing that contact with the outside world was detrimental to the children's development, withdrew their children from the public schools, and sought review of the public-school placements. *Board of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 527 N.E.2d 767, 770 (1988).

The governor of New York signed the Kiryas Joel Village School District bill into law in 1989 when only one child from the religious enclave was enrolled in the public school. *Grumet*, 114 S. Ct. at 2486. According to the governor, the 1989 law represented "a good faith effort to solve th[e] unique problem" inherent in any attempt to provide the necessary services to handicapped children within a religious community. Id.

155. The initial lawsuit challenging the constitutionality of the law was brought by the executive director and the president of the New York State School Boards Association, both in their individual capacities and as officers of the association. *Grumet*, 114 S. Ct. at 2486 n.2. The New York Appellate Division ruled that neither the association nor its officers possessed the requisite standing to challenge the law. *Grumet*, 187 A.D.2d 16, 592 N.Y.S.2d 123, 126 (1992). The Appellate Division also held, however, that the individual officers of the association had statutory standing as citizen-taxpayers to bring the instant action. Id.

156. *Grumet*, 114 S. Ct. at 2486.

157. *Grumet v. New York State Educ. Dep't*, 151 Misc. 2d 60, 579 N.Y.S.2d 1004 (Sup. Ct. 1992). According to the Supreme Court of Albany County, the statute which created the independent school district violated all three prongs of the *Lemon* test. Id. at 1007-08. The

Appellate Division[158] and the New York Court of Appeals affirmed.[159] The Supreme Court of the United States stayed the mandate of the Court of Appeals[160] and granted certiorari.[161]

A divided Supreme Court[162] affirmed the judgment of the New York Court of Appeals on the ground that the law at issue impermissibly advanced religion in violation of the Establishment Clause.[163] What is interesting about the *Grumet* decision is not the final result, but rather the Court's blatant refusal to apply the *Lemon* test in its analysis. Although the decision does tangentially mention *Lemon*,[164] nowhere does the Court actually apply the three-prong inquiry to the specific facts of the case.[165] Instead, the Court based its decision on the principle of state neutrality toward religion and concluded that the New York statute violated this standard by delegating too much authority to a religious organization.[166] Not unlike *Lamb's Chapel*,

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court therefore found the law unconstitutional under both the New York and United States constitutions. Id. at 1007.

158. *Grumet*, 187 A.D.2d 16, 592 N.Y.S.2d 123 (1992). A divided Appellate Division affirmed the trial court's decision because it also found the New York law inconsistent with *Lemon*. Id. at 126-28.

159. *Grumet*, 81 N.Y.2d 518, 618 N.E.2d 94 (1993). Two judges (Smith and Simmons, JJ.) concluded that the New York law failed the *Lemon* test. Id. at 100 (concluding that "the principal or primary effect of [the New York law] is to advance religious beliefs"). Two other judges concurred separately, one noting that the New York law was unconstitutional without regard to *Lemon*, and the other stating that the law failed both the first and second prongs of *Lemon*. Id. at 102 (Kaye, C.J., concurring) (rejecting the notion "that *Lemon* supplies the preferred analytical framework for this case"); id. at 107 (Hancock, J., concurring) (noting that while disposition of the case focused upon the "effect" prong of *Lemon*, the law also violated the first or "purpose" prong). Finally, two judges joined in dissent, noting with approval the permissible accommodation with religion that the law produced. Id. at 113 (Bellacosa, J., dissenting, in which Titone, J., concurs).

160. *Grumet*, 114 S. Ct. 10 (1993).

161. *Grumet*, 114 S. Ct. 544 (1993).

162. There is perhaps no better evidence of the Court's confused and incoherent Establishment Clause doctrine than the number of diverse and inconsistent opinions filed in the *Grumet* case. Justice Souter announced the judgment of the Court. Justices Blackmun, Stevens, O'Connor, and Keunedy filed separate concurring opinions, while Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined.

163. *Grumet*, 114 S. Ct. at 2494 (stating that the New York law crossed "the line from permissible accommodation to impermissible establishment").

164. The Court in its analysis mentions *Lemon* only twice in the context of "see also" cites. Id. at 2488. Such scant reference to the alleged test that controls all Establishment Clause cases suggests that the Court has yet to accept responsibility for generating consistency in the area of church-state interaction.

165. Although Justice Blackmun joined in concurrence to allay fears that the Court's opinion signaled the demise of *Lemon*, one cannot argue that the Court actually supported the principles outlined in that case. Id. at 2494-95 (noting that the cases upon which the Court relied rested upon the *Lemon* criteria). Justice Blackmun's effort reflects more an attempt to hold on to some semblance of stability in an area plagued with inconsistency rather than a realistic portrait of the Court's analysis.

166. According to the Court, the proper inquiry was whether the New York law was neutral toward religion. Id. at 2487. In striking down the law, the Court fonnd that the New York

the Court in *Grumet* failed to move beyond its preference for case-by-case adjudication, choosing instead to decide only the narrow issue before it.

At one time or another, almost every member of the Supreme Court has voiced dissatisfaction with the *Lemon* test.[167] The flood of criticism, however, is not limited to the Court, as several commentators also have attacked the test as fatally inadequate to establish consistency in Establishment Clause decisions.[168] The principal challenge to the *Lemon* test is that it provides no more than a general standard, or "helpful signpost"[169] which the Court selectively

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statute unconstitutionally delegated the state's authority over public schools to a group defined by its religious character. Id. The Court found it unpersuasive that the law did not expressly delegate power by reference to religious beliefs, concluding that the law "effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly." Id. at 2489. As Justice Souter noted:

> In this case we are clearly constrained to conclude that the statute before us fails the test of neutrality. It delegates a power this Court has said "ranks at the very apex of the function of a State," to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism.

Id. at 2494 (citation omitted).

