STUDENT-INITIATED RELIGIOUS SPEECH IN PUBLIC SCHOOLS

[*CHANDLER V. JAMES*, 180 F.3D 1254 (11TH CIR. 1999)]

> A student wrote a letter that said: "Dear God, why didn't you save the students at Columbine High School?" God responded saying: "Dear Student, I am not allowed in school."[1]

I. INTRODUCTION

In 1962, the United States Supreme Court decided the first notable case dealing with the issue of religion in public schools.[2] In *Engel v. Vitale,*[3] the Supreme Court held the school's practice of holding invocations in the classroom violated the Establishment Clause of the First Amendment.[4] Since *Engle*, the Supreme Court has continued to analyze the constitutionality of student-initiated religious speech under the Establishment Clause, [5] and for the most part, lower courts have mirrored the Supreme Court's analytical framing.[6]

In *Chandler v. James*,[7] however, the United States Court of Appeals for the Eleventh Circuit departed from the Establishment Clause framework and analyzed the issue of student-initiated religious speech[8] under the First Amendment's Free Speech and Free Exercise Clauses.[9] The court concluded that a 1993 Alabama statute,[10] which permits re-

1. Author unknown.
2. *See* Engel v. Vitale, 370 U.S. 421 (1962).
3. *Id.*
4. *See id.* at 424.
5. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 821 (1995) (holding that a Christian editorial section in the university newspaper did not violate the Establishment Clause); Lee v. Weisman, 505 U.S. 577, 577 (1992) (holding that prayer at a graduation ceremony led by a clergyman violated the Establishment Clause); Board of Educ. Westside Community Schs. v. Mergens, 496 U.S. 226, 248-49 (1990) (holding that the school district should allow a Christian student club to use public school facilities); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) (holding it is a violation of the Establishment Clause to require students to read passages from the Bible in public schools).
6. *See infra* Part III.D.
7. 180 F.3d 1254 (11th Cir. 1999).
8. Hereinafter prayer and the phrase religious speech will be used interchangeably.
9. *See Chandler*, 180 F.3d at 1261.
10. *See* ALA. CODE § 16-1-20.3 (1995).

ligious speech in public schools, was constitutional.[11] The court analyzed the statute under the Establishment Clause, but ultimately determined that student-initiated religious speech was an issue to be decided upon free speech and free exercise grounds.[12] By classifying student-initiated religious speech as an issue of free speech and free exercise, the *Chandler* court diverged from the traditional analysis followed by other federal courts. Thus, the court provided a new avenue by which to analyze the constitutionality of student-initiated religious speech in public schools.

II. CASE DESCRIPTION

In 1996, the plaintiffs, Michael Chandler and his son Jesse, brought suit asserting that the Alabama statute,[13] which permitted student-initiated religious speech, was unconstitutional.[14] At the time of filing, Michael was an administrator in the DeKalb County school system and his son was a student.[15] The defendants in this case include, among others, the Governor of Alabama, the State Superintendent of Education, and DeKalb County.[16]

The Chandlers alleged that the DeKalb County school system engaged in the unconstitutional practice of allowing student-led prayer at school-sponsored events, such as "graduations and school football games."[17] The Chandlers also asserted that the school "officially organized or sponsored prayers in classrooms."[18]

11. *See Chandler*, 180 F.3d at 1258.
12. *See id.* at 1261.
13. In 1993, the Alabama Legislature enacted a statute permitting prayer in school. It provides:

> . . . .
> (b) 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 ceremonies, and other school-related student events.
> (c) Nothing in this section shall otherwise diminish the right of any student or person to exercise his or her rights of free speech and religion, including prayer, as permitted by the United States Constitution and the Alabama Constitution on public school or other public property, or other property, at times or events other than those stated in subsection (b).

ALA. CODE § 16-1-20.3(b).

"In 1977, the Alabama legislature [sic] passed the first series of 'school prayer' statutes." Chandler v. James, 958 F. Supp. 1550, 1553 (M.D. Ala. 1997). The first statute required each school day to begin with a moment of silence. *See id.* This statute was later amended in 1981 to specifically read: the moment of silence "shall be observed for meditation or voluntary prayer." *Id.* (quoting ALA. CODE § 16-1-20.1 (1995)). In 1982, another statute was adopted to permit school teachers to lead students in prayer. *See id.* In 1985, the Supreme Court struck down the statutes declaring them unconstitutional. *See* Wallace v. Jaffree, 472 U.S. 38, 41 (1985). Section 16-1-20-3 was adopted in response to this holding. *See Chandler*, 958 F. Supp. at 1553.

