SUPREME COURT OF THE UNITED STATES

No. 91–2024

LAMB'S CHAPEL AND JOHN STEIGERWALD, PETITIONERS *v.* CENTER MORICHES UNION FREE SCHOOL DISTRICT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 7, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I join the Court's conclusion that the District's refusal to allow use of school facilities for petitioners' film viewing, while generally opening the schools for community activities, violates petitioners' First Amendment free-speech rights (as does N. Y. Educ. Law §414 (McKinney 1988 and Supp. 1993), to the extent it compelled the District's denial, see *ante*, at 1–2). I also agree with the Court that allowing Lamb's Chapel to use school facilities poses "no realistic danger" of a violation of the Establishment Clause, *ante*, at 10, but I cannot accept most of its reasoning in this regard. The Court explains that the showing of petitioners' film on school property after school hours would not cause the community to "think that the District was endorsing religion or any particular creed," and further notes that access to school property would not violate the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). *Ante*, at 10.

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. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee* v. *Weisman*, 505

U. S. ——, —— (1992) (slip op., at 7), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. See, *e.g.*, *Weisman*, *supra*, at —— (slip op., at 14) (SCALIA, J., joined by, *inter alios*, THOMAS, J., dissenting); *Allegheny County* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 655–657 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 346–349 (1987) (O'CONNOR, J., concurring); *Wallace* v. *Jaffree*, 472 U. S. 38, 107–113 (1985) (REHNQUIST, J., dissenting); *id.*, at 90–91 (WHITE, J., dissenting); *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 400 (1985) (WHITE, J., dissenting); *Widmar* v. *Vincent*, 454 U. S. 263, 282 (1981) (WHITE, J., dissenting); *New York* v. *Cathedral Academy*, 434 U. S. 125, 134–135 (1977) (WHITE, J., dissenting); *Roemer* v. *Maryland Bd. of Public Works*, 426 U. S. 736, 768 (1976) (WHITE, J., concurring in judgment); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 820 (1973) (WHITE, J., dissenting).

The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. See, *e.g.*, *Lynch* v. *Donnelly*, 465 U. S. 668, 679 (1984) (noting instances in which Court has not applied *Lemon* test). When we wish to strike down a practice it forbids, we invoke it, see, *e.g.*, *Aguilar* v. *Felton*, 473 U. S. 402 (1985) (striking down state remedial education program administered in part in parochial schools); when we wish to uphold a practice it forbids, we ignore it entirely, see *Marsh* v. *Chambers*, 463 U. S. 783 (1983) (upholding state legislative chaplains). Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts," *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973). Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced. See, *e.g.*, Choper, The Establishment Clause and Aid to Parochial Schools—An Update, 75 Cal. L. Rev. 5 (1987); Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495 (1986); McConnell, Accommodation of Religion, 1985 S. Ct. Rev. 1; Kurland, The Religion Clauses and the Burger Court, 34 Cath. U. L. Rev. 1 (1984); R. Cord, Separation of Church and State (1982); Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673 (1980). I will decline to apply
Lemon—whether it validates or invalidates the government action in question—and therefore cannot

join the opinion of the Court today.[1]

I cannot join for yet another reason: the Court's statement that the proposed use of the school's facilities is constitutional because (among other things) it would not signal endorsement of religion in general. *Ante*, at 10. What a strange notion, that a Constitution which *itself* gives "religion in general" preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general. The Attorney General of New York not only agrees with that strange notion, he has an explanation for it: "Religious advocacy," he writes, "serves the community only in the eyes of its adherents and yields a benefit only to those who already believe." Brief for Respondent Attorney General 24. That was *not* the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good. It suffices to point out that during the summer of 1789, when it was in the process of drafting the First Amendment, Congress enacted the famous Northwest Territory Ordinance of 1789, Article III of which provides, "Religion, morality, and knowledge, *being necessary to good government and the happiness of mankind*, schools and the

---

[1]The Court correctly notes, *ante*, at 10–11, n. 7, that I joined the opinion in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987), which considered the *Lemon* test. Lacking a majority at that time to abandon *Lemon*, we necessarily focused on that test, which had been the exclusive basis for the lower court's judgment. Here, of course, the lower court did not mention *Lemon*, and indeed did not even address any Establishment Clause argument on behalf of respondents. Thus, the Court is ultimately correct that *Presiding Bishop* provides a useful comparison: it was as impossible to avoid *Lemon* there, as it is unnecessary to inject *Lemon* here.

means of education shall forever be encouraged." 1 Stat. 52 (emphasis added). Unsurprisingly, then, indifference to "religion in general" is *not* what our cases, both old and recent, demand. See, *e.g.*, *Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions"); *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664 (1970) (upholding property tax exemption for church property); *Lynch*, 465 U. S., at 673 (the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions . . . . Anything less would require the `callous indifference' we have said was never intended" (citations omitted)); *id.*, at 683 ("our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action"); *Marsh*, *supra; Presiding Bishop*, *supra* (exemption for religious organizations from certain provisions of Civil Rights Act).

* * *

For the reasons given by the Court, I agree that the Free Speech Clause of the First Amendment forbids what respondents have done here. As for the asserted Establishment Clause justification, 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.