167. Justice White dissented in *Lemon* and continued to express opposition over the application of its framework. See, for example, *Roemer v. Board of Pub. Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) (stating "I am no more reconciled now to *Lemon*... than I was when it was decided"). Justice White's use of *Lemon* is primarily restricted to those cases in which application of *Lemon* would result in upholding a challenged statute. See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). Justice Rehnquist likewise spoke out against *Lemon*. See *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 726 (1981) (Rehnquist, J., dissenting) (recognizing the Court's failure to apply consistently the *Lemon* test). Justice O'Connor attacked the *Lemon* framework in *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about [*Lemon*'s] entanglement test"). Justice Scalia robustly criticized the "purpose" prong of the test in *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (stating that "[a] pessimistic evaluation . . . of the tetality of *Lemon* is particularly applicable to the 'purpose' prong"). Justice Kennedy also expressed fervent dissatisfaction with the *Lemon* test in his dissent in *County of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (stating that "[s]ubstantial revision of our Establishment Clause doctrine may be in order").

168. See generally Paul Brickner, Comment, *The* Lemon *Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 Ky. L. J. 1061 (1988); W. Scott Simpson, Comment, Lemon *Reconstituted: Justice O'Connor's Proposed Modifications of the* Lemon *Test for Establishment Clause Violations*, 1986 B.Y.U. L. Rev. 465; Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal. L. Rev. 817, 827-29 (1984); Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformed, or Rejected?*, 4 Notre Dame J. L. Ethics & Pub. Policy 513, 543 (1990) (stating that "[i]t is hard to think of a contemporary legal doctrine that is as besieged from all quarters as is the *Lemon* test"); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L. J. 409, 450 (1986); Kenneth W. Starr, *The Establishment Clause*, 41 Okla. L. Rev. 477 (1988); Hal Culbertson, Note, *Religion in the Political Process: A Critique of* Lemon's *Purpose Test*, 1990 U. Ill. L. Rev. 915; James M. Lewis and Michael L. Vild, Note, *A Controversial Twist of* Lemon*: The Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990).

has applied. In an effort to combat the widespread confusion and criticism that surrounds current Establishment Clause analysis, members of the Court have advocated significant revision or abandonment of the *Lemon* test.[170]

Throughout the 1980s, Justice O'Connor attempted to clarify the *Lemon* framework by focusing upon the principle of state endorsement of religion.[171] According to O'Connor, the central focus of Establishment Clause analysis is whether the governmental action conveys a message of endorsement or disapproval of religion.[172] This

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169. *Hunt v. McNair*, 413 U.S. 734, 741 (1973). As the Court explained in *Lynch v. Donnelly*:

> In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute."

465 U.S. 668, 678 (1984) (quoting *Walz v. Tax Commission.*, 397 U.S. 664, 668 (1970)).

Though this construction of the Establishment Clause may be accurato, it provides only contoxt-specific guidance to government and state officials concerning what restrictions are permissible and what restrictions are mandatory. This confusion is particularly acute in the public school setting. In this forum, the Court has recognized that free speech and free exercise remain applicable. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). The Court has, however, also held that, due to the nature of schools and the interests to be protected, religion may not be advanced. See *Edwards*, 482 U.S. at 584. As a result, there is no definitive guideline to the scope and appropriate nature of government restraints on speech or the exercise of religion. See Levin, 95 Yale L. J. at 1658-67 (cited in note 5).

170. See *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring) (suggesting a new approach to Establishment Clause cases); *County of Allegheny*, 492 U.S. at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part) (stating that a revision of the Court's Establishment Clause doctrine is needed).

171. See *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (asserting that the *Lemon* test should require courts to consider whether government action has the purpose or effect of endorsing religion); *Wallace*, 472 U.S. at 69-70 (O'Connor, J., concurring) (framing the *Lemon* inquiry as "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement"); *Corporation of Presiding Bishop*, 483 U.S. at 346-49 (O'Connor, J., concurring in the judgment) (expanding on the endorsement analysis); *County of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring) (framing the issue as whether the challenged goverument action conveys "an endorsement of particular religious beliefs").

Justice O'Connor's alternative Establishment Clause paradigm was constructed "in order to make [the *Lemon* criteria] more useful in achieving the underlying purpose of the First Amendment." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring). According to Justice O'Connor, any Establishment Clause construct must be designed te "prohibit[ ] government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

Justice O'Connor's test has been subject to critical evaluation by several commentators. See, for example, Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 Notre Dame L. Rev. 151, 175-82 (1987); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 302-13 (1987); Note, *Developments in the Law—Religion and the State*, 100 Harv. L. Rev. 1606, 1647 (1987) (noting that Justice O'Connor reformulated *Lemon* to focus on whether or not the government endorses religion).

172. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring).

is an objective determination, and thus, the government's actual intent is not controlling.[173] Other members of the Court appear to have accepted and applied Justice O'Connor's endorsement test in later cases.[174] This approach, however, does not eliminate the confusion surrounding church-state issues because it depends on a case-by-case evaluation of unique facts and circumstances.[175] Thus, while the endorsement model serves to increase flexibility, it does not provide a coherent framework for Establishment Clause issues.[176]

In *County of Allegheny v. ACLU*,[177] Justice Kennedy advanced what has become known as the "coercion" test.[178] Kennedy strongly criticized O'Connor's endorsement framework,[179] and reasoned that the proper inquiry in Establishment Clause cases is whether the government actually forces individuals to accept or participate in

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173. Justice O'Connor summarized the endorsement test in *County of Allegheny v. ACLU*: "The question under endorsement analysis, in short, is whether a reasonable observer would view [the governmental action] as a disapproval of his or her particular religious choices. . . ." 492 U.S. at 631 (O'Connor, J., concurring).

See also *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring) (stating that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement"). One realistically could question whether, given the high level of knowledge Justice O'Connor imputes to the objective observer, the real focus is on the justices themselves.

174. See, for example, *Texas Monthly v. Bullock*, 489 U.S. 1, 8 (1989) (Brennan, J.) (stating that "the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985) (Brennan, J.) (stating that "if this identification conveys a message of governmental endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated"); *County of Allegheny*, 492 U.S. at 592-94 (Brennan, J.). See also *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring) (framing the Establishment Clause inquiry as "a legal question to be answered on the bases of judicial interpretation of social facts").

175. *County of Allegheny*, 492 U.S. at 606 (O'Connor, J., concurring).

176. Id.

177. 492 U.S. 573 (1989).

178. Id. at 659-61 (Kennedy, J., concurring in the judgment in part and dissenting in part).

179. According to Justice Kennedy, Justice O'Connor's reformation of *Lemon* was "a . . . most unwelcome . . . addition to our tangled Establishment Clause jurisprudence." Id. at 668. Justice Kennedy believed that the "endorsement test" was inappropriate:

> Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.

