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"The communists are in, the atheists are in, the agnostics are in, but religion's out because we don't like their viewpoint . . . ."[1]

This statement typifies government sentiment toward the religious perspective in the marketplace. The Supreme Court, however, has long recognized that religious speech is protected under the First Amendment.[2] Further, the Supreme Court has taught that the government carries a heavy burden to justify any content-based restrictions imposed upon protected expression.[3] In fact, the Supreme Court has held that content-based censorship will be, in all but the most exceptional circumstances, inevitably unconstitutional:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control. . . .
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[4]

Despite clear direction from the Court, religious speakers seeking access to government fora otherwise open for expressive activity have repeatedly been subjected to discriminatory treatment. Sadly, the perception of some government

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1. Oral Argument Transcript at 62, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024).

2. Widmar v. Vincent, 454 U.S. 263, 269 (1981) ("[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment.") (citing Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948)).

3. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

4. Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972) (citations omitted).

officials seems to be that religion and the religious perspective are unfit for public communication. The New York Attorney General, in his brief for *Lamb's Chapel v. Center Moriches Union Free School District*,[5] argued fervently that the suppression of private religious speakers advances the public good, stating, "[r]eligious advocacy . . . serves the community only in the eyes of its adherents and yields a benefit only to those who already believe."[6]

From the denial of equal access rights for Bible clubs[7] and the use of government facilities for religious purposes,[8] to the prohibition of distribution of free religious literature and the communication of religious ideas in general,[9] anti-religious bigotry has yet to cease.

On June 7, 1993, the United States Supreme Court issued its decision in *Lamb's Chapel v. Center Moriches Union Free School District.*[10] The Supreme Court unanimously determined that viewpoint-based speech restrictions, religious or otherwise, are unconstitutional even in a nonpublic forum.[11] In so doing, the *Lamb's Chapel* Court, without question, confirmed that government hostility toward religion and the religious perspective will not be tolerated. The Court's holding, one of the most significant in recent years,[12] has far-reaching implications.

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

6. Brief for Respondent Attorney General at 24, *Lamb's Chapel* (No. 91-2024). Justice Scalia expressed concern over the Attorney General's position in a brief discussion with Mr. Hoefling, Counsel for the Center Moriches School District, at oral argument:

> Question: Mr. Hoefling—
> Mr. Hoefling: Yes, Your Honor.
> Question: This—this may be a little unfair because it's really not your brief, but you—you are here representing both respondents, I—I gather, in this argument, and the Attorney General of New York, in his brief defending the—the New York rule says that—I'm quoting, "Religious advocacy serves the community only in the eyes of its adherents and yields a benefit only to those who already believe."
> Does New York State—I grew up in New York State and in those days they—they used to have a tax exemption for religious property. Is that still there?
> Mr. Hoefling: Yes, Your Honor, it still is.
> Question: But they've changed their view, apparently, that—
> Mr. Hoefling: Well, Your Honor—
> Question: You see—it used to be thought that—that religion—it didn't matter what religion, but it—some code of morality always went with it and it was thought that, you know, what was called a God-fearing person might be less likely to mug me and rape my sister. That apparently is not the view of New York anymore.
> Mr. Hoefling: Well, I'm not sure that that's—that—
> Question: Has this new regime worked very well?
> (Laughter.)

Oral Argument Transcript at 53-54, *Lamb's Chapel* (No. 91-2024).

7. Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

8. Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45 (1st Cir. 1991); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990); Concerned Women for Am., Inc. v. Lafayette County, 883 F.2d 32 (5th Cir. 1989); Shumway v. Albany County Sch. Dist., 826 F. Supp. 1320 (D. Wyo. 1993).

9. Friedmann v. Sheldon Community Sch. Dist., 995 F.2d 802 (8th Cir. 1993); Harris v. Joint Sch. Dist., 821 F. Supp. 638 (D. Idaho 1993); Nelson v. Moline Sch. Dist., 725 F. Supp. 965 (C.D. Ill. 1989); Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189 (D. Colo. 1989); Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379 (M.D. Pa. 1987).

10. 113 S. Ct. 2141 (1993).

11. *Id.*

12. *Lamb's Chapel* is the Court's first decision squarely addressing the issue of viewpoint-based discrimination.

This Article is divided into three parts. Part I explores the blatant hostility toward religion that has permeated government decisions regarding access to the supposed "free marketplace of ideas."[13] Part II examines the Supreme Court's recent landmark decision in *Lamb's Chapel v. Center Moriches Union Free School District*,[14] and the clear mandate of the Court against further disparate treatment of religious speakers and the religious perspective in the public square. Finally, Part III addresses the implications of the *Lamb's Chapel* opinion, both independently and in conjunction with other significant decisions.

I. THE HOSTILITY FACTOR

A. Denials of Equal Access and the Use of Government Facilities

As previously noted, government regulation of speech must be content-neutral.[15] If the government creates a forum for speech, it cannot selectively exclude speakers based solely upon the message they wish to communicate. The principle is simple and completely neutral with respect to all expression. Unfortunately, however, government entities have often been led astray by undifferentiated fear of the Establishment Clause.[16]

Properly understood, the Establishment Clause is a limitation on the power of government. It is not a restriction on the rights of individuals acting on their own behalf according to the dictates of their conscience. As the Supreme Court has stated, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[17]

An excessive preoccupation with avoiding any form of government "support" for religion has led many to focus improperly upon the location of speech rather than upon the identity of the speaker.[18] As a result, government entities often end up actively discriminating against religious speech by excluding it from otherwise open public fora. Private religious speech, however, is protected against viewpoint discrimination regardless of the nature of the forum. Further, any benefit that may enure to a religious speaker obtaining access to public property on an equal basis with other speakers is purely incidental and thus, does not violate the Establishment Clause.[19]

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13. *See* Pope v. Illinois, 481 U.S. 497, 519 (1987) (Stevens, J., dissenting); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 596 (1980) (Rehnquist, J., dissenting).

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

15. *See supra* notes 3-4 and accompanying text.

16. The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

17. Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

18. This fact was acknowledged and further discussed in Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 NW. U. L. REV. 1, 9-13 (1986) [hereinafter Laycock].

19. *See* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993) (does not violate the Establishment Clause to grant religious expression a benefit which is otherwise generally available).

As the Supreme Court has held, " '[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.' "[20]

Government entities have yet to grasp this reality, however, and have consistently exhibited animosity toward religious speakers. The Supreme Court first addressed this misguided government hostility more than a decade ago in *Widmar v. Vincent*.[21]

1. *Widmar v. Vincent*

The University of Missouri formally encouraged the formation of voluntary student organizations and freely opened its facilities for use by such groups.[22] In January, 1977, however, the University refused to grant Cornerstone, one of the more than one hundred registered student organizations on campus, access to a meeting room.[23] The University based the denial on the fact that Cornerstone's meetings included Bible teaching and an "atmosphere" of worship.[24] University regulations prohibited the use of University buildings or grounds for "religious teaching" or "religious worship" by both students and non-students.[25]

Cornerstone challenged the constitutionality of the regulation and the University's denial of equal access in federal district court.[26] The University defended on the basis that the regulation and the specific denial of equal access to

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20. *Mergens*, 496 U.S. at 248 (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). In fact, any regulation which is not facially neutral and which targets religious expression for special disabilities violates the Free Exercise Clause. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993).

21. 454 U.S. 263 (1981).

22. *Id.*

23. Chess v. Widmar, 480 F. Supp. 907, 909-10 (W.D. Mo. 1979).

24. *Id.*

25. The regulation provided, in relevant part: " 'No university buildings or grounds . . . may be used for purposes of religious worship or religious teaching by either student or non-student groups.' " Widmar v. Vincent, 454 U.S. 263, 265 n.3 (1981).

26. Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979).

