

7-2000

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Sarah Beth Mabery

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Recommended Citation

Mabery, Sarah Beth (2000) "*Chandler v. James: Welcoming Student Prayer Back in the Schoolhouse Gate*," *Mercer Law Review*: Vol. 51 : No. 4 , Article 14.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol51/iss4/14

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CASENOTES

Chandler v. James: Welcoming Student Prayer Back in the Schoolhouse Gate

In *Chandler v. James*,¹ the Eleventh Circuit Court of Appeals vacated the district court's order permanently enjoining enforcement of an Alabama statute that permitted student-initiated religious speech in public schools.² The court of appeals concluded that permitting student-initiated religious speech did not violate the Establishment Clause and such speech is protected by the Free Exercise and Free Speech Clauses of the First Amendment.³

I. FACTUAL BACKGROUND

In 1993 the Alabama Legislature enacted a statute that stated, in pertinent part, "On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement

1. 180 F.3d 1254 (11th Cir. 1999).

2. *Id.* at 1256, 1258.

3. *Id.* at 1263.

ceremonies, and other school-related student events."⁴ In 1996, Michael Chandler, a DeKalb County school vice principal, and his son, a DeKalb County student, challenged the facial validity of the statute and the application of it in DeKalb County schools. Named as defendants were the Governor of Alabama, the State Superintendent of Education, the members of the State Board of Education, and the DeKalb County and City of Talladega Superintendents and Boards of Education. The District Court for the Middle District of Alabama granted partial summary judgment for plaintiff in March 1997, holding the statute to be facially unconstitutional. The district court permanently enjoined DeKalb County from enforcing the statute. The permanent injunction prohibited defendants from permitting all but private student prayer. In November the district court issued a Memorandum Opinion and Order, which stated that defendants unconstitutionally organized or sponsored religious activities. The court also granted plaintiffs summary judgment on the claim that the statute was applied unconstitutionally and appointed a monitor to oversee enforcement of the injunction. All defendants appealed; although, the Governor only appealed on the ground that the First Amendment's Establishment Clause does not apply to the states. The remaining defendants appealed regarding whether the district court could require them to prohibit nonprivate student-initiated prayer.⁵ The Eleventh Circuit Court of Appeals held that the court erred in permanently enjoining DeKalb County from permitting student-initiated prayer and remanded the case.⁶

II. LEGAL BACKGROUND

The constitutionality of the district court's permanent injunction prohibiting DeKalb County from permitting student-initiated religious speech that is not purely private depends upon the distinction the United States Supreme Court has made between private and government action. Also important to the disposition of this issue are the rights of students within the school setting.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."⁷ The Fourteenth Amendment made the First Amendment applicable to the states.⁸

4. ALA. CODE § 16-1-20.3(b) (1995 & Supp. 1998).

5. 180 F.3d at 1256-57.

6. *Id.* at 1265-66.

7. U.S. CONST. amend. I.

8. *See, e.g.,* *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (applying the freedom of religion clauses to the states); *Schneider v. State*, 308 U.S. 147, 160 (1939) (applying the

The Supreme Court first addressed the issue of prayer in school in *Engel v. Vitale*.⁹ The Court concluded that the use in classrooms of a prayer written by government officials as part of a program to promote religious activities violated the "constitutional wall of separation between Church and State" because the state and federal government lack the power to designate an official prayer.¹⁰ Likewise, in *School District of Abington Township v. Schempp*,¹¹ the Court struck down as unconstitutional statutes requiring a reading from the Bible, without comment on the reading, at the beginning of each school day.¹² This was because the state and federal government cannot pass laws that "aid one religion, aid all religions, or prefer one religion over another."¹³ According to the Court, the Establishment and Free Exercise Clauses mandate governmental neutrality with regard to religion.¹⁴

A. *The Establishment Clause*

In these first two school prayer cases, the Court addressed the issue of a state imposing religious activity on school children, and in the subsequent cases to be discussed, the Court addressed the issue of private actors. In *Widmar v. Vincent*,¹⁵ the Court decided whether state actors can prohibit private speakers from using university facilities for religious speech.¹⁶ The Court concluded that by providing the university's facilities to registered student organizations, the university created an open forum and must justify exclusion of religious clubs under applicable constitutional norms.¹⁷ By prohibiting religious clubs from using its facilities, the university imposed a content-based exclusion that could only be sustained by showing that the exclusion was necessary to serve a compelling state interest and was narrowly drawn.¹⁸ The university asserted compliance with the Establishment Clause as its compelling interest.¹⁹ While agreeing that compliance with the Establishment Clause is a compelling interest, the Court did not find that the "equal access" policy necessarily conflicted with the

freedom of speech clause to the states).

