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Tolling the Final Bell: Will Public School Doors Remain Open to the First Amendment

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TOLLING THE FINAL BELL: WILL PUBLIC SCHOOL DOORS REMAIN OPEN TO THE FIRST AMENDMENT?

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"It's all in the name, '*Lamb's Chapel*.' It sounds like a Supreme Court case."[1] That was the response of a lawyer friend when I asked in preparation for writing this article: "Why did the Court take this case? What is the importance of this decision?"[2] Of course my friend was being facetious, but after reviewing the Court's decision and examining the case's relative importance, I'm beginning to believe that there may be some truth to that remark.[3]

The Court itself speaks on the subject: "Because the holding below was questionable under our decisions, we granted the petition for certiorari . . . ."[4] While there is certainly some truth to that statement, it does not seem to answer the question of why this particular case was chosen when so few petitions for certiorari are granted.[5] There is no broad rule of law which emerges from *Lamb's Chapel v. Center Moriches Union Free School District*,[6] nor is there any significant pronouncement on or clarification of the Court's public forum doctrine.[7]

Thus, the question remains: What is the importance of the Supreme Court's *Lamb's Chapel* decision? Is it simply that the Court disagreed with a lower court ruling and sought to rectify a perceived injustice? This Article will attempt to provide an answer. The answer will begin with an examination of the Supreme Court's free speech "forum analysis" doctrine,[8] as that was the approach utilized by the Court in resolving the issue in *Lamb's Chapel*.[9] Next, this Article will

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1. Interview with Richard E. Geller, Esq. (Aug. 7, 1993).

2. *Id.*

3. As with my friend before me, I do not mean to seriously suggest that the United States Supreme Court is deciding what cases to hear based on the future short citation form of that case. I simply mean to convey that I am a bit puzzled by the Court's grant of certiorari in this case.

4. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2145 (1993). Four *Lamb's Chapel* decisions will be cited in this Article. The two district court opinions will be referred to as *Lamb's Chapel I* and *Lamb's Chapel II* and are reported at 736 F. Supp. 1247 (E.D.N.Y. 1990) and 770 F. Supp. 91 (E.D.N.Y. 1991), respectively. The Second Circuit Court of Appeals' decision is reported at 959 F.2d 381 (2d Cir. 1992).

5. The Supreme Court breaks down cases according to whether the petitioners have retained paid counsel or are in forma pauperis. For the 1991 and 1992 terms, the Court granted only 209 of the 12,561 petitions for certiorari that were submitted. UNITED STATES SUPREME COURT CLERK'S OFFICE, STATISTICAL SHEET No. 25 (October Term 1992 (June 24, 1993, corrected)). Thus, the total number of petitions for certiorari granted equalled less than 2% of those submitted.

6. 113 S. Ct. 2141 (1993).

7. See *infra* notes 13-43 and accompanying text for a discussion of the Supreme Court's "public forum doctrine."

8. *See infra* notes 13-43 and accompanying text.

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

review the background of the *Lamb's Chapel* litigation[10] and will continue with an examination of the court opinions from the district court through the Supreme Court.[11] Finally, this Article will attempt to discern the importance of the *Lamb's Chapel* decision and will endeavor to predict the impact this decision may have on like cases in the future.[12]

I. PUBLIC FORA AND THE SUPREME COURT

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."[13] This right to free speech, while a preferred and protected liberty,[14] is not

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10. *See infra* notes 44-67 and accompanying text.

11. See *infra* notes 68-80 and accompanying text for a discussion of the district court opinions. See *infra* notes 81-89 and accompanying text for a discussion of the Second Circuit's decision. See *infra* notes 90-107 and accompanying text for a discussion of the Supreme Court opinions.

12. *See infra* notes 108-48 and accompanying text.

13. U.S. CONST. amend. I. The full text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

The First Amendment's protections and guarantees of personal freedom against intrusion by the United States Government are among those liberties secured by the Fourteenth Amendment against state intrusion or abridgment. Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (citations omitted).

14. *See* Greer v. Spock, 424 U.S. 828, 843 (1976) (Powell, J., concurring) ("[O]ur decisions properly emphasize that any significant restriction of First Amendment freedoms carries a heavy burden of justification."); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, [and] freedom of religion are in a preferred position."). *See generally* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2716-17 (1992) ("At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); Robert B. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1184 n.7 (1959) (wherein Professor McKay notes that this notion of First Amendment rights holding a preferred position stems from Justice Stone's footnote in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), stating that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

absolute.[15] It must be balanced, at times, against countervailing interests that seek or demand to limit that freedom.[16] When these rights and interests conflict, the courts are called upon to determine when the First Amendment right to free speech must yield.[17]

One such conflict which the Supreme Court has wrestled with for some time now is the difficult question[18] of how best to resolve the inevitable clash between the constitutional guarantees of free speech, free expression, free assembly, and the government's interest in maintaining the integrity of property within its control.[19] One method has taken hold as the predominant test for resolving this conflict; aptly named, it is the Supreme Court's "public forum doctrine." First described in detail in the case of *Perry Education Ass'n v. Perry Local Educators'*

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15. Cohen v. California, 403 U.S. 15, 19 (1971) ("First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses."). *See also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799 (1985) ("Even protected speech is not equally permissible in all places and at all times."); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) ("First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.").

The classic formulation of this limitation was Justice Holmes' statement in Schenck v. United States, 249 U.S. 47, 52 (1919):

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Id.

This, however, is only one of the situations in which the freedom of speech or expression may be limited. Another situation, quite obviously, and the subject of this article, is the Government's right to limit expression on publicly owned property. *See, e.g., Cornelius*, 473 U.S. at 799-800 ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."); *Greer*, 424 U.S. at 836 (Government, " 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' " (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).

16. Jennifer A. Giamo & Stacy P. Maza, Comment, International Society for Krishna Consciousness, Inc. v. Lee: *Public Forum Analysis of Airport Restrictions on Speech*, 6 ST. JOHNS J. LEGAL COMMENT. 333, 334 n.5 (1991) ("The United States Supreme Court has not espoused an absolutist view of the first amendment, but has engaged in a balancing of interests to determine whether there has been an infringement upon free speech.") (citations omitted).

17. *See Cornelius*, 473 U.S. at 816 (Blackmun, J., dissenting) ("At the same time, however, expressive activity on government property may interfere with other important activities for which the property is used. Accordingly, in answering the question whether a person has a right to engage in expressive activity on government property, the Court has recognized that the person's right to speak and the interests that such speech serves for society as a whole must be balanced against the 'other interests inhering in the uses to which the public property is normally put.' ") (quoting *Adderley*, 385 U.S. at 54 (Douglas, J., dissenting)).

18. *See Cornelius*, 473 U.S. at 815 (Blackmun, J., dissenting) ("The public forum doctrine arose out of the Court's efforts to address the recurring and troublesome issue of when the First Amendment gives an individual or group the right to engage in expressive activity on government property.").

19. For example, and particularly relevant for our purposes here, the Court's statement in *Cornelius* that it "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius*, 473 U.S. at 800. This formulation of the public forum doctrine has been quoted often by the Court. *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 726 (1990).

Ass'n[20] in 1983, this analytical tool classifies government owned property according to what type of expressive activity, if any, has been permitted there and establishes a corresponding standard that measures the constitutionality of a government regulation restricting free expression.[21]

Commentators and litigants alike have expressed a growing concern that the "public forum" approach is not the liberating force it was initially thought to be. Rather, they believe it has become a muzzle, choking and muting speech that it was designed to protect.[22]

Although there has certainly been some confusion regarding the use of this doctrine, the Supreme Court has consistently utilized this approach in resolving the conflicts between free speech and government control of its property.[23] One such case in which it did so was *Lamb's Chapel*.[24] Thus, my analysis of the *Lamb's Chapel* decision must begin with an examination of the "public forum doctrine."

