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Protecting Religious Speakers' Access to Public School Facilities: *Lamb's Chapel v. Center Moriches School District*

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PROTECTING RELIGIOUS SPEAKERS' ACCESS TO PUBLIC SCHOOL FACILITIES: *LAMB'S CHAPEL V. CENTER MORICHES SCHOOL DISTRICT*

I. INTRODUCTION

In numerous instances in the past, schools and courts have demonstrated a great deal of hostility toward religion in general and toward Christianity in particular.[1] Recently, however, the Supreme Court took a significant step toward ending such bias. In *Lamb's Chapel v. Center Moriches School District*,[2] the Supreme Court ruled that school districts may not prohibit the use of their facilities by religious organizations when other groups are permitted to use the facilities under similar circumstances.[3] *Lamb's Chapel* is important because it applies the concept of equal access to private groups, expanding prior decisions which held that students wishing to engage in religious speech could not be denied access to school facilities based upon the content of their beliefs.[4] The Court also began moving toward the reversal of a long trend of judicial bias against religion that has resulted in a number of decisions adverse to persons seeking to express religious viewpoints in the public schools.[5] Finally, the decision in *Lamb's Chapel* provides a power-

1. *See infra* notes 87-101 and accompanying text.

2. 113 S. Ct. 2141 (1993).

3. *Id.* at 2147.

4. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding Congressional guarantees of equal access); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (requiring universities to provide equal access to religious student groups).

5. *See infra* notes 87-101 and accompanying text. *See generally* Frederick M. Gedicks, Essay, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 681 (1992) ("The privileging of secular knowledge in public life as objective and the marginalizing of religious belief in private life as subjective has been a foundational premise of American jurisprudence under the Religion Clause of the First Amendment."); *see also* George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 864, 868 (1988) ("[S]everal studies buttress the [contention] that the public school curriculum is systematically biased against Protestant Christianity.").

ful new weapon for pro-Christian legal advocacy groups, most notably the American Center for Law and Justice, that seek to strengthen the rights of religious speakers through litigation in the courts.[6]

II. BACKGROUND

Before discussing the *Lamb's Chapel* decision, it is important to review prior decisions dealing with similar first amendment issues.[7] In the 1960s and 1970s, the Supreme Court handed down a number of decisions limiting religious activities in the public schools,[8] pursuant to the Establishment Clause of the First Amendment.[9] At the same time, the Court recognized that the First Amendment guarantees the free speech rights of high school students,[10] that religious speech is afforded the same level of protec-

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6. *See infra* notes 105-12 and accompanying text. The American Center for Law and Justice (hereinafter ACLJ) was established in 1990 by former presidential candidate and founder of the Christian Broadcasting Network, Pat Robertson. *See* David Bauman, *Conservative Lawyers Argue Religious Free Speech Case*, Gannett News Service, February 23, 1993, *available in* LEXIS, Nexis Library, Current File. The stated purpose of the ACLJ is "Christian advocacy and the promotion of pro-liberty, pro-life and pro-family causes." Richard Willing, *Mich. School Superintendent Studying Graduation Prayers*, Gannet News Service, June 5, 1993, *available in* LEXIS, Nexis Library, Current File. In pursuit of these goals, the ACLJ provides free legal services to Christians who feel that their constitutional rights have been violated and regularly challenges liberal advocacy groups such as the American Civil Liberties Union (hereinafter ACLU). *See* Roy Rivenburg, *Robertson Lawyers Aid Conservative Christians*, HOUSTON CHRONICLE, February 6, 1993, at 3, *available in* LEXIS, Nexis Library, Current File (describing some of the cases for which the ACLJ is providing free legal services).

7. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .").

8. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) (banning the reading of the Bible and the recitation of the Lord's Prayer at the start of each school day); Engel v. Vitale, 370 U.S. 421, 424 (1962) (banning school-sponsored prayer at the start of each day).

9. U.S. CONST. amend. I (stating in part that "Congress shall make no law respecting an establishment of religion"). In Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), the Court determined that, in order to survive an Establishment Clause challenge, a state action: "[M]ust have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (citations omitted). Several Supreme Court Justices have criticized this framework as "contrary to the long-range interests of the country." Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 400 (1985) (White, J., dissenting); *accord* Aguilar v. Felton, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting).

10. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to

tion as other forms of speech,[11] and that the Constitution forbids government hostility toward religion.[12]

The line of cases involving access to school facilities by religious groups began with the Supreme Court's decision in *Widmar v. Vincent*,[13] wherein the Court determined that a public university that allowed all student groups to meet on university property could not exclude religious groups based upon the content of their beliefs.[14] The University of Missouri at Kansas City had adopted a policy forbidding student groups to use university facilities "for purposes of religious worship or religious teaching."[15] The Court determined that the university's policy "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion."[16] The Court also determined that, although the university may have a compelling interest in complying with the Establishment Clause, an argument which was also advanced by the school district in *Lamb's Chapel*, "[i]t does not follow . . . that an 'equal access' policy would be incompatible [therewith]."[17] Despite the Supreme Court's decision in *Widmar*, the Federal Courts of Appeals began striking down equal access policies under the Establishment Clause.[18] For example, in *Lubbock Civil Liberties Union v. Lubbock Independent School District*,[19] the court struck down a policy allowing student religious groups to use school facilities "on the same basis as other groups."[20] These courts almost universally

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freedom of speech or expression at the schoolhouse gate.").

11. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 653 (1981) ("[N]onreligious organizations . . . are entitled to rights equal to those of religious groups to enter a public forum and spread their views . . . .").

12. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

13. 454 U.S. 263 (1981).

14. *Id.* at 277.

15. *Id.* at 265.

16. *Id.* at 269.

17. *Id.* at 271.

18. *See, e.g.*, Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1045-46 (5th Cir. 1982) (distinguishing *Widmar* on the basis that university students are less likely than younger students to equate equal access with an endorsement of religion), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980) (finding no equal access when the forum was a public high school and the speech consisted of prayer meetings), *cert. denied*, 454 U.S. 1123 (1981).

19. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

20. *Id.* at 1041.

determined that "even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit."[21] The Circuit Courts have also taken the position that the Establishment Clause provided a compelling governmental interest in the exclusion of religious speakers from the schools.[22] In response to these decisions, Congress passed the Equal Access Act[23] designed to curtail content-based restrictions on student meetings within secondary schools. The Supreme Court upheld the constitutionality of the Equal Access Act in *Board of Education v. Mergens*,[24] finding that "[t]he Establishment Clause does not license government to treat religion and those who teach and practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[25] However, the Supreme Court also decided a number of cases which have severely disadvantaged those seeking to express their religious views in the schools. For example, in *Wallace v. Jaffree*,[26] the Court struck down a statute requiring a moment of silence at the beginning of the school day for the purpose of allowing students to meditate of pray on a voluntary basis.[27]

III. THE *LAMB'S CHAPEL* DECISION

A. Facts

The Center Moriches Union Free School District, located in Suffolk County, New York, adopted a policy that opened its fa-

21. *Brandon*, 635 F.2d at 978; *see also Lubbock*, 669 F.2d at 1045 ("[A]llowing religious meetings at a time closely associated with the beginning or end of the school day implies recognition of religious activities and meetings as an integral part of the District's extracurricular program and carries with it an implicit approval by school officials of those programs.").

22. *See Brandon*, 635 F.2d at 980 ("While students have First Amendment rights to political speech in public schools. [sic] sensitive Establishment Clause considerations limit their right to air religious doctrines.") (citation omitted); *cf. Lubbock*, 669 F.2d at 1046 ("[A]uthorization of voluntary meetings held before or after school . . . has the primary effect of advancing religion.").

23. Equal Access Act, 20 U.S.C. §§ 4071-74 (1988) (declaring it unlawful for a public secondary school, which receives federal funding and has a limited open forum, to deny equal access to, or to discriminate against, any students who wish to conduct a meeting at that school on the basis of the religious content of the speech at such meetings).

24. 496 U.S. 226 (1990).

25. *Id.* at 248.

26. 472 U.S. 38 (1985).

27. *Id.* at 60.

cilities to a wide variety of groups pursuant to New York state law.[28] On November 19, 1988, Lamb's Chapel, an evangelical Christian group, sought permission to use school facilities to conduct a Sunday morning worship service.[29] Thereafter, on two separate occasions, Lamb's Chapel sought permission to use the school facilities for the purpose of showing a five-part film series containing lectures by Doctor James Dobson, described as a "Family oriented movie—from the Christian perspective."[30] School officials denied each request stating that "[t]his film does appear to be church related and therefore your request must be refused."[31]

