Vanderbilt Law Review

Volume 17
Issue 3 *Issue 3 - June 1964*

Article 14

6-1964

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I. Constitutional Officers

A. *Legislative Power To Enlarge upon Constitutional Qualifications*

Sections 3 and 4 of article VI of the Constitution of Tennessee provide that judges shall be elected by the people and prescribe certain age and residence qualifications. In *LaFever v. Ware*,[1] the Supreme Court of Tennessee upheld the constitutionality of acts of the legislature requiring that judges also be licensed to practice law.

A Democratic nominee who was not a licensed attorney was elected judge of the court of general sessions of White County despite a provision of the act creating the court that such judge "shall be a licensed attorney of the State."[2] The act also vested in the general sessions court jurisdiction over divorce cases concurrent with that of circuit and chancery courts, causing the candidate's election to violate a similar requirement of recent general legislation setting qualifications for judges of appellate, criminal, chancery, circuit courts, and other courts exercising their jurisdiction.[3] The entire bar of White County joined in an action to prevent the elected candidate's assuming the

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1. 365 S.W.2d 44 (Tenn. 1963).
2. Tenn. Priv. Acts 1953, ch. 35, § 15.
3. Tenn. Code Ann. § 17-119 (Supp. 1964), enacted in 1961, requires that such judges be "learned in the law, which must be evidenced by said judge being authorized to practice law in the courts of Tennessee." This was construed by the court to mean that the judge be "a licensed attorney of the state," the same requirement as the private act in question.

office. The chancellor held the pertinent provisions of the private act and the general legislation unconstitutional and sustained a demurrer. In reversing, the supreme court held that the requirement that a judge be a licensed attorney is a valid exercise of the legislative power to prescribe reasonable qualifications for holding office in addition to those prescribed by the constitution.

The question is important and the result is obviously in the interests of effective judicial administration. The bar is well aware of alarming recent instances of disbarred attorneys or untrained laymen being elected, or nearly elected, to judicial office in Tennessee. If popular election of judges must be retained it should at least be coupled with a limitation of judicial office to members of the bar. The number of statutes by which the legislature has required that holders of particular judicial offices be "learned in the law"[4] or "members of the bar"[5] or a "competent lawyer"[6] attests both to the endorsement of this principle by the representatives of the people and to an assumption by the legislature that it has constitutional power to protect the people from such electoral miscarriages. Nonetheless, the holding in *LaFever* encountered serious obstacles, both in Tennessee judicial precedent and in the weight of authority from other jurisdictions.

In *Kivett v. Mason*,[7] the supreme court held unconstitutional a private act requiring that a county judge be a "practicing attorney" in an opinion whose reasoning and language was broad enough to have invalidated the statutory provisions in the present case. The *LaFever* opinion distinguishes *Kivett* as involving an unreasonable statutory qualification. The requirement that a judge be a *practicing* attorney, in contrast to a more general requirement that he merely be licensed to practice or learned in the law, was viewed as unworkable because of the uncertainty of the term "practicing" and as arbitrary because it would preclude from judicial office public officials, law teachers and others who might be equally as competent to be judges although not engaged in the active practice of law. From this view of *Kivett* the court reasoned further that by implication that case recognized legislative power to prescribe *reasonable* qualifications.

Although *LaFever* finds support in two treatises[8] and some decisions

4. TENN. CODE ANN. §§ 17-112, -115, -204, -221 (1956) (gubernatorial appointees to vacancies in courts).

5. TENN. CODE ANN. §§ 17-214 -215 (1956) (special judges). *Cf.* TENN. CODE ANN. § 17-225 (1956) (since superseded by a new section).

6. TENN. CODE ANN. § 17-202 (1956) (special gubernatorial appointments in event of incompetency of supreme court judges); TENN. CODE ANN. § 17-222 (1956) (special judges and chancellors) (since superseded by a new section).

7. 185 Tenn. 558, 206 S.W.2d 789 (1947).

