Vanderbilt Law Review

Volume 18
Issue 3 *Issue 3 - June 1965*

Article 11

6-1965

Constitutional Law -- 1964 Tennessee Survey

James C. Kirby, Jr.

Constitutional Law—1964 Tennessee Survey

James C. Kirby, Jr.[*]

I. Equal Protection

A. *Criminal Prosecution of Sit-in Demonstrators*

The prosecutions in *McKinnie v. State*,[1] arose from "sit-in" demonstrations by which a group of Negroes attempted to obtain service at a privately operated cafeteria in Nashville. The passage of the Civil Rights Act of 1964 has since been held by the United States Supreme Court to abate these particular prosecutions[2] and the prospective application of its public accommodations provisions makes it unlikely that their facts will recur. When a doorman refused to allow them to enter the cafeteria because of its policy against serving Negroes, the defendants congregated in a small vestibule and effectively blocked entrance and exit of other patrons. They were arrested and charged with violations of section 39-1101(7) of the Tennessee Code which prohibits "conspiracy . . . to commit any act injurious to public health, public morals, trade, or commerce . . ." and section 62-711 which provides penalties for any person guilty of "turbulant or riotous conduct within or about any hotel, inn, restaurant. . . ." A jury found the defendants guilty and each was sentenced by the court to serve ninety days in the work-house and to pay a fine of fifty dollars, despite the jury's recommendation that each be punished only by a fine of less than fifty dollars.

[*] Professor of Law, Vanderbilt University.

1. 379 S.W.2d 214 (Tenn. 1964), *cert. granted*, 379 U.S. 811, *rev'd*, 85 Sup. Ct. 1101 (1965).
2. 85 Sup. Ct. 1101 (1965).

In affirming the convictions, the Supreme Court of Tennessee rejected a variety of constitutional claims made by appellants' thirteen assignments of error, including alleged invalidity of the statutes and indictments for vagueness, exclusion of Negroes from the jury, and denial of rights of free speech. The most important issue was whether due process and equal protection of the laws were denied to the defendants by criminal prosecutions which enforce a private owner's policy of racial discrimination.[3] The court avoided a decision of this question by holding that the defendants' conduct was unlawful and punishable under the particular statutes independently of factors of race and discrimination. The court assumed arguendo that such prosecutions might be invalid if based upon peaceable, non-violent attempts to obtain service, but, on the factual record, it held that defendants' actions contained elements of conspiracy, physical force and riotousness[4] which rendered them unlawful. In this posture, the case presented to the court a simple instance of employment of unlawful means to a possibly legitimate end. The same reasoning enabled the court to dispose of the free speech claim. The defendants' actions were compared to mass picketing in labor disputes which loses the constitutional protection accorded to peaceful picketing because of the addition of the element of physical force to those of communication and protest.

B. *Racial Discrimination by Private Motel in Urban Renewal Project*

The Court of Appeals for the Sixth Circuit affirmed a judgment of the United States District for the Middle District of Tennessee in *Smith v. Holiday Inns of America, Inc.*[5] The lower court had held that state and federal involvement in the development of Nashville's Capitol Hill Redevelopment Project caused the operation of a motel within it to be "state action" which was precluded from racial discrimination by both the fifth and fourteenth amendments.[6] The appellate court withheld its decision until passage of the Civil Rights

3. A question which the United States Supreme Court has adeptly managed to avoid by deciding upon other grounds a series of cases raising the issue. In Bell v. Maryland, 378 U.S. 226 (1964), six justices addressed themselves to the question and divided equally. Delaware is believed to be the only state whose highest court has held such prosecutions to be unconstitutional. Delaware v. Brown, 195 A.2d 379 (Del. 1963).

4. The Supreme Court apparently disagreed with the Tennessee court's view of this aspect of the case. In its per curiam order of reversal, *supra* note 2, it merely cited Hamm v. City of Rock Hill, 379 U.S. 306 (1964), which held that the Civil Rights Act of 1964 abated pending prosecutions based upon *nonforcible* attempts to gain admittance to or remain in establishments covered by the act.

