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The Lemon Test Rears Its Ugly Head Again: Lamb's Chapel v. Center Moriches Union Free School District

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CASENOTE

THE LEMON TEST REARS ITS UGLY HEAD AGAIN: *LAMB'S CHAPEL V. CENTER MORICHES UNION FREE SCHOOL DISTRICT*

> *Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,* Lemon *stalks our Establishment Clause jurisprudence once again —Justice Scalia*[1]

I. INTRODUCTION

Since 1971, Establishment Clause cases have been analyzed under the three-prong test articulated by the Supreme Court in *Lemon v. Kurtzman*.[2] However, this test has often been criticized for producing inconsistent results.[3] In addition, inconsis-

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

2. 403 U.S. 602 (1971).

3. *See generally* Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 283 (1993) (arguing the Court's inability to address Establishment Clause issues concretely stems from the Court's disregard of religion's sociological function); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) (discussing the inconsistent history of Establishment Clause jurisprudence since the Burger Court); Shanin Rezai, County of Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503 (1990) (discussing problems with the *Lemon* test and proposing a reformulated version of Justice O'Connor's endorsement test); Gary J. Simson, *The Establishment*

tent application of the test by the Court, and conflicting philosophies among judges and scholars regarding the separation of church and state, have resulted in considerable objection to the Lemon test. In fact, at least five of the current Supreme Court Justices have expressed their dissatisfaction with the Lemon test as a workable framework for Establishment Clause analysis.[4]

In 1992 the Supreme Court by a narrow majority banned ceremonial prayer at public school graduation exercises.[5] The Court did not apply the *Lemon* analysis, a move which signaled that the Court reassessed the future applicability of the Lemon test. However, one year later in *Lamb's Chapel v. Center Moriches Union Free School District*[6] the Court failed to reject the Lemon test once again and applied *Lemon's* three-prong analysis to conclude that a church group's use of public school facilities did not violate the Establishment Clause.[7] Consequently, the future of Establishment Clause jurisprudence remains uncertain.

Clause in the Supreme Court: Rethinking the Court's Approach, 72 CORNELL L. REV. 905 (1987) (supporting a revised version of the *Lemon* test).

4. *See* Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., with whom Rehnquist, C.J., White, J., and Thomas, J., join, dissenting) ("Our religion-clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 655 (1989) (Kennedy, J., with whom Rehnquist, C.J., White, J., and Scalia, J., join, concurring in part and dissenting in part) ("I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area."); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring) ("I write separately to note that this action once again illustrates certain difficulties inherent in the Court's use of the test articulated in *Lemon v. Kurtzman*."); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("The three-part *Lemon* test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.").

5. Lee v. Weisman, 112 S. Ct. 2649 (1992).

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

7. *Id.* at 2148. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."); *see* Everson v. Board of Educ., 330 U.S. 1, 8 (1947) (extending the Establishment Clause to the states through the Fourteenth Amendment).

This Casenote discusses the Supreme Court's holding in *Lamb's Chapel* and the impact of this decision on future Establishment Clause jurisprudence focusing on the application of the Lemon test. Part II briefly describes the history and background of the Lemon test; part III contains an analysis of three recent Supreme Court decisions preceding *Lamb's Chapel*; part IV discusses and analyzes the background of and the Supreme Court's holding in *Lamb's Chapel.*

II. HISTORY AND BACKGROUND OF THE LEMON TEST

The United States Supreme Court has long struggled with philosophical differences and concerns regarding the relationship between church and state.[8] In 1947 in *Everson v. Board of Education,*[9] Justice Black adopted a strict separationist standard: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, all religions, or prefer one religion over another . . . ."[10] However, one year later Justice Reed argued for an accomodationist interpretation of the Establishment Clause.[11] Noting that Congress aided religion throughout history,[12] Justice Reed concluded that the purpose of the Establishment Clause was not to impose "an absolute prohibition against every conceivable situation where [church and state] may work together."[13] These fundamental differences over the underlying purpose of the Establishment Clause have long plagued the Court, leading to inconsistent results and conflict among jurists over the proper analytical approach to Establishment Clause issues.[14]

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8. *See generally* Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301 (1984) (tracing the history of the Establishment Clause); Daniel A. Spiro, *The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause After the Alabama Secular Humanism Decision*, 39 ALA. L. REV. 1 (1987) (discussing Madison's and Jefferson's views).

