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Sands v. Morongo Unified School District: Graduates, Will We Stand and Join in Prayer

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Sands v. Morongo Unified School District: Graduates, Will We Stand and Join in Prayer?

The establishment clause of the first amendment states that "Congress shall make no law respecting an establishment of religion . . . ."[1] This pledge of religious freedom strives to isolate church and state into separate and distinct spheres in order to protect government from religious influence, as well as to protect religion from government interference.[2] While precedent does not require complete division between church and state,[3] the Supreme Court of the United States has continually held that a high degree of separation is necessary when state-sanctioned religious expression occurs in public school classrooms.[4] However, when religious activity occurs outside the instructional classroom at

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1. U.S. CONST. amend I.

2. *See* Wallace v. Jaffree, 472 U.S. 38, 68 (1984) (O'Connor, J., concurring) (stating that the purpose of the first amendment religion clauses is to secure religious liberty); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (stating that the goal of the Court is "to prevent as far as possible, the intrusion of either [church or state] into the precincts of the other"). *See also Developments in the Law - Religion and the State*, 100 HARV. L. REV. 1606, 1684 (1987) [hereinafter *Religion and the State*] (stating that separationism requires that government and religion occupy strictly autonomous spheres).

3. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973) (finding that a complete wall of separation is impossible); *Lemon*, 403 U.S. at 614 (recognizing that complete separation is not possible in an absolute sense).

4. *See, e.g., Wallace*, 472 U.S. at 61 (striking down a statute requiring a moment of silence at the beginning of the school day); Stone v. Graham, 449 U.S. 39, 43 (1980) (per curiam) (invalidating a statute which required posting of the Ten Commandments in public school classrooms); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (invalidating a statute that forbade the teaching of evolution in public schools); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (invalidating bible reading and recitation of the Lord's Prayer in public school classroom); Engle v. Vitale, 370 U.S. 421, 436 (1962) (invalidating daily reading of a prayer in public school classroom imposed by statute); Illinois *ex. rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (overturning a "released time" program in which religious teachers provided sectarian instruction in public schools). *See also Religion and the State, supra* note 2, at 1659 (noting that the Supreme Court has found an establishment clause violation in every instance of state-sanctioned religious expression in public schools).

school-sanctioned functions, the degree of separation demanded by the establishment clause becomes less certain.[5]

While prayer in public primary and secondary schools has been held to violate the establishment clause of the United States Constitution,[6] the United States Supreme Court has yet to conclude whether prayer given at a public high school graduation ceremony is constitutional.[7] *Lee v. Weisman*,[8] currently awaiting decision by the Supreme Court, challenges invocational prayers at a public junior high school graduation ceremony.[9]

The California Supreme Court recently addressed the constitutionality of invocations and benedictions during public high school graduation ceremonies in *Sands v. Morongo Unified School District*.[10] In a majority opinion, the California Supreme Court held that prayers presented during public high school graduation ceremonies violated the establishment clause of the United States Constitution.[11] However, the Court was unable to reach agreement regarding the validity of the graduation prayers under the California Constitution, thereby leaving the California constitutional issues undecided.[12]

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5. *See* Stein v. Plainwell Community Schools, 822 F.2d 1406, 1408 (6th Cir. 1987) (recognizing that the limitations on school prayer developed for the classroom under the line of cases beginning with *Engle v. Vitale*, 370 U.S. 421 (1962) had not been extended to include school functions outside of the instructional period).

6. *Wallace*, 472 U.S. at 61 (holding that a mandatory moment of silence at the beginning of the school day for meditation or voluntary prayer violated the establishment clause); *Abington*, 374 U.S. at 222 (holding that a daily reading of the Bible in class violated the establishment clause); *Engle*, 370 U.S. at 436 (holding that a non-denominational daily prayer at the beginning of the school day violated the establishment clause). *See infra* notes 73-97 and accompanying text (discussing the United States Supreme Court's analysis in public school prayer cases).

7. Sands v. Morongo Unified School District, 53 Cal. 3d 863, 899, 809 P.2d 809, 845, 281 Cal. Rptr. 34, 70 (1991) (Panelli, J., dissenting) (stating that the Supreme Court has not decided whether public high school graduation prayers violate the establishment clause of the United States Constitution).

8. 908 F.2d 1090 (1st Cir. 1990) *aff'd.* 728 F. Supp. 66 (R.I. 1990), *cert. granted sub nom.* Lee v. Weisman, 111 U.S. 1305 (1991) (No. 90-1014).

9. *Weisman*, 908 F.2d at 1091 (considering whether prayers given during a public junior high school graduation ceremony violated the establishment clause of the United States Constitution).

10. 53 Cal. 3d 863, 864, 809 P.2d 809, 810, 281 Cal. Rptr. 34, 35 (1991).

11. *Id.*

12. *Id.* at 903, 809 P.2d at 833, 281 Cal. Rptr. at 58 (1991) (Lucas, C.J., concurring). *See infra* notes 98-100 and accompanying text (discussing the California Constitution).

This Note examines the approach used by the California Supreme Court in determining that invocations and benedictions given during public high school graduation ceremonies violate the establishment clause of the United States Constitution. Part I discusses the evolution of the establishment clause, concentrating on the school prayer and ceremonial prayer cases.[13] Part II summarizes the facts and procedural history of *Sands v. Morongo Unified School District* and reviews the lead, concurring, and dissenting opinions.[14] Part III evaluates the legal implications of the California Supreme Court's decision in *Sands v. Morongo Unified School District* upon future cases brought under both the United States and California Constitutions, while recognizing the possible ramifications of the United States Supreme Court's pending decision in *Lee v. Weisman.*[15]

I. LEGAL BACKGROUND

The United States Supreme Court has developed several alternative tests in order to analyze the constitutionality of religious expression under the establishment clause.[16] Lack of coercion, government neutrality, and accommodation of historically acceptable practices are factors the Court has addressed continually in cases which allege establishment clause violations.[17] The test

13. *See infra* notes 16-100 and accompanying text.

14. *See infra* notes 101-191 and accompanying text.

15. *See infra* notes 263-270 and accompanying text (discussing the effect that the United States Supreme Court's pending decision in *Lee* could have upon future cases brought under the establishment clause of the California Constitution).

16. *See infra* notes 22-72 and accompanying text (discussing the *Lemon* test and its variations, the historical significance test of *Marsh*, and Justice O'Connor's endorsement analysis).

17. *See* County of Allegheny v. ACLU, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in judgment and dissenting in part) (discussing flexible accommodation of religion); Marsh v. Chambers, 463 U.S. 783, 789-92 (1983) (discussing the historical significance of ceremonial prayer); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (stating that a violation of the free exercise clause is based upon the existence of coercion while the existence of an establishment clause violation does not depend upon a finding of coercion); Engle v. Vitale, 370 U.S. 421, 430 (1962) (discussing effect of coercion upon the establishment clause); Adam & Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317, 322-30 (1988) (discussing the historical significance of religious activity and application of the religion clauses); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No*

predominately applied by the United States Supreme Court in establishment clause cases, and applied by the vast majority of state and lower federal courts addressing the constitutionality of public high school graduation prayers is the three prong test announced by the United States Supreme Court in *Lemon v. Kurtzman*,[18] popularly referred to as the *Lemon* test.[19] Despite the overwhelming acceptance of the *Lemon* test as a framework in establishment clause analysis, the United States Supreme Court has been reluctant to formally adopt *Lemon* as the sole standard by which to judge all establishment clause cases.[20] Therefore, it is necessary to explore all of the currently available establishment clause tests before undertaking an analysis of public high school graduation prayers.[21]

A. The Lemon *Test*

In *Lemon v. Kurtzman*,[22] the United States Supreme Court combined three previously existing standards into one three part

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Endorsement" Test, 86 MICH. L. REV. 266, 313 (1987) (discussing the importance of government neutrality and the religion clauses).

18. 403 U.S. 602 (1971).

19. *See* Jones v. Clear Creek Indep. School Dist., 930 F.2d 416, 420, 424 (5th Cir. 1991) (upholding non-sectarian and non-proselytizing invocations and benedictions written by students and given at public high school graduation ceremonies under the *Lemon* test); Jager v. Douglas County School Dist., 862 F.2d 824, 833 (11th Cir. 1989) (invalidating invocation prayers at public school sponsored football games under the *Lemon* test); Lundberg v. West Monona Community School Dist., 731 F. Supp. 331, 345 (W.D. Iowa 1989) (invalidating public high school graduation prayers under the *Lemon* test); Graham v. Central Community School Dist., 608 F. Supp. 531, 535 (C.D. Iowa 1985) (invalidating public school graduation prayer after application of the *Lemon* test); NOWAK & ROTUNDA, CONSTITUTIONAL LAW 1162 n.1 (4th ed. 1991) (stating that the *Lemon* test has been used in the majority of establishment clause cases since the early 1970's); *Religion and the State*, *supra* note 2, at 1676 (stating that the *Lemon* test has been used since its adoption by the Court in 1971). *See also infra* notes 22-57 and accompanying text (discussing application of the three-prong *Lemon* test).

20. *See* Lynch v. Donnelly, 465 U.S. 669, 678-79 (1984) (stating the Court's unwillingness to be confined to any single test). *See also* Note, Stein v. Plainwell Community Schools: *The Constitutionality of Prayer in Public High School Commencement Exercises*, 22 GA. L. REV. 469, 476 (1988) (stating that the United States Supreme Court has not adopted a test to universally apply in establishment clause cases).

21. *See infra* notes 22-72 and accompanying text (discussing the various alternative establishment clause tests).

22. 403 U.S. 602 (1971).

test,[23] stating that: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[24] A violation of any one of these three prongs will render a statute or government activity unconstitutional under the establishment clause.[25] The Supreme Court originally designed the tri-parte *Lemon* test to confront state sponsorship of religious conduct,[26] as well as to prevent financial support and active government involvement with religion.[27] Although these three factors continue to concern the Supreme Court in establishment clause cases,[28] subsequent Supreme Court case law has dramatically modified the *Lemon* test from its original form.[29]

The first prong of the *Lemon* test originally required that legislation or governmental activity have a secular legislative

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23. *Id.* at 612. *See* Walz v. Tax Commission, 397 U.S. 664, 668 (1970) (establishing the excessive entanglement prong); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) (establishing the secular purpose and primary effect prongs).

24. *Lemon*, 403 U.S. at 612-13.

25. Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (stating that state action violates the establishment clause if it fails to satisfy any of the three prongs); Stone v. Graham, 449 U.S. 39, 40-41 (1980) (stating that government aid to religion is constitutional only if all three prongs of the *Lemon* test are satisfied).

26. *See Lemon*, 403 U.S. at 612 (discussing the Court's concern with government sponsorship of religious activity).

27. *See id. See also Walz*, 397 U.S. at 668 (discussing concerns which the establishment clause seeks to prevent from occurring); Note & Comment, *The Establishment Clause in Public Schools: A Model for Future Analysis*, 79 GEO. L.J. 121, 128 (1990) (discussing the Supreme Court's concerns regarding the establishment clause).

28. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 597 (1987) (prohibiting teaching of evolution since it evidenced state sponsorship and government endorsement of religion); Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (finding that mandatory moment of silence in public school was a state sponsorship of religious activity); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (determining that the hanging of a creche in county buildings during Christmas was not government sponsorship of religion); Marsh v. Chambers, 463 U.S. 783, 794-95 (1983) (holding that legislative prayer was not state sponsorship or involvement with religion); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 797-98 (1973) (finding state financial aid to non-public schools is a violation of the establishment clause).

29. *See* Esbeck, *The Lemon Test: Should it be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 513, 515-16 (1990) (stating that the *Lemon* test has been materially altered by Supreme Court cases and is barely clinging to the shell of its original state); Note & Comment, *supra* note 27, at 128 (stating that recent cases indicate a shift in the Supreme Court's original articulation of the *Lemon* test).

purpose.[30] Strict application of the purpose prong led to the exclusion of all governmental activity that was linked to a religious purpose, despite the co-existence of a non-religious purpose.[31] The Supreme Court, however, has moved away from a strict interpretation of the purpose prong, softening the scrutiny.[32] First, the Supreme Court found it difficult to determine reliably the subjective motivation behind legislative enactments.[33] While some legislatures had explicitly stated their objectives, many had not.[34] Therefore, the Supreme Court was left to determine the possible motive or purpose behind the legislative enactment.[35] Finding it inappropriate for courts to engage in examinations of the inner workings of legislative bodies, the Supreme Court began altering the scrutiny required under the purpose prong.[36] Second, the Supreme Court did not wish to invalidate laws that would have been acceptable but for an impermissible legislative motive.[37] Invalidating laws based upon an improper purpose was futile since the law was likely to be re-enacted when cleansed of the improper

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

31. *See* Carter v. Broadlawns Medical Center, 857 F.2d 448, 454 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1569 (1989) (upholding employment of church deacon as chaplain of county hospital involving both a secular and non-secular purpose).