5. 336 F.2d 630 (6th Cir. 1964).

6. 220 F. Supp. 1 (1963). This decision was reviewed at length in the last survey article.

Act of 1964 on the possibility that prospective voluntary compliance with the act might bring a suggestion of mootness. When no such suggestion was filed, the court affirmed the district court, but solely on the basis of the fourteenth amendment. It modified the judgment to eliminate the holding that the fifth amendment was also violated because of the federal involvement, viewing this as unnecessary to the decision. The Court of Appeals agreed that the use of state and local public funds, the supervision by state agencies of the execution of the Redevelopment Plan, and the continuing state controls were sufficient state involvement to cause the fourteenth amendment to be applicable. It emphasized, however, that its holding was not based on the mere fact that a state agency had previously held title to the property.

C. *Racial Discrimination in Public Schools*

The extended litigation aimed at desegregation of the Memphis public schools went through another phase, but did not reach a conclusion. In *Northcross v. Board of Education of the City of Memphis*,[7] the Court of Appeals for the Sixth Circuit again reversed a district court ruling which had been favorable to the defendant School Board. In 1962, the case was remanded to the district court with instructions to enjoin the Board from operating a bi-racial school system or in the alternative, to require it to adopt a desegregation plan. Over plaintiff's objections, the district court approved a plan submitted by the Board which provided for new unitary school zones and grade-a-year completion of desegregation over a seven year period.[8] In reversing the district court, the court of appeals held that it had erred in four respects: (1) evidence of possible racial gerrymandering of school zones was sufficient to place upon the Board the burden of proving that zone lines were not drawn with a view to preserving a maximum amount of segregation, and the district court was directed to take further testimony on the criteria utilized by the Board in drawing zones; (2) the rate of desegregation under the plan did not satisfy current standards and the district court was directed to order complete desegregation of junior high schools in September of 1965 and senior high schools in 1966; (3) following its previous holding in the Chattanooga school case,[9] the court held that pupils have standing to raise the issue of desegregation of faculties because of the effects upon their education of assignment of teachers by race; and (4) the plan included an invalid transfer provision which allowed pupils in schools attended by both races to transfer to other schools which did

7. 333 F.2d 661 (6th Cir. 1964).
8. The district court's action is reported at 8 RACE REL. L. REP. 1021 (1963).
9. Mapp v. Board of Educ., 319 F.2d 571 (6th Cir. 1963).

not have full enrollment. Under the holding of the United States Supreme Court in *Goss v. Board of Education of Knoxville*,[10] this provision was unconstitutional because it permitted transfer only from schools attended by both races and would not permit transfers to a desegregated school from a school attended solely by one race. The obvious tendency of the provisions to perpetuate segregated schools was also cited as a grounds for reversal. The case was remanded to the district court for further proceedings.

D. *Apportionment of Representative Bodies*

There were no reported decisions during the survey period in the continuing federal court litigation concerning reapportionment of the Tennessee legislature. However, the three-judge District Court, in unreported orders, allowed the 1965 assembly of the Tennessee legislature one further and final opportunity to take corrective action. As this article is written, the regular session of the legislature has adjourned without having acted, but it is to meet in extraordinary session in May, 1965 to consider legislative reapportionment and congressional redistricting. The court approved plans apportioning both houses on a population basis, to be effective June 1, 1965, if the legislature does not act.

The United States Supreme Court declined to review *West v. Carr*,[11] in which the Tennessee Supreme Court had refused to halt the election of constitutional convention delegates pursuant to the same formula of apportionment which had been held unconstitutional for the legislature. In a per curiam order, the Court dismissed plaintiff's appeal for want of jurisdiction, possibly because the procedural ground of the decision of the state supreme court was an adequate and independent state law basis which precluded appeal as of right from the unfavorable ruling on federal constitutional claims.[12] In the same order, the court treated the appeal as a petition for *certiorari* and denied the writ. The decision of the Supreme Court of Tennessee was criticized in last year's survey.[13]