14. *See Chandler*, 958 F. Supp. at 1553.
15. *See Chandler*, 180 F.3d at 1256.
16. *See id.*
17. Brief of Appellant Governor Forrest H. "FOB" James, Jr. at 4, Chandler v. James, 180 F.3d 1254 (11th Cir. 1999) (No. 97-6898).
18. Brief of Appellant Attorney General at 15, Chandler v. James, 180 F.3d 1254 (11th Cir.

The federal district court declared the Alabama statute unconstitutional.[19] Six months later, the district court permanently enjoined all defendants from enforcing the statute.[20] Subsequently, the court issued a supplemental opinion[21] and, in a separate document, granted the plaintiffs' summary judgment motion.[22] Finally, the court denied the State's motion for a partial stay of the injunction.[23] The governor of Alabama and DeKalb County appealed.

The Eleventh Circuit reversed the district court's decision and held that the statute was constitutional.[24] The circuit court concluded that the First Amendment's Free Exercise and Free Speech clauses protect student-initiated religious speech.[25]

III. BACKGROUND

The First Amendment is intended to protect religion and free speech. It consists of three clauses which provide: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[26] All three clauses were at issue in *Chandler*.[27]

Originally, the First Amendment was drafted to limit Congress' authority.[28] However, the Supreme Court has since held that no branch of the federal government may infringe upon the rights protected by the First Amendment.[29] The First Amendment also applies to the states through the Due Process Clause of the Fourteenth Amendment.[30]

The Establishment Clause and Free Exercise Clause offer contrasting views.[31] The Establishment Clause prohibits the government from participating or giving preference to any religion.[32] In contrast, the Free Exercise Clause forbids the government from placing heavy burdens on the exercise of religious beliefs.[33] Thus, the First Amendment

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1999) (No. 97-6898).

19. *See Chandler*, 958 F. Supp. at 1568 (original decision).

20. *See* Chandler v. James, 985 F. Supp. 1062 (M.D. Ala. 1997) (injunction).

21. *See* Chandler v. James, 985 F. Supp. 1068 (M.D. Ala. 1997) (supplemental opinion).

22. *See* Chandler v. James, 985 F. Supp. 1094 (M.D. Ala. 1997) (grant of Chandler's motion for summary judgment).

23. *See* Chandler v. James, 998 F. Supp. 1255 (M.D. Ala. 1997) (denial of state's motion for a partial stay of injunction).

24. *See* Chandler v. James, 180 F.3d 1254, 1258 (11th Cir. 1999) (appellate decision).

25. *See id.* at 1260-61.

26. U.S. CONST. amend. I.

27. 180 F.3d at 1258-64.

28. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE UNITED STATES 79 (1988).

29. *See* New York Times Co. v. United States, 403 U.S. 713, 717-19 (1971) (holding that the government may not abridge the freedom of the press).

30. *See* Everson v. Board of Educ. of Ewing TP., 330 U.S. 1, 8 (1947) (noting that the Establishment Clause is "made applicable to the states by the Fourteenth Amendment.").

31. *See* CURRIE, *supra* note 28, at 81.

32. *See id.*

33. *See id.* at 79-81.

restricts government action at both ends of the religious spectrum, first by preventing the government from endorsing a religion and second by forbidding it from burdening religious practices.[34]

The third clause of the First Amendment protects the freedom of speech[35] by forbidding government action that abridges an individual's freedom of expression.[36] In some instances, this clause is used in place of or in connection with the Free Exercise Clause because religious conduct can also be analyzed as free speech.[37] In *Chandler*, the court combined the Free Speech and Free Exercise Clauses in its analysis of the constitutionality of student-initiated religious speech.[38]

A. Establishment Clause

The Supreme Court relies on three different approaches under the Establishment Clause when analyzing religion in public schools. The first focuses on whether public schools may ordain or implement a curriculum that furthers religious beliefs.[39] The second focuses on whether schools may use their facilities to accommodate religious instruction or activities.[40] The final approach, which is discussed in *Chandler*, focuses on whether prayer in school violates the Establishment Clause.[41]

As a general rule, the Establishment Clause requires the government to stay out of religion.[42] The Supreme Court, in *Everson v. Board*

34. *See id.* at 81.

35. U.S. CONST. amend. I.

36. *See* CURRIE, *supra* note 28, at 70-71.

37. *See* Wooley v. Maynard, 430 U.S. 705, 716 (1977) (holding that a state may not force an individual to support its license plate motto "Live Free or Die"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (making students salute the flag and say the pledge of allegiance violates the First Amendment).

38. *See* Chandler v. James, 180 F.3d 1254, 1260-64 (11th Cir. 1999).

39. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (holding that the state's "Creationism Act" lacked a clear secular purpose); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding that the "Anti-evolution" statute was not neutral); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) (requiring passages from the Bible to be read in public schools is a violation of the Establishment Clause).