32. *See* Esbeck, *supra* note 29, at 515-16 (discussing the shift in the purpose prong analysis). *See infra* notes 33-38 and accompanying text (discussing the Court's reasons for shifting the purpose prong analysis).

33. *See* Esbeck, *supra* note 29, at 515-16 (stating that the Supreme Court found it difficult to determine legislative intent).

34. *See* Engle v. Vitale, 370 U.S. 421, 423 (1962) (stating that the State Board of Regent's admitted purpose for requiring a daily prayer in public schools was to promote morality). *But see* Abington School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963) (engaging the Court in analysis of an unstated legislative purpose behind the reading of a daily Bible scripture).

35. *See Abington*, 374 U.S. at 222-23 (engaging the Court in analysis of an unstated legislative purpose behind the reading of a daily Bible scripture).

36. *See* Wallace v. Jaffree, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (stating that a court has no license to psychoanalyze the legislators); Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (recognizing the difficulty in analyzing legislative motives). *See also* Esbeck, *supra* note 29, at 515-16 (stating that the Court did not wish to engage in psychoanalyzing legislative bodies).

37. *See* Mueller v. Allen, 463 U.S. 388, 394-95 (1983) (discussing the reluctance to attribute unconstitutional motives to States when a plausible secular purpose could be found on the face of the statute). *See also*, Esbeck, *supra* note 29, at 515-16 (stating that Court did not wish to invalidate good laws).

motive.[38] Hence, the Supreme Court will currently invalidate government activity under the purpose prong only if the sole or preeminent government purpose for the legislative enactment is the advancement of religion.[39]

The second prong of the *Lemon* test initially required that the primary effect of the contested government activity neither advance nor inhibit religion.[40] In applying the "effect prong," the Court has continually invalidated laws found to create direct material benefits to religion, as well as some laws which have been found to create mere incidental benefits.[41] The Supreme Court has further acknowledged the effect prong's preemptive strike capability which allows courts to invalidate laws which might promote religion in the future.[42] Using the preemptive strike

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38. *See* Esbeck, *supra* note 29, at 516 (recognizing that laws invalidated for an unconstitutional purpose were likely to be redrafted and then re-enacted with a stated proper purpose).

39. *See* Edwards v. Aguillard, 482 U.S. 578, 590 (1987) (discussing the preeminent religious purpose of teaching religious theory of evolution in public schools); Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (stating that the government action was motivated solely by religious considerations); Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) (stating that the posting of the Ten Commandments in public school classrooms was motivated preeminently by religious purpose which could not be ignored). A statute that is motivated in part by a religious purpose, and in part by a secular purpose, will not necessarily violate the first prong of *Lemon*. *See Stone*, 449 U.S. at 41 (stating that a law will be invalidated only when its preeminent feature is the promotion of religion). The Court has stated that requiring a law's purpose to be unrelated to religion would require government to "show a callous indifference to religious groups." Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987).

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

41. *See* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385, 387 (1985) (invalidating release time from school classroom for religious instruction under the primary purpose and primary effect prongs of *Lemon* due to finding a direct benefit to religion). *See also* Levitt v. Committee for Pub. Educ., 413 U.S. 472, 480 (1973) (invalidating state aid to non-public schools for the expense of grading test results as an impermissible indirect aid to religion). *But see* Bowen v. Kendrick, 487 U.S. 589, 622 (1988) (upholding federal law funding anti-abortion counselors, despite an indirect benefit to religion); *Lynch*, 465 U.S. at 683 (upholding municipal Christmas display despite indirect benefit to religion); *Walz*, 397 U.S. at 680 (upholding property tax exemptions for churches and other religious organizations as an indirect benefit to religion). *See generally* Esbeck, *supra* note 29, at 515-17 (discussing Court's differing applications involving direct and indirect effects upon religion).

42. *See Grand Rapids*, 473 U.S. at 385, 387 (applying the preemptive strike capability of the effect prong to invalidate state financial aid to non-public schools); Wolman v. Walter, 433 U.S. 229, 254 (1977) (invalidating state financial aid to non-public schools through use of the preemptive strike capability of the effect prong); Meek v. Pittenger, 421 U.S. 349, 370, 372 (1975) (invalidating state loan to private school since there was a future risk of advancing religion). The preemptive strike capability has been limited to cases involving pervasively sectarian institutions. *See* Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 760-61 (1976) (plurality opinion) (limiting the

capability, courts are able to invalidate government enactments before any benefit to religious activity actually occurs.[43]

A further reformulation of *Lemon's* first and second factors was introduced by Justice O'Connor in two separate concurring opinions. First, in *Lynch v. Donnelly*,[44] Justice O'Connor suggested that the purpose and effect prongs of the *Lemon* test be addressed under one analysis since the two prongs were closely directed toward the common goal of ending government endorsement of religious activity.[45] Justice O'Connor articulated that the proper inquiry under the purpose and effect prongs should be whether the government intended to convey a message of state endorsement or disapproval of religion.[46] By focusing upon government endorsement or disapproval of religion, Justice O'Connor concluded that the purpose and effect prongs of *Lemon* would permit some government-sponsored religious activity despite an indirect effect, advancement, or inhibition of religion, since not all religious activity would convey a message of state endorsement or disapproval.[47] Justice O'Connor, in *Wallace v. Jaffree*,[48] submitted a further refinement of the *Lemon* test to the Court by considering whether an objective observer would think that the government was endorsing religion through the conduct in issue.[49] By focusing upon the message that the particular activity actually conveyed to an objective observer, Justice O'Connor submitted that the Court would be able to determine the effect of the legislation

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preemptive strike capability of the effect prong to non-public school aid cases).

43. *See* Esbeck, *supra* note 29, at 522 (discussing the preemptive quality of the primary effect prong).

44. 465 U.S. 668 (1984).

45. *Id.* at 691 (O'Connor, J., concurring) (applying an endorsement of religion analysis to both purpose and effect prongs).

46. *Id.* at 690-91 (O'Connor, J., concurring).

47. *Id.* at 691-92 (O'Connor, J., concurring). Justice O'Connor suggested that endorsement be examined by considering the history, language, and administration of a particular statute to determine whether it operated to endorse religion. Wallace v. Jaffree, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring).

48. 472 U.S. 38 (1985).

49. *Id.* at 76 (O'Connor, J., concurring). In *Wallace*, Justice O'Connor indicated that moment of silence statutes that were clearly drafted so as to permit prayer, meditation, and reflection within a specific period, without endorsing one alternative over the other, would likely pass the endorsement test. *Id.*

in issue without invalidating all state enactments which were found to have some effect upon religion.[50] The Supreme Court adopted Justice O'Connor's endorsement analysis in *County of Allegheny v. ACLU*.[51]

The third prong of the *Lemon* test originally required that the act or conduct not foster an excessive government entanglement with religion.[52] The Supreme Court looked to both administrative and political entanglements between church and state to find whether an excessive entanglement existed.[53] Administrative entanglements have been found by the Supreme Court when the government has entered itself into the position of restricting or monitoring religious activity.[54] Political entanglements have been found by the Supreme Court when state assistance to a particular religious activity involved considerable political controversy, which entangled the church and state in the political forum.[55] Finding that political entanglements tended to infringe upon the speech and political activity of religionists, the Court restricted application of the political entanglement prong to parochial school aid cases.[56] Therefore, the Supreme Court, in an excessive entanglement analysis, will look primarily to whether state involvement with

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50. *Id.* at 68-70 (O'Connor, J., concurring). "[D]espite its initial promise, the *Lemon* test has proved problematic . . . [therefore] the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment." *Id.* (O'Connor, J., concurring). The relevant issue is how the objective observer perceived the activity. *Id.* at 76 (O'Connor, J., concurring).

51. 492 U.S. 573 (1989). The Court declined to overrule the *Lemon* test, instead articulating a revised version which considered the issue of whether the challenged government action was likely to be perceived by adherents of the controlling denomination as an endorsement, or by non-adherents as a disapproval, of their individual religious choices. *Id.* at 593-94. *County of Allegheny* involved the constitutionality of hanging a creche inside a courthouse, and a menorah outside of a municipal building, with signs saluting liberty and a Christmas tree alongside the menorah. *Id.* at 579. The *Allegheny* Court found such practices violated the establishment clause under reformulated endorsement analysis of the *Lemon* test. *Id.* at 601-02.

52. *Lemon*, 403 U.S. at 613.

53. *Id.* at 614.

54. *Id.* at 620.

55. *Id.* at 622.

56. Lynch v. Donnelly, 465 U.S. 668, 684 (1984) (limiting the political entanglement prong to state-sponsorship of parochial schools). Political entanglement, often called political divisiveness, was designed to prevent political polarization along religious lines. Note, *Invoking the Presence of God at Public High School Graduation Ceremonies: Graham v. Central Community School District*, 71 IOWA L. REV. 1247, 1267 (1986).

religious activity resulted in administrative monitoring of religion.[57]

B. The Historical Significance Test: Marsh v. Chambers

In *Marsh v. Chambers,*[58] the Nebraska Legislature's long standing practice of opening legislative sessions with an invocational prayer was challenged by several legislative members.[59] The Nebraska Legislature, throughout the state's history, had opened its sessions with a prayer given by state-paid Christian chaplains.[60] The Supreme Court, rather than applying the *Lemon* test, looked to the historical significance of the religious activity to determine whether history mandated finding the ceremonial legislative prayer constitutional.[61]

Recognizing that legislative prayer had been acceptable during the First Congress, the Court determined that ceremonial prayer was not conduct that the Framers had intended to exclude under the establishment clause.[62] The *Marsh* court determined that historical patterns alone did not justify legislative prayer, but the historical patterns shed light upon the draftsmen's intent regarding the establishment clause.[63] Therefore, because the drafters of the Constitution had themselves engaged in legislative prayer, the Supreme Court held that the Nebraska Legislature's invocation prayers were constitutional, as an integral part of American culture and heritage.[64]

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57. *See* Esbeck, *supra* note 29, at 528 n.56 (discussing federal precedent and the entanglement prong of the *Lemon* test).

58. 463 U.S. 783 (1983).

59. *Id.* at 785.

60. *Id.* at 787.

61. *Id.* at 791. The Court did not state a justification for departing from the traditional *Lemon* test. *Id.* at 796 (Brennan, J., dissenting). Justice Brennan stated that the "Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause." *Id.* (Brennan, J., dissenting).

62. *Id.* at 788 n.10. The Senate Committee on the Judiciary had considered the constitutionality of legislative prayers in 1857, and found that no violation of the establishment clause existed since legislative prayer was not an establishment of religion. *Id.*

63. *Id.* at 790.

64. *Id.* at 795.

Although it is not entirely clear whether the Supreme Court will expand the historical significance analysis developed in *Marsh* to public high school graduations, the Sixth Circuit Court of Appeal, in *Stein v. Plainwell Community Schools*,[65] concluded that the historical significance test governed the issue of graduation prayers.[66] *Stein* involved graduation exercises at two high schools near Kalamazoo, Michigan.[67] Invocations had been included regularly during graduation ceremonies.[68] Reversing the District Court, the Sixth Circuit Court of Appeal reasoned that since both graduation and legislative prayers served to solemnize the respective ceremonies, graduation ceremonies were analogous to the legislative and judicial sessions referred to in *Marsh*.[69] Recognizing that graduation ceremonies involved public school functions, the *Stein* Court determined that the public nature of the graduation ceremony, and the presence of parents, minimized the potential of coercion.[70] The *Stein* Court, therefore, determined that the concerns of coercion and peer pressure which existed in the classroom setting did not exist at the graduation ceremony.[71] Despite the Sixth Circuit's analysis in *Stein*, the majority of federal and state courts which have considered graduation prayers have not adopted the *Marsh* historical significance test, and have continued to apply the *Lemon* factors.[72]

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65. 822 F.2d 1406 (6th Cir. 1987).

66. *Id.* at 1409-10. *Cf.* Comment, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395, 425 (1989) (stating that *Marsh* is so fact specific that it is unclear to what set of facts the holding may apply).

67. *Stein*, 822 F.2d at 1407.

68. *Id.*

69. *Id.* at 1410.