Id. at 674.

Justice Kennedy believed that since O'Connor's proposed modification to the *Lemon* test was not adopted by the Court in *Lynch*, it was not controlling, as it is unprecedented "that a concurring opinion . . . could take precedence over an opinion joined in its entirety by five Members of the Court." Id. at 668. In reality, Justice O'Connor's model was adopted by the four dissenting members in *Lynch*, and Justice Brennan, in writing for this group, observed that Justice O'Connor had correctly stated the propor inquiry. *Lynch*, 465 U.S. at 697-98 n.3 (Brennan, J., dissenting).

religious practices which counter personally held beliefs.[180] According to Kennedy, this approach would provide the appropriate balance between the Establishment Clause and the Free Exercise Clause.[181] Any other construct, according to Kennedy, would lead to the invalidation of accepted government actions, because all laws touching upon religion in some way necessarily involve a degree of coercion.[182] Kennedy suggested, however, that psychological coercion, short of actual coercion, would also violate the Establishment Clause.[183]

Although not carrying a majority of the Court, Justice Kennedy did manage to gather the support of Chief Justice Rehnquist and Justices Scalia and White.[184] The Court repeatedly has recognized, however, that a violation of the Establishment Clause need not be predicated on any form of coercion.[185] Nevertheless, the increasing debate between the "coercion" model and the "endorsement" test indicates that, for the Court, the question of establishment is far from resolved.

Lee v. Weisman[186] reflects the Court's confusion regarding the applicability of *Lemon* and its alternative constructs. In *Weisman*, the Court struck down as unconstitutional a public school policy that permitted clergy members to give invocations and benedictions at graduation ceremonies.[187] Although rejecting the school committee's invitation to reconsider *Lemon*,[188] Justice Kennedy, writing for the

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180. *County of Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part) (reasoning that "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal").

181. Id. at 661.

182. Id. at 659 (stating that "it would be difficult indeed to establish a religion without some measure of more or less subtle coercion").

183. Id. at 661 (suggesting that "[s]ymbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case").

184. Id. at 655.

185. See, for example, *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (recognizing that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not"); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963) (holding that a violation of the Establishment Clause need not be "predicated on coercion"); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 786 (1973) (stating that "proof of coercion" is not "a necessary element of any claim under the Establishment Clause"); *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring); *Lee v. Weisman*, 112 S. Ct. 2649, 2664 (1992) (Blackmun, J., concurring) (noting that "proof of government coercion is not necessary to prove an Establishment Clause violation"); id. at 2672 (Souter, J., concurring) (stating that the Court's precedents "simply cannot . . . support the position that a showing of coercion is necessary to a successful Establishment Clause claim").

186. 112 S. Ct. 2649 (1992).

187. Id. at 2661.

188. Id. at 2655 (declining "the invitation of [the school committee] and *amicus* the United States to reconsider [the Court's] decision in *Lemon v. Kurtzman*").

Court, appled the coercion test from the *County of Allegheny* dissent.[189]

It is apparent from the Court's decision in *Lamb's Chapel v. Center Moriches Union Free School District* that *Lemon* is still the operative Establishment Clause paradigm. What *Weisman* illustrates, however, is that as late as 1992, the continued debate over *Lemon* had not been resolved. In *Lamb's Chapel*, the Supreme Court failed to capitalize on an opportunity to resolve this debate.

D. The Right of Free Speech

The First Amendment, in addition to ensuring personal autonomy in religious affairs, also guarantees freedom of speech and expression.[190] The protection of speech is not limited to the spoken word, but also may encompass physical and expressive conduct.[191] Not all speech falls within the scope of the First Amendment,[192] however, and even speech which is entitled to protection may be

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189. Justice Kennedy stated in *Lee v. Weisman* that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees 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.'" 112 S. Ct. at 2655 (quoting *Lynch*, 465 U.S. at 678) (emphasis added).

Continuing, Kennedy concluded that this interpretation of the Establishment Clause was sufficient to decide the instant case, reasoning that "[t]he State's involvement in the school prayers challenged today violates these central principles." Id. Since *Weisman*, scholars have debated whether or not this decision effectively eliminated *Lemon* as the core Estahlishment Clause paradigm. See Paulsen, 43 Case W. Res. L. Rev. at 795 (cited in note 134); Conkle, 43 Case W. Res. L. Rev. at 865 (cited in note 136).

190. U.S. Const., Amend. I provides in part: "Congress shall make no law . . . abridging the freedom of speech."

191. See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (holding that burning the American flag is expressive conduct protected by the First Amendment); *United States v. Eichman*, 496 U.S. 310 (1990) (upholding the *Johnson* determination that flag burning constitutes expressive conduct); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (noting that burning a Selective Service registration certificate may be sufficient to bring First Amendment protection into play); *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (holding that displaying an altered flag may constituto conduct protected by the First and Fourth amendments).

192. The Supreme Court has, on several occasions, held that certain forms of expression, though formally "speech," are not entitled to protection under the First Amendment. *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding obscenity not entitled to protection) (lator defined in *Miller v. California*, 413 U.S. 15, 24 (1973)); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that the advocacy of illegal conduct is not considered "speech" for purposes of First Amendment). This holding was limited in the later case of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that government cannot regulate speech that advocates illegal conduct "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (denying First Amendment protection to speech classified as "fighting words"); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (excluding defamation from First Amendment protection); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (same).

regulated under certain circumstances.[193] In determining whether restrictions on speech are valid, courts will consider the nature of the restriction and the location in which the speech occurs.[194]

Governmental restrictions on speech can be classified as content-based or content-neutral.[195] Under the former category, the government takes action which restricts otherwise protected speech solely on the basis of its subject matter or underlying viewpoint.[196] The case of *Cohen v. California*[197] illustrates the basic idea of content-based restrictions. In *Cohen*, the defendant was convicted of disturbing the peace for wearing a jacket bearing the words "Fuck the Draft" in a public place.[198] In reversing the conviction, the Court held that although the state had a legitimate interest in maintaining order in public places, it could not legitimately advance that interest by punishing speech solely on the basis of its underlying content.[199] The Court has long held that content-based restrictions on speech are presumptively unconstitutional[200] and cannot be upheld absent proof of a compelling state interest and a showing that the restriction is narrowly tailored to achieve that interest.[201]