40. *See* Rosenberger v. Rector & Visitors of the University of Va., 515 U.S. 819, 845-46 (1995) (holding the school newspaper's funding could not be denied because it published a Christian editorial); Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 248-49 (1990) (finding that providing equal access to a student Christian club does not violate the Establishment Clause); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that if the university's facilities are open to the public, they must also be open to religious organizations); Zorach v. Clauson, 343 U.S. 306, 314-15 (1952) (allowing students to leave school grounds during school hours for religious instruction is not a violation of the Establishment Clause); McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (noting that schools cannot have religious instruction during class hours).

41. *See* cases discussed *infra* Section III(C).

42. *See* County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989) (displaying a crèche outside city buildings is a violation of the Establishment Clause). The Establishment Clause limits "the religious content of the government's own communications . . . [and] prohibits the government's support and promotion of religious communications by religious organizations." *Id. See also* Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMM. 471, 474 (1998).

Often the phrase "a wall of separation between church and state" is used to denote the separation that should occur between government and religion. *Chandler*, 180 F.3d at 1262 n.12. This "phrase comes from a letter written by [Thomas] Jefferson who was neither present when the First Amendment was passed, nor consulted about its language." *Id.* Justice Rehnquist's dissenting

of Education,[43] provides examples of specific violations of the Establishment Clause, which included: establishing an official church; aiding or giving preference to any religion; and influencing or forcing a person "to profess a belief or disbelief in any religion."[44] Under the examples, however, it remained difficult for courts to determine whether a specific action violated the Establishment Clause. As a result, the Supreme Court formulated a three prong test in *Lemon v. Kurtzman*.[45] In recent years, however, the Court has moved away from the *Lemon* test. In *Texas Monthly, Inc. v. Bullock*[46] and *Lynch v. Donnelly*,[47] the Court followed the Endorsement test rather than the full *Lemon* test to determine whether government actions advance religion.[48]

B. Free Exercise and Free Speech Clauses

The general rule under the Free Exercise Clause is that the government is restricted from making any law prohibiting the exercise of religion.[49] For example, if a government action discriminates against religion or excludes individuals from public service because of their religious beliefs, the action violates the Free Exercise Clause. When a government action affects religion, it will be strictly scrutinized by the courts unless the conduct "is neutral and of general applicability."[50] In *Wisconsin v. Yoder*,[51] the Supreme Court found that a Wisconsin law, which compelled Amish parents to send their children to a formal high school, interfered with the free exercise of their religion.[52] A state's in-

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opinion, in *Wallace v. Jaffree*, 472 U.S. 38 (1984), states that the letter was "written 14 years after the Amendments were passed by Congress." *Id.* at 92.

43. 330 U.S. 1 (1947).

44. *See id.* at 15. However, "the Supreme Court has made clear that permitting religious speech or symbols in our public institutions does not automatically constitute an unconstitutional State endorsement of religion." *Chandler*, 180 F.3d at 1262. For example, "[r]eferences to our religious heritage are found in the statutorily prescribed national motto on our currency, 'In God We Trust'. . . and in the part of the Pledge of Allegiance to our flag recited by public school children every day. Congress opens with a prayer, and, indeed, the Supreme Court, itself, hears oral argument in a chamber decorated with a depiction of Moses and the Ten Commandments. We celebrate Thanksgiving and Christmas as national holidays." *Id.* Furthermore, in court a witness is sworn to testify under the name of God.

45. 403 U.S. 602, 612-13 (1971). The *Lemon* test provides: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (internal quotation omitted)).

46. 489 U.S. 1 (1989).

47. 465 U.S. 668 (1984).

48. *See Bullock*, 489 U.S. at 9-15 (holding that a state law, which gives tax exemption to religious periodicals, violates the Establishment Clause); *Lynch* 465 U.S. at 678-80 (holding a city's nativity scene displayed at Christmas does not violate the Establishment Clause).

49. *See* Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 300 (1999).

50. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993).

51. 406 U.S. 205 (1972).

52. *See id.* at 207. The state statute required all children under the age of sixteen to attend a public or private school. *See id.* The Supreme Court stated that the Amish have demonstrated the

terest in compulsory education is not absolute and is subordinate to certain fundamental rights including freedom of religion.[53] In cases where compulsory education would interfere with the free exercise of religion, a state cannot require children to attend public schools because an individual's freedom of religion prevails over the state's interest in education.[54]

With regard to free speech, the general rule is that the government may not abridge a person's freedom of speech.[55] However, in the specific context of public schools, the exercise of free speech may be limited because public schools are not considered a traditional public forum.[56] In such cases, the courts must balance a student's right to free speech with the school administrations' duties to fulfill the educational mission and to provide discipline.[57] The Supreme Court has stated that "conduct by the student, in class or out . . . [that] materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[58] However, school officials must apply the limits carefully because the Supreme Court has also stated: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[59]

"adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education." *Id.* at 235.