70. *Id.*

71. *Id.*

72. *See, e.g.*, Jones v. Clear Creek Indep. School Dist., 930 F.2d 416, 420, 424 (5th Cir. 1991) (permitting only non-sectarian and non-proselytizing invocations and benedictions written by students and given at public high school graduation ceremonies after application of the *Lemon* test); Jager v. Douglas County School Dist., 862 F.2d 824, 833 (11th Cir. 1989) (invalidating invocation prayers at public school sponsored football games under *Lemon* test); Lundberg v. West Monona Community School Dist., 731 F. Supp. 331, 345 (W.D. Iowa 1989) (invalidating public high school graduation prayers under the *Lemon* test); Graham v. Central Community School Dist., 608 F. Supp. 531, 535 (C.D. Iowa 1985) (invalidating public high school graduation ceremony prayers under the *Lemon* test). Federal and state court judges, as well as legal scholars criticizing the *Stein* decision, have suggested that the Court in *Stein* erred by failing to continue strict separation between church and

C. Public Schools: Strict Separation Between Church and State

The United States Supreme Court has consistently found government involvement with religious activity to violate the establishment clause in the primary and secondary public school settings.[73] In the overwhelming majority of public school cases where establishment clause challenges have been asserted toward religious conduct in the classroom, the Court has struck down the challenged activity.[74] The Supreme Court has maintained this strict standard for public schools based on several factors.[75] These factors are best illustrated in three Supreme Court Cases.

In the case of *Engle v. Vitale*,[76] the New York State Board of Regents composed a prayer which was to be recited at the start of the school day, as part of an effort to teach morality to public

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state, under the *Lemon* test, in the public school system. *See* Note, *supra* note 20, at 492 (criticizing the application of *Marsh* to graduation prayer).

73. *See infra* notes 74-97 and accompanying text (discussing the Supreme Court's consistent separation of church and state in the public school system).

74. *See* Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (striking down a statute requiring a moment of silence at the beginning of the school day); Stone v. Graham, 449 U.S. 39, 43 (1980) (per curiam) (invalidating a statute which required posting of the Ten Commandments in public school classrooms); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (invalidating a statute that forbade the teaching of evolution); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (invalidating Bible reading and recitation of the Lord's Prayer); Engle v. Vitale, 370 U.S. 421, 436 (1962) (invalidating daily reading of a prayer imposed by statute); Illinois *ex. rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (overturning a released time program in which religious teachers provided sectarian instruction in public schools). *But see* Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 247 (1990) (upholding right of students to form a Christian club that would abide by the same terms and conditions as other extra-curricular school organizations); Zorach v. Clauson, 343 U.S. 306, 315 (1952) (upholding a New York statute allowing students to be released from public schools to attend religious services or classes). *See Religion and the State*, *supra* note 2, at 1659 (stating that the Supreme Court has found a violation of the establishment clause in nearly every instance of state-sanctioned religious expression in public schools).

75. *See* Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987) (recognizing that compulsory education laws make attendance at public school involuntary up to a certain age); Abington School Dist. v. Schempp, 314 U.S. 203, 230 (1963) (Brennan, J., concurring) (recognizing that a common American history can not be taught in public schools if religious differences between children are emphasized in the school setting). *See* Marshall, *"We Know It When We See It," The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 541 (1986) (discussing the Supreme Court's justification for strictly separating religion from the public primary and secondary schools); Note & Comment, *supra* note 27, at 133 (discussing the Supreme Court's various justifications for separating church and state in the public school classroom).

76. 370 U.S. 421 (1962).

primary and secondary school students.[77] The prayer was brief, non-denominational, and participation was voluntary.[78] Shortly after the practice of reciting the prayer was adopted by the school district, disgruntled parents filed an action claiming that prayer in public school was contrary to the beliefs and religions of the petitioners' families.[79]

The United States Supreme Court considered the constitutionality of the Regent's prayer under the establishment clause.[80] The Court sought to determine the result which the prayer was designed to promote.[81] Due to the religious significance of reciting a daily prayer, the Court found that the purpose of the prayer was to promote religion.[82] Further, although participation was voluntary, the *Engle* Court found the school environment particularly coercive, due to the vulnerability of primary and secondary school students under the guidance of their teachers and the influence of their peers.[83] Therefore, coupling the coercive environment with the prayer's religious purpose, the *Engle* Court held that mandatory daily prayers in public school classrooms violated the establishment clause.[84]

The United States Supreme Court was again faced with legislative enactments requiring public school prayer in *School District of Abington Township v. Schempp*.[85] School attendance

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77. *Id.* at 423. The students were to recite the following prayer:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

Id.

78. *Id.* at 438, 441. The prayer in *Engle* was deemed voluntary because children could refuse to recite the prayer. *Id.* at 430. *See generally* Sutherland, *Establishment According to Engle*, 76 HARV. L. REV. 25 (1962) (discussing the *Engle* Court's analysis of school prayer under the establishment clause).

79. *Engle*, 370 U.S. at 423.

80. *Id.*

81. *Id.* at 424-25. The *Lemon* test was not adopted until after consideration of *Engle*. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). However, the Court's focus in *Engle* could be analogized to the purpose prong of the *Lemon* test because the goal of both was to determine the purpose of the religious activity. *See supra* notes 30-39 and accompanying text (discussing the primary purpose prong of the *Lemon* test).

82. *Engle*, 370 U.S. at 424-25.

83. *Id.* at 430.

84. *Id.* at 436.

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

was mandatory in the Abington school district, but students could be excused from the classroom during the daily Bible reading and prayer session at the request of a parent.[86] The *Abington* Court established a new standard to evaluate school prayer under the establishment clause, which looked to the primary purpose and effect of the legislative enactments.[87] This test eventually became the first and second prongs of the three-part *Lemon* test.[88]

Applying the purpose and effect test, the *Abington* Court, based on the State's own concession during trial, found that the prayers had religious and moral implications.[89] Further, the Court found that the daily recitation of prayers and Bible readings was designed to promote religious ideals.[90] Therefore, the purpose and effect test had been violated by the daily recitation of religious prayers.[91]

In *Wallace v. Jaffree*,[92] the most recent United States Supreme Court case dealing with school prayer, the Court was faced with determining the constitutionality of a mandatory moment of silence.[93] The period of silence, according to the Alabama statute, was to be used for a voluntary prayer or for meditation.[94] Applying the *Lemon* test, the Supreme Court determined that the legislative purpose was to advance religious activity by forcing prayer upon students in a coercive environment.[95] The *Wallace* Court further determined that the state was endorsing prayer by enacting a mandatory moment of silence, and that therefore, the activity conflicted with the course of neutrality between church and

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86. *Id.* at 205.

87. *Id. See supra* notes 22-57 and accompanying text (discussing the *Lemon* test).

88. *See supra* notes 30-51 and accompanying text (discussing the purpose and effect prongs of the *Lemon* test).

89. *Abington*, 374 U.S. at 224 (maintaining that the state had conceded during trial that the prayers were religious in nature and character).

90. *Id.*

91. *Id.* at 223.

92. 472 U.S. 38 (1985).

93. *Id.* at 40. *See generally*, Smith, *Now is the Time for Reflection:* Wallace v. Jaffree *and its Legislative Aftermath*, 37 ALA. L. REV. 345 (1986) (discussing the *Wallace* Court's establishment clause analysis).

94. *Wallace*, 472 U.S. at 40.

95. *Id.* at 61.

state laid out by establishment clause precedent.[96] Accordingly, the *Wallace* Court held that the mandatory moment of silence was unconstitutional under the establishment clause since it violated the primary purpose prong of the *Lemon* test.[97]

D. The Establishment Clause of the California Constitution

California courts have traditionally been free to interpret the California Constitution independently from the United States Constitution.[98] Distinguished from the federal constitution, the California Constitution contains three articles discussing state and church relations, providing far more detailed and comprehensive language than the First Amendment of the United States Constitution.[99] In several cases in which the California Supreme Court has considered the establishment clause of article I, section 4, the Court has continually applied the three prong *Lemon* test,

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96. *Id.*

97. *Id.* The *Wallace* Court stated that the moment of silence might have been upheld had the legislature's purpose not been to restore a form of daily prayer to the public school system. *Id.* at 59.

98. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (stating that state court constitutional decisions are shielded from federal review only if the judgment clearly relies upon independent state constitutional grounds); Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 491-92 (1965) (stating that the Supreme Court has long recognized the right of the states to interpret textually similar passages of state constitutions in a broader manner than parallel federal guarantees); CAL. CONST. art. I, § 24 (stating "[r]ights guaranteed by this Constitution are not dependant on those guaranteed by the United States Constitution").

99. Article I, section 4 of the California Constitution states:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

CAL. CONST. art. I, § 4. Article IX, section 8 of the California Constitution states:

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

CAL. CONST. art. IX. § 8 states. Article XVI, section 5 of the California Constitution states:

> Neither the Legislature, nor any . . . school district . . . shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian denomination whatever . . . .

CAL. CONST. art. XVI, § 5. This Note primarily focuses upon the establishment clause of the California Constitution. The free exercise and "no preference" clauses of article I, section 4 as well as article XVI, section 5 and article IX, section 8 are beyond the scope of this Note.

declining to extend the California establishment clause beyond federal precedent.[100]

II. THE CASE

A. The Factual and Procedural History

Respondent Morongo Unified School District (District) consists of two public high schools and two alternative/continuation high schools situated in San Bernardino County, California.[101] Over the course of several years, graduation ceremonies at the schools had included opening invocations and closing benedictions.[102]

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100. *See, e.g.,* Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (holding that under the *Lemon* test, the city of Los Angeles could not display an illuminated crucifix on city hall to honor Christmas or Easter holidays under article I, section 4); California Educational Facility Authority v. Priest, 12 Cal. 3d 593, 526 P.2d 513, 116 Cal. Rptr 361 (1974) (holding that state funding of an institution of higher learning, which is affiliated with or governed by a religious organization, does not violate of article I, section 4 under the *Lemon* test). The only case to expand the scope of article I, section 4 of the California Constitution beyond the *Lemon* test is the California Court of Appeal's decision in *Feminist Women's Health Center v. Philibosian,* 157 Cal. App. 3d 1076, 302 Cal. Rptr. 918 (1984) *reh' denied, cert. denied* 470 U.S. 1052 (1985). In *Philibosian,* the Second District Court of Appeal was faced with determining whether the District Attorney could allow the internment of 16,500 aborted fetuses in a local cemetery which had contracted with a Catholic organization to hold memorial services at the burial site. *Id.* After finding that the District Attorney's actions violated the *Lemon* test, the California Court of Appeal expanded article 1, section 4 beyond the federal establishment clause in three ways. *Id.* at 1089, 302 Cal. Rptr. at 927. First, the California Court of Appeal stated that California must avoid any and all appearance of religious partiality, ignoring any official accommodation of religion, while the federal constitution has allowed some accommodation. *Id.* at 1090, 302 Cal. Rptr. at 928. Second, political entanglement, a factor deemed inconsequential by federal precedent, was important to the California Court of Appeal. *Id.* at 1091, 302 Cal. Rptr. at 929. Third, the California Court of Appeal required a compelling state interest to justify any government activity that preferred one religion over another, where the federal courts had held such strict scrutiny limited to religious discrimination cases. *Id.* at 1092, 302 Cal. Rptr. at 930. Despite the broad interpretation of article I, section 4 by the appellate court in *Philibosian,* other California courts have been reluctant to expand article I, section 4 in the same manner even though the California Supreme Court, by refusing to grant a rehearing in *Philibosian,* refused to restrict the appellate court's approach. *Id.* at 1093, 302 Cal. Rptr. at 927.

101. Sands v. Morongo Unified School District, 53 Cal. 3d 863, 868, 809 P.2d 809, 810, 281 Cal. Rptr. 34, 35 (1991). The four schools are Yucca Valley High School, Twenty-Nine Palms High School, Sky High School, and Monument High School. *Id.*

102. *Id.* Prayers have occurred at Yucca Valley High School since 1968, Twenty-Nine Palms High School since 1937, Sky High School since 1977, and Monument High School since 1978. *Id.* The 1986 Yucca Valley High School invocation, which the California Supreme Court listed as an example of the prayers from all four schools, was as follows:

> Will the audience please stand and join us in prayer.

The prayers were brief, and the District asserted that an effort was made to maintain non-denominational tones throughout both the invocation and benediction.[103] Although the speakers were primarily clergymen, non-clergy faculty members were also asked

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> Dear Father, we thank You for these graduates who have meant to much to us. We thank You for their energy, their enthusiasm, their sense of humor and their sense for life. May the years never diminish these traits.
>
> We ask Your guidance as these graduates try to meet the many challenges of their future years. Grant them the strength to meet these challenges with courage, confidence and faith.
>
> We ask Your blessings so that their lives will brim with happiness and good health. And that each one experiences a life rich in friendship and rich in love.
>
> Finally, we ask these young men and women, mature in years, may they forever remain young at heart and free in spirit. We ask this in Your name, amen.