The second type of governmental restriction impedes the free flow of ideas without reference to the content of the underlying speech.[202] Restrictions of this type are considered content-neutral and, in certain circumstances, will be upheld as reasonable time,

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193. The right of free speech, though phrased in absolute language, is not absolute and unlimited. General regulatory statutes, not intended to inhibit the exercise of free speech but incidentally limiting its unfettered exercise, are constitutionally valid, provided that they are supported by sufficient governmental interests. See, for example, *Konigsberg v. State Bar of California*, 366 U.S. 36, 44 (1961) (holding that a state may deny admission to the Bar for refusal to answer relevant questions in the application process); *Schneider v. State*, 308 U.S. 147, 160 (1939) (holding that a state may lawfully regulate the use of public streets even if regulations incidentally interfere with the right of free speech); *Cox v. New Hampshire*, 312 U.S. 569, 575 (1941) (upholding convictions of Jehovah's Witnesses for marching in public street without obtaining requisite permit as justified by the state's interest in ensuring safety of citizens).

194. See Tribe, *American Constitutional Law* § 12-2 at 789, § 12-24 at 987 (cited in note 4).

195. Id.

196. Id.

197. 403 U.S. 15 (1971).

198. Id. at 16.

199. Id. at 18.

200. See, for example, *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991); *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). See also Paul B. Stephen, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 233-36 (1982) (discussing cases based on content-neutral speech).

201. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983).

202. Tribe, *American Constitutional Law* § 12-2 at 977-78 (cited in note 4).

place, or manner regulations.[203] Unlike content-based restrictions on speech, these restrictions need not be justified by a compelling governmental interest.[204]

In addition to the nature of the restriction placed upon speech, the location or "forum" in which the speech occurs also influences the extent to which the government may regulate expression.[205] Forum analysis is a framework developed by the Supreme Court to determine when the governmental interest in limiting the use of government property "to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[206] In effect, this balancing approach seeks to delineate the permissible level of governmental regulation of speech on publicly owned property. The Court's forum analysis approach to First Amendment issues identifies the nature and intended use of the government property, the interest of the government in that property, and the standard that must be applied in determining whether the government properly excluded a particular speaker from that forum.[207] Courts traditionally have divided government property into three classifications: the traditional public fornm, the designated public forum and the nonpublic forum.[208]

The traditional public forum includes government property that historically has been open to public debate and assembly.[209]

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203. A government restriction on the use of National Parks in accordance with the purposes for which they were established is an example of a content-neutral restriction on speech. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984). To be upheld, such restrictions must: (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the restricted information. See *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (holding that a city has the constitutional power to restrict sign-posting in order to improve the city's appearance); *United States v. Grace*, 461 U.S. 171, 177 (1983) (stating that a prohibition on expression must be narrowly drawn to accomplish a compelling governmental interest); *Grayned v. City of Rockford*, 408 U.S. 104, 121 (1972) (upholding the validity of a law which prohibited demonstrations near schools during instructional time).

204. See *Clark*, 468 U.S. at 295. When governmental restrictions are not aimed at ideas or the free flow of information, the Court traditionally has balanced the severity of the restriction against the stato's asserted interest. See *Konigsberg v. State Bar of California*, 366 U.S. 36, 51 (1961); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

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

206. Id. at 800. This approach toward free speech analysis has produced critical commentary. See, for example, David S. Day, *The End of the Public Forum Doctrine*, 78 Iowa L. Rev. 143, 145, 202 (1992); Rebert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1715 (1987).

207. *Cornelius*, 473 U.S. at 800 (stating that "the extent to which the Government can control access [to a particular forum] depends on the nature of the relevant forum").

208. *Perry*, 460 U.S. at 45-46.

209. Id. at 45 (designating public fora as those "places which by long tradition or by government flat have been devoted to assembly and debate"). The Court has recognized the

Classic examples of such fora are public streets and parks.[210] The government's ability to enforce content-based restrictions in these areas is confined to situations in which the regulation serves a compelling government interest and the restriction is narrowly drawn to achieve that interest.[211] Content-neutral restrictions in traditional public fora will be upheld if they are narrowly tailored to serve a significant governmental interest and leave open alternative channels for communication.[212]

Designated public fora, though similar to traditional public fora, consist of government property which historically has not been open to public assembly or debate but which the government has opened for public use.[213] Examples of designated public fora include university facilities made available for student meetings,[214] municipal theaters,[215] and school board meetings opened for citizen input.[216] Although the government is not required to maintain designated public fora,[217] as long as it does so, it is bound by the same standards that govern the traditional public fora.[218]

Finally, nonpublic government property is that which by tradition or designation is not a forum designed for public communication.[219] In these nonpublic fora, government regulations need only be reasonable in light of the facility's intended purpose and not operate to restrict speech on the basis of its underlying content.[220]

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defining characteristic of the traditional public forum as property that has as a "principal purpose . . . the free exchange of ideas." *Cornelius*, 473 U.S. at 800.

210. *Cornelius*, 473 U.S. at 802. See also *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (confirming the notion that residential streets constitute public fora).

211. *Perry*, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). Failure to meet this stringent requirement results in the goverument being forced to grant access to the excluded party. *Carey*, 447 U.S. at 464-67. The Court in *Perry* also recognized that the government "may not prohibit all communicative activity" within the traditional public forum. *Perry*, 460 U.S. at 45.

212. See note 203 and accompanying text.

213. See *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992). The government must take some affirmative action to create a designated public forum. Id. at 2706. This is done only when the government intentionally opens "a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802.

214. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

215. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

216. *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976).

217. *Perry*, 460 U.S. at 46.

218. Id.

219. Id. Examples of nonpublic fora include prisons and city transit systems. See *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 134 (1977); *Adderley v. Florida*, 385 U.S. 39, 46 (1966); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974).