Cornerstone were compelled by the strict "separation of church and state"[27] demanded by the Establishment Clause of the First Amendment and the Missouri Constitution.[28] Persuaded by the mesmerizing metaphor,[29] the district court held that any violation of Cornerstone's First Amendment rights was justified by the principles of separation required by the Establishment Clause and the Missouri Constitution.[30] The district court had no difficulty with the fact that its ruling effectively diminished religious expression to a form of second class speech, entitled to less protection than other speech.[31]

The Eighth Circuit Court of Appeals reversed in favor of Cornerstone, holding the content-based restriction on free speech unjustified by either the requirements of the Establishment Clause or the Missouri Constitution.[32] The United States Supreme Court affirmed.[33]

The Supreme Court held that religious discussion and worship "are forms of speech and association protected by the First Amendment."[34] The Court further held that the University of Missouri had created an "open" forum for students and faculty in its facilities.[35] Having done so, any restrictions on speech must necessarily be content-neutral.[36] Regarding the University's contention that the Establishment Clause compelled the disparate treatment of religious speech on the

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27. The metaphor coined by Thomas Jefferson in his famous letter to the Danbury Baptist Association has become almost synonymous with an absolute separationist interpretation of the Establishment Clause. *See* Richard H. Jones, *Accommodationist and Separationist Ideals in Supreme Court Establishment Clause Decisions*, 28 J. CHURCH & ST. 193, 193-200 (1986) (According to the separationist perspective, the Establishment Clause demands the creation of "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.") (citing Everson v. Board of Educ., 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting)). Unfortunately, Jefferson's metaphor is one of the few constants in the confused and incoherent doctrine of the Establishment Clause. *See* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."). The text of Jefferson's letter stated, in relevant part:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach action only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their 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 Members of the Danbury Baptist Association in Connecticut (Jan. 1, 1802), *reprinted in* SAUL K. PADOVER, THE COMPLETE JEFFERSON 518-19 (1943).

28. MO. CONST. art. I, §§ 6, 7; art. IX, § 8.

29. *See* Laycock, *supra* note 18, at 27 ("[T]he separation metaphor has been the basis of repeated efforts to censor religiously motivated speech.").

30. Chess v. Widmar, 480 F. Supp. 907, 918 (W.D. Mo. 1979).

31. *Id.*

32. Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980).

33. Widmar v. Vincent, 454 U.S. 263 (1981).

34. *Id.* at 269.

35. A government body creates an "open" forum for free speech when it opens government facilities to general use by the public or some segment of the public. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The University of Missouri policy authorized use of its facilities by more than one hundred registered student groups for "political, cultural, educational, social and recreational events." *Widmar*, 635 F.2d at 1312.

36. *See* Carey v. Brown, 447 U.S. 455 (1980); Healy v. James, 408 U.S. 169 (1972); Police Dep't v. Mosley, 408 U.S. 92 (1972).

campus, the Supreme Court stated, "[w]e agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases."[37]

Thus, two principles emerged from the Court's decision in *Widmar.* First, religious worship and discussion are protected under the Free Speech Clause of the First Amendment.[38] Second, the Establishment Clause does not conflict in any way with a policy of equal access under which the conducting of religious meetings is treated without reference to its content.[39]

2. The Companion Cases to *Lamb's Chapel*

The problems faced by the religious speakers in *Widmar* have not been an anomaly. In fact, three circuit courts have addressed the issue of religious speakers in public facilities.[40] As these three cases show, the hostility to the religious speaker in the public forum has been pervasive.

In *Concerned Women for America, Inc. v. Lafayette County*,[41] the Fifth Circuit Court of Appeals was faced with the denial of a request by the local Concerned Women for America [hereinafter CWA] Prayer Chapter for use of the Lafayette County and Oxford Public Library auditorium.[42] By regular practice, the auditorium was available on a first-come, first-served basis to anyone requesting its use, provided such use was not for a religious or political purpose.[43] Pursuant to this

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37. *Widmar*, 454 U.S. at 271. The Establishment Clause *requires* government neutrality and *forbids* government hostility toward religion. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (The Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (The principal effect of government action must not "inhibit" religion.). Thus, "equal access" is *required* by the Establishment Clause because "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990).

38. The Court specifically rejected the notion raised in Justice White's sole dissent that religious worship is somehow distinct from other religious speech, and, therefore, deserving of less protection under the Free Speech Clause of the First Amendment. *Widmar*, 454 U.S. at 269-70 n.6.

Justice White has since altered his view on this issue as evidenced by his majority opinion in *Lamb's Chapel* which, on free speech grounds, upheld the church's right to use school district facilities for an admittedly "religious purpose." *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2142-49 (1993).

39. The *Widmar* Court specifically reserved judgment on whether the principles of equal access apply with equal force to students in public secondary schools. *Widmar*, 454 U.S. at 275-76. But see the discussion of *Mergens* and the Equal Access Act, *infra* notes 88-106 and accompanying text.

40. *See* Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45 (1st Cir. 1991); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990); Concerned Women for Am., Inc. v. Lafayette County, 883 F.2d 32 (5th Cir. 1989).

41. 883 F.2d 32 (5th Cir. 1989).

42. *Id.* at 33.

43. *Id.* The library's written policy provided that the auditorium was:

> [O]pen for use of groups or organizations of a civic, cultural or educational character, but not for social gatherings, entertaining, dramatic productions, money-raising, or commercial purposes. It is also not available for meetings for social, political, partisan or religious purposes . . . .

Id.

practice, CWA's request was denied because it was determined that "CWA was a group with religious purposes."[44]

The Fifth Circuit, agreeing with the district court, held that the library had created a designated open forum and therefore could not discriminate against potential users based solely upon the content of their speech, regardless of whether such speech was religious.[45]

Similarly, in *Grace Bible Fellowship, Inc. v. Maine School Administrative District*,[46] the First Circuit Court of Appeals invalidated a school district's denial of a church's request to use school facilities for the purpose of giving a free Christmas community dinner.[47] The policy and practice of the school district, based on its view of the Establishment Clause, was to grant use of its facilities to any group, provided "they [did] not seek to propagate or propound a religious message."[48] Denial of the church's request was grounded upon the fact that "the dinner was to be accompanied by an evangelical message."[49] The court concluded that such an exclusion is an "elementary violation" of the freedom of speech, stating, "[p]rivate citizens can freely choose the recipients of their benefactions; the state has restrictions. One of these is the First Amendment."[50]

Finally, in *Gregoire v. Centennial School District*,[51] the Third Circuit Court of Appeals held that permitting a religious organization to rent public school facilities for a religious purpose does not violate the Establishment Clause.[52] Specifically, Student Venture, a Christian youth organization, sought permission to use the local high school auditorium[53] for a performance by magician Andre Kole.[54] The school's denial was predicated on the fact that the show was religious.[55] The school district argued that the denial was compelled by the Establishment Clause.[56]

Student Venture sought relief in federal district court, and the Eastern District of Pennsylvania ruled that Centennial had created a designated open forum by renting to a wide range of community groups and issued an injunction restraining

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44. *Id.* at 34. Typically, CWA meetings consisted of prayer and discussion on political and family issues from a Biblical perspective. *Id.* at 33-34.

45. *Id.* at 34-35. The court further noted that principles of equal access do not offend the Establishment Clause. *Id.* at 35.

46. 941 F.2d 45 (1st Cir. 1991).

47. *Id.*

48. *Id.* at 46.

49. *Id.*

50. *Id.* at 48.

51. 907 F.2d 1366 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990).

52. *Id.*

53. Centennial School District had rented its facilities to a wide variety of community groups. *Id.* at 1369. By written policy, however, the school district prohibited use of its facilities for "religious services, instruction, and/or religious activities." *Id.*

54. *Id.* The performance was to take place on a Saturday evening. *Id.* During intermission, Mr. Kole planned to offer "an account of his investigation of the miracles of Christ and how his discovery that Jesus Christ was who he claimed to be changed the course of [his] life." *Id.*

55. *Id.*

56. *Id.* at 1379.

the school district from discriminating against applicants based upon the content of their message.[57]

On cross-appeals to the Third Circuit, the court of appeals affirmed the district court's injunction, finding that the school district had created an open forum, thus requiring equal access, and that Student Venture's use of the auditorium would not violate the Establishment Clause.[58]

In each of these cases, the courts conducted a forum analysis and concluded that the government entity had created a designated open forum in its facilities for after-hours use.[59] In the absence of a compelling state interest,[60] government officials could not discriminate against potential users based solely upon the content of their speech, regardless of whether such speech was religious.[61] Further, the argument advanced by the government, which suggested that granting religious speech access to the forum would violate the Establishment Clause, was rejected in each instance.[62]

B. The Special "School Context"

Nowhere is blatant government hostility toward religion more clearly evidenced than in the public schools.

1. The School Prayer Cases

The Supreme Court has closely scrutinized activities in the public school context for compliance with the Establishment Clause, leaving most school officials on edge and extremely fearful of the dreaded "wall of separation between church and state."[63] Of particular significance are three cases often referred to as the

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57. *Id.* at 1369. Subsequently, Student Venture filed a Motion for Clarification, seeking to amend the injunction to enjoin the school district from prohibiting "religious worship" and to bar the school district from interfering with the peaceful distribution of religious literature. *Id.* at 1370. The district court denied the group's motion. *Id.*

58. *Id.* at 1369. The Third Circuit further concluded that "religious worship" and the distribution of religious literature are protected speech and remanded the case back to the district court with instruction to expand the injunction to enjoin the school district from prohibiting religious worship or the distribution of religious literature. *Id.* at 1383.