9. 370 U.S. 421 (1962).

10. *Id.* at 425, 430.

11. 374 U.S. 203 (1963).

12. *Id.* at 205.

13. *Id.* at 216 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)).

14. *See id.* at 215, 222.

15. 454 U.S. 263 (1981).

16. *See id.* at 264-65.

17. *Id.* at 267-68.

18. *Id.* at 269-70.

19. *Id.* at 270.

Establishment Clause.²⁰ In concluding that an open forum policy that was nondiscriminatory toward religious speech would provide religion with only incidental benefits, the Court held that an open forum does not confer "any imprimatur of state approval on religious sects or practices."²¹ The Court was also persuaded by the fact that the open forum is available to religious as well as nonreligious speakers, and the Establishment Clause does not prohibit extending general benefits to religious groups.²² However, this does not mean that the university could not establish reasonable time, place, and manner restrictions.²³

Following *Widmar*, in 1984 Congress adopted the Equal Access Act (the "EAA")²⁴ requiring "equal access" policies in public secondary schools under certain circumstances and in compliance with specific guidelines.²⁵ The EAA provides:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.²⁶

In addition to requiring equal access policies, the EAA delineates certain criteria for offering a fair opportunity, including the following: that meetings be student initiated and voluntary; that the school, government, or its agents or employees do not sponsor meetings; and that agents or employees of the school or government only attend religious meetings in a "nonparticipatory capacity."²⁷ The EAA further prohibits the states or their political subdivisions from requiring participation in religious activities or from influencing content or form of any religious activities.²⁸ By enacting these provisions Congress sought to clearly distinguish between activities initiated and controlled by students and those initiated and controlled by the school or government: The former is permitted while the latter is prohibited.

20. *Id.* at 271.

21. *Id.* at 274.

22. *Id.*

23. *Id.* at 276.

24. 20 U.S.C. §§ 4071-4074 (1994).

25. *Id.*

26. *Id.* § 4071(a).

27. *Id.* § 4071(c)(1)-(c)(3).

28. *Id.* § 4071(d).

In 1989 the Court interpreted the EAA and ruled on its constitutionality in *Board of Education of Westside Community Schools v. Mergens*.²⁹ The Court recognized that in passing the EAA, Congress had extended the holding in *Widmar* to public secondary schools.³⁰ The Court proceeded to interpret the meaning of the phrase “noncurriculum related student group” to determine if Westside High School had to provide equal access to a Christian club.³¹ While a majority of the Court agreed with regard to the statutory interpretation, the Court was divided with regard to the rationale for upholding the EAA as constitutional.³² In her opinion for the plurality, Justice O'Connor examined *Widmar*, concluding that the Court reasoned that opening university facilities to religious groups sends a message of “neutrality rather than endorsement.”³³ The plurality found the logic of *Widmar* applicable and concluded that a school does not endorse student speech when the speech is allowed on a nondiscriminatory basis.³⁴ The plurality recognized concern over actions being perceived as government support of religion in the “eyes of impressionable youngsters.”³⁵ However, there is “a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”³⁶ In addition, secondary school students are mature enough to recognize that the school is not endorsing student speech it merely permits.³⁷ As an additional safeguard, the statute prohibits active participation by school officials and limits such meetings to “noninstructional time”; therefore, there is little risk, if any, of state endorsement or coercion.³⁸ Also, the school could avoid any “mistaken inference of endorsement” by making

29. 496 U.S. 226 (1990). The majority wrote an opinion on the statutory interpretation regarding the applicability of the Equal Access Act to Westside High School. *Id.* at 231-47. Justice O'Connor delivered the plurality opinion regarding the constitutionality of the Equal Access Act. *Id.* at 247-53. Justice Kennedy, joined by Justice Scalia, wrote an opinion concurring in part and concurring in the judgment. *Id.* at 258-62. Justice Marshall, joined by Justice Brennan, concurred in the judgment. *Id.* at 262-70. Justice Stevens dissented. *Id.* at 270-91.