II. DUE PROCESS OF LAW: REGULATION OF THE PRACTICE OF ACCOUNTANCY

The undisputed facts of *State v. Bookkeeper's Business Service*

10. 373 U.S. 683 (1963).
11. 212 Tenn. 367, 370 S.W.2d 469 (1963) (appeal dismissed), *cert. denied*, 378 U.S. 557 (1964).
12. Herb v. Pitcairn, 324 U.S. 117 (1945); McCoy v. Shaw, 277 U.S. 302 (1928).
13. Kirby, *Constitutional Law—1963 Tennessee Survey*, 17 VAND. L. REV. 944, 956-59 (1964).

Co.,[14] show that the defendant corporation offers generally to small businesses having a volume of sales less than 10,000 dollars per month what it calls a "personalized bookkeeping and tax service." Defendant's agents perform services which include posting from a customer's records to books of account; preparation of regular profit and loss statements; filing of monthly and quarterly state and federal tax returns including sales, excise, unemployment and social security taxes; preparation of the annual federal income tax return; and, upon request, furnishing of statements of net worth. Its advertising brochure represents that defendant gives the smaller merchant "the same advantages that 'Big Business' receives through employing full-time, highly trained tax experts and bookkeepers." To a businessman who wishes to post his own books, the defendant offers to install a bookkeeping system designed for his business, but the defendant will prepare his tax returns. Without considering the clear potential for harm if such services are rendered by unqualified persons, the Court of Appeals for the Eastern Section concluded that legislative regulation of defendant's activity under the state police power would be unconstitutional. Defendant was therefore held not to be engaged in the practice of public accountancy within provisions of the Tennessee Code which define such practice,[15] requires examination and licensing by the State Board of Accountancy,[16] and prohibit corporations from its pursuit.[17]

The court construed the definitive provision as including only persons who: (1) hold themselves out to the public as qualified to render any of a number of specified accounting services; (2) perform such services for more than one employer, and (3) represent themselves as skilled in the practice of accounting either as a "public accountant" or "certified public accountant." The court concluded that although the defendant was within (1) and (2) because it represented itself as qualified to render, and did actually render to more than one employer, several of the enumerated statutory accounting services, it was not within (3) because it did not use the magic words, "public accountant" or "certified public accountant," but, instead, represented itself as performing only "bookkeeping and similar technical services."[18]

The court conceded that the definition was subject to a broader construction urged by the state which would have applied the acts

14. 382 S.W.2d 559 (Tenn. App. E.S. 1964). The supreme court denied *certiorari.*
15. TENN. CODE ANN. § 62-127 (Supp. 1964).
16. TENN. CODE ANN. § 62-126 (Supp. 1964).
17. TENN. CODE ANN. § 62-140 (Supp. 1964). The action sought only to enjoin the corporation from engaging in the practice of accountaucy.
18. 382 S.W.2d at 565.

to a mere bookkeeper or accountant, if he performed any of the enumerated services[19] except as an employee of one employer or in part-time preparation of tax returns or bookkeeping. It rejected this construction in order to save the constitutionality of the acts.[20]

A reading of the entire chapter of the code on regulation of accountants[21] leaves little doubt that the legislature intended a comprehensive scheme of licensing and regulation of both certified public accountants and non-certified accountants or bookkeepers who, like the defendant, hold themselves out to the public as being generally engaged in the business of performing any of the enumerated services. The interpretation sought by the state may have been too broad, but a decision which places this corporation outside the scope of the state's police power is far too restrictive. At the minimum, the legislature should be able to withhold from such an operation the privilege of doing business in the corporate form. While the decision merely denies an injunction against a corporation's engaging in the regulated practices, its reasoning would totally insulate this commercial activity from regulation in the public interest. The complexity of modern business finances and the pitfalls in the handling of tax matters by incompetents should enable the legislature to reasonably determine that the public interest requires some regulation of the type of commercial activity conducted by Bookkeepers Business Service Company.

