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# *Chandler v. James: A Student's Right of Prayer in Public Schools*<sup>\*</sup>

## I. INTRODUCTION

As our nation recovers from the shock and horror of the recent shootings occurring at Columbine High and other public schools<sup>1</sup>, some point to these events as evidence that public schools suffer from a lack of religious spirituality that comes from organized prayer.<sup>2</sup> While religious expression in public schools continues to be a heated issue, these tragic events provide new emotional ammunition for proponents of school prayer. Since *Engel v. Vitale*,<sup>3</sup> courts have struggled to articulate how students can express themselves religiously in the public school arena.<sup>4</sup>

In *Tinker v. Des Moines Independent Community School District*,<sup>5</sup> the Supreme Court first used the widely recognizable phrase that "students [do not] shed their constitutional rights . . . at the schoolhouse gate."<sup>6</sup> But the Supreme Court left unanswered the more difficult questions of determining exactly what rights students are allowed to bring with them into the schoolhouse. Through subsequent years, the Supreme Court has set boundaries for lower courts to follow. At one end of the spectrum, the Supreme Court has allowed students to pray privately or as a group;<sup>7</sup> at the other end, the Court has restricted officially sponsored

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1. See *An Epidemic of Violence*, (visited March 8, 2001) <<http://www.cnn.com/2001/US/03/08/alarming.incidents/index.html>>. These shootings include, but are not limited to, the Feb. 29, 2000 incident at Buell Elementary School in Mt. Morris Township, Michigan, where a six-year-old shot to death another first grader; the Nov. 19, 1999 shooting at Deming Middle School in Deming, New Mexico, where a 12-year-old shot and killed another student; the May 26, 2000 incident at Lake Worth Middle School in Palm Beach County, Florida where a 13-year-old shot and killed his English teacher. These incidents occurred after the infamous shootings in Pearl, Mississippi; Paducah, Kentucky; and Littleton, Colorado.

2. See Betsy Hart, *Tragedy Puts Prayer in School*, DESERET NEWS, April 30, 1999, at A15.

3. 370 U.S. 421 (1962).

4. Compare *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) cert. denied, 508 U.S. 967 (1993) (upholding the practice of choosing a volunteer student to give a graduation prayer), with *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994) (holding graduation prayer unconstitutional because of the state's involvement), and *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (contradicting the *Jones* decision, which does not permit graduation prayer where the students vote whether to have prayer).

5. 393 U.S. 503 (1969).

6. *Id.* at 506.

7. See *id.* at 513.

school prayer.<sup>8</sup> However, the area between these two extremes continues to be unclear. In *Chandler v. James*,<sup>9</sup> the U.S. Court of Appeals for the Eleventh Circuit provided guidance to its lower courts regarding "the religious speech in public school"<sup>10</sup> question by holding that a school district does not violate the Establishment Clause when the district allows students to initiate religious speech in schools and at school-related events. This speech is in fact protected under the Free Speech and Free Exercise Clauses of the First Amendment.

The Eleventh Circuit's analysis in *Chandler*, even with its shortcomings, provides a helpful framework from which to analyze cases involving religious speech in public schools. While the Supreme Court in *Santa Fe Independent School District v. Doe*<sup>11</sup> has recently decided against religious speech (prayer) before football games, its holding is fact-specific and does not contradict the ruling or analysis presented in the *Chandler* case.

To begin, this Note provides a brief background of the pertinent judicial history involving prayer in schools and is followed by an examination of the different ways several federal circuit courts have decided school prayer cases after the Supreme Court's decision in *Lee v. Weisman*.<sup>12</sup> This Note then gives a short introduction to *Chandler v. James*, followed by an explanation of the reasoning behind the *Chandler* court's decision and examination of how the Eleventh Circuit's ruling sits in relation to other circuit court decisions. In addition, the Note explores the significance of state-sponsored control in determining a First Amendment violation. It further addresses the question of what constitutes student-initiated speech and what type of limitations a school can place upon it. Reference is made to the Equal Access Act and the principle of limited public forums in providing a useful support of the *Chandler* analysis for school prayer cases. Finally, this Note argues that the recent Supreme Court decision in *Santa Fe* does not void the *Chandler* analysis and that such analysis should be looked to as a valuable tool for examining issues of prayer in our public schools.

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8. See *Lee v. Weisman*, 505 U.S. 577 (1992).

9. 180 F.3d 1254 (11th Cir. 1999).

10. *Id.* at 1254.

11. 530 U.S. 290 (2000).

12. 505 U.S. 577 (1992).

## II. BACKGROUND

A. *Violation of the Establishment Clause Under Lee v. Weisman*

In 1962, the Supreme Court decided in *Engle v. Vitale*<sup>13</sup> that the Establishment Clause of the First Amendment<sup>14</sup> prohibited school-sponsored prayer. Since *Engle*, lower courts have struggled to deal with variations of religious speech in the classroom.<sup>15</sup> In 1992, the Supreme Court helped to clarify some questions by ruling in *Lee v. Weisman* that prayer at public school graduation ceremonies violated the Establishment Clause.<sup>16</sup>

In *Weisman*, a principal invited a rabbi to give the invocation and benediction at a middle school graduation ceremony with instructions that the prayers needed to be nonsectarian.<sup>17</sup> Regardless of the nonsectarian nature of the prayers, the Court ruled that the "government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."<sup>18</sup> Moreover, in deciding this case, the Court focused on several factors: the control of the school over the graduation ceremony, the selection of the speaker, the school's attempt to control the content of the prayer by instructing that it be nonsectarian, and the essentially obligatory attendance of the students.<sup>19</sup> In addressing these factors, the Court concluded that the degree of school involvement related to the graduation prayer gave a clear impression of state support.<sup>20</sup>