30. *Id.* at 235.

31. *Id.* at 234, 237 (interpreting 20 U.S.C. § 4071 (b)).

32. *See id.* at 247; *See id.* at 258 (Kennedy, J., concurring); *See id.* at 262-63 (Marshall, J., concurring).

33. *Id.* at 248 (O'Connor, J., plurality opinion).

34. *Id.* at 248, 250.

35. *Id.* at 250 (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985)).

36. *Id.* at 250 (emphasis supplied by court).

37. *Id.*

38. *Id.* at 251 (citing 20 U.S.C. § 4071(b), (c)(2), (c)(3)).

it clear that recognition of a club is not an endorsement of the members' views.³⁹

In *Wallace v. Jaffree*,⁴⁰ the Court concluded that an Alabama statute which permitted a moment of silence "for meditation or voluntary prayer"⁴¹ was unconstitutional because it indicated the state's intent that prayer be considered the favored practice.⁴² Justice O'Connor, concurring, stated that the Establishment Clause prohibits the government from "conveying or attempting to convey a message that religion . . . is favored."⁴³ A state-sponsored moment of silence could be constitutional, if properly written, because it is "not inherently religious"; moreover, "[b]y mandating a moment of silence, a State does not necessarily endorse" what happens during that period.⁴⁴

Thus, the Court has concluded that a state does not establish religion by merely granting secondary or university students who promote religion access to facilities equal to that given students promoting secular ideas. In fact, schools are required to treat all student speech equally once they have opened the forum to student speech. However, a state cannot convey a preference for religious speech in the guise of allowing students to exercise their First Amendment rights to free speech.

In *Lamb's Chapel v. Center Moriches Union Free School District*,⁴⁵ the Court examined the school district's rules permitting use of school property by nonstudents for social, civic, or recreational uses but not for religious purposes. Based upon those rules, the school district denied the request of Lamb's Chapel to use school facilities for showing a film series on family and child-rearing with a religious tone.⁴⁶ The Court indicated that control over use of public property that is not a public forum can be based on subject matter, but must be reasonable in light of the forum's purpose and must be viewpoint neutral.⁴⁷ A speaker could not be excluded from a nonpublic forum based on the view espoused if the speaker's subject was one that would otherwise be

39. *Id.*

40. 472 U.S. 38 (1985).

41. ALA. CODE § 16-1-20.1 (Supp. 1984), *repealed by* ALA. CODE § 16-1-20.1 9 (Supp. 1999).

42. 472 U.S. at 40, 60-61.

43. *Id.* at 70 (O'Connor, J., concurring).

44. *Id.* at 72-73.

45. 508 U.S. 384 (1993).

46. *Id.* at 387.

47. *Id.* at 392-93 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

includable in the forum.⁴⁸ While such exclusion would normally be unconstitutional, the discrimination could be saved by an Establishment Clause defense.⁴⁹ The school district's denial would be saved if permitting such use of the facilities would be an establishment of religion; here, however, fears of an Establishment Clause violation were unfounded.⁵⁰ The Court concluded no real danger of the community believing that the school district was endorsing a general or a particular religion existed.⁵¹

Thus, the Court has consistently held that the Establishment Clause is not violated by permitting religious speakers to use nonpublic school facilities when there is no appearance of government endorsement of religion. So long as the government actor affords religious speakers who are not government actors the same opportunity to use government facilities as given to secular speakers, no danger of a perception of government endorsement exists. Absent such a perception, the Establishment Clause is not violated.

The Court extended the equal access requirement to include access to funding as well as facilities in *Rosenberger v. Rector & Visitors of University of Virginia*.⁵² The university had denied Student Activity Funds to a Contracted Independent Organization ("CIO") called Wide Awake Productions because publishing its newspaper constituted a religious activity.⁵³ Under university guidelines, a CIO had to include a disclaimer that it is independent of the university in all dealings with third parties and all its writings.⁵⁴ The Court began by indicating that the state may use content discrimination to preserve the purposes of a limited forum, but may not use viewpoint discrimination.⁵⁵ Content discrimination distinguishes speech based on the subject of the speech

48. *Id.* at 394 (quoting *Cornelius*, 473 U.S. at 806).

49. *Id.* (quoting *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986)).