220. *Perry*, 460 U.S. at 46 (holding that restrictions on access to nonpublic fora will be upheld if they are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"). See also *Lehman*, 418 U.S. at 303. Generally, the

The Court has suggested that a fourth type of forum should be recognized, the limited public forum.[221] In these fora, a designated public facility is opened for use by a certain class of speakers or for assembly and debate on selected subjects.[222] Some have argued that in these situations, government property remains nonpublic as to all unspecified uses.[223]

Designating public schools as one type of forum or another obviously affects the degree of scrutiny that restrictions on speech must pass to be found constitutional.[224] Public school facilities become designated public fora when school officials open those facilities for indiscriminate use by the general public.[225] When school officials permit public access to school facilities for certain specified uses, however, the question becomes whether the uses are indiscriminate or merely characteristic of a limited public forum.[226] It appears that selective access to school facilities does not create a public forum in

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government restriction need not be the most or the only reasonable limitation available. See *Cornelius*, 473 U.S. at 808; *Weisman*, 112 S. Ct. at 2708; *United States v. Kokinda*, 497 U.S. 720, 730 (1990).

221. *Perry*, 460 U.S. at 46 n.7 (suggesting "[a] public forum may be created for a limited purpose such as use by certain groups, or for discussion of certain subjects") (citations omitted); *Travis v. Owego-Appalachian Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) (finding that a limited public forum "is created when government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects").

222. *Perry*, 460 U.S. at 46 n.7.

223. *Lamb's Chapel*, 959 F.2d at 386.

224. See text accompanying notes 205-08.

225. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (citation omitted).

226. There is authority for both of these conclusions. Federal courts of appeals have held that school facilities made available for social, civic, and recreational use by outside groups are designated public fora. See, for example, *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. #5*, 941 F.2d 45, 48 (1st Cir. 1991) (holding that the school district created a public forum and thus could not exclude religious organizations from using it); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1018 (4th Cir. 1973) (en banc) (stating that a school auditorium used regularly for the exercise of free speech was a public forum); *Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, 578 F.2d 1122, 1124 (5th Cir. 1978) (holding that past grants of permission to use a school facility made it a public forum). The Supreme Court has suggested, however, that when property is opened for use by a selective class or for speech on designated subjects, it is no longer a designated public forum, but rather a limited public forum. In *Perry*, for example, the Court held that a school's internal mail system was a nonpublic forum open for use to only a limited number of outside entities. The Court held that, absent evidence that all who sought access were granted permission to use the school property, "selective access does not transform government property into a public forum." *Perry Educ. Ass'n*, 460 U.S. at 47. Similarly, in *United States v. Kokinda*, the Court held that a sidewalk on federal property was a nonpublic forum even though some expressive activity had been permitted there. It held that "[t]he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse." 497 U.S. at 730 (quoting *Cornelius*, 473 U.S. at 802) (emphasis added in *Kokinda*).

which all interested entities have an unconditional right to utilize school property.[227]

Supreme Court cases that address the question of free speech in public schools often focus on the rights of *students* to express various social, religious, and political viewpoints. The Court has noted that student expression is subject to First Amendment protection even if it involves political or religious subjects.[228] In order to bolster the right of religious expression for students, Congress enacted the Equal Access Act ("the Act").[229] Generally, the Act makes it unlawful for public secondary schools to deny students access to school facilities because of the political or religious nature of their speech.[230] The Act does not, however, require public schools to allow nonstudent religious groups access to school property.

In *Lamb's Chapel*, both the district court and the Second Circuit held that the district's refusal to allow Lamb's Chapel access to school facilities did not constitute a violation of the Free Speech

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227. See text accompanying note 226. See also *Cornelius*, 473 U.S. at 805 (holding that a combined federal campaign is a nonpublic forum providing limited access to "those organizations considered appropriate"); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (finding that university facilities must be available to students only); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding that municipal facilities constituted a limited public forum because they were restricted to dramatic productions).

228. See, for example, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (finding the wearing of black armbands by students to protest Vietnam War is protected as expressive conduct because students do not "shed their constitutional rights to freedom of . . . expression at the schoolhouse gate"); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 689 (1986) (Brennan, J., concurring) (recognizing that "[t]he authority school officials have to regulate such speech by high school students is not limitless"). The Court has tempered this recognition with the understanding that student rights cannot be universally equated with the rights of adults. See *Hazelwood Sch. Dist.*, 484 U.S. at 266 (recognizing that although rights are not "shed" at the schoolhouse gate, students' rights are not automatically the same as the rights of adults in other settings). The fact that student speech may contain religious references, however, in no way curtails its First Amendment status. See, for example, *Widmar*, 454 U.S. at 269 (noting that college students' religious speech is protected); *Mergens v. Board of Educ. of Westside Community Sch.*, 867 F.2d 1076, 1079 (8th Cir. 1989) (holding that religious activity of public secondary school students is protected).

229. 20 U.S.C. § 4071(a) (1988).

230. The Act provides in part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Id. § 4071(a).

In order to fall within the mandato of the Act, secondary schools must: (1) be public and not private; (2) receive financial assistance from the government; and (3) maintain a limited open forum of noncurriculum related student groups. Id. § 4071 (a) & (b). Nowhere does the Act require all public schools to open their facilities te religious-oriented school groups. Only when the school has unilaterally opened its facilities for certain student groups is it required to do so.

Clause.[231] The Second Circuit, relying on the nature of the government property and the type of restriction imposed,[232] concluded that the total exclusion of religious groups from school property was within the range of permissible restrictions.[233] This finding, coupled with the Establishment Clause and Free Exercise reasoning of the lower courts, set the stage for the Supreme Court's holding.

IV. THE INSTANT DECISION

A. The Opinion of the Court

In a majority opinion authored by Justice White,[234] the Supreme Court reversed the district court and Second Circuit decisions.[235] The Court held that the district's refusal to allow Lamb's Chapel access to school property violated the Free Speech Clause of the First Amendment.[236] The Court noted that although the district could protect school property under its control[237] and was under no obligation to grant access to outside groups,[238] it could not deny access to Lamb's Chapel once it unilaterally had opened its facilities to a variety of other organizations.[239]

The Court rejected the Second Circuit's conclusion that the district's regulations were content-neutral since they were applied to

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231. *Lamb's Chapel*, 770 F. Supp. at 97-98; 959 F.2d at 387-89.

