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A Tale of Two Opinions

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A TALE OF TWO OPINIONS

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This is a tale of two opinions, with a bit of irony and a smidgeon of moral. One is by the Court of Appeals for the Ninth Circuit in *Ellis v. City of La Mesa*,[1] involving a challenge to the maintenance of a religious cross on public land in California. One might have expected a federal court to analyze the issue under the First Amendment, on the basis of the still extant tests in *Lemon v. Kurtzman*. Instead, it found the answer in the California Constitution—which, in addition to a recently added "establishment clause," contained from its earliest incarnation two other clauses not found in the federal constitution. One guarantees the exercise and enjoyment of religion "without discrimination or preference"; the other prohibits government from "grant[ing] anything to or in aid of any religious sect, church, creed, or sectarian purpose." The California Supreme Court had viewed these clauses as building an even stronger wall of separation than the federal constitution, and on that basis it had held a cross on public land to be unconstitutional. The federal court, relying on that opinion, found it unnecessary to reach the federal constitutional issue.

The second opinion is by the California Supreme Court in *Sands v. Morongo Unified School District*,[2] involving a challenge to a school district's practice of sponsoring religious invocations at public high school graduation ceremonies. Given its long history of state constitutionalism, and its experience in deciding church/state issues under the state constitution, one might have expected the court to analyze and decide the case on state constitutional grounds. Two justices were apparently prepared to do that, but a third wrote an opinion (which the two also joined) finding the practice to violate *both* state and federal constitutions, and two other justices were of the view that it violated neither.[3] That left two justices

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[1] 990 F.2d 1518 (9th Cir. 1993).

[2] 809 P.2d 809 (Cal. 1991).

[3] Justice Kennard wrote the opinion for the court, focusing primarily upon the federal Constitution but containing a section which relied on the state constitution as well. She was

remaining,[4] and these agreed with the first group that the practice was unconstitutional, but they declined to reach the state constitutional issue. Instead, they decided that strict application of the *Lemon* tests—with which they expressly disagreed, and which they urged the United States Supreme Court to overturn in the then pending case of *Lee v. Weisman*—required invalidation of the practice. As it happened, the high court did not oblige; retaining *Lemon*, it ruled that the graduation invocation practice in that case violated the First Amendment. The result is that California jurisprudence is deprived of meaningful development in an important area.

The irony is apparent, but perhaps not the moral. *Sands* was not the first case in which the California Supreme Court failed to accord priority to the state constitutional issue, and this is so despite that court's deserved reputation as a leader in state constitutionalism. There have been other lapses, and no doubt when I was a member of the court I contributed to some of them. The moral is that we—which is to say the legal culture—have not yet fully absorbed the principle of state constitutionalism. Unlike some critics, I do not believe that this is because the principle is not worth absorbing. On the contrary, I believe the principle is soundly grounded in both legal logic and political theory. Rather the lapses—which are apparent in courts around the country from time to time—occur either because counsel have inadequately presented the issues or because there are too many tempting reasons for judges to avoid the responsibility of independent decisionmaking. I trust this new journal will serve as stimulus to both bench and bar toward taking state constitutions seriously.

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joined in that opinion by Justices Mosk and Broussard. Justice Mosk, joined by Justice Broussard also wrote separately to elaborate their views regarding the state Constitution. Justices Panelli and Baxter wrote separate dissents.

[4] Chief Justice Lucas and Justice Arabian, each writing separate concurrences.