Id. at 948, 809 P.2d at 864-65, 281 Cal. Rptr. at 89-90 (Baxter, J., dissenting). The invocation given in 1986 at Yucca Valley High School stated:

> Graduates, faculty, friends, family. I consider it a privilege to be here this evening to do the Invocation, particularly as I look back to 20 years ago today that I graduated from high school.
>
> Its a real blessing to speak to you and encourage you to be confident in looking forward to the years ahead. That hope, that confidence, that indeed there are certain to be changes to come, will come. Yet each point of change is an opportunity for growth. And I want to encourage you to have confidence looking forward to that.
>
> And so it is that I was to even extend that in a Prayer. That as you have the opportunity to grow and change, and to face things, and sometimes those things will cause you to be apprehensive, cause you to begin to doubt, I have found that for myself its good to have something, someone to trust in that is greater than yourself.
>
> So if you would like to you can bow your head, if not, feel free not to, that's what freedom is all about.
>
> Heavenly father, I thank you for the privilege it is to see these graduates going forth receiving their diplomas this evening. To celebrate this time, I pray that you would give them that blessing, that confidence, courage, vision, hope, peace and gladness, and looking forward to the days to come, the years to come being confident of what they have already been able to do in receiving this diploma.
>
> Now I pray your blessing upon them, in the name of our Lord, amen.

Id. (Baxter, J., dissenting).

103. *Id.* at 875, 809 P.2d at 815-16, 281 Cal. Rptr. at 40-41. In his concurring opinion, Chief Justice Lucas stated that the prayers occupied one minute or less in a forty-five to ninety minute program. *Id.* at 893, 809 P.2d at 827, 281 Cal. Rptr. at 52 (Lucas, C.J., concurring).

to perform the prayers on at least one occasion.[104] Further, attendance by the graduating students was purely voluntary.[105]

Petitioners Jim Sands and Jean Bertolette, local taxpayers who resided within the District, objected to the use of religious prayers at the public school graduations.[106] After unsuccessful attempts to persuade the District to discontinue the inclusion of prayers at the graduation ceremonies, the petitioners filed suit seeking declaratory and injunctive relief prohibiting the practice.[107] While the petitioners' action was pending in the trial court, California's First District Court of Appeal, applying the *Lemon* test, held in *Bennett v. Livermore Unified School District*,[108] that prayer at public high school graduation ceremonies violated the establishment clause of both federal and state constitutions.[109] After the *Bennett* decision, the *Sands* petitioners and the District

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104. *Id.* at 868, 809 P.2d at 810, 281 Cal. Rptr. at 35. At Yucca Valley High, Protestant ministers and faculty members gave the benediction in 1985 and in 1986. *Id.* At Twenty-Nine Palms High, a Presbyterian minister delivered the invocation and a Catholic priest gave the benediction. *Id.* At Monument High, a Protestant minister delivered both the opening and closing prayers. *Id.* At Sky High, the same Methodist pastor had given the invocation and benediction every year since 1977. *Id.*

105. *Id.* at 893, 809 P.2d at 827, 281 Cal. Rptr. at 52 (Lucas, C.J., concurring). Chief Justice Lucas noted that admission tickets were given only to graduating students and their families, and that diplomas were not contingent on attendance at the graduation ceremony. *Id.*

106. *Id.* at 869, 809 P.2d at 811, 281 Cal. Rptr. at 36.

107. *Id.* at 869-70, 809 P.2d at 811, 281 Cal. Rptr. at 36. The petitioners' filed suit under California Code of Civil Procedure section 525(a), which authorizes taxpayers' actions against local public entities to enjoin the unlawful expenditure of public funds. *Id.* at 869, 809 P.2d at 811, 281 Cal. Rptr. at 36.

108. 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987).

109. *Id.* Prior to the California Supreme Court's consideration of *Sands v. Morongo Unified School Dist.*, two California Courts of Appeal disagreed as to whether graduation prayers violated the California Constitution. *Sands*, 53 Cal. 3d at 867, 809 P.2d at 813, 281 Cal. Rptr. at 36. While the Fourth District Court of Appeal in *Sands* found that graduation prayers did not violate the California Constitution, the First District Court of Appeal in *Bennett v. Livermore Unified School District* reached a contrary conclusion. *Bennett*, 193 Cal. App. 3d at 1020, 238 Cal. Rptr. at 824. In *Bennett*, a high school senior filed an action against the District challenging the practice of including an invocation in graduation ceremonies. *Id.* at 1014, 262 Cal. Rptr. at 820. The *Bennett* court applied the *Lemon* test, stating that the federal establishment clause standards were useful in determining the constitutionality of graduation prayers since this was a case of first impression in California. *Id.* at 1017, 262 Cal. Rptr. at 821. The Court of Appeal found that the graduation prayers violated all three prongs of the *Lemon* test. *Id.* at 1020, 262 Cal. Rptr. at 824. Further, the Court of Appeal stated that California constitutional provisions were to be interpreted as granting broader protection against religious interference than those of the federal constitution. *Id.* at 1020, 262 Cal. Rptr. at 823. Therefore, the Court of Appeals in *Bennett* held that both the federal and California Constitutions were violated by the graduation prayers. *Id.* at 1024, 262 Cal. Rptr. at 826.

each filed motions for summary judgment.[110] The trial court granted the petitioners' motion for summary judgment and denied the District's similar motion, after which the District appealed.[111] The Fourth District of the California Court of Appeal, applying the *Lemon* test, reversed the trial court's granting of petitioners' motion for summary judgment, concluding that the prayer in issue did not violate the establishment clause of the United States Constitution or the California Constitution.[112] Subsequently, the Supreme Court of California granted review in *Sands* to resolve the constitutional questions that existed between the two California Courts of Appeal decisions in *Bennett* and *Sands*.[113]

B. *The Majority Opinion*

Justice Kennard, writing the lead opinion for the majority of the California Supreme Court,[114] reversed the Fourth District Court of Appeal and held that religious invocations and benedictions at public high school graduation ceremonies were an unconstitutional violation of the establishment clause under the *Lemon* test.[115] Despite recognizing the existence of alternative tests, Justice Kennard stated that federal constitutional cases such as *Sands* were to be determined by federal precedent as it presently existed.[116] Therefore, since the *Lemon* test was the test predominantly used by the United States Supreme Court in establishment clause cases, the majority held that the three-prong analysis was the correct test.[117]

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110. *Sands*, 53 Cal. 3d 863, 870, 809 P.2d 809, 811, 281 Cal. Rptr. 34, 36.

111. *Id.* The District appealed to challenge the trial court's granting of the petitioner's motion for summary judgment. *Id.*

112. *Id.*

113. *Id.*

114. The *Sands* decision produced a lead opinion by Justice Kennard, three concurring opinions by Chief Justice Lucas, Justice Mosk, and Justice Arabian, respectively, and two dissenting opinions by Justice Panelli and Justice Baxter, respectively. *Id.* at 863, 809 P.2d at 809, 281 Cal. Rptr. at 34. Justice Broussard and Justice Mosk concurred and signed onto Justice Kennard's opinion. *Id.* Chief Justice Arabian concurred only in the judgment of Justice Kennard's opinion, and Justice Arabian concurred in the holding by Justice Kennard's opinion. *Id.*

115. *Id.* at 883-84, 809 P.2d at 821, 281 Cal. Rptr. at 60.

116. *Id.*

117. *Id.*

Applying the three prongs of the *Lemon* test, Justice Kennard determined that the effect and excessive entanglement prongs had been violated,[118] but declined to apply the primary purpose prong.[119]

Applying the primary effect prong of the *Lemon* test, Justice Kennard determined that the appropriate analysis under the effect prong was Justice O'Connor's endorsement analysis.[120] The Court in *Sands* found that prayer is, by nature and content, a fundamental religious practice for many religious denominations.[121] Therefore, the Court held that by allowing the religiously recognized practice of prayer to take place at a school-sanctioned celebration, the District was sending a strong message of government endorsement of religious conduct.[122] Accordingly, the majority concluded that, irrespective of the District's actual objective of solemnizing the ceremony, the effect of the practice was to convey a message of religious endorsement, thereby violating the primary effect prong of *Lemon*.[123]

Addressing the excessive entanglement prong of the *Lemon* test, Justice Kennard determined that supervision of religious practices at a school function was in direct conflict with the establishment clause goal of separating church and state.[124] The Court concluded that due to the participation of school officials in the

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118. *Id.*

119. *Id.* Justice Kennard stated that the primary purpose of allowing the prayers did not need to be addressed since the primary effect and excessive entanglement prongs had been violated. *Id.*

120. *Id.* at 867, 809 P.2d at 813, 281 Cal. Rptr. at 38.

121. *Id.* Justice Kennard relied upon the United States Supreme Court's statement in Engle v. Vitale, 370 U.S. 421, 424-25 (1962), which concluded that prayers were religious in nature. *Id.*

122. *Id.* at 876, 809 P.2d at 815, 281 Cal. Rptr. at 39. Justice Kennard stated that the establishment clause prohibits governments from appearing to take a position on questions of religious belief. *Id.* Further, the Justice Kennard concluded that the state, through the practice of allowing prayer, appeared to favor religion over non-religion by recognizing a religion which addresses a single deity over all other religions or non-believers. *Id.* The majority opinion stated that the short, limited nature of the encroachment did not make the prayer constitutional since the focus of concern was upon the religious character, not the duration. *Id.* at 877, 809 P.2d at 815, 281 Cal. Rptr. at 40.

123. *Id.* at 879, 809 P.2d at 817, 281 Cal. Rptr. at 42.

124. *Id.* The majority relied upon United States Supreme Court's statements in *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971), which indicated that state inspection and evaluation of religious content was unconstitutional. *Id.*

selection of the invocation speakers and in the monitoring of prayer content, excessive administrative entanglement existed.[125] In addition, the *Sands* Court reasoned that the school officials would be prone to choosing speakers who supported a creed or religion with which the school official was familiar, creating entanglements between church and state.[126] Therefore, the majority in *Sands* held that the invocation prayers were a violation of the third prong of the *Lemon* test.[127]

Justice Kennard next addressed the application of the historical and cultural significance test developed in *Marsh v. Chambers*.[128] The Court noted that the United States Supreme Court in *County of Allegheny v. ACLU*[129] had stated that *Marsh* should not be misinterpreted to suggest that all 200 year old practices be deemed constitutional based on the existence of that practice during the time the Framers were in office.[130] Further, the majority asserted that the United States Supreme Court in *Edwards v. Aguillard*[131] had stated that the *Marsh* historical significance test was not useful in public school cases since the free public education system did not exist during the time of the Framers.[132] The fact that ceremonial invocations had been allowed in Nebraska's legislative sessions, therefore, did not persuade the California Supreme Court to extend the *Marsh* rule to ceremonial prayers at public high school graduations.[133]

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125. *Id.* at 880, 809 P.2d at 818, 281 Cal. Rptr. at 43.

126. *Id.* Justice Kennard determined that school officials would have no basis upon which to select speakers, other than to rely upon personal religious preferences. *Id.* Justice Kennard apparently did not rely upon any direct proof or evidence of such a conclusion. *See id.*

127. *Id.*

128. *Id.* at 881, 809 P.2d at 819, 281 Cal. Rptr. at 44. *See supra* notes 58-72 and accompanying text (discussing *Marsh v. Chambers*).

129. 492 U.S. 573 (1989).

130. *Sands*, 53 Cal. 3d 863, 881, 809 P.2d 809, 819, 281 Cal. Rptr. 34, 44 (1991) (citing *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)). Further, the Court stated that the application of *Marsh* by the Sixth Circuit Court of Appeal in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (1987), was error since the *Lemon* test had been the predominate test in school prayer cases. *Sands*, 53 Cal. 3d. at 882, 809 P.2d at 820, 281 Cal. Rptr. at 45.

131. 482 U.S. 578 (1987).

132. *Sands*, 53 Cal. 3d at 881, 809 P.2d at 819, 281 Cal. Rptr. at 44 (citing *Edwards v. Aguillard*, 482 U.S. 578 (1987)).