232. Because the Second Circuit found that religious groups had been excluded from school property in the past, it declined the plaintiffs' invitation to label the district's facilities designated public fora. Instead, the Second Circuit concluded that the school property was a limited public forum. The court held that, consistent with *Perry*, the school could therefore exclude entire groups from its property, provided that the exclusion did not rest upon the content of the message conveyed. The school property could thus remain nonpublic with respect to those activities specifically excluded by state regulations, namely, religious uses. The fact that the district had allowed other nonreligious groups access did not transform the limited nature of school facilities into a public forum. *Lamb's Chapel*, 959 F.2d at 387-88.

233. Id.

234. Justice White delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, and Souter joined.

235. *Lamb's Chapel*, 113 S. Ct. at 2149.

236. Id. at 2147-48.

237. Id. at 2146 (stating "[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated"). The Court has recognized that the government is under no obligation to allow all forms of speech on property that it owns and controls. See, for example, *International Society for Krishna Consciousness*, 112 S. Ct. at 2705; *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981); *Greer v. Spock*, 424 U.S. 828, 836 (1976).

238. *Lamb's Chapel*, 113 S. Ct. at 2146.

239. Id. The Court relied on the district court findings concerning what organizations had been granted access to school facilities. Id. at 2146 n.5.

restrict access to all religious organizations.[240] The Court framed the critical issue as whether the district restrictions were applied to prevent Lamb's Chapel from using school facilities because of the viewpoint of the speech involved, not whether all religious organizations similarly were denied access.[241] The Court went on to note that because the district regulations would have allowed presentation of the film involved in the instant case had it not dealt with the subject matter from a religious standpoint, Lamb's Chapel was denied access because of the film's underlying content.[242]

While acknowledging that religious involvement in public schools may create a compelling interest,[243] the Court summarily rejected the district's contention that granting access to Lamb's Chapel would amount to an establishment of religion.[244] First, the Court appeared to apply an endorsement test in finding no danger that the community would perceive state support of particular religious views by allowing Lamb's Chapel access to school facilities.[245] The Court went on, however, to apply the much maligned *Lemon* test.[246] It held that permitting Lamb's Chapel to use district property to exhibit the film involved in the instant case did not violate the *Lemon* standard.[247]

The Court found no merit in the district's position that since there was no guarantee that Lamb's Chapel's application would have been granted absent its religious affiliation, it should not reverse the

240. Id. at 2147.

241. According to the Court, the fact "[t]hat all religions and all uses for religious purposes are treated alike under [the district restriction], however, does not answer the critical question whether it discriminates on the basis of viewpoint. . . ." Id.

242. The Court noted that the general topic of child rearing and family values was not prohibited by the district restriction. Id. The only reason the film series was denied, according to the Court, was because it dealt with the subject matter from a religious standpoint. Id. Accordingly, the Court found the distict's restriction "plainly invalid." Id.

243. The Court stated: "[T]he interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment. . . ." Id. at 2148 (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

244. *Lamb's Chapel*, 113 S. Ct. at 2148 (stating "the posited fears [of the district] of an Establishment Clause violation are unfounded").

245. The Court concluded that since the film would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." Id.

246. Id. The Court unequivocally stated that the *Lemon* tost had "not been overruled." According to the Court, the instant case did not even present an occasion to rethink *Lemon* or its framework. Id. at 2148 n.7.

247. Id. at 2148.

lower courts.[248] The Court found this inquiry irrelevant given the content-based nature of the underlying restriction.[249] Moreover, since the district had chosen to allow a variety of organizations to use school property, there was no realistic concern that allowing access to Lamb's Chapel would promote sectarian interests over the interests of the citizenry in general.[250]

B. The Kennedy Concurrence

In a rather short concurring opinion, Justice Kennedy joined in the judgment of the Court.[251] Justice Kennedy based his holding on two different grounds. First, he agreed that the district restriction was an "overt, viewpoint-based discrimination" that violated the Free Speech Clause of the First Amendment.[252] Second, Justice Kennedy believed that there was no showing of an Establishment Clause violation that could warrant sustaining the exclusion of Lamb's Chapel in the instant case.[253]

Interestingly, Justice Kennedy blatantly criticized the majority's establishment reasoning. According to Justice Kennedy, the Court's use of the *Lemon* test was misplaced.[254] Similarly, Justice Kennedy voiced his disapproval of the Court's use of Justice O'Connor's endorsement language.[255] Justice Kennedy believed that this test was inconsistent with the previous decisions of the Court and served only to confuse the proper inquiry in the instant case.[256]

C. The Scalia Concurrence

Justice Scalia, while concurring in the result, wrote separately to note his ardent disapproval of the Court's Establishment Clause

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248. The Court found this inquiry to be "beside the point," focusing instead on the content-based nature of the underlying restriction. Id. at 2149.

249. Id.

250. The district attempted to justify its exclusion of Lamb's Chapel on the ground that it was necessary to promote the interests of the general public, rather than a specific group or religious organization. The Court, however, held that since a variety of other groups had utilized the facilities for social, civic, and educational purposes, allowing access to Lamb's Chapel would not hinder the interests of the public. Id. at 2148-49.

251. Id. at 2149 (Kennedy, J., concurring in part and concurring in the judgment).

252. Id.

253. Id.

254. Id. (reasoning that since there was no Establishment Clause concern, the "Court's citation of *Lemon v. Kurtzman* . . . is unsettling and unnecessary").

255. Id.

256. Id. Justice Kennedy believed that the endorsement test "cannot suffice as a rule of decision consistont with our precedents and our traditions in this part of our jurisprudence." Id.

analysis.[257] Justice Scalia, joined by Justice Thomas, initially noted his agreement with the Court's two main conclusions: (1) the district's refusal to allow Lamb's Chapel to show its films, while generally opening its facilities to the public, violated the Free Speech Clause; and (2) allowing Lamb's Chapel to use school facilities would not violate the Establishment Clause.[258]

Justice Scalia expressed disbelief over the Court's mention of the *Lemon* test.[259] He noted that no fewer than five of the current Justices had personally criticized *Lemon* over the years.[260] Justice Scalia then went on to attack *Lemon* directly. He suggested that the framework which it provided was really no test at all,[261] but merely a guideline, kept alive by the Court for selective application when it served the Court's interests.[262] According to Justice Scalia, the Court used *Lemon* to strike down practices with which it disapproved, or iguored it entirely in other situations.[263] Scalia then went on to note that he would not apply *Lemon* in the future, regardless of its effect.[264]

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257. Id. (Scalia, J., concurring in the judgment).