Less than a year after the *Weisman* case, the Fifth Circuit, in *Jones v. Clear Creek Independent School District*, allowed a student to voluntarily give a graduation prayer after a majority of the graduating seniors

13. 370 U.S. 421 (1962). The Supreme Court ruled in this early prayer case that "New York state's prayer program officially establishes the religious beliefs embodied in the Regents' prayer." *Id.* at 430. The Court held that this was a violation of the Establishment Clause even though it was argued that the prayer to be offered was nondenominational in form and the program would allow students to choose to remain silent or leave the room. *See id.* The Court emphasized that even if a prayer is denominationally neutral and students can choose to participate, the First Amendment prevents any type of government sponsorship of the establishment of religion. *See id.*

14. The First Amendment of the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Establishment Clause refers to the phrase, "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

15. *See supra* note 4.

16. *See Weisman*, 505 U.S. at 577.

17. *See id.* at 581.

18. *Id.* at 587.

19. *See id.* at 586-88.

20. *See id.* at 590.

voted for it.<sup>21</sup> The court, while using a similar line of reasoning as in *Weisman*, emphasized the factual differences between the two cases.<sup>22</sup> Specifically, the court focused on the control of the majority vote of the senior class in determining whether to initiate a graduation prayer.<sup>23</sup> This differs from *Weisman* because there the school not only selected who was to give the prayer, but also attempted to control the content of the prayer.<sup>24</sup> In *Jones*, the student vote was an important part of the court's determination that the school did not direct prayer at its graduation, and thus did not violate the Establishment Clause.<sup>25</sup> Critics of the Fifth Circuit's ruling believe that the decision grossly misreads the Supreme Court's ruling in *Weisman*.<sup>26</sup> Unfortunately, the Supreme Court refused to grant review of the *Jones* case, and the question whether student-initiated prayer through majority vote is constitutionally permitted remains uncertain in some cases.<sup>27</sup> Since *Jones*, federal courts other than the Fifth Circuit have examined cases regarding student-initiated prayers.<sup>28</sup> However, the decisions have varied and reflect the lack of clarity and uniformity regarding state control and student-initiated speech.

### B. Confusion Among the Circuit Courts

The *Weisman* decision, although helpful in further shaping the law regarding prayer in public schools, left unanswered the important question as to whether the ban on school prayer encompasses student-initiated graduation prayers or simply applies to those prayers directed and controlled by school officials.<sup>29</sup> The discrepancies among the decisions of the various appellate courts reflect this confusion.

*Jones* was one of the earlier appellate cases to address prayer after the *Weisman* decision.<sup>30</sup> However, in 1995, the Third Circuit heard a

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21. See *Jones*, 977 F.2d at 963.

22. See *id.* at 969-71.

23. See *id.* at 969, 971-72.

24. See *Weisman*, 505 U.S. at 586-88.

25. See *Jones*, 977 F.2d at 971-72.

26. See ACLU Legal Bulletin, *The Establishment Clause and Public School* (visited Feb. 21, 2001) <<http://www.aclu.org/issues/religion/pr3.html>>. The ACLU bulletin argues that the Court in *Weisman* emphasized that schools maintain a substantial amount of control during a graduation ceremony. See *id.* Because of this control, when a school reserves time on the program for prayer, it essentially is endorsing the prayer regardless of whether a voluntary student offers it. Thus, the state violates the Constitution.

27. See *id.* The Supreme Court in *Santa Fe* attempted to clarify this issue, but the cases remain fact intensive and therefore distinguishable. See *infra* discussion Part IV.F.

28. Compare *Jones*, 977 F.2d at 963, and *Harris*, 41 F.3d at 447, with *Black Horse*, 84 F.3d at 1471, and *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998).

29. See Ralph Mawdsley, *Student Choice and Graduation Prayer: Division Among the Circuits*, 129 EDUC. LAW REP. 553 (1998).

30. See *Jones*, 977 F.2d at 963.

similar case, *ACLU v. Black Horse Pike Regional Board of Education*, in which a school allowed the graduating seniors to vote for prayer at the graduation.<sup>31</sup> *Black Horse* factually differed from *Jones* in that students in *Black Horse* were allowed to vote for prayer, no prayer, or a moment of reflection.<sup>32</sup> Interestingly, the *Black Horse* court reached an opposite conclusion from the Fifth Circuit in *Jones*. In *Jones*, the student vote was interpreted as a method of eliminating the school's entanglement with prayer,<sup>33</sup> while the court in *Black Horse* determined that even a student referendum could not "erase the state's imprint from this graduation prayer."<sup>34</sup> The court determined that delegating one facet of the graduation ceremony, the choice for a graduation prayer, would not relieve the school of its ultimate control over the event or "insulate the School Board from the reach of the First Amendment."<sup>35</sup> The court further emphasized that students are able to determine the existence of a graduation prayer only because the school gives them this opportunity.<sup>36</sup> The Third Circuit prohibited graduation prayer even when a plurality of students voted for it.<sup>37</sup>

In another recent circuit court case involving graduation prayer, *Doe v. Madison School District No. 321*, the Ninth Circuit, like the Fifth Circuit in *Jones*, upheld student choice and graduation prayer.<sup>38</sup> However, this case factually differs from both *Jones* and *Black Horse* in that the students did not vote on the decision to have a graduation prayer.<sup>39</sup> Instead, the school selected speakers based on academic standing and left it up to the students to decide the topic of their speeches.<sup>40</sup> In referring to the *Weisman* case, the Ninth Circuit emphasized the importance that the Supreme Court placed on the degree of school involvement with the graduation prayers in deciding an Establishment Clause violation.<sup>41</sup> The Ninth Circuit followed a similar line of reasoning as the *Jones* interpretation of *Weisman* and indicated that the facts in *Madison* showed that the

31. See *Black Horse*, 84 F.3d at 1471.

32. See *id.* at 1475.

33. See *Jones*, 977 F.2d at 970-71.

34. *Black Horse*, 84 F.3d at 1479.