53. *See id.* at 215.

54. *See id.* The Free Exercise Clause is not without limitations. In some instances, the state has a compelling interest to limit religious conduct. *See* CURRIE, *supra* note 28, at 79-81. *See also* Reynolds v. United States, 98 U.S. 145, 166 (1879) (prohibiting polygamy does not violate the Free Exercise Clause).

55. *See* CURRIE, *supra* note 28, at 79-81.

56. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-72 (1988) (holding that schools have the right to exercise control over student newspapers); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (permitting school authorities to regulate lewd and vulgar speech in order to maintain school discipline).

There are three types of public forums: traditional, semi-public—also referred to as limited or designated forum—and nonpublic forums. *See* Jessica Smith, "*Student-initiated" Prayer: Assessing the Newest Initiatives to Return Prayer to the Public Schools*, 18 CAMPBELL L. REV. 303, 323 (1996). Traditional public forums are places that have traditionally been "devoted to assembly and debate," such as streets, sidewalks and parks. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983); Myron Schreck, *Balancing the Right to Pray at Graduation and the Responsibility of Disestablishment*, 68 TEMP. L. REV. 1869, 1886 (1995). The Supreme Court has stated that the use of these places for public speech is an inherent privilege protected by the First Amendment. *See* Hague v. Committee for Indus. Org., 307 U.S. 496, 512 (1939).

Semi-public forums are places and facilities that the state specifically designates as an area for expressive activity. *See* Smith, *supra*, at 323-24. Finally, a nonpublic forum is where the state may restrict speech as long as the government regulation is reasonable. *See id.* at 324 (noting that the reasonableness test is often referred to as the "mere rationality" test, under which the government involvement must be rationally related to some government objective).

57. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 507 (1969); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding an Arkansas statute that made it unlawful to teach evolution in public schools was unconstitutional).

58. *Tinker*, 393 U.S. at 513.

59. *Id.* at 506. It is true that allowing free expression may spark a controversy, but this is the risk we take for having the freedom of speech. *See id.* at 508.

The Supreme Court has, on occasion, concluded that school authorities have violated the Free Speech Clause.[60] For instance, in *Tinker v. Des Moines Independent Community School District*,[61] the Court explained that public schools "may not be enclaves of totalitarianism . . . . [O]fficials do not possess absolute authority over their students."[62] Students are persons under the Constitution and, therefore, school officials must respect their fundamental rights.[63] School administrators may not confine student expressions to "those sentiments that are officially approved . . . [because] students are entitled to freedom of expression of their views."[64] Thus, student speech is protected under the First Amendment, to some degree.

C. Supreme Court Decisions on the Constitutionality of Prayer in Public Schools

The Supreme Court has not addressed the issue presented in *Chandler*, which is whether a state may allow student-initiated religious speech or prayer in public schools.[65] The Supreme Court has, however, dealt with the issue of state officiated prayers.[66] In *Wallace v. Jaffree*[67] and *Lee v. Weisman,*[68] the Supreme Court concluded that state officiated prayer violates the Establishment Clause.[69]

In *Wallace*, the Court found that the Alabama statute[70] allowing teachers to lead students in prayer was unconstitutional.[71] The Supreme Court stated that the statute "is a law respecting the establishment of religion and thus violates the First Amendment."[72]

Similarly, the Supreme Court found, in *Lee,* that the school principal had violated the Establishment Clause because of his involvement in leading a school prayer.[73] In *Lee*, the principal of a public middle school invited a rabbi to give an invocation at a graduation ceremony.[74] The school provided the rabbi with "guidelines for the composition of public

60. *See id. See also Epperson*, 393 U.S. at 109.
61. 393 U.S. at 503 (noting that the school refused to allow students to wear black armbands in protest to the Vietnam War).
62. *Id.* at 511.
63. *See id.*
64. *Id.* The Court emphasized the issue of students' constitutional rights by repeating Justice Brennan's statement: "[t]he classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth . . . ." *Id.* at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).
65. *See* Chandler v. James, 180 F.3d 1254, 1258 (11th Cir. 1999).
66. *See generally* Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985).
67. 472 U.S. 38 (1985).
68. 505 U.S. 577 (1992).
69. *See id. See also Wallace*, 472 U.S. at 59-60.
70. ALA. CODE § 16-1-20.1 (1995).
71. *See Wallace*, 472 U.S. at 38.
72. *Id.* at 38.
73. *See Lee*, 505 U.S. at 577.
74. *See id.*

prayers . . . and [the principal] advised him that the prayers should be nonsectarian."[75] The Court stated:

> Through these means the principal directed and controlled the content of the prayers . . . . It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[76]

The Court held that the principal's action was unconstitutional because his involvement in the graduation prayer constituted an endorsement of religion.[77]

While the Supreme Court has made it clear that state sponsored prayer violates the Establishment Clause,[78] it has not addressed the issue of student-initiated religious speech or prayer in public schools.[79] As a result, serious questions remain unresolved.[80]

D. Federal Court Decisions on Student-Initiated Religious Speech

Since the Supreme Court has not dealt directly with the issue of student-initiated religious speech,[81] federal appellate courts are divided on whether to permit such speech in public schools.[82] For example, the Ninth Circuit has reached two different conclusions on the issue of student-initiated religious speech. First, in *Collins v. Chandler Unified School District*,[83] the court found that the Establishment Clause was violated when the school principal allowed the student council to select students for the purpose of offering prayers and devotionals during school assemblies.[84] Second, in *Doe v. Madison School District No. 321*,[85] the Ninth Circuit concluded that a school district's policy giving control to the students to select the content for their graduation speeches was constitutional.[86] The Ninth Circuit distinguished *Madison*

75. *Id.*

76. *Id.* at 588.

77. *See id.* at 587.

78. *See id.* at 577; Wallace v. Jaffree, 472 U.S. 38, 38 (1985).

79. *See* Daniel N. McPherson, *Student-Initiated Religious Expression in the Public Schools: The Need for a Wider Opening in the Schoolhouse Gate*, 30 CREIGHTON L. REV. 393, 410 (1997).

80. For example, can school officials forbid students from voluntarily leading or participating in a devotional speech or Bible reading while at school? In order to maintain neutrality with respect to religion, does the state have "the ability (and duty) to impose content restrictions on purportedly 'private' speakers at school events[?]" To provide clarity to the issue of student-initiated religious speech, the Supreme Court must answer these questions.

81. The Supreme Court has recently granted certiorari to a case that deals specifically with student prayers at school sponsored events. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *cert. granted in part*, 120 S. Ct. 494 (1999).

82. *See* Charles J. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?*, 1999 BYU EDUC. L.J. 1, 4 (1999).

83. 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981).

84. *See id.* at 760.

85. 147 F.3d 832 (9th Cir. 1998), *vacated*, 177 F.3d 789, 793 (9th Cir. 1999).

86. *See id.* at 835. The court, however, later dismissed the case because the plaintiff lacked standing. *See* Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 793 (9th Cir. 1999).

from *Collins* because the policy at issue in *Madison* was "neutral."[87] The school district, in *Madison*, selected the students using secular criteria.[88] However, in *Collins* the principal approved the selection of students based on religion.[89] Therefore, according to the Ninth Circuit, when school officials allow student-initiated religious speech, the intent of the officials must be neutral in order to pass constitutional scrutiny.

The Fifth Circuit decided two cases in a similar fashion. First, in *Jones v. Clear Creek Independent School District*,[90] the court determined that a resolution, which permitted student volunteers to give invocations at a graduation ceremony, was constitutional.[91] Conversely, in *Ingebretsen v. Jackson Public School District*,[92] the Fifth Circuit concluded that a Mississippi statute that permitted students to offer prayers at compulsory and noncompulsory school events violated the Establishment Clause.[93] The court noted that the distinguishing feature between these two cases was found in the purposes behind the statute and the resolution.[94] In *Jones*, the purpose of the resolution was purely secular.[95] The school district was trying to promote the solemnization and profound significance of graduation ceremonies.[96] However, in *Ingebretsen*, the court found the purpose behind the state statute was to promote religion.[97] Thus, the Fifth Circuit, like the Ninth Circuit, concluded that the intent of the statute or resolution must be neutral in order to satisfy the constitutional review.[98]

E. Alabama's Statute

The Alabama statute, at issue in *Chandler*, sought to promote neutrality. The statute was similar to the school policy in *Madison* because it permitted nonsectarian and nonproselytizing student-initiated prayers

87. *Madison*, 147 F.3d at 836.

88. *See Madison*, 177 F.3d at 791-92.

89. *See Collins*, 644 F.2d at 760. The court found the Establishment Clause was violated when the principal and superintendent "tapped a 'select group of students' in the 'social mainstream' for the specific purpose of leading prayer." *Madison*, 147 F.3d at 836 (reflecting *Collins*).

90. 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

91. *See id.* at 964-65.

92. 88 F.3d 274 (5th Cir. 1996), *cert. denied*, 519 U.S. 965 (1996).

93. *See id.* at 277.

94. *See id.* at 279.

95. *See Jones*, 977 F.2d at 965.