258. Id.

259. In an elaborate passage, Justice Scalia strongly criticized the majority for its reference to *Lemon*:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. It's most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman* ... conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it.

Id. at 2149-50.

260. Justice Scalia noted that "[o]ver the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's [the *Lemon* test's] heart...." Id. at 2150. See also note 11.

261. Justice Scalia referred to *Lemon* as the "supposed 'test'" which the Court ignored in application, yet failed to eliminate. *Lamb's Chapel*, 113 S. Ct. at 2150.

262. Justice Scalia expressed his disgust at the Court's selective application of *Lemon*. After noting that a majority of the justices personally had called for the demise of *Lemon*, Justice Scalia then explained why, despite this flood of criticism, the Court continued to apply its three-prong test. According to Justice Scalia, "[t]he secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return te the tomb at will." He continued, "such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him." Id.

263. In an accurate portrayal of Establishment Clause precedent, Justice Scalia noted that the Court selectively applies *Lemon* as a teol to achieve desired results in certain cases, and not as a colıesive and uniform test in all cases. Referring to the *Lemon* test, Justice Scalia noted: "When we wisli to strike down a practice it forbids, we invoke it; when we wisli to uphold a practice it forbids, we ignore it entirely. Sometimes we take a middle course, calling its three prongs 'no more than helpful signposts.'" Id. at 2150 (citations omitted).

264. Id.

Justice Scalia explained that he could not join the Court's decision, not only because it used *Lemon*, but also because it used the endorsement test.[265] He rejected the idea that the Constitution forbids endorsement of religion in general since the Free Exercise Clause grants religion a preferred status.[266] Justice Scalia reasoned that far from prohibiting accommodation of religion, the Constitution demands it,[267] a conclusion that, according to Justice Scalia, is supported by the Founders[268] and the Court.[269]

V. COMMENT AND ANALYSIS

Characteristic of the Supreme Court's fragmented Establishment Clause doctrine and preference for case-by-case adjudication, the central holding of *Lamb's Chapel*, though precise and uncontroversial, is rather limited in both scope and significance: The First Amendment generally prohibits viewpoint discrimination by the government.[270] Since the school district in the instant case would have allowed any social, civic, or recreational group to present its views on family issues, it was unconstitutional to prohibit a religious group from doing so.[271] In reality, however, *Lamb's Chapel* is unlikely to provide any precedential value beyond the unique facts involved in that case. The significance of *Lamb's Chapel* lies more in the unanswered questions and heightened confusion it produces. While applauded by different organizations on opposite ends of the church-

265. Id. at 2151.

266. Id. (observing "[w]hat a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment . . . forbids endorsement of religion in general") (emphasis in original).

267. Id.

268. Id. (concluding that to refuse religion a place in society was "not the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good"). Justice Scalia went on to note that when the First Amendment was drafted, Congress enacted the Northwest Territory Ordinance of 1789, which provides: "Religion, morality, and knowledge, *being necessary to good government and the happiness of mankind*, schools and the means of education shall forever be encouraged." Id. (citation omitted, emphasis added by Justice Scalia).

269. Justice Scalia noted several Supreme Court cases standing for the proposition that indifference to religion is neither what the First Amendment demands nor permits. In contrast, Scalia noted that in some instances, government action will advance religion in ways consistent with the Establishment Clause. Id.

270. The Court in *Lamb's Chapel*, though considering Establishment Clause implications, decided the case on free speech grounds. Id. at 2147-48.

271. *Lamb's Chapel*, 113 S. Ct. at 2147.

state debate,[272] the instant case raises some fundamental questions that are left unresolved.

Unfortunately, *Lamb's Chapel* failed to articulate a cohesive framework for the resolution of church-state interaction. The most disturbing aspect of the Court's opinion is its application of two entirely different models of Establishment Clause analysis. Although the endorsement test had never been accepted by a majority of the Justices,[273] the Court applied this framework in the instant case to invalidate a total ban on religious access to school facilities.[274] Application of the endorsement test alone would have failed to eliminate Establishment Clause confusion, but the Court also applied the much-maligned *Lemon* test.[275] As a result, *Lamb's Chapel* actually heightened the level of confusion and inconsistency surrounding the continuing Establishment Clause debate by applying two distinct and independent tests simultaneously. At best, the instant case forces everyone, including public school districts, to ascertain from a multitude of tests what actions violate the Establishment Clause.

Justice Scalia adds to this confusion in his dramatic concurrence by proposing what appears to be yet another alternative to *Lemon*. According to Justice Scalia, only government action that signifies state acceptance of a particular religious ideology violates the Establishment Clause.[276] Under this "religious embrace" test, schools presumably could endorse, support, or advocate religion in general, but could not support any particular religion or religious ideology.[277] Under this framework, school policies would not run afoul

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272. Pat Robertson's American Center for Law and Justice, a very conservative organization, was joined in the instant case by Americans United for Separation of Church and State and the American Civil Liberties Union, both of which filed briefs supporting Lamb's Chapel's right of free speech. David Schimmel, *Discrimination Against Religious Viewpoints Prohibited in Public Schools*, 85 Educ. L. Rptr. 387, 392 (1993).

273. *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

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

275. Id.

276. Id. at 2151 (Scalia, J., concurring in the judgment) (stating that "giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect").