9. 330 U.S. 1 (1947).

10. *Id.* at 16.

11. McCollum v. Board of Educ., 333 U.S. 203 (1948).

12. *Id.* at 253-54 (Reed, J., dissenting).

13. *Id.* at 256 (Reed, J., dissenting).

14. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970) (applying accommodation principles); Everson v. Board of Educ., 330 U.S. 1 (1947) (applying separationist

However, three principles emerged which became the basis for future Establishment Clause analysis. In *McGowen v. Maryland*,[15] the Court validated Maryland's Sunday closing laws, concluding that a secular purpose for the laws existed—providing a uniform day of rest.[16] In *Abington School District v. Schempp*,[17] the Court expanded its inquiry by analyzing the primary effect of the state action. The Court held that reading the Bible at the opening of each school day had the effect of advancing religion and therefore violated the Establishment Clause.[18] Finally, in *Walz v. Tax Commission*,[19] the Court upheld a New York state law granting tax exemptions to religious properties, concluding that the law did not lead to "excessive entanglement" with religion.[20] The principles relied upon in these three cases became the basis for the three-prong Lemon test.[21]

In 1971 the Supreme Court recognized that a strict "wall of separation" approach was not possible, as "[s]ome relationship between government and religious organizations is inevitable."[22] In *Lemon*, two state statutes were challenged: a Rhode Island statute providing salary supplements to teachers of nonsecular subjects in private schools and a Pennsylvania statute reimbursing nonpublic schools for teachers' salaries, textbooks, and instructional materials.[23]

The Rhode Island legislature determined that the quality of education in the state's nonpublic schools suffered due to the rising salaries of quality educators.[24] The legislature responded

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principles).

15. 366 U.S. 420 (1961).

16. *Id.* at 449.

17. 374 U.S. 203, 222 (1963) (establishing that the rationale for the primary effect inquiry was to avoid "fusion of governmental and religious functions or a concert or dependency of one upon the other."); *see also* Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

18. *Abington*, 374 U.S. at 222-23.

19. 397 U.S. 664 (1970).

20. *Id.* at 674-75.

21. *See infra* text accompanying note 38.

22. Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (citing Zorach v. Clauson, 343 U.S. 306, 312 (1952)).

23. *Lemon*, 403 U.S. at 607-11.

24. *Id.* at 607.

by enacting The Rhode Island Supplement Act,[25] authorizing state officials to supplement the salaries of teachers who taught secular subjects in private schools.[26] The supplement was paid directly to the teachers and could not exceed fifteen percent of the teacher's annual salary.[27] Rhode Island taxpayers brought suit claiming the act violated the Establishment Clause.[28]

The Pennsylvania legislature, facing similar concerns over the quality of private school education, enacted The Pennsylvania Nonpublic Elementary and Secondary Education Act.[29] That act authorized the state Superintendent of Public Instruction to reimburse private schools for expenditures for teachers' salaries, textbooks, and instructional materials. However, reimbursement was limited to secular subjects that were also taught in public schools.[30] Alton Lemon, a taxpayer and parent of a child attending public school in Pennsylvania, along with other taxpayers, challenged the constitutionality of the statute.[31]