Although the court felt that its holding followed a majority of state court decisions which have considered the issue,[22] its reasoning is contrary to the trend towards increased judicial deference to legislative determinations of factual need for economic regulations. The court's approach is also in sharp contrast to that of most other Ten-

19. The services listed, including those performed by the defendant, appear to go beyond mere bookkeeping or accounting. They are: "auditing; devising and installing systems; recording and presentation of financial information or data; compiling tax returns; preparing financial statements, schedules, reports, and exhibits for publication, credit purposes, use in courts of law and equity, and for other purposes." TENN. CODE ANN. § 62-127 (Supp. 1964).

20. The constitutionality of the act as applied to one who admittedly held himself out as a "public accountant" was upheld in Davis v. Allen, 43 Tenn. App. 278, 307 S.W.2d 800 (M.S. 1957), which emphasized the "holding out to the public" as the justification for legislative regulation.

21. TENN. CODE ANN. §§ 62-120 to -145 (Supp. 1964).

22. See Annot., 70 A.L.R.2d 447 (1960). However, the main concern in this area appears to have been legislation which totally prohibits a non-certified accountant from practicing the profession of accountancy. So long as he does not use a statutory title, "certified public accountant" or "public accountant," he is generally held to have a right to practice his profession. 1 AM. JUR. 2d *Accountants* § 3 (1962). The Tennessee legislation falls short of such a prohibition, *supra* note 19, and it bases regulability on the nature of the accounting services offered to the public rather than upon the label.

nessee decisions during recent years. Except for questionable decisions that the police power does not permit legislative regulation of the business of watch repairing[23] and the sale of gasoline with premiums,[24] Tennessee courts have been slow to strike down economic regulations on due process grounds. The state's so-called "Fair Trade Law" was upheld despite its sweeping impairment of property and contract rights under a declaration that the court would not substitute its judgment as to the reasonableness of a police power regulation "unless it clearly appears to us that those regulations are beyond all reasonable relation to the subject to which they are applied as to amount to an arbitrary usurpation of power, or they are unmistakably and palpably in excess of legislative power, or they are arbitrary beyond all justice."[25] Using the same language, the supreme court upheld legislation which severely restricted the freedom of contract of burial associations and insurance companies.[26] Similar restraint led the court to uphold the legislative imposition of standard time upon the entire state[27] and to respect legislative decisions to regulate electricians,[28] pawn brokers,[29] and automobile distributors.[30]

Bookkeepers Business Service conflicts even more sharply with the trend of the United States Supreme Court away from overturning state economic regulations under the due process clause of the fourteenth amendment.[31] The opinion refers to unreasonable restriction of the accountant's "right of private contract," a right which Mr. Chief Justice Hughes put to rest as a specially protected freedom almost

23. Livesay v. Tennessee Bd. of Examiners, 204 Tenn. 500, 322 S.W.2d 209 (1959). This decision is criticized by Overton, *Constitutional Law—1959 Tennessee Survey*, 12 VAND. L. REV. 1096 (1959).

24. State v. White, 199 Tenn. 544, 288 S.W.2d 428 (1956), criticized by Sanders, *Constitutional Law—1956 Tennessee Survey*, 9 VAND. L. REV. 943 (1956).

25. McKesson & Robbins v. Government Employees Dep't Store, Inc., 211 Tenn. 494, 499, 365 S.W.2d 890, 892 (1963).

26. Cosmopolitan Life Ins. Co. v. Northington, 201 Tenn. 541, 300 S.W.2d 911 (1957).

27. Phillips v. State, 202 Tenn. 402, 304 S.W.2d 614 (1957).

28. Hughes v. Board of Comm'rs, 204 Tenn. 298, 319 S.W.2d 481 (1958).

29. Epstein v. State, 211 Tenn. 663, 366 S.W.2d 914 (1963).

30. Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360 (1960).