50. *Id.* at 394-95 (citing *Widmar*, 454 U.S. at 263).

51. *Id.* at 395.

52. 515 U.S. 819, 845-46 (1995).

53. *Id.* at 827. The university had guidelines governing which student organizations were eligible for Student Activity Funds. To be eligible, the organization had to be a Contracted Independent Organization ("CIO"). To be a CIO, the organization had to meet certain requirements. Then, to receive Student Activity Funds for third-party payment of publishing costs incurred by the organization, a CIO had to meet certain requirements. Certain student activities could not receive reimbursement by the Student Activity Fund. Among those are religious activities, which were defined as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* at 823-27.

54. *Id.* at 823.

55. *Id.* at 829-30.

while viewpoint discrimination distinguishes speech based on the point of view the speaker espouses regarding the subject of the speech.⁵⁶ Noting the imprecision of the distinction, the Court concluded that the denial of third-party payment of the newspaper's publishing costs was viewpoint discrimination.⁵⁷ The university was "not exclud[ing] religion as a subject matter," but disfavoring student publications with "religious editorial viewpoints."⁵⁸ The Court further held that, while viewpoint discrimination could be proper when the university actually speaks or subsidizes transmittal of its favored message, the university may not impose viewpoint restrictions when it uses funds "to encourage a diversity of views from private speakers."⁵⁹ Likewise, the scarcity of resources does not warrant viewpoint discrimination in allocating funds, but requires allocation based on neutral principles.⁶⁰ However, the university's actions may have been necessary in order to comply with the Establishment Clause.⁶¹ The Court acknowledged a difference between government speech endorsing religion and private speech doing so and recognized that the university had made a point to disassociate itself from the private speech in this case.⁶² The Court also found that using government funds to pay third-party contractors is no different than using funds to maintain facilities when access is on a religion-neutral basis and religious groups use the facilities.⁶³

The First and Fourteenth Amendments prohibit the government from establishing religion. As the cases above indicate, a private speaker may endorse religion, but the government may not. However, when a private speaker endorses religion, the state may violate the Establishment Clause if its actions toward the speaker convey the message of state endorsement of religion. This does not occur when the state takes a neutral position with regard to religious speakers and provides them with access equal that provided to secular speakers.

B. The Free Speech Clause in the School Context

In *West Virginia State Board of Education v. Barnette*,⁶⁴ the Court addressed a challenge to a Board of Education resolution requiring a

56. *See id.* at 829-31.

57. *Id.* at 831.

58. *Id.*

59. *Id.* at 833-34.

60. *Id.* at 835.

61. *Id.* at 837.

62. *Id.* at 841 (quoting *Mergens*, 496 U.S. at 250 (O'Connor, J., plurality opinion)).

63. *Id.* at 843.

64. 319 U.S. 624 (1942).

salute and pledge to the United States flag. The Court found the pledge and salute to be a form of utterance and that the compulsory flag salute required an affirmation of a belief.⁶⁵ The Court concluded that the compulsory flag salute and pledge violated the constitution.⁶⁶

A second important case regarding a student's right to free speech at school is *Tinker v. Des Moines Independent Community School District*.⁶⁷ The Court stated in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the school-house gate."⁶⁸ However, a student's First Amendment rights are to be "applied in light of the special characteristics of the school environment."⁶⁹ A student's exercise of free speech cannot be restricted unless it "materially disrupts class work or involves substantial disorder or invasion of the rights of other[]" students.⁷⁰

After restricting the school's ability to regulate student speech in *Tinker*, the Court modified the constraint on schools in *Bethel School District No. 403 v. Fraser*.⁷¹ When a student challenged his having been disciplined for using a sexual metaphor at a school assembly, the Court concluded that the school was permitted to determine that vulgar speech would undermine the educational mission of the school.⁷² The Court recognized in the school setting a need to weigh the freedom to espouse unpopular and controversial ideas against society's interest in teaching the appropriate social boundaries of behavior.⁷³ The fact that adults may use an offensive expression to make a political point does not mean that students must be given the same latitude in public schools.⁷⁴ Therefore, it is appropriate for the school board to determine what manner of speech is inappropriate in the classroom or school assembly.⁷⁵

The Court further addressed the extent to which the school could restrict student speech in *Hazelwood School District v. Kuhlmeier*.⁷⁶

65. *Id.* at 632, 633. The Court stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

66. *Id.*

67. 393 U.S. 503 (1969).

