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Critical Analysis of Continuing Establishment Clause Flux As Illustrated by Lee v. Weisman, 112 S. Ct. 2649(1992) and Graduation Prayer Case Law: Can Mutual Tolerance Reconcile Dynamic Principles of Religious Diversity and Human Commonality, A

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A Critical Analysis Of Continuing Establishment Clause Flux As Illustrated By *Lee v. Weisman*, 112 S. Ct. 2649 (1992) And Graduation Prayer Case Law: Can Mutual Tolerance Reconcile Dynamic Principles Of Religious Diversity And Human Commonality?

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INTRODUCTION

Establishment Clause analysis in the Supreme Court of the United States remains in a state of flux,[1] despite the High Court's recent graduation invocation and benediction decision entitled *Lee v. Weisman*,[2] a case widely expected to break new Establishment Clause ground.[3] The Court's plurality decision in *Lee* and actions by

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1. Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 885, 809 P.2d 809, 821, 281 Cal. Rptr. 34, 46 (1991) (Lucas, C.J., concurring), *cert. denied*, 112 S. Ct. 3026 (1992).

2. 112 S. Ct. 2649 (1992).

3. *See* Linda Greenhouse, *Justices Appear Wary In Argument Over Prayer At School Graduations*, N.Y. TIMES (National Ed.), Nov. 7, 1991, at A1 (stating "the case, which could well be a vehicle for unsettling decades of precedent on the relationship between church and State, is one of the most important of the Supreme Court's term"); Laura Mecoy, *High Court Bans Graduation Prayers, Strong Bearing on California Case*, SACRAMENTO BEE, June 25, 1992, at A1 (stating "Wednesday's ruling shocked the High Court's critics and supporters because they had expected the

the Court such as granting certiorari in at least two Establishment Clause cases in the 1992 term[4] are indicative of the continuing unresolved state of Establishment Clause law. Also indicative was the Court's denial of the petition for certiorari in *Sands v. Morongo Unified School District*,[5] a case argued by this author in the California trial, appellate, and supreme courts, which struck down student-planned graduation invocations and benedictions as unconstitutional, while at the same time vacating and remanding for further consideration in light of *Lee* a Fifth Circuit decision entitled *Jones v. Clear Creek Independent School District*,[6] a case approving graduation prayer initiated, drafted, and presented by students.[7]

Counsel sailing into uncharted Establishment Clause waters finds a variety of Supreme Court approaches. Early Supreme Court Establishment Clause opinions stressed an absolute separation between church and state.[8] Later majority decisions rejected such an absolutist approach,[9] focusing instead upon an historical analysis.[10] Currently, counsel involved in an Establishment Clause dispute will

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conservative justices to open the floodgates for new litigation by devising a new interpretation of the Constitution's ban on the government's establishment of religion").

4. *See generally* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381 (2nd Cir. 1992), *cert. granted*, 61 U.S.L.W. 3219 (U.S. Oct. 5, 1992) (New York decision involving use of school auditorium for religious activities); Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3219 (U.S. Oct. 5, 1992) (Arizona decision regarding furnishing state-financed sign language interpreter for private sectarian high school student).

5. 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*, 112 S. Ct. 3026 (1992).

6. 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992).

7. *Id.* at 417. At the close of the 1991 Term the High Court also declined to hear two additional education cases implicating Establishment Clause issues; *see* Roberts v. Madigan, 921 F.2d 1047, 1056 (10th Cir. 1990) (holding that a Denver school district did not violate the Establishment Clause by forbidding a Denver public school teacher to display on his desk and silently read the Bible during class), *cert. denied*, 112 S. Ct. 3025 (1992); Bishop v. Aronov, 926 F.2d 1066, 1078 (11th Cir. 1991) (upholding University of Alabama directions to a professor not to interject religious beliefs into the classroom), *cert. denied*, 112 S. Ct. 3026 (1992).

8. *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) ("[s]eparation means separation, not something less"); Everson v. Board of Education, 330 U.S. 1, 18 (1947). *See also infra* notes 38-50 and accompanying text (discussing the absolute separation approach).

9. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673, 678 (1984); Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970); *see also infra* notes 38-50 and accompanying text (discussing the absolute separation approach).

10. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983); *see also* Wallace v. Jaffree, 472 U.S. 38, 91-107 (1985) (Rehnquist, J., dissenting) (setting forth an historical analysis); *infra* notes 81-88 and accompanying text (discussing cases utilizing an historical analysis).

find that First Amendment jurisprudence has resulted in the evolution of multiple identifiable "tests" for Establishment Clause issues, the most well-known of which is the often repeated trilogy of "purpose," "effect," and "entanglement" set forth in *Lemon v. Kurtzman.*[11] Nevertheless, the Supreme Court notably has declined to limit itself to any single "test,"[12] or even a single "guideline,"[13] in this delicate area of constitutional law. In fact, the majority of justices now on the Court have at one time or another criticized or expressed reservations regarding *Lemon.*[14] Even when the Court has stated it was applying *Lemon*, various justices have critiqued and reformulated the *Lemon* test and, in the process, have put forward competing "endorsement" and "coercion" analyses.[15]

The High Court's decision last term in *Lee* left the state of flux unresolved. While the majority of the Court in *Lee* determined graduation invocations and benedictions sponsored by public school district officials were impermissible,[16] the Court did not resolve the larger Establishment Clause issue of which standards or principles apply in evaluating an Establishment Clause case that is not fact-specific to *Lee*. Thus, bench and bar must continue to wrestle with difficult Establishment Clause issues without definitive guidance from the High Court. The most basic question is what law to apply to

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11. 403 U.S. 602 (1971); *see infra* notes 72-80 and accompanying text (discussing the *Lemon* decision).

12. *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (emphasizing the Court's "unwillingness to be confined to any single test or criterion in this sensitive area").

13. *See* Mueller v. Allen, 463 U.S. 388, 394 (1983) (portraying the *Lemon* trilogy as "'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges"); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 789-90 (1973) (quoting Chief Justice Burger in *Lemon*, 403 U.S at 614) (noting that "constitutional analysis is not a 'legalistic minuet in which precise rules and forms must govern'").

14. *See, e.g.*, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment and dissenting in part); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting); Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting); Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring).

15. *See, e.g., Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Wallace*, 472 U.S. at 69-70 (O'Connor, J., concurring); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (setting forth "endorsement" analysis); *County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part, dissenting in part) (setting forth "coercion" analysis); *see infra* notes 89-100 and accompanying text (discussing endorsement and coercion approaches).

16. Lee v. Weisman, 112 S. Ct. 2649, 2661 (1992).

a given set of facts. But larger questions remain. Why are judicial splits of opinion in Establishment Clause cases not only unresolved, but widening? Why does the Establishment Clause create such judicial confusion, consequently making it difficult, if not impossible, for public agency counsel to render practical, comprehensible advice?[17]

The length, breadth, eloquence, and sheer number of judicial opinions in graduation prayer cases alone attest to the struggles within both trial and appellate courts.[18] Moreover, church-state issues, particularly in public schools, have been identified as part of a larger societal culture war,[19] and the courts must be presumed aware of the public's strong reaction to the 1960s school day prayer decisions.[20] The public's ongoing interest in religion and religious practices remains high,[21] and judicial opinions often reference the

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17. This sentiment is not unique to the author. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional").

18. *See, e.g., Lee*, 112 S. Ct. 2649 (resulting in four diverse opinions from the High Court); Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (resulting in three opinions by the First Circuit Court of Appeals); Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*, 112 S. Ct. 3026 (1992) (resulting in separate opinions from six of the seven California Supreme Court justices, collectively rated "Best Opinion of the Year" by *California Lawyer*); Sands v. Morongo Unified Sch. Dist., 214 Cal. App. 3d 45, 262 Cal. Rptr. 452 (1989), *rev'd*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991) (resulting in two opinions by the California Court of Appeal, Fourth District); Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987) (resulting in three opinions by the Sixth Circuit Court of Appeals in this graduation prayer case); *see also Annual Supreme Court Review: Plunging Into the Political Thicket*, CAL. LAW., June, 1992, at 31-36.

19. *See* JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 197-224 (1991).

20. *See* RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION, A CASE STUDY IN CONSTITUTIONAL INTERPRETATION 175 (1987) ("Public furor which was without equal in any prior case before the Supreme Court arose after the *Engle* decision was announced").

21. *See* HAROLD BLOOM, THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION 38-39 (1992) (noting "[t]he central fact about American life, as we enter the final decade of the twentieth century, is that our religiosity is everywhere"); *see also* George W. Cornell, *Religious Beliefs a Key to Political Leaning, Poll Finds*, SACRAMENTO BEE, Sept. 5, 1992, Scene, at 10 (publishing a recent survey conducted by the Ray C. Bliss Institute of Applied Politics at the University of Akron concluding Americans are a very religious people); Gibbs, *America's Holy War*, TIME, Dec. 9, 1991, at 60, 64 [hereinafter *America's Holy War*] (setting forth a recent Time/CNN Poll on Religion). The recent Time/CNN poll set forth the following responses regarding religion in public life:

strong religious interests of the American public and the historic place of religion in American life.[22] This overall interest of the public in civic religious practices remains strong, especially in the school context.[23]

In addition to public sentiment, there is the unstated but real fact that each judge before whom such a matter is brought, though duty-bound to interpret and enforce the federal and state constitutions regardless of personal convictions, brings to the case personal

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In American life:

How much religious influence is there?
Too much - 11%
Too little - 55%
Right amount - 30%

Is religious influence:
Increasing? - 27%
Decreasing? - 65%

Do you favor or oppose:
Displaying symbols like a Nativity scene or a menorah on government property?
26% oppose, 67% favor
Removing references to God from all oaths of public office?
74% oppose, 20% favor

Would you vote for a presidential candidate who did not believe in God?
63% no, 29% yes.

America's Holy War, supra, at 64.

22. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 313 (1952) (stating "[w]e are a religious people whose institutions presuppose a Supreme Being"); Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 892 n.5, 809 P.2d 809, 827 n.5, 281 Cal. Rptr. 34, 52 n.5 (1991) (Lucas, C.J., concurring).

23. *See America's Holy War, supra* note 21, at 64 (setting forth the following responses regarding religion in schools). Additionally, the poll received the following responses:

In American schools:

Which of these activities should be allowed on school grounds?
Voluntary Bible classes - 78%
Voluntary Christian fellowship groups - 78%
Prayers before athletic games - 73%
Church choir practice - 56%

Do you favor or oppose:
Allowing children to say prayers in public schools?
18% oppose, 78% favor
Allowing children to spend a moment in silent meditation in public schools?
9% oppose, 89% favor.

Id.

feelings, beliefs, and a religious or non-religious background.[24] The struggle to interpret and enforce federal and state Establishment Clauses also necessarily involves, particularly at the federal level, the historical purposes and intent of the Constitution's framers.[25] A large part of the Establishment Clause debate concerns dynamic principles of religious diversity and human commonality in a pluralistic American society, principles which, although inchoate, are often discussed in Supreme Court opinions.[26]

To ensure the reader's general understanding of the state of flux in Establishment Clause law, Part I of this Article will briefly review the primary Establishment Clause standards formulated by the Supreme Court of the United States in decisions leading up to the Court's recent decision in *Lee v. Weisman*.[27] Next, the Article will provide a concise analysis of each justice's recent position regarding the applicable standard as reflected in the *Lee* decision.[28] Part III of the Article will then focus on the underlying judicial assumptions regarding key issues of religious diversity and human commonality; assumptions that are apparent in Establishment Clause case law and particularly noteworthy in determining the outcome of the public school graduation cases.[29] To illustrate how these assumptions continue to impact judicial Establishment Clause analysis, this

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24. This practical reality has spawned significant academic debate. *See, e.g.*, MICHAEL J. PERRY, MORALITY, POLITICS AND LAW, A BICENTENNIAL ESSAY 121-79 (1988).

25. *See* Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970) (noting the Establishment Clause cannot be interpreted "with a literalness that would undermine the ultimate constitutional objective as illuminated by history.")

26. *See, e.g.*, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 589-91 (1989) (stating "[p]recisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights . . ."); *id.* at 613, 619 (Blackmun, J., concurring) (display of menorah at Christmas time is not "an endorsement of religious faith but simply a recognition of cultural diversity"); *id.* at 627 (O'Connor, J., concurring) (stating "[W]e live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all"); *id.* at 679 (Kennedy, J., concurring) (stating Justice Kennedy's view that "principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious respects"); *see also infra* notes 127-222 and accompanying text (illustrating further the presence of these principles in Establishment Clause case law).

27. 112 S. Ct. 2649 (1992); *see infra* notes 34-100 and accompanying text.

28. *See infra* notes 101-26 and accompanying text.

29. *See infra* notes 127-222 and accompanying text.

Article will then engage in a critical analysis of the California Supreme Court's decision in *Sands v. Morongo Unified School District*,[30] a case in which key opinions specifically reflect each active conflicting strand of Establishment Clause law.[31] Finally, Part IV of this Article will call for a fresh re-thinking of certain key assumptions made by the bench and bar, illustrated again by critical references to the opinions in *Lee* and *Sands*,[32] and conclude by questioning whether genuine mutual tolerance can create a society and jurisprudence where individual conscience is protected, long-standing community traditions including a religious component may continue, and where religion and the State do not end up increasingly hostile towards each other.[33]

I. BACKGROUND: THE "TESTS"

It was not until 1971 that the Court adopted the *Lemon*[34] trilogy, which is now well-known as the operative "test," to be applied, or at least acknowledged, in every Establishment Clause case.[35] However, even when the Supreme Court purports to apply the *Lemon* test, certain identifiable approaches that have developed both prior to

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30. 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*, 112 S. Ct. 3026 (1992).

31. *See infra* notes 223-308 and accompanying text.

32. *See infra* notes 309-15 and accompanying text.

33. *See infra* notes 315-18 and accompanying text.

A caveat. The perspective of the author is that of a public agency counsel in private practice who both successfully and unsuccessfully argued the California graduation prayer case before the trial, appellate, and state supreme courts. This Article does not claim to be that of a detached scholar; rather, whatever insights the author gained came primarily from experience. It is hoped this Article will serve to assist counsel and the bench engaged in Establishment Clause litigation. It is also hoped this Article will contribute to the on-going debate regarding the future of the Establishment Clause, particularly assisting any much-needed attempt to craft a middlepath between those pressure groups who seek to unconstitutionally and unconscionably use the powers of government to impose their religious beliefs on others, and those who conversely seek to use the judiciary to sanitize all facets of religion from public life and discourse.

34. Lemon v. Kurtzman, 403 U.S. 602 (1971).

35. *See infra* notes 101-26 and accompanying text (discussing the *Lemon* decision and subsequent cases considering application of the *Lemon* test). To invalidate a practice or law under *Lemon*, a court must determine: (1) The statute or action in question has a secular purpose, (2) the principal or primary effect of the statute or action is one that neither advances nor inhibits religion, and (3) the statute or practice does not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13.

and since the *Lemon* decision often flow in and out of judicial opinions, affecting the outcome more profoundly than the purported application of the *Lemon* test itself. These identifiable approaches to analyzing an Establishment Clause case will be categorized for discussion purposes as: (1) The absolutist approach; (2) the acknowledgement and accommodation approach; (3) the secular purpose and effect approach;[36] (4) the historical analysis approach; (5) the endorsement of religion approach; and (6) the coercion approach.[37]

A. Absolutist Approach

Early Establishment Clause analysis introduced the concept of an absolute separation between church and state by way of Thomas Jefferson's wall metaphor.[38] In *Everson v. Board of Education*[39] the Court set forth an often repeated absolutist summary of minimum principles as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid a religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious belief or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state

36. These prongs were later joined with excessive governmental entanglement with religion to form the *Lemon* test. *See infra* notes 72-80 and accompanying text (discussing *Lemon*).