For purposes of adjudging what speech is permissible on government property, the Supreme Court has traditionally divided government property into three

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20. 460 U.S. 37 (1983). *See generally Kokinda*, 497 U.S. at 726 (Justice O'Connor states in a plurality opinion that in *Perry*, "the Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property.").

21. *Perry*, 460 U.S. at 45-46. The first significant use of some of the terms that today comprise the "public forum doctrine" appeared in the case of Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939), wherein the Court stated the oft-quoted dicta that has become a cornerstone of the public forum doctrine:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515. Since the *Hague* case, the term public forum has appeared numerous times in Supreme Court decisions beginning with International Ass'n of Machinists v. Street, 367 U.S. 740, 796 (1961) (Black, J., dissenting), and again in Griffin v. California, 380 U.S. 609, 617 (1965) (Stewart, J., dissenting). However, it was not until the *Perry* case in 1983 that the doctrine took hold as the preferred analytical tool for resolving questions of what speech is permissible on government owned property. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

See generally Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984) [hereinafter Farber & Nowak]; Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisana, 1965 SUP. CT. REV. 1 (1965) (wherein Professor Kalven presents the first in-depth review of the public forum concept after the Supreme Court's decision in Cox v. Louisiana, 379 U.S. 536 (1965)).

22. *See, e.g.*, *Kokinda*, 497 U.S. at 741 (Brennan, J., dissenting) ("I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand."); Brief Amicus Curiae of the American Civil Liberties Union, Americans United for Separation of Church and State, New York Civil Liberties Union, People for the American Way, and Union of American Hebrew Congregations, in Support of Petitioners at 18-19, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024) (The ACLU argues that because "the conceptual framework of *Perry* suffers from a central inconsistency," the public forum doctrine should be abandoned in favor of a reasonableness test.); Farber & Nowak, *supra* note 21, at 1224 ("Our objection to public forum analysis is not that it invariably yields wrong results (although it sometimes does), but that it distracts attention from the first amendment values at stake in a given case."); Michael A. Scherago, Note, *Closing The Door on the Public Forum*, 26 LOY. L.A. L. REV. 241, 263 (1992) [hereinafter Scherago] ("The public forum doctrine should be abandoned in its entirety.").

23. The Court has addressed this question three times in the past three years and has utilized the public forum doctrine in each of those cases. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993); International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992); *Kokinda*, 497 U.S. 720 (1990). See also *infra* notes 25-43 and accompanying text for a further discussion of the use of the "public forum doctrine."

24. 113 S. Ct. 2141 (1993).

classifications: the traditional public forum, the designated public forum, and the nonpublic forum.[25]

Traditional public fora are those "places which by long tradition or by government fiat have been devoted to assembly and debate . . . ."[26] In these traditional public fora, such as streets and parks, the government's ability to regulate speech is most restricted, with the standard being one of strict scrutiny.[27] This standard requires the government to prove that there is a compelling state interest underlying an exclusionary regulation and that the regulation is narrowly drawn to further that interest.[28] If the government fails to meet this arduous standard, the regulation must fall, and the excluded party must be granted access.[29]

The second classification of public property, similar in nature to the traditional public forum, is the designated public forum which can be of either a limited or unlimited nature.[30] Property in this second classification is that "property that the

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25. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-46 (1983) (The Court noted that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue," and then condensed and reviewed the tripartite system of classifying government property that had developed over the years.). *See generally* Farber & Nowak, *supra* note 21, at 1220-21 (discussing the "three kinds of forums in which communication takes place").

26. *Perry*, 460 U.S. at 45. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 480 (1988) ("[W]e have repeatedly referred to public streets as the archetype of a traditional public forum."); Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public."); Wolin v. Port of N.Y. Auth., 392 F.2d 83, 90 (2d Cir. 1968) (holding that "the [bus] [t]erminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. Like a covered marketplace area, the congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum."), *cert. denied*, 393 U.S. 940 (1968) (footnote omitted).

27. *Hague*, 307 U.S. at 515-16.

28. *Perry*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 385 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993). In these traditional public fora the government is also permitted to enforce time, place, and manner restrictions provided they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45.

29. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981). In *Widmar*, the Supreme Court found that the University of Missouri at Kansas City had created a designated open forum by granting access to their facilities to over one hundred officially recognized student organizations. *Id.* at 274. As such, the Court applied the strict scrutiny test, as it would have to any regulation restricting speech in a traditional public forum, to a university regulation excluding a student Bible club. *Id.* at 277. Due to the University's inability to demonstrate a compelling state interest in excluding the Bible Club, the Court held that the regulation was unconstitutional and the club must be granted access to the school facilities on the same grounds as all other student organizations. *Id.*

30. *Perry*, 460 U.S. at 45-46. *See also* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2705 (1992) ("The second category of public property is the designated public forum, whether of a limited or unlimited character.").

There has been a considerable amount of confusion regarding this second classification due to certain commentators labeling these types of fora "limited public fora." *See, e.g.*, Brett W. Berg, Note, *Diminishing the Freedom to Speak on Public Property:* International Society for Krishna Consciousness, Inc. v. Lee, 26 CREIGHTON L. REV. 1265, 1281 (1993) ("Places which have been opened intentionally for the purpose of facilitating public speaking and expression were labeled as limited public forums." (footnote omitted)).

This article argues that regardless of the label one uses, the standard to be applied to an exclusionary regulation differs depending on the nature of the speaker and/or the subject the speaker seeks to discuss. *See infra* notes 108-48 and accompanying text.

state has opened for expressive activity by part or all of the public."[31] Traditionally, property falling within this second classification was subject to the same strict scrutiny applicable to public fora: once the property is opened for expressive activity, a government regulation restricting speech on that type of property must be narrowly tailored to further a compelling state interest.[32] This still holds true for the category of unlimited designated public forum which includes government property which has been opened for indiscriminate expressive activity by the public.[33] Finally, it is important to note that the government is under no obligation to open a forum to any expressive activity nor is it required to "indefinitely retain the open character of the facility."[34]

However, it seems that there might now be a split in the designated public forum category according to whether the government has opened its property to all or some of the public.[35] The "limited public forum" is a subcategory of the designated public forum, a classification that permits the property in question to remain nonpublic "except as to specified uses."[36] Thus, if the government has permitted a certain subject to be discussed on its property or has granted access to a select class of speakers, then the exclusion of any future use similar to those previously permitted must be judged by the stringent compelling interest standard.[37] Conversely, the prohibition of speech or the exclusion of speakers dissimilar to those

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31. *Lee*, 112 S. Ct. at 2705. *See also* Cornelius v. NAACP Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.").

The Supreme Court has determined that government facilities, such as public universities, Widmar v. Vincent, 454 U.S. 263 (1981); public school board meetings, City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976); and municipal theaters, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), are designated public fora.

However, the Court has also stated that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802.

32. *Perry*, 460 U.S. at 45-46 ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." (citations omitted)). See *supra* notes 26-29 and accompanying text for a discussion of the strict scrutiny standard.

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

34. *Perry*, 460 U.S. at 46. *See also Cornelius*, 473 U.S. at 802.

35. See *infra* notes 37-38 and accompanying text for a discussion of the distinction between property opened for indiscriminate use by the public and property opened for use by selected speakers or for discussion of selected subjects.

36. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 386 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

37. *Id.*

traditionally granted access is reviewed under the standard governing the third and most restrictive category, the nonpublic forum.[38]

This third category of fora consists of "[p]ublic property which is not by tradition or designation a forum for public communication."[39] In these nonpublic fora, the government need only demonstrate that its regulation restricting speech is reasonable and viewpoint-neutral.[40]

Theoretically, all government owned property falls within the three classifications reviewed above, and any regulation restricting speech is judged by one of the two aforementioned standards.[41] Yet reasonable minds will differ on even the most basic question: In which category does a particular piece of state property belong,

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38. United States v. Kokinda, 497 U.S. 720, 730 (1990). Regardless of the nomenclature one uses, the distinction here lies in whether the person applying for use of a certain forum is a member of the class of speakers for whom the forum has been opened or if the person wishes to discuss a topic that has previously been aired in that forum. The Second Circuit, as it had previously in *Lamb's Chapel*, discussed this distinction:

> Places opened specifically for the use of certain speakers or for the discussion of certain subjects are referred to as "limited" or "designated" fora. As to these fora, "the first amendment protections provided to traditional public forums [sic] only apply to entities of a character similar to those the government admits to the forum."

Lamb's Chapel, 959 F.2d at 386 (citations omitted) (quoting Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986)). *See also*, Longo v. United States Postal Serv., 953 F.2d 790 (2d Cir.), *cert. granted and judgment vacated*, 113 S. Ct. 31 (1992); Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991).

The plaintiffs in *Lamb's Chapel* argued that this limited public forum distinction that the Second Circuit used to uphold Center Moriches' regulation excluding the church from school district property was an unconstitutional distortion of the Supreme Court's public forum doctrine. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2146 (1993). However, the Supreme Court itself has stated on numerous occasions that different standards could be applied to speakers seeking access to the same public facilities. In United States v. Kokinda, 497 U.S. 720 (1990), the Court stated:

> We have held that "[t]he government does not create a public forum by . . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, under *Perry*, regulation of the reserved non-public uses would still require application of the reasonableness test.

Id. at 730 (other citations omitted) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)). In fact, the Court alluded to this distinction as far back as *Perry* by stating that "selective access does not transform government property into a public forum." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983).

39. *Perry*, 460 U.S. at 46. Very often, government facilities falling within this category are those properties "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license." International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2705 (1992). The Court has further held on numerous occasions that " ' " '[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' " ' " *Perry*, 460 U.S. at 46 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129-30 (1981) (quoting Greer v. Spock, 424 U.S. 828, 836 (1976) (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)))).

40. *Perry*, 460 U.S. at 46. In this regard, the Court has noted time and again that

> the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Id. (citations omitted) (quoting *Greenburgh*, 453 U.S. at 129) (citations omitted). *See also Cornelius*, 473 U.S. at 808 (The Court notes that "[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.").

41. *See generally* Scherago, *supra* note 22, at 243 ("By 1983, public forum analysis identified three categories into which all public property could be placed: the traditional public forum, the designated public forum, and the nonpublic forum." (citations omitted)).

and, thus, by which corresponding standard is it to be judged?[42] The difficulty in answering this question has resulted in an explosion of public forum litigation and commentary in the nine years since *Perry*.[43] The only constant through the years has been disagreement over whether this approach helps or hinders the proper resolution of these conflicts. An examination of the *Lamb's Chapel* case will demonstrate the difficulty courts have had in categorizing government property and determining the proper standard to apply.

II. *Lamb's Chapel* LITIGATION

A. Statement of Facts

Section 414 of the New York Education Law vests control and supervision of public school property in the trustees or board of education of the district in which the property is located.[44] Section 414 enumerates the proper uses of public school property and permits the trustees or board of education to promulgate regulations,

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42. This disagreement is best illustrated by the numerous dissenting opinions in Supreme Court cases addressing the question of what type of public forum is at issue. *See, e.g.*, United States v. Kokinda, 497 U.S. 720 (1990) (A majority of Justices found the sidewalk adjacent to a United States Post Office to be a nonpublic forum while Justices Brennan, Marshall, and Stevens, in dissent, argued that a public sidewalk was indeed a public forum, regardless of its proximity to a United States postal facility. *Id.* at 722-37 (majority); *Id.* at 740-63 (dissenting)); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (A plurality of Justices ruled that advertising space on city owned vehicles was a nonpublic forum, while the dissenting tandem of Justices Brennan, Stewart, Marshall, and Powell believed that the government had created a designated public forum "[b]y accepting commercial and public service advertisements." *Id.* at 319; *Id.* at 299-308 (plurality); *Id.* at 308-22 (dissent)). *See also* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Greer v. Spock, 424 U.S. 828 (1976).

43. In the first in-depth analysis of the "public forum doctrine" following the Supreme Court's decision in *Perry*, Professors Farber and Nowak noted that in the fifty-nine years between 1925 and 1984 the "phrase 'public forum' has appeared in only thirty-two Supreme Court decisions." Farber & Nowak, *supra* note 21, at 1221. The authors based that assertion on LEXIS and WESTLAW searches of Supreme Court opinions since 1925. *Id.* at 1221 n.15. In a similar search conducted during the writing of this article and limited to the nine years since the *Perry* decision, a total of twenty-eight Supreme Court cases use the phrase "public forum." While that may not seem at first glance to constitute "an explosion of public forum litigation," a similar search of federal court cases yielded an additional 636 decisions mentioning the public forum. Thus, while the Supreme Court has continuously attempted to clarify the public forum analytical procedure, the lower federal courts have been inundated with cases seeking a declaration of what government restriction of speech is permissible.

A second indication of the controversy surrounding the public forum doctrine is the vast amount of legal commentary that has been written in the nine years since *Perry*. A search of the *Index To Legal Periodicals* revealed that a separate heading has recently been created for the "Public forum doctrine," inasmuch as the subject was becoming too extensive for the "Freedom of speech" heading. A total of twenty-five articles have been written on the topic in just the past two years. *See* INDEX TO LEGAL PERIODICALS, SUBJECT AND AUTHOR INDEX 202, (Stephen Rosen ed., Oct. 1992–Aug. 1993); INDEX TO LEGAL PERIODICALS, SUBJECT AND AUTHOR INDEX 618, (Stephen Rosen ed., Oct. 1991–Sept. 1992).

44. N.Y. EDUC. LAW § 414(1) (McKinney 1988 & Supp. 1993) ("Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district.").

consistent with that section, to govern the use of property within its control.[45] The ten purposes set forth in this section have been held by both state and federal courts to encompass the entire realm of permissible uses of school property.[46] Conspicuously absent from these ten enumerated uses is the use of public school property for religious purposes.[47]

Pursuant to the enabling provision of section 414 of the New York Education Law,[48] the Center Moriches Union Free School District promulgated a set of regulations governing the use of property within its possession and control.[49] The Center Moriches "Rules & Regulations for Community Use of School Property" [hereinafter "Rules & Regulations"] permits use of its property for social, civic, and recreational purposes provided that such use is "non-exclusive and open to all residents of the school district."[50] The Rules & Regulations further provide that "[t]he school premises shall not be used by any group for religious purposes."[51] Consistent with the State Education Law and the local Rules & Regulations, Center Moriches opened the doors to its public school property and permitted a

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45. *Id.* New York Education Law provides that the trustees or board of education may permit school district property to be used, when the property is not being used for school purposes, for these ten distinct purposes:

1. "education, learning or the arts,"
2. "public library purposes,"
3. "for holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public,"
4. "for meetings and entertainment where admission is charged and the proceeds applied to an educational or charitable purpose, but not for the benefit of a religious sect or denomination,"
5. "for polling places for primaries and elections or for political meetings and registration of voters,"
6. "civic forums and community centers,"
7. "for classes of instruction for mentally retarded minors,"
8. "for recreation, physical training and athletics,"
9. "for child care services during non-school hours," and
10. "for graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed."

Id. § 414(1)(a)-(j). Section 414 further provides that:

> The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided.

Id. § 414(1).

46. *See* Trietley v. Board of Educ., 409 N.Y.S.2d 912, 915 (N.Y. App. Div. 1978) ("Religious purposes are not included in the enumerated purposes for which a school may be used under section 414 of the Education Law . . . . Consequently, the board of education had no authority to grant petitioners' request to form Bible clubs in the public high schools."); *see also* Deeper Life Christian Fellowship, Inc. v. Board of Educ., 948 F.2d 79 (2d Cir. 1991) (holding that the *Trietley* court's interpretation of section 414 as enumerating all permissible uses for public school property is an interpretation binding on the federal courts).