The Supreme Court held that both statutes were unconstitutional. Although the legislative purpose of both statutes was to advance the quality of secular education (a valid secular purpose), the teachers in private schools under the direction of religious authorities would "inevitably experience great difficulties in remaining religiously neutral."[32] As a result, the potential for advancing religion was present.[33] Consequently, the state would continuously monitor the schools receiving aid to insure that the Establishment Clause was not violated.[34] Yet, such an excessive degree of state surveillance would result in excessive entanglement between church and state.[35]

The Court criticized the "wall" approach established in *Everson* and reasoned that "the line of separation, far from

25. R.I. GEN. LAWS §§ 16-51-1 to -9 (Supp. 1970) (repealed 1980).
26. *Lemon*, 403 U.S. at 607.
27. *Id.*
28. *Id.* at 608.
29. PA. STAT. ANN. tit. 24, §§ 5601-09 (Supp. 1971).
30. *Lemon*, 403 U.S. at 609-10.
31. *Id.* at 610-11.
32. *Id.* at 618.
33. *Id.* at 619.
34. *Id.*
35. *Id.*

being a 'wall,' is [a] blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[36] Consequently, due to "the absence of precisely stated constitutional prohibitions,"[37] the Court adopted a three-prong test, combining three elements from earlier decisions to create a single multi-part test for Establishment Clause cases.

In *Lemon*, the Court combined the principles from *McGowen*, *Abington School District*, and *Walz* to create the following framework for Establishment Clause analysis: (1) the governmental action must have a secular purpose; (2) the primary effect cannot advance or inhibit religion; and (3) the action must not foster excessive entanglement with religion.[38] Thus, the Lemon test grew from criteria used by the Court in prior cases and was intended to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity."[39]

III. RECENT DEVELOPMENTS LEADING TO *Lamb's Chapel*

Since 1989 the Supreme Court has decided three important Establishment Clause cases. These cases are not only important because of their impact on the relationship between church and state, but also because they demonstrate that the Establishment Clause analysis is in transition. These recent attempts to clarify Establishment Clause analysis indicate that the Court may be ready to replace the Lemon test.

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36. *Id.* at 614; *see also* Michael W. McConnell, *Religious Clauses of the First Amendment: Where is the Supreme Court Headed?*, 32 CATH. LAW. 187, 188-89 (1989) (discussing separation of church and state and neutrality toward religion).

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

38. *Id.* at 612-13.

39. *Id.* at 612 (citing Walz v. Tax Commission, 397 U.S. 664, 668 (1970)).

A. County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter[40]

In *County of Allegheny*, the Court held, in a five-to-four decision, that a crèche displayed alone in a government building had the effect of communicating a government endorsement of religion.[41] Yet, a menorah placed next to a Christmas tree did not have the effect of endorsing religion.[42]

Although the Court applied the Lemon test, it focused on Justice O'Connor's endorsement approach.[43] Justice Blackmun wrote for the majority that the city "has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause."[44] This was the first time that the Court had applied the endorsement analysis to invalidate a state action. While the endorsement approach is not inconsistent with the Lemon test, it certainly is not required by Lemon's three-prong analysis. Consequently, the *County of Allegheny* decision has produced unclear precedent, and demonstrates an inconsistent application of the Lemon test.[45]

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40. 492 U.S. 573 (1989).

41. *Id.* at 595-600.

42. *Id.* at 621-25.

43. *Id.* at 601-02; *see also* Witters v. Department of Social Serv., 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part, concurring in judgment) (O'Connor's endorsement inquiry asks whether a "reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.").

44. *County of Allegheny*, 492 U.S. at 601-02.

45. *Compare* Doe v. City of Ottawa, 934 F.2d 743 (7th Cir. 1990) (holding that the display of sixteen pictures depicting the life of Christ in a city park violated the Establishment Clause *and* Smith v. County of Albemarle, 895 F.2d 953 (4th Cir. 1990) (finding that the display of a nativity scene on the front lawn of a county office building violated the Establishment Clause *with* Kreisner v. City of San Diego, 988 F.2d 883 (9th Cir. 1993) (holding that the display of eight scenes depicting the life of Christ in a public park did not violate the Establishment Clause) *and* Mather v. Village of Munpelein, 864 F.2d 1291 (7th Cir. 1989) (stating that the display of a nativity scene with secular holiday symbols on the lawn of the Village Hall did not violate the Establishment Clause).