37. This review of the pertinent approaches is not intended to be an exhaustive compilation of all case law applying a particular approach. Rather, it is intended to orient the general reader to the key approaches to further illustration and discussion on the underlying causes for the continued Establishment Clause flux.

38. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (stating "[i]n the words of Jefferson, the clause against the establishment of religion was intended to erect a 'wall of separation between church and state'").

39. 330 U.S. 1 (1946).

> nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[40]

Nevertheless, the idea that "the First Amendment erected a wall between Church and State which must be kept high and impregnable"[41] has subsequently been tempered by the Supreme Court. For example, in *Zorach v. Clauson*[42] the Court upheld a New York City program permitting public schools to release students from class during school hours so the students could attend religious instruction or devotional exercises.[43] In so doing, the Court conceded that insofar as "free exercise" or "establishment" of religion was concerned, separation between church and state must be "complete and unequivocal."[44] However, the Court noted that the First Amendment does not require there to be separation "in every and all respects."[45]

More recently, in *Lynch v. Donnelly*,[46] the Court specifically rejected the absolutist approach, characterizing the approach as "simplistic" and defining an approach which examines the actual effect of the law or practice.[47] However, the absolutist approach is

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40. *Id.* at 15-16.
41. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948).
42. 343 U.S. 306 (1952).
43. *Zorach*, 343 U.S. at 312.
44. *Id.*
45. *Id.* In *Zorach* the Court stated:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other–hostile, suspicious, and even unfriendly.

Id.
46. 465 U.S. 668 (1984).
47. *Lynch*, 465 U.S. at 678. The Court stated:

> In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolute approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.
>
> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith–as an absolutist approach would dictate–the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

not a dead letter. Indicative of its perseverance is then-Justice Rehnquist's dissent in *Wallace v. Jaffree*,[48] a 1985 decision involving an Establishment Clause challenge to Alabama's statute authorizing a period of silence for meditation or voluntary prayer.[49]

In *Wallace*, Justice Rehnquist argued the First Amendment was "designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects . . . [but does not] requir[e] neutrality on the part of government between religion and irreligion."[50] Justice Rehnquist's dissent in *Wallace* demonstrates that the absolute separation theory retains vitality and is a continuing source of dispute among the justices of the Supreme Court. Thus, the absolutist approach cannot be ignored by a practitioner entering the Establishment Clause arena.

B. Acknowledgment and Accommodation Approach

By declining to follow the absolutist approach only five years after adhering to it in *Everson v. Board of Education*,[51] the Supreme Court in *Zorach v. Clauson* initiated a vein of law focusing upon acknowledgment and accommodation of religious beliefs and practices.[52] Specifically, the *Zorach* Court asserted:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.[53]

Id. This rejection followed a discussion by the Court focusing on the history of the Establishment Clause. *Id.* at 673-78.

48. 472 U.S. 38, 91-114 (1985).
49. *Wallace*, 472 U.S. at 40-41.
50. *Id.* at 98 (Rehnquist, J., dissenting).
51. 330 U.S. 1 (1946).
52. 343 U.S. 306, 313-14 (1952).
53. *Id.* The Court went on to observe:
When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the

The acknowledgement and accommodation approach reappeared in both the holiday display cases, *Lynch v. Donnelly*[54] and *County of Allegheny v. American Civil Liberties Union.*[55] For example, in *Lynch*, the Court invoked what it described as an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life"[56] to hold that the city of Pawtucket, Rhode Island had a secular purpose for including a nativity scene in its Christmas display, that the city had not impermissibly advanced religion, and that including the creche did not create excessive entanglement between religion and government.[57]

The Court's decision in *County of Allegheny* further illustrates the Court's debate about the acknowledgment and accommodation approach, particularly showing the division among the Justices regarding what constitutes appropriate accommodation. Justice Blackmun, joined by Justices Brennan, Marshall, Stevens and O'Connor, held that a Christmas creche prominently displayed in the county courthouse with an angel bearing a banner proclaiming "Gloria in Excelis Deo!" ("Glory to God in the Highest!") sent "an unmistakable message that [the county government] supports and promotes the Christian praise to God that is the creche's religious message," thus violating the Establishment Clause.[58] According to Justice Blackmun, the government can acknowledge Christmas as a cultural phenomenon, but under the First Amendment the government cannot observe Christmas as a Christian holy day by suggesting that people should praise God for the birth of Jesus.[59]

In contrast to the lack of accommodation for the Christmas display, Justice Blackmun's decision held that a menorah displayed at the city-county building next to a Christmas tree and a sign bearing the message that the city of Pittsburgh "salutes liberty" did not

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public service to their spiritual needs.

Id.

54. 465 U.S. 668 (1984).
55. 492 U.S. 573 (1989).
56. *Lynch*, 465 U.S. at 674.
57. *Id.* at 685.
58. *County of Allegheny*, 492 U.S. at 600.
59. *Id.* at 601.

violate the Establishment Clause.[60] The Court reasoned that, given the display's particular physical setting, the city's overall holiday display must be understood as conveying the city's secular recognition of different traditions for celebrating the holiday season.[61]

A different vision of accommodation was set forth in *County of Allegheny* by Justice Kennedy's dissent, joined by Justices White and Scalia, and Chief Justice Rehnquist. While grudgingly invoking the effect prong of *Lemon* to uphold the validity of displaying a creche in the county courthouse and a menorah in the city-county building,[62] Justice Kennedy stated:

> Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage... [and] the Establishment Clause permits government some latitude in recognizing the central role of religion in society....[63]

Thus, according to Justice Kennedy, the majority's approach was contrary to values expressed in the Establishment Clause because it obsessively resisted all but the most secular and carefully scripted forms of accommodation.[64]

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60. *Id.* at 620.

61. *Id.*

62. *See id.* at 655-57 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy stated he was "content" with the application of the *Lemon* test by the majority, but did not wish "to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area." *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).

63. *Id.* (Kennedy, J., concurring in part and dissenting in part).

64. *Id.* at 677-78 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy concluded that the majority's approach:

> [C]ontradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not .... [T]he only Christmas the State can acknowledge is one in which references to religion have been held to a minimum.

Id.

C. Purpose, Effect, and Entanglement—Putting Together the Lemon Test

1. Purpose and Effect Approach

Approximately ten years after first advancing the acknowledgement and accommodation approach in *Zorach*, two key school prayer cases emerged, specifically barring state-mandated prayer in schools.[65] Because they occurred in the elementary/ secondary school environment, both these decisions have significant precedential influence.[66] However, one of these decisions, *Abington School District v. Schempp*,[67] is also significant for its emphasis on what would ultimately become both the purpose and effect prongs of the tripartite *Lemon* test.[68]

In *Abington*, the Supreme Court of the United States was faced with companion cases presenting the issue of the constitutionality of a public school beginning its day with readings from the Bible.[69] In

65. *See* Engle v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schemp, 374 U.S. 203 (1963). In *Engle*, the Supreme Court held that by requiring a prayer acknowledging dependence upon and asking the blessings of "Almighty God" to be recited in each class in the presence of a teacher at the beginning of each school day, the State of New York had adopted a practice "wholly inconsistent with the Establishment Clause." *Id.* at 422-24.

66. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992) (utilizing Establishment Clause precedent arising in the school context to illustrate the Court's "heightened concern" with prayer and other religious exercises in the elementary and secondary school context). It is clear the influence of *Abington* and *Engel* extends beyond the mere factual similarity of settings. For example, to Justice Kennedy, *Abington* and *Engel* illustrate the risk of "indirect coercion" prayer exercises present, particularly in the context of schools. *Id.* Although Justice Kennedy does not elaborate in *Lee* regarding the reasons prayer in the school context can especially instill the appearance of employing the "machinery of the State to enforce a religious orthodoxy," it is clear that when Establishment Clause issues arise in elementary and secondary school settings, special significance and protection is presumed. *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (noting that "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out derisive forces than in our schools."); Wallace v. Jaffee, 472 U.S. 38, 60-61 (1985) (declaring "[t]hat [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes").

67. 347 U.S. 203 (1963).

68. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also infra* notes 72-80 and accompanying text (discussing *Lemon*).

69. *Abington*, 374 U.S. at 205.

striking down the practice as unconstitutional, the Supreme Court stated that in order to pass constitutional muster, the enactment or action in question must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[70] *Abington* was first in the line of Supreme Court decisions articulating the purpose and effect test and applying them to Establishment Clause cases within the public school setting.[71]

2. *Government Entanglement Prong Added to Create The Lemon Test*

By 1970, with the Court's decision in *Lemon v. Kurtzman*, the Court added a third prong to the purpose and effect inquiry established by *Abington*—namely "excessive government entanglement with religion."[72] In *Lemon*, an opinion holding unconstitutional statutory programs in Pennsylvania and Rhode Island which provided financial support to church-related educational institutions through teacher salary reimbursements or enhancements,[73] Chief Justice Burger stated that every Establishment Clause analysis must begin with consideration of the cumulative criteria developed by prior Supreme Court decisions.[74] Justice Burger went on to identify three tests that he believed could be gleaned from prior decisions: (1) The statute must have a secular legislative purpose; (2) the statute's principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not encourage excessive

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70. *Id.* at 222. The Court wrote:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id.

71. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980).

72. *Lemon*, 403 U.S. at 613; *see Edwards*, 482 U.S. at 583; *Wallace*, 472 U.S. at 55; *Stone*, 449 U.S. at 40 (exemplifying Supreme Court decisions applying *Lemon*).

73. *Lemon*, 403 U.S. at 606-07.

74. *Id.* at 612.

government entanglement with religion.[75] Chief Justice Burger went on to analyze the statutes under each prong to determine that while the statutes had the appropriate secular purpose and effect,[76] they failed the entanglement prong because both states would be involved in qualifying and monitoring the teachers receiving state aid to ensure those teachers successfully segregated their religious beliefs from their secular educational duties.[77]

Since its publication, the *Lemon* decision's three-pronged test has become a force with which to contend in all Establishment Clause decisions.[78] The *Lemon* formulation subsequently has had both detractors[79] and defenders[80] on the High Court. Thus, counsel in an Establishment Clause case must continue to examine the tangled web of Establishment Clause opinions which consider *Lemon.*

D. Historical Analysis Approach

Although *Lemon* has become the standard test in Establishment Clause cases, in *Marsh v. Chambers*[81] the High Court did not reference or apply *Lemon.* Instead, the Court conducted an historical analysis to uphold the commencement of legislative sessions with

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75. *Id.* at 612-13.

76. *Id.* at 613-14.

77. *Id.* at 627.

78. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-9 (2d ed. 1988) (noting that the Supreme Court has applied the *Lemon* framework in all but one Establishment Clause case since *Lemon* was decided in 1971).

79. *See supra* note 12 and accompanying text (listing opinions questioning the applicability of, or simply criticizing, the *Lemon* test).

80. Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring). Justice Powell set forth the following defense of the *Lemon* test:

> I write separately to express additional views and to respond to criticism of the three-pronged *Lemon* test. *Lemon* identifies standards that have proved useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted. Only once since our decision in *Lemon, supra* have we addressed an Establishment Clause issue without resort to its three-pronged test. *Lemon, supra,* has not been overruled or its test modified. Yet, continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis.

Id.

81. 463 U.S. 783 (1983).

invocations.[82] Many decisions by the Supreme Court interpreting the Establishment Clause have used an historical analysis to discern the purpose or intent of the drafters to assist the determination of the constitutionality of a specific action or statute.[83] Indeed, one year prior to *Lemon*, in *Walz v. Tax Commission*,[84] the Supreme Court noted the importance of history in illuminating underlying constitutional objectives.[85]

While an historical analysis is often invoked by the Supreme Court in the area of constitutional interpretation, counsel arguing such an approach in an Establishment Clause case should be wary for the simple reason that history itself is frequently a point of contention, particularly with the justices of the Supreme Court. For example, in his dissenting opinion in *Wallace v. Jaffree*,[86] then Justice Rehnquist, conducted a detailed historical analysis to discredit the absolutist separationist's Jeffersonian wall metaphor,[87] itself an historical approach at one time advocated by the Supreme Court.[88]

E. Endorsement Reformulation

During the 1980's, Justice O'Connor began formulating a revision of the *Lemon* trilogy focusing upon principles of government endorsement or sponsorship of religion.[89] In her concurring opinion in *Wallace v. Jaffree*, Justice O'Connor stated that the central

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82. *Marsh*, 463 U.S. at 786-92.

83. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 425-33 (1962).

84. 397 U.S. 664 (1970).

85. *Walz*, 397 U.S. at 671.

86. 472 U.S. 38 (1985).

87. *Wallace*, 472 U.S. at 92-107 (Rehnquist, J., dissenting); *see supra* notes 48-50 and accompanying text (discussing Justice Rehnquist's dissent in *Wallace*).

88. *See infra* notes 81-88 and accompanying text (discussing early application of the historical analysis approach); *see also* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (declaring that according to Jefferson, the Establishment Clause was intended to erect a wall of separation between church and state).

89. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 69-70 (O'Connor, J., concurring); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring); *see also* Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987); Note, *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1647 (1987) (law review articles discussing Justice O'Connor's endorsement theory).

principle of an endorsement analysis focuses on the Establishment Clause's prohibition of the government taking a position on questions of religious belief, or making adherence to any religion relevant in any way to a person's standing in the political community.[90] This analysis is made from the viewpoint of the reasonable observer.[91]

The endorsement approach seeks to render the *Lemon* trilogy more flexible, primarily by combining the purpose and effect prongs and providing these prongs with an analytical framework by increasing the judicial ability to review historical factors and context.[92] The emerging *Lemon* endorsement analysis is highly context specific, requiring each government practice to be judged according to its unique circumstances, history, and ubiquity.[93] According to Justice O'Connor:

> Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement. . . . The task for the court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.[94]

F. *Principles of Coercion Emerge*

A principle that has arisen to compete with Justice O'Connor's endorsement analysis is illustrated in *County of Allegheny v. American Civil Liberties Union.*[95] In *County of Allegheny*, Justice Kennedy in dissent, with the support of four justices, rejected the

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90. *Wallace* 472 U.S. at 69 (O'Connor, J., concurring).

91. *Id.* at 76 (O'Connor, J., concurring). According to Justice O'Connor, "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." *Id.*

92. *Id.* at 69-70, 74-76 (O'Connor, J. concurring).

93. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 606 (1989); *see id.* at 625, 629-31 (O'Connor, J., concurring).