59. *See supra* notes 46-58 and accompanying text.

60. The most common interest offered by government officials is avoidance of an Establishment Clause transgression. Repeatedly, however, the interest has been ruled insufficient to justify discrimination against private religious speech. Board of Educ. v. Mergens, 496 U.S. 226, 247-53 (1990) (plurality), 260-62 (concurrence); Widmar v. Vincent, 454 U.S. 263, 270-76 (1981); Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45, 48 n.6 (1st Cir. 1991); *Gregoire*, 907 F.2d at 1382 n.14 ("While we have . . . applied strict scrutiny analysis to the facts before us, we are by no means convinced that the reasons advanced by [the school district] for excluding [the religious group] could withstand review even under a rational basis standard."); Concerned Women for Am., Inc. v. Lafayette County, 883 F.2d 32, 35 (5th Cir. 1989).

61. *Grace Bible Fellowship*, 941 F.2d at 47-48; *Gregoire*, 907 F.2d at 1378-82; *Concerned Women*, 883 F.2d at 34-35.

62. *See supra* notes 46-58 and accompanying text.

63. Everson v. Board of Educ., 330 U.S. 1 (1947).

Court's "School Prayer" decisions: *Engel v. Vitale*,[64] *School District of Abington v. Schempp*,[65] and *Stone v. Graham*.[66]

In *Engel v. Vitale*,[67] the Court addressed the constitutionality of a daily procedure, *mandated* by the State of New York, whereby each public school class was *required, at the direction of* school officials, to recite a *state-composed* prayer.[68] The Court held that the state regulation violated the Establishment Clause. Specifically, the Court stated that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[69]

Similarly, in *School District of Abington v. Schempp*,[70] the Supreme Court struck down, as violative of the Establishment Clause, state action *requiring* the reading of the Holy Bible and recitation of the Lord's Prayer at the beginning of each school day.[71] The *Schempp* Court found it of particular significance that these exercises were (1) conducted on school property with direct supervision and participation by government-employed teachers, and (2) "prescribed as part of the curricular activities of students who [were] required by law to attend school."[72]

Fear that religious discussion or discourse must be removed from the classroom is unfounded. In fact, the Court in *Schempp* emphasized:

> It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[73]

Finally, *Stone v. Graham*[74] involved a Kentucky state statute which *required* the posting of the Ten Commandments in every public school classroom.[75] The United States Supreme Court declared the statute unconstitutional as a violation of the Establishment Clause.[76]

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64. 370 U.S. 421 (1962).

65. 374 U.S. 203 (1963).

66. 449 U.S. 39 (1980).

67. 370 U.S. 421 (1962).

68. The prayer was as follows: " 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.' " *Id.* at 422. The prayer was recited at the beginning of each school day, immediately following the pledge of allegiance. *Id.* at 1271 (Douglas, J., concurring). A teacher led the prayer or selected a student to do so. *Id.* at 438.

69. *Id.* at 425.

70. 374 U.S. 203 (1963).

71. *Id.* at 223.

72. *Id.*

73. *Id.* at 225.

74. 449 U.S. 39 (1980).

75. The statute provided, in part:

> (1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available . . . , to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth.

Id. at 39-40 n.1 (citing KY. REV. STAT. ANN. § 158.178 (Baldwin 1980)).

76. The *Graham* Court, however, reiterated the fact that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* at 42.

As a result of these early cases, many school officials have reacted with hostility toward private expression of religious views in the public schools. The Supreme Court's "School Prayer" cases,[77] however, as noted above, have focused on active government control and involvement in religion and religious exercise in the schools.[78] Despite this fact, school officials have aggressively censored private student speech endorsing religion or religious perspectives. This is particularly surprising in light of the Supreme Court's clear pronouncement concerning students' rights in *Tinker v. Des Moines Independent Community School District.*[79]

2. Students Do Not Leave Their Rights at the Schoolhouse Gate

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court addressed the rights of students to express themselves in the public schools. The students in *Tinker* were suspended from school for wearing black armbands in a symbolic protest against the Vietnam War.[80] Expressing concern about the controversial nature of the students' message and fear of potential school disruption, officials argued that schools were an inappropriate place for the students' expressive activity.[81]

The Supreme Court sharply responded by stating "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[82] The Court emphasized that "[w]hen [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects."[83]

The *Tinker* Court held that school administrators may only prohibit protected student speech when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[84] As Justice Fortas noted:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as

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77. Stone v. Graham, 449 U.S. 39 (1980) (state-required posting of the Ten Commandments); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (school-mandated prayer and Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (school-directed prayer).

78. James M. Smart, Jr., Widmar v. Vincent *and the Purposes of the Establishment Clause*, 9 J.C. & U.L. 469, 471 nn.11-12 (1982-83) (and footnote) [hereinafter Smart]. "The [Supreme] Court has never found the Establishment Clause to be applicable in restricting the religious activities of private individuals regardless of whether such activities are conducted on public property." *Id.* at 473.

79. 393 U.S. 503 (1969).

80. *Id.* at 504.

81. *Id.* at 508-10.

82. *Id.* at 506.

83. *Id.* at 512-13.

84. *Id.* at 509. The Court specifically noted that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

> closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend."[85]

Thus, there can be no question that students possess broad free speech rights in the public schools.[86] Their right to express themselves, even on controversial matters, is guaranteed, provided such expression does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[87]

3. *Mergens* and the Equal Access Act

In 1984, Congress passed the Equal Access Act[88] to cure the pervasive anti-religious bigotry exhibited by public secondary schools in the aftermath of the Supreme Court's School Prayer cases.[89] The Act made it unlawful:

> [F]or any public secondary school which receives Federal financial assistance and which has a limited open forum[[90]] 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.[91]

Unfortunately, the Act was held hostage for almost six years, until the Supreme Court finally declared it constitutional in *Board of Education v. Mergens*.[92]

At issue in *Mergens* was whether student-initiated Bible Clubs are entitled to equal treatment and equal access in public secondary schools.[93] The Supreme Court upheld the constitutionality of the Equal Access Act and ruled, pursuant to the Act, that public secondary schools that receive federal funds and allow

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85. *Id.* at 511.

86. It is important to note that the Court's holding in *Tinker* did not depend on the forum status of the school. Whether or not a school campus constitutes a public forum for outsiders, it is clear that the students who are required to attend, and are lawfully attending school, have the protection of the First Amendment Free Speech guarantees. *See* Laycock, *supra* note 18, at 48.

87. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969).

88. 20 U.S.C. §§ 4071-74 (1988).

89. S. REP. No. 357, 98th Cong., 2d Sess. 10-11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2357.

> [School officials] have even prohibited students from praying together in a car in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying their personal Bibles on school property. Individual students have been forbidden to say a blessing over their lunch or recite the rosary silently on a school bus.

S. REP. No. 357, 98th Cong., 2d Sess. 11-12 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2357-58.

90. According to the Act, a "limited open forum" is defined as follows: "A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b) (1988).

91. 20 U.S.C. § 4071(a) (1988).

92. 496 U.S. 226 (1990).

93. *Id.* at 231.

non-curriculum related clubs[94] to meet on campus must allow student-initiated Bible Clubs to meet on campus during non-instructional time and grant them official recognition.[95] The Court further explained that "[o]fficial recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair."[96]

The *Mergens* Court responded forcefully to Establishment Clause arguments raised against the Act and in defense of exclusion of the Bible Club, stating, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[97] The Court went on to hold that a policy of equal access for religious speech conveys a message "of neutrality rather than endorsement; [in fact,] if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[98] The Court also emphasized that a policy of equal access "would in fact *avoid* entanglement with religion."[99]

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94. The *Mergens* Court held that noncurriculum related groups are those not "directly-related" to the school curriculum. *Id.* at 239-40. The Court went on to state that:

> In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements.

Id.

95. *Id.* at 239-40, 247.

96. *Id.* at 247.

97. Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990). The Court was unpersuaded by the government's argument that the school atmosphere provides a "ready-made audience for student evangelists." *Id.* at 249-50. In fact, the right to persuade, advocate, or evangelize a religious viewpoint implicates the very reason the First Amendment was adopted. As the Supreme Court held in Thomas v. Collins, 323 U.S. 516 (1945),

> [t]he protection [the Framers] sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts.