35. *Id.* (indicating that the *Weisman* case presented an obvious example of the state's entanglement with religion. Though the involvement of the state in this case is less obvious, the court emphasizes that even a student vote cannot eliminate the school's endorsement of religion from the graduation prayer.)

36. See *id.*

37. See *Black Horse*, 84 F.3d at 1471.

38. See *Madison*, 147 F.3d at 832.

39. See *id.* at 834.

40. See *id.*

41. See *id.* at 835.

control over prayer was with the students and not the State.<sup>42</sup> Thus, if selection of a student speaker is based solely on the neutral criterion of academic standing, the student may engage in prayer or religious discussion.<sup>43</sup>

On July 13, 1999, the Eleventh Circuit decided another case involving school prayer, *Chandler v. James*.<sup>44</sup> Factually, this case can be distinguished from the above-mentioned circuit court cases in that no student vote or school selection of a graduation speaker is directly involved.<sup>45</sup> Instead, the contention surrounds a broad Alabama statute permitting nonsectarian student-initiated prayer at mandatory and non-mandatory events.<sup>46</sup> The U.S. District Court for the Middle District of Alabama issued an injunction against the statute ruling that it was unconstitutional.<sup>47</sup> On appeal, the Eleventh Circuit held that the injunction was too broad. In narrowing the scope of the injunction, the court held that prayers could be allowed at events such as graduations and school assemblies, even if mandatory attendance is required.<sup>48</sup>

### III. CHANDLER V. JAMES

#### A. Facts

In 1996, a vice-principal Michael Chandler and his son, a student in the DeKalb Alabama County school system (DeKalb), challenged the validity of an Alabama statute which read: "On public school, other public, or other property, nonsectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory . . . school-related graduation or commencement ceremonies, and other school-related student events."<sup>49</sup> The U.S. District Court for the Middle District of Alabama ruled in favor of the Chandlers and held the statute unconstitutional.<sup>50</sup> The court further

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42. *See id.*

43. *See id.* at 836. However, the Supreme Court recently denied certiorari in a case where a student was prohibited from delivering a graduation speech in which he referenced God and other religious sentiments. *See Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied* Niemeyer v. Oroville Union High Sch. Dist., \_\_ U.S. \_\_, 2001 WL 15969 (March 5, 2001). The Supreme Court upheld the Ninth Circuit decision, which affirmed the district court's decision of allowing the school district to prohibit the speech.

44. 180 F.3d 1254 (11th Cir. 1999).

45. *See id.*

46. *See id.* at 1255.

47. *See id.* at 1256-57.

48. *See id.* at 1264-67.

49. *Id.* at 1256 (quoting Ala. Code § 16-1-20.3(b) (1995)).

50. *See id.*

ordered a permanent injunction prohibiting DeKalb from officially sanctioning "vocal prayer or other devotional speech in its schools."<sup>51</sup> It further "prohibit[ed] all [school sanctioned, induced and ordered] prayer or other devotional speech in situations which are not purely private, such as aloud in the classroom, over the public address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony."<sup>52</sup>

DeKalb conceded that the Supreme Court's decision in *Weisman* prohibited school sponsorship, prescription, and endorsement of religion in curricular or extracurricular activities.<sup>53</sup> However, the injunction went so far as to require school officials to not only abstain from leading or participating in public prayer or other religious speech, "but also requires [them] to forbid students or other private individuals from doing so while in school or at school-related events."<sup>54</sup> It is this part of the injunction that DeKalb appealed. DeKalb did not challenge the district court's ruling of the unconstitutionality of the Alabama statute<sup>55</sup> and that issue will not be examined in this paper.<sup>56</sup>

The only question the Eleventh Circuit reviewed was "whether the district court may constitutionally enjoin DeKalb from permitting student-initiated religious speech in its schools."<sup>57</sup> In addressing this question, the appellate court directly tackled one of the issues left unclear after *Weisman*.

### B. Reasoning of Appellate Court

The Chandlers argued that all religious speech in public schools, even if student-initiated, should be prohibited under the Establishment Clause of the First Amendment.<sup>58</sup> Their argument consisted of two main contentions. First, they contend that no difference exists between state prayer and student-initiated prayer in public schools and that both give the impression of state endorsement.<sup>59</sup> Second, they argue that all public religious speech in schools is unconstitutional because of its coercive nature and resulting peer pressure on some of the school's students.<sup>60</sup> The

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51. *Id.* at 1257.

52. *Id.*

53. *See id.*

54. *Id.*

55. *See id.*

56. To better understand the history surrounding this Alabama statute and others like it, see *Wallace v. Smith*, 472 U.S. 38 (1985).

57. *Chandler*, 180 F.3d at 1258.

58. *See id.*

59. *See id.*

60. *See id.* at 1260.