94. *Wallace*, 472 U.S. at 69-70 (O'Connor, J., concurring). *See* Lynch v. Donnelly, 465 U.S. 668, 690 (O'Connor, J., concurring) (stating "[t]he purpose and effect prongs of the *Lemon* test represent the two aspects of the City's action").

95. 492 U.S. 573 (1989).

endorsement approach[96] and formulated an alternative coercion test.[97] Justice Kennedy's emerging coercion analysis, which he further developed and strongly relied upon in his opinion in *Lee v. Weisman*,[98] focuses both upon history and the purpose of the Establishment Clause[99] to determine whether a challenged practice, in reality, coerces participation or support of a religion or religious faith, or tends to do so.[100] While Justice Kennedy's dissent in *County of Allegheny* put forward the competing coercion approach, it left for future cases such critical questions as how specifically history and purpose are to be applied, and how a practice or statute in reality establishes religion.

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96. *Id.* at 668 (Kennedy, J., concurring in part, dissenting in part). Justice Kennedy noted:

> Even if *Lynch* did not control, I would not commit this court to the test applied by the majority today. The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a 'reasonable observer' may 'fairly understand' government action to 'send a message to non-adherents that they are outsiders, not full members of the political community,' is a recent, and in my view a most unwelcome, addition to our tangled establishment jurisprudence.

Id.

97. *Id.* at 659 (Kennedy, J. concurring in part, dissenting in part.) According to Justice Kennedy:

> Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not in the guise of avoiding hostility or callous indifference give direct benefits to religion in such a degree that it in fact establishes a 'state religion or religious faith or tends to do so.'

Id. (citing *Lynch*, 465 U.S. at 678). In *Allegheny*, the justices of the Supreme Court of the United States extensively examined Establishment Clause principles in the holiday display context. *Allegheny*, 492 U.S. at 655. *Lemon* and the evolving endorsement analysis were revisited by the majority and Justice O'Connor in concurrence. *Id.* at 592-94, 605-06, 609. *See id.* at 623-37 (O'Connor, J., concurring).

98. 112 S. Ct. 2649 (1992); *see infra* notes 102-26 and accompanying text (summarizing Kennedy's opinion, his reliance on coercion principles, and the concurring and dissenting justices' response to a coercion analysis).

99. *Allegheny*, 492 U.S. at 656-57 (Kennedy, J., concurring in part, dissenting in part). According to Justice Kennedy:

> The requirement of neutrality inherent in that [*Lemon*] formulation has sometimes been stated in categorical terms . . . these statements must not give the impression of a formalism that does not exist. Taken to its logical extreme, some of the language quoted above would require a relentless extirpation of all contact between government and religion. But that is not the history or purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.

Id.

100. *Id.* at 659 (Kennedy, J., concurring in part, dissenting in part).

II. WHAT STANDARD CONTROLS TODAY?

Although the question was placed squarely before the Supreme Court in *Lee v. Weisman*,[101] the decision failed to resolve the issue of the appropriate test to be applied in determining whether a practice violated the Establishment Clause. Instead, the Court split 5-4 on the outcome regarding the constitutionality of graduation prayers, while the opinions evidence a discernible four, four, and one division regarding the appropriate Establishment Clause standard. Justice Kennedy, writing the opinion of the Court, framed the issue before the Court as follows: "[W]hether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment . . . ."[102]

Justice Kennedy essentially relied upon the school day prayer cases[103] and his previously asserted coercion approach[104] in determining whether a constitutional violation existed.[105] In reaching the conclusion respondents Daniel Weisman and his daughter, middle school graduate Deborah Weisman,[106] were the victims of impermissible psychological coercion by the state, Justice Kennedy held that, "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. . . ."[107] According to Justice Kennedy such

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101. *See* Petitioner's Opening Brief in *Lee v. Weisman*, at i (copy on file at *Pacific Law Journal*). The Opening Brief states the questions before the Court as follows:

> (1) Do school authorities violate the Establishment Clause by allowing a speaker at a public junior high or high school graduation ceremony to offer an invocation and a benediction that acknowledge a deity; (2) Whether direct or indirect government coercion of religious conformity is a necessary element of an Establishment Clause violation?

Id.

102. Lee v. Weisman, 112 S. Ct. 2649, 2652 (1992).

103. *See supra* notes 39-48 and accompanying text (discussing school day decisions).

104. *See supra* notes 95-100 and accompanying text (discussing Justice Kennedy's coercion analysis).

105. *See Lee*, 112 S. Ct. 2649, 2658 (invoking a long line of cases dealing with religion, primarily through some form of prayer, in schools).

106. *Id.* at 2653-54. Both attended the graduation ceremony at issue in *Lee* after voicing their objections to the school district's decision to include an invocation and benediction in the ceremony. *Id.*

107. *Id.* at 2655.

coercion exists when, as in *Lee*, school officials conduct a formal religious observance at an important ceremonial event, such as a prayer at a school graduation, thus creating an environment where subtle coercive pressures exist and where the student has no real alternative which would allow her to avoid either the fact or appearance of participation in the religious component of the graduation ceremony.[108] Justice Kennedy noted:

> [I]f common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcends human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.[109]

The imprint of the state in composing prayers for students was critical to Justice Kennedy's analysis, which warned that "a State created orthodoxy would put at grave risk freedom of belief and conscience" which Justice Kennedy views as the sole assurance that religious faith is real, not imposed.[110]

Perhaps recognizing the absolutist extreme to which his opinion might be taken, Justice Kennedy stated that at graduation time and throughout the course of the educational process there would be instances when religious values, religious practices, and religious persons would interact with the public schools and students.[111] The significance of this caveat is debatable. Justice Kennedy may be simply referring to student/clergy contact through the Federal Equal Access Act.[112] On the other hand, the door may have been left open

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108. *Id.* at 2656.
109. *Id.*
110. *Id.* at 2658.
111. *Id.* at 2661.
112. *See* Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (upholding the Federal Equal Access Act allowing student religious groups to meet and operate on campus in specified circumstances); *see also* 20 U.S.C. §§ 4071-74 (1991) (setting forth the provisions of the Federal Equal Access Act which allows religious clubs to meet on public school campuses in certain specified circumstances). The curiosity is Justice Kennedy's inclusion of graduation time in the categories within which religious values, religious practices and religious persons may permissibly

for the Fifth Circuit Court of Appeals to resuscitate student planned and directed graduation invocations as in *Jones v. Clear Creek Independent School District*, the graduation prayer case remanded by the Court for determination in light of its decision in *Lee*.[113]

In contrast, Justices Blackmun and Souter, writing separate concurring opinions which were joined by Justices Stevens and O'Connor, specifically rejected coercion as a necessary element of an Establishment Clause violation.[114] Rather, to Justices Blackmun, Souter, Stevens and O'Connor, a violation of the Establishment Clause occurs "when public school officials, armed with the State's authority, convey an endorsement of religion to their students. . . ."[115] Justice Souter also wrote to reject any "acknowledgment or accommodation" approach in the Establishment Clause area which allows "non-preferential" state promotion of religion over non-religion,[116] determining the Establishment Clause forbids support for religion in general no less than support for one religion or another.[117]

Finally, Justice Scalia, in a dissent joined by Chief Justice Rehnquist and Justices White and Thomas, vehemently rejected Justice Kennedy's use of psychological coercion rather than legal compulsion.[118] Instead, the four dissenting justices would have focused upon history, tradition, and the absence of legally (as opposed to psychologically) imposed coercion to uphold the graduation prayer practice at issue in *Lee*.[119]

Thus, the continuing vitality of the tripartite *Lemon* analysis is left unanswered by the Court's decision in *Lee*.[120] Justice Kennedy declined the invitation by petitioner school district and the United

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interact with public schools and students.

113. *See* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992).

114. *Lee*, 112 S. Ct. at 2664 (Blackmun, J., concurring); *id.* at 2671 (Souter, J., concurring).

115. *Id.* at 2678 (Souter, J., concurring); *see also id.* at 2664-65 (Blackmun, J., concurring).

116. *Id.* at 2668-70 (Souter, J., concurring).

117. *Id.* at 2670 (Souter, J., concurring).

118. *Id.* at 2681-85 (Scalia, J., dissenting).

119. *Id.* at 2679, 2683-84 (Scalia, J., dissenting).

120. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1970); *see also supra* notes 72-80 and accompanying text (discussing the *Lemon* decision).

States government to reconsider *Lemon*.[121] Instead of applying the *Lemon* test, Justice Kennedy focused upon coercion principles to determine that "religious exercise[s]" may not be conducted at a graduation ceremony where "young graduates who object are induced to conform."[122] Justice Souter, joined by Justice Stevens and O'Connor, apparently also found insufficient justification to formally revisit *Lemon*. Justice Souter instead conducted a broad stare decisis and historical analysis to essentially adopt the endorsement analysis.[123] Likewise, Justice Blackmun, also joined by Justices Stevens and O'Connor, without discussing the vitality of *Lemon* as precedent, relied solely upon an endorsement analysis as dispositive in this case.[124] Based upon the mere lip service given to *Lemon* by the majority of justices in *Lee*, Justice Scalia's dissent accurately notes that the Court demonstrated "the irrelevance of *Lemon* by essentially ignoring it."[125] Justice Scalia goes on to note that "the internment [of *Lemon*] may be the one happy byproduct of the Court's otherwise lamentable decision."[126]

Thus, with the tripartite analysis of *Lemon* left virtually meaningless but not dead, the *Lee* Court provides the bench and bar with more questions than answers regarding the proper standard to apply when deciding or presenting an Establishment Clause question. For example, does the practitioner argue, and the court apply, one or all of the approaches set forth above, depending upon the facts of the matter, or is the contest now reduced to competing endorsement and coercion principles? Given the continuing flux, a deeper understanding of the underlying judicial assumptions operating in *Lee* and in other Establishment Clause cases is required, both for the courts to examine their own assumptions when deciding a case, and for a practitioner in this area to effectively persuade a court to adopt a desired resolution.

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121. *Lee*, 112 S. Ct. at 2655.
122. *Id.* at 2661.
123. *Id.* at 2678 (Souter, J. concurring).
124. *Id.* at 2667 (Blackmun, J., concurring).
125. *Id.* at 2685 (Scalia, J., dissenting).
126. *Id.* (Scalia, J., dissenting).

III. UNDERLYING DIVERSITY, COMMONALITY AND TOLERANCE PRINCIPLES

It is critical to note that underneath all Establishment Clause tests, as well as proposed revised and new tests as set forth above, lie different judicial visions based upon principles of diversity, commonality, and tolerance. Justice Kennedy's opinion in *Lee* provides an excellent example of how focus upon one of these visions to the exclusion of others creates a virtually outcome-determinative Establishment Clause test. Specifically, Justice Kennedy's opinion evidences a deep concern for the individual in a religiously diverse society. It does not go too far to characterize Justice Kennedy's opinion as focusing solely upon the individual, emphasizing the duty of the state under the Establishment Clause to protect such individual from coercive exposure to religion.

Likewise, Justice Scalia's primary focus on history and tradition, invoking a theme of commonality that rises above our diverse heritage, also foreshadows the outcome of his opinion that the Establishment Clause should not be used as a tool to frustrate the majority of Americans who wish to invoke God during community celebrations. Examples of such references regarding diversity and commonality principles abound in prior decisions of the Supreme Court of the United States[127] and, as illustrated below, were particularly present and outcome-determinative in the lower court graduation prayer cases.

A. Graduation Prayer Case Law

Turning first to an analysis of the reported pre-*Lee* graduation prayer case law, two federal appellate courts,[128] four federal district

127. *See infra* notes 223-30 and accompanying text (discussing the use of these inchoate principles in United States Supreme Court decisions).

128. Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992); Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987). In *Stein*, the court upheld graduation prayer in principle, but struck down the specific prayers before it. *Id.* at 1409-10.

courts,[129] one state appellate court,[130] and one state supreme court[131] upheld graduation prayer as constitutional, while one federal appellate court,[132] three federal district courts,[133] one state supreme court[134] and two state appellate courts[135] struck graduation prayer down as unconstitutional. Strictly by the numbers, an almost even split between holdings of constitutionality and unconstitutionality emerges. This split is not explained solely by reference to the judicial test applied by the various courts—application of at least two *Lemon* prongs by thirteen of the fifteen cases referenced above resulted in a split of six (constitutional)[136] to seven (unconstitutional).[137]

While this Article asserts that the technical judicial method of applying one or more *Lemon* prongs may become critical,[138] most

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129. Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991); Stein v. Plainwell Community Sch., 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987); Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972).

130. Sands v. Morongo Unified Sch. Dist., 214 Cal. App. 3d 45, 262 Cal. Rptr 452 (1989), *rev'd*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991).

131. Wiest v. Mt. Lebanon Sch. Dist., 320 A.2d 362 (Pa. 1974).

132. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992).

133. Weisman v. Lee, 728 F. Supp. 68 (D. R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990); Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989); Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. 531 (S.D. Iowa 1985).

134. Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*, 112 S. Ct. 3026 (1992).

135. Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. App. 1986).

136. Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992); Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991); Stein v. Plainwell Community Sch., 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987); Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wiest v. Mt. Lebanon Sch. Dist., 320 A.2d 362 (Pa. 1974); Sands v. Morongo Unified Sch. Dist., 214 Cal. App. 3d 45, 262 Cal. Rptr. 452 (1989), *rev'd*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1992).

137. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992); Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990); Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989); Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*, 112 S. Ct 3026 (1992); Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. App. 1986).

138. *See* Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992); Weisman v. Lee, 728 F. Supp. 68 (D. R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990); Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*,

dispositive of the outcome in these fifteen cases was the deciding courts' focus and emphasis on the organizing principles of diversity and commonality. Taking again the thirteen courts applying the *Lemon* analysis, a careful reading of these cases reveals that if the court focused generally upon the *diversity* of America's population and specifically upon the individual participant in the graduation ceremony, as well as the potentially oppressive or coercive effect that a prayer could have on any person who held agnostic, atheistic, or simply non-prayer oriented beliefs, the court would strike down the invocation or benediction.[139] Indeed, when one court striking down an invocation considered the nation's common heritage, the court did so in a fashion predisposed to minimizing the importance of that commonality.[140] This focus upon the individual often included a concern with whether an individual felt welcome to attend the ceremony. Concern was expressed that simply because a student was not required to attend graduation in order to receive a diploma, the invocation practice was not free from violating the Establishment

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112 S. Ct. 3026 (1992) (decisions not applying the first secular purpose *Lemon* prong, focusing instead mainly upon the second primary effects prong); *see also infra* notes 156-59 and accompanying text (asserting that the way one or more of the *Lemon* prongs is applied may be critical); *Sands*, 53 Cal. 3d at 921, 809 P.2d at 846, 281 Cal. Rptr. at 71 (Panelli, J., dissenting) (stating "[u]nfortunately, it appears cases like this are decided not by applying a test but by choosing which test to apply"). This Article refines Justice Panelli's insight by asserting that viewpoints on diversity and commonality determine what approach to apply, and then secondarily impact the judicial method of applying an approach or test.