68. *Id.* at 506.

69. *Id.*

70. *Id.* at 513.

71. 478 U.S. 675, 685-87 (1986).

72. *Id.* at 677-78, 685.

73. *Id.* at 681.

74. *Id.* at 682.

75. *Id.* at 683.

76. 484 U.S. 260 (1988).

The Court recognized a distinction between the issues of whether the First Amendment requires tolerance of particular student speech and whether it requires promotion of particular student speech.⁷⁷ Teachers and administrators are vested with greater control over expressive activities that may be characterized as part of the school curriculum than activities that are a student's personal expression.⁷⁸ Activities that may be characterized as part of the curriculum are those "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."⁷⁹

C. *The Free Exercise Clause*

Finally, regulation of student speech regarding religion also has free exercise implications. In *Cantwell v. Connecticut*,⁸⁰ the Court recognized that the First Amendment protections of religion are twofold: they prohibit laws that compel acceptance of a particular religion and safeguard the ability to exercise one's chosen religion.⁸¹ A freedom to believe is absolute while a freedom to act is not.⁸² The power to regulate cannot unduly infringe on the free exercise, but the state may regulate the time, place, and manner through general, nondiscriminatory legislation.⁸³

Thus, in *Braunfeld v. Brown*,⁸⁴ the Court held that a law with the purpose or effect of "imped[ing] the observance of one or all religions or . . . discriminat[ing] invidiously between religions" is invalid, even if the burden is indirect.⁸⁵ However, when legislation regulating conduct indirectly burdens religion, the statute is constitutional unless there are means to accomplish the purpose that will not burden religion.⁸⁶ The Court has also held that the Free Exercise Clause is violated when a legislative enactment has a coercive effect on an individual's religious practice.⁸⁷ Finally, a state may justify restraint on religious liberty by showing that it is using the least restrictive means to further a compelling state interest.⁸⁸

77. *Id.* at 270-71.

78. *Id.* at 271.

79. *Id.*

80. 310 U.S. 296 (1940).

81. *Id.* at 303.

82. *Id.* at 303-04.

83. *Id.* at 304.

84. 366 U.S. 599 (1961).

85. *Id.* at 607.

86. *Id.*

87. *Schempp*, 374 U.S. at 223.

88. *Thomas v. Review Bd. of the Ind. Empl. Sec. Div.*, 450 U.S. 707, 718 (1981).

Therefore, while schools may control student speech, there are limits upon that control. The school has more control over student speech that may be regarded as promoted by the school than over personal student speech. Also, restraint on student speech cannot unduly burden a student's right to the free exercise of religion.

In conclusion, a school must maintain a policy of neutrality towards religious speech by students. Doing otherwise would risk violating the First Amendment in one of two ways. On one hand, state involvement in, or perceived endorsement of, religious speech by students would violate the Establishment Clause. On the other hand, state prohibition of religious speech by students would violate the students' free speech and exercise rights.

III. RATIONALE OF THE COURT

In *Chandler* the Eleventh Circuit Court of Appeals three-judge panel unanimously held that the District Court for the Middle District of Alabama erred in permanently enjoining DeKalb County from permitting student-initiated prayer in public schools.⁸⁹ Writing for the court, Judge Hill quickly rejected the Governor of Alabama's claim that the First Amendment's Establishment Clause does not apply to the states.⁹⁰ Therefore, the district court was correct in subjecting the law to constitutional scrutiny.⁹¹

The remaining defendants did not challenge the district court's ruling that the statute was facially unconstitutional, nor did they challenge the district court's injunction prohibiting the school from prescribing prayer and allowing state employees to participate in or endorse prayer during school activities. However, defendants did challenge the portion of the injunction that prohibited them from permitting students to exercise any type of religious speech that is not purely private. Defendants argued that such a prohibition violates the students' rights under the Free Speech and Free Exercise Clauses.⁹²

The court first addressed defendants' argument that students cannot establish a religion because they are not state actors.⁹³ Defendants based the argument on the principle that any governmental body is prohibited from acting so as to establish a religion and because students are not state actors their speech cannot establish religion.⁹⁴ The court

89. 180 F.3d at 1256, 1265-66.

90. *Id.* at 1257 (citing *Cantwell*, 310 U.S. at 303; *Everson*, 330 U.S. at 8).