96. *See id.*

97. *See* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d at 279. (holding that the statute in question was unconstitutional because it did not have a secular purpose). This holding was premised on the decision that the language of the statute allowed anyone, including teachers, to lead students in prayer. *See* Igebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473, 1487 (S.D. Miss. 1994).

98. *See Ingebretsen*, 88 F.3d at 279. The District of Columbia Court of Appeals reached a completely different conclusion. In *Committee for Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (App. D.C. 1997), the court decided that there was no difference between student-initiated and teacher-initiated voluntary prayers in school. *Id.* at 1203. Teachers are state actors and permitting students to lead prayers is an endorsement of religion and a violation of the Establishment Clause. *See id.*

at graduation ceremonies.[99] Unlike *Jones*, where the resolution limited prayers to graduations,[100] the Alabama statute allows student-initiated prayers at other school events including assemblies and school-related sporting events.[101]

The Alabama statute was also distinguishable from the statute and policy at issue in *Ingebretsen* and *Collins*. In both cases, the schools permitted student prayers and religious speech at school events.[102] However, the Fifth Circuit and Ninth Circuit concluded that the intent of the school officials and the respective legislatures was to promote religion.[103] In contrast, the first part of the Alabama statute, at issue in *Chandler*, stated that the intent of the legislature was to protect the freedom of speech guaranteed in the First Amendment.[104]

IV. ANALYSIS

The issue in *Chandler* was whether Alabama's statute, which allowed student-initiated religious speech in school, was constitutionally permissible.[105] The Eleventh Circuit held that the statute was constitutional and that the permanent injunction should be vacated.[106] The court determined that student-initiated religious speech was protected by the First Amendment.[107]

99. *See* ALA. CODE § 16-1-20.3(b) (1995).

100. *See Jones*, 977 F.2d at 965 n.1. The court stated that unless the audiences religious convictions are being advanced, the government is not endorsing religion. *See id.* at 967. The court concluded that any advancement would be minimized if the prayer is nonsectarian and nonproselytizing. *See id.*

101. *See* ALA. CODE § 16-1-20.3(b).

102. *See Ingebretsen*, 88 F.3d at 277; Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 760 (9th Cir. 1981).

103. *See Ingebretsen*, 88 F.3d at 279; *Collins*, 644 F.2d at 762. The Fifth Circuit and the Ninth Circuit agree that student-initiated prayer should be allowed at public high school graduations. *See* Doe v. Madison Sch. Dist., 147 F.3d 832, 838 (9th Cir. 1998); *Jones*, 977 F.2d at 964-65. However, in *Ingebretsen*, and *Collins*, both circuit courts found that school policies permitting prayer and religious speech at other school-sponsored events constitutes a promotion of religion. *See Ingebretsen*, 88 F.3d at 280; *Collins*, 644 F.2d at 762.

104. *See* ALA. CODE § 16-1-20.3(a). The statute provides:

> The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution and Article 1, Section 4 of the Constitution of Alabama of 1901, to define for the citizens of Alabama the rights and privileges that are accorded them on public school and other public property and at school-related events, and to provide guidance to public school officials on the rights and requirements of law they must apply. Further, the intent and purpose of the Legislature is to properly accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as mandated by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

Id. Even though the statute expresses that the legislature's intent was purely secular, it is difficult to conclude that the statute is valid just because the legislature stated its intent was secular.

105. *See* Chandler v. James, 180 F.3d 1254, 1258 (11th Cir. 1999).

106. *See id.*

107. *See id.* at 1264.

A. Student-Initiated Speech and the Establishment Clause

In determining the constitutionality of the Alabama statute, the *Chandler* court first examined whether student-initiated religious speech violated the Establishment Clause.[108] In *Engel v. Vitale*,[109] the Supreme Court explained that "[t]he First Amendment . . . protects freedom of religious expression by forbidding [the] government from requiring us to 'speak only the religious thoughts that government want[s] [us] to speak and to pray only to the God that government want[s] [us] to pray to.'"[110] When the government requires religious speech, it has violated the Establishment Clause.[111] However, the Alabama statute, in *Chandler*, did not require, but merely permitted, religious speech.[112]

The plaintiffs argued that the state was endorsing religion by permitting student-initiated religious speech in schools and, therefore, violated the Establishment Clause.[113] The plaintiffs further contended that school officials should "provide a religiously neutral environment" to avoid the establishment of religion.[114] According to the plaintiffs, schools must forbid student-initiated religious speech because the Establishment Clause requires neutrality; to achieve complete neutrality, schools must control the content of student speech.[115]

The *Chandler* court rejected the plaintiffs' endorsement argument, determining that student-initiated speech could "advance religion" without violating the Establishment Clause.[116] The court stated that "[t]here 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."[117] Since student-initiated speech is private speech, it is protected under the First Amendment.[118] Therefore, the Alabama statute is constitutional because it only allows private speech.