Supreme Court in *Weisman* focused on exactly these two concerns in its ruling against graduation prayer.<sup>61</sup> However, the Eleventh Circuit disagreed with the arguments the Chandlers proposed and ruled that the district court may not prevent DeKalb from allowing student-initiated religious speech in its schools.<sup>62</sup>

The court emphasized that “[t]he suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression.”<sup>63</sup> Further, the court stated that “[b]ecause genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution.”<sup>64</sup> To discriminate against student religious speech would be to demonstrate outright hostility towards religion, which the Freedom of Expression Clause of the First Amendment prohibits.<sup>65</sup>

In referring to the famous Supreme Court decision in *Tinker*,<sup>66</sup> the court reiterated the principle that students do not leave their constitutional rights “at the schoolhouse gate.”<sup>67</sup> But as the introduction of this note indicates, the problem lies in determining which rights students retain after entering the schoolyard. As the Eleventh Circuit noted, religious speech by a student outside the public school arena “does not become forbidden ‘state action’ the moment the students walk through the schoolhouse door.”<sup>68</sup> In *Weisman*, the school’s high degree of control over the prayer, speech content, and selection of the graduation speaker was a determining factor in the Court’s ruling against graduation prayer.<sup>69</sup> In allowing religious speech in graduation ceremonies, the Fifth and Ninth Circuits in *Jones* and *Madison*, respectively, decided that the control of the prayer was with the students and not the state.<sup>70</sup> In *Jones*, the students voted for the graduation prayer,<sup>71</sup> and in *Madison* the speakers were selected by neutral factors and were given the freedom to choose whatever speech topic they preferred.<sup>72</sup> The Eleventh Circuit fol-

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61. See *Weisman*, 505 U.S. 577.

62. See *Chandler*, 180 F.3d at 1258.

63. *Id.* at 1261.

64. *Id.*

65. See *id.* at 1261.

66. 393 U.S. 503 (1969).

67. *Chandler*, 180 F.3d at 1261 (quoting *Tinker*, 393 U.S. at 506).

68. *Id.* at 1261-62.

69. See *Weisman*, 505 U.S. at 577.

70. See *Jones*, 977 F.2d at 963; *Madison*, 147 F.3d at 832.

71. See *Jones*, 977 F.2d at 964-65.

72. See *Madison*, 147 F.3d at 834.

lowed a similar line of reasoning, finding that the government must remain neutral with respect to religion.<sup>73</sup> The *Chandler* court maintained that genuinely student-initiated speech does not become state sponsored simply because it takes place in public schools.<sup>74</sup>

The *Chandler* court stated that simply permitting religious speech in schools does not equate to state control and endorsement of religion prohibited by the Constitution.<sup>75</sup> Although the court acknowledged the possibility that permitting student-initiated religious speech might advance religion in some sense, it emphasized the assertion that "[s]tate action may incidentally advance religion without offending the Constitution."<sup>76</sup> Therefore, the *Chandler* court ruled that the district court could not constitutionally restrict students from engaging in genuinely student-initiated religious speech and vacated the permanent injunction.<sup>77</sup>

#### IV. ANALYSIS

##### A. State-Sponsored Control of Graduation Events

In the wake of the Supreme Court's *Weisman* decision, the question still remained whether the ban on school prayer encompassed student-initiated graduation prayers or simply applied to graduations under the management and direct control of school officials. While circuit courts have dealt with this issue,<sup>78</sup> the Eleventh Circuit directly addressed this question by indicating that student-initiated religious speech in public schools, free from the direct control of school officials, is not state prayer and therefore is constitutional.<sup>79</sup> Critics will argue that no real distinction exists between a school controlling a religious activity and merely delegating that control to its students. In fact, the Third Circuit upheld this viewpoint in ruling that student-initiated and student-led prayer at graduation is unconstitutional because the ceremony remains a school-sponsored event under the control of school officials.<sup>80</sup> Further, the *Weisman* decision clearly indicated that merely delegating the decision regarding one or two segments of the graduation ceremony does not diminish the state sponsorship.<sup>81</sup>

73. See *Chandler*, 180 F.3d at 1261.

74. See *id.* at 1261-62.

75. See *id.* at 1262.

76. *Id.* at 1262 (alluding to *Widmar v. Vicent*, 454 U.S. 263 (1981)).

77. See *id.* at 1263-66.

78. See *supra* note 4.

79. See *Chandler*, 180 F.3d. at 1264-65.

80. See *Black Horse*, 84 F.3d at 1471.

81. See *Weisman*, 505 U.S. at 577.

It is true that at a graduation ceremony, “teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students”<sup>82</sup> However, the Eleventh Circuit aptly addressed this concern by first acknowledging that the Constitution requires neutrality, and later explaining that permitting students to speak religiously signifies neither state approval nor disapproval of that speech.<sup>83</sup> One cannot attribute state establishment or sponsorship of religion simply because a school gave permission for students to speak on a religious topic.<sup>84</sup> The *Chandler* court took this principle a step further when it stated that the religious speech could even advance religion in some sense without violating the Constitution.<sup>85</sup> The court’s reasoning is sound because it strikes a balance between state establishment of religion and a complete rejection of it in violation of the Free Exercise Clause.