91. *Id.*

92. *Id.* at 1257-58.

93. *Id.* at 1258.

94. *Id.*

recognized that a private party cannot ordinarily establish religion through religious speech, even when speaking in a public institution like a school.⁹⁵ However, if the state uses the private party as a channel then the private party's speech can violate the Establishment Clause.⁹⁶ The state cannot command religious speech, either by directly requiring religious speech or by allowing private parties to speak while limiting the message to religious speech.⁹⁷ Though the state cannot command religious speech, this does not mean that the state is required to be "hostil[e] toward religion or toward prayer."⁹⁸

Next the court examined student speech with regard to the Free Exercise and Free Speech Clauses.⁹⁹ The government must be neutral with regard to religion; however, this requirement of neutrality does not require suppression of student-initiated religious speech.¹⁰⁰ In fact, suppression "demonstrates not neutrality but hostility toward religion."¹⁰¹ Prohibiting all religious speech in schools has the effect of establishing disbelief and implies an "unconstitutional *disapproval* of religion."¹⁰² However, permitting religious student speech conveys neither approval nor disapproval, and it is not the state's speech "by attribution or by adoption."¹⁰³ The Constitution requires accommodation of all religions; therefore, student-initiated speech can be accommodated without constituting an unconstitutional state establishment of religion.¹⁰⁴ Even if the speech advances religion, it does not violate the Establishment Clause because it is private speech protected by the First Amendment.¹⁰⁵

Therefore, the question was not whether school officials may require religious speech, or whether school officials may prohibit religious speech in schools, because they can do neither.¹⁰⁶ Rather, the question was this: What sort of time, place, and manner limits may the school impose on student-initiated religious speech?¹⁰⁷ Answering the question

95. *Id.* (citing *Mergens*, 496 U.S. at 250).

96. *Id.* at 1259.

97. *Id.*

98. *Id.* at 1260 (quoting *Engel*, 370 U.S. at 434).

99. *Id.*

100. *Id.* at 1261 (quoting *Shempp*, 374 U.S. at 306 (Goldberg, J., concurring)).

101. *Id.*

102. *Id.* (emphasis supplied by court).

103. *Id.*

104. *Id.* at 1262 (citing *Widmar*, 454 U.S. at 273).

105. *Id.* at 1263 (citing *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963, 965 (5th Cir. 1992), *impliedly overruled on other grounds*, *Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999)).

106. *Id.*

107. *Id.*

required the Court to balance the right to pray with the right to be free from government-required prayer.¹⁰⁸

The court stated that a school can accommodate religious expression without commanding it by simply allowing students or other private individuals to exercise their First Amendment right to speak religiously.¹⁰⁹ The school must permit truly student-initiated religious speech.¹¹⁰ The court noted that the state cannot participate in or supervise the speech.¹¹¹ "Supervise" does not mean the mere presence of a teacher, but supervision is an unconstitutional endorsement when it crosses the line into active endorsement, encouragement, or participation.¹¹² The court also noted that students' religious speech may be subject to the same reasonable time, place, and manner restrictions placed on secular student speech at school.¹¹³ Also, students do not have the right to use the "machinery of the state" as a means to convert their audience.¹¹⁴ Students are permitted religious speech, not religious proselytizing.¹¹⁵

The court concluded by upholding the district court's appointment of a monitor.¹¹⁶ This was not an abuse of the district court's discretion because there was evidence that school personnel acted unconstitutionally to do more than permit the students' religious activities by participating or encouraging such activity.¹¹⁷

In his concurring opinion, Judge Tjoflat addressed sua sponte the appropriate uses and nature of injunctions.¹¹⁸ Punitive, compensatory, and coercive contempt sanctions are used to enforce injunctions.¹¹⁹ The type of sanction available depends upon the type of conduct to be enjoined.¹²⁰ Based upon both the principle that equity will not be used when there is an adequate remedy at law and concern over separation of powers issues, Judge Tjoflat concluded that injunctions should only be

108. *Id.* at 1263-64.

109. *Id.* at 1264.

110. *Id.*

111. *Id.* (citing *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 406-07 (5th Cir. 1995)).

112. *Id.* at 1264-65 n.19 (citing *Duncanville*, 70 F.3d at 410 (Jones, J., concurring and dissenting)).