108. *See id.* at 1258-60. Ordinarily, religious speech by a private party does not violate the Establishment Clause. *See id.* at 1258. Yet, there are occasions when religious speech by a private party can violate this clause. For example, when the party is acting in concert with the state or when the state uses a religious organization to accomplish what it could not do, there is a violation of the Establishment Clause. *See id.* at 1259.

109. 370 U.S. 421 (1962).

110. *Chandler*, 180 F.3d at 1260 (quoting *Engel*, 370 U.S. at 435).

111. *See id.* at 1259.

112. *See* ALA. CODE § 16-1-20.3(b) (1995).

113. *See Chandler*, 180 F.3d at 1260. By allowing students to speak religiously in public schools—where the environment is not purely private—the state is endorsing religion. *See id.*

114. *See id.*

115. *See id.* But under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), student speech is protected from school officials' "absolute authority." *Id.* at 511.

116. *Chandler*, 180 F.3d at 1262.

117. *Id.* at 1258 (quoting Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 250 (1990)).

118. *See id.* at 1261. The court, in *Chandler*, decided that student-initiated and private-initiated speech were the same thing. *See id.* at 1263. Arguably, much of the court's opinion hinged on the issue of whether or not student-initiated speech was the same as private speech.

It follows that *Chandler* is distinguishable from the Supreme Court decisions of *Wallace* and *Lee*, which involved the constitutionality of state sponsored prayer and not student-initiated religious speech.[119] In *Wallace*, the Alabama statute allowed teachers to lead the students in prayer.[120] Comparatively, the statute in *Chandler* permits only student-initiated prayer.[121] Nothing in the Alabama statute at issue in *Chandler*, called for teachers to lead the students in prayer. In *Lee*, the school chose an individual to give the prayer and selected a neutral format.[122] The Supreme Court determined that the neutral format of state ordered prayer is irrelevant; so long as the state commands a religious belief, it violates the Establishment Clause.[123] Again by comparison, the *Chandler* statute did not grant authority to school officials to direct students on prayer or religious speech but rather students were given the authority to initiate their own religious speech.[124]

B. Student Speech under the Free Exercise and Free Speech Clauses

In *Chandler*, the Eleventh Circuit Court of Appeals concluded that under the Free Exercise and Free Speech Clauses, the suppression of student-initiated religious speech is unconstitutional.[125] The "prohibition of all religious speech in our public schools implies, therefore, an unconstitutional disapproval of religion."[126] In short, "'[c]leansing' our public schools of all religious expression" ultimately "results in the 'establishment' of disbelief-atheism" which violates the Constitution's purpose of promoting neutrality.[127]

The defendants, in *Chandler*, argued that the First Amendment required tolerance of religious speech by students.[128] The *Chandler* court agreed and found that student-initiated religious speech should not be suppressed.[129] It stated that the "Constitution does not require a complete separation of church and state such that religious expression may not be tolerated in our public institutions."[130] The court relied on *Lynch v. Donnelly*,[131] where the Supreme Court noted that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[132] Therefore, the First

119. *See generally* Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985).
120. *See Wallace*, 472 U.S. at 40.
121. *See Chandler*, 180 F.3d at 1256. S*ee also* ALA. CODE § 16-1-20.3(b) (1995).
122. *See Lee*, 505 U.S. at 577.
123. *See id.* at 588-89.
124. *See* ALA. CODE § 16-1-20.3(b).
125. *Chandler*, 180 F.3d at 1261.
126. *Id.*
127. *Id.*
128. *See id.* at 1260.
129. *See id.* at 1261.
130. *Id.* at 1262.
131. 465 U.S. 668 (1983).
132. *Chandler*, 180 F.3d at 1262 (quoting *Lynch* 465 U.S. at 673).

Amendment requires tolerance toward student-initiated religious speech in public schools.

In addition, the *Chandler* court stated that school officials must accommodate religious speech even if this results in an indirect advancement of religion.[133] The Supreme Court also recognized this and stated that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action . . . [but] 'not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid.'"[134] Thus, official support of student-initiated religious speech that incidentally enhances religion does not violate the First Amendment.[135]

C. The Type of Forum and Speech Restriction in Public Schools

For the *Chandler* court to conclude that student-initiated religious speech was protected by the Free Speech Clause, proponents of religious speech had to show that public schools are not a nonpublic forum. Speech can be restricted in a "non-public" forum if the purpose is rationally related to a governmental objective.[136] In *Tinker v. Des Moines Independent School District*,[137] the Supreme Court determined that school officials cannot restrict student expression merely because the officials believed that the student speech could cause a disturbance.[138] Instead, the Court concluded that students are entitled to some freedom of expression.[139]

Public schools, however, cannot be classified as a traditional forum because student expression, in certain instances, can be restricted. A traditional forum is defined as a place for citizens to assemble and communicate thoughts.[140] The Supreme Court, in *Hazelwood School District v. Kuhlmeier*,[141] found that "public schools do not possess all of the attributes of streets, parks and other traditional public forums . . . ."[142] School officials can restrict student expression or speech that

133. *See id.* at 1262.