For example, in *Lynch v. Donnelly*,[46] the Court held that a government sponsored crèche was permissible in the "context" of a traditional Christmas display so long as secular symbols, such as a Santa Clause house, candy striped poles, a Christmas tree, and cut out figures of a clown and elephant, were also included in the display.[47] The Court determined that the display advanced the legitimate secular purposes of celebration of a national holiday and the depiction of the origins of the holiday.[48] In addition, the inclusion of the crèche in the Christmas display did not have the primary effect of advancing religion since the inclusion of the crèche was "no more of an advancement or endorsement of religion" than other "endorsements" previously upheld by the Court.[49]

Although the Court attempted in *County of Allegheny* to reject the premise that some advancements or endorsements may be permitted, it "lost sight of the primary concern of the endorsement test, which is the effect that governmental displays of religious symbols may have on minorities and nonadherents."[50] Consequently, the endorsement test was applied in a subjective manner focusing on the context in which the crèche was displayed.[51] This analysis produced an inconsistent result, as it is difficult to conceive how a city sponsored menorah would not appear to be an endorsement of a particular religious faith to members of the community.

County of Allegheny not only signaled the acceptance by the majority of a modification of the Lemon test, but also demonstrated that four members of the Court oppose use of the endorsement test. Justice Kennedy wrote:

> The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a "reasonable observer" may "fairly understand" government action to "sen[d] a message to nonadherents that they are

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46. 465 U.S. 668 (1984).

47. *Id* at 679-85.

48. *Id.* at 681.

49. *Id.* at 682; *see, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the constitutionality of a state-sponsored chaplain).

50. Shahin Rezai, County of Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U.L. REV. 503, 533 (1990).

51. *Id.*

> outsiders, not full members of the political community," is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence.[52]

Justice Kennedy also criticized the majority for applying the endorsement test and ignoring precedent and historical fact.[53] Consequently, *County of Allegheny* demonstrates that the Justices strongly disagree on the proper analysis for Establishment Clause cases.

B. Board of Education of Westside Community Schools v. Mergens[54]

One area of Establishment Clause jurisprudence that has traditionally been subject to strict separationist treatment under *Lemon* is government action affecting public schools.[55] However, in *Mergens*, the Court upheld the Equal Access Act of 1984[56] and concluded that the Christian club of West Side High School in Omaha, Nebraska could not be denied access to school facilities based on the religious content of the meetings.[57]

The conflict arose when a group of students wished to form a Christian Bible study club that would meet on school property

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52. *County of Allegheny*, 492 U.S. at 668 (Justice Kennedy, with whom C.J. Rehnquist, J. White, and J. Scalia, join, concurring in part and dissenting in part).

53. *Id.* at 674.

54. 496 U.S. 226 (1990).

55. Edwards v. Aguillard, 482 U.S. 578 (1987) (banning teaching of creationism in public schools); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (prohibiting employment of parochial school teachers to teach secular subjects in public schools); Wallace v. Jaffree, 472 U.S. 38 (1985) (prohibiting a moment of silence in public schools); Stone v. Graham, 449 U.S. 39 (1980) (holding that the posting of the Ten Commandments in public schools is unconstitutional).

56. 20 U.S.C. §§ 4071-74 (1990).