B. District Court Proceedings

Lamb's Chapel and its pastor John Steigerwald filed suit against the school district in the United States District Court for the Eastern District of New York, seeking declaratory and injunctive relief on the grounds that the school district's refusal to grant permission to show the requested films violated their rights under the First and Fourteenth Amendments.[32] On May 16, 1990, the Court refused to grant Lamb's Chapel's request for a preliminary injunction.[33] Thereafter, on July 15, 1991, the District Court granted summary judgment in favor of the school district.[34] The court distinguished the Supreme Court's decision in *Board of Education v. Mergens*[35] on the ground that *Mergens* was decided on the basis of the Equal Access Act, which granted rights only to students; thus, "[n]either Congress nor the Supreme Court has seen fit to require a school district to open its doors to nonstudents who wish

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28. N. Y. EDUC. LAW § 414 (McKinney 1988 & Supp. 1993) (allowing schools to be opened for a wide variety of purposes); *see also* Brief for Petitioners at 4-6, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024) [Hereinafter *Petitioner's Brief*] (listing the various groups which had conducted activities in school functions in Center Moriches and describing their activities). The statute and the school district policy listed the permissible uses of school facilities by outside groups, but religious activities were not included in this list.

29. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91, 92 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

30. *Lamb's Chapel*, 113 S. Ct. at 2145.

31. *Id.* at 2144-45.

32. *Petitioner's Brief*, *supra* note 28, at 8-9.

33. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 736 F. Supp. 1247, 1254 (E.D.N.Y. 1990).

34. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp 91, 99 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

35. 496 U.S. 226 (1990). *See supra* notes 24-25 and accompanying text (discussing the case).

to use school facilities for the purpose of conducting religious activities within a school."[36] The court then held that the schools were neither traditional public fora nor designated public fora[37] because the New York statute limited the permissible uses of the school buildings. The court also determined that religious speech could be excluded as a nonpermitted use "where a school district has not, by policy or practice, permitted a similar use in the past."[38]

C. *The Second Circuit Opinion*

On March 18, 1992, the Second Circuit affirmed the decision of the District Court.[39] The court first determined that "the school property in question falls within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses."[40] Like the District Court, the court based its conclusion on the fact that religious uses were not mentioned in the applicable New York statute.[41] The court then found that the

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

37. *Id.* at 97-98. The Supreme Court has determined that the degree of protection given to speech by the First Amendment depends upon the type of forum in which the speaker wishes to express his or her views. Generally, there are three types of fora for purposes of First Amendment analysis. First, traditional public fora such as streets and parks have "been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939) (plurality opinion); *see also* United States v. Grace, 461 U.S. 171, 179 (1983) (overturning a ban on expressive activity outside the Supreme Court building). In traditional public fora, the government may enforce reasonable time, place, and manner restrictions on speech, provided the restrictions "'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Id.* at 177 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

The second type of forum is known as a "designated public forum" and has been defined as an area where a "[s]tate has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n,* 460 U.S. at 45. In a designated public forum, the state cannot exclude a class of speakers "even if it was not required to create the forum in the first place." *Id.* Thus, as long as the forum is held open, traditional public forum rules apply. *Id.* at 46.

Finally, in a nonpublic forum, speech can be regulated to a greater degree. The Supreme Court has concluded that "control over access to a nonpublic forum can be 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." Cornelius v. NAACP, 473 U.S. 788, 806 (1985).

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

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

40. *Id.* at 386.

41. *Id.* at 386-87.

exclusion of Lamb's Chapel met the requirement of viewpoint neutrality because the school district had not permitted any religious uses of school property that would amount to opening the forum to religious speech.[42] The Second Circuit agreed with the lower court that "none of the prior uses pointed to by [Lamb's Chapel] were for religious purposes."[43] The court concluded that "the facilities were limited forums not opened to religious uses by policy or practice and there was no constitutional violation in the failure of the School District to afford access to [Lamb's Chapel]."[44]

D. The Supreme Court Decision

On June 7, 1993, the Supreme Court unanimously reversed the Second Circuit's decision.[45] Writing for the Court, Justice White began by rejecting the forum analysis applied by the lower courts stating that "even if the courts below were correct in this respect—and we shall assume for present purposes that they were—the judgment below must be reversed" because the exclusion of Lamb's Chapel was not reasonable and viewpoint neutral as required by the Supreme Court's decision in *Cornelius v. NAACP*.[46] The Court rejected the lower courts' finding that the exclusion was viewpoint neutral because their reasoning "does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint."[47] The Court found no "indication in the record . . . that the application to exhibit the particular film involved here was or would have been denied for any reason other than the fact that the presentation would have been from a religious perspective."[48] Thus, the denial of access to Lamb's Chapel violated the First Amendment because