### B. Student Impressionability

A concern that arose in *Weisman* was student impressionability in believing school prayer would be equated with state-sponsored prayer.<sup>86</sup> However, this concern seems misguided. In *Westside Community School v. Mergens*,<sup>87</sup> the Supreme Court accepted the belief 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 nondiscriminatory basis.”<sup>88</sup>

While the court in *Weisman* worried about the coercive effect religious speech could have on the students,<sup>89</sup> in a purely pragmatic sense, it is difficult to imagine a graduating senior who would see a graduation prayer or religious reference in a speech as anything but part of the tradition and ceremony that has been previously established. High school seniors are mature enough to realize that the school does not sponsor every speech it permits. As the dissent in *Weisman* indicated, our nation’s history and tradition is filled with public ceremonies involving prayers.<sup>90</sup> Americans witness prayers at government ceremonies and presidential inaugurations, and congressional sessions open with a chaplain’s

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82. *Id.* at 597.

83. *See Chandler*, 180 F.3d at 1261.

84. *See id.* at 1262.

85. *See id.*

86. *See Weisman*, 505 U.S. at 578, 593-94.

87. 496 U.S. 226 (1990).

88. *Id.* at 250.

89. *See Weisman*, 505 U.S. at 587-88, 592-93.

90. *See id.* at 633 (Scalia, J., dissenting).

prayer—even the legal tender of the United States is printed with the words “in God we trust.”<sup>91</sup> In some public schools, students begin the day by reciting the pledge of allegiance, which directly references God. Graduation ceremonies have a long history and association with prayer.<sup>92</sup> Prayers at graduation ceremonies are pervasive and are expected to accompany the traditional graduation ritual.<sup>93</sup> If a graduation prayer is coercive, it is no more coercive than reciting the pledge of allegiance in our schools or using currency upon which the words “in God we trust” is written. A school can mitigate any impression of sponsored prayer with disclaimers printed on programs and read at the beginning of such ceremonies. Because the remedy for such concern is simple, it is unnecessary to prohibit religious references and student-initiated prayer outright.

### C. Limits on Student-Initiated Speech

The Eleventh Circuit emphasized that genuinely student-initiated speech is protected by the Free Exercise and the Free Speech Clauses of the First Amendment.<sup>94</sup> However, questions arise as to what constitutes student-initiated speech and what type of limitations, if any, a school can place upon it. Some courts explore student-initiated speech as a product of a state's lack or limited degree of control.<sup>95</sup> In fact, the lack of state control seems to characterize student-initiated speech.<sup>96</sup> However, defining what is student-initiated speech becomes more difficult when that speech occurs in a forum of government or state control. Courts struggle with defining the point where state control over the forum would change student-initiated speech into a form of state speech, regardless if that speech was initiated and voluntarily given by students.<sup>97</sup>

Another concern with allowing student-initiated speech is the potential for abuse. Consider a situation where, in order to avoid state-sponsored religion, a court prohibits a teacher from leading a school choir in religiously oriented Christmas songs at a school holiday assembly. Instead of abiding by the restriction, the teacher/music director allows a voluntary student to take over the leading and directing of those particular religious songs.<sup>98</sup> Is this speech student-initiated or simply a

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91. *Id.* at 634.

92. *See id.* at 635-36.

93. *See id.*

94. *See Chandler*, 180 F.3d at 1261.

95. *See Weisman*, 505 U.S. at 590-91; *Chandler*, 180 F.3d at 1264; *Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 252 (1990).

96. *See Weisman*, 505 U.S. at 590-91; *Chandler*, 180 F.3d at 1264.

97. *See id.*

98. *See Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997).

way in which schools can get around the First Amendment and indirectly sponsor religious expression?

The Eleventh Circuit does not define the bounds of student-initiated speech<sup>99</sup> but other circuit courts have wrestled with whether a student majority vote falls under the umbrella of speech that is student-initiated.<sup>100</sup> The Fifth and Third Circuits dealt with this issue and came to different conclusions.<sup>101</sup> However, it seems clear that allowing a majority of a group to impose their religious beliefs on individuals who do not share those beliefs runs contrary to the purpose of the Establishment Clause.<sup>102</sup> The Supreme Court has stated:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>103</sup>

Thus, it seems that even a ninety-nine percent majority vote should not be allowed if the effect results in imposing beliefs on those who do not share the same beliefs.

The second question that arises is what limits, if any, a school can place on student-initiated speech. This is an important question since schools play a crucial *in loco parentis* role and must be able to restrict speech that disrupts the school's education and teaching goals.<sup>104</sup> The *Chandler* court attempted to answer this question by referring to the Equal Access Act and stating that religious speech must be "without oversight, without supervision, subject only to the same reasonable time, place, and manner restrictions as all other student speech in school."<sup>105</sup> This seems to give neither standard, practical guidance nor a bright-line rule for schools to follow. However, a more extensive analysis of the Equal Access Act and the theory of "limited open forums"<sup>106</sup> provides clearer and more concrete guidance.

99. See *Chandler*, 180 F.3d 1254.

100. The Supreme Court has recently addressed this issue in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 290. See *infra* Part IV.F.

101. See *supra* note 4.

102. See *Barnette*, 319 U.S. at 624. See also *School Dist. v. Schempp*, 374 U.S. 203, 225-226 (1963) (holding that the State cannot permit the majority to "use the machinery of the state to practice its beliefs").

103. *Barnette*, 319 U.S. at 638.

104. See Byron Fisher, Class Lecture for Law and Public Education Seminar at the J. Reuben Clark Law School, Brigham Young University (November 1999).

105. *Chandler*, 180 F.3d at 1264-65.

106. 20 U.S.C. § 4071 (1994).