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

20 U.S.C. § 4071(a).

57. *Mergens*, 496 U.S. at 235.

after school.[58] Although the school had no written policy regarding the formation of student clubs, school officials denied the request.[59] The decision was based on a school policy that required all student clubs to have a faculty sponsor.[60] The school officials explained that the proposed club could not have a faculty sponsor and would violate the Establishment Clause.[61]

The Equal Access Act is triggered if any "noncurriculum related student group"[62] can hold meetings on school premises during noninstructional periods.[63] The plurality reasoned that *Lemon* would not be violated since the purpose of the act was secular; the primary effect of the act would not promote religion since the act expressly prohibited school officials from promoting, leading, or participating in religious meetings; and denial of access might "create greater entanglement problems in the form of invasive monitoring to prevent religious speech."[64]

This holding extended the Court's reasoning in *Widmar v. Vincent*[65] that an "equal access" policy would not violate the Establishment Clause under the Lemon test.[66] Consequently, access to public school facilities by religiously oriented school groups is not only permissible, but is mandated by statute when noncurriculum related groups seek access to limited open forums.

The substantive effect of this decision removes the distinction that the Court made in *Widmar* between college and pre-college students.[67] In addition, a school now has an affirmative duty

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58. *Id.* at 231.
59. *Id.* at 232.
60. *Id.*
61. *Id.* at 233.
62. The Court defined a group as "curriculum related" if "the group's subject matter is actually taught, or will soon be taught, in a regularly offered course; if that subject matter concerns the body of courses as a whole; or if participation in the group is required for a particular course or results in academic credit." *Id.* at 227.
63. *Id.* at 236.
64. *Id.* at 253.
65. 454 U.S. 263 (1981).
66. *Id.* at 271-75.
67. In *Widmar,* the Court indicated that college students "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14. The same reasoning was applied to high school students in *Mergens.* 496 U.S. at 250.

to provide access to religious groups when school premises are open to use by other noncurriculum groups. However, the Court decided the case on statutory grounds and did not rule on whether the same result would be reached under the First Amendment.[68] Finally, the Court reverted to the standard *Lemon* analysis and did not apply Justice O'Connor's endorsement analysis.[69]

C. Lee v. Weisman[70]

Lee addressed the appropriateness of nonsectarian prayer in public school graduation ceremonies. A public school student and her father sought a permanent injunction to prevent inclusion of invocations and benedictions in graduation ceremonies of city public schools.[71] They contended that students should not be compelled by the state to conform to any religious ceremony even if the message was nonsectarian.[72]

In Rhode Island, public school principals are allowed to invite members of the clergy to give invocations and benedictions during graduation ceremonies.[73] Principal Lee invited a rabbi to give the invocation and benediction at Deborah Weisman's graduation.[74] The principal instructed the rabbi that the prayer must be nonsectarian and gave him guidelines for prayers at civic ceremonies.[75] The district court denied a motion for a temporary restraining order made by Deborah Weisman's father to prevent the school from including the prayers in the graduation ceremony. The Weismans attended the graduation where the prayers were recited.[76] Subsequently, Mr.

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68. *Mergens*, 496 U.S. at 252.

69. *But see id.* at 264 (Marshall, J., concurring) (expressing concern that allowing the Christian club access could signify an endorsement of religion); *see also id.* at 260 (Kennedy, J., concurring) (Justice Kennedy and Justice Scalia opposing the use of the *Lemon* test and advocating use of the "flexible accommodation" approach).

70. 112 S. Ct. 2649 (1992).

71. *Id* at 2654.

72. *Id.*

73. *Id.* at 2650.

74. *Id.*

75. *Id.*

76. *Id.*

Weisman sought a permanent injunction barring prayers in future graduation ceremonies.[77]

Here, the Court held that the pervasive degree of government involvement clearly violated the Establishment Clause.[78] The plurality, in yet another five-to-four decision, rejected the State's and United States', as amicus, argument that since students were free not to attend the ceremony there was no coercion by the State to force students to participate in formal prayer.[79]

Justice Kennedy expressed his concern over the pervasive government involvement:

> The State's role did not end with the decision to include a prayer and with the choice of clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayer.[80]