133. *Id.*

Finally, Justice Kennard sought to hold the graduation prayers unconstitutional under the establishment clause of the California Constitution.[134] However, this portion of Justice Kennard's opinion did not gain the support of a majority of the Court.[135] According to Justice Kennard, the establishment clause of the California Constitution was to be interpreted by the California Supreme Court independent of federal precedent, despite the fact that its language is virtually identical to the federal establishment clause.[136] However, Justice Kennard did not provide an independent analysis of the *Sands* case under the California establishment clause.[137]

C. Concurring Opinion by Chief Justice Lucas

Chief Justice Lucas wrote separately for two reasons: First to express his discontent with the application of the *Lemon* test to graduation prayers in public school, and second, to express his

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134. *Id.* at 882, 809 P.2d at 820, 281 Cal. Rptr. at 45. Justice Kennard also looked to two other provisions of the California Constitution which provide additional guarantees that church and state would remain completely separate. *Id.* at 874, 809 P.2d at 822, 281 Cal. Rptr. at 37-38. Justice Kennard reasoned that the state appeared to take a position on endorsing religion through government sponsorship of prayer at graduation ceremonies in public schools, which clearly violated the "no preference" clause of article I, section 4 of the California Constitution. *Id.* Justice Kennard relied upon the majority's earlier analysis of the graduation prayers under the purpose and effect prongs of the *Lemon* test, where the *Sands* Court had concluded that the prayers in issue were a symbol of government endorsement. *Id.* Government endorsement, according to Justice Kennard, was clearly an indication of a government preference toward religion. *Id.* Justice Kennard also relied upon article XVI, section 5 of the California Constitution, determining that article XVI, section 5 prohibited any official involvement by government which directly or indirectly promoted religion. *Id.* Concluding that graduation prayers promoted religion by endorsing religious conduct at a school sanctioned event, Justice Kennard held that the conduct in issue had clearly violated article I, section 4 and article XVI, section 5 of the California Constitution. *Id. See* CAL. CONST. art. I, § 4; CAL. CONST. art. XVI, § 5.

135. *Id.* at 887, 809 P.2d at 833, 281 Cal. Rptr. at 58 (Lucas, C.J., concurring). Chief Justice Lucas stated that as a result of the various opinions, the *Sands* decision did not contain a majority of the Court regarding the California constitutional issues. *Id.*

136. *Id.* at 874, 809 P.2d at 820, 281 Cal. Rptr. at 45.

137. *Id.* at 883, 809 P.2d at 820, 281 Cal. Rptr. at 45. Justice Kennard stated that the practice of government endorsement of graduation prayers violated not only the establishment clause of First Amendment, but also independently violated the establishment clause of article I, section 4 of the California Constitution. *Id.* Justice Kennard did not explain this conclusion.

unwillingness to reach a decision under the California Constitution.[138] The Chief Justice conceded that the Court was bound under the Supremacy Clause of the United States Constitution to apply federal precedent, and reluctantly concurred in the majority's judgment that the effect prong of the *Lemon* test had been violated.[139]

Although conceding that the California Supreme Court was bound under the Supremacy Clause to apply the *Lemon* test to the federal establishment clause issues in *Sands*, Chief Justice Lucas expressed his dissatisfaction with application of the three prong test in the graduation arena.[140] Despite finding that the United States Supreme Court had continually kept school and prayer separated through application of *Lemon*, the Chief Justice suggested that the reasons for keeping prayer out of the classroom were not as evident in the graduation ceremony context.[141] Further, Chief Justice Lucas found that ceremonial prayer had been a traditional part of American history and culture since the drafting of the Constitution.[142]

In suggesting possible alternatives to the *Lemon* test, Chief Justice Lucas considered the application of the historical analysis

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138. *Sands*, 53 Cal. 3d at 884, 809 P.2d at 821, 281 Cal. Rptr. at 46 (Lucas, C.J., concurring). Chief Justice Lucas was reluctant to concur for several reasons. *Id.* (Lucas, C.J., concurring). First, the Chief Justice preferred to await the United States Supreme Court's pending decision in *Lee v. Weisman*, No. 90-1014 (1991), before deciding the *Sands* decision. *Id.* (Lucas, C.J., concurring). Second, the Chief Justice recognized that the state of establishment clause law was in a state of flux since the *Lemon* test had been criticized by several of the United States Supreme Court Justices. *Id.* (Lucas, C.J., concurring).

139. *Id.* at 884-85, 809 P.2d at 821, 281 Cal. Rptr. at 46 (Lucas, C.J., concurring). Chief Justice Lucas did not formally address the application of the *Lemon* test, and simply concurred with the majority's conclusion that the prayers in issue violated the establishment clause under the second prong of *Lemon*. *Id.* (Lucas, C.J., concurring).

140. *Id.* at 885, 809 P.2d at 821-22, 281 Cal. Rptr. at 46-47 (Lucas, C.J., concurring). The Chief Justice recognized that *Marsh* had allowed ceremonial legislative prayers, and further, that several Supreme Court Justices had expressed dissatisfaction with the three-prong *Lemon* test. *Id.* (Lucas, C.J., concurring). Therefore, if the Supremacy Clause had not bound the Court to apply the *Lemon* test, Chief Justice Lucas would have preferred the historical significance test of *Marsh*. *Id.* (Lucas, C.J., concurring).

141. The Chief Justice found that the vulnerability and impressionability of classroom primary and secondary students was not as evident at graduation ceremonies. *Id.* at 889, 809 P.2d at 831, 281 Cal. Rptr. at 56 (Lucas, C.J., concurring).

142. *Id.* at 890-92, 809 P.2d at 825-27, 281 Cal. Rptr. at 50-52 (Lucas, C.J., concurring).

test adopted by the United States Supreme Court in *Marsh v. Chambers.*[143] Examining America's religious heritage, the Chief Justice compared public school graduation ceremonies to the Nebraska legislative ceremonies considered in *Marsh.*[144] Finding that the graduation prayers were purely voluntary and that the references to "God" easily conformed to fit many different interpretations, the Chief Justice reasoned that the prayers in *Sands* were analogous to the legislative prayers in *Marsh.*[145] Both prayers, according to the Chief Justice, served a secular function of solemnizing public occasions, expressing confidence in the future, and encouraging recognition of what is considered worthy in society.[146]

Chief Justice Lucas determined that when the state engaged in a religious activity similar to harmless acknowledgments endorsed by the Framers and supported by use throughout history, the government activity should be upheld.[147] The Chief Justice stated that if the Court had not been bound by federal precedent, he would have upheld the prayers in issue as a mere accommodation of a historically acceptable practice under the *Marsh* analysis.[148] Finally, the Chief Justice concluded his opinion by declining to address whether the graduation prayers violated the California Constitution until the federal issues had been settled by the United States Supreme Court.[149]

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143. *Id.* at 897, 809 P.2d at 830, 281 Cal. Rptr. at 55 (Lucas, C.J., concurring). Addressing Justice Kennard's reliance upon dicta in *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987), which stated that a historical approach is not appropriate to determinations in public schools since public education did not exist during the time the Constitution was adopted, Chief Justice Lucas asserted that the *Edwards* dicta did not necessarily exclude application of *Marsh* in the public school setting. *Id.* at 898, 809 P.2d at 831, 281 Cal. Rptr. at 56 (Lucas, C.J., concurring). Instead, the Chief Justice suggested that the dicta of *Edwards* was limited to classroom instruction cases since the *Edwards* decision was aimed at prohibiting the teaching of creation science in public school classrooms, not at activities outside the instructional environment. *Id.* (Lucas, C.J., concurring).

144. *Id.* (Lucas, C.J., concurring).

145. *Id.* at 895, 809 P.2d at 829, 281 Cal. Rptr. at 53-54 (Lucas, C.J., concurring).

146. *Id.* (Lucas, C.J., concurring). Legislative prayers and graduation prayers both indicate an acknowledgment of religious beliefs widely held in this country. *Id.*

147. *Id.* at 901, 809 P.2d at 833, 281 Cal. Rptr. at 58 (Lucas, C.J., concurring).

148. *Id.* (Lucas, C.J., concurring).

149. *Id.* at 905, 809 P.2d at 835, 281 Cal. Rptr. at 60 (Lucas, C.J., concurring).

D. Concurring Opinion by Justice Mosk

Justice Mosk, concurring with the majority in finding a violation of the federal constitution under the *Lemon* test, wrote separately to assert that the California Supreme Court should have relied on an independent analysis under the establishment clause of the California Constitution.[150] Justice Mosk stated that California law and California constitutional principles should have been the Court's first concern instead of the Court's last referent.[151] Recognizing that *Lemon* was the proper test under federal establishment clause precedent, Justice Mosk claimed that California was free to provide broader protection than the federal Constitution, and could require a more exacting separation of church and state than was necessary under the *Lemon* test.[152]

Applying the California Constitution's religious clauses to *Sands*, Justice Mosk determined that California precedent sought to prevent government from giving any benefit to religion.[153] Therefore, the relevant inquiry, according to Justice Mosk, should have been whether the school district had granted any benefit to religion that had not been granted to society at large.[154] Under Justice Mosk's analysis, when the state gave preferential treatment to religion by allowing a religious prayer to be placed in an exalted position at a school sanctioned ceremony, a violation of the California Constitution resulted.[155] Viewing the facts of *Sands*, Justice Mosk stated that use of prayer to solemnize an occasion, and the use of clergymen to give the graduation prayers, had definitely given a preferential benefit to religion by placing prayer in an exalted position.[156] Therefore, Justice Mosk concluded that

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150. *Id.* at 905, 809 P.2d at 836, 281 Cal. Rptr. at 61 (Mosk, J., concurring).

151. *Id.* (Mosk, J., concurring). Justice Mosk also stated that it was a pure waste of time and money to not decide the California issue since it would eventually have to be reheard if the United States Supreme Court altered the existing establishment clause tests or protection. *Id.* (Mosk, J., concurring).

152. *Id.* at 906, 809 P.2d at 836, 281 Cal. Rptr. at 61 (Mosk, J., concurring).

153. *Id.* at 911, 809 P.2d at 840, 281 Cal. Rptr. at 65 (Mosk, J., concurring).

154. *Id.* at 911-12, 809 P.2d at 840, 281 Cal. Rptr. at 65 (Mosk, J., concurring).

155. *Id.* at 912, 809 P.2d at 840, 281 Cal. Rptr. at 65 (Mosk, J., concurring).

156. *Id.* (Mosk, J., concurring).

the California Constitution, in addition to the federal constitution, had been violated by the prayers in issue.[157]

E. Concurring Opinion by Justice Arabian

Justice Arabian, finding that federal precedent required the application of the *Lemon* test, concurred with the majority's holding that the graduation prayers in issue violated the First Amendment of the United States Constitution when analyzed under the *Lemon* factors.[158] However, Justice Arabian wrote separately to express his discontent with the *Lemon* test as a guide in establishment clause cases.[159]

Although Justice Arabian stated that the legislative prayer analysis from *Marsh* was not helpful when considering prayer in the public educational setting since public schools did not exist during the time of the Framers, he found that American history did provide the proper perspective for analyzing the ceremonial prayers.[160] Justice Arabian noted that ceremonial prayer was a tradition which held an honorable place in American life and did not threaten religious liberty.[161] Therefore, Justice Arabian held that if *Lemon* had not been required by the Supremacy Clause and federal precedent, the common historical acceptance of public prayer might support the prayers in issue.[162] Further, Justice

157. *Id.* at 905, 809 P.2d at 835-36, 281 Cal. Rptr. at 60-61 (Mosk, J., concurring).

158. *Id.* at 914-15, 809 P.2d at 842, 281 Cal. Rptr. at 67 (Arabian, J., concurring). Justice Arabian did not formally analyze the prayers in *Sands* under the *Lemon* test, concurring in the majority's application of the prayers to *Lemon*. *See id.* (Arabian, J., concurring).

159. *Id.* at 914, 809 P.2d at 842, 281 Cal. Rptr. at 67 (Arabian, J., concurring). Justice Arabian directly appealed to the United States Supreme Court to alter *Lemon* in future establishment clause cases. *Id.* at 918, 809 P.2d at 844, 281 Cal. Rptr. at 69 (Arabian, J., concurring).

160. *Id.* at 917, 809 P.2d at 844, 281 Cal. Rptr. at 69 (Arabian, J., concurring).

161. *Id.* at 916, 809 P.2d at 843, 281 Cal. Rptr. at 68 (Arabian, J., concurring). Justice Arabian stated that George Washington, in his first inaugural address, used a prayer to ask for "His divine blessing." *Id.* at 917, 809 P.2d at 843, 281 Cal. Rptr. at 68 (Arabian, J., concurring). Justice Arabian further stated that Presidential Inaugurals have not changed over the past 200 years with presidents today often invoking religious prayers when addressing the nation. *Id.* (Arabian, J., concurring).

162. *Id.* at 916-17, 809 P.2d at 843-44, 281 Cal. Rptr. at 68-69 (Arabian, J., concurring). Justice Arabian concluded that the prayers did not threaten the religious liberty which the establishment clause has historically sought to protect. *Id.* (Arabian, J., concurring).