> [a]lthough a speaker may be excluded from a non-public

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42. *Id.* at 388.
43. *Id.*
44. *Id.*
45. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993).
46. *Id.* at 2147; *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91, 98 (E.D.N.Y. 1991) (setting forth the test from Cornelius v. NAACP, 473 U.S. 788, 866 (1985), regarding regulation in a non-public forum).
47. *Lamb's Chapel*, 113 S. Ct. at 2147.
48. *Id.*

> 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.[49]

The Court also rejected the school district's claim that allowing Lamb's Chapel to show the films would violate the Establishment Clause.[50] The school district argued that a court-ordered policy of unlimited access would violate the Establishment Clause because it would be government advancement of religion.[51] Calling the school district's fears "unfounded," the Court stated that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed."[52] Thus, the Court held that the use of the school by Lamb's Chapel met the standards of *Lemon v. Kurtzman*.[53]

The Court also summarily rejected the school district's argument that the exclusion of Lamb's Chapel, which the district termed a "radical . . . religious organization,"[54] was justified because "it is sensible to anticipate that certain groups' use of facilities . . . would give rise to a volatile and destructive situation."[55] The Court stated that "[t]here is nothing in the record to support such a justification, which in any event would be difficult to defend."[56] For these reasons the Court reversed the judgment of the lower courts.[57]

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49. *Id.* (quoting Cornelius v. NAACP, 473 U.S. 788, 806 (1985)).

50. *See* Brief For Respondents at 27-30, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (No. 91-2024) [hereinafter *Respondent's Brief*].

51. *Id.* at 27; *cf.* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1064 (6th Cir. 1987) (holding that accommodating Christianity in the schools violated the Establishment Clause), *cert. denied*, 484 U.S. 1066 (1988); Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1045 (5th Cir. 1982) (holding that allowing equal access to school facilities by Christian groups violated the Establishment Clause), *cert. denied*, 459 U.S. 1155 (1983).

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

53. *Id.*; *see also supra* note 9 and accompanying text (discussing the *Lemon* test).

54. *Id.* at 12.

55. *See Respondent's Brief*, *supra* note 50, at 4-5.

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

57. *Id.* at 2149. Two concurring opinions were filed, one by Justice Kennedy and one written by Justice Scalia and joined by Justice Thomas. *Id.* Both of these opinions criticized the Court's use of the *Lemon* test to determine the issue of whether allowing

IV. ANALYSIS

The decision in *Lamb's Chapel* is significant for a number of reasons. First, the Court extended the right of equal access to school facilities beyond the provisions of the Equal Access Act and placed these rights within the protection of the First Amendment.[58] The Court also extended the right of equal access by granting first amendment protection to private groups in addition to students.[59] The Court's reasoning indicates that several lower court decisions limiting the access of religious groups to school facilities should now be decided differently. For example, in *Berger v. Rensselaer Central School Corp.*,[60] the court decided that a school district that allowed the Gideons to distribute Bibles to school children under the district's equal access policy violated the Establishment Clause because "expression may be stifled in the govern-ment's vigilance to remain neutral toward religion."[61] Holding the school district's equal access policy unconstitutional, the court stated that "[a] public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech."[62]

In *Doe v. Human*,[63] the court determined that a school district violated the Establishment Clause by allowing volunteers to enter the schools to teach voluntary Bible classes for the purpose of balancing the schools' endorsement of secular humanism.[64] In support of its holding, the court stated that "[e]ven if [the school district [has] established one religion (secular humanism), such

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Lamb's Chapel to utilize the school's facilities would violate the Establishment Clause. *Id.* at 2149-50. Justice Scalia stated "I would hold, simply and clearly, 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 (Scalia, J., concurring).

58. *See* Board of Educ. v. Mergens, 496 U.S. 226, 253 (1990) ("Because we hold that petitioners have violated the [Equal Access] Act, we do not decide respondents claims under the Free Speech [Clause].").

59. The Supreme Court's prior decisions addressing equal access issues all dealt exclusively with the rights of students. *See, e.g.*, Mergens, 496 U.S. at 231-32; Wallace v. Jaffree, 472 U.S. 38 (1985).

60. 982 F.2d 1160 (7th Cir.), *cert. denied*, 113 S. Ct. 2344 (1993).

61. *Id.* at 1168.

