Recently, the University of Tennessee at Knoxville received a letter asking it to stop prayer at football games. The letter, sent by the Freedom from Religion Foundation, was sent in conjunction with a UT alumnus, and requested UT Knoxville, to stop completely its practice of prayer before football games. For the local news story click here.

UT Knoxville Chancellor responded in the negative, by affirming UT's practice of prayer before the games. In his letter to the Freedom from Religion Foundation, he affirmed that the university's practice conformed to the constitutional standards as set forth in a prior Sixth Circuit case on a similar issue.

Now, it seems that there is some confusion about the holding of the case in question and whether the university's practice is constitutional.

To avoid a single lengthy discussion and appease both SEO factors and my readers, I will start with the conclusion. UT's current practice of holding prayer before football games is constitutional.

As I look over some of the local news stories covering the issue I see confusion in the reporting as well as some confusion concerning the holding of the case. I will explain the factors involved and explain the constitutional outcome as well.

Initially, let me note, that the controlling case at hand seems to be in fact the 6th circuit case of **Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. Tenn. 1997)** in that case Tennessee State University had a practice of including nonsectarian prayers at university events. After a complaint, the university began to simply hold a moment of silence rather than a prayer.

In *Chaudhuri*, the plaintiff, a tenured professor at Tennessee State complained he wasn't being his constitutional rights were being violated because of the prayers at university events at which he his attendance was required. The court, applying the lemon test factors, affirmed the lower court's decision and granted summary judgment in favor of the university.

Here, the questions concerning the Chaudhuri case seem to suggest, either 1. That *Chaudhuri* does not apply here, or 2. That the factors at issue in that case are differentiated to the extent that whether or not the Chaudhuri case is applicable the practice here is unconstitutional.

Tomorrow, I will explore in more depth the constitutional issues involved and develop some of the extensive constitutional history on the issues involved.

Santa Fe and School Prayer

In a continuation of yesterday's posting, I wanted to develop some of the recent history of school and prayer. Once we have a basic understanding of what the Supreme Court has said on the subject then we will be able to contrast the public school system with the collegiate system.

First, lets take a look at the *Santa Fe* case. In the case styled as *Santa Fe Independent School District v. Doe*, a student-led prayer prior to football games and at other events was challenged as an unconstitutional practice. In that case, the school district did not require these prayers but did permit them. The case affirmed the unconstitutionality of the permitted practice at the Supreme Court level[1].

While the Lemon test was mentioned toward the end of the majority opinion, it lost on a Lemon analysis partially because of the extent of school involvement and the policy to which it adhered. The policy entitled "October Policy" created what the Court considered to be a forum for public speech and not simply an allowance for private "free speech." "we are not persuaded that the pregame invocations should be regarded as "'private speech.'" (*Santa Fe*)

Rather, the Court viewed more persuasive the fact that "invocations are authorized by a government policy and take place on government property at government-sponsored school-related events," and that the school allows only one student, the same student for the entire season, to give the invocation," and that "[T]he statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message,"

The Court determined that "the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion." The Lemon test prohibits excessive entanglement, advancement or events that do not have a secular purpose (i.e. have a religious purpose). Thus, under the Lemon test the Court views the school district as being excessively entangled with religion.

One of the key factors, which gave the Court pause was the age of the individuals involved. Age has been used throughout jurisprudential history as a limiting or distinguishing factor. Here the Court quoted a previous case[2], "'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.'"

The Court reasoned that younger students, were more susceptible when it came to perception. This essentially created an aggravating factor against the school district in *Santa Fe*.

Next time, I will take a look at the distinguishing factors between this case and Chaudhuri case. We will contrast the facts, which will help establish the basis for determining the constitutionality of pre-football prayer for college students as opposed to high school or younger students. We will also explain how the plaintiff in this case is purposely ignoring the case law in order to try to get the Court to change the law.

One of the most significant differences between *Santa Fe* and *Chaudhuri* was the age of the individuals at issue. As we saw from last time, the Court reasoned that susceptibility was a key determinate of whether a governmental institution was promoting religion.

Of course, whether or not the student involved is 18 and in high school or 18 and in college is not the only distinguishing factor. In *Santa Fe*, the students who prayed were the same ones who were elected, based on district policy for that purpose. The Court reasoned that this practice acted to alienate the minority of students who could not be represented.

"The majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." The elective process

1 For the complete text of the decision and the facts surrounding the case you may click on the link above.
2 Lee v. Weisman

was, therefore, for-all-intents and purposes a state sanctioned way to exclude a part of the student body.

For instance, the Court writes, "the District's decision to hold the constitutionally problematic election is clearly a choice attributable to the State." Moreover, on the question of whether the students were all in agreement that a prayer should be held before events like a football game? The Court finds, "the students' views are not unanimous on that issue."

The Court, it seems could find no other conclusion but that the State itself was promoting prayer.

The nonsectarian prayer described in the school district's policy was controlled and limited by the District, ergo, it was not free private speech. The issue at hand was not whether the prayer was sectarian, it was more an issue of the mechanism of nonsectarian. Although, one must keep in mind, the Court's reasoning for much of this was based on its impression of the reason behind the policy.

The Court also reasoned that when the school district changed its policy it did so specifically with an intent to promoting prayer as a type of speech. The Court has a decent basis for this argument because the name of the policy, which gave rise to this conclusion was changed for the "August" policy to "Prayer at Football Games."

The final "October" policy was the same as the "August" policy, which was the same as the policy before it. These factors all gave rise to this same conclusion by the Court.

Chaudhuri, on the other hand is different for a number of reasons. Aside from the ages, already addressed, one significant factor is the State's involvement. For instance, "did not provide any guidelines for content, other than to request that the prayers be nonsectarian and that references to Jesus Christ be omitted."

The individuals by whom the prayer was recited were different local clergy picked by the University.

One may at first, fail to see the significant difference between these above-mentioned distinguishing factors. In other words, someone might not be able tell much (although its huge) of a difference between *Chaudhuri and Santa Fe*.

The difference is based on the State's involved with respect to its promotion or sponsorship of the events and how this limited the ability of others to be heard. Where the District, in *Santa Fe*, chose a policy, which used the same speaker to pray at each event, and Chaudhuri had different speakers is easy to spot.

Where the District creating a policy students were required to follow in one case, and the University actually choosing speakers in another shows a difference is harder to spot.

To make it easier on the reader, I will take them out of suspense here (a strategically timed joke). The distinction comes with the District's policy of limitation. That is, that the District limited points of view to one single student, who was elected from a group of other school elected students.

In *Chaudhuri*, although the University itself was choosing clergy, each time a different clergyman gave a nonsectarian prayer, it represented a different group.

Thus the difference above, between these two case, owes to the difference between public and private speech.

This difference, is extraordinarily significant. Next time, we will continue to make distinctions between these two cases, and bring some more clarity to the difference between public and private speech.