#### D. Applying the Equal Access Act to School Prayer

Congress passed the Equal Access Act in 1984 to end "perceived widespread discrimination" against religious speech in public schools.<sup>107</sup> The Supreme Court, in *Westside Community Schools v. Mergens*,<sup>108</sup> later upheld the constitutionality of the Act and ruled it to be within the bounds of the Establishment Clause.<sup>109</sup> The Equal Access Act allows equal access to school facilities and prohibits discrimination based on speech content.<sup>110</sup> The Act sets forth the principle of a limited public forum and designates a public secondary school as such "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."<sup>111</sup> In other words, if a school allows one club to meet on campus, then it creates a limited open forum and must allow all other clubs on campus as well. A school is not allowed to restrict access based on the content or viewpoint of the clubs or speakers.<sup>112</sup> However, the school may close the forum at any time by prohibiting all clubs from meeting on school grounds.<sup>113</sup> In Salt Lake City, Utah, East High School chose to do this rather than allow a gay and lesbian club equal access to its facilities.<sup>114</sup>

Whether or not a school graduation is a limited open forum will be subject to debate. Although a strong analogous argument can be made that if a school allows a student to speak on one topic, then a type of limited open forum is created. Therefore, other topics should be allowed as well. Speeches at school graduation events often have similar themes of nostalgia, goals and dreams. But if a school allows a speaker to speak on a particular topic of his or her choice, then it can be argued that a limited open forum is established and the school must allow other topics as well, including religion. Although the school sponsors the graduation ceremony, and directs or controls the overall event, the school would not control the students' choice of speech content or material.

107. Catherine A. Loveless, Recent Developments, *After-School Use of Public Elementary and Junior High School Facilities by Student Religious Groups*, 48 WASH. U. J. URB. & CONTEMP. L. 297 (1995).

108. 496 U.S. 226 (1990).

109. *See id.*

110. *See* 20 U.S.C. § 4071 (1994).

111. *See id.* § 4071(b).

112. *See* ACLU Legal Bulletin, *The Establishment Clause and Public Schools* (visited Feb. 21, 2001) <<http://www.aclu.org/issues/religion/pr3.html>>.

113. *See id.*

114. *See* Jennifer Toomer-Cook, *State Office Backs S.L. School District*, DESERET NEWS, April 21, 1998, at B3; Chip Parkinson, *Judge Will Hear Suit Against State Senators*, DESERET NEWS, May 17, 1996, at B4.

While the Equal Access Act prohibits schools from sponsoring, participating in, directing or controlling the activities of the student groups,<sup>115</sup> the schools still maintain general control over the school facilities. For instance, the school establishes the time during which certain rooms can be used and still provides the electricity for the meetings, desks and other supplies that might be used. A similar analogy can be made in regard to student-initiated speeches. A school controls the sequence of the speakers, the printing of the programs and other supplies. The general control over the graduation belongs to the school, but student-initiated speeches and the voluntary choice of religious expression remains in the hands and control of the students. This line of reasoning reaches a similar conclusion as the *Chandler* court in allowing student-initiated speeches at graduation ceremonies. The concern expressed in *Weisman* over conveying the impression of state sponsorship over religious speeches<sup>116</sup> could be dealt with by a simple disclaimer or announcement at the beginning of the ceremony or by printing a disclaimer in the graduation programs handed to students and the audience.

Another area in which the Equal Access Act might be helpful is in determining limitations on student-initiated speech. A concern that arises with the decision in *Jones* is the extent to which students will be allowed to engage in student-initiated speech. Will students be allowed to speak freely on all topics as long as they are student-initiated? It was this concern that brought down the Religious Freedom Amendment Act of 1998.<sup>117</sup> Because of the public's concern that federal courts had misinterpreted the Constitution by issuing rulings that severely restrict religious expression,<sup>118</sup> Congressman Ernest Istook (R-Oklahoma) sponsored the Religious Freedom Amendment in an attempt to protect religious free-

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115. See 20 U.S.C. § 4071(c)(1)-(5) (1994).

116. See *Weisman*, 505 U.S. at 590-91.

117. See H.R.J. Res. 78, 105th Cong. (1998). The Religious Freedom Amendment did not pass in the House of Representatives. The amendment was sixty-one votes short of reaching the two-thirds majority to amend the Constitution (224 against and 203 in favor). See *id.* The purpose of the Amendment was to "restore the right of religious persons to acknowledge their beliefs, heritage, and an equal opportunity to participate in government programs, activities, or benefits. The Religious Freedom Amendment (RFA) would prohibit Federal and state governments from establishing any religion or denying equal access to a benefit because of religious affiliation." H.R. REP. NO. 105-543, at 1 (1998). The Amendment would have allowed, among other things, sectarian prayers in the classroom, personal religious opinions given by teachers during class hours, and prayers at high school graduation ceremonies. This amendment was in response to the public's concern that the Supreme Court and lower courts have misinterpreted the Constitution by issuing rulings that severely restrict religious expression when other forms of free speech are not so restricted, and which result in discrimination against a religious viewpoint in public affairs. See H.R. REP. NO. 105-543, at 1 (1998).