Arabian did not join any portions of the opinion regarding the California Constitution, reserving judgment until a later time.[163]

F. Dissenting Opinion By Justice Panelli

In a dissenting opinion, Justice Panelli concluded that invocations and benedictions at public high school graduation ceremonies should have been upheld based on their historical significance and the need for government accommodation of religion.[164] Asserting that the United States Supreme Court had allowed government accommodation of historically based religious expression in *Marsh*, Justice Panelli held that the challenged prayer should have been reviewed under the *Marsh* historical significance test.[165] Maintaining that the United States Supreme Court had never insisted on application of *Lemon*, Justice Panelli refused to take for granted that the proper analysis was *Lemon* without considering alternative tests.[166] Further, Justice Panelli found that even if *Lemon* was the proper analysis, the conduct in issue would have survived analysis under all three prongs.[167]

First, Justice Panelli considered the primary purpose prong of *Lemon*.[168] Questioning the wisdom of the majority's failure to apply the purpose prong, Justice Panelli stated that the purpose behind allowing the prayers should have been considered by the Court before the prayers were categorically forbidden.[169]

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163. *Id.* at 915, 809 P.2d at 842, 281 Cal. Rptr. at 67 (Arabian, J., concurring).

164. *Id.* at 921, 809 P.2d at 846, 281 Cal. Rptr. at 71 (Panelli, J., dissenting).

165. *Id.* (Panelli, J., dissenting).

166. *Id.* at 921, 809 P.2d at 846, 281 Cal. Rptr. at 71 (Panelli, J., dissenting). Justice Panelli stated that the United States Supreme Court has not yet spoken on the permissibility of graduation prayers. *Id.* at 920, 809 P.2d at 845, 281 Cal. Rptr. at 70 (Panelli, J., dissenting). Justice Panelli did not take for granted that the United States Supreme Court would have applied the *Lemon* test to graduation prayers since the Supreme Court had repeatedly stated its unwillingness to be confined to a single test. *Id.* (Panelli, J., dissenting). Justice Panelli noted that in *Marsh*, one case in which the Court had not applied the *Lemon* test, the Court had permitted ceremonial prayers similar to the graduation prayers in issue. *Id.* (Panelli, J., dissenting).

167. *Id.* at 925, 809 P.2d at 849, 281 Cal. Rptr. at 74 (Panelli, J., dissenting).

168. *Id.* at 926, 809 P.2d at 849, 281 Cal. Rptr. at 74 (Panelli, J., dissenting).

169. *Id.* (Panelli, J., dissenting). Justice Panelli recognized that only one prong of *Lemon* needed to be violated before the practice was deemed unconstitutional, but stated that the primary purpose prong should have been given stronger consideration. *Id.* (Panelli, J., dissenting).

Applying the purpose prong, Justice Panelli determined that the purpose of the *Sands* prayer was not to promote religion, but rather to promote solemnity in a ceremonial event.[170] Therefore, according to Justice Panelli, the invocations would pass judicial scrutiny under the primary purpose prong of *Lemon* since the commencement prayers were not designed to solely advance religion.[171]

Applying the second prong of the *Lemon* test, Justice Panelli found it difficult to believe the invocations had the effect of benefiting religion.[172] Due to the short duration of the prayers, Justice Panelli stated that the prayers were actually a fleeting part of a ceremony which recognized a one-time scholastic achievement.[173] Further, Justice Panelli argued that it was highly unlikely that the graduating students would interpret the invocation as government endorsement of any particular religious message due to the maturity of the young adults.[174] Finding no benefit to religion, Justice Panelli held that the primary effect prong of *Lemon* had not been violated.[175]

Applying the excessive entanglement prong, *Lemon*'s third factor, Justice Panelli asserted that no reason existed for school officials to censor the content of graduation prayers.[176] Justice Panelli reasoned that since religious and secular content could co-exist within one prayer, no valid justification existed for curtailing free expression of the prayers by purging them of religious content.[177] Since censorship of the prayer content was unnecessary, Justice Panelli held that the excessive entanglement prong did not create an obstacle for allowing the prayers in issue.[178]

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170. *Id.* (Panelli, J., dissenting).
171. *Id.* (Panelli, J., dissenting).
172. *Id.* at 929, 809 P.2d at 851, 281 Cal. Rptr. at 76 (Panelli, J., dissenting).
173. *Id.* (Panelli, J., dissenting).
174. *Id.* (Panelli, J., dissenting).
175. *Id.* (Panelli, J., dissenting).
176. *Id.* at 930-31, 809 P.2d at 853, 281 Cal. Rptr. at 78 (Panelli, J., dissenting).
177. *Id.* (Panelli, J., dissenting).
178. *Id.* (Panelli, J., dissenting).

Justice Panelli also held that the graduation prayers had not violated the California Constitution.[179] Citing to legislative debates in formulation of the California Constitution, Justice Panelli found it doubtful that the delegates who had voted to place the words "almighty God" into the Preamble of the California Constitution, and who opened legislative sessions with invocations, would have intended to prohibit invocations in public high school graduation ceremonies.[180] Moreover, Justice Panelli argued that the legislative debates on article I, section 4 of the California Constitution did not support Justice Kennard's and Justice Mosk's conclusions that separation of church and state in California extended beyond the requirements of the federal constitution since the drafters of the California Constitution had not so indicated.[181] Article I, section 4, according to Justice Panelli, simply required that no discrimination or religious preference occur, which meant that the state could not give preference to one religion over another.[182] Finding that the state had not given preference to one religion over another through the simple practice of allowing graduation ceremonial prayers, Justice Panelli held that the California Constitution had not been violated by the prayers in issue.[183]

G. Dissenting Opinion By Justice Baxter

Justice Baxter, in a dissenting opinion, concluded that there was no justification for excluding all religious prayers from public high school graduation ceremonies.[184] Although Justice Baxter conceded that some particular clauses within the invocations and

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179. *Id.* at 931, 809 P.2d at 853, 281 Cal. Rptr. at 78 (Panelli, J., dissenting).

180. *Id.* at 931-33, 809 P.2d at 853-54, 281 Cal. Rptr. at 78-79 (Panelli, J., dissenting). Debates regarding the use of the words "almighty God" had occurred, but the majority of the California legislature had voted to incorporate the religious words into the Preamble as a means of solemnizing the California Constitution. *Id.* (Panelli, J., dissenting).

181. *Id.* at 933, 809 P.2d at 854, 281 Cal. Rptr. at 81 (Panelli, J., dissenting). *See supra* notes 99-100 and accompanying text (discussing article I, section 4 of the California Constitution).

182. *Sands*, 53 Cal. 3d at 935, 809 P.2d at 856, 281 Cal. Rptr. at 81 (Panelli, J., dissenting).

183. *Id.* (Panelli, J., dissenting).

184. *Id.* at 939, 809 P.2d at 859, 281 Cal. Rptr. at 84 (Baxter, J., dissenting).

benedictions at issue created establishment clause infractions, he found that significant portions of the prayers did not violate the establishment clause.[185] Justice Baxter agreed with the majority that the *Lemon* test applied to the *Sands* case,[186] but stated that the majority's decision to ban all religious prayers from graduation ceremonies was an overly broad application of *Lemon*.[187] The Court, according to Justice Baxter, could have excluded the specific prayers which had violated the establishment clause without a categorical ban of all graduation ceremony prayers.[188]

Further, Justice Baxter found no violation of the California Constitution.[189] Although he determined that several provisions of the California Constitution referred to separation between church and state, Justice Baxter found no requirement for an absolute ban of religious activity at school-sanctioned events.[190] Accordingly, Justice Baxter would have upheld the practice of ceremonial prayers at public high school commencement exercises under the federal constitution and the California Constitution.[191]

III. LEGAL RAMIFICATIONS

The decision in *Sands* settled a dispute among the California appellate courts by concluding that prayer at public high school graduation ceremonies violates the establishment clause of the

185. *Id.* at 940-43, 809 P.2d at 858-62, 281 Cal. Rptr. at 84-87 (Baxter, J., dissenting). Justice Baxter stated that prayers, which asked the audience to stand and join in prayer, or repeatedly indicated that the audience as a whole was seeking God's blessing, might create establishment clause violations. *Id.* (Baxter, J., dissenting). However prayers which simply stated that the speaker sought God's blessing, or prayers which asked the audience to join in prayer if they so chose, did not create the same establishment clause violations since such prayers allowed for religious freedom which was the intent of the first amendment. *Id.* (Baxter, J., dissenting).

186. *Id.* at 940, 809 P.2d at 859, 281 Cal. Rptr. at 84 (Baxter, J., dissenting).

187. *Id.* at 944, 809 P.2d at 862, 281 Cal. Rptr. at 87 (Baxter, J., dissenting). Justice Baxter concluded that the majority had been overly broad in its *Lemon* test analysis since it could have excluded the prayers which had created obvious violations, instead of excluding all prayers from graduation ceremonies. *Id.* (Baxter, J., dissenting).

188. *Id.* (Baxter, J., dissenting).

189. *Id.* at 947, 809 P.2d at 864, 281 Cal. Rptr. at 89 (Baxter, J., dissenting).

190. *Id.* at 945-47, 809 P.2d at 863-64, 281 Cal. Rptr. at 88-89 (Baxter, J., dissenting).

191. *Id.* (Baxter, J., dissenting).

United States Constitution.[192] In order to reach the conclusion in *Sands*, the California Supreme Court applied the three-part establishment clause test from *Lemon v. Kurtzman*.[193] The Court construed the facts of *Sands* to conclude that the prayers in issue had violated the primary effect and the excessive entanglement prongs of the *Lemon* test.[194] In so doing, the majority in *Sands* asserted that its decision was in accordance with current federal establishment clause precedent.[195]

A. *The* Lemon *Test Controversy*

Due to the broad acceptance of the *Lemon* factors in the majority of cases asserting establishment clause violations the majority in *Sands* concluded that the appropriate analysis under the establishment clause of the United States Constitution was the tri-parte *Lemon* test.[196] However, as pointed out in Justice Panelli's dissent, the United States Supreme Court has not adopted *Lemon* as the sole establishment clause analysis.[197] Since the United States Supreme Court has not spoken on the constitutionality of graduation prayers under the federal Constitution, and in light of discord among the United States Supreme Court Justices as to the

192. *See supra* notes 108-113 and accompanying text (discussing the conflict between the first and fourth district appellate courts).

193. 403 U.S. 602 (1971). *See supra* notes 117-127 and accompanying text (discussing application of the three *Lemon* factors to *Sands*).

194. *See supra* notes 120-27 and accompanying text (discussing the application of the primary effect and excessive entanglement prongs to *Sands*).

195. *Sands*, 53 Cal. 3d at 872, 809 P.2d at 813, 281 Cal. Rptr. at 38.

196. *Id.* at 871, 809 P.2d at 812, 281 Cal. Rptr. at 37.

197. *Id.* at 920, 809 P.2d at 845, 281 Cal. Rptr. at 70 (Panelli, J., dissenting). Despite Justice Panelli's assertion that the *Lemon* test has not been adopted as the sole establishment clause analysis, the United States Supreme Court's overwhelming application of *Lemon* in establishment clause cases would suggest that *Lemon* is presumptively applied unless countervailing justifications command consideration of alternative tests. *See supra* notes 22-72 and accompanying text (discussing alternatives to the *Lemon* test).

credibility of the *Lemon* test,[198] it remains undetermined whether *Lemon* will be the test of choice on this issue.[199]

The *Lemon* test controversy stems from criticism that strict application of the *Lemon* test categorically excludes many religious activities without directing proper consideration toward the historical significance of the religious conduct in issue.[200] Further criticism of the *Lemon* test has resulted from the United States Supreme Court's admitted inconsistencies in addressing establishment clause dilemmas under *Lemon*.[201] The United States Supreme Court Justices, and scholarly critics of *Lemon*, however, are divided as to whether the test should be reformulated, disregarded in limited cases, or abolished altogether.[202]

Strict application of *Lemon* has been questioned by several United States Supreme Court Justices in recent cases.[203] Justice O'Connor, suggesting that *Lemon* be refined or reworked, has favored a reformulation of *Lemon* which focuses on government endorsement of religious messages rather than on the purpose and

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198. *See infra* notes 203-211 and accompanying text (discussing the United States Supreme Court Justices' opinions regarding the *Lemon* test).

