

1994

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14 Miss. C. L. Rev. 23 (1993-1994)

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RELIGIOUS PARTICIPATION IN PUBLIC DEBATE

*Matthew S. Steffey**

Lamb's Chapel, an evangelical Christian church, sought permission to use local public school facilities during non-school hours to show a six-part film series depicting "the undermining influences of the media that [can] only be counterbalanced by returning to traditional, Christian family values instilled at an early stage."¹ Center Moriches Union Free School District denied the request based on a school district rule which stated that "school premises shall not be used by any group for religious purposes."² At oral argument, the school district conceded that access would not be foreclosed to others who sought to present views on family problems.³ This provided the focal point for the Supreme Court's unanimous conclusion that to deny Lamb's Chapel access in these circumstances violated a basic free speech guarantee: Government may not discriminate on the basis of a speaker's viewpoint in deciding whether to grant a speaker access to government property.⁴

Under the free speech clause of the First Amendment, a school district's decision to deny a particular speaker after-hours access to school property is evaluated by reference to the district's general policy or practice concerning access to school property for communicative purposes. Speaking broadly, that policy can be placed along a line running from a policy of no access, through various policies that grant access to selected speakers and uses, to a policy of indiscriminate access.

At either end of this spectrum, current law renders the constitutional questions rather straightforward. On one hand, "[t]here is no question that [a school district], like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated . . . [and thus blanketly refuse to] permit[] after-hours use of its property"⁵

At the other extreme, a school district may choose to designate its property as a forum open for all communicative purposes and thereby subject itself to the constitutional standards that govern "traditional public fora" such as public sidewalks, streets, and parks.⁶ Those standards, among the most stringent in constitutional

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1. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2144 (1993).

2. *Id.*

3. See '*Censorship*' of Religious Speech, 61 U.S.L.W. 3609, 3611 (March 9, 1993).

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

5. *Id.* at 2146 (citations omitted).

6. *Id.* The Court has suggested that government may be deemed to have opened its property for all communicative purposes if it is sufficiently indiscriminate about groups granted access. See *id.*

law, require "subject-matter or speaker exclusion . . . to be justified by a compelling state interest and to be narrowly drawn to achieve that end."⁷

Analytical nuance only arises when a school district decides to open its property for some, but not all, communicative activity. For those who fall within the categories of speakers or uses granted access, a denial of access must satisfy the test of strict scrutiny applicable to denials of access to traditional public fora.⁸ Regarding such speakers and uses, the forum is public, albeit for a limited universe of speakers and uses.

Regarding speakers and uses that fall outside the categories granted access, however, the forum remains "nonpublic." Denials of access need only meet the softer and more elastic standards of reasonableness and viewpoint neutrality.⁹ Specifically,

[w]ith respect to public property that is not a [traditional or] designated public forum open for indiscriminate public use for communicative purposes, . . . "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral."¹⁰

In *Lamb's Chapel*, the constitutional defect in the exclusion of the religious film series was that it forbade presentation of a religious view on a subject otherwise designated for access.¹¹ In the Court's words,

"[while] a speaker may be excluded from a non-public 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." The film involved here no doubt dealt with a subject otherwise permissible under [the school district's policy], and its exhibition was denied solely because the film dealt with the subject from a religious standpoint.¹²

Two things about the *Lamb's Chapel* decision are most noteworthy. The first is that the Court considered the free speech issue uncontroversial. Not a whisper of dissent was raised against the conclusion that, in these circumstances, religious views regarding an issue have the same constitutional stature as non-religious views. This is not to say, though, that the Court's resolution of the free speech

7. *Id.*

8. *Id.*

9. *Id.* at 2147. While now apparently settled, the development of constitutional standards applicable to policies of selective access to government property (other than traditional public fora) proved both confusing and the subject of much contention. *Cf.* *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992); *U.S. v. Kokinda*, 497 U.S. 720 (1990); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

10. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2147 (1993) (citations omitted) (quoting *Cornelius*, 473 U.S. at 806).