62. *Id.*

63. 725 F. Supp. 1503 (W.D. Ark. 1989), *aff'd*, 923 F.2d 857 (8th Cir. 1990), *cert. denied*, 499 U.S. 922 (1991).

64. *Id.* at 1506.

conduct does not allow them to establish a second (Christianity)."[65]

Lamb's Chapel also will help those students who seek to express their religious views in the public schools by expanding their rights beyond the terms of the Equal Access Act and placing their emphasis instead on the First Amendment. Applying the logic of the *Lamb's Chapel* Court, numerous lower court decisions regarding the free speech rights of religious children are now of questionable validity. Especially dubious is the decision in *Nartowicz v. Clayton County School District*,[66] wherein the court held that allowing meetings of a Christian student group violated the Establishment Clause.[67] Similarly, in *DeNooyer v. Livonia Public Schools*,[68] the court upheld a school district's decision to prohibit a second grade student from showing a videotape of herself singing a Christian song during "show and tell" while allowing Jewish students to display menorahs and other religious symbols.[69]

Under *Lamb's Chapel*, the exclusion of each of these groups and individuals based solely upon the religious content of their messages is clearly unconstitutional. Justice White's majority opinion unequivocally states that "denial on that basis was plainly invalid."[70] As one commentator has stated, the First Amendment grants religious bodies the right to "act as agents for transmitting the operative values of society by formulating and articulating the moral aspects of political questions."[71] Thus, the Court's decision opens the door to even greater free speech rights of Christians in the public schools.[72]

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65. *Id.* at 1508 n.2; *see also* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (noting that "[e]fforts to achieve [balance in the school curriculum] would lead to a forbidden entanglement of the public schools in religious matters"); James E. Wood, Jr., *Religion and the Public Schools*, 1986 B.Y.U. L. REV. 349, 356 (1986) (arguing that public schools must remain secular in their teachings).

66. 736 F.2d 646 (11th Cir. 1984).

67. *Id.* at 649. In Garnett v. Renton Sch. Dist. No. 403, 874 F.2d 608, 613 (9th Cir. 1989), *vacated on other grounds*, 496 U.S. 914 (1990), the Court determined that a school district properly denied a Christian group permission to meet prior to the beginning of the school day because "[t]he district's exclusion of religious groups from its cocurricular program is not only reasonable, but also constitutionally required."

68. 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd*, 1 F.3d 1240 (6th Cir. 1993).

69. *Id.* at 753-54.

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

71. Edward M. Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 285 (1992).

72. Even members of groups opposed to the decision in *Lamb's Chapel*, admit that the

Additionally, the Court's holding that nondiscriminatory equal access plans do not violate the Constitution should help to dispel the notion that merely permitting religious speech is equivalent to establishing an official religion.[73] Professor Michael McConnell stated that "I don't think people realize how common it is for religious speakers to be suppressed in public schools. This decision says public spaces will not be treated as religion-free zones."[74] One commentator has insightfully observed that "[p]erhaps in a totalitarian state the government implicitly endorses all that it does not censor. But no such inference can be drawn in a nation with a constitutional guarantee of free speech."[75] However, a number of courts have relied upon this reasoning to uphold the removal of religious speakers from school facilities. For example, in *Jager v. Douglas County School District*,[76] the court ruled that an equal access plan permitting various groups to give invocations prior to high school football games violated the Establishment Clause stating that "invocations permitted by the equal access plan convey the message that the state endorses religions believing in prayer."[77] As one commentator has stated, "[v]iewpoint discrimination does not become any more palatable because it is used in conjunction with the Establishment Clause."[78] By disapproving a similar argument

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decision paves the way for greater protection of the free speech rights of religious speakers. *See Sonya Live: God & School* (CNN television broadcast, June 8, 1993), *available in* LEXIS, Nexis Library, Current File. (Lisa Thurau, acting chair of the New York State Committee for Public Education and Religious Liberty, referred to *Lamb's Chapel* as "just the beginning, a foot in the door" and stated that "there's more to come after this").

73. *See Lamb's Chapel*, 113 S. Ct. at 2148 (asserting that using district property to show a film on family values, where told from a religious standpoint, was not an establishment of religion under *Lemon*). A number of prior Court decisions had reached the opposite result. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989), wherein the Supreme Court decided that allowing a private group to display a nativity scene on government property "sends an unmistakable message that it supports and promotes . . . Christian praise to God." *But cf.* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir.1987) (holding that the mere exposure to anti-religious materials is permissible under the Constitution).