118. Carrie A. Moore, *School Prayers*, DESERET NEWS, April 25, 1998, at A15.

dom.<sup>119</sup> However, unlike the Equal Access Act, the Religious Freedom Amendment failed to garner enough votes for ratification.<sup>120</sup>

Doug Bates, the director of School Law and Legislation for the Utah State Office of Education and a critic of the amendment, expressed his concern that the amendment would allow tolerance of prayers, even those referencing praise to Satan. "If you're going to permit [school prayer], you have to permit it all . . . ."<sup>121</sup>

This same concern is raised in *Chandler*. The Eleventh Circuit allowed religious expression in schools and at school-related and school-sponsored events as long as the expression was student-initiated, even at mandatory events.<sup>122</sup> However, the court did not define the limits of religious expression nor did it give any indication of what is religious.<sup>123</sup> An assumption can be made that the religious expression envisioned was that of the mainstream religions and formalities. There could be a rare but possible situation in which a student claims Satanism is his or her religion and praises Satan in prayer. Although this example is extreme and might rarely occur, it begs the question of just how far the *Chandler* court is willing to extend its decision.

Critics may claim that as long as the speech was student-initiated, there does not seem to be any limits to stop it. The *Chandler* court does not entirely ignore this issue. The court does provide some guidance in deciding this question by indicating that religious speech must be "subject . . . to the reasonable time, place, and manner restrictions as all other student speech in school."<sup>124</sup> This guideline, however, is subject to broad interpretations. A better guideline on restricting student-initiated speech can be found by again looking to the Equal Access Act. The Act allows for groups to meet on a school's premises only if their meeting does not "materially and substantially interfere with the orderly conduct of educational activities."<sup>125</sup> This same principle, applied to student-initiated speeches, would sufficiently regulate speech that might cause disruption in public schools. The example of the Satanic speech would likely fall under the regulatory arms of the school and could be excluded accordingly.

Therefore, the Equal Access Act, which the Supreme Court has already ruled constitutional and within the bounds of the Establishment

119. H.R. REP. NO. 105-543.

120. See Moore, *supra* note 118.

121. *Id.*

122. See *Chandler*, 180 F.3d at 1258-64.

123. See *id.* at 1254.

124. *Id.* at 1264-65.

125. 20 U.S.C. § 4071(c)(4) (1994).

Clause,<sup>126</sup> and the concomitant limited open forum principle proves useful in analyzing whether student-initiated speech should be allowed in public schools and in providing helpful guidelines to answer lingering uncertainties left in the wake of *Weisman*. Under the Equal Access Act, any meetings that take place on school facilities must be voluntary and student-initiated; no sponsorship by the school is allowed; no employees or agents of the school are allowed to participate, direct, conduct, control, or regularly attend the activities of the student groups.<sup>127</sup> These provisions, along with the other restrictions and guidelines of the Equal Access Act previously mentioned, provide useful tools in examining issues of student-initiated free speech in the context of a graduation ceremony.

### *E. Official Involvement*

The Eleventh Circuit ruled that as long as prayer is not controlled and encouraged by school officials, it is protected speech and should be allowed.<sup>128</sup> In this way, the court avoids addressing another problematic issue involving school prayer.

A problem with past court decisions requiring nonsectarian prayer is that the very suggestion of nonsectarian prayer requires someone to review the prayer to make sure it is nonsectarian. This poses obvious problems of censorship and biases favoring one religion over another as to what is and what is not appropriate religious speech. The Supreme Court has clearly indicated that this is not allowed.<sup>129</sup> Having an organization decide what is and is not acceptable presents additional problems besides the constitutional restrictions. Religious expressions that do not fall within the recognizable and acceptable framework of the majority might be relegated to pariah status and never permitted. For example, a policy-making body located in the Bible Belt of the Southeastern United States might permit a Baptist-style prayer, but decide that any other variations of prayer are not acceptable. The *Chandler* court wisely focuses on student-initiated religious speech and therefore bypasses this issue.<sup>130</sup>

Technically, the Eleventh Circuit in *Chandler* merely restricted the broad permanent injunction issued by the district court. However, in reaching its decision the court set forth an analysis and holding that seems to support the rights of students to initiate religious speech in public schools. Although the Supreme Court declared in *Tinker* that "students [do not] shed their Constitutional rights . . . at the schoolhouse

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126. See *Westside*, 496 U.S. at 226.

127. See 20 U.S.C. § 4071(c) (1994).

128. See *Chandler*, 180 F.3d at 1264-65.

129. See *Engel v. Vitale*, 370 U.S. 421 (1962).

130. See *Chandler*, 180 F.3d 1254.

gate,"<sup>131</sup> there may be some rights students do not possess even before they enter the school.<sup>132</sup>

*F. Recent Supreme Court Decision: Santa Fe Independent School District v. Doe*

The Eleventh Circuit ruled that as long as prayer is not controlled and encouraged by school officials, it is protected speech and should be allowed. Recently, the Supreme Court decided a case involving prayer before public football games. In *Santa Fe Independent School District v. Doe*,<sup>133</sup> the Supreme Court upheld the decision of the United States Courts of Appeals for the Fifth Circuit, preventing student-led invocations before the start of public school football games.

The *Santa Fe* case involved a challenge to the Santa Fe School District's policy of allowing prayers to be delivered over the public address system before home football games.<sup>134</sup> The process involved two majoritarian elections: the first determined whether an invocation would be given, and the second selected the student who would deliver the message.<sup>135</sup>

While the outcome of this case seems to run contrary to the Eleventh Circuit's decision in *Chandler*, which seems to expand prayer in schools, a close analysis of both cases reveals that *Santa Fe* does not overrule the decision of *Chandler*. After the Supreme Court's decision in *Santa Fe*, the Court remanded the *Chandler* case to the Eleventh Circuit for further evaluation in light of its recent decision.<sup>136</sup> The Eleventh Circuit's own analysis provides the best explanation as to why *Santa Fe* and *Chandler* are not in conflict: "So long as the prayer is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected."<sup>137</sup>

131. *Tinker*, 393 U.S. at 506.