Id. at 537.

The nature of public schools does not justify the forfeiture of constitutional rights. Rather, the public nature of such schools enhances the constitutional rights of students. The school is the best place to teach students how the laws of the land apply.

98. *Mergens*, 496 U.S. at 248.

99. *Id.* (citation omitted) (emphasis added).

4. Problem Areas

With the combined force of the Supreme Court's pronouncements in *Tinker* and *Mergens*, it is difficult to imagine the source of any government justification for the disparate treatment of peaceful religious student expression. Unfortunately, school officials have persisted in their discriminatory conduct.

Under the guise of the Supreme Court's opinion in *Lee v. Weisman*,[100] for example, government officials and school administrators have issued mandates prohibiting *all* prayer at public school graduations.[101] As a result, valedictorians, salutatorians, and other designated student speakers have been forbidden to discuss their religious views or offer any religious sentiment in their graduation speeches.[102]

Even beyond the graduation context, voluntary student prayer has generated immense hostility from government administrators. For instance, police officials called to one school physically assaulted a student for voluntarily praying on the school campus with other like-minded students before the commencement of the official school day in recognition of the "See You at the Pole" National Day of Prayer.[103] Specifically, police officers, with the assistance of school officials, threatened students with tear gas if they did not cease praying on school property.[104] When students refused to surrender their cherished constitutional rights, officials physically wrenched students' hands from one another, took them into custody, and removed them from the school campus in a police car.[105]

Further, students have battled repeatedly with school officials to obtain recognition of their rights to distribute religious literature,[106] wear t-shirts with religious messages, and even to bring their Bibles to school.

II. *Lamb's Chapel* AND THE RELIGIOUS HOSTILITY FACTOR

Against this backdrop, Center Moriches Union Free School District proceeded to encroach upon the rights of Lamb's Chapel Church.

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100. 112 S. Ct. 2649 (1992) (holding that it violates the Establishment Clause for school officials to invite clergy to give prayers at commencement).

101. *See, e.g.*, Shumway v. Albany County Sch. Dist., 826 F. Supp. 1320 (D. Wyo. 1993) (discussing the letter opinion issued by the Wyoming Attorney General's Office).

102. *See* Friedmann v. Sheldon Community Sch. Dist., 995 F.2d 802 (8th Cir. 1993) (vacating preliminary injunction enjoining student prayers at commencement); Adler v. Duval County Sch. Bd., No. 93-833-Civ-J-10 (M.D. Fla. June 10, 1993) (denying preliminary injunction against student-initiated prayers at graduation ceremonies); Harris v. Joint Sch. Dist., 821 F. Supp. 638 (D. Idaho 1993) (post-*Lee* decision upholding the rights of students to initiate prayers at graduation).

103. "See You at the Pole" is a student-initiated, student-led national prayer event which takes place on school campuses across the nation one day each September, prior to the commencement of the official school day. Students gather with like-minded peers to pray for their friends, teachers, administrators, and the nation.

104. *See* Complaint at 10, Newberry v. Short, No. 92-4198JLF (S.D. Ill. Sept. 10, 1992).

105. *Id.* at 10-11.

106. *See, e.g.*, Nelson v. Moline Sch. Dist., 725 F. Supp. 965 (C.D. Ill. 1989); Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189 (D. Colo. 1989); Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379 (M.D. Pa. 1987).

A. Background of the Case

New York state law authorizes the use of public school facilities for, inter alia, "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" provided that "such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public."[107] Pursuant to that statute, Center Moriches Union Free School District [hereinafter Center Moriches] adopted official rules governing community use of school district facilities which permitted "social, civic, or recreational use" when "non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event."[108] Not surprisingly, however, Center Moriches' official rules expressly forbade use of school premises "by any group for religious purposes."[109]

Pastor John Steigerwald and Lamb's Chapel Church [collectively hereinafter Lamb's Chapel] applied on two separate occasions for permission to use school facilities for the showing of a film series about family issues, entitled, *Turn Your Heart Toward Home*.[110] In both instances, Center Moriches denied Lamb's Chapel's requested use because of the religious content of the film.[111]

By longstanding practice, Center Moriches had opened its facilities to a wide variety of uses.[112] In fact, the only applications for use of its facilities that Center Moriches had ever denied were those of Lamb's Chapel.[113] Further, Center Moriches had previously granted access to a number of organizations for the purpose of engaging in expression concerning precisely the same topics Lamb's Chapel would have addressed in the film, *Turn Your Heart Toward Home*.[114]

Whether based upon a misunderstanding of the Establishment Clause or a forbidden animosity toward religion,[115] it is difficult to imagine a more fundamental

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107. N.Y. EDUC. LAW § 414(1)(c) (McKinney 1988 & Supp. 1992).

108. Rules and Regulations for Community Use of School Facilities [hereinafter Rules & Regs.] #10, Appendix to Petition for Writ of Certiorari at 57a, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024). Center Moriches also permitted use by "political organizations." Rules & Regs. #8, Appendix to Petition for Writ of Certiorari at 57a, *Lamb's Chapel* (No. 91-2024).

109. Rules & Regs. #7, Appendix to Petition for Writ of Certiorari at 57a, *Lamb's Chapel* (No. 91-2024).

110. The film series was in six parts, hosted by Dr. James Dobson, "a licensed psychologist, former associate clinical professor of pediatrics at the University of Southern California, best-selling author, and radio commentator." *Lamb's Chapel*, 113 S. Ct. at 2144. The film series discussed "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." *Id.*

111. *Id.* at 2144-45. Specifically, the school district stated that "[t]his film does appear to be church related and therefore your request must be refused." *Id.* at 2145; *see also* Joint Appendix at 84, 92, *Lamb's Chapel* (No. 91-2024).

112. Only a partial listing of school uses from 1987 to 1990 revealed more than 955 uses of Center Moriches' facilities by no less than 80 different groups. Petitioners' Reply Brief at 3, *Lamb's Chapel* (No. 91-2024); *see also* Joint Appendix at 27-69, 100-09, 139-48, *Lamb's Chapel* (No. 91-2024).

113. Petitioners' Brief at 8, *Lamb's Chapel* (No. 91-2024).

114. Petitioners' Reply Brief at 4-5, *Lamb's Chapel* (No. 91-2024).

115. The Establishment Clause requires government neutrality and *forbids* government hostility toward religion. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (The Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (the principal effect of government action must not "inhibit" religion).

deprivation of guaranteed First Amendment liberties than that wrought by the policy and practice of Center Moriches. The deprivation could not have been more egregious had the school district opened its doors for discussion of the Civil War, but banned the African-American perspective.

Freely admitting the religious nature and purpose of its requested use, Lamb's Chapel challenged the denial of equal access to Center Moriches' facilities.[116] Lamb's Chapel brought suit in the United States District Court for the Eastern District of New York on February 9, 1990, seeking both injunctive and declaratory relief.[117]

Despite the fact that it had opened its facilities for use by the community for an exceptionally broad variety of uses, Center Moriches argued that it had not created an "open forum";[118] that the denial of Lamb's Chapel's request to use school facilities was compelled by both state law and school district policy; and that to permit Lamb's Chapel access to school facilities to show the film, *Turn Your Heart Toward Home*, would violate the Establishment Clause.[119]

The district court sided with Center Moriches and denied Lamb's Chapel's motion for declaratory and injunctive relief on May 16, 1990.[120] Specifically, the court determined that Center Moriches had not created an open forum.[121] Rather, the court held that "by enforcing restrictions on access imposed by state statute and by its regulations, the School District . . . created [a] limited public forum[]."[122] The court stated that, unlike an open forum, "limited public forum" access "can be restricted by reasonable and viewpoint-neutral regulations."[123] The court concluded, using circular reasoning, that Center Moriches had equally prohibited all

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116. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 736 F. Supp. 1247 (E.D.N.Y. 1990).

117. Specifically, Lamb's Chapel sought a preliminary injunction to compel Center Moriches to grant Lamb's Chapel's requested use of school facilities and restrain Center Moriches from further discriminating against applicants based on the religious content of their speech. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 384-85 (2d Cir. 1992). In addition, Lamb's Chapel sought declaratory relief confirming that Center Moriches had created an "open forum" in its facilities and had engaged in unconstitutional content-based discrimination against Lamb's Chapel and its religious speech. *Id.* Lamb's Chapel requested a further declaration that Center Moriches had violated Lamb's Chapel's federal constitutional rights of free speech, association, equal protection, and free exercise, and had violated the Establishment Clause. *Id. See also* Petition for Writ of Certiorari at 6-7, *Lamb's Chapel* (No. 91-2024).