74. Max Boot, *High Court Sends Signals on Church, State Issue*, THE CHRISTIAN SCI. MONITOR, June 9, 1993, at 8, *available in* LEXIS, Nexis Library, Current File (citation omitted).

75. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 14 (1986).

76. 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

77. *Id.* at 832; *see also* Joki v. Board of Educ., 745 F. Supp. 823, 831 (N.D.N.Y. 1990) (holding that a school district violated the Establishment Clause by refusing to censor the display of student artwork containing religious images because such images transmit a message of the endorsement of religion).

78. John W. Hamilton, Note, Bishop v. Aronov: *Religion-Tainted Viewpoints are*

in *Lamb's Chapel*, the Court unquestionably has weakened similar arguments that may arise in future cases.

By extending equal access rights to private speakers, the *Lamb's Chapel* Court took an important step toward eliminating bias against religion and toward a true policy of neutrality toward religious speech.[79] In recent years, courts and educators, in alliance with a number of liberal interest groups, have undertaken extensive efforts to remove Christian ideas from the public schools.[80] For example, in *Roberts v. Madigan*,[81] a teacher read from his own Bible during silent reading periods and placed a number of books discussing Christianity, Buddhism, Native American religions, and Greek gods and goddesses in his classroom library.[82] Under the auspices of the Establishment Clause, the principal ordered the teacher to cease reading the Bible and to remove only the books dealing with Christianity.[83] The court upheld the principal's actions on the ground that the teacher "substantially infringed on the rights of [his] students" by placing the Christian books in the classroom.[84] Now that the Supreme Court

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Banned From the Marketplace of Ideas, 49 WASH. & LEE L. REV. 1557, 1589 (1992).

79. *See* Laycock, *supra* note 75, at 14 ("[P]rotecting religious and antireligious speech equally with secular speech is far more neutral than singling out religious and antireligious speech for special treatment.").

> If the Establishment Clause means that anything that receives public funds must be devoid of religion, then given the ever expanding role of the government in education, the religious principles upon which our country was founded will be excluded unfairly from the academic forum. This application of the Establishment Clause is not religion-neutral, it is anti-religion.

Hamilton, *supra* note 78 at 1590.

80. For example, in New York City, "dozens of Long Island organizations" held a series of workshops for the purpose of preventing members of The Christian Coalition from holding positions on local school boards. Roni Rabin, *Challenging the Religious Right: Aim to "out" Christian Coalition*, NEWSDAY, May 21, 1993 at 25, *available in* LEXIS, Nexis Library, Current File; *see also* Gerald V. Bradley, *Protecting Religious Liberty: Judicial and Legislative Responsibilities*, 42 DEPAUL L. REV. 253, 257 (1992) (stating that as judicially interpreted from 1947 until very recently, "the First Amendment was hostile to all religion that was not privatized"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 134 (1992) ("The Religion Clause jurisprudence of the Warren and Burger era was . . . characterized by a hostility or indifference to religion, manifested in a weak application of free exercise doctrine and an aggressive application of an establishment doctrine systematically weighted in favor of the secular and against genuine religious pluralism.").

81. 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992).

82. *Id.* at 1049, 1055.

83. *Id.* at 1055.

84. *Id.* at 1058.

has granted religious groups a constitutional right of equal treatment, this bias may soon come to an end.

In *Abington School District v. Schempp*,[85] Justice Goldberg, in a concurring opinion, warned that judicial overreliance on the principle of religious neutrality could lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."[86] However, judges have not heeded Justice Goldberg's warning and have often expressed open hostility toward religion. One of the most common arguments advanced by judges and legal commentators is that religious individuals are intolerant of opposing viewpoints; therefore, they wish to indoctrinate others in their beliefs for the purpose of obtaining power over society.[87] For example, in *Board of Education v. Allen*,[88] the Court upheld a program allowing a public school to loan books to religious schools.[89] In a dissenting opinion, Justice Black stated that the law allowing the loan program was passed by "sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes [and who] can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion."[90] Another federal judge wrote that a group of students who opposed the teaching of evolution on religious grounds were "totalitarian" and wished to engage in "book-burning."[91] One commentator has suggested that when faced with competing beliefs or ideas inconsistent with their own, religious individuals may engage in "intolerance, repression, hate, and persecution."[92] As a result, "the erection of a presumptive barrier

85. 374 U.S. 203 (1963).