8. MECHEM, PUBLIC OFFICE AND OFFICERS §§ 64-67 (1890); THROOP, PUBLIC OFFICERS § 82 (1892).

from other jurisdictions,[9] the weight of authority is that where state constitutional provisions expressly enumerate qualifications for a public office, these constitutional qualifications are exclusive and cannot be enlarged upon by statute.[10] This result is generally reached even though the state's constitution does not expressly direct that the listed qualifications shall be exclusive, sometimes on the basis of the maxim *"expressio unius est exclusio alterius,"*[11] finding a constitutional intent of exclusiveness by implication from the express listing of certain qualifications. This reasoning is close to that of the Tennessee Supreme Court in the *Kivett* case where it was said:

> The language of this section clearly gives the voters the privilege of electing as judges of these inferior courts whoever they please, so long as the person they elect is not less than thirty years of age, a resident of the state not less than five years, and of the circuit or district for which elected not less than one year. This privilege of the voters can neither be taken away nor abridged by the legislature, because it is a privilege given these voters by the Constitution. . . . This is an abridgement of this constitutional right given these voters to elect whomsoever they please as their County Judge, provided such person meets the age and residential qualifications required by the Constitution. If the legislature can limit the selection of the voters to a list composed only of practicing attorneys, then, by the same token, it can further abridge this constitutional privilege of the voters by limiting them to an election of one of a list of attorneys who have practiced for not less than such number of years as the legislature may desire to fix.[12]

The majority view, as expressed in *Kivett*, is derived from a narrow doctrine of constitutional construction which unduly restricts legislative power. It views the constitution itself as the source of legislative power and requires of every statute an authorization from the constitution. A better approach (where the government is not one of limited powers like that of the United States) views the people as the source of all governmental power and holds that the people have vested in the legislature a total law making power subject only to positive limitations of the state and federal constitutions. This principle, although overlooked in *Kivett*, is not novel in Tennessee cases. Mr. Justice White's opinion in *LaFever* cited an 1823 opinion of Judge Haywood in which he stated, "the Legislature of Tennessee, like the legislatures of all other sovereign states, can do all things not prohibited by The Constitution of this State or of the United States . . . ."[13] More recently the court has phrased the rule: "To be invalid a statute must be plainly obnoxious to some constitutional

9. Mitchell v. Kinney, 242 Ala. 196, 5 So. 2d 788 (1942); Boughton v. Price, 70 Idaho 243, 215 P.2d 286 (1950); Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950); Glasco v. State Election Bd., 121 Okla. 119, 248 Pac. 642 (1926).

10. See Annot., 34 A.L.R.2d 155 (1952); 3 VAND. L. REV. 811 (1950).

11. "The expression of one thing is the exclusion of another."

12. 185 Tenn. at 564, 206 S.W.2d. at 792.

13. Bell v. Bank of Nashville, 7 Tenn. 269 (1823).

provision."[14] So long as the constitutional qualifications are respected, statutes adding reasonable qualifications for public office are not "plainly obnoxious."

Although the court found a basis to distinguish *Kivett* and it may still be good law, the *LaFever* opinion can be viewed as a return to fundamentals in its view of legislative power. Tennessee judges must still have those qualifications specified by the constitution but the legislature may view these as minimal and add such additional qualifications as it reasonably deems the public interest to require. This could foreshadow further statutory improvements in judicial machinery now that legislative power in the premises is firmly established. Statutory requirements of judicial qualifications which might have seemed unreasonable in the past may take on new light in view of the increasing complexity of modern litigation and the strains upon the court system.

B. *Divestment of Duties by Metropolitan Charter*

In *Winter v. Allen*,[15] the supreme court held that Nashville's Metropolitan Charter superseded general statutory law by transferring to the Metropolitan Tax Assessor certain statutory functions of the County Court Clerk for Davidson County. Although the County Court Clerk is a constitutional officer, his duties and functions are left to be prescribed by statute. The *Winter* opinion recognizes that the charter is a valid exercise of delegated legislative power by holding that its provisions prevail over prior law "of equal dignity" in the same way that a statute repeals prior conflicting enactments by implication. This analysis also clarifies the subordinate position of the charter to the state constitution. The court's reasoning in the 1962 case upholding the charter[16] had left the way open for argument that the terms of the charter might prevail over express constitutional provisions.[17] This could have had far reaching consequences and would have permitted total abolition of constitutional offices by Metropolitan Charter. Equating the charter to a statutory enactment removes any doubt that the charter is equally subject to constitutional limitations.

II. Due Process of Law

A. *Statutory Prohibition of Purchases by Pawnbrokers*

In *Epstein v. State*,[18] a pawnbroker had been convicted of violating

14. Frazer v. Carr, 210 Tenn. 565, 585, 360 S.W.2d 449, 457, (1962); City of Chattanooga v. Fanburg, 196 Tenn. 226, 235, 265 S.W.2d 15, 20 (1954).

15. 367 S.W.2d 785 (Tenn. 1963).