118. The Supreme Court has identified "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). Traditional public fora include property, such as public streets and parks, traditionally open to assembly and debate. *Id.* Designated or "open" public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] . . . for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups, Widmar v. Vincent, 454 U.S. 263 (1981), municipal theaters made available for private dramatic productions, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), and school board meetings opened for citizen input, Madison Joint School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983), such as jailhouse grounds, Adderley v. Florida, 385 U.S. 39 (1966).

119. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 736 F. Supp. 1247, 1250 (E.D.N.Y. 1990).

120. *Id.* at 1248.

121. *Id.* at 1251.

122. *Id.*

123. *Id.* at 1252 (citations omitted).

organizations from using school facilities for religious purposes, and, thus, Center Moriches' denial of Lamb's Chapel's requested use was viewpoint-neutral and constitutionally justified.[124]

Lamb's Chapel appealed to the United States Court of Appeals for the Second Circuit,[125] which on March 18, 1992, affirmed the district court's grant of summary judgment.[126] The Second Circuit incorrectly held that public property may be divided into three types of fora: the "traditional public forum," the "purposefully opened forum," and the "non-public forum."[127] The court determined that "the school property in question falls within the subcategory of 'limited public forum,'[128] the classification that allows it to remain non-public except as to specified uses."[129] The court ruled that Center Moriches had, by state law and local rule, specifically excluded religious speech from the list of permitted uses.[130] Thus, Lamb's Chapel could gain access to school facilities only if Center Moriches had, by practice, opened its facilities to religious uses and purposes in the past.[131] Although it stated that "[w]hether Center Moriches has opened its facilities to religious uses and purposes presents a close question," the court concluded that none of the prior uses of Center Moriches' facilities were "religious in any meaningful way."[132] The court, therefore, found no basis for any of the claims presented by Lamb's Chapel.

Lamb's Chapel petitioned to the United States Supreme Court for certiorari.[133] The Supreme Court granted certiorari[134] and heard argument on February 24,

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124. *Id.* at 1253-54.

125. This was the second time Lamb's Chapel appealed to the Second Circuit. Lamb's Chapel had previously appealed the district court's denial of the preliminary injunction to the Second Circuit Court of Appeals. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91 (E.D.N.Y. 1991). The appeal was withdrawn, however, at the suggestion of Staff Counsel for the Second Circuit, and Lamb's Chapel returned to the district court to obtain a final disposition of the case and to afford the district court an opportunity to reconsider its decision in light of the Supreme Court's opinion in Board of Education v. Mergens, 496 U.S. 226 (1990). *Id.* at 92.

The district court distinguished the *Mergens* opinion and, relying substantially upon its prior findings, granted summary judgment in favor of Center Moriches on July 15, 1991. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91 (E.D.N.Y. 1991).

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

127. *Id.* at 385-86.

128. More specifically, the court defined a "limited public forum" as a subcategory of the "purposefully opened" or "designated" forum in which, according to the Second Circuit, "property remains a nonpublic forum as to all unspecified uses . . . , and exclusion of uses – even if based upon subject matter or the speaker's identity – need only be reasonable and viewpoint-neutral to pass constitutional muster." *Id.* at 387 (quoting Deeper Life Christian Fellowship v. Board of Educ., 852 F.2d 676, 679-80 (2d Cir. 1988)).

129. *Id.* at 386 (citing *Deeper Life*, 852 F.2d at 679 (where the Second Circuit adopted state court interpretation of N.Y. Educ. Law § 414 that use of New York school facilities is confined to nonreligious purposes)).

130. *Id.* at 383.

131. According to the Second Circuit, "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Id.* at 387 (quoting Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991)).

132. *Id.* at 387-88.

133. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 51 (1992).

134. *Id.*

1993.[135] A decision was issued in favor of Lamb's Chapel, reversing the Second Circuit, on June 7, 1993.[136]

B. The Supreme Court's Opinion

1. Justice White's Majority Opinion

The Court first examined Lamb's Chapel's argument that Center Moriches had created a designated open forum in its facilities, such that any subject matter or speaker exclusions were required to be justified by a compelling state interest and narrowly tailored to achieve that end.[137] The record demonstrated that Center Moriches' written policy regarding the use of its facilities authorized "social, civic, or recreational uses," as well as use by political organizations.[138] Further, Center Moriches permitted more than 955 uses of its facilities by more than eighty different groups in less than three years.[139] The Court, however, reserved judgment on this issue, because Center Moriches' denial of Lamb's Chapel's requested use was plagued by a much more fundamental error.[140]

The Court determined that Center Moriches' denial of Lamb's Chapel's requested use did not survive constitutional scrutiny even under the most lenient standard—reasonableness.[141] Among the multitude of groups to whom Center Moriches had granted access to its facilities were at least four who had engaged in expression concerning the exact same topic[142] Lamb's Chapel would have

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135. *Id.*

136. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

137. *Id.* at 2146. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

138. *Lamb's Chapel*, 113 S. Ct. at 2144. N.Y. Educ. Law § 414 authorized the use of public school facilities for, inter alia, "holding social, civic, and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." N.Y. EDUC. LAW § 414(1)(c) (McKinney 1988 & Supp. 1992). This is effectively the same range of activity provided by the policy that was found to establish a designated open forum in *Widmar*. *See* Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980) ("political, cultural, educational, social and recreational").

139. Petitioners' Reply Brief at 3, *Lamb's Chapel* (No. 91-2024). *See also* Joint Appendix at 27-69, 100-09, 139-48, *Lamb's Chapel* (No. 91-2024).

140. The Court did state that Lamb's Chapel's "[forum] argument has considerable force," suggesting quite strongly that a policy or practice similar in nature to that of Center Moriches would, without more, create a designated open forum for expressive activity. *Lamb's Chapel*, 113 S. Ct. at 2146-47. This argument is further bolstered by the fact that at least three circuits have determined that even narrower policies create a designated open forum and a right to equal access for religious speakers. Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45 (1st Cir. 1991) (youth groups, community civic and service organizations, government agencies, educational programs, athletic or recreational activities, and cultural events); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1372-73 (3d Cir.) ("civic, cultural and service organizations," "labor unions," for-profit "plays" and "musical performances," and adult education or college classes), *cert. denied*, 498 U.S. 899 (1990); Concerned Women for Am., Inc. v. Lafayette County, 883 F.2d 32, 33 (5th Cir. 1989) ("[o]pen for use of groups or organizations of a civic, cultural or educational character, but not for social gatherings, entertaining, dramatic productions, money-raising, or commercial purposes [or for] meetings for social, political, partisan or religious purposes.").

141. *Lamb's Chapel*, 113 S. Ct. at 2147. This level of scrutiny is typically employed when examining speech restrictions in a nonpublic forum and only requires that the restriction be viewpoint-neutral and reasonable in light of the purpose served. *See Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49.

142. The film, *Turn Your Heart Toward Home*, addresses family issues and child-rearing from a religious perspective. *Lamb's Chapel*, 113 S. Ct. at 2144-45.

addressed in the film, *Turn Your Heart Toward Home.*[143] The Court reasoned that Lamb's Chapel was denied its requested use solely because of the religious viewpoint of its message[144] and declared that "denial on that basis was plainly invalid."[145] Justice White firmly stated "[t]he principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' "[146]

Regarding Center Moriches' argument that the Establishment Clause compelled the denial of Lamb's Chapel's application for use of school facilities, the Court stated, "[w]e have no more trouble than did the *Widmar* Court in disposing of the claimed defense . . . ."[147] This is hardly surprising since the Supreme Court had already ruled definitively that the Establishment Clause presents no bar to a policy of equal access to public school facilities.[148] As previously noted, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[149]

2. Justice Kennedy's Concurrence

Justice Kennedy concurred in the judgment, but wrote separately to voice his continuing displeasure with the Court's Establishment Clause doctrine, including the majority's "unsettling and unnecessary" citation of *Lemon v. Kurtzman.*[150]

3. Justice Scalia's Concurrence[151]

Justice Scalia clarified one matter left open by the majority – the continuing viability of New York's overreaching Education Law section 414. Specifically, Justice Scalia argued that section 414 is effectively invalidated by the Court's decision "to the extent it compelled the District's denial" of Lamb's Chapel's requested

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143. Center Moriches had previously granted access to these groups on a number of different occasions for activities relating to "family issues": Family Counseling Service, a division of the Hampton Council of Churches; Center Moriches Parent Teacher Association, which used school facilities to discuss many topics relating to family issues; Helping Every Living Person, a non-profit organization dedicated to strengthening families; Special Education Parent Teacher Association, which used school facilities to discuss many topics relating to special education children and their families. Petitioners' Reply Brief at 4-5, *Lamb's Chapel* (No. 91-2024).