139. *See, e.g.*, Weisman v. Lee, 908 F.2d 1090, 1093, 1096 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992); Weisman v. Lee, 728 F. Supp. 68 (D. R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990); Lundberg v. West Monona Comm. Sch. Dist., 731 F. Supp. 331, 344-45 (N.D. Iowa 1989); Graham v. Central Community Sch. Dist., 608 F. Supp. 531 (S.D. Iowa 1985); Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 883-84, 809 P.2d 809, 820-21, 281 Cal. Rptr. 34, 45-46 (1991), *cert. denied*, 112 S. Ct. 3026 (1992); Bennet v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 1023, 238 Cal. Rptr. 819, 825 (1987); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875, 880 (Or. App. 1986); *id.* at 882 (Warren, J., concurring).

140. *See, e.g., Lundberg*, 731 F. Supp. at 333 n.19. The *Lundberg* court, citing to the legislative prayer case, *Marsh v. Chambers*, 1463 U.S. 783 (1983), noted that the *Marsh* court came close to asserting that prayer in the legislative setting was, at best, a de minimis advancement of religion by the state. *Id.* The *Marsh* Court held that opening the legislative session with prayer was a tolerable acknowledgment of beliefs widely held by the people of this country. *Marsh*, 463 U.S. at 792. However, the *Lundberg* court noted that not only was this de minimis rationale not the basis for the *Marsh* Court's holding, it also failed to take into account the age of the participants involved in a graduation prayer case—namely, children, who would be more susceptible to religious indoctrination. *Lundberg*, 731 F. Supp. at 333 n.19.

Clause. As stated in Justice Kennard's opinion in *Sands v. Morongo Unified School District*:[141]

> Such a result, in which nonbelievers and adherents of minority religions would be effectively excluded from, or made to feel unwelcome at, an important public school activity, would be contrary to the proper and intended role of public schools in our society.[142]

In contrast, one of the six courts upholding graduation school prayer via a *Lemon* analysis specifically focused upon *common* American history and traditions, and would require the individual to tolerate "some governmental accommodation of religion."[143] Another court focused upon broad commonality among human beings and how "[t]he history of [humans] is inseparable from the history of religion."[144] The remaining four courts applying *Lemon* focused upon context and the ceremonial aspect of graduations to essentially strike a balance in favor of the common tradition and history represented by an invocation or benediction, as opposed to individual concerns.[145] Although not applying *Lemon*, one early court decision upholding graduation prayer distinguished the school day prayer decision, *Engle v. Vitale*,[146] focusing upon the secular

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141. 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*, 112 S. Ct. 3026 (1992).

142. *Id.* at 878, 809 P.2d at 817, 281 Cal. Rptr. at 42; *see also* Weisman v. Lee, 908 F.2d 1090, 1094 (1990) ("[t]he fact that individual students may absent themselves . . . furnishes no defense to a claim of unconstitutionality under the Establishment Clause"); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875, 880 (Or. App. 1986) ("school board's action in directing the superintendent and principal of David Douglas High School to include the religious invocation required plaintiffs, including the class valedictorian, as well as other students, to choose between attending the ceremony or staying away"); *Lundberg*, 731 F. Supp. at 344 ("the voluntariness of attendance at the ceremony does not decrease the concern that prayer at the ceremony might still appear to have the stamp of school approval").

143. Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416, 421 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992).

144. Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974).

145. Albright v. Board of Ed. of Granite Sch. Dist., 765 F. Supp. 682, 689, 691 (D. Utah, 1991); Stein v. Plainwell Community Sch., 610 F. Supp. 43 (W.D. Mich. 1985); Sands v. Morongo Unified Sch. Dist., 214 Cal. App. 3d 45, 262 Cal. Rptr. 452 (1989), *rev'd*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991); Wiest v. Mt. Lebanon Sch. Dist., 320 A.2d. 362 (W.D. Pa. 1974).

146. 370 U.S. 421 (1962); *see supra* note 65 and accompanying text (discussing *Engle*).

nature of the activity and the students' voluntary participation in the ceremony.[147]

An excellent example of a decision struggling with and interweaving the principles of diversity and commonality that so marks this area of constitutional law is *Stein v. Plainwell Community Schools.*[148] In *Stein*, the Sixth Circuit did not apply the *Lemon* analysis. Instead, the court applied the analysis of the United States Supreme Court decision of *Marsh v. Chambers*[149] to strike down as unconstitutional the particular invocation at issue, while upholding the practice in theory.[150]

To reach that decision, the *Stein* court first recognized the diversity of the American people, and the value our nation places on the principle of "equal liberty of conscience."[151] The *Stein* court focused upon consistent application of "equal liberty of conscience" to both the legislative and school settings to uphold the practice of offering invocations and benedictions at high school commencements in theory.[152] Thus, the court recognized that "[l]iberty of conscience is limited by the common interest in public order and security . . . [and] individuals may be required to make some accommodation with the 'history and tradition of this country,'"[153] but, by the same token, held such accommodation must not be allowed to rise to the level of excluding certain members of society by allowing invocations and benedictions that contain "language that says to some parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours."[154] Because the language at issue in

147. Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293, 1294 (W.D. Pa. 1972); *see* Engle v. Vitale, 370 U.S. 421 (1962) (barring prayer in public school).

148. 822 F.2d 1406 (6th Cir. 1987).

149. 463 U.S. 783 (1983); *see supra* notes 81-82 and accompanying text (discussing the *Marsh* decision).

150. *Stein*, 822 F.2d at 1410.

151. *Id.* at 1408-09. The phrase "equal liberty of conscience" appears to be the *Stein* court's method of reconciling individual rights of conscience with the tradition and history represented by the legislative invocation approved in *Marsh.*

152. *Id.* at 1409.

153. *Id.* at 1408 (quoting *Marsh*, 463 U.S. at 797).

154. *Id.* at 1410.

Stein did exactly this, the *Stein* court concluded the particular invocation was unconstitutional.[155]

This judicial struggle with principles of diversity, focusing upon common heritage and community traditions, is by no means limited to graduation prayer cases. Principles based upon diversity and commonality in our pluralistic American society, although inchoate, have often been discussed, or cited extensively if not formally discussed, in Supreme Court Establishment Clause opinions.[156] Indeed, the *Lee* decision illustrates quite distinctly that these

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155. *Id.* The *Stein* court objected to the prayers in question because:

> [The invocations/benedictions] are framed and phrased so that they 'symbolically place the government's seal of approval on one religious view'—the Christian view. They employ the language of Christian theology and prayer. Some expressly invoke the name of Jesus as the Savior. They are not the 'civil' invocations or benedictions used in public legislative and judicial sessions as described in *Marsh.*

Id.

156. *See, e.g.*, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 589-591 (1989) (stating "[p]recisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights. . ."); *id.* at 613, 619; *id.* at 627-28 (O'Connor, J., concurring) (stating "[w]e live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all"); *id.* at 679 (Kennedy, J., concurring in part and dissenting in part) (stating "[i]n my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious respects"); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); *id.* at 615 (Scalia, J., dissenting) (stating "[w]e have implied that voluntary governmental accommodation of religion is not only permissible but desirable"); Wallace v. Jaffree, 472 U.S. 38, 53-54 (1985). In *Wallace*, the Court stated:

> This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from the recognition of the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among religions—to encompass intolerance of the disbeliever and the uncertain.

Id.; *see id.* at 69-79, 80-81 (O'Connor J., concurring); *id.* at 89-90 (Burger, C.J., dissenting); *id.* at 113 (Rehnquist, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 673, 678 (1984); *id.* at 697 (Brennan, J., dissenting); *id.* at 727 (Blackmun, J., dissenting); Marsh v. Chambers, 463 U.S. 783, 791 (1983) (asserting history supports "the subject [of legislative prayer] was considered carefully and the action not taken thoughtlessly by force of any tradition and without regard to the problems posed by a pluralistic society); *id.* at 803-06, 812, 817 (Brennan, J., dissenting); Lemon v. Kurtzman, 403 U.S. 602, 658 (1971) (Brennan, J., concurring); Abington Sch. Dist. v. Schempp 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring); McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (stating "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny"); *id.* at 236-37 (Jackson, J., concurring); *id.* at 238-39, 243 (Reed, J., dissenting).

seemingly inchoate principles are now rising up to carry the day.[157] Therefore, a greater understanding and recognition of these organizing principles[158] of diversity and commonality are necessary for counsel who plan to tread Establishment Clause waters. As set forth below, the California Supreme Court's decision in *Sands v. Morongo School District*[159] well illustrates how these organizing principles—a focus upon our nation's religious diversity and the discrete individual versus a contrary focus upon the nation's common history and heritage—impact both the judicial approach taken and the method of applying such an approach.

B. *The* Sands *Decision*

1. *The Test Applied*

In *Sands v. Morongo School District*,[160] six justices of the Supreme Court of California crafted analytic opinions of length and breadth regarding the constitutionality of traditional invocations and benedictions at public high school graduation ceremonies.[161] On the issue of federal constitutionality, the opinions discussed either different prongs of the *Lemon* test, or different alternative tests altogether. The opinions also extensively analyzed, and differed on, basic principles and values of the First Amendment.[162]

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157. *See supra* notes 102-26 and accompanying text (discussing the *Lee* decision).

158. The author refers to these principles as "organizing" principles in the sense that they are arranged by courts into a "whole of interdependent parts." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 831 (9th ed. 1983).

159. 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*, 112 S. Ct. 3026 (1992).

160. *Id.*

161. *Id.* at 867-84, 809 P.2d at 810-21, 291 Cal. Rptr. at 35-46 (Kennard, J., delivering lead opinion); *id.* at 884-905, 809 P.2d at 821-35, 281 Cal. Rptr. at 46-60 (Lucas, C.J., concurring); *id.* at 905-14, 809 P.2d at 835-42, 281 Cal. Rptr. at 60-67 (Mosk, J., concurring); *id.* at 914-18, 809 P.2d at 842-44, 281 Cal. Rptr. at 67-69 (Arabian, J., concurring); *id.* at 918-39, 809 P.2d at 844-59, 281 Cal. Rptr. at 69-84 (Panelli, J., dissenting); *id.* at 939-47, 809 P.2d at 859-64, 281 Cal. Rptr. at 84-89 (Baxter, J., dissenting).

162. Associate Justices Mosk and Panelli also thoroughly analyzed pertinent state and constitutional history and precedent to reach conflicting conclusions. *See Sands*, 53 Cal. 3d 863, 905-14, 809 P. 2d 809, 835-42, 281 Cal. Rptr. 34, 60-67 (Mosk, J., concurring); *id.* at 918-39, 809 P.2d at 844-59, 281 Cal. Rptr. at 69-84 (Panelli, J., dissenting). It is clear a majority of the court did not

The *Sands* plurality flatly held the challenged practice of allowing secondary students to include a religious invocation and benediction in graduation ceremonies unconstitutional based upon both the primary effect and entanglement prongs of *Lemon*.[163] On the other hand, Associate Justice Panelli in dissent extensively analyzed the *Lemon* test,[164] as well as precedent regarding history and permissible accommodation of religious beliefs in public life[165] to find no federal violation.[166] Also in dissent, Associate Justice Baxter applied the *Lemon* test[167] and concluded that the majority of justices went too far in relying on *Lemon* to ban the inclusion of any religious prayer in a high school graduation ceremony.[168]

The concurrences of Chief Justice Lucas and Associate Justice Arabian were thus determinative. Associate Justice Arabian pertinently reasoned that the prayers in *Sands* were Judeo-Christian in nature and that this emphasis would likely offend or seem to be an endorsement of religion to persons who did not share those beliefs, thus violating the effect prong of *Lemon*.[169] However, Justice Arabian also believed that the spirit of religious freedom contained in the Constitution and our common history supported the prayers at

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render any holding on independent state grounds, so discussion of state issues is left for future State Establishment Clause cases.

163. *Sands*, 53 Cal. 3d at 872-81, 809 P. 2d at 812-19, 281 Cal. Rptr. at 37-44. The plurality stated: "Thus, the *Lemon* test has remained controlling law for twenty years. We are required to decide federal constitutional cases on the law as it presently exists. Accordingly, we apply the *Lemon* test in this case." *Id.* at 872, 809 P.2d at 811-12, 281 Cal. Rptr. at 37-38; *see also id.* at 872 n.3, 809 P.2d 813 n.3, 281 Cal. Rptr. 38 n.3. Due to the four-four-one split in *Lee*, this conclusion regarding *Lemon* is outdated and leaves California Establishment Clause jurisprudence extremely muddled.

164. *Id.* at 925-31, 809 P.2d at 849-53, 281 Cal. Rptr. at 74-78 (Panelli, J., dissenting).

165. *Id.* at 921-25, 809 P.2d at 846-49, 281 Cal. Rptr. at 71-74 (Panelli, J., dissenting).

166. *Id.* at 931, 809 P.2d at 849, 281 Cal. Rptr. at 78 (Panelli, J., dissenting).

167. *Id.* at 940, 809 P.2d at 859-60, 281 Cal. Rptr. at 84 (Baxter, J., dissenting).

168. *Id.* at 944, 809 P.2d at 862, 281 Cal. Rptr. at 87 (Baxter, J., dissenting).

169. *Id.* at 916, 809 P.2d at 843, 281 Cal. Rptr. at 68 (Arabian, J., concurring). Justice Arabian stated:

> [I]t is undeniable that the prayers at issue do reflect mainstream Judeo-Christian beliefs. Accordingly, those who shun public prayer, others who reject the concept of a patriarchal 'Lord' or 'Father,' and still others who adhere to non-Western religions, or no religion at all, may view such publicly sanctioned prayers as offensive, if not indeed an official endorsement of religion. Thus viewed, the prayers in question could not pass muster under the second prong of the United States Supreme Court's *Lemon* test.

Id.

issue and, therefore, though constrained to concur in the holding of Justice Kennard's opinion, Justice Arabian did not endorse the underlying reasoning and analysis.[170] Justice Arabian thereafter concluded:

> Our national experience teaches that the mutual independence of church and state is the most conducive system to religious freedom and social and political tranquility. Public prayer does not threaten that harmony or the liberty of conscience which underlies it. On the contrary, it is through such occasions that we reinforce and celebrate the rich diversity that has made us a great and noble people.[171]

California Chief Justice Lucas also reluctantly concurred in Justice Kennard's holding, basing his conclusion upon the fact that the prayer used by the Morongo Unified School District violated the effect prong of *Lemon* because the prayers in question advanced religion.[172] Chief Justice Lucas thereafter fully and thoughtfully reviewed key principles underlying the religion clauses,[173] evaluated the facts and considered the context (*i.e.*, that the prayer was recited as part of a long-standing practice at a graduation ceremony),[174] and applied principles such as those set forth in *Marsh* and *County of Allegheny* to decide:

> Like a scientific theory, a legal principle or fact must account for all the data, i.e., both church-state disengagement and benign recognition of religion and religious ideas in American constitutional law and civic

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170. *Id.*

171. *Id.* at 918, 809 P.2d at 844, 281 Cal. Rptr. at 69 (Arabian, J., concurring).

172. *Id.* at 884-85, 809 P.2d at 821, 281 Cal. Rptr. at 46 (Lucas, C.J., concurring). The Chief Justice stated:

> Reluctantly, I concur in the judgment. On issues of federal constitutional law, this court is bound under the supremacy clause of the United States Constitution by applicable decisions of the United States Supreme Court. Based on my reading of the relevant Supreme Court authority, I conclude that the Morongo Unified School District's practice of allowing invited members of the clergy and others to offer prayers at high school graduation ceremonies violates the second prong of the high court's *Lemon* test, i.e., the primary effect of the practice is one that advances . . . religion.