16. Frazer v. Carr, *supra* note 14.

17. See Kirby, *Constitutional Law—1962 Tennessee Survey*, 16 Vand. L. Rev. 649, 650-51 (1963).

18. 366 S.W.2d 914 (1963).

a statute which provides that "no pawn broker . . . shall, in the conduct of said business, under any pretense whatever, purchase or buy any personal property whatsoever."[19] Although he was acquitted of related charges of larceny and receiving stolen goods, he was convicted of this offense on proof of a transaction in which he paid out a large sum of money and received stolen firearms which he soon thereafter offered for sale in a mercantile business conducted on the same premises.[20]

The statute was challenged as a denial of due process of law because its terms prohibit all purchases of personal property in the conduct of a pawnbroking business and literally would forbid the buying of supplies and equipment necessary for its operation. The court construed the statute so as to avoid such an absurd and obviously unconstitutional application by limiting it to purchases made by the pawnbroker "in the business of pawnbroking," that is, to purchases from "those who come in to pawn their property." As thus construed, the statute was readily upheld.

Pawnbroking's obvious potential for the aid of crime through purchases of stolen goods makes the business particularly susceptible to police power regulation by the state. Also, forbidding pawnbrokers from purchasing from prospective borrowers removes an opportunity for exploitation of distressed persons who need money. The pawnbroker can only loan on the security of the pawned goods at rates regulated by law; he cannot refuse a loan in order to induce the customer to sell at a low price.

Although one substantive due process objection was avoided by giving the statute this narrow application, it suggests other problems. Conviction of this defendant did not require that the jury be instructed on the subtle differences between lawful loans secured by pawns and unlawful purchases by pawnbrokers in similar circumstances. The difference is frequently only formal, since often the borrower has no intention to redeem the pawned goods. The court indicated that a purpose of the legislature may have been to keep the pawnbroker from buying personal property in a transaction which "purports to be a pledge." Difficulties may arise if a criminal conviction is ever based upon findings that an apparent pledge was only "purported" and actually amounted to a purchase. If a transaction actually takes the form, and carries the incidental attributes, of a lawful pledge, and the borrower had a right to redeem the goods upon repayment of the cash advance according to its terms, could

19. TENN. CODE ANN. § 45-2216 (1956).

20. A provision of the law which prohibited pawnbrokers from carrying on any other business in the same or an adjoining building was repealed in 1949.

criminal liability result from an intention of one or both parties that the right of redemption would not be exercised?

In the *Epstein* case the defendant apparently contended that the transaction was not a pawn and claimed that it was a purchase from a trader in guns for purposes of resale in a mercantile business. This obviously was not believed by the jury and it made the nature of the seller, rather than the nature of the transaction, a determinative issue. The report of the case leaves considerable doubt that the jury was adequately instructed on this aspect of the law or the meaning of the statute as the supreme court later interpreted it on appeal. The net effect is that pawnbrokers who also are retailers act at their peril unless they purchase for resale only from regular dealers and deal in pawns only with individual members of the general public. These may be legitimate restrictions but they do not readily appear from the terms of the statute. This suggests that the statute as construed, may be unconstitutionally vague and uncertain, an issue not considered by the court.

III. Equal Protection of the Laws

Racial discrimination continued to be the subject of much constitutional litigation in federal courts in Tennessee. The public schools of the major metropolitan areas, recreational facilities of the City of Memphis, and a privately owned and operated motel in Nashville were objects of federal court decisions requiring desegregation. Legislative apportionment also continued to be a source of equal protection claims.

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

A far-reaching decision was reached by the Federal District Court for the Middle District of Tennessee in *Smith v. Holiday Inns of America, Inc.*[21] The defendant corporation owns and operates a motel in the Capitol Hill Redevelopment Project in Nashville on land which it purchased by warranty deed from the Nashville Housing Authority. Plaintiff was denied accommodations at the motel pursuant to an admitted policy against serving Negroes and brought a class action under Federal Civil Rights Acts for declaratory relief and an injunction against racial discrimination. The court held that extensive participation by state agencies in the development of defendant's property and continuing governmental controls over its future use caused its operation to be "state action" within the meaning of the fourteenth amendment and thus prevented it from discriminating on account of race. The case was held to be within the rule of *Burton v.*

21. 220 F. Supp. 1 (M.D. Tenn. 1963).