86. *Id.* at 306 (Goldberg, J., concurring); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that judges send "a clear message of disapproval [of religion]" when they act as "jealous guardians of an absolute 'wall of separation' [between religion and government]"); Gaffney, *supra* note 71, at 293 ("[C]omplete indifference to religion on the part of government is just a lethal to religious freedom [as official hostility]").

87. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1068-69 (6th Cir. 1989) (characterizing Christians as intolerant), *cert. denied*, 484 U.S. 1066 (1988).

88. 392 U.S. 236 (1968).

89. *Id.* at 248.

90. *Id.* at 251 (Black, J., dissenting).

91. Wright v. Houston Indep. Sch. Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974); *see also* Deeper Life Christian Fellowship v. Board of Educ., 852 F.2d 676, 680 (2d Cir. 1988) (stating that a church desiring to conduct services in a school auditorium while the church was renovated were seeking "a forum for proselytizing or indoctrinating the public").

92. William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L. J. 843, 858

against religious participation in the public square is defensible."[93]

In addition to characterizing religious speakers in an improper light, some judges have engaged in outright bigotry against certain religions.[94] For example, in the case on *Lemon v. Kurtzman*,[95] in his concerning opinion Justice Douglas cited a book that has been labeled by one commentator as "one of the most notorious anti-Catholic polemical tracts of recent times."[96] The work cited by Justice Douglas recommends that Catholics be forbidden from holding public office and stated that parochial schools are "taught by ignorant European peasants" and produce "an undue proportion of the gangsters, racketeers, thieves, and juvenile delinquents who roam our big city streets."[97]

Lower federal courts have also practiced a great deal of anti-religious bigotry. For example, in *Grove v. Mead School District No. 354*,[98] the court upheld the inclusion in the public school curriculum of a book containing threats to "blow the ass off Jesus Christ, the long-legged white son-of-a-bitch" and referring to God as "a poor white trash God."[99] Going further, the court stated that accommodation of the wishes of Christians posed a "critical threat to public education."[100] Finally, in *Berger v. Rensselaer Central School Corp.*,[101] the court felt that allowing the Gideons access to the schools was a more serious constitutional violation than allowing a Rabbi to lead a graduation prayer because the Gideons' views were "Christian."[102]

The school district in *Lamb's Chapel* made a similar argument based upon the premise that religious groups are so intolerant that

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(1993). Professor Marshall also refers to religion as "dogmatic," "authoritarian," and "frightening." *Id.* at 852, 853.

93. *Id.* at 863.

94. *See generally* McConnell, *supra* note 80, at 121-22 (accusing Justice Black of "bigotry"); Gaffney, *supra* note 71, at 279-83 (tracing the history of judicial prejudice against Catholics).

95. 403 U.S. 602 (1971).

96. Gaffney, *supra* note 71, at 282; *see also* Douglas Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L. REV. 390, 419 (1977) (stating that Justice Douglas cited "an elaborate hate tract"). Justice Douglas cited LORAINE BOETTNER, ROMAN CATHOLICISM (1962), *quoted in Lemon*, 403 U.S. at 636 (Douglas, J., concurring).

97. Laycock, *supra* note 96, at 419 (quoting LORAINE BOETTNER, ROMAN CATHOLICISM 420, 371, 370 (1962)).

98. 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

99. *Id.* at 1547-49 (appendix to case).

100. *Id.* at 1534.

101. 982 F.2d 1160 (7th Cir.), *cert. denied*, 113 S. Ct. 2344 (1993).

102. *Id.* at 1170.

violence and unrest would necessarily follow their inclusion in the school building.[103] By rejecting this argument outright and stating that such a contention, even if proven "would be difficult to defend as a reason to deny the presentation of a religious point of view,"[104] the Supreme Court sent a message that such unfounded stereotypes cannot be used to exclude religious speech from the public schools.

The final effect of the decision in *Lamb's Chapel* is the enhancement of the stature of Christian advocacy groups, most notably the American Center for Law and Justice (ACLJ),[105] which represented Lamb's Chapel and its pastor, John Steigerwald, who continue their efforts to enhance the equal access rights of religious speakers. The Supreme Court's ruling was hailed by Christian Right groups as a "major victory."[106] Another source credited the ACLJ with "finding clever new legal pathways back into the schools" and securing "'equal access to the marketplace of ideas for religious people.'"[107]

The victory in *Lamb's Chapel* has given both publicity and credibility to the ACLJ and is sure to increase its bargaining power with local school officials who seek to restrict the access of religious speakers to school facilities. Patterning its activities after those of legal advocacy groups such as the American Civil Liberties Union,[108] the ACLJ employs what has been referred to as a "blackmail and bludgeon" approach, often writing letters to local officials who, in the opinion of the ACLJ, are violating the first amendment rights of religious individuals explaining the obligations of the schools under the law and threatening litigation if the offi-

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103. *Respondents Brief, supra* note 50, at 4-5, 11-12; *cf.* May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1109 (7th Cir. 1986) (speculating that a group of teachers conducting prayer meetings prior to the start of the school day would lead to "the destruction of the school's peaceful atmosphere").