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

145. *Id.* The Court pointed to the fact that it had previously held that " 'the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.' " *Id.* at 2147 (quoting *Cornelius*, 473 U.S. at 806). *See also* City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

146. *Lamb's Chapel*, 113 S. Ct. at 2147-48 (quoting *Taxpayers for Vincent*, 466 U.S. at 804).

147. *Id.* at 2148. Despite Justice Scalia's colorful objection, Justice White invoked the *Lemon* test. *Id.* The majority, however, summarily concluded that permitting school property, used by a wide variety of private organizations, to be used after-hours for the exhibition of a film with a religious perspective would not violate the Establishment Clause under *Lemon. Id.*

148. Board of Educ. v. Mergens, 496 U.S. 226, 247-53 (1990) (plurality), 260-62 (concurrence); Widmar v. Vincent, 454 U.S. 263, 270-76 (1981).

149. *Mergens*, 496 U.S. at 250.

150. *Lamb's Chapel*, 113 S. Ct. at 2149 (Kennedy, J., concurring).

151. Justice Scalia concurred in the judgment and was joined by Justice Thomas. *Id.* (Scalia, J., concurring).

use.[152] His conclusion is only logical. If it were not so, then the Court's decision would have meant nothing. All facts the same, Center Moriches would simply be permitted to deny Lamb's Chapel's use again, claiming that section 414 compelled its action.

In dramatic fashion, Justice Scalia expressed his lack of respect for the Court's Establishment Clause doctrine and particularly the infamous *Lemon* test.[153] As with the ill-conceived "wall of separation" metaphor, Justice Scalia recognized that the *Lemon* test has spawned significant fear and hostility while offering little assistance in the complex maze of Establishment Clause jurisprudence.[154]

III. IMPLICATIONS

A. Equal Access Is Mandated Where the Government Has Created an Open Forum for Expressive Activity

Clearly, the principles of equal access are well-established after *Lamb's Chapel.* When a governmental body, by policy or practice, makes its facilities available for general use by the public, or a segment of the public, it may not selectively exclude users on the basis of the religious content of their speech or activities.[155]

The *Lamb's Chapel* Court declared that there was "considerable force" behind the argument that Center Moriches had created an open forum for expressive activity.[156] The Court withheld judgment on the issue, because the school district's egregious viewpoint discrimination was unconstitutional regardless of the nature of the forum.[157] It is quite clear, however, that any government entity with a policy or practice of facility use similar to that of Center Moriches will be found to have

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152. *Id.*

153. *Id.* The Supreme Court announced a three-part Establishment Clause test in Lemon v. Kurtzman, 403 U.S. 602 (1971), whereby challenged 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 entanglement with religion." *Id.* at 612-13.

154. Justice Scalia's remarks, though humorous, bear repeating for their truth:

> 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. . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.
>
> The 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 to the tomb at will. . . . When we wish to strike down a practice it forbids, we invoke it . . . when we wish 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,". . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel, 113 S. Ct. at 2149-50 (Scalia, J., concurring).

155. The fact that a request involves an expressly religious purpose, including worship, does not alter the government's duty not to discriminate in an open forum.

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

157. *Id.* at 2147.

created a designated open forum.[158] For instance, the *Widmar* Court found that the University of Missouri had created an open forum in its facilities for students by granting access to "political, cultural, educational, social and recreational" uses.[159] The *Widmar* policy covered effectively the same range of activity specified in Center Moriches' policy. Further, other courts have determined that even narrower policies create designated open fora and a right to equal access for religious speakers.[160]

1. *Lamb's Chapel's* Effect on the Use of Government Facilities by Religious Speakers

The ramifications of the Supreme Court's decision in *Lamb's Chapel* are significant. No longer can religious expression be censored in the public arena just because the government says so.

a. Privately Sponsored Displays with a Religious Message

Lamb's Chapel affirms the fact that privately sponsored displays in public parks and other fora opened for expressive activity are constitutional.[161] The fact that a particular display is religious will not justify government censorship.[162] Decisions like that of the Eleventh Circuit Court of Appeals, in *Chabad-Lubavitch of Georgia v. Miller*,[163] and the Seventh Circuit Court of Appeals, in *Doe v. Small*,[164] are in accord with the principles dictated by the Supreme Court in *Lamb's Chapel*.

The Eleventh Circuit Court of Appeals recently held, in *Chabad-Lubavitch of Georgia v. Miller* that

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158. By policy, Center Moriches made its facilities available for "social, civic, and recreational" uses. *Lamb's Chapel*, 113 S. Ct. at 2146. By practice, the only use the school district ever denied was that of Lamb's Chapel. Petitioners' Brief at 8, *Lamb's Chapel* (No. 91-2024).

159. Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980).

160. *See, e.g.*, Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45 (1st Cir. 1991) (youth groups, community civic and service organizations, government agencies, educational programs, athletic or recreational activities, and cultural events); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1372-73 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990) ("civic, cultural and service organizations," "labor unions," for-profit "plays" and "musical performances," and adult education or college classes); Concerned Women for Am., Inc. v. Lafayette County, 883 F.2d 32, 33 (5th Cir. 1989) ("open for use of groups or organizations of a civic, cultural or educational character, but not for social gatherings, entertaining, dramatic productions, money-raising, or commercial purposes [or for] meetings for social, political, partisan or religious purposes"). *See also* Shumway v. Albany County Sch. Dist., 826 F. Supp. 1320 (D. Wyo. 1993) (holding that local school district could not deny access to its facilities to a group sponsoring a private baccalaureate service) (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993)).

161. *See generally* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

162. *See* Chabad-Lubavitch of Ga. v. Miller, No. 92-8008, 1993 WL 409604 (11th Cir. Oct. 18, 1993) (citing *Lamb's Chapel* for the proposition that there is no violation of the Establishment Clause when the government grants a private organization permission to erect a religious display in a designated open forum located inside the State Capitol Building); *see also* Kreisner v. City of San Diego, 988 F.2d 883 (9th Cir. 1993) (There is no constitutional violation where a city permits a "private, overtly religious holiday display" in a public park.); Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) (erection of privately-funded religious holiday display in a traditional public forum does not violate the Establishment Clause); Doe v. Small, 964 F.2d 611 (7th Cir. 1992) (erection of private religious display in a public park does not violate the Establishment Clause).

163. No. 92-8008, 1993 WL 409604 (11th Cir. Oct. 18, 1993).

164. 964 F.2d 611 (7th Cir. 1992).

> [p]art of the majesty of the public forum is that it insulates the government from the necessity of scrutinizing the content of the citizenry's speech. Through a broad policy of content-neutral inclusion, the public forum is uniquely situated to avoid the need for the State to make religion-based exclusionary judgments and therefore risk unconstitutional entanglement with religion.[165]

At issue in *Chabad*, was the constitutionality of a private organization's request to erect a Chanukah menorah[166] display in the Georgia Capitol Rotunda.[167] Noting that "Georgia has opened the Rotunda to Georgia's citizenry for their expressive activities both secular and religious in nature,"[168] the court of appeals held that "[i]n a true public forum, such as the Rotunda, the Establishment Clause cannot be used as a justification for content-based restrictions on religious speech."[169] The *Chabad* court, citing *Lamb's Chapel*, correctly recognized that

> [b]y permitting religious speech in a public forum—whether in the heart of a core government building, in the Georgia Governor's mansion, or in the outer reaches of some state-owned pasture—the state simply does not endorse, but rather acts in a strictly neutral manner toward, private speech.[170]

Thus, "[a]ny perceived endorsement of religion in a true public forum is simply misperception . . . ."[171] It is not the responsibility of the private speaker, however, to dispel any such misperception, if in fact it exists. Rather, "[i]f the state is concerned that those who hear or view the private religious speech may not appreciate the strictly private nature of the speech, the state has the burden of informing the public that speech in a public forum does not enjoy state endorsement."[172]

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165. *Chabad*, 1993 WL 409604, at *5.

166. The Chanukah menorah is "a nine-pronged candelabrum, the principle symbol of [a] Jewish holiday." *Chabad*, 1993 WL 409604, at *12 n.1.

167. "The Rotunda is an open space under the dome in the center of the Capitol Building." *Id.* at *2.