Wilmington Parking Authority,[22] in which the United States Supreme Court held that a restaurant privately operated under lease from a city in connection with a city-owned parking area was involved with the state "to a significant extent" so that otherwise private action was subject to the fourteenth amendment.

The Capitol Hill Redevelopment Project originated in studies made by the Nashville Housing Authority and the Nashville Planning Commission for which the Federal Housing and Home Finance Agency ultimately provided the funds. These studies resulted in approval by the city of a comprehensive redevelopment plan for the purpose of eliminating slums and blighted areas around the Tennessee State Capitol. The city, the Housing Authority, and the Housing and Home Finance Agency then entered into agreements under which the requisite financing was provided pursuant to the Federal Housing Act of 1949. The Housing Authority acquired the necessary land by purchase or condemnation, relocated displaced residents, landscaped, constructed streets, installed utilities and sold lots to private owners, all pursuant to the comprehensive overall development plan. The total cost was projected to be about twelve million dollars, of which only four million would be recaptured by sales of land to private owners, leaving a net project cost of eight million dollars, two-thirds of which is to be paid from Federal grants and one-third by the Housing Authority and City of Nashville.

The contract under which the defendant purchased its land obligated it to construct a motel in accordance with agreed plans and specifications. The warranty deed was subject to restrictive covenants which were found by the court to burden the private owner with such governmental restrictions and controls that "not even the slightest change" in the use of the property or physical alterations or improvements "of any kind" could be made without prior approval of a public agency. Indicating that it would be a different issue if the only governmental involvement were prior ownership and development of the property, the court held that the deeds, contracts of sale, and recorded restrictions reserved substantial governmental control over the present and future use of the property in pursuance of public purposes served by the Nashville Housing Authority. The fact that such controls were accomplished with a sale rather than a lease, as in the *Burton* case, was held to be immaterial because "the crucial test of State action is the actuality of State involvement, rather than the form of the transaction." Plaintiff was held entitled to a permanent injunction enjoining defendants from denying accommodations to Negroes on the same terms and conditions as they are

22. 365 U.S. 715 (1961).

furnished to white persons. The case is on appeal to the Sixth Circuit Court of Appeals, which will doubtless dispose of it during the next survey period.

The *Holiday Inns* decision is part of a discernible trend under the *Burton v. Wilmington Parking Authority* rule towards holding otherwise private action to be subject to the fourteenth amendment because of governmental aid and involvement. The denial of certiorari by the U.S. Supreme Court in a case holding private hospitals receiving federal Hill-Burton funds to be subject to the fourteenth amendment[23] indicates that it is not yet ready to define the outer limits of the *Burton* doctrine and is awaiting further experience in the lower federal courts in applying the doctrine to varying factual situations before laying down further guidelines. The *Burton* opinion stated that "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[24] This indicates a deference to determinations by trial courts which could afford a wide latitude to their assessment of the "significance" of state involvement in particular cases. This may foreshadow a long period of uncertainty as to the public or private status of many activities as government increasingly becomes more involved with them.

B. *Racial Segregation in Public Recreational Facilities*

In *Watson v. City of Memphis*,[25] the United States Supreme Court reversed a decision of the Sixth Circuit Court of Appeals which had approved a plan for gradual desegregation of Memphis parks and recreational facilities. The Sixth Circuit had reasoned that the same "deliberate speed" standard for school desegregation should also be applicable to these facilities. The Supreme Court disagreed and ordered immediate total desegregation.

Passage of time since the 1954 school cases and absence of similar administrative considerations were held to distinguish the situations and to require that gradual desegregation not be permitted. The Negroes' right to be free of racial discrimination in governmental facilities was said to be a "present right" rather than "a mere hope of some future enjoyment" and the second *Brown* decision[26] per-

23. Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). The same court has since held that a private hospital which was not in the Hill-Burton program was also subject to the fourteenth amendment because of various other governmental involvements, particularly a reverter clause in a deed from the city which required that the property be operated as a hospital. Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964).

24. 365 U.S. at 722.

25. 373 U.S. 526 (1963).

26. Brown v. Board of Educ., 349 U.S. 294 (1955).

mitting deliberate speed was described as a "narrowly drawn and carefully limited, qualification upon usual precepts of constitutional adjudication."[27] In addition to distinguishing public recreational facilities from public schools with respect to inherent administrative difficulties of desegregation, the Court also indicated that programs for school desegregation which would have been sufficient earlier might no longer satisfy the "all deliberate speed" test of *Brown*. Indefinite delay in eliminating racial barriers was never contemplated and the fact that the governing principles are no longer new is now to be considered in determining the appropriateness of equitable protection of constitutional rights.