47. N.Y. EDUC. LAW § 414(1)(a)-(j) (McKinney 1988 & Supp. 1993); *see supra* text accompanying notes 45-46.

48. N.Y. EDUC. LAW § 414(1) (McKinney 1988 & Supp. 1993).

49. Joint Appendix at 74-77, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024) [hereinafter Joint Appendix]. The Rules & Regulations provide specific instructions to potential applicants relating to the type, time, and manner of outside organizational use of Center Moriches' property. *Id.*

50. *Id.* at 75, rule 10. Use of school district property for social, civic, and recreational activities is explicitly authorized by New York Education Law § 414(1)(c), provided that such use "shall be non-exclusive and shall be open to the general public." N.Y. EDUC. LAW § 414(1)(c).

51. Joint Appendix at 75, *Lamb's Chapel* (No. 91-2024).

wide range of outside entities to use the facilities.[52] However, Center Moriches had never been presented with an application by any entity requesting permission to use the facilities for religious purposes,[53] and no organization had ever used the Center Moriches facilities for the purpose of religious proselytization.[54]

Against this background of state and local regulation concerning community use of public school property came *Lamb's Chapel*, an evangelical Christian church with an established congregation in Center Moriches.[55] Reverend John D. Steigerwald, the pastor of Lamb's Chapel,[56] led the congregation toward their ultimate objective, "to share the love of Christ in very real and practical ways."[57] This mission apparently led Reverend Steigerwald, in November, 1988, to the Center Moriches Union Free School District in search of facilities large enough to accommodate his growing parish.[58]

Initially, Reverend Steigerwald petitioned Alice Schoener[59] of the Center Moriches School District for permission to use the Center Moriches High School

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52. Pursuant to rule ten of the Rules & Regulations, Center Moriches has permitted many organizations to use the school district's facilities for social, civic, and recreational purposes. *Id.* at 75. A sampling of these diverse groups include the following: Hampton Council of Churches/Family Counseling Services; Salvation Army; Southern Harmonizers Gospel Singing; Unkechaug Dance Group; Moriches Bay Civic Association, Inc.; Center Moriches Free Public Library; S.C. Girl Scouts; Boy Scouts of America Troop 414; Myo-Mastic Sports Club; The Manorville Humane Society; Family Counseling Service; Moriches Youth Organization. *Id.* at 93, 95-99, 110, 111, 114, 126, 132, & 135.

53. Ms. Schoener wrote to Reverend Steigerwald upon receiving his request for use of the school district facilities for the purpose of showing a film series, stating:

> As indicated in my earlier letter to you, we are bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.

Id. at 81.

54. While no group has ever listed a religious purpose as its objective in applying for use of the Center Moriches facilities, Lamb's Chapel argued to the district and circuit court that a number of the previous uses were religious in nature. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 387-88 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993). As examples, the petitioners pointed to the following: The Salvation Army Band Benefit Concert in which there was an invocation and the singing and playing of religious songs, *Id.* at 387; the Gospel Music Concert in which the Southern Harmonizers Gospel Singing Group sang "Amazing Grace" as well as other gospel songs, *Id.* at 388; the New Age Religion Lecture Series in which parapsychologist Jerry Huck gave a lecture entitled "Psychology and the Unknown," *Id.* Mr. Huck acknowledged that although his lecture contained references to a Far Eastern concept known as Kundalini, that such references were simply " 'a fascinating sideline' and 'not the purpose of the [lecture].' " *Id.*

55. Joint Appendix at 70-72, *Lamb's Chapel* (No. 91-2024). *See also Long Island Church at Center of Not What But Who*, N.Y. TIMES, June 8, 1993, at A23 ("Lamb's Chapel is a nondenominational, evangelical church with about 150 members from this eastern Long Island hamlet and surrounding areas.").

56. Joint Appendix at 4, *Lamb's Chapel* (No. 91-2024). At the time of the Supreme Court's decision in June, 1993, the pastor at Lamb's Chapel was Reverend Allen T. Sharp. Estelle Lauder, *Pastor Applauds the Court Ruling*, NEWSDAY (New York), June 8, 1993, at 1, 5, & 104.

57. Joint Appendix at 70, *Lamb's Chapel* (No. 91-2024).

58. *Id.* at 70-72. Reverend Steigerwald stated in his initial letter to Ms. Schoener and the Center Moriches School District that Lamb's Chapel "has experienced such growth that it creates a problem for me and the families of our congregation. The V.F.W. Hall which is headed by Bernard A. Volin (who has been more than courteous [sic] and accommodating) is no longer adequate for our Sunday services."

59. *Id.* at 73-78. Ms. Schoener was the "business manager and district clerk" for Center Moriches School District and was responsible for reviewing applications for use of Center Moriches facilities. Lamb's Chapel v. Center Moriches Union Free Sch. Dist. (Lamb's Chapel II), 770 F. Supp 91, 92-93 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993) [hereinafter *Lamb's Chapel II*].

facilities to conduct Sunday morning services and hold Sunday school.[60] Ms. Schoener denied Reverend Steigerwald's request, citing the religious use prohibition of rule seven of the Rules & Regulations as well as New York Education Law section 414.[61] Reverend Steigerwald changed his request, asking simply for use of the Center Moriches facilities one night per week for five consecutive weeks.[62] The purpose of Lamb's Chapel in requesting access was to show a film series on family values and child rearing entitled *Turn Your Heart Toward Home*.[63] Reverend Steigerwald admitted that this film series, designed to "encourage and educate parents in raising positive families," was from a Christian perspective.[64] Ms. Schoener once again denied Reverend Steigerwald's request for use of public school facilities, basing the decision on the decidedly religious nature of the film series.[65]

These denials prompted Lamb's Chapel to file suit against the Center Moriches School District,[66] alleging, inter alia, that the denial of its applications violated the Church's and its parishioners' constitutional right of freedom of speech.[67]

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60. Joint Appendix at 73, *Lamb's Chapel* (No. 91-2024).

61. *Id.* at 78.

62. *Id.* at 79-80. Reverend Steigerwald first petitioned Center Moriches to use its facilities to show this film series in December, 1988. *Id.* After requesting and receiving further information on the proposed film series, Ms. Schoener denied the Lamb's Chapel request citing the religious nature of the film series. *Id.* at 81-84. In October, 1989, Reverend Steigerwald submitted a second application seeking to show the same film series and was once again denied due to the religious perspective of the film. *Id.* at 90-92.

63. *Id.* at 83. The *Turn Your Heart Toward Home* film series contains a series of lectures by Dr. James Dobson. *Id.* at 88. Dr. Dobson is a licensed psychologist, author, and former associate clinical professor of pediatrics at the University of Southern California. *Id.*

The brochure that Reverend Steigerwald sent to Ms. Schoener contained the following description of Dr. Dobson's film series:

> In this bold new film series, America's most trusted family life expert brings his vast experience to bear on one of society's most pressing challenges – the protecting and strengthening of family relationships.
>
> Citing example after familiar example, Dr. Dobson portrays the pressures today's parents are susceptible to. The time traps that steal precious moments so important to a child's welfare. The battlegrounds of parent/child relationships.
>
> And he reminds parents of society's slide toward humanism – the undermining influences of radio, television, films and the press – which can only be counterbalanced by a loving home where Christian values are instilled from an early age.
>
> "Time is the priceless gift we can give our families."
>
> A swelling majority of Americans sense the vulnerability of their own families, and are willing to make all commitments necessary to preserve them. Commitments to their marital relationships. Commitments to their children and home lives. Commitments to get involved in issues that affect the family.
>
> It is the purpose of this powerful new film series to challenge those individuals to return to the traditional values upon which families are best created and nurtured.