Id.

173. *Id.* at 886-93, 809 P.2d at 822-27, 281 Cal. Rptr. at 47-52 (Lucas, C.J., concurring).

174. *Id.* at 893-901, 809 P.2d at 827-33, 281 Cal. Rptr. at 52-58 (Lucas, C.J., concurring); *see infra* notes 203-07 and accompanying text (further discussing the importance of context).

> culture. When government engages in a practice that is similar to those benign acknowledgements of a Supreme Being endorsed by the framers of the Constitution and that has stood the test of time by remaining an accepted part of culture, such practice should be upheld as constitutional unless it engages government in sectarian favoritism, financial aid to church institutions, or other conduct that pressures citizens, directly or indirectly, to believe or disbelieve. Having found none of the latter elements to be present in this case, I would, if free to do so, uphold the challenged practice of the school district.[175]

Thus, while the majority of the Supreme Court of California perceived its result in *Sands* as dictated by the High Court's *Lemon* precedent and the Supremacy Clause, the holding in *Sands* was more narrowly based upon the concurring views of Justice Arabian and Chief Justice Lucas regarding uncited precedent specifically involving the second primary effect prong of the *Lemon* test. Both Chief Justice Lucas and Associate Justice Arabian, free from the constraints of *Lemon*, would have upheld the traditional practice. Thus, even among a court majority ostensibly applying *Lemon*, and particularly the second primary effect prong, significant distinctions in approach and method are discernable. Further analysis illustrates key differences among the court majority and dissenters in *Sands*, and demonstrates the importance of the organizing principle chosen by each justice.

2. *The* Sands *Plurality*

Justice Powell noted in *Wallace v. Jaffree*[176] that one value of the *Lemon* test in the past had been avoidance of ad hoc decision making.[177] However, the above analysis of the splits of opinion among the California Supreme Court in graduation prayer case law establishes, at a minimum, that ad hoc decision-making continues

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175. *Sands*, 53 Cal. 3d at 901, 809 P.2d at 833, 281 Cal. Rptr. at 58 (Lucas, C.J., concurring); *see* Marsh v. Chambers, 463 U.S. 783 (1983); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

176. 472 U.S. 38 (1985).

177. *Wallace*, 472 U.S. at 63.

unabated.[178] Justice Kennard's *Sands* opinion concretely demonstrates that such ad hoc judicial choices continue by a court assertedly applying *Lemon*. These judicial choices change based upon which approach is adopted,[179] and perhaps more specifically in the *Sands* plurality opinion, which prong of the *Lemon* test is emphasized in given circumstances.

The *Sands* opinion illustrates that the primary, outcome-determinative judicial choice is whether the court adopts the organizing principles of diversity or commonality.[180] The importance the *Sands* plurality opinion placed, in both opening and closing the opinion with tributes to the diversity of America cannot be slighted or dismissed.[181] The underlying policy driving the *Sands* plurality opinion eloquently rests upon diversity and pluralism, commencing with the statement that "[o]urs is a nation composed of people of many races and faiths."[182] The opinion concludes by observing:

> In a world frequently torn by religious factualism and the violence tragically associated with political division along religious lines, our nation's position of governmental neutrality on religious matters stands as an illuminating example of the true meaning of freedom and tolerance.[183]

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178. *See supra* notes 128-59 and accompanying text (graduation prayer case law analysis).

179. *See supra* notes 38-100 and accompanying text (setting forth the various approaches used to analyze Establishment Clause cases).

180. This point is borne out by much of the emphasis in oral argument before the California Supreme Court. Counsel for Appellants (A.C.L.U.-Sands) told the court a story involving a Native-American student who had faced disciplinary action in a district somewhere in California due to her refusal to stand or recite the Pledge of Allegiance; a point having nothing to do with graduation ceremonies in Morongo Unified, but everything to do with ethnic and religious diversity and a focus upon the individual. The author focused to a great extent upon the history and ceremonial nature of the practice in dispute, prompting Justice Mosk to remark at one point that Thomas Jefferson "must be whirling in his grave." Justice Kennard asked the author whether a Japanese-American high school principal selecting a Buddhist monk to deliver an invocation at his school for sixteen years would not establish a preference for a religion. Chief Justice Lucas, Justice Arabian, and Justice Panelli extensively questioned both counsel regarding similar historical practices and acknowledgments of the religious heritage, including the reference to "Almighty God" in the preamble to the California Constitution.

181. *Sands*, 53 Cal. 3d at 867-68, 883-84, 809 P.2d at 810, 821, 281 Cal. Rptr. at 35, 46.

182. *Id.* at 867, 809 P.2d at 810, 281 Cal. Rptr. at 35.

183. *Id.* at 884, 809 P.2d at 821, 281 Cal. Rptr. at 46.

The *Sands* plurality opinion's primary focus upon individual religious sensibilities is apparent:

> Through the practices challenged in this case, the government appears to prefer religion over nonreligion; appears to prefer religions that acknowledge the practice of petitionary prayer over religions that do not recognize such prayer, appears to prefer the religious belief that prayer should be public over the belief that prayer should be private; and implicitly endorses religions that address a single, anthropomorphic, and male deity over those that do not.[184]

The plurality's emphasis upon national religious diversity and sensitivity to each religion's tenets regarding a deity, as well as each individual's own personal religious or non-religious conceptions, is certainly far different than Justice Douglas' previous dismissal of a standard based upon the perception of the "fastidious atheist or agnostic."[185] The clear policy focus and consequent emphasis upon individual sensibilities significantly impacted the method of applying the *Lemon* inquiry undertaken by the *Sands* plurality.

First, and perhaps most notably, Justice Kennard's opinion declined to apply the secular purpose prong of the *Lemon* test.[186] The *Sands* plurality simply noted that although it had doubts whether the government sponsored prayers at issue here would pass the secular purpose test, the court would not address that question because the *Lemon* primary effect and entanglement prong were violated.[187] However, by refusing to address the first prong of *Lemon*, the *Sands* plurality ignored two important and carefully drafted California Court of Appeal secular purpose findings.

The Fourth District Court of Appeal had initially determined that the purpose of the graduation ceremony itself was "wholly secular."[188] The court of appeal then examined the invocation and benediction opening and closing the graduation ceremony in the

184. *Id.* at 874, 809 P.2d at 814, 281 Cal. Rptr. at 39.

185. Zorach v. Clausen, 343 U.S. 306, 312-13 (1952).

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

187. *Id.*

188. Sands v. Morongo Sch. Dist., 225 Cal. App. 3d 1385, 1397, 262 Cal. Rptr. 452, 459 (1989), *rev'd*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991).

context of that secular purpose.[189] The appellate court concluded that the challenged practice in *context* served the legitimate secular purpose of solemnizing the public occasion and added a note of dignity and decorum to the ceremony by serving to focus the audience's attention.[190] The court of appeal thereafter analytically applied the second primary effect *Lemon* prong and determined that although standing alone, prayer may appear to have the purpose or effect of advancing religion, in the *context* of the graduation ceremony, where it was a brief and peripheral part of a ceremonial function, the practice was constitutional.[191]

Since Justice Kennard's opinion in *Sands* simply did not address the secular purpose prong of *Lemon*, the opinion avoided consideration of the long-standing history and ubiquity of the graduation practice, and averted analyzing such invocations and benedictions in their unique circumstances. Thus, any approach involving considerations of context and history are left out of the California Supreme Court plurality's analysis of the *Lemon* test.[192]

Additionally, the *Sands* plurality ruled as a matter of law, a standard appellate courts must apply in Establishment Clause cases.[193] Although recognizing that the record lacked evidence of any student or other participant in a graduation ceremony actually objecting to invocations and benedictions, the *Sands* plurality opinion concluded, as a matter of law, that "a reasonable observer would view the inclusion of graduation prayers in an official school

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189. *Id.*

190. *Id.*

191. *Id.* at 1397-99, 262 Cal. Rptr. at 459-61. The court noted that the prayer did not occur in a pedagogical context, nor was it part of a program of calculated indoctrination. *Id.*

192. Justice Panelli in dissent critiqued this omission writing:

> The lead opinion does not discuss secular purpose, the *Lemon* test's first prong. While I understand the opinion's statement that a challenged practice violates the *Lemon* test if it fails any of the three prongs, I question the wisdom of forbidding a practice that is deeply embedded in tradition without stopping to consider its purpose. To do so may suggest an insensitivity to widely held beliefs that the majority probably does not intend.

Sands, 53 Cal. 3d at 926, 809 P.2d at 849, 281 Cal. Rptr. at 74 (Panelli, J., dissenting).

193. *Id.* at 874 n.5, 809 P.2d at 814 n.5, 281 Cal. Rptr. at 39 n.5; *see* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 597-602 (1989) (Supreme Court of the United State's decision holding, as a matter of law, that the government had given support to a particular religious message by its display of a creche on the grand staircase in the county courthouse); *see also supra* notes 58-64 and accompanying text (discussing *County of Allegheny*).

ceremony as signifying approval of the practice of prayer and the prayer's religious content. The message of sponsorship is unavoidable."[194]

The *Sands* plurality opinion ruled as a matter of law regarding the primary effect upon a hypothetical reasonable observer yet, as noted, did not address the secular *celebratory* purpose which impacts any effect upon a genuine reasonable observer during a ceremony. The court's non-contextual approach is an unmistakable result of an emphasis upon diversity. If one assumes it is constitutionally impermissible for any single individual to attend or, put bluntly, undergo a public ceremony in which clergy improperly invoke solely a "single, anthropomorphic, and male deity,"[195] then the ceremonial context, history and ubiquity of the practice is of little import. A court may safely assume a reasonable observer would of course object *regardless of context.* Indeed, the long-standing ceremonial inclusion of the invocation and benediction within the graduation ceremony mattered even less if a court considered the school day cases[196] controlling, rather than the facts regarding actual graduation ceremonies. The ceremonial context is then simply irrelevant.

As another predictable result of the court's chosen emphasis upon diversity and the individual, the *Sands* plurality shifted to analogizing the end of the year graduation ceremony situation to the instructional school day.[197] The plurality's use of this analogy assists in understanding the underlying dynamic, since an analogy to the school day can be made only by ignoring *context,* as is made clear by brief application of both the purpose and effect prongs of *Lemon.*

First, with respect to the school day, the overall state secular purpose is instruction of pupils. Assuming momentarily no opinion

194. *Sands,* 53 Cal. 3d at 874 n.5, 809 P.2d at 814 n.5, 281 Cal. Rptr. at 39 n.5.

195. *Id.* at 874, 809 P.2d at 814, 281 Cal. Rptr. at 39.

196. *See supra* notes 65-71 and accompanying text (discussing the school-day cases).

197. *Sands,* 53 Cal. 3d at 876, 809 P.2d at 816, 281 Cal. Rptr. at 41. Thus, the plurality stated:

> Moreover under the district's logic, prayers at the beginning of the school day would be constitutionally unobjectionable solely because they would be part of an education experience that is predominantly nonreligious. Yet prayers at the beginning of the school day have long been unconstitutional.

Id.

on point from the United States Supreme Court, what would be the asserted secular purpose of prayers, invocations, or benedictions during the school day? If such a secular purpose were claimed, to have credibility it would need to be asserted in the context of the overall instructional purpose. As a result, purported secular purposes of religious material or activity in schools have actually included assertions of proper instruction such as in *Stone v. Graham*,[198] where the state argued the posting of the Ten Commandments met the secular purpose of instruction regarding a "fundamental legal code."[199] The Supreme Court has disapproved certain challenged statutes or practices based on their purported secular purpose, and has held that the effect of combining instruction and religious practice is an impermissible advancement of religion.[200] If, as in *Wallace v. Jaffree*,[201] the High Court finds there is no genuine asserted instructional secular purpose, e.g., the real purpose is to return prayer to the school day, the majority of justices on the United States Supreme Court would hold and have so held the secular purpose prong violated.[202]

Problems arise when the reviewing court both ignores context and fails to apply the secular purpose *Lemon* prong. For example, in contrast to the *Sands* plurality, the Fourth District Court of Appeal in the lower court *Sands* opinion essentially held that a genuine congruency existed between the secular celebratory purpose (e.g., pomp and circumstance) and the secular solemnizing effect of traditional invocation and benedictions at graduation ceremonies.[203] Thus, historical and ubiquitous invocations or benedictions in the

198. 449 U.S. 39 (1980).

199. *Stone*, 449 U.S. at 41; *see* Edwards v. Aguillard, 482 U.S. 578, 589-90 (1987); *id.* at 592 (concluding the secular purpose was to change the science curriculum of public schools); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963) (stating the secular purpose was the "promotion of moral values, in contradiction to the materialistic trends of our times, the perpetuation of our institutions, and the teaching of literature").

200. *See Stone*, 449 U.S. at 39 (statutory posting of Ten Commandments); *Edwards*, 482 U.S. at 590 (statutory teaching of creationism science); *Abington*, 374 U.S. at 203 (practice of daily prayer).

201. 472 U.S. 38 (1985).

202. *See Wallace*, 472 U.S. at 56-57 (involving statutory moment of meditation).

203. *See* Sands v. Morongo Sch. Dist., 225 Cal. App. 3d 1385, 1397, 262 Cal. Rptr. 452, 459 (1989), *rev'd*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991).

context of the graduation ceremony did not have the primary effect of advancing or endorsing religion to a reasonable observer. This ceremonial congruency between purpose and effect does not logically carry over to the instructional day.

While it could cogently be argued that the school day prayer cases should have been controlling in *Sands* since stare decisis was the primary ground for Justice Kennedy's opinion in *Lee v. Weisman*,[204] or that the return of prayer to the school day was at least a theoretical possibility requiring consideration by a court facing such a case, such arguments fail to address the larger issues clearly present in Establishment Clause disputes. Given the splits in pre-*Lee* graduation prayer case law,[205] in which judges faced arguments that the school day prayer cases were dispositive, it remains clear that an individual judge's perceptions regarding the organizing principles of either diversity or commonality became determinative in deciding what Establishment Clause approach to utilize and, in turn, determined the outcome of the case.[206] The *Sands* plurality's approach and its resulting method of applying the *Lemon* prongs, particularly deciding to emphasize the effect prong and declining to analyze context and history, became virtually outcome-determinative.[207]

3. *The Swing Concurring Opinions in* Sands

When considering the same arguments as the *Sands* plurality, four of the state supreme court justices chose alternative approaches, with

204. 112 S. Ct. 2649, 2657-61 (1992).

205. *See supra* notes 128-47 and accompanying text (discussing these splits).

206. *See supra* notes 128-59 and accompanying text (discussing pre-*Lee* graduation prayer cases).