Chabad had requested permission from the State to erect the menorah in the Rotunda for the duration of the Chanukah season. *Id.* Georgia officials refused to grant Chabad's request, and the group sought relief from the Federal District Court for the Northern District of Georgia. Chabad-Lubavitch of Ga. v. Harris, 752 F. Supp. 1063 (N.D. Ga. 1990). The district court concluded that the State's Establishment Clause concerns justified its denial of Chabad's request. *Id.* Chabad appealed, and the Eleventh Circuit Court of Appeals affirmed. Chabad-Lubavitch of Ga. v. Miller, 976 F.2d 1386 (11th Cir. 1992). A petition for rehearing en banc, however, was granted. Chabad-Lubavitch of Ga. v. Miller, 988 F.2d 1563 (11th Cir. 1993).

168. *Chabad*, 1993 WL 409604, at *2.

169. *Id.* at *10.

170. *Id.* at *8. Other circuits have similarly acknowledged this basic principle. *See* Kreisner v. City of San Diego, 988 F.2d 883, 895 (9th Cir. 1993) ("The public forum doctrine would be rendered meaningless if only places in the middle of nowhere could be free speech areas, and if all speech that occurred near 'structural symbols of government' had to be viewed as governmental speech."); Doe v. Small, 964 F.2d 611, 630 (7th Cir. 1992) ("That a public forum may be close to city hall cannot matter; any forum open to secular speech must be open to religious speech.").

171. *Chabad*, 1993 WL 409604, at *9.

172. *Id.* The *Chabad* Court expressed caution, however, stating:

> We have grave doubts whether, under circumstances like those in this case, a state may post signs in front of only some displays, or beside only certain speakers. Such a practice might permit the state to treat speech differently within the public forum based on the content of the speech. Disclaiming endorsement of only certain speech may suggest approval of non-disclaimed speech, all contrary to the nature of a public forum.

Id. at *12 n.18.

In *Doe v. Small*,[173] the Seventh Circuit Court of Appeals addressed the constitutionality of a private display of sixteen canvases depicting scenes from the life of Christ erected in a public park in Ottawa, Illinois.[174] Noting, as did the *Chabad* court, that the Supreme Court has held that the Establishment Clause is not a sufficiently compelling government interest to justify content-based restriction even in a designated open forum, the *Doe* court held that "[government] *may not exclude private persons from* [a public park] *merely because of the religious content of their speech.*"[175] The *Doe* court went on to state that

> [b]ecause the First Amendment mandates that the government permit religious speech in quintessential public forums, the mere presence of religious symbols in such a forum cannot violate the Constitution.[176]

The Seventh Circuit correctly concluded that:

> [the government] *must treat all who wish to engage in expressive activities within the confines of the law in* [public parks] *(and other public forums) equally*[, regardless of the viewpoint or perspective of the message communicated].[177]

b. Privately Sponsored Baccalaureate Services

Students, community groups, and churches are entitled to sponsor events, such as baccalaureate services. If school facilities are available to the community for use, these groups must be allowed to use school facilities also, regardless of the religious nature of their activities.

In *Shumway v. Albany County School District*,[178] the United States District Court for the District of Wyoming recently issued a preliminary injunction enjoining the denial of equal access to school facilities for a private baccalaureate service.[179] Citing *Lamb's Chapel*, the *Shumway* court held that when the school district "changed its existing policy [of open access to the community] to exclude use of school facilities by groups with a religious purpose, the [school district] engaged in unconstitutional conduct and abridged the baccalaureate group's first amendment rights in a manner not permitted by the law."[180]

The United States District Court for the Middle District of Alabama also granted a preliminary injunction, in *Verbena United Methodist Church v. Chilton*

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173. 964 F.2d 611 (7th Cir. 1992).

174. *Id.* at 612-13. Following an initial challenge of the religious display, the United States District Court for the Northern District of Illinois issued an injunction enjoining the city from permitting anyone to display the religious paintings in the public park. Doe v. Small, 726 F. Supp. 713 (N.D. Ill. 1989). The court of appeals affirmed. Doe v. Small, 934 F.2d 743 (7th Cir. 1991). A petition for rehearing en banc, however, was granted. Doe v. Small, 947 F.2d 256 (7th Cir. 1991).

175. *Doe*, 964 F.2d at 619.

176. *Id.* at 620-21. The *Doe* court recognized the "crucial difference" between *government* speech endorsing religion and *private* speech endorsing religion. Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

177. *Doe*, 964 F.2d at 621.

178. Shumway v. Albany County Sch. Dist., 826 F. Supp. 1320 (D. Wyo. 1993).

179. *Id.*

180. *Id.* at 1327.

County Board of Education,[181] compelling a local school board to rent its high school gymnasium to a private group for the purpose of holding a baccalaureate service.[182]

B. Viewpoint Discrimination Is Unconstitutional Even in a Nonpublic Forum

The *Lamb's Chapel* Court has made one thing very clear: Under no circumstance will the type of wholesale anti-religious bigotry perpetrated by the Center Moriches School District be tolerated. The religious perspective on any issue is valuable to society and worthy of the full protections of the First Amendment.[183] Whether it is a leaflet expressing a religious view on abortion, a valedictorian communicating the significance of God in his high school career, or a child singing a religious rap song in the school talent show, no justification exists for religious viewpoint-based discrimination even in a nonpublic forum.

1. *Lamb's Chapel's* Effect on Student-Initiated Commencement Prayers

With respect to student commencement speeches, school administrators have failed to understand that the Supreme Court, in *Lee v. Weisman*,[184] held *only* that it violates the Establishment Clause for *school officials* – arms of the government – to *invite clergy* to give prayers at commencement. Justice Kennedy, writing for the *Lee* majority, made it very clear that the Court's decision was limited to the particular facts before the Court.[185] Further, the *Lee* majority recognized that "at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students."[186]

Indeed, following *Lee*, at least one federal appellate court ruled that "a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies."[187] In *Jones v. Clear Creek Independent School District*, the Fifth Circuit Court of Appeals upheld the

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181. 765 F. Supp. 704 (M.D. Ala. 1991).

182. *Id. See also* Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991) (school district does not violate the Establishment Clause when it rents its facilities to a group for a privately sponsored baccalaureate service).

183. Contrary to the argument made by the New York Attorney General in *Lamb's Chapel*: "The First Amendment assumes that the opportunity to discuss religious matters, and to be exposed to religious practices, benefits each member of the community, just as the privilege of free speech benefits each one, even those having nothing to say." Smart, *supra* note 78, at 478.

184. 112 S. Ct. 2649 (1992).

185. *Id.* at 2655.

186. *Id.* at 2661.

187. Jones v. Clear Creek Indep. Sch. Dist. (Jones II), 977 F.2d 963, 972 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). Prior to the *Lee* decision, the Fifth Circuit ruled that the school board resolution permitting prayer was constitutional. Jones v. Clear Creek Indep. Sch. Dist. (Jones I), 930 F.2d 416 (5th Cir. 1991). A petition for certiorari was taken. *Jones II*, 977 F.2d at 965. Following the decision in *Lee*, the Supreme Court remanded the case back to the Fifth Circuit for reconsideration in light of *Lee*. Jones v. Clear Creek Indep. Sch. Dist., 112 S. Ct. 3020 (1992). The Fifth Circuit, after reviewing *Lee*, determined that the school board resolution remained constitutional. *Jones II*, 977 F.2d at 965. On June 7, 1993, the Supreme Court denied certiorari, allowing the Fifth Circuit's decision to stand in *Jones II*. Jones v. Clear Creek Indep. Sch. Dist., 113 S. Ct. 2950 (1993).

constitutionality of a school board resolution *permitting* students to include a student-led invocation in their graduation ceremony if the majority of the class so votes.[188] The *Jones* Court recognized, as the Supreme Court has held, that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[189]

In *Harris v. Joint School District*,[190] the United States District Court for the District of Idaho also upheld the rights of students to initiate prayers at graduation ceremonies, emphasizing the fact that

> the Supreme Court is willing to tolerate some prayer at graduation ceremonies. The Supreme Court has had two recent opportunities to ban all prayer at graduation ceremonies, but has declined to do so. First, in *Lee*, rather than emphasizing the need for fact sensitivity, the Court could have stated that *any* prayer at public high school graduation ceremonies violates the Constitution under *any* circumstances. But it did not do so. Or, the Court could have required that *separate* baccalaureate services be held in place of including invocations and/or benedictions in official graduation ceremonies. But it did not choose to do so. And, secondly, in *Jones II*, rather than vacating the judgment and remanding that case to the Fifth Circuit Court of Appeals, the Court could have directly addressed the appropriateness of senior students choosing whether or not to have prayer at their public high school graduations. But it did not choose to do so.[191]

Students, without question, retain the right to initiate protected speech of their choosing.[192] As the *Tinker* Court held, school officials may not prohibit protected student expression unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[193] Where students have been granted freedom to compose their own speeches, or even their own commencement exercises, protected student expression should not be subjected to censorship because of its content or viewpoint. In fact, as *Lamb's Chapel* and *Widmar* attest, it is a fundamental proposition of constitutional law that a government body may not suppress or exclude the speech of private parties for the sole reason that the speech contains a religious perspective.