Id. at 86-87.

64. *Id.* at 90.

65. *Id.* at 84, 92.

66. *Id.* Also named as a defendant in Lamb's Chapel's summons and complaint was Louise Tramontano in her official capacity as president of the Center Moriches Board of Education. *Id.* at 3. The New York State Attorney General's Office joined the suit as an intervenor pursuant to Rule 24 of the Federal Rules of Civil Procedure.

67. *See id.* at 3-15. This article is going to focus on the plaintiffs' allegation that their constitutional right to free speech has been violated, as that was the basis upon which the Supreme Court reversed the lower courts and granted the plaintiffs application for an injunction. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993). However, plaintiffs' complaint also alleged that their constitutional rights of freedom of assembly, free exercise of their religion, and equal protection of the law were violated. Joint Appendix at 5-12, *Lamb's Chapel* (No. 91-2024). Finally, the plaintiffs' also allege that the defendants' action constituted a violation of the First Amendment's Establishment Clause. *Id.* at 12-13.

B. District Court Proceedings

On February 9, 1990, Lamb's Chapel and John Steigerwald filed suit in the United States District Court for the Eastern District of New York seeking a preliminary injunction enjoining the school district from prohibiting plaintiffs from showing a film series in school district facilities.[68] The district court reviewed the Supreme Court's tripartite classification system for publicly owned property and examined the standards for judging what speech may constitutionally be excluded from each different forum.[69] The court found that the school district had created a limited designated public forum rather than an unlimited designated public forum[70] and that the state had "by policy and practice circumscribed availability through reasonable and viewpoint-neutral regulations."[71] The court denied the plaintiffs' motion for a preliminary injunction,[72] and the plaintiffs appealed.[73]

"[T]hat appeal was withdrawn at the suggestion of the Staff Counsel for the Second Circuit, and the case [was] . . . returned to" the district court for a final disposition.[74] Although the relief requested on this return to the district court differed from the first case, the result was the same.[75] Defendants' cross-motion for summary judgment was granted, and the plaintiffs' complaint was dismissed.[76] The court held, as it had on plaintiff's initial application, that because Center Moriches had not permitted "organizations of similar character to Lamb's Chapel to use its facilities for religious purposes,"[77] the school district property was

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68. Joint Appendix at 13, *Lamb's Chapel* (No. 91-2024). The *Lamb's Chapel* complaint further sought an injunction compelling the school district to permit religious or political groups to use district facilities "without discriminat[ing] against them because of the religious context or political content of their speech." *Id.* Finally, the plaintiffs' complaint requested declaratory relief, seeking a statement that the defendants had created an open forum in the school district's facilities and that the school district's denial of plaintiffs' application was a violation of a number of the plaintiffs' constitutional rights. *Id.* at 13-14.

69. Lamb's Chapel v. Center Moriches Union Free Sch. Dist. (Lamb's Chapel I), 736 F. Supp. 1247, 1250-51 (E.D.N.Y. 1990) [hereinafter *Lamb's Chapel I*].

70. *Id.* at 1252. See *supra* notes 13-43 and accompanying text for a discussion of the Supreme Court's "public forum doctrine."

71. *Id.* at 1254.

72. *Id.*

73. Lamb's Chapel v. Center Moriches Union Free Sch. Dist. (Lamb's Chapel II), 770 F. Supp. 91 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

74. *Lamb's Chapel II*, 770 F. Supp. at 92. Staff Counsel for the Second Circuit suggested returning the case to the district court to allow that court to consider the plaintiff's allegations in light of the United States Supreme Court's decision in Board of Education v. Mergens, 496 U.S. 226 (1990). *Lamb's Chapel II*, 770 F. Supp. at 92. The court adhered to its prior ruling that the plaintiffs were not entitled to the relief requested in their complaint, finding that *Mergens* was decided on purely statutory grounds that were inapplicable to the *Lamb's Chapel* case. *Lamb's Chapel II*, 770 F. Supp. at 97.

In *Mergens*, the Supreme Court determined that the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988), prohibited a high school "from denying a student religious group permission to meet on school premises during noninstructional time." *Mergens*, 496 U.S. at 231. In addition, the Court determined that granting student religious groups equal access to school facilities does not violate the Establishment Clause of the First Amendment. *Id.* at 253.

75. Instead of seeking injunctive and declaratory relief as they had initially in *Lamb's Chapel I*, the plaintiffs moved for summary judgment. *Lamb's Chapel II*, 770 F. Supp. at 92. Center Moriches also moved for summary judgment. *Id.*

76. *Id.* at 99.

77. *Id.*

properly characterized as "limited public fora."[78] Once again, the district court examined the Supreme Court's jurisprudence with respect to permissible speech in public and nonpublic fora and determined that in a limited public forum the state regulation need only be reasonable and viewpoint-neutral to pass constitutional muster.[79] Finally, the court held that "[b]ecause the School District ha[d] not, by policy or practice, opened its doors to groups akin to Lamb's Chapel, . . . the School District's denial of plaintiffs' applications to show the film series is viewpoint-neutral and, hence, constitutional."[80]

C. Second Circuit Opinion

On March 18, 1992, the United States Court of Appeals for the Second Circuit affirmed the district court's decision granting summary judgment to Center Moriches.[81] The court of appeals examined relevant Supreme Court precedent with respect to "the extent of permissible governmental regulation of expressive activity on publicly owned property"[82] and recognized that such regulation is largely "dependent upon the character [and primary purpose] of the [government] property in question."[83] The court identified the three classifications traditionally used by the Supreme Court as part of its "forum analysis"[84] approach to questions of free speech and determined that the property at issue in *Lamb's Chapel* actually fell within the subcategory of " 'limited public forum,' [a] . . . classification that allows it to remain nonpublic except as to specified uses."[85]

In such a limited public forum, a regulation restricting speech is constitutional if it can be shown to be reasonable and viewpoint-neutral.[86] The Second Circuit determined that Center Moriches' rule seven was indeed reasonable and viewpoint-neutral, stating that they "have not been able to identify any prior use of Center Moriches' School District facilities for purposes that are religious in any meaningful way."[87] Lacking such prior religious use, the court found that it was viewpoint-neutral to exclude speech on the basis of its religious content.[88] As such, the court ruled that there was no constitutional violation and affirmed the district court's grant of summary judgment to the Center Moriches School District.[89]

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78. *Id.*

79. *Id.*

80. *Id.*

81. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 383 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

82. *Id.* at 385.

83. *Id.*

84. See *supra* notes 13-43 and accompanying text for a discussion of the Supreme Court's "public forum doctrine."

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

86. *Id.* at 388. *See supra* note 40 and accompanying text.

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

88. *Id.*

89. *Id.* at 389.

D. Supreme Court Opinions

After the district court's decision was affirmed by the Second Circuit, plaintiffs filed a petition for a writ of certiorari with the Supreme Court of the United States.[90] The Court granted plaintiffs' petition, stating that it did so "[b]ecause the holding below was questionable under our decisions . . . ."[91]

In an opinion joined by four of the Justices and the Chief Justice, Justice White began by examining New York education law and Center Moriches' regulations regarding community use of public school property.[92] The Court accepted as controlling, as the Second Circuit had,[93] a New York appellate court's interpretation of section 414 of the New York Education Law, which held that public school property may only be used for the ten purposes explicitly enumerated in the statute.[94]

The Court then addressed the plaintiffs' arguments with respect to the appropriate categorization of Center Moriches' facilities and the proper corresponding standard to be applied.[95] The Court accepted the district and circuit courts' determination that the district facilities were limited public fora and that the regulation prohibiting Lamb's Chapel from using Center Moriches School District property was constitutional if it could be proven to be reasonable and viewpoint-neutral.[96]

However, the Court disagreed with both lower courts on another critical question and held that rule seven of the Center Moriches Rules & Regulations was indeed viewpoint-discriminatory and, thus, unconstitutional.[97] Justice White reasoned that the film series Lamb's Chapel sought to show dealt primarily with the issue of child rearing and family values.[98] This subject, according to the Court, was one on which any other group would have been permitted to speak.[99] Thus, Center Moriches' denial of Lamb's Chapel's petition was based solely on the

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

91. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2145 (1993).