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

105. *See supra* note 6 and accompanying text (tracing the history of the ACLJ).

106. Boot, *supra* note 74, at 8; *accord* Don Lattin, *Religious Groups Favored in Two High Court Cases; One Allows Some Student Prayers in School*, THE SAN FRANCISCO CHRONICLE, June 8, 1993, at A1, *available in* LEXIS, Nexis Library, Current File (hailing the case as a victory for Pat Robertson, founder of the ACLJ).

107. Tom Teepen, *Religious Right is Back in Class*, ATLANTA J. AND CONST., June 20, 1993, at 5, *available in* LEXIS, Nexis Library, Current File (quoting Jay Sekulow, chief counsel for the ACLJ).

108. *See* Roy Rivenburg, *Litigating for a 'Godly Heritage'; Law: Pat Robertson's Group of Lawyers Provides Free Help to Conservative Christians. It Hasn't Lost a Case in Two Years*, LOS ANGELES TIMES, December 30, 1992, at E1, *available in* LEXIS, Nexis Library, Current File.

cials fail to fulfill their obligations.[109] The Court's unanimous decision in *Lamb's Chapel* will help the ACLJ to follow the advice of one commentator and "create an impression that they are a source to be reckoned with so that school administrators will think twice about fighting them."[110] The decision in *Lamb's Chapel* provides a powerful weapon to the ACLJ as it attempts to end discrimination against religious speech at the local level.

The ACLJ has already used this tactic successfully in a number of instances. For example, the Clark County, Nevada School Board overruled a principal's decision to prohibit a student from singing a Christian song during a Christmas program after the ACLJ threatened to sue.[111] Additionally, a number of schools changed their policies after the ACLJ has sent letters to hundreds of school districts advising them that student-initiated prayers at graduations must be allowed.[112] The publicity generated by the unanimous decision in *Lamb's Chapel* will undoubtedly increase the pressure that the ACLJ is able to bring against school officials who seek to deny religious speakers their free speech rights and will make such efforts more successful in the future.

V. CONCLUSION

The Supreme Court's decision in *Lamb's Chapel* was a significant victory for religious speakers seeking access to the public schools. By extending the right of equal access to private speakers and holding that such rights are guaranteed by the Constitution as well as by the Equal Access Act, the Court presented Christians with a powerful weapon to overcome their exclusion from the public schools based solely upon their beliefs. In *Shumway v. Albany County School District No. One*,[113] the United States District Court for the District of Wyoming held that *Lamb's Chapel* prevented a school board from changing its equal access policy for the purpose of excluding a group of students and parents who sought permission to conduct a baccalaureate ceremony in the high

109. John G. West, Jr. *The Changing Battle Over Religion in the Public Schools*, 26 WAKE FOREST L. REV. 361, 400-01 (1991) (explaining the ACLU's approach).

110. *Id.* at 401.

111. Larry Witham, *Christian Group Fights Under Free Speech Flag*, WASHINGTON TIMES, December 22, 1992, at A3, *available in* LEXIS, Nexis Library, Current File.

112. *See, e.g.*, Robert O'Harrow, Jr., *Loudon Second-Guesses High Court in Prayer Vote: Students May Pray at Graduation Ceremonies*, WASH. POST, May 4, 1993, at B3.

113. 826 F. Supp. 1320 (D. Wyo. 1993).

school auditorium.[114] The court stated that the school board "singled out the baccalaureate parent/student group in a discriminatory manner which significantly impacted the first amendment rights of group members."[115] Thus, the court's extension of the equal access principle is already having an impact on the outcome of litigation.

Although it remains to be seen how the Court will treat future equal access cases, the new weapons given to the ACLJ and similar groups by the *Lamb's Chapel* decision indicate that the rights of religious speakers will be more vigorously enforced in the future.

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114. *Id.* at 1325-26.
115. *Id.* at 1325.