207. Again, both the California Supreme Court's plurality decision in *Sands* and the trial and appellate courts in *Lee* focused almost exclusively upon the second *Lemon* prong. *See* Sands v. Morongo Sch. Dist., 53 Cal. 3d 863, 872-79, 809 P.2d 809, 813-17, 281 Cal. Rptr. 34, 38-42 (1991); Weisman v. Lee, 908 F.2d 1090, 1094-95 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992); Weisman v. Lee, 728 F. Supp. 68, 71-73 (D.C.R.I. 1990), *aff'd* 908 F.2d 1090 (1st Cir. 1990).

differing results.[208] Chief Justice Lucas' and Justice Arabian's concurring opinions are of primary importance to this analysis since both explicitly reflect the on-going debate between a strict application of the primary effect *Lemon* prong and, alternatively, an emphasis upon the common American heritage present throughout the nation's history.[209] Both justices joined the holding based solely upon the primary effect *Lemon* prong, but rejected Justice Kennard's approach.[210] Each opinion honors the individual, but also looks towards recognizing the worth of the individual within the larger community in which she or he lives.[211]

As did Justice Kennard, Justice Arabian concludes his concurring opinion with a discussion of the organizing principle of diversity, but presents a far different view of diversity than that of the *Sands* plurality—a diversity grounded in the complementary principle of human commonality.[212] Justice Arabian cites Presidents Lincoln and Washington as among those who "innately understood that the American spirit does not simply 'tolerate' religious, racial, or cultural differences: it takes pride in them. They are our source of strength and hope for the future."[213] In this viewpoint, tolerance is concerned with recognizing genuine human commonality, while still validating the discrete conscience of each individual. For example, President-elect Abraham Lincoln's February 11, 1861 "Farewell

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208. The dissents of Justice Panelli and Justice Baxter also reflect different visions from the *Sands* plurality. Justice Panelli's opinion in particular should not be overlooked as he extensively analyzed precedent in the area of acknowledgment of religion and our common history, historical principles in *Marsh*, as well as a sensitive *Lemon* inquiry, to uphold the practice. *Sands*, 53 Cal. 3d at 918-39, 809 P.2d at 844-59, 281 Cal. Rptr. at 69-84 (Panelli, J., dissenting). Justice Baxter applied a complete *Lemon* inquiry, and would have provided guidance to remedy what he believed to be suspect practices. *Id.* at 939-47, 809 P.2d at 859-64, 281 Cal. Rptr. at 84-89 (Baxter, J., dissenting). Both opinions are well worth reviewing for in-depth alternative approaches to that taken by the *Sands* plurality, but in the interests of conciseness, these decisions are not extensively analyzed here. *See* Michaelle DiGrazia, Note, *Sands v. Morongo Unified School District: Graduates, Will We Stand and Join in Prayer?*, 23 PAC. L.J. 1449 (1992) (providing a full case analysis of *Sands*).

209. *See Sands*, 53 Cal. 3d at 884-905, 809 P.2d at 821-35, 281 Cal. Rptr. at 46-60 (Lucas, C.J., concurring); *id.* at 914-18, 809 P.2d at 842-44, 281 Cal. Rptr. at 67-69 (Arabian, J., concurring).

210. *Id.* at 884-905, 809 P.2d at 821-35, 281 Cal. Rptr. at 46-60 (Lucas, C.J., concurring); *id.* at 914-18, 809 P.2d at 842-44, 281 Cal. Rptr. at 67-69 (Arabian, J., concurring).

211. *See id.* at 890-93, 809 P.2d at 825-27, 281 Cal. Rptr. at 50-52 (1991) (Lucas, C.J., concurring); *id.* at 915-18, 809 P.2d at 842-34, 281 Cal. Rptr. at 67-69 (Arabian, J., concurring).

212. *See id.* at 915-16, 809 P.2d at 842-43, 281 Cal. Rptr. at 67-68 (Arabian, J., concurring).

213. *Id.* at 918, 809 P.2d at 844, 281 Cal. Rptr. at 69 (Arabian, J., concurring).

Address at Springfield" perhaps best demonstrates the ideal of commonality cited by Justice Arabian:

> My friends—No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe every thing. Here I have lived a quarter of a century, and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when, or whether ever, I may return, with a task before me greater than that which rested upon Washington. Without the assistance of that Divine Being, who ever attended him, I cannot succeed. With that assistance I cannot fail. Trusting in Him, who can go with me, and remain with you and be every where for good, let us confidently hope that all will yet be well. To His care commending you, as I hope in your prayers you will commend me, I bid you an affectionate farewell.[214]

Earlier presidents, including Washington, Jefferson, and Madison invoked a Supreme Being when addressing Congress or the American people.[215] This ideal is presently also expressed daily in California classrooms when pupils recite or listen to the Pledge of Allegiance, particularly the concluding phrase "and to the Republic for which it stands, one nation, under God, indivisible, with liberty and justice for all."

In the viewpoints expressed by Chief Justice Lucas and Justice Arabian, a sense of community is one result of positive expressions of our commonality as human beings. As understood by California Chief Justice Lucas in his concurring opinion, public invocations and benedictions provide a sense of tradition, continuity, and transcendence that evokes positive emotions and expectations. These elements, in turn, serve to unify the community and provide a

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214. LARRY SHAPIRO, ABRAHAM LINCOLN, MYSTIC CHORDS OF MEMORY, A SELECTION OF LINCOLN'S WRITINGS 37 (1984).

215. *See, e.g.* U.S. GOV'T PRINTING OFFICE, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON, 1789 TO GEORGE BUSH, 1989, 1-2 (Bicentennial ed. 1989) (George Washington, First Inaugural Address, April 30, 1789); *id* at 13, 15, 17 (Thomas Jefferson, First Inaugural Address, March 4, 1801); *id.* at 22-23 (Thomas Jefferson, Second Inaugural Address, March 4, 1805); *id.* at 28 (James Madison, First Inaugural Address, March 4, 1809).

foundation for moral and ethical standards."[216] Chief Justice Lucas recognized that "without some sharing of these kinds of ideas and sentiments, a community is not a community."[217]

The Chief Justice's thorough opinion in *Sands* recognized and solidified the two underlying principles in Establishment Clause case law: (1) Church and state disengagement;[218] and (2) benign recognition of religion as part of American culture.[219] Thereafter, the Chief Justice evaluated the challenged invocation and benediction within traditional graduation ceremonies,[220] and would have upheld the practice under endorsement principles, the *Marsh* principles,[221] or a sensitive *Lemon* inquiry.[222] The Chief Justice's approach seeks to continue to bar genuine establishments of religion, and practices which tend to do so, while allowing accommodation of the nation's deep religious heritage through benign acknowledgements of that history in public ceremony and ritual. How such an approach would work in practice must be left to future cases which reach the state supreme court.

IV. DIVERSITY AND COMMONALITY: RECOGNIZING AND QUESTIONING KEY ASSUMPTIONS

This Article has established, through analysis of graduation prayer case-law in general[223] and key opinions from *Sands v. Morongo School District*[224] in particular, that bench and bar assumptions regarding the organizing principles of diversity and commonality affect judicial decision-making in Establishment Clause

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216. Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 894, 809 P.2d 809, 827-28, 281 Cal. Rptr. 34, 52-53 (1991) (Lucas, C.J., concurring).

217. *Id* at 896, 809 P.2d at 829, 281 Cal. Rptr. at 54 (Lucas, C.J., concurring).

218. *Id.* at 887-90, 809 P.2d at 823-25, 281 Cal. Rptr. at 48-50 (Lucas, C.J., concurring).

219. *Id.* at 890-93, 809 P.2d at 825-27, 281 Cal. Rptr. at 50-52 (Lucas, C.J., concurring).

220. *Id.* at 893-901, 905, 809 P.2d at 827-33, 835, 281 Cal. Rptr. at 52-58, 60 (Lucas, C.J., concurring).

221. *See supra* notes 81-82 and accompanying text (discussing the *Marsh* decision).

222. *Id.*

223. *See supra* notes 128-59 and accompanying text (discussing graduation prayer case law).

224. 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied*, 112 S. Ct. 3026 (1992); *see supra* notes 160-222 and accompanying text (discussing relevant portions of the *Sands* decision).

cases.[225] The United States Supreme Court decision in *Lee v. Weisman*,[226] as well as references in previous High Court opinions,[227] fully support this analysis. Any absolutist approach resting upon one vision of religious diversity and resulting in a focus entirely upon perceptions of the discrete individual will ultimately result in holding the challenged practice or statute unconstitutional, as evidenced by the *Sands* plurality opinion.[228] In contrast, practices or statutes analyzed under an approach supporting acknowledgement of our nation's religious heritage and focusing upon history rest largely upon a vision of the nation's common heritage and basic human commonality, and will tend to be upheld as constitutional. While the emerging and competing endorsement and coercion approaches[229] struggle to reconcile the *Lemon* precedent with the rights of individual conscience and the appropriate recognition of the history and ubiquity of challenged religious practices in our community civic life, neither approach had the firm support of a majority of justices in *Lee*.[230] Indeed, deep judicial concerns regarding recognition of individual rights and the conflicting accommodation of historical community traditions are left unanswered in *Lee*.

Thus, recognition of these core principles, as sought by California Chief Justice Lucas in *Sands*,[231] is clearly needed but not yet in sight. Such a synthesis would prohibit attempts to establish a State religion violative of individual conscience, but would permit benign ceremonial acknowledgements of the nation's religious heritage. However, to reach this much needed point of certainty in Establishment Clause jurisprudence, the bench and bar must be

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225. *See supra* notes 128-222 and accompanying text.

226. 112 S. Ct. 2649 (1992).

227. *See supra* notes 38-100 and accompanying text (setting forth relevant United States Supreme Court decisions).

228. *See supra* notes 178-207 and accompanying text (discussing the *Sands* plurality decision).

229. *See supra* notes 89-100 and accompanying text (discussing the endorsement and coercion approaches).

230. *See supra* notes 101-26 and accompanying text (discussing the *Lee* decision).

231. *See* Sands v. Morongo Sch. Dist., 53 Cal. 3d 863, 901, 809 P.2d 809, 833, 281 Cal. Rptr. 34, 58 (1991) (Lucas, C.J., concurring) (stating "[l]ike a scientific theory, a legal principle or fact must account for all the data, i.e., *both* church-state disengagement and benign recognition of religion and religious ideas in American constitutional law and civil culture") (emphasis added).

willing to both recognize and question key assumptions, while remaining open to fresh thinking.[232]

A. Definition Versus Context

One such key assumption concerns the religious nature of the speech, display, or practice in dispute and the always-easy determination, usually based upon a dictionary definition of the religious practice or activity, that the primary purpose or effect of the practice must inherently be religious.[233] The United States Supreme Court rejected this method in *Lynch v. Donnelly*,[234] wherein it noted that to "focus exclusively on the religious component of any activity could lead to [the activity's] invalidation under the Establishment Clause."[235] Nevertheless, the absolutist approach set forth in Part I above lends itself easily to this method of argument, and will continue to do so if courts focus solely upon a discrete individual activity and do not analyze the challenged practice in its "unique circumstances,"[236] e.g., *context.*

Justice Blackmun's concurring opinion in *Lee v. Weisman* illustrates this application of a definition, stating: "There can be 'no doubt' that the invocation of God's blessings delivered at Northern Bishop Middle School is 'a religious activity.'"[237] Justice

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232. Counsel must be ready to address such assumptions as apply in presenting a particular case.

233. *See, e.g.*, Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 1020, 238 Cal. Rptr. 819, 823-24 (1987); Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982). The author has experienced this argument first hand. The A.C.L.U., appellants before the state supreme court in *Sands*, asserted that as a matter of law, it was without question that the primary purpose of a religious invocation was religious. Petitioner's Opening Brief to the California Supreme Court, Sands v. Morongo Unified School District, at 9-10 (copy on file at *Pacific Law Journal*). The A.C.L.U. also asserted that by definition, prayer is not a secular practice. *Id.* at 10-11.

234. 465 U.S. 668 (1984).

235. *Lynch*, 465 U.S. at 680.

236. *See, e.g.*, County of Allegheny v. American Civil Liberties Union, 392 U.S. 573, 591-92 (1989) (O'Connor, J., concurring); *see also supra* notes 38-50 and accompanying text (discussing the absolutist approach).

237. Lee v. Weisman, 112 S. Ct. 2649, 2664 (1992) (Blackmun, J. concurring). Justice Blackmun also notes:

> In this case, the religious message it promotes is specifically Judeo-Christian. The phrase in the benediction: "We must each strive to fulfill what you require of us all, to do justly, to love mercy, to walk humbly" obviously was taken from the Book of the Prophet

Blackmun continues on to quickly determine "there can be no doubt that the government is advancing and promoting religion."[238]

A contextual analysis is broader than simply referencing a definition. Prayer may easily be conceded to be a core component of religion.[239] However, verbal or silent prayer in a synagogue, church, or mosque during a religious service held among adherents to a particular belief is far different from a non-sectarian, non-denominational inspirational invocation or benediction delivered during a public ceremony. Perhaps the best contextual judicial description of a civic invocation is that previously set forth by Justice Blackmun in *County of Allegheny v. American Civil Liberties Union*:

> [L]egislative prayer (like the invocation that commences each session of this Court) is a form of acknowledgment of religion that 'serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.' The function and history of this form of ceremonial deism suggest that 'those practices are not understood as conveying government approval of particular religious beliefs.'[240]

Recognition of the unique role that civic invocations play in our culture precisely differentiates the purpose and effect of prayer in a civic ceremony from prayer in an unabashed religious activity. However, since Justice Blackmun focused simply upon a definition in *Lee*, he thereby cut himself off from the richer contextual discussion of invocations and benedictions he previously engaged in, as exemplified by the above-quoted language from his opinion in *County of Allegheny*.

A more encompassing contextual analysis is not limited to cases involving prayer. It can also be argued that a Christian cross has a

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Micah, ch. 6, v. 8.

Id. at 2664 n.5 (Blackmun, J. concurring). In this view, any "Judeo-Christian" inspired message is per se religious.

238. *Id.* at 2664 (Blackmun, J., concurring).

239. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 415-28 (1990).

240. *County of Allegheny*, 492 U.S. at 491 n.46 (incorporating Justice O'Connor's explanation of invocations/benedictions from her concurrence in *Lynch v. Donnelly*).

different purpose and effect when displayed within a church than when displayed upon a hill in San Diego, or in a public park in San Francisco, where both have remained for decades.[241] So too for a menorah displayed in a synagogue, versus the same definitionally religious artifact placed in a civic building during the holiday season.[242]

The question of *context* may be critical for resolving the competing endorsement and coercion approaches. In *Lee*, Justice Kennedy's application of his emerging coercion analysis recognized the importance of the graduation ceremony in the life of a young adult.[243] Nevertheless, Justice Kennedy's opinion did not extensively analyze the invocation and benediction practice within the *context* of the ceremony. Furthermore, Justice Kennedy's opinion notably lacked any discussion whatsoever regarding the history of the challenged practice.

Justice O'Connor, the primary proponent of the endorsement analysis, did not write in *Lee*. Previously, Justice O'Connor included in her endorsement reformulation the concept of examining the "history and ubiquity"[244] of a practice, its own "unique circumstances,"[245] and context.[246] However, Justice Blackmun's and Justice Souter's opinions in *Lee*, both of which were joined by Justice O'Connor, while written in the endorsement vein, did not closely examine the graduation ceremony context, instead focusing upon the Justices' perception of the primary effect of the challenged practice.[247]

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241. *See* Murphy v. Bilbray, 782 F. Supp. 1420 (S.D. Cal. 1991); Carpenter v. City & County of San Francisco, 1992 WL 224490 (N.D.Cal. 1992).