92. *Id.* at 2143-44. Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, and Souter joined in Justice White's opinion. *Id.* at 2143. Justice Kennedy filed an opinion concurring in part and concurring in the judgment. *Id.* at 2149. Justice Scalia filed an opinion concurring in the judgment. *Id.* Justice Thomas joined the concurring opinion of Justice Scalia. *Id.*

93. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 387 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

94. *Id.* at 386-87. *See* Trietley v. Board of Educ., 409 N.Y.S.2d 912, 915 (N.Y. App. Div. 1978) ("Religious purposes are not included in the enumerated purposes for which a school may be used under section 414.") (citations omitted). The *Trietley* case was cited with approval by the Second Circuit Court of Appeals in Deeper Life Christian Fellowship, Inc. v. Board of Education, 852 F.2d 676, 680 (2d Cir. 1988) ("By state law, public school buildings may be used by the general public only for . . . purposes enumerated in New York Education Law § 414. The provision of religious worship, instruction, and fundraising is not among these purposes.").

95. *Lamb's Chapel*, 113 S. Ct. at 2146-48.

96. *Id.*

97. *Id.* at 2147.

98. *Id.*

99. *Id.*

viewpoint it wished to express on an otherwise permissible subject.[100] Justice White concluded that this is precisely what the First Amendment prohibits.[101]

On this "speech" question, the concurring opinions of Justices Kennedy and Scalia both state very simply that they agree that the school district's actions violated the plaintiffs' constitutionally guaranteed right to free speech.[102]

The school district further argued to the Supreme Court that the Establishment Clause barred the use of school property for religious purposes.[103] With respect to this argument based on the constitutional separation of church and state mandate, the Court stated:

> The district property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar,* there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.[104]

Thus, the Court held that the three prong test articulated in *Lemon v. Kurtzman*,[105] used to determine when a government regulation contravenes the Establishment Clause, was not violated.[106] Justice Scalia's concurring opinion, and to a lesser extent Justice Kennedy's concurrence, derided the Court for

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100. *Id.* at 2147-48.

101. *Id.* at 2148. Justice White's majority opinion summarily rejected a number of other arguments raised on behalf of respondents. First, the school district had argued that public policy required denial of Lamb's Chapel's application. Brief for Respondents at 4-5, 11-13, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024). Initially, the district asserted that a court-ordered open access policy might force school districts to close their property "rather than become embroiled in controversy every time a radical religious . . . organization [sought] access to [school] facilities." *Id.* Secondly, granting access to radical religious organizations may result in the destruction of school property or the interruption and disruption of the proper functioning of the school. *Id.* at 12-13.

Justice White responded to the destruction of school property argument by stating that: "There is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the district otherwise makes open to discussion on district property." *Lamb's Chapel*, 113 S. Ct. at 2148. The majority decision did not respond to the respondent's argument that a court-ordered open access policy may result in the closing of school district facilities throughout the nation if remaining open will continuously involve the school districts in litigation.

102. Justice Kennedy, concurring in part and concurring in the judgment, noted the "apparent unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Speech Clause of the First Amendment." *Lamb's Chapel*, 113 S. Ct. at 2149.

Justice Scalia, joined by Justice Thomas, concurred in the judgment and stated: "I join the Court's conclusion that the District's refusal to allow use of school facilities for petitioners' film viewing, while generally opening the schools for community activities, violates petitioners' First Amendment free-speech rights (as does N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1993), to the extent it compelled the District's denial)." *Id.* (citations omitted).

103. Respondents' Brief at 27-30, *Lamb's Chapel* (No. 91-2024).

104. *Lamb's Chapel*, 113 S. Ct. at 2148. The Court continued by stating that:

> [P]ermitting District property to be used to exhibit the film involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.

Id.

105. 403 U.S. 602 (1971).

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

unnecessarily invoking the *Lemon* test, a test they believed to be insufficient and outdated as a standard for a rule of law.[107]

III. DISCUSSION

A. Importance

As with any attempt to discover the importance of a Supreme Court decision, a primary focus must be placed on how the case will affect a particular area of the law. The *Lamb's Chapel* decision will obviously have an impact on First Amendment jurisprudence as both the Free Speech and Establishment Clauses of that amendment are implicated here.[108] This discussion will focus on the Free Speech Clause, as that was the basis upon which the Supreme Court struck down the district's regulations.[109]

In the *Lamb's Chapel* case, the plaintiffs argued that the "limited public forum" distinction that the Second Circuit used to support its decision in the school district's favor, is a distortion of the Supreme Court's "public forum" analysis.[110] The Church argued that the terms "designated public forum" and "limited public forum" are synonymous;[111] while the school district argued, according to Second Circuit and Supreme Court precedent, that these terms distinguished two types of fora.[112] Regardless of the labels used, both parties agreed upon the proper standard to be applied:[113] that standard being dependant upon whether the speaker did or did not meet the limiting criteria of the particular forum.[114]

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107. *Id.* at 2149-51. Justice Kennedy found the Court's use of the *Lemon* test and the phrase "endorsing religion" to be unsettling and unnecessary. *Id.* at 2149. Justice Scalia, with whom Justice Thomas joined, was much more animated in his criticism of the Court's invocation of the *Lemon* test. In a witty and metaphorically ripe opinion, Justice Scalia invites comparison between the *Lemon* test and the seemingly immortal zombies of late-night cinema. *Id.* at 2149-51. In the end, his concurrence with respect to the asserted Establishment Clause violation states simply "that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate that provision because it does not signify state or local embrace of a particular religious sect." *Id.* at 2151.

108. See *supra* note 13 for the text of the First Amendment's Free Speech and Establishment Clauses.

109. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993). Despite the fact that the court of appeals focused its entire discussion and based its decision on the Supreme Court's freedom of speech public forum doctrine, the Court stated:

> The appellants argue that denial of access somehow violated the Establishment Clause of the First Amendment as well as the Freedom of Speech Clause. It is difficult to see how this is so. If anything, a claim of a violation of the Free Exercise Clause would be expected. Nevertheless, there is no basis for any claim of First Amendment violation here.

Id. at 389.

110. Petitioners' Brief at 22, *Lamb's Chapel* (No. 91-2024) ("The Second Circuit's approval of a 'religion-free' designated public forum represents an unconstitutional distortion of public forum doctrine.").

111. *Id.* at 26 ("As noted above, there is no separate category of 'limited public forum' distinct from 'designated public forum.' The Second Circuit's innovation represents a departure from the consistent teaching of this Court that there are only three categories of forum: the traditional public forum, the public forum by designation, and the nonpublic forum.").

112. *Id.* at 10 ("A limited public forum is defined as a subcategory of designated public forum in which the government has opened a particular property for use by a certain class of speakers or for assembly and debate on selected subjects." (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983); Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991))).

113. *See infra* note 117 and accompanying text.

114. See *supra* note 38 and accompanying text for an in-depth discussion of the different standards to be applied to different speakers seeking access to the same forum.