He pointed out that allowing such involvement by the State would suggest "that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds . . . ."[81] Furthermore, the high degree of involvement by school officials creates public pressure on those attending, even though, "subtle and indirect," and has an effect of coercing students to participate in religious exercise.[82]

Consequently, this case was decided without using the *Lemon* analysis. Instead, the Court focused on the coercive effect that the state action would have on the students as evidenced by Justice Kennedy's conclusion: "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and

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77. *Id.*
78. *Id.* at 2657.
79. *Id.* at 2659. The State relied on Marsh v. Chambers, 463 U.S. 783 (1983), in which the Court upheld the constitutionality of the Nebraska legislature's opening each session with a prayer by a chaplain paid with public funds.
80. *Id.* at 2656.
81. *Id.* at 2657.
82. *Id.* at 2658.

it is forbidden by the Establishment Clause of the First Amendment."[83]

Although *Lemon* was ignored, the *Lemon* analysis was not affirmatively rejected by the majority. "This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens."[84]

Yet in a concurring opinion by Justice Blackmun with whom Justices Stevens and O'Connor join, Justice Blackmun rejects, as a new test, the coercion approach taken by Justice Kennedy. Justice Blackmun asserts that "[a]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient."[85] These Justices analyzed the case using the *Lemon* framework, and reasoned that coercion indicates government is endorsing religion.[86]

Finally, the four dissenters argued that the Court should not ignore historical practices. Justice Scalia wrote that "[g]overnment policies of accommodation, acknowledgment, and support for religion . . . are an accepted part of our political and cultural heritage."[87] The dissenters rejected both the "psycho-coercion test" and the Lemon test as legitimate approaches to Establishment Clause analysis.[88]

Consequently, there is strong agreement among the Justices that *Lemon* is no longer a workable framework for Establishment Clause cases. However, there is also significant disagreement on which test should replace *Lemon*. This apparent disagreement led to the surprise return of the Lemon test in *Lamb's Chapel*.

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83. *Id.* at 2661.
84. *Id.* at 2655.
85. *Id.* at 2664 (Blackmun, J., concurring).
86. *Id.* (Blackmun, J., concurring).
87. *Id.* at 2678 (Scalia, J., with whom Rehnquist, C.J., White, J., and Thomas, J., join, dissenting) (citing Allegheny County v. Greater Pittsburgh Chapter, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part)).
88. *Id.* at 2685.

III. LEMON RETURNS: *Lamb's Chapel v. Center Moriches Union Free School District*[89]

In *Lamb's Chapel v. Center Moriches Union Free School District*, the Supreme Court held that the Center Moriches Union Free School District violated the free speech clause of the First Amendment by denying Lamb's Chapel access to public school premises to show a film depicting child rearing from a religious viewpoint.[90] Furthermore, the Court concluded that church access to the school premises was not a violation of the Establishment Clause of the First Amendment.[91] The Court once again applied the controversial Lemon test to analyze the Establishment Clause issue.

Lamb's Chapel sought permission to use public school facilities to show a six part film series on child rearing and family values.[92] The school board twice denied the request since the film "appear[ed] to be church related."[93] The board's decision was based on a brochure that described the content of the films. The church challenged the denial as a violation of the Freedom of Speech Clause, the Assembly Clause, the Free Exercise Clause, and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.[94]

The school board justified its decision to deny access to Lamb's Chapel based on section 414 of the New York Education Law.[95] That section authorizes local districts to promulgate rules and regulations for use of school property when the school property is not being used for school purposes. Local rule 10 allows social, civic, and recreational uses.[96] Rule 7 provides that "school premises shall not be used by any group for religious purposes."[97]