11. *Id.*

12. *Id.* (quoting *Cornelius*, 473 U.S. at 806).

question is of no moment. Many religious groups espouse a religious view on every subject, and *Lamb's Chapel* holds that government may not exclude from public debate those who wish to present a religious perspective. The importance of this conclusion can be seen by comparing it to an alternative rejected by the Court. The Court was asked to conclude, but did not, that the school board permissibly excluded a subject—religion—from the forum, but did not exhibit viewpoint bias by favoring one religious perspective over another.¹³

The second point that bears mention is that the decision leaves many Free Speech and Establishment Clause questions unanswered. The decision does not say whether a school district can open its property for religious purposes but exclude other groups. It does not say whether a school district can, conversely, open its property for a small range of outside groups and activities—say athletic events, charity fundraising, and political elections—but exclude religious worship.¹⁴ In fact, it does not even say whether a school district can open its property for such a limited set of groups and activities and *include* religious worship.¹⁵ Each of these situations presents an Establishment Clause challenge more serious than the one raised in *Lamb's Chapel*.¹⁶ Moreover, each requires a determination under the Free Speech Clause of the reasonableness of the school board's policy, an issue not reached in *Lamb's Chapel* and one which the Supreme Court has usually resolved in government's favor.¹⁷

These two points provide the focus for the two papers that follow, the first written by counsel for *Lamb's Chapel*, the other by counsel for Center Moriches Union

13. *See id.*

14. For such a school district policy to be unconstitutional, the Court arguably must relax the present constraints of the Establishment Clause while simultaneously tightening the constraints of the Free Speech Clause. Thus, a justice inclined to allow government more discretion generally, including more latitude under the Establishment Clause to confer benefits on religious groups, would not necessarily strike down a government decision not to confer such benefits. *Cf.* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992) ("Initial decisions suggest that the Rehnquist Court may replace the reflexive secularism of the Warren and Burger Courts with an equally inappropriate statism. Just when the Court appears to be shedding its inordinate distrust of religion, it appears to be embracing an inordinate faith in government.").

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

The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. [School] District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar* [v. Vincent, 454 U.S. 263 (1981)], 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. As in *Widmar*, permitting 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*.

Id. (emphasis omitted) (citations omitted). *Widmar* involved a student religious group that sought access to a forum otherwise completely open to student groups. *Widmar*, 454 U.S. at 271-72.

16. It is interesting to note that even the majority's summary discussion of an essentially settled Establishment Clause question drew two pointed responses. *Compare Lamb's Chapel*, 113 S. Ct. at 2148 (White, J., majority), with *id.* at 2149 (Kennedy, J., concurring), and *id.* (Scalia, J., concurring).

17. *See, e.g.,* *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985) (exclusion upheld); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (same). *See also* *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (ban on solicitation upheld); *U.S. v. Kokinda*, 497 U.S. 720 (1990) (same). *But see* *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987) (complete ban on First Amendment activities in the Los Angeles International Airport struck down because no conceivable government interest could justify such an absolute prohibition on speech).

Free School District. Predictably, the first essay seeks to cast the decision as a pronouncement with broad implications for the constitutional protection of religious speech and activity, while the second would paint the case as one of little or no consequence. Counsel for Lamb's Chapel argues that the Free Speech, Establishment, and Equal Protection Clauses require a broad rule of access for religious speech and speakers; counsel for the school district, in contrast, finds it hard to understand why the Court chose to hear the case at all. Such a divergence of views is bound to warrant more reflection than might initially be suggested by an opinion on a free speech issue that commanded unanimous assent from the Court and which spans a scant two pages in the official reports.¹⁸

18. *Lamb's Chapel*, 113 S. Ct. at 2147-49 (free speech discussion comprises two of the majority's five-page opinion).