In the *Widmar* case for example, in a forum limited to use by student groups, the exclusion of any new student organization would be judged by the "traditional public fora" strict scrutiny standard.[115] Conversely, the denial of access to an outside community organization would presumably be reviewed under the more lenient "nonpublic fora" test for reasonableness and viewpoint-neutrality.[116] Thus, although the parties and the courts could not agree on the appropriate label, they did agree that the standard to be used differs depending on the speaker and/or the speaker's topic and purpose.[117]

That, unfortunately, is where their agreement ended. The plaintiffs believed that Lamb's Chapel was an eligible speaker in a designated public forum: therefore, their exclusion from the Center Moriches facilities must be tested by the compelling state interest standard.[118] To the contrary, the school district argued, and the lower courts agreed, that Lamb's Chapel was not a member of the class for whom the facilities had previously been opened.[119] Therefore, their exclusion was judged under the lenient nonpublic fora, reasonable/viewpoint-neutral test.[120] The

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115. Widmar v. Vincent, 454 U.S. 263, 269-70 (1981). See *supra* note 29 for a discussion of the *Widmar* case.

116. I use the term "presumably" because the Court does not say definitively that the reasonableness/viewpoint-neutral standard is the standard that would be applicable. The Court, however, does note:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

Id. at 268 n.5. It seems clear that an outside organization that sought access to the university facilities for expressive activity would not be considered a member of the class for whom this forum had previously been opened. As such, the exclusion of that organization would be judged by a different standard than the exclusion of another student group. *See Perry*, 460 U.S. at 48 (This is precisely the situation the *Perry* Court was referring to when it stated "[w]hile the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment."); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 386 (2d Cir. 1992) (" '[F]irst [A]mendment protections provided to traditional public forums only apply to entities of a character similar to those the government admits to the forum.' " (quoting Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986))), *rev'd*, 113 S. Ct. 2141 (1993).

117. Both parties suggested in their briefs to the Supreme Court that the standard to be applied differs depending on whether the excluded party is an eligible or non-eligible speaker. *See* Brief for Petitioners at 23, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024); Respondents' Brief at 16, *Lamb's Chapel* (No. 91-2024).

The lower courts agreed with this premise. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist. (Lamb's Chapel II), 770 F. Supp. 91, 94 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 386 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993). While the Supreme Court did not mention this topic specifically, the majority did accept the Second Circuit's use of the nonpublic forum reasonable/viewpoint-neutrality test as the proper standard to be applied in these circumstances. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147 (1993).

118. Petitioners' Brief at 24, *Lamb's Chapel* (No. 91-2024) (arguing that the strict scrutiny standard is triggered because Lamb's Chapel is an "entity of similar character" to those previously granted access to the Center Moriches School District facilities).

119. Respondents' Brief at 23, *Lamb's Chapel* (No. 91-2024) (the School District argued that Lamb's Chapel, as a religious entity with a religious purpose, was dissimilar in all respects to organizations that had previously been granted access to school property). *See also Lamb's Chapel*, 959 F.2d at 387-88.

120. Respondents' Brief at 23, *Lamb's Chapel* (No. 91-2024).

Supreme Court somewhat reluctantly agreed that the school district facilities did fall within the "limited public forum" subcategory and, as such, agreed that the nonpublic fora standard was the proper test to be applied.[121]

Both lower courts and the school district believed that rule seven's prohibition on religious use was viewpoint-neutral since it excluded any and all religious organizations regardless of their affiliation or denomination.[122] The Supreme Court disagreed. Rule seven was indeed viewpoint-discriminatory, according to the high Court, because it prohibited religious organizations from speaking on topics which any other group would be permitted to discuss.[123] The Court took the narrow view, focusing on the topic Lamb's Chapel wished to discuss, while the school district and the lower courts took a somewhat broader view, choosing instead to focus on the nature of the speaker's purpose in using the facilities.[124]

Thus, a situation was presented wherein two lower courts decided a case based on the Supreme Court's public forum doctrine and held a government regulation valid under the First Amendment.[125] The Supreme Court then heard the case and unanimously reversed the decision of both lower courts.[126] The foregoing pointedly demonstrates the confusion that surrounds the Supreme Court's public

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121. *Lamb's Chapel*, 113 S. Ct. 2146-47.

122. The Second Circuit Court of Appeals addressed the question of whether the school district's denial of access to plaintiffs was viewpoint-neutral and determined that, although a close question, it was indeed nondiscriminatory as all religious uses had been prohibited equally. *Lamb's Chapel*, 959 F.2d at 387-88. *Compare with* Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692-94 (2d Cir. 1991) (holding that the school district's denial of an application to the plaintiffs was viewpoint-discriminatory because the district had permitted its facilities to be used in the past for religious purposes).

123. *Lamb's Chapel*, 113 S. Ct. at 2143. The Court states:

> "[A]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose special benefit the forum was created . . . 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 v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

124. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993); Lamb's Chapel v. Center Moriches Union Free Sch. Dist. (Lamb's Chapel II), 770 F. Supp. 91 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993). Focusing as the Court did on the narrow topic that Lamb's Chapel wished to discuss presents some extremely disturbing possibilities. For instance, it seems clear that any group must now be granted access to Center Moriches School District property to discuss family values and child raising. This, we must assume, would include a group such as the North American Man-Boy Love Association [hereinafter NAMBLA]. Thus, when NAMBLA seeks access to the facilities to show a film series on the benefit to both man and boy of such a family unit and to promote such relationships as the preferred method of child rearing, they must be granted access on the same terms as Lamb's Chapel.

Can we suggest that this organization be excluded because their views are so much more distasteful to the general population than Christianity? I believe not. Thus, Center Moriches will be faced with a choice: Permit NAMBLA to use the facilities or close the facilities altogether. The Supreme Court was so unimpressed with this public policy argument when raised by the School District in *Lamb's Chapel* that it did not utter a word in response. The issue will arise again. Hopefully, in the interest of constitutionally protected free speech, the Court will consider the ramifications of a court-ordered open access policy.

Some may argue that the Constitution protects even the speech of the NAMBLA. Absolutely! However, I submit that the Constitution does not require that they be permitted to espouse their views on public school property. This demonstrates, I believe, the basic failing of the *Lamb's Chapel* decision.

125. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381 (1992), *rev'd*, 113 S. Ct. 2141 (1993); Lamb's Chapel v. Center Moriches Union Free Sch. Dist. (Lamb's Chapel II), 770 F. Supp. 91 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

126. *Lamb's Chapel*, 113 S. Ct. at 2151.

forum doctrine. It seems that the time is ripe, with the public forum doctrine already in disarray,[127] for the Court to move to a new method of determining when a government regulation restricting expression on its property contravenes the First Amendment's guarantee of freedom of speech. With the Court seemingly in transition, this movement may already be underway.[128] Moving away from the rigid tripartite classification system,[129] the Court should now examine restrictions on speech in light of the purpose and characteristics of the property[130] in question rather than simply on the traditional extracurricular use or nonuse of the property.[131] Of course, the labels of traditional, designated, or nonpublic fora could still be used, but the assignment of a label would not end the inquiry, nor would the standard to be applied turn, as it does now,[132] solely on what label is used.

Actually, the classification system works rather well with respect to property that falls within the traditional public fora category and the nonpublic fora category. However, the bulk of government owned property does not fit neatly within these two boxes but comprises the middle classification of designated public forum "whether of a limited or unlimited character."[133] It is the breadth of this second classification that presents a problem. Courts are forced to draw a line and make a difficult determination of whether the forum is limited or unlimited and then apply a standard dependent on that determination.

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127. See *infra* note 128 for a discussion of new approaches advocated by certain Justices. In addition, commentary criticizing the public forum doctrine is numerous. *See, e.g.*, C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986); Farber & Nowak, *supra* note 21; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

128. After the Court's decision in International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992), a strong argument can be made that a majority of Justices are already moving away from the present classification system. In her concurring opinion, Justice O'Connor reiterated that a restriction on speech " 'must be assessed in light of the purpose of the forum and all the surrounding circumstances.' " *Id.* at 2712 (quoting Cornelius v. NAACP Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Justice Kennedy's concurrence, which was joined by Justices Blackmun, Stevens, and Souter, suggested:

> If the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.