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89. 113 S. Ct. 2141 (1993).
90. *Id.* at 2145-47.
91. *Id.* at 2148-49.
92. *Id.* at 2144.
93. *Id.* at 2145.
94. *Id.*
95. Title I. Article 9 NY CLS Educ. § 414 (1993).
96. *Lamb's Chapel*, 113 S. Ct. at 2144.
97. *Id.*; *see also* Trietley v. Board of Educ., 65 A.D.2d 1, 5 (N.Y. App. Div. 1978) (holding "[r]eligious purposes are not included in the enumerated purposes for which

A. *Case Background*

The district court granted summary judgment for the School District.[98] The court determined that the facilities were a limited public forum.[99] Since the forum was not open to religious worship or instruction, denial of access to school facilities was viewpoint neutral and therefore did not violate the Free Speech Clause.[100] The district court also found that denying church access to the facilities did not demonstrate hostility toward religion and advancement of nonreligion.[101] Thus, the denial was not a violation of the Establishment Clause of the First Amendment.[102]

The United States Court of Appeals for the Second Circuit affirmed the lower court's decision holding that the forum was not a traditional public forum or a designated public forum. The appellate court agreed that the forum was a limited public forum, and as such any exclusions need only be reasonable and viewpoint neutral.[103]

B. *The Supreme Court Decision*

The United States Supreme Court looked at other uses of the forum and concluded that a lecture or film on child rearing and family values would be a use for social or civic purposes permitted by rule 10.[104] In addition, there was no "indication in the record before [the Court] that the application to exhibit the particular film involved here was or would have been denied for

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a school may be used under section 414.").

98. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 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).

99. *Lamb's Chapel*, 770 F. Supp. at 97.

100. *Id.* at 99.

101. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 736 F. Supp. 1247, 1253 (E.D.N.Y. 1990).

102. *Id.*

103. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 389 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

104. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147 (1993).

any reason other than the fact that the presentation would have been from a religious perspective."[105]

Since the topic here dealt with a subject that was permissible, the church could not be denied access to the forum. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[106] Having decided that the church was entitled to use the property, the Court addressed the issue of whether such use would be a violation of the Establishment Clause.

The Court concluded that allowing the group access to school property would not violate the Establishment Clause. First, the Court acknowledged that the State's interest in avoiding an Establishment Clause violation may justify an abridgment of protected free speech.[107] However, applying the Lemon test to these facts, there was no violation of the Establishment Clause.[108] The majority did not employ lengthy analysis to dispose of the Establishment Clause issue, but rather relied heavily on *Widmar v. Vincent*[109] to conclude that there was no danger of the community perceiving that the school district was endorsing religion.[110] In addition, any benefit to religion would only be incidental.[111]

C. *Analysis*

The position taken by the Court in *Lamb's Chapel* is significant for three main reasons. First, the decision expanded the equal access principles established in *Widmar* and further broadened in *Mergens*. Second, the holding is somewhat limited because the Court determined that Rule 7 was unconstitutionally applied, but refused to address the issue of whether the rule

105. *Id.*
106. *Id.* at 2147-48 (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).
107. *Id.* at 2148 (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981)).
108. *Id.*
109. 454 U.S. 263; *see also supra* text accompanying notes 65, 67.
110. *Lamb's Chapel*, 113 S. Ct. at 2418.
111. *Id.*

is facially invalid. Third, the Lemon test was resuscitated despite the Court's refusal to apply it in *Lee v. Weisman*.[112]

The principle from *Widmar* that a university is prohibited from discriminating against a registered student religious group by denying the group access to a generally open forum was expanded in *Mergens* to encompass limited forums in high schools. *Lamb's Chapel* broadens access to school facilities by allowing religious organizations, not comprised of school students, to use public school facilities which are open to other non-student groups. Since these outside organizations do not fall within the protection expressly afforded to students by the Equal Access Act, *Lamb's Chapel* provides constitutional protection, under the Free Speech Clause, for religious viewpoints so long as the non-public forum has been opened to the speaker's topic and the speaker is a member of a class that is entitled to use the particular forum.[113]

However, such access may be limited in the future since the Court did not rule on whether religious speech or conduct could be prohibited. Rule 7, prohibiting use of school property for religious purposes, was unconstitutional as applied in *Lamb's Chapel*. The Court acknowledged that the school could control access to the nonpublic forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral."[114] Nevertheless, the Court questioned the Second Circuit's support for holding that Rule 7 was reasonable.[115] Thus a total ban on religious use of school property could be attacked in the future under this theory.