277. This conclusion is supported by Justice Scalia's concurrence. Justice Scalia emphatically argues that the government may advance religion in general in order to follow precedent and tradition. Id. (citing several cases standing for the proposition that the Establishment Clause does not prevent indifference to religion, but rather requires advancement in certain situations). In the last sentence of the concurrence, moreover, Justice Scalia found that granting access to Lamb's Chapel would not violate the Establishment Clause because *"it does not signify state or local embrace of a particular religion sect."* Id. (emphasis added).

of the Establishment Clause even if their purpose or ultimate effect was to advance religion.[278] This approach, however, fails to follow the direct language and underlying spirit of the Establishment Clause because it permits government involvement in religious affairs to an extent inconsistent with judicial precedent.[279]

Due to the Court's failure in *Lamb's Chapel* to generate consistency in Establishment Clause analysis, the case fails to delineate a proper limit on religious access to school facilities. Although *Lamb's Chapel* stands for the proposition that religious groups are entitled to equal access to school facilities once school districts permit after-hours use of their property,[280] it does not indicate what religious activities would exceed permissible bounds. If, as the Court suggests, a school district must allow religious groups to present a religious perspective on a general and clearly secular topic, such as family values and child rearing, must it also allow these groups to use schools for admittedly religious purposes, such as peyote rituals, animal sacrifice, or Sunday Mass? According to the *Lamb's Chapel* analysis, excluding these practices on school property would be content-based and thus unconstitutional. Although it is difficult to imagine the Court upholding these activities, nothing in the instant case suggests that religious access does not include unqualified religious use.

By interpreting content-based restrictions in a broad fashion, the instant decision virtually eliminates the viability of limited public fora. The Court in *Lamb's Chapel* recognized that access to nonpublic fora can be based on subject matter and speaker identity so long as the distinctions drawn are viewpoint neutral.[281] When the govern-

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278. Id.

279. The Author does not agree that the Establishment Clause permits the government to "establish religion" provided all ideologies are advanced uniformity. Justice Scalia's concurrence, in accepting just such an analysis, effectively turns the Establishment Clause on its head by arguing that while it is improper to advance some religion, it is appropriate to advance all religion.

The Establishment Clause was intended to prevent government involvement in religion, regardless of whether the actions taken by the state fail to show preferential treatment to one sect or support for another. At a minimum, the Establishment Clause was enacted to prohibit "sponsorship, financial support, and active involvement of the sovereign in religious affairs." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). A policy supporting all religions, even with no "embrace of a particular sect," still contravenes this standard. As Justice Black noted, "a state policy of aiding 'all religions' necessarily requires a governmental decision as to what constitutes 'a religion.' Thus is created a governmental power to hinder certain religious beliefs by denying their character as such." *Zorach v. Clauson*, 343 U.S. 306, 318 n.4 (1952) (Black, J., dissenting).

280. *Lamb's Chapel*, 113 S. Ct. at 2147-48.

281. Id. at 2147 (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

ment denies access in order to suppress views espoused on an "otherwise includible subject," it violates this standard.[282]

In the instant case, the film series allegedly addressed family interaction.[283] The true subject matter of the film, however, was the role of Christianity within the family unit.[284] Contrary to the Court's finding that this subject was otherwise permissible under the district regulations, the district's policy expressly excluded religious subjects.[285] In effect, the Court, while paying lip service to the propriety of exclusions in limited public fora, held that restrictions on access can never be applied to exclude religious groups from school property because, by definition, these restrictions would be content-based.

The instant case, moreover, may have the unintended effect of stifling the exercise of free speech, rather than endorsing and encouraging it. By effectively eliminating schools' ability to open their facilities on a limited basis—for a selected class of speakers or for discussion of selected topics—*Lamb's Chapel* may actually foster a closed-door policy by public schools. Instead of creating high profile controversy every time a religious group or fringe political organization seeks access to school facilities, public school districts may decide to exclude all groups, regardless of political or religious affiliation. This result would be understandable in light of *Lamb's Chapel*, which effectively forces school districts to allow all speech on school property if they unilaterally have opened their doors to the community in general for apolitical gatherings. This all or nothing approach does not advance the First Amendment goal of free and uninhibited discussion; it hinders it.

The risk of a closed-door effect is heightened by the language of the instant case. The practical message sent by the Court is clear and straightforward: deny access to everyone. First, as the Court noted, public schools may preserve property under their control and need not

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282. *Lamb's Chapel*, 113 S. Ct. at 2147.

283. The Court's acceptance of the nonreligious subject of the film series is evident by the manner in which the Court framed the issue: "[W]hether [the District restriction] discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint." Id.

The Court effectively separated the basic subject of the film from the manner in which it was presented. This distinction led to the conclusion that Lamb's Chapel would have allowed any "social, civic, or recreational" group to show a film on the same subject. The Court rejected the position of the district that all groups addressing family values from a religious standpoint were similarly excluded. Id.

284. Id. at 2144.

285. Id.

permit the after-hours use of their facilities by any outside group.[286] Second, it is clear that if a school district permits some groups to use its property, it must grant the same access to all groups. When the Court holds that avoidance of an Establishment Clause violation may constitute a compelling interest,[287] yet fails to provide guidance on exactly what constitutes the violation,[288] it is unreasonable to expect public schools to determine what the Court itself has failed to determine: What constitutes an Establishment Clause violation?

VI. CONCLUSION

Lamb's Chapel not only failed to resolve the confusion surrounding the Establishment Clause, but increased it by adding to the number of alleged tests to be used in Establishment Clause analysis. Moreover, the instant case, though decided on free speech grounds, created the very real possibility that public school districts will close their doors to all outside entities, a result that can only decrease the exercise of First Amendment rights.

Given the unique nature of public schools, the scope and extent of religious involvement within these areas must be limited considerably. Unfortunately, the Court has eroded piecemeal the idea that church and state must remain distinct. Instead, the Court has allowed religion to make inroads into public schools to an extent inconsistent with the Establishment Clause.

The debate and controversy within the Court will continue unabated unless a single Establishment Clause standard is developed. Without this standard, school districts and other government entities are forced to predict the Court's future approach to church-state issues prior to enacting reasonable restrictions on religious access. This result does not assist the goal of freedom, but prevents its realization.

Any attempt to bring a level of consistency and predictability to the Supreme Court's Establishment Clause jurisprudence must begin with an understanding that at the present time, there simply is no single "test." While several competing constructs for the resolution of church-state interaction do exist, the members of the Court have yet to reach a consensus on an appropriate framework. The Court's continued reluctance to formally abrogate the *Lemon* test and replace

286. Id. at 2146.
287. Id. at 2148.
288. See notes 245-47.

it with one of several available alternatives renders an effective solution to this troubling situation improbable. A constant and ever-evolving middle ground, with passing references to *Lemon* and unpredictable applications of several different approaches, serves only to muddle the already confusing body of law surrounding the Religion Clauses.

John E. Burgess