113. *Id.* at 1264-65.

114. *Id.* at 1265.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.* at 1266-77 (Tjoflat, J., concurring).

119. *Id.* at 1266.

120. *Id.* at 1268.

entered when they can be enforced through coercive contempt sanctions.¹²¹

IV. IMPLICATIONS

The holding in *Chandler* is consistent with prior First Amendment cases.¹²² The court recognized the distinction between government and private action, which has been a major focus of Supreme Court cases on the Establishment Clause. Its conclusion that student-initiated religious speech is private action is likewise consistent with precedent.

This holding has both a general effect and a more specific implication. First, this case has welcomed prayer back into schools within the Eleventh Circuit. The court has concluded that truly student-initiated religious speech is permitted in the schools.¹²³ Additionally, it has set general guidelines regarding religious speech in school.¹²⁴ The likely result is that state legislatures and school boards within the Eleventh Circuit's jurisdiction will begin passing laws or establishing policies modeled after the Alabama statute.

However, *Chandler* is not likely to be the last case dealing with religious speech in schools for the Eleventh Circuit. In fact, this ruling could result in a resurgence of cases dealing with religious speech in school. This increase will result from the struggle to further define the limits of school officials' involvement in student-initiated prayer. The court in *Chandler* gave only general guidance for school officials, prohibiting active endorsement, encouragement, and participation. One does not need to be clairvoyant to foresee several cases in the future challenging whether school officials have stepped over the line into the territory of unconstitutional establishment of religion; whether the time, place, and manner restrictions imposed are appropriate; and whether the statutes and policies are too broad or too narrow. The Eleventh Circuit has opened the school gate for religious speech with this case, which will be heralded by some and lamented by others. However, the Eleventh Circuit has not resolved the issue once and for all.

In fact, the entire Eleventh Circuit will be holding an en banc rehearing of *Adler v. Duval County School Board*,¹²⁵ a case similar to *Chandler*. In 1993 the Duval County School Superintendent sent all high school principals in the county school system a memorandum which

121. *Id.* at 1266.

122. *See supra* text accompanying notes 9-88.

123. *See* 180 F.3d at 1263.

124. *See id.* at 1264-65.

125. 174 F.3d 1236 (11th Cir. 1999). The rehearing was ordered on June 3, 1999. *Id.* at 1271.

contained guidelines regarding permitting seniors to vote for a brief opening and/or closing message to be delivered at graduation by a student volunteer; the memo instructed that the content of the message be composed by the student volunteer and not be monitored or reviewed by Duval County School personnel.¹²⁶ In a two-to-one decision, the panel held that based on *Lee v. Weisman*¹²⁷ and *Lemon v. Kurtzman*,¹²⁸ the policy of permitting seniors to decide whether to have an unrestricted message delivered by a student at graduation facially violates the Establishment Clause.¹²⁹ This decision was vacated and a rehearing en banc ordered.¹³⁰

In light of the panel's decision in *Chandler*, the en banc hearing of *Adler* may possibly result in a decision similar to that in *Chandler*. From the unanimous vote in *Chandler* and the dissent in *Adler*, it appears that at least four of the Eleventh Circuit judges believe that the Constitution not only permits student-initiated religious speech, but protects it as well.¹³¹

The Supreme Court's recent decision in *Santa Fe Independent School District v. Doe*¹³² will not affect *Chandler*. The policy at issue in *Santa Fe* permitted students to vote for having an invocation and/or message delivered before football games by a student elected to do so for the season.¹³³ The Court held that the policy was unconstitutional because it "establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."¹³⁴ The key differences between *Santa Fe* and *Chandler* are the encouragement of prayer and school involvement with prayer that was present in *Santa Fe* and absent in *Chandler*.

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126. *Id.* at 1238-39.

127. 505 U.S. 577 (1992).

128. 402 U.S. 602 (1971).

129. 174 F.3d at 1251.

130. *Id.* at 1271.

131. Since the writing of this Casenote, the Eleventh Circuit has issued its en banc decision in *Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2000). The court held, as this author predicted, that the policy was not state sponsored religion because there was a complete lack of state involvement in deciding if there is a graduation message, who will deliver it, and what the content will be. *See id.* at 1071.

132. 2000 WL 775587 (U.S. 2000).

133. *See id.* at *4 n.6.

134. *Id.*

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