Finally, the Lemon test was applied to settle the Establishment Clause issue and a majority of the Justices joined in the opinion. Not only did the Court apply the test, which is surprising since it ignored *Lemon* in *Weisman*, but six Justices supported use of the *Lemon* analysis. Both Chief Justice Rehnquist

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112. 112 S. Ct. 2649 (1992); *see supra* part III.C.
113. 113 S. Ct. at 2147.
114. *Id.* (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).
115. *Id.* at 2147 n.6.

and Justice White, who have opposed the Lemon test in the past, and most recently in the dissent in *Weisman*, joined the majority in *Lamb's Chapel* supporting use of the Lemon test.

Although Justices Kennedy, Scalia, and Thomas concurred in judgment, all three opposed the application of the Lemon test. Justice Kennedy felt that use of the Lemon test was "unsettling and unnecessary."[116] In addition, Justice Scalia voiced strong disapproval of the Lemon test.

> As to the Court's invocation of the Lemon test: Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.[117]

Despite clear opposition in the past to the continued use of the Lemon test by the Court, the Justices were once again, unwilling to replace *Lemon*.[118] In addition, use of the Lemon test was given stronger support than in recent decisions which indicated *Lemon* would be replaced.

IV. CONCLUSION

The future of the Lemon test remains as cloudy as it has been for the last decade. Further, a quick review of the current Justices' position does little to resolve the problems created by *Lemon*. Chief Justice Rehnquist and Justice Scalia, with whom Justice Thomas is now aligned, are clearly in favor of an accomodationist approach.[119] Justice Kennedy has taken a neutral approach but recognizes that "proper sensitivity to our traditions"[120] must be considered. He has favored the coercion

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116. *Id.* at 2149 (Kennedy, J., concurring in part and concurring in judgment).
117. *Id.* at 2149-50 (Scalia, J., concurring).
118. Justice Scalia noted that "no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so." *Id.* at 2150.
119. *See generally* Timothy V. Franklin, *Squeezing the Juice Out of the Lemon Test*, 72 Educ. L. Rep. 1 (West 1992) (discussing various positions taken by Justices).
120. County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989).

analysis to distinguish between actions that coerce religious beliefs and actions that accommodate the right to exercise one's faith.[121] Justice O'Connor favors the endorsement approach which would revise the Lemon test. Finally, Justice Stevens and Justice Souter advocate a strict separationist approach, but have not shown strong disapproval of *Lemon*.[122]

Justice Ginsburg's appointment may not significantly change this outlook. When pressed in confirmation hearings on her thoughts about the Establishment Clause, she acknowledged that Lemon was the test.[123] Although she seemed receptive to other avenues of analysis, she offered no replacement for the test.[124]

As a result, Establishment Clause analysis will likely remain a mystery. Until the Justices can agree on the fundamental principles on which the Establishment Clause was founded and on a workable replacement for the Court's current mode of analysis, *Lemon* is not likely to be replaced. "Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him."[125]

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121. *Franklin, supra* note 119, at 2.
122. *See* Lee v. Weisman, 112 S. Ct. 2649, 2668 (1992) (Souter, J., concurring) (accepting *Lemon* and advocating a strict separationist standard); Wallace v. Jaffree, 472 U.S. 38 (1985).
123. Marcia Coyle & Marianne Levelle, *Judge Ginsburg Gives Little Away at Hearings*, NAT'L L.J., Aug. 2, 1993, at 5.
124. *Id.*
125. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2150 (1993) (Scalia, J., concurring).