242. *See County of Allegheny*, 492 U.S. at 578; Okrand v. City of Los Angeles, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (1989).

243. Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992).

244. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring).

245. *Id.* at 595 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984)).

246. *Id.* at 597 (Justice Blackmun, quoting Justice O'Connor from her concurrence in *Lynch* and noting "government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context").

247. *Lee*, 112 S. Ct. at 2661-67 (Blackmun, J., concurring); *id.* at 2667-78 (Souter, J., concurring).

Judicial assumptions regarding the dispositive effect of a dictionary definition versus the potentially compelling force of a contextual analysis are critical to counsel's practical strategy. As demonstrated by this discussion, counsel challenging a practice as violative of the Establishment Clause is immediately in an advantageous position if the court's attention can be riveted upon the definitionally religious nature of the practice. Conversely, counsel defending a practice must place the practice in context and seek to inform the court regarding its historical background, all as part of arguing that the activity has value and is worth preserving.[248] Counsel's eventual success may be dependent upon this initial judicial choice.

B. Considerations of History and Traditions

The question of preservation of what have arguably become traditional practices under challenge in any particular factual circumstance leads naturally to historical considerations. Assumptions regarding history and the appropriate method of applying history in Establishment Clause disputes can also be critical to the evaluation of a practice's constitutionality. History may be argued and applied both as to the general intended "purpose of the

248. By the same token, counsel must be careful not to overplay context and unintentionally offend the court. Justice Arabian's concurring opinion in *Sands v. Morongo School District* illustrates an analysis based upon context can cut both ways:

> The present controversy demonstrates that Madison's concerns are well founded. In arguing that their purpose is to solemnize high school graduation ceremonies, defendants and amici curiae stress the civil or nonsectarian nature of benedictions and invocations. The irony cannot go unnoticed, however, that the government's justification for the use of religious rituals to achieve secular ends finds expression in terms which *disparage* religion. [Citation.] In essence, the government defends the references to "our Lord" and "Father" on the ground that the terms constitute little more than insipid symbols of a shared secular culture.
>
> If, however, prayer does serve to solemnize an occasion, then we must recognize and identify it for what it is—a *religious* practice—and ask whether it has a legitimate constitutional place in a public high school graduation ceremony.

Sands v. Morongo Sch. Dist., 53 Cal. 3d 863, 916-17, 809 P.2d 809, 843, 281 Cal. Rptr. 34, 68 (1991) (Arabian, J., concurring).

Establishment Clause as illuminated by history,"[249] and as to the "history and ubiquity"[250] of a specific challenged practice.

Establishment Clause history lies at the heart of both the absolutist[251] and historical approaches.[252] Absolutists ground their position in the Jeffersonian wall metaphor, asserting an absolute separation between church and state,[253] but critics, including Chief Justice Rehnquist, have specifically attacked that historical ground.[254] An historical analysis alone was sufficient to preserve the long-standing practice of legislative invocations in *Marsh v. Chambers*,[255] without even referencing *Lemon*. However, the High Court has also explicitly recognized that an unconstitutional action does not become constitutional simply through long repetition.[256]

Nevertheless, despite the seeming importance of history, Justice Kennedy in *Lee* held unconstitutional graduation invocations and benedictions without addressing the history of the specific practice, which is both long-standing in the United States and an historical component of graduation ceremonies.[257] Justice Souter engaged in an historical analysis, but only to support his expressed adherence to stare decisis.[258] However, Justice Scalia, with three other justices in dissent, vehemently objected to the majority's omission and provided an analysis grounded in history.[259] Thus, history remains

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249. Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970).

250. *Allegheny*, 392 U.S. at 625 (O'Connor, J., concurring).

251. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2667-71 (1992) (Souter, J., concurring); McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1946); *see also supra* notes 38-50 and accompanying text (discussing the "absolutist" approach).

252. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 92-107 (1985) (Rehnquist, J., dissenting); Lynch v. Donnelly, 465 U.S. 668 (1983); Marsh v. Chambers, 463 U.S. 78 (1983).

253. *See Everson*, 330 U.S. at 15-16; *see also supra* notes 38-40 and accompanying text (discussing *Everson* and the Jeffersonian wall metaphor).

254. *See Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting); *see also* ROBERT L. LORD, SEPARATION OF CHURCH AND STATE 1-82, 109-145 (1982); RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 125-32 (1987).

255. 463 U.S. 783 (1983).

256. *Marsh*, 463 U.S. at 788-89.

257. Lee v. Weisman, 112 S. Ct. 2649, 2652-61 (1992).

258. *Id.* at 2667-78 (Souter, J., concurring).

259. *Id.* at 2678-86 (Scalia, J., dissenting); *see* KEVIN SHEARD, ACADEMIC HERALDRY IN AMERICA (1962) (discussing the history of graduation ceremonies). The *Sands* plurality also notably failed to conduct any historical analysis regarding the graduation ceremony, and Justice Panelli's dissent objected to this omission. Sands v. Morongo Sch. Dist., 53 Cal. 3d 863, 931, 809 P.2d 809,

a key factor in Establishment Clause analysis and counsel must be prepared to argue both general Establishment Clause history and the specific background of the practice at issue.

A court's historical discussion may conceivably also be aimed at public acceptance of the decision. It is difficult for the public to accept judicial decisions invalidating long-standing and popular religious components of civic life, particularly when it seems that the history and common-sense of the matter has been lost in favor of abstract legalisms.[260] In *Sands*, Justice Arabian recognized and attempted to address this reality by "plac[ing] before the people, as Thomas Paine might have said, the common sense of the subject, not merely in the idiom of the law, but in terms so plain, firm and true as to compel their assent."[261]

Justice Arabian thereafter placed minority rights before the people as the strongest basis for the necessity of the *Sands* decision,[262] yet in a judicial twist moved on to write in support of the graduation invocation at issue in *Sands* on the basis of "the spirit of religious freedom imminent in the constitution and our common history. . . ."[263] In so doing, Justice Arabian spotlighted the judicial dilemma regarding the organizing principles of diversity and commonality, specifically regarding how a court can explain to the public decisions in which individual rights and long-standing historical practices collide, resulting in longstanding practices being barred by the judicial branch. Assumptions regarding individuals are thus critical in such cases.

853, 281 Cal. Rptr. 34, 78 (1991) (Panelli, J., dissenting).

260. Zorach v. Clauson, 343 U.S. 306, 312 (1952). In the Morongo Unified School District the practice of allowing students to include invocations and benedictions within their graduation ceremony had been continuous since at least 1937 at the oldest high school. In other San Bernardino County school districts the practice had been traceable to the 1890's. The author's perception from numerous public discussions is that this seemingly abrupt break in tradition is most troubling to the public.

261. *Sands*, 53 Cal. 3d at 915, 809 P.2d at 842, 281 Cal. Rptr. at 67 (Arabian, J., concurring).

262. *Id.*

263. *Id.* at 916, 809 P.2d at 843, 281 Cal. Rptr. at 67-68 (Arabian, J., concurring).

C. The Establishment Clause Focus Upon the Individual—Where Are We Going?

The constitutional duty to protect individual conscience[264] lies at the heart of the Establishment Clause, and is central to disputes such as the graduation prayer line of cases. Thus, prevalent assumptions regarding the individual and the Establishment Clause must also be closely reexamined by bench and bar. One such assumption surrounds the protection of minority rights.

1. Minority Rights—Questioning The Assumption Regarding "Minority" Status For Establishment Clause Purposes

In *Sands*, Justice Arabian emphasized that it is critical to view the issues surrounding the individual and the Establishment Clause from the perspective of the minority, "be they discordant, harmonious, or eloquently silent, for they compose a large segment of the symphony which is America."[265] Yet, it is actually difficult to generalize regarding the "they" who is the minority,[266] or about the "wide

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264. *See* Lee v. Weisman, 112 S. Ct. 2649, 2657 (1992) (noting that the Establishment Clause embraces a freedom of conscience that specifically prohibits forms of state intervention in religious activities).

265. *Sands*, 53 Cal. 3d at 915, 809 P.2d at 842, 281 Cal. Rptr. at 67 (Arabian, J., concurring); *see* Graham v. Central Community Sch. Dist., 608 F. Supp. 531 (D.C. Iowa 1985). In Graham, Chief Judge Vietor stated:

> It may well be that the majority of graduating seniors and the majority of the population in the defendant school district would like to have an invocation and benediction as part of the commencement exercises. However, the enforcement of constitutional rights is not subject to the pleasure of the majority. It would be the antithesis of the concept of constitutional law to apply the protection of the Constitution, which is the fundamental law of our land, in any given situation only if the majority at the relevant time and place approved. The Constitution protects all of us, including those who are in the minority. Indeed, First Amendment rights (religion, speech, press, peaceable assembly and petitioning for redress of grievances) would be meaningless if they were not available to minorities, the unpopular, and those courageous enough to speak out against the prevailing views of the majority and those entrusted with governmental power.

Id. at 537.

266. *See, e.g., Dimensions*, EDUCATION WEEK, April 24, 1991, at 3 (setting forth a recent extensive 13-month survey conducted by the ICR Survey Research Group for the City University of New York on religion in America). The ICR survey yielded interesting results in terms of popular generalizations on religious affiliation. For example, regarding the immigrant experience, the survey

variety of belief and practice,"[267] or adherence of substantial segments of our population "to non-Christian religions or to no religions"[268] in Establishment Clause analysis. Religious adherence and non-adherence sweep across all ethnic, gender and racial groups. Both women and men are involved in a variety of religious affiliations, including serving as clergy. Members of both sexes may also be non-adherents. The civil rights movement in the United States involved African-Americans, churches, and American religious thought to a critical degree, unalterably improving American race relations.[269] The heritage of California's Hispanic population includes traditions of the Catholic Church.[270] But just such classes, e.g., race, gender, national origin, while not necessarily "minorities" for Establishment Clause purposes, are now considered protected minorities for judicial equal protection analysis.[271]

Perhaps minority status for Establishment Clause analysis is assumed to mean non-Christian or non-Western.[272] However, not only should the court not generalize regarding minority status, it should avoid a judicial assumption or conclusion that *reasonable* adherents to non-Christian or non-Western religions would object to non-sectarian, non-denominational invocations and benedictions in the tradition of the American civic culture during public ceremonies. For example, Judaic opinion on public ceremonies and similar

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found most Irish-Americans are Protestant, not Catholic, and most Arab-Americans and Asian-Americans are Christian. *Id.*

267. *See, e.g., Sands*, 53 Cal. 3d at 884-85 & n.11, 809 P.2d at 321 & n.11, 281 Cal. Rptr. at 46 & n.11 (noting the religious diversity in the United States).

268. *Id.*

269. *See* DAVID J. CARROW, BEARING THE CROSS, MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1988); *see also* STEPHEN B. OATES, LET THE TRUMPETS SOUND, THE LIFE OF MARTIN LUTHER KING, JR. 28-31, 37-39 (1982) (discussing the specifically religious roots of the movements non-violence theory). California public schools honor the life of Dr. Martin Luther King, Jr., each January for his philosophy and deeds. It is certainly incongruous to honor Dr. King during the school year, yet not allow his fellow clergy to deliver inspirational invocations or benedictions during graduations.

270. *See* ISIDRO LUCAS, THE BROWNING OF AMERICA, THE HISPANIC REVOLUTION IN THE AMERICAN CHURCH 55-68 (1981) (discussing "American Catholics, Hispanic Variety," and stating most Hispanics would answer "yes" if asked if they were Catholic).

271. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1521-53 (2d ed. 1988).

272. *See* Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 883-84, 809 P.2d 809, 821, 281 Cal. Rptr. 34, 46 (1991) (Justice Kennard's closing remarks distinguishing between Christian and non-Christian).

practices is not uniform.[273] Moreover, Islam shares a common religious heritage and belief in a monotheistic Supreme Being with Christianity and Judaism.[274] Further, non-monotheistic Buddhist principles of civility and tolerance toward other religions and systems of thought are exemplified by an edict from early India which concludes, "So concord is good: let all listen, and be willing to listen to the doctrines professed by others."[275] Non-Western Hinduism is also tolerant of other persons' views:

> An important consequence of this (religious principle) is tolerance, nonviolence considered an active virtue; this is a manner of acting which must be respected—even in the political sphere—regardless of the attitude of others.[276]

Certainly a judge can look for division among religions,[277] but judges should not ignore co-existing principles of mutual tolerance and commonality. The concept of basic commonality among the world's religions is aptly summed up by the following insight from Nobel Laureate Mother Teresa:

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273. *See* JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 263-266 (1991) (citing the 1987-1988 Williamsburg Charter Survey on Religion and American Public Life). Hunter posits that much of current debate on such issues is inter-denominational, by and between what he terms more conservative "orthodox" theologians and clergy, and those of a more liberal "progressive" outlook. *Id.* at 67-132. For example, Rabbi Gutterman delivered the invocations and benedictions at issue in *Lee*, yet plaintiffs challenging the practice were also of the same religion.

274. *See* ALBERT H. HOURANI, A HISTORY OF THE ARAB PEOPLES 14-21, 62-65 (1991); JOHN A. WILLIAMS, ISLAM, GREAT RELIGIONS OF MODERN MAN (1962).

275. *See* RICHARD A. GARD, BUDDHISM, GREAT RELIGIONS OF MODERN MAN 18-19 (1962) (quoting Buddhist Emperor Ashoka (d.238 BC)).

> One should not know only one's own religion and condemn the religion of others, but one should know other's religions for this or that reason. So doing, one helps one's own religion to grow and renders service to the religions of others too. In acting otherwise, one digs the grave of one's own religion and also does harm to other religions. Whosoever honors his own religion and condemns other religions, does so indeed through devotion to his own religion, thinking, 'I will glorify my own religion.' But on the contrary, in so doing he injures his own religion more gravely. So concord is good: let all listen and be willing to listen to the doctrines professed by others.

Id.

276. LOUIS N. RENOU, HINDUISM, GREAT RELIGIONS OF MODERN MAN, 55-56 (1962).

277. *See, e.g.*, Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 883-84, 809 P.2d 809, 821, 281 Cal. Rptr. 34, 46 (1991) (Justice Kennard noting the "violence tragically associated with political division along religious lines").

> Throughout the ages, the scriptures of all religions have proclaimed that humanity is one great family. This is a simple truth, and it is simply and directly stated in every religion. In fact, almost all the principles that are associated with religious thought are shared by every religion.[278]

Thus, at a minimum, principles of commonality, mutual tolerance, and civility among both Western and non-Western religions establish that prayers in the tradition of the American civic culture should not be held per se offensive to reasonable adherents of numerically minority religions.[279] Indeed, this assumption ignores the unifying force of religion among superficially disparate multi-cultural groups.[280] In the past, the United States Supreme Court has noted that "[w]e are a religious people whose institutions presuppose a Supreme Being."[281] Public attachment to the national motto "In God We Trust,"[282] religious symbols on currency, including the concept "E Pluribus Unum" (one out of many),[283] the Pledge of Allegiance, legislative and inaugural invocations,[284] all suggest that commonly held religious sentiments can and do create a sense of oneness and unity. President Lincoln's "Springfield Address" fully

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278. JEFFREY MOSES, ONENESS, GREAT PRINCIPLES SHARED BY ALL RELIGIONS 1 (1989).