134. *Lynch*, 465 U.S. at 683. At issue, in *Lynch*, was whether a nativity scene sponsored by the city constituted an endorsement of religion. *See id.* at 671-72. The opponents to the display felt that a government sponsored nativity scene constitutes an advancement of Christianity. *See id.* at 668. The Court found that government may indirectly advance religion without violating the Constitution. *See id.* at 683.

135. *See Chandler*, 180 F.3d at 1262-63.

136. Smith, *supra* note 56, at 324.

137. 393 U.S. 503 (1969).

138. *See id.* at 513. In other words, school officials cannot restrict student expression unless the activity will substantially disrupt school work. *See id.*

139. *See id.* at 511.

140. *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

141. 484 U.S. 260 (1987).

142. *Id.* at 267. The Court further explained that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public'. . . . If the facilities have instead been reserved for other in-

materially disrupts classroom work.[143] Therefore, public schools appear to fall somewhere between nonpublic and traditional forums.

Arguably, schools should be characterized as semi-public forums.[144] A semi-public forum is a place that the state appoints for expressive activity.[145] In *Tinker*, the Court noted that schools were a "market place of ideas" and that student expression and speech is essential for the exchange of ideas.[146] According to *Tinker*, students enjoy limited freedom of speech, if the speech pertains to the exchange of ideas.[147] Thus, schools, as semi-public forums, are places designated for student expression and speech.

Consequently, if public schools are considered a semi-public forum, student-initiated speech cannot be completely restricted.[148] The First Amendment gives students the right to speak or express themselves religiously.[149] However, school officials may impose reasonable time, place, and manner restrictions on student-initiated speech when the speech activity causes substantial disorder.[150] Clearly, student-initiated speech is protected by the Free Speech Clause. However, it is not as clear whether student-initiated religious speech receives the same protection.

As previously discussed, the *Chandler* court determined that student-initiated religious speech was private speech and, therefore, protected.[151] Student-initiated religious speech is private speech because it is not commanded by the state.[152] When "the State participates in or supervises speech" then it is no longer private speech and "constitute[s] [a] state action."[153] The state's involvement with student religious speech "signals an unconstitutional endorsement of religion."[154] However, the fact that school officials permit this speech does not create a state action.[155] The state has a "duty to tolerate religious expression."[156]

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tended purposes, 'communicative or otherwise,' then no public forum has been created and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." *Id.* at 267 (quoting *Perry*, 460 U.S. at 47 (internal quotation marks omitted)).

143. *See Tinker*, 393 U.S. at 513.

144. *See* Grained v. Rockford, 408 U.S. 104, 120 (1972) (upholding an anti-noise ordinance prohibiting anyone from making noises that interfered with the peace and order of school while in session).

145. *See* Smith, *supra* note 56, at 323-24. The difference between traditional public and semi-public forums is that speech activity cannot be regulated in a traditional forum to preserve "tranquillity." Terminiello v. Chicago, 337 U.S. 1, 27 (1948).

146. *Tinker*, 393 U.S. at 512.

147. *See id.* at 511-12.

148. *See* Chandler v. James, 180 F.3d 1254, 1265 (11th Cir. 1999).

149. *See id.* at 1264.

150. *See Tinker*, 393 U.S. at 513.

151. *See* discussion *supra* Part IV.A; *Chandler*, 180 F.3d at 1261.

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

153. *Id.* at 1264.

154. *Id.*

155. *See id.* at 1261.

Thus, student-initiated religious speech, as private speech, is protected under the Free Speech Clause.[157]

V. CONCLUSION

The court, in *Chandler*, correctly analyzed student-initiated religious speech under the Free Exercise and Free Speech Clauses. Student-initiated religious speech is private speech and, as such, it does not violate the Establishment Clause.[158] Conversely, this type of speech is protected by the Free Speech Clause. Hence, schools should allow religious and secular speech that does not disrupt the school's administration of education.[159]

Religion has long been a part of American history. Students cannot be expected to divorce themselves of their religious beliefs when attending a public school.[160] The court, in *Chandler*, is not giving religious speech special treatment rather it is asserting that student-initiated religious and secular speech must be treated equally.[161]

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156. *Id.*
157. *Id.* at 1265.
158. Public Schools must allow students the freedom of expression. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969).
159. *See id.* at 513.
160. *See id.* at 506.
161. *See Chandler*, 180 F.3d at 1265.