132. Many Supreme Court decisions have given less constitutional protection to minors than adults in similar situations. See John Thompson, *Student Religious Groups and the Right of Access to Public School Activity Periods*, 74 GEO. L.J. 205, 219 n.88 (1985) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 349 (1985) (Powell, J., concurring) (noting that high school officials are able to search students without probable cause or a search warrant); *Ingraham v. Wright*, 43 U.S. 651, 671 (1977) (holding that Eighth Amendment does not prohibit Florida law from allowing corporal punishment of school children); *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (stating that New York law against prohibiting the selling of sexually oriented magazines to minors does not violate the limited first amendment rights of the minors); *id.* at 649 (Stewart, J., concurring) (noting that in some specific areas, children do not have a full capacity for individual choice which triggers first amendment guarantees).

133. 530 U.S. 290 (2000). The Supreme Court was split 6-3.

134. See *id.* at 290.

135. See *id.* at 290-91.

136. See *Chandler v. Siegelman*, 230 F.3d 1313 (11<sup>th</sup> Cir. 2000).

137. *Id.* at 1316.

In *Santa Fe*, the Supreme Court held that state-sponsored prayer before football games is not allowed.<sup>138</sup> The Court reached this conclusion by determining that the speech being offered in this particular case was not private but public speech.<sup>139</sup> Determining whether speech is private or public is difficult, especially in the public school arena. Public schools must remain neutral but the line between neutrality and state sponsorship of religion is often blurred, putting a greater emphasis on the factual analysis and circumstances of each case. In *Santa Fe*, the Court determined that the process by which a student was selected and allowed to give a prayer involved a great degree of school involvement, so much involvement, in fact, that the line was crossed from neutrality to state sponsorship of religion.<sup>140</sup> When this line was crossed, the speech was no longer private and therefore not protected by the Free Exercise and Free Speech Clauses.<sup>141</sup> In determining school control, the Court focused on several facts including the school board's adoption of the policy allowing for a message or invocation to be delivered before football games to solemnize the event. The Court also focused on the majoritarian election process by which a student would be elected to give a message.<sup>142</sup>

While the opinion does place limits on student-led and student-initiated invocations in public schools, it is important to note that the Supreme Court's ruling does not extend to all student-initiated and student-led speech that would otherwise be private.<sup>143</sup> In *Santa Fe*, the Supreme Court was particularly concerned about the majority vote by which speakers and topics were selected. The Supreme Court was concerned that by allowing decisions to be left to a student body majority, the minority voice would be stifled.<sup>144</sup> But the Supreme Court left open the possibility of student-led messages in situations similar to that in *Doe v. Madison School District No. 321*, where a school selects a speaker based on neutral grounds such as academic standing and allows the student to decide the topic of the speech.<sup>145</sup>

The Eleventh Circuit, in reviewing the *Chandler* decision in light of *Santa Fe*, appropriately concluded that *Chandler* does not contradict *Santa Fe* but complements the decision by helping to answer questions as to what circumstances religious speech in schools should be consid-

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138. See *Santa Fe*, 530 U.S. at 290.

139. See *Siegelman*, 230 F.3d at 1315.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *Santa Fe*, 530 U.S. at 301-303.

144. See *id.* at 291, 304.

145. See *id.* at 290.

ered private and thus protected.<sup>146</sup> The Eleventh Circuit ruled in *Chandler*, and reaffirmed in *Siegelman*, that as long as prayer is "genuinely student-initiated" and not controlled and encouraged by school officials, it is private and therefore protected speech, and should be allowed in public schools.<sup>147</sup> The Supreme Court, in *Santa Fe*, ruled against prayer precisely because it was not "genuinely student-initiated."<sup>148</sup> It was controlled and encouraged by school officials. Thus, the Court decided that the speech was not private and not protected.<sup>149</sup> The Eleventh Circuit appropriately concluded that *Santa Fe* and *Chandler* are not contradictory. Thus, the *Chandler* decision and analysis remain valid.

## VII. CONCLUSION

The *Chandler* decision highlights some important questions with which courts continue to struggle with after the Supreme Court's decision in *Weisman*. The Eleventh Circuit gives wide latitude for student-initiated speech in public schools as long as they are truly initiated by students and do not bear "the imprint of the state."<sup>150</sup> Questions do arise as to how far a court will go in allowing various topics of student speech. In fact, the recent Supreme Court decision in *Santa Fe* does provide more specific limitations in this regard, which were then elaborated upon in *Seigelman*.

*Chandler* ruled and *Seigelman* reaffirmed that student-initiated speech is private speech and therefore protected. The Supreme Court does not contradict this principle with its decision in *Santa Fe*. As the Eleventh Circuit appropriately decided in reviewing its decision in light of *Santa Fe*, "[s]o long as the prayer is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected."<sup>151</sup>

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146. See *Siegelman*, 230 F.3d at 1315-16.

147. *Siegelman*, 230 F.3d at 1317. See also *Chandler*, 180 F.3d at 1264-65.

148. *Siegelman*, 230 F.3d at 1317. See also *Santa Fe*, 530 U.S. at 291.

149. See *Santa Fe*, 530 U.S. at 302.

150. *Siegelman*, 230 F.3d at 1315 (quoting *Santa Fe*, 530 U.S. at 305 (quoting *Weisman*, 505 U.S. at 590).

151. *Siegelman*, 230 F.3d at 1317.