31. The defendant alleged unconstitutionality only under two state constitutional provisions. However, the "law of the land" clause, TENN. CONST. art. I, § 8, is generally treated as synonymous with "due process of law," Roberts v. Brown, 43 Tenn. App. 565, 310 S.W.2d 197 (W.S. 1957), and the "class legislation" clause, TENN. CONST. art. XI, § 8, is equivalent to the equal protection clause of the fourteenth amendment. Memphis v. State *ex rel.* Ryals, 133 Tenn. 83, 179 S.W. 631 (1915). Nonetheless, the courts of Tennessee and most states are generally more restrictive of legislative power to regulate economic activity than are federal courts. See Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 226 (1958); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

thirty years ago in *West Coast Hotel Co. v. Parrish*,[32] when he said:

> In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and counotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraint of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process.

Nor does the Constitution of Tennessee speak of "freedom of contract." It did not prevent the state supreme court, in *Ford Motor Co. v. Pace*[33] from upholding far-reaching regulation of the distribution of automobiles which not only controlled the terms of future contracts, but which abrogated existing franchise agreements between manufacturers and dealers by imposing different mutual obligations upon them. The court's holding that the automobile industry could reasonably be found by the legislature to sufficiently affect Tennessee's economy to justify regulation under the police power was noted in this survey as a commendable deference to legislative determination of the need for regulation of a business pursuit.[34] The present case must be viewed as retrogression to a judicial attitude which substitutes a court's judgment for that of the legislature. This legislation would undoubtedly be upheld in the federal courts. Some may find a certain irony in comparing the reasoning of this case with that of the United States Supreme Court, speaking through Mr. Justice Black, when it held that the fourteenth amendment was not offended by a Kansas statute which limited the business of debt adjusting to lawyers:

> We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether

32. 300 U.S. 379, 391 (1937).
33. Ford Motor Co. v. Pace, *supra* note 30.
34. Kirby, *Constitutional Law—1961 Tennessee Survey*, 14 VAND. L. REV. 1171, 1178 (1961).

> the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.[35]

Perhaps a different philosophy is justified in Tennessee because of outmoded legislative machinery which does not permit the sort of factual inquiries and deliberative legislative procedures which are presupposed by such notions as "presumption of constitutionality," "conceivable rational basis," "judicial restraint," and deference to legislative judgments on debatable issues. If so, there should be greater consistency in following the opposite approach than is shown by Tennessee decisions of the past decade.

III. Legislative Delegation to Administrative Agency

Section 49-233 of the Tennessee Code delegates to the State Board of Education the power to establish standards for new school systems of cities and special districts. A private act had created a special district for one civil district of Perry County although the County Board of Education had determined that the schools of that district should be consolidated with a city system. The State Board of Education ruled that there was an insufficient number of students in the proposed special district to justify affording adequate educational opportunities under the Board's standards. In *Lobelville School District v. McCanless*,[36] the supreme court affirmed a Davidson County Chancery Court judgment holding the statute under which the Board acted to be a valid legislative delegation. The court fonnd sufficient statutory standards to guide the Board in establishing school district standards and ruling upon proposed systems. One factor to be considered by the Board is the willingness of the people of the district to raise sufficient local funds for such schools as indicated by majority vote in a referendum. The court reaffirmed its rule that no legislative act may be framed so that its efficacy is derived from a popular vote, but viewed this referendum as merely a factor to be considered by the Board and not binding upon it.

IV. Constitutional Officers: Effect of Metropolitan Charter

In three cases, the supreme court considered the effects of the Nashville metropolitan charter upon offices established by the state constitution, with results favorable to the charter. In *Robinson v.*

35. Ferguson v. Skrupa, 372 U.S. 726, 731 (1963).
36. 381 S.W.2d 273 (Tenn. 1964).

Briley,[37] the court upheld provisions transferring certain functions of the Davidson County Trustee to the metropolitan treasurer and requiring that the Trustee remit daily all funds collected by him. The Trustee argued unsuccessfully that the constitution preserved his rights to retain the fees and functions of his office as they existed under North Carolina law when the original Tennessee Constitution created this office. Provisions of article 11, section 9 of the 1953 amendments to the constitution authorizing

> "the consolidation of any and all functions" of local government and provisions of the implementing statute that no officer "shall retain any right, power, duty or obligation unless this chapter or the charter of the metropolitan government shall expressly provide, or unless such retention and continuation be required by the constitution of Tennessee"[38] were construed to authorize the disputed reorganization of official functions.