Arguments suggesting that commencement exercises are not public fora are irrelevant. First, as previously noted, the Court's holding in *Tinker* did not depend

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188. *Jones II*, 977 F.2d at 972.

189. *Id.* at 969 (quoting Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990)). School officials must learn to distinguish between refusing to *direct* prayer or *invite* clergy to give prayer at graduation, and choosing to *prohibit* individual student expression based on its content.

190. 821 F. Supp. 638 (D. Idaho 1993).

191. *Id.* at 643 (citation omitted). It is important to note that the Supreme Court rejected yet another opportunity to declare any prayer at graduation unconstitutional when it recently denied certiorari in *Jones II*. Jones v. Clear Creek Indep. Sch. Dist., 113 S. Ct. 2950 (1993).

192. Government actors must learn that the Court meant what it said in *Mergens*: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250.

193. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969).

on the forum status of the school.[194] Rather, the Court declared that a student retains his free speech rights "[w]hen he is in the cafeteria, or on the playing field, or on the campus during the authorized hours."[195] Second, the Supreme Court's decision in *Lamb's Chapel* stands for the proposition that government may not prohibit any expressive activity, regardless of the nature of the forum, based solely upon the viewpoint of the message communicated.

2. *Lamb's Chapel's* Effect on Student-Initiated Prayer and Evangelism

The same principles apply when students choose to engage in voluntary student-initiated, student-led prayer on school property; wear t-shirts with religious messages; bring Bibles or other religious texts to school; or distribute religious literature on campus.[196] School officials cannot interfere unless the expressive activity materially or substantially disrupts school discipline.[197]

C. Religious Worship is Religious Speech

Any attempt to limit the scope of the Court's decision in *Lamb's Chapel* by distinguishing religious speech from religious worship is unavailing. The Supreme Court has specifically held that both "religious discussion" and "religious worship" are protected speech under the First Amendment.[198]

The sole dissent in *Widmar* was authored by Justice White,[199] who argued that religious speech and religious worship are two separate and distinct types of expression, one protected by the Free Speech Clause and the other protected by the Free Exercise Clause.[200] Thus, he contended that government should be free to exclude "religious worship," unprotected by the Free Speech Clause, from an otherwise open forum.[201]

The *Widmar* majority, holding that "religious worship" and "religious teaching" are protected speech, correctly responded that such a distinction is devoid of any

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194. Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189, 1193 (D. Colo. 1989) ("The holding in *Tinker* did not depend upon a finding that the school was a public forum.").

195. *Tinker*, 393 U.S. at 512-13.

196. The Supreme Court's consistent jurisprudence, for over fifty years, recognizes the free distribution of literature as a form of protected expression. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Lovell v. City of Griffin, 303 U.S. 444 (1938).

Several courts have specifically held that student distribution of religious literature on public school campuses is protected speech under the First and Fourteenth Amendments. *See* Nelson v. Moline Sch. Dist., 725 F. Supp. 965 (C.D. Ill. 1989); Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189 (D. Colo. 1989); Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379 (M.D. Pa. 1987).

197. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Connick v. Myers, 461 U.S. 138 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); New Rider v. Board of Educ., 414 U.S. 1097 (1973); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

198. Widmar v. Vincent, 454 U.S. 263, 269 (1981).

199. It should be noted that Justice White also authored the majority opinion in *Lamb's Chapel*. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2144 (1993). Justice White determined that the denial of Lamb's Chapel's requested use was unconstitutional on free speech grounds, despite the fact that Lamb's Chapel freely admitted that its request was for a "religious purpose." *Id.* at 2144.

200. *See generally Widmar*, 454 U.S. at 282-89.

201. *Id.* at 284.

"intelligible content."[202] "Worship" is an elusive concept to define. As one commentator has stated, "[a] sermon, a hymn, a scripture reading, or even a prayer, will sometimes be worship and sometimes not, depending partly on close analysis of its content, partly on the speaker's mental state, and partly on his theology."[203] Further, assuming arguendo, that a definition could be found, government should not be in the business of defining what is and what is not "worship." Certainly, the government is not equipped to enter such a theological mine field. Any attempt to do so would require close and intimate scrutiny of each requested activity to determine whether it was overly religious and qualified for the government-derived definition of worship. Obviously, such a process would generate extensive entanglement problems.[204] In addition, religious speakers who sought use and were denied based on the supposed distinction would have a claim under the Equal Protection Clause because of the unequal treatment among religious users.

1. Courts Have Not Sanctioned the Denial of Equal Access on the Ground That the Requested Use Is for Religious Services

As previously discussed, *Widmar* upheld the use of university facilities for "religious worship."[205] Further, *Mergens* and *Lamb's Chapel* both involved the use of government facilities for admittedly "religious purposes."[206] Thus, where a government entity has opened its facilities for use by the public, the fact that a requested use is for religious services or a religious purpose is not a valid justification for denial.[207]

D. The Establishment Clause Is Not a Proper Justification for Denial of Equal Access and Certainly Not for Any Form of Viewpoint Discrimination

Despite the persistent attempts of government actors to justify their discriminatory conduct by reference to the Establishment Clause, it is clear that such arguments are misplaced. The Establishment Clause was never intended to be used as a sword to justify the repression of religion.[208]

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202. *Widmar*, 454 U.S. at 269-70 n.6.

203. Laycock, *supra* note 18, at 56.

204. The Third Circuit in *Gregoire* also rejected the distinction between religious discussion and worship, stating that "[a]ttempting to draw a line between religious discussion and worship would only exacerbate establishment clause concerns, requiring [the school district] to entangle itself in what would almost certainly be complex content-determinations." Gregoire v. Centennial Sch. Dist., 707 F.2d 1366, 1382 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990).

205. *See supra* notes 22-39 and accompanying text.

206. *See also* Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45 (1st Cir. 1991); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990); Concerned Women for Am., Inc. v. Lafayette County, 883 F.2d 32 (5th Cir. 1989).

207. *See, e.g.*, Wallace v. Washoe County Sch. Dist., 818 F. Supp. 1346 (D. Nev. 1991) (school district required to rent district facilities to church for Sunday worship services where district had opened its facilities to a wide variety of uses).

208. *See* McDaniel v. Paty, 435 U.S. 618, 641-42 (1978) (Brennan, J., concurring) (invalidating state statute prohibiting ministers from serving as legislators).

The Establishment Clause presents no bar to a policy of equal access to government facilities.[209] In fact, the Establishment Clause *requires* government neutrality and *forbids* government hostility toward religion.[210] Only a policy of equal access avoids hostility and preserves neutrality toward religion.[211] Thus, the Establishment Clause actually *mandates* equal access to open fora for religious speakers.

Viewpoint-based speech restrictions are even more egregious than content-based discrimination.[212] As such, the Establishment Clause, which is an insufficient justification for denying equal access to religious speakers, could never justify the type of anti-religious bigotry exhibited by Center Moriches.

IV. CONCLUSION

There is no question whether the Constitution demands that government grant access to every type of government property for all of those wishing to engage in expressive activity. It does not.[213] What it does require, however, is that government refrain from content-based discrimination where it has by tradition or designation opened a forum for free speech. Further, as the *Lamb's Chapel* Court emphasized, regardless of the nature of the forum, viewpoint-based restrictions on speech, religious or otherwise, will not be tolerated. With the Supreme Court's decision in *Lamb's Chapel*, religious apartheid has ended.

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209. As the Supreme Court stated in *Mergens*, and as this Article has repeatedly emphasized, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

210. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (The Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (The principal effect of government action must not "inhibit" religion.).

211. "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248.

212. Content-based restrictions may be constitutional where the government can demonstrate a sufficiently compelling state interest, and the restriction is narrowly tailored to serve the particular interest. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). No provision is made, however, for the justification of viewpoint-based discrimination.

213. *Cornelius*, 473 U.S. at 799-800.