279. *See, e.g., Sands*, 53 Cal. 3d at 895, 809 P.2d at 828, 281 Cal. Rptr. at 53 (Lucas, C.J., concurring).

> If one elects to participate, he or she may infuse the brief exercise with personal beliefs and emotions, particularly since the references to God are 'weak symbols' which readily conform to individual interpretation. As one commentator observes: '[T]he religious use of the term 'God' comes as close as possible to a generic religious persons' specific beliefs. Not only can all traditional Western and Eastern theists interpret the symbol to fit their specific faith, but Native American Indians and even most Buddhists can do so. Robert Bellah has rightly noted that 'God' is 'a word which almost all Americans can accept but which means so many different things to so many different people that it is almost an empty sign.' Thus, the symbol permits religious diversity in our pluralistic society.'

Id.

280. The author has been fortunate to attend a privately sponsored celebration honoring the life and work of Dr. Martin Luther King, Jr., held each January in the Sacramento Community Center. There is no doubt the invocation, benediction and religious music, including the closing hymn "We Shall Overcome," brings a thoroughly multi-ethnic, multi-cultural and multi-generational audience together as one.

281. Zorach v. Clausen, 343 U.S. 306, 313 (1952).

282. 36 U.S.C. § 186 (1981).

283. *See* HUNTER, *supra* note 273, at 307-308 (discussing the concept that our society has certain commonly held religious beliefs).

284. *See* Marsh v. Chambers, 463 U.S. 783 (1983).

succeeds in setting forth a common bond among his listeners, rhetorically creating a confident sense of community despite distance, and a belief that we as discrete individuals are all in this society together.[285]

2. *How Will Courts Determine That The Individual Has Been Coerced?*

Another assumption respecting the individual and the Establishment Clause that should be questioned is reliance upon sociological studies or psychological research. In *Lee*, Justice Kennedy cites such research to support his concerns regarding adolescent peer pressure impacting invocations and benedictions,[286] an approach bitterly criticized by Justice Scalia.[287] Yet, in *Board of Education v. Mergens*,[288] a High Court majority cited such studies and academic articles to support the independent and critical thinking ability of high school students and rejected an Establishment Clause challenge to the Equal Access Act.[289] Even if reliance upon the social science approach does not yield the catastrophic results predicted by Justice Scalia,[290] *Lee* and *Mergens* do illustrate the elasticity of this method of legal argument.

Common law and statutory judgments about the maturity levels of individual adolescents are time-tested or democratically reached by legislators and, arguably, are more on target. Society itself, as exemplified by common law and statute, does not view young adults attending a farewell high school graduation ceremony to be so impressionable as to consider a brief invocation or benediction in the context of a ceremony an establishment or advancement of religion.

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285. LARRY SHAPIRO, ABRAHAM LINCOLN, MYSTIC CHORDS OF MEMORY, A SELECTION OF LINCOLN'S WRITINGS 37 (1984).

286. Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992).

287. *Id.* at 2681 (Scalia, J., dissenting).

288. 496 U.S. 226 (1990).

289. *Mergens*, 496 U.S. at 250. In *Mergens*, the High Court specifically recognized the maturity level of high school students stating: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscretionary basis." *Id.*

290. *See Lee*, 112 S. Ct. at 2682, 2686 (Scalia, J., dissenting).

Many such young adults will soon be entering college. Furthermore, in California all eighteen-year-old young adults are deemed mature and responsible enough to hold public office,[291] vote,[292] marry, enter into a contract, and own real property.[293] Even prior to age eighteen, young adults have been judged mature enough to operate a motor vehicle with consent,[294] suffer suspension or expulsion from school as a result of their own actions,[295] commit crimes,[296] obtain confidential medical services without parental consent,[297] or authorize health treatment in certain circumstances.[298]

When a court is moving beyond the public school context post-*Lee*, it will be difficult for bench or bar to rely upon psychological or sociological research regarding coercion because such research may not meet evidentiary burdens of proof, particularly since social science studies often conflict and can fly in the face of common-sense experience. For example, are individuals objectively or subjectively coerced when viewing a cross on a hill,[299] a religious motto on a city seal,[300] biblical statuary in a park,[301] a holiday display of religious artifacts,[302] or when listening to an inspirational invocation or benediction in a public ceremony? Moving beyond the question of ceremonies or displays, would individuals be coerced for Establishment Clause purposes if and when tax funds are spent by way of vouchers at a private parochial school?

Any successful evolution of the coercion test as set forth by Justice Kennedy in *Lee* and *County of Allegheny* may well depend on a necessary shift from sociological or psychological research to an

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291. CAL. GOV'T CODE § 1020 (Deerings 1982).
292. CAL. CONST. art. II, § 2.
293. CAL. CIV. CODE § 25 (Deerings 1990).
294. CAL. VEH. CODE § 17701 (Deerings 1984).
295. CAL. EDUC. CODE §§ 48900 et seq. (Deerings 1987 & Supp. 1992).
296. CAL. PENAL CODE § 26 (Deerings 1985).
297. CAL. EDUC. CODE § 46010.1 (Deerings 1987).
298. CAL. CIV. CODE §§ 25.9, 34.5 (Deerings 1990).
299. *See* Carpenter v. City & County of San Francisco, 1992 WL 224490 (N.D.Cal. 1992); Murphy v. Bilbray, 782 F. Supp. 1420 (S.D. Cal. 1991); Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).
300. Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991).
301. Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991), *cert. denied*, 112 S. Ct 969 (1992).
302. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989); Okrand v. City of Los Angeles, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (1989).

analysis of the evidentiary facts to establish coercion. The above discussion of *Mergens* and *Lee* demonstrates the changeability of results based, in part, on reliance upon social studies, as well as the seemingly more substantial and objective determination regarding maturity levels made by common law or statute. Since such Establishment Clause cases are typically decided as a matter of law,[303] Justice Scalia may be on firmer ground in the long run by grounding his theory of a coercion test upon identifiable *legal* compulsion rather than academic research.[304] Bench and bar in Establishment Clause cases must now wrestle with this division between Justices Kennedy and Scalia.

3. *Individual Conscience Versus Individual Sensitivities*

The final essential underlying assumption regarding diversity, commonality, and tolerance to be addressed by the bench and bar in all such cases is the question of individual conscience versus individual sensitivities. As set forth above, both Justice Kennedy's opinion for the majority in *Lee v. Weisman* and Justice Kennard's opinion in *Sands v. Morongo School District* focus upon the protection of each individual's freedom of conscience—to believe or not believe in any deity, to be either an adherent or nonadherent of any religious system—which lies without a doubt at the core of the First Amendment's ban on the establishment of religion by the State. But freedom of conscience should not be presumed genuinely impacted each and every time religious activity, displays, or speech are connected with public events sponsored or supported in some way by the federal, state, or local governments. There is a qualitative difference between genuine freedom of conscience and an individual's personal desire not to listen to any religious speech or view any religious display with which they are uncomfortable or do not agree.

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303. *See supra* note 193 and accompanying text (discussing the fact that Establishment Clause decisions are decided as a matter of law).

304. Lee v. Weisman, 112 S. Ct. 2649, 2683 (1992) (Scalia, J., dissenting).

The author has no doubts that State-mandated school day prayer directly and adversely impacts individual freedom of conscience and violates the Establishment Clause for all the reasons set forth in Justice Brennan's concurring opinion in *Edwards v. Aguillard*:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the student's emulation of teachers as role models and the children's susceptibility to peer pressure.[305]

But, it must also be stated that the key concerns set forth in *Edwards* by Justice Brennan—state coercive authority, the closed nature of a classroom, advancement of particular religious views in such classrooms, impressionable children of all age and grade levels, involuntary attendance, role modeling and peer pressure—are not present in student planned, voluntary graduation ceremonies held once a year with a limited audience, including parents.

Thus, rather than protection of the individual's genuine freedom of conscience, *Lee* fell on the other side of the line into judicial concern for individual sensitivities. Plaintiffs in *Lee* were no doubt uncomfortable with invocations and benedictions and considered such ceremonial speech offensive.[306] But, short of adopting an easy absolutist approach sanitizing religion from all public discourse, there will always be some expression, whether as seemingly harmless as the invocation which opens United States Supreme Court sessions[307] or the reference to God in the Pledge of Allegiance,

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305. Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

306. Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992).

307. *See* Wallace v. Jaffree, 472 U.S. 38, 84-85 (1985) (Burger, C.J., dissenting). Chief Justice Burger noted with particular irony the following:

> Some who trouble to read the opinions in these cases will find it ironic—perhaps even bizarre—that on the very day we heard arguments in the cases, the Court's session opened with the invocation for Divine protection. Across the park a few yards away, the House

which someone somewhere will find offensive. However, Justice Kennedy's *Lee* opinion rejects subjective feelings of offense as an Establishment Clause standard, stating: "[O]ffense alone does not in every case show a violation [of the Establishment Clause]."[308] Thus, unless American society was to somehow collectively agree to extirpate all religious references from public life, the principle of mutual tolerance becomes critical as a practical ethic in resolving this quandary.

V. MUTUAL TOLERANCE

The Establishment Clause issues involving public ceremony and ritual raised by this Article, which were particularly apparent in the graduation prayer line of cases, are not new. Samuel Adams responded to concerns that an invocation would be divisive in opening the Continental Congress by remarking "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."[309] This idea of mutual tolerance spoken by Mr. Adams refers to one person's ability to *listen* to another of differing viewpoint or religious background. Bigotry in this view refers to an unwillingness to so listen. While mutual tolerance would never support proselytizing during a civic occasion, a societal and individual ethic of mutual tolerance as intimated by Samuel Adams would not forestall the act of listening or require sanitizing long-standing non-denominational, non-sectarian invocations and benedictions from all public ceremony.

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of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for divine guidance.

Id.

308. *Lee*, 112 S. Ct. at 2661. Justice Kennedy stated:

We do not hold that every State action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as non-religious messages, but offense alone does not in every case show a violation.

Id.

309. Marsh v. Chambers, 463 U.S. 783, 791-92 (1983) (citing 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 449 (1950)).

Reflecting an alternate viewpoint, a contemporary academic political analyst recently wrote:

> That is why our history has been selectively re-written, foisting on us a premature ecumenism and mythical amity of 'Judeo-Christian' elements. But it is our task, in a society of increasing complex articulation, to complete the effort of Madison in removing religion from state ceremony and proclamations. We appreciate better than Lincoln's contemporaries did his use of religious language to question the complacent view that God is in agreement with armies that invoked him. We value more those who follow conscience to deny that a once-Christian culture must have a Christian state. A modern prophet like Dr. King makes us understand the witness of those who found the 'Christian state' ungodly in its blessing of things like slavery.[310]

Tolerance in this context refers to freeing religion completely from governmental influences. President Lincoln and Dr. King, Jr., in this view, do not stand for their invoking the "better angels of our nature,"[311] or for the commonality of all Americans as human beings through timeless deistic imagery, but rather as persons using religious speech to question complacency and agitate the public and government on moral questions of the day. Under this viewpoint, tolerance frankly requires completing the effort to remove religion from all State ceremony and proclamation in order to give full expression to the individual conscience.[312] Yet, in this perspective, there is little or no tolerance toward those high school graduates who chose in the past, through their self-governance structures, to enjoy a traditional graduation ceremony and rite of passage to the next phase of their life with all available pomp and circumstance,

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310. GARY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 383 (1990).

311. *See* U.S. GOV'T PRINTING OFFICE, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON, 1789 TO GEORGE BUSH, 1989 133, 141 (Bicentennial ed. 1989) (first inaugural address of Abraham Lincoln).

312. WILLS, *supra* note 310 at 384-85. Mr. Wills points out:

> Religion has, admittedly, been a powerful force for social stability, supporting indirectly the regime that offers free exercise to all beliefs; but it has also been a prophetic voice of resistance to power when that is unchecked by moral insight. The cleric in jail is an American tradition, the conscientious objector, the practitioner of civil disobedience.

Id.

including the long-standing religious invocation and benediction.[313] Perhaps even more importantly, what eventually becomes of the reality of community and ideals of unity?[314] Are judicial steps banning long-standing community traditions including religious references truly necessary to genuinely protect individual conscience, rather than particularized sensitivities?

Basic principles of mutual tolerance and civility would urge to the contrary, suggesting that individuals present at a ceremony whose sensitivities are such that they do not personally like non-sectarian, non-denominational invocations and benedictions, nevertheless listen, as did Samuel Adams, out of courtesy and respect to those fellow citizens who include such a traditional element within the particular celebration. Society and the courts certainly expect no less of individuals who, in the graduation context, feel personally uncomfortable with the music selected by the students, or even who might vehemently object to unpopular themes expressed in the speech of a student valedictorian. In other First Amendment free speech contexts, the sensitivity or emotions of the listener are only rarely allowed to control the content of speech, and when allowed, can only narrowly control such content.[315]

CONCLUSION

The state of flux in Establishment Clause law continues unabated and the debate will continue between justices of a deeply split High Court. Justice Kennedy's majority opinion in *Lee v. Weisman* explicitly leaves unresolved the specific issue of invocations and

313. This issue was starkly raised in *Sands v. Morongo Unified School District*, where no participant, student or parent, objected to the practice, and the components of their ceremony, including the invocations and benedictions, were left to the students themselves. *See* Sands v. Morongo Unified Sch. Dist., 53 Cal. 863, 869, 809 P.2d 809, 811, 281 Cal. Rptr. 34, 36 (1991) (describing plaintiffs in this action as "taxpayers residing within the District").

314. *See generally* ARTHUR M. SCHLESSINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTI-CULTURAL SOCIETY (1992).

315. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (hate crime decision noting the First Amendment generally prevents government from proscribing speech because of disapproval with the ideas expressed); Texas v. Johnson, 491 U.S. 397, 407-08 (1989) (flag burning case noting the very purpose of protecting freedom of speech is to invite dispute).

benedictions at public ceremonies "if the affected citizens are mature adults. . . ."[316] This Article suggests the First Amendment does not per se compel sanitizing the non-sectarian, non-denominational invoking of God from all traditional public ceremonies and rituals. Such benign traditional acknowledgments of religion have not served to establish a State religion, or a religious faith, in over 200 years of American history, nor should such acknowledgments tend to do so now.

Pursuant to the Establishment Clause, and any post-*Lee* test set forth by the Supreme Court of the United States to implement Establishment Clause principles, reasonable adherents or non-adherents should not be assumed to perceive historical invocations and benedictions within the context of a public ceremony to be an establishment of religion, or even an endorsement or advancement of religion.

As this nation becomes increasingly diverse, it is all the more important that society focus upon principles of mutual tolerance and civility. Such tolerance must mutually extend to traditional as well as non-traditional, and conventional as well as unconventional, ceremonial practices. Otherwise, the "common sense of the matter"[317] will increasingly be lost, and the State and religion far closer to becoming "aliens to each other, hostile, suspicious, and even unfriendly."[318]

316. Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992).
317. Zorach v. Clauson, 343 U.S. 306, 311 (1952).
318. *Id.* at 312.