199. *But see* Weisman v. Lee, 908 F.2d 1090, 1091 (1st Cir. 1990) *cert. granted sub nom.* Lee v. Weisman, 111 U.S. 1305 (1991) (No. 90-1014) (considering whether prayers given during a public junior high school graduation ceremony violated the establishment clause of the United States Constitution). *See infra* notes 263-270 and accompanying text (discussing the effect that the United States Supreme Court's pending decision in *Weisman* could have upon future cases brought under the establishment clause of the California Constitution).

200. *See Religion and the State, supra* note 2, at 1644 (criticizing the tendency of the *Lemon* test to categorically define religious activity); Marshall, *supra* note 75, at 495-99 (1986) (observing that the Court's applications of the *Lemon* test in the area of establishment clause analysis form an incoherent framework which easily turns on seemingly inconsequential factual determinations); Ripple, *The Entanglement Test of the Religion Clause - A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1217 (1980) (stating that application of the *Lemon* test involves personal judgment regarding how the activity will effect the school environment based on the judge's personal tolerance for religious activity).

201. *See* Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980) (stating that the Court recognizes its inconsistent opinions in establishment clause precedent); Walz v. Tax Commission, 397 U.S. 664, 668 (1970) (stating that the Court's inconsistencies in establishment clause doctrine stem from sacrificing clarity and predictability for flexibility).

202. *See infra* notes 203-216 and accompanying text (discussing the various United States Supreme Court Justice's suggestions regarding *Lemon*, as well as legal scholars' opinions on the abolition or reformulation of the *Lemon* test).

203. *See infra* notes 204-211 and accompanying text (discussing the varying opinions of several United States Supreme Court Justices).

effect of government activity.[204] The Court formally adopted Justice O'Connor's endorsement analysis in *County of Allegheny v. ACLU*.[205] Justice Kennedy, often joined by Justice Scalia, has projected his own test, appearing to favor complete abandonment of the three part *Lemon* test for a test which would favor accommodation of religious practices and invalidate government activity only if such activity directly supported religious conduct or coerced persons to engage in religious activity.[206] Justice White and Chief Justice Rehnquist have on occasion joined with Justice Kennedy and Justice Scalia, expressing discontent over the strict application of the *Lemon* factors.[207] Further, in *Wallace v. Jaffree*,[208] Chief Justice Rehnquist, in a dissenting opinion, stated that the *Lemon* test was a constitutional theory which had no basis in the history of the first amendment it sought to interpret, was difficult to apply, and resulted in unprincipled results.[209] Justice White, in *Roemer v. Board of Public Works*,[210] stated that *Lemon* imposed unnecessary and often superfluous tests for establishing first amendment violations.[211]

Moreover, the *Lemon* test has incurred growing criticism among legal scholars due to the high degree of judicial subjectivity and categorical exclusion of religious conduct which has occurred in

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204. *See supra* notes 44-51 and accompanying text (discussing Justice O'Connor's endorsement analysis). *See generally* Smith, *supra* note 17, at 299 (discussing the application of the endorsement test to religious activity).

205. 492 U.S. 573 (1989). *See supra* note 51 (discussing the Court's decision in *Allegheny*).

206. *See* Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 247 (1990) (Kennedy, J., joined by Scalia, J., concurring in part and concurring in the judgment) (discussing Justice Kennedy's alternative test based on coercion); County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., concurring in the judgment in part and dissenting in part) (discussing Justice Kennedy's discontent with the *Lemon* test and suggesting a return to a test considering coercion).

207. *Allegheny*, 492 U.S. at 655 (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., concurring in the judgment in part and dissenting in part) (discussing Justice Kennedy's desire to apply a new establishment clause analysis).

208. 472 U.S. 38 (1985).

209. *Id.* at 112.

210. 426 U.S. 736 (1976).

211. *Id.* at 768 (White, J., concurring).

establishment clause cases applying the *Lemon* test.[212] As indicated by the majority's application of Justice O'Connor's endorsement test in *Sands*, rather than balancing the weight of evidence in the record, or remanding the case for further factual consideration, application of *Lemon* led the California Supreme Court to conclude that all graduation ceremonial prayers in public high schools involved a high degree of government endorsement and religious advancement.[213] By concluding that the prayers resulted in government endorsement, the California Supreme Court broadly excluded, as a matter of law, all graduation prayers from the public school system, instead of excluding only particular prayers which violate the establishment clause.[214] Such subjective fact finding provided no guidance for lower courts attempting to analyze religious conduct under the establishment clause, other than indicating that a categorical exclusion of graduation prayers was required.[215] However, despite the lack of guidance to lower courts and the controversy surrounding *Lemon*, the *Sands* Court upheld the application of the tri-parte test in establishment clause cases.[216]

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212. *See* Ripple, *supra* note 200, at 1216-18 (discussing judicial subjectivity and the entanglement prong). *See also Religion and the State, supra* note 2, at 1644-1647 (criticizing the tendency of the *Lemon* test to categorically define religious activity based on subjective interpretations). *See generally* Marshall, *supra* note 75, at 496 (criticizing the United States Supreme Court's establishment clause analyses).

213. *See supra* notes 117-137 and accompanying text (discussing the majority opinion in *Sands*).

214. *See supra* notes 164-191 and accompanying text (discussing Justice Panelli's and Justice Baxter's concerns that the majority had been overly broad in the application of the *Lemon* test). *See also* Ripple, *supra* note 200, at 1216-18 (discussing judicial subjectivity of the *Lemon* test).

215. Sands v. Morongo Unified School Dist., 53 Cal. 3d 863, 941, 809 P.2d 809, 860, 281 Cal. Rptr. 34, 85 (1991) (Baxter, J., dissenting). Justice Baxter stated that the school district had asked the court for guidance in applying the *Lemon* test to its practice of including religious invocations in the ceremonies, and the court had failed to provide any guidance. *Id.* (Baxter, J., dissenting). Justice Baxter stated that instead of guidance, the court had provided only an absolute bar to inclusion of the prayers. *Id.* (Baxter, J., dissenting). *See also* Comment, *supra* note 66, at 413 (stating that lower courts lack certainty in applying the *Lemon* analysis which leads some courts to avoid *Lemon* altogether).

216. *See supra* notes 101-191 and accompanying text (discussing the *Sands* decision).

B. "School Prayer" Cases Extended Beyond the Classroom

By classifying high school graduation prayer as school prayer, the *Sands* decision has expanded the school prayer cases to exclude religious conduct beyond the confinement of the classroom setting.[217] In determining the constitutionality of the graduation prayers, the *Sands* Court intermingled instructional classroom prayers found to be unconstitutional by the United States Supreme Court, with the brief ceremonial prayers of the traditional graduation ceremony.[218] Although the graduation ceremonies are closely related to the public school system, application of the school prayer cases excludes from consideration historic traditions of graduation invocations.[219]

There are many differences between classroom prayer and graduation prayer.[220] Graduation ceremonies are analogous to traditional public ceremonies that have existed throughout America's history as a means of solemnizing an event or rewarding individuals for their accomplishments.[221] Further, graduation is not a time of educational instruction, but rather an administrative ceremony to reward students for their educational achievements.[222] Relying on arguments from public classroom prayer cases, the *Sands* majority suggests that graduation prayers

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217. *See supra* notes 73-97 and accompanying text (discussing the school prayer cases). *See also* Note, *supra* note 56, at 1256 (stating that application of the school prayer cases to the graduation context will expand the regulation of religious activity beyond the classroom setting).

218. *See supra* notes 73-97 and accompanying text (discussing the school prayer cases).

219. Stein v. Plainwell Community Schools, 822 F.2d 1406, 1408 (6th Cir. 1987) (discussing the school board's contention that the school prayer cases were developed for the classroom environment and do not extend to graduation exercises which are only annual occasions of a festive, celebratory nature). *See also* Note, *supra* note 56, at 1257 (stating that application of the school prayer cases to graduation prayer cases fails to take account of the secular purposes behind invocations, fails to consider the formality of the ceremony, and fails to maintain the traditional nature of graduation ceremony).

220. *See infra* notes 221-23 and accompanying text (discussing the differences between classroom prayer and graduation prayer).

221. *Stein*, 822 F.2d at 1409 (discussing the history behind graduation prayers).

222. *Id. See also Arguments Before the Court*, 60 U.S.L.W. 3351, 3352 (1991) (stating that graduation ceremonies are not part of the instructional process).

should not to be treated differently than classroom prayer.[223] However, graduation ceremonies are not infused with the same concerns that supported finding classroom prayer unconstitutional.[224]

First, the graduating seniors are of the age of social maturity, so that vulnerability of religious indoctrination or influence does not exist as it does with younger children.[225] Additionally, parents, family, and friends are generally present at graduation ceremonies, thereby removing the coercive influence that a teacher might have in a classroom without parental supervision.[226] The students often control the graduation ceremony, choose the speakers, and play a large part in the celebration of their accomplishments, while the teachers and administrators take a more passive role in these ceremonies.[227] By the time the graduation ceremony occurs, the educational classroom instruction has been completed, removing any possibility of coercion by school officials, or coercion due to the school environment, towards non-participants.[228] Further, while the school prayer cases involved daily repetition of prayer, the graduation prayers occur once a year for 30-90 seconds, and finally, while classroom attendance is mandatory, attendance at graduation ceremonies is not.[229]

However, countervailing arguments suggested that the duration or repetition of the prayer is irrelevant since it is not the quantity of religious endorsement that the establishment clause seeks to

223. Sands v. Morongo Unified School Dist., 53 Cal. 3d 863, 863, 809 P.2d 809, 809, 281 Cal. Rptr. 34, 34 (1991).

224. *See Arguments Before the Court, supra* note 222, at 3352 (listing various differentiating factors between school prayer and classroom prayer)

225. *Sands*, 53 Cal. 3d at 929, 809 P.2d at 851, 281 Cal. Rptr. at 77 (Panelli, J., dissenting).

226. *See Stein*, 822 F.2d at 1409 (discussing the lack of coercion due to parental presence). However, this argument fails to consider that coercion is no longer a factor in consideration of establishment clause violations. *See Sands*, 53 Cal. 3d at 877, 809 P.2d at 817, 281 Cal. Rptr. at 42 (stating that coercion has not been an element in establishment clause cases for nearly three decades).

227. *Sands*, 53 Cal. 3d at 893-94, 809 P.2d at 827, 281 Cal. Rptr. at 52 (Lucas, C.J., concurring); *Stein*, 822 F.2d at 1409.

228. *Sands*, 53 Cal. 3d at 893, 809 P.2d at 827, 281 Cal. Rptr. at 52 (Lucas, C.J., concurring).

229. *Id.* (Lucas, C.J., concurring).

prohibit, but the fact of its existence at all.[230] First, although graduation ceremonies are not mandatory, the vast majority of graduating students do attend the ceremonies.[231] Opponents of high school graduation prayer assert that it would be improper to expect graduating seniors to choose between listening to a prayer during their graduation ceremony verses not attending a graduation ceremony which is designed to honor their educational accomplishments.[232] Finally, although the ceremonies are generally non-educational, graduation ceremonies are an integral part of the educational process, which are often organized and controlled by public school district officials.[233] Considering the countervailing arguments, it is difficult to conclude, that the *Sands* Court erred by applying the school prayer cases in the graduation prayer context.

C. *Historical Significance of Ceremonial Prayer Finds No Place in the Public Schools.*

Relying on a strict application of *Lemon*, the majority in *Sands* did not extend the *Marsh* analysis to the public school setting.[234] Each justice of the California Supreme Court admitted that prayer

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230. *Id.* at 875, 809 P.2d at 815, 281 Cal. Rptr. at 40. *See* Edwards v. Aguillard, 482 U.S. 578, 583-83 (1987) (stating that vigilant compliance with the establishment clause is necessary in the public elementary and secondary school system). *See generally* Note, *supra* note 20, at 478 (stating that the Court has been careful to scrutinize government involvement with religious activity in the context of public schools).

231. *Sands*, 53 Cal. 3d at 878, 809 P.2d at 817, 281 Cal. Rptr. at 42.

232. *Id.* It is suggested that such a choice would be no choice at all. *Id.*

233. *Id.* at 873-74, 809 P.2d at 814, 281 Cal. Rptr. at 39. Justice Kennard asserted that the school district officials could not avoid excessive entanglement with religion when they were monitoring the content of the prayers and participating in the selection of the speakers. *Id.* at 879, 809 P.2d at 817-18, 281 Cal. Rptr. at 42-43. In addressing Justice Kennard, Justice Panelli asserted that there was no need for school officials to involve themselves in the monitoring of prayer content since freedom of expression should allow the speakers to speak as they choose. *Id.* at 930-31, 809 P.2d at 853, 281 Cal. Rptr. at 78 (Panelli, J., dissenting). It should be noted that Justice Panelli did not explain how the Court in *Sands* could have engaged in an examination of the prayers in issue, to determine which prayers did or did not violate the establishment clause, without themselves violating the excessive entanglement prong by monitoring religious content. *See id.* (Panelli, J., dissenting).