Id. at 2718 (Kennedy, J., concurring).

129. See *supra* notes 13-43 and accompanying text for a discussion of the Court's public forum classification system.

130. *Cornelius*, 473 U.S. at 809.

131. In *Lee*, the majority opinion did just this when it based the determination of whether airport terminals are public fora on the history of what expressive use had been permitted there. *Lee*, 112 S. Ct. at 2706. Noting that the "tradition of airport activity does not demonstrate that airports have historically been made available for speech activity," the Court ruled that airport terminals are nonpublic fora. *Id.*

132. *See supra* notes 13-43.

133. *Lee*, 112 S. Ct. at 2705. *See also id.* at 2718 (Kennedy, J., concurring) ("The second category of the Court's jurisprudence, the so-called designated forum, provides little, if any, additional protection for speech. Where government property does not satisfy the criteria of a public forum, the government retains the power to dedicate the property for speech, whether for all expressive activity or for limited purposes only.").

A better system may be to combine the two standards presently in use, the compelling state interest test[134] and the reasonableness/viewpoint-neutrality test,[135] leaving the Court with one critical question to answer when faced with property falling into this vast expanse between the traditional public forum and the nonpublic forum: Has the government presented an adequate justification for restricting traditionally protected free speech on a particular piece of state property?

In essence, and very simply, the courts would be faced with a balancing test in which the rationale for restricting speech or expression would be more difficult to justify as the traditional openness of the forum increased. With such a standard, the history, purpose, and characteristics of a particular forum will still be important and will either add or detract from the level of justification needed to support a regulation restricting First Amendment activity. As the Court stated in the early public fora case of *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,[136] the reasonableness of a government restriction "must be assessed in light of the purpose of the forum and all the surrounding circumstances."[137]

This sentiment was echoed in a number of recent opinions by Justice O'Connor when she stated: " ' "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." ' "[138]

B. Impact

The day following the announcement of the Court's decision in this case, Reverend Allen Snapp of Lamb's Chapel commented that he was "grateful for the decision that came our way this week. It means that we can speak about biblical issues that present answers to things that are tearing the nation apart."[139] No one ever doubted that he could speak about such issues; the only question was whether he could or should do it on public school property. Apparently, Reverend Snapp

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134. See *supra* notes 26-29 and accompanying text for a discussion of the compelling interest test.

135. See *supra* notes 39-40 and accompanying text for a discussion of the reasonable/viewpoint-neutral standard.

136. 473 U.S. 788 (1985).

137. *Id.* at 809.

138. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2712 (1992) (O'Connor, J., concurring) (quoting United States v. Kokinda, 497 U.S. 720, 732 (1990) (quoting Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1981))).

139. Collin Nash, *Pastor Calls Film Ruling Good News*, NEWSDAY (New York), June 14, 1993, at 14.

believes he now can. However, the *Lamb's Chapel* decision says no such thing.[140] In fact, this decision is so fact specific that it may ultimately have little or no impact on judging what religious use is or is not permissible on government owned property.[141] This is the basic failing of this decision. It does not provide any framework for school districts or courts to determine what religious use is permissible on public school property.

This brings me back to my original question: Why did the Court take this case? A case with different facts may have given the Court a better opportunity to examine this area of the law and provide the country and the lower courts with a standard by which to answer the question of when religious use of public school facilities is proper. The *Lamb's Chapel* decision does not do so. For instance, Lamb's Chapel may renew its request to Center Moriches to use the school district's property to hold Sunday sermons.[142] How must Center Moriches respond to this request following the Supreme Court's decision in *Lamb's Chapel*? The church may argue that they must indeed be granted access to the facilities, yet, the opposing argument carries equal if not greater strength.

Remaining unanswered as they do, these questions will inevitably lead to further litigation. When they do, the courts would do well to recall the cautionary words of Justice O'Connor in *United States v. Kokinda*:

> In any event, it is anomalous that the [Postal] Service's allowance of some avenues of speech would be relied upon as evidence that it is impermissibly suppressing other speech. If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission. The dissent would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at

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140. Apparently, just as Reverend Snapp believes that the Supreme Court has sanctioned religious use of public school property, at least one court has now similarly misinterpreted the Supreme Court's decision in *Lamb's Chapel*. In Shumay v. Albany County School District No. One Board of Education, 826 F. Supp. 1320, (D. Wyo. 1993), the United States District Court was presented with an action wherein the plaintiffs sought a preliminary injunction enjoining a school district from prohibiting the plaintiffs from holding baccalaureate ceremonies on school property. *Id.* at 1321.

Holding in plaintiffs' favor and granting the preliminary injunction, the court considered the recent decision in *Lamb's Chapel* and stated the holding there: "The United States Supreme Court determined that a public school district rule barring use of school facilities by groups whose subject matter has a religious purpose or a religious viewpoint *when all other groups are allowed such use* violates the first amendment." Id. at 1326 (emphasis added). That misstates the holding of *Lamb's Chapel*. The Supreme Court's decision in *Lamb's Chapel* was very narrow, holding simply that when any and all groups are permitted access to discuss a particular topic then any and all religious groups must be granted access to discuss that subject. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147 (1993). The Court did not hold, as the district court in Wyoming apparently believes, that if school district facilities are open to the public for some uses, then a religious group must be granted access for any religious purpose.

141. Lou Grumet, Executive Director of the New York State School Boards Association, has said that he believes that school boards will still be able to keep religious groups out of the school "as long as they prevent similar programs by secular groups." Timothy M. Phelps, *Ruling Aids Churches In LI Case, Court Says School Can't Bar Religious Group*, NEWSDAY (New York), June 8, 1993, at 4.

142. Lamb's Chapel has already renewed its request to use the Center Moriches School District facilities for the purpose of showing Dr. Dobson's film series on family values and that request has been granted. The film series will be shown in the Center Moriches High School Auditorium on four Tuesdays, October 19 and 26, and November 9 and 16, 1993. Application For Use of Sch. Dist. Facilities from Lamb's Chapel to Center Moriches Union Free Sch. Dist., (June 14, 1993) (on file with author).

> all. In the end, its approach permits it to sidestep the single issue before us: Is the Government's prohibition of *solicitation* on postal sidewalks *unreasonable*?[143]

The dissent there should not become the majority here; and the next *"Lamb's Chapel"*[144] case should not provide an opportunity to "create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at all."[145] If the next case before the Court results in a ruling that public schools must permit religious proselytization on its property, districts may determine that the potential controversy outweighs any benefit and decide that the time to close its doors altogether has come.[146] The property would then revert to a nonpublic forum, dedicated to education and education only. Then the expressive activity of the Center Moriches community, as a whole, would be curtailed. How can the First Amendment abide such a result?[147]

The plaintiffs and the Court, after *Lamb's Chapel*, have ascribed to Center Moriches a malicious intent in barring religious use from school district property.[148] How odd that that should be the epitaph of a school district, once opened virtually twenty-four hours a day, seven days a week for its inhabitants' social, civic, and recreational enjoyment, and now forced to keep "banker's hours."

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143. United States v. Kokinda, 497 U.S. 720, 733 (1990).

144. It seems highly likely that this issue of what speech is acceptable on public school property will be before the Court again.

145. *Kokinda*, 497 U.S. at 733.

146. It is axiomatic that the government need not keep a forum open indefinitely – it may close it at any time. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (citations omitted).

147. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1973). Writing for the plurality, Justice Blackmun noted with respect to political advertisement on City owned buses:

> There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. *Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be-pamphleteer and politician. This the Constitution does not require.*

Id. at 304 (emphasis added).

148. *See* Brief for Petitioners at 30, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024) ("A more flagrant policy of viewpoint exclusion would be difficult to imagine."); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Kennedy, J., concurring) (noting "the apparent unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Speech Clause of the First Amendment").