The holding follows naturally from previous decisions that the duties and functions of the constitutional officers are to be prescribed by statute[39] and that the metropolitan charter has the effect of legislation.[40]

In *Glasgow v. Fox*,[41] the court held that the office of constable was not abolished merely by the absence of any charter provision expressly retaining it, but the court refused to decide unnecessarily the question of whether a constitutional office could be abolished by express charter provision. This question was answered in the negative by dictum in *Metropolitan Government of Nashville and Davidson County v. Poe*.[42] The court upheld provisions of the charter which transferred to the metropolitan chief of police the powers of the sheriff as principal conservator of the peace and law enforcement officer of the county, leaving him his powers as custodian of the jail, and also held him subject to general functional, budgetary and purchasing provisions of the charter. Although unnecessary to its holding, the statement of the court that the charter could not validly abolish a constitutional office reinforces prior indications that the charter has the dignity of a statute and that its provisions are equally subject to constitutional limitations.

---

37. 374 S.W.2d 382 (Tenn. 1963).

38. TENN. CODE ANN. § 6-3702 (Supp. 1964).

39. Redistricting Cases, 111 Tenn. 234, 80 S.W. 750 (1903); Judges' Cases, 102 Tenn. 509, 53 S.W. 134 (1899).

40. Winter v. Allen, 212 Tenn. 84, 367 S.W.2d 785 (1963).

41. 383 S.W.2d 9 (Tenn. 1964).

42. 383 S.W.2d 265 (Tenn. 1964).

V. MISCELLANEOUS

A. *Constitutionality of Reciprocal Enforcement of Support Act*[43]

In *Martin v. Martin*,[44] the supreme court added another to the long line of cases upholding legislative enactments against challenges of violation of the state constitutional prohibition against special legislation which suspends the general law.[45] A circuit court had dismissed a proceeding under the act by a non-resident mother against a Tennessee father which sought enforcement of a Michigan court order requiring him to furnish monetary support for his three children. The provisions of the act authorizing the filing of such petitions by non-residents on paupers oath and certification of records of judicial proceedings of another state according to the laws of that state are both departures from general Tennessee law and for this reason the circuit judge held the act unconstitutional. The supreme court reversed, applying familar principles that legislative classifications will be upheld if any rational basis for them can be conceived. The probable impoverished condition of minor children for whom such petitions would be filed and the public interest in minimizing procedural difficulties in the institution and proof of such petitions were readily held to be rational bases for the special provisions.

B. *Civil Rights Action for Slander by Public Officials*

In *Hopkins v. Wasson*,[46] the defendants, who were school officials of Bradley County, were granted summary judgment in a federal court action by a discharged school teacher based upon Federal Civil Rights Acts. The plaintiff had combined counts based upon common law slander and the Civil Rights Acts, apparently under the theory that slander by public officials was within an old provision which incorporated state common law in addition to the laws of the United States where the latter did not provide suitable remedies in a civil rights action.[47] This provision was held to be purely procedural for the purpose of remedies. Violation of a specific right derived from, or secured by, the Constitution or laws of the United States is an essential element of an action under the Civil Rights Acts. The Court of Appeals agreed with the District Court and affirmed in a memorandum opinion.[48]

43. TENN. CODE ANN. §§ 36-901 to -929 (Supp. 1964).
44. 373 S.W.2d 609 (Tenn. 1964).
45. TENN. CONST. art. XI, § 8. See note 31 *supra*.
46. 227 F. Supp. 278 (E.D. Tenn. 1962), *aff'd*, 329 F.2d 67 (6th Cir. 1964).
47. Rev. Stat. § 1988 (1875), 42 U.S.C. § 1988 (1958).
48. 329 F.2d 67 (6th Cir. 1964).