234. *See supra* notes 128-133 and accompanying text (discussing the majority's consideration of *Marsh*).

was a historically permissible religious practice in the United States.[235] However, the *Sands* Court concluded that the historical justifications did not extend to allowing prayer in public schools.[236]

Graduation ceremonies throughout the California school system have a long tradition of including invocations and benedictions.[237] Historically, the Framers of the Constitution opened their legislative sessions with prayers,[238] while Presidents speaking to the nation have addressed Americans with prayers.[239] Even the federal courts open courtroom proceedings with a brief prayer.[240] Further, in *Marsh v. Chambers*,[241] the Supreme Court recognized that legislative invocations did not violate the establishment clause since the Framers of the Constitution allowed the First Congress to open with a legislative prayer.[242] Despite the existence of at least some judicial support for ceremonial prayer, the California Supreme Court did not expand the *Marsh* decision to public high school graduation prayers.[243] By limiting the *Sands* decision to an analysis under the *Lemon* test, the California Supreme Court concluded that the *Marsh* analysis was not meant to extend beyond its immediate facts.[244]

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235. *Sands*, 53 Cal. 3d 863, 809 P.2d at 809, 281 Cal. Rptr. at 34.

236. *Id.*

237. Answering Brief for Respondents at 1, Sands v. Morongo Unified School Dist., 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991) (stating that graduation prayer is a long standing tradition in the California school districts).

238. *See* Marsh v. Chambers, 463 U.S. 783, 795 (1983) (upholding legislative prayer during the First Congress based on its historical significance).

239. *See* County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part). Presidents Adams and Madison also issued Thanksgiving Proclamations. *See* STOKES, CHURCH AND STATE IN THE UNITED STATES 180-193 (1950). Further, Presidents have repeatedly issued proclamations recognizing religious holidays. *Id.*

240. *See Marsh*, 463 U.S. at 786 (recognizing the practice of federal courts to open the proceedings by stating "God save the United States and this Honorable Court.")

241. 463 U.S. 783 (1983).

242. *Id.* at 795 (upholding legislative prayer based on its historical significance during First Congress).

243. Sands v. Morongo Unified School Dist., 53 Cal. 3d 863, 874, 809 P.2d 809, 820, 281 Cal. Rptr. 34, 45 (1991).

244. *See id.*

D. Maturity of High School Graduates is Not Considered

In referring to the inherent coerciveness of the school classroom which was relied upon in *Engle v. Vitale*,[245] the majority in *Sands* did not consider the maturity of the graduating high school seniors.[246] By the time of graduation, the average graduating senior is eighteen years of age.[247] At the age of eighteen, the State of California and the federal government recognize that these young adults are able to hold public office,[248] to vote in public elections,[249] to serve America in the armed forces,[250] to marry,[251] and in most states, to enter into binding contracts.[252] At the even younger age of sixteen, the state of California allows these young adults to operate motor vehicles,[253] to be punished for their actions in the commission of crimes,[254] and in some instances to obtain confidential medical treatment without parental

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245. 370 U.S. 421 (1962).

246. *See, e.g.*, Reply Brief for Respondents to Amicus Curiae American Jewish Congress at 3, Sands v. Morongo Unified School Dist., 53 Cal. 3d 863, 809 P.2d 809, 251 Cal. Rptr. 34 (1991) [hereinafter *Reply Brief for Respondents*] (recognizing the maturity level of high school graduates). *See* Albright v. Board of Educ. of Granite School Dist., 765 F. Supp. 682, 691 (recognizing that high school students are not "babes in arms" and are mature enough to know prayer is not government endorsement of religion).

247. *See, e.g.*, Reply Brief for Respondents, *supra* note 246, at 4 (stating that the average graduating high school senior is eighteen or nearly eighteen years of age).

248. *See, e.g.*, CAL. GOV'T CODE § 1020 (West 1980); *See* Reply Brief for Respondents, *supra* note 246, at 4 (stating that graduates are old enough to hold some public offices).

249. *See, e.g.*, CAL. CONST. art. II, § 2; Reply Brief for Respondents, *supra* note 246, at 4 (stating that eighteen-year olds may vote in federal and state elections).

250. *See, e.g.*, 10 U.S.C.S. § 505 (1985); Reply Brief for Respondents, *supra* note 246, at 4 (stating that at the age of eighteen, young males must register for Selective Service in the armed forces and both males and females are of age to enroll themselves in the armed forces).

251. *See, e.g.*, CAL. CIV. CODE § 25 (West 1982); Reply Brief for Respondents, *supra* note 246, at 4 (stating that at the age of eighteen, young adults are allowed to marry without parental consent).

252. *See, e.g.*, CAL. CIV. CODE § 25 (West 1982); Reply Brief for Respondents, *supra* note 246, at 4 (stating that at the age of eighteen, most states allow young adults to bind themselves into lawful contracts).

253. *See, e.g.*, CAL. VEH. CODE § 17701 (West 1982); Reply Brief for Respondents, *supra* note 246, at 4 (stating that at the age of sixteen, young adults may seek their driver's license).

254. *See, e.g.*, CAL. PENAL CODE § 26 (West 1988); Reply Brief for Respondents, *supra* note 246, at 4-5 (stating that sixteen-year olds are able to be tried and punished for their wrongs).

consent.[255] To assert that high school graduates are capable of making the above decisions, but incapable of hearing a thirty to ninety second prayer due to their easily influenced minds appears highly contradictory.[256] Although the concern regarding student vulnerability may be a valid consideration when younger primary school children are involved, it appears misplaced when applied to the graduating high school student.[257]

E. California Implications

Due to the current trend by the United States Supreme Court to limit government action where individual rights are threatened, a re-evaluation of California's state constitution has become extremely important.[258] The California provisions which govern aid to religion are much more explicit than the federal constitution provisions, thereby providing the California courts with further guidance in evaluating the degree of separation necessary between church and state.[259] California has largely ignored the religious clauses of its own Constitution, and instead has relied heavily on

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255. *See, e.g.*, CAL. EDUC. CODE § 46010.1 (West 1982 to Supp. 1992); CAL. CIV. CODE §§ 25.9, 34.50 (West 1982 to Supp. 1992); Reply Brief for Respondents, *supra* note 246, at 5 (stating that young adults of at least sixteen years of age may seek confidential medical treatment without a parent's consent in limited circumstances).

256. *See* Note, *supra* note 56, at 1264 (stating that the invocation and benediction were not directed at impressionable children, but were directed at an audience consisting of mostly adults who were less susceptible to the proselytizing that was a primary concern in public school classrooms).

257. *See* Tilton v. Richardson, 403 U.S. 672, 686 (1971) (noting maturity of college-age students renders them less susceptible to religious influence or indoctrination). However, in support of the majority's decision to disregard the maturity of graduating seniors, it should be noted that a test which focuses upon the maturity of the students might lead to further confusion in establishment clause doctrine by involving the courts in subjective determinations of a student's maturity level. By drawing a bright line between the college students and the primary or secondary school students, the *Sands* Court has upheld a bright line classification based on educational levels, instead of an independent maturity analysis of each grade level or each student.

258. Crosby, *New Frontiers: Individual Rights Under the California Constitution*, 17 HASTINGS CONST. L.Q. 81, 81 (1981) (discussing importance of California Constitution in light of federal limits on first amendment protection).

259. *Id.* at 88. *See supra* notes 98-100 and accompanying text (reciting the California religion clauses).

broad federal protection.[260] However, the current trend of limiting federal first amendment protection suggests that California's Constitution can no longer be overlooked.[261]

In *Sands*, the California Supreme Court was unable to reach a majority decision as to whether the California Constitution had been violated, leaving this issue open for future consideration.[262] Determination of this issue may become exceedingly important, hinging on the outcome of the United States Supreme Court's pending decision in *Lee v. Weisman*.[263] In *Lee*, the United States Supreme Court will determine whether prayers at a public junior high school in Rhode Island violated the establishment clause of the United States Constitution.[264] During oral argument to the United States Supreme Court, counsel for the school board of Rhode Island urged the Court to replace the three part *Lemon* test with a test, similar to *Marsh*, which would provide accommodation to historically acceptable religious practices.[265] The respondents, opposing the graduation prayers, argued for retention of the traditional *Lemon* test.[266] Since the facts and arguments presented in *Lee* are very similar to those in *Sands*,[267] the decision in *Lee*

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260. *See* Note, *Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions*, 37 HASTINGS L.J. 499, 501 (1986) (discussion of California cases refusing to expand the California Constitution beyond the federal Constitution).

261. *See* Crosby, *supra* note 258, at 81 (stating that California's Constitution can no longer be ignored). *See also* Note, *supra* note 260, at 499-502 (stating that the religion clauses of the California Constitution can no longer be ignored).

262. *See supra* notes 101-191 and accompanying text (discussing the *Sands* opinion).

263. Lee v. Weisman, No. 90-1014 (1992). *See* Reidinger, *Let Us Pray: Graduation without Benediction*, 77 A.B.A. J. 90, 90 (Aug. 1991) (stating that if the United States Supreme Court holds that graduation prayers do not offend the federal Constitution, the California ruling could be "vulnerable to hostile review on the ground that it does not rest on an 'adequate and independent' state rationale.").

264. *Weisman*, 908 F.2d at 1091 (considering whether prayers given during a public junior high school graduation ceremony violated the establishment clause of the United States Constitution). *See also*, Reske, *Does Prayer Belong at Graduation?*, 78 ABA J. 47, 47 (Feb. 1992) (discussing the *Lee v. Weisman* case).

265. *See Arguments Before the Court*, *supra* note 222, at 3351 (discussing the oral arguments in *Lee v. Weisman*).

266. *Id.*

267. Reidinger, *supra* note 263, at 90 (stating that *Sands* and *Lee* both considered whether prayers at public school graduation ceremonies violated the establishment clause of the United States Constitution).

will have great impact upon the California Supreme Court's decision.[268]

If the United States Supreme Court determines that the graduation prayers violate the establishment clause, then the California Supreme Court will be unlikely to reconsider the California Constitution on this issue.[269] However, if *Lee* finds no violation of the establishment clause, or drastically alters the current establishment clause protection in favor of limiting first amendment restrictions, the California Court will doubtlessly once again face the issue of graduation prayer under the California Constitution's religion clauses.[270] Since the State of California is free to provide greater separation of church and state than the federal first amendment protection, the California religion clauses will become the focus of protection for those opposed to public school graduation prayers.[271]

IV. CONCLUSION

The California Supreme Court, in *Sands v. Morongo Unified School District*,[272] upheld application of the three-prong *Lemon*

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268. *Id.*

269. There will be no need for the California Supreme Court to rehear whether graduation prayers violated the establishment clause of the California Constitution as long as the federal establishment clause excludes such activity.

270. *See Sands*, 53 Cal. 3d at 906-07, 809 P.2d at 836, 281 Cal. Rptr. at 61 (1991) (Mosk, J., concurring) (stating that the Court will likely rehear the constitutionality of graduation prayers under the California Constitution if the United States Supreme Court alters the current establishment clause tests).

271. *See supra* notes 98-100 and accompanying text (discussing the California Constitution). If the California Supreme Court were to reconsider the graduation prayers under the California Constitution, it is difficult to speculate upon how the various justices would hold. *See* Ripple, *supra* note 200, at 1224-25 (stating that it has always been particularly difficult to predict the future trend of the religion clause doctrine). Although Justice Kennard and Justice Mosk held in *Sands* that the California Constitution had been violated, Justice Panelli and Justice Baxter did not agree. *See supra* notes 101-191 and accompanying text (discussing the various Justices' opinions in *Sands*). Further, given Chief Justice Lucas' and Justice Arabian's discontent with the *Lemon* test, it is unclear which direction these Justices will sway. *See supra* notes 137-149 and 158-163 and accompanying text (discussing Chief Justice Lucas' and Justice Arabian's opinion in *Sands*). Finally Justice George, replacing Justice Broussard as the newest Justice to the California Supreme Court, did not sit on the Court during consideration of *Sands*. Therefore, it is unclear how Justice George would hold on the California issues.

272. 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991).

test in establishment clause cases, and accordingly held that public high school graduation invocations and benedictions violated the establishment clause of the United States Constitution. Hence, individuals seeking to use religious expression to solemnize occasions or join citizens together, will be forced to refrain from such expression at public school functions. The final result is a further separation of church and state under the first amendment's establishment clause in California's public schools.

Michaelle S. DiGrazia