A contention by the city that total and immediate desegregation of these facilities would cause widespread violence was viewed as speculative but was held immaterial because constitutional rights may not be denied merely because of hostility to their exercise. A claim of need for additional supervision in integrated facilities and time in order to prepare for additional expense was also rejected. No collateral considerations were deemed sufficient to justify exception to total and immediate relief. The district court had abstained from ruling on desegregation of an art museum pending initiation of a suit in a state court to construe a racially restrictive covenant in the deed of the property to the city. This was held to be error because the outcome of such litigation was immaterial to the invalidity of segregation enforced by the city. Even if desegregation were to cause a reversion of title to the museum property, this could not affect the city's constitutional duty.[28]

C. *Racial Segregation in Public Schools*

In 1962 the United States Court of Appeals for the Sixth Circuit reaffirmed its prior decision upholding transfer provisions of the so-called "Nashville Plan"[29] and approved similar provisions in plans for desegregation of schools of Davidson County[30] and Knoxville.[31] In *Goss v. Board of Education*,[32] the U.S. Supreme Court unanimously reversed in an opinion issued for both cases.

The transfer provisions in question permitted voluntary transfer by students when: (1) a white student would otherwise be required

27. 373 U.S. at 533.

28. However, the court noted that there was little reason to believe the restriction would be enforced because the museum had been open to Negroes one day a week without complaint.

29. Kelly v. Board of Educ., 270 F.2d 209 (6th Cir. 1959), *cert. denied*, 361 U.S. 924 (1959).

30. Maxwell v. Board of Educ., 301 F.2d 828 (6th Cir. 1962).

31. Goss v. Board of Educ., 301 F.2d 164 (6th Cir. 1962).

32. 373 U.S. 683 (1963).

to attend a school previously attended solely by colored students; (2) a colored student would otherwise be required to attend a school previously attended only by white students; or (3) when any student would otherwise be required to attend a school in which his race was in the minority.

Recognition of race as a criteria for transfer was alone sufficient to invalidate the provisions as racial classifications by law, but the Court also relied upon the necessary tendency of the provisions to perpetuate segregation. Mr. Justice Clark described the right to transfer as a "one-way ticket leading to but one destination, *i.e.*, the majority race of the transferee and continued segregation."[33] The fact that each race was equally able to transfer from a desegregated to a segregated school, was viewed as only "superficial" equality and it was held to be racially discriminatory because it allowed a student to transfer as of right to a school in which his race is in the majority but not to one where it is a minority.

Desegregation of the Chattanooga public schools passed through another phase with the decision of the federal court of appeals in *Mapp v. Board of Education*.[34] Defendants had appealed from the district court's disapproval of a proposed provision in their plan for gradual desegregation which would have required parents to file a "notice of intent" before enrolling a child in a desegregated school other than the school he previously attended.[35] The court of appeals agreed that the provision unlawfully made student application and consent a prerequisite to implementation of desegregation. The board was also unsuccessful in its appeal from disapproval of transfer provisions. Because of their tendency to promote segregation, the district court had disapproved "Nashville plan" transfer provisions similar to those later held unconstitutional by the United States Supreme Court in the *Goss* case. The *Goss* decision had intervened when the court of appeals decided *Mapp* and it readily affirmed the district court in this respect. *Goss* was construed as holding that trial judges have no discretion to approve transfer provisions based on race.

Plaintiffs' appeal from portions of the district court's judgment unfavorable to them were more successful. The district court had stricken from the complaint allegations of discriminatory assignment of principals, teachers, and administrative personnel on the grounds that since such personnel were not members of the class represented

33. *Id.* at 687.

34. 319 F.2d 571 (6th Cir. 1963).

35. Details of the Chattanooga desegregation plan are set forth in the opinion of the district court at 203 F. Supp. 843 (E.D. 1962), which is discussed in Kirby, *Constitutional Law—1962 Tennessee Survey*, 16 VAND. L. REV. 649, 673 (1963).

by plaintiffs, they could not raise an issue concerning their rights. The court of appeals construed the complaint as asserting a claim that discriminatory assignment of such personnel on a racial basis impaired the students' rights to education free of racial considerations. Noting that neither the Supreme Court nor any court of appeals had considered such a claim,[36] the court expressly declined to indicate any opinion upon the merits but ordered the allegations restored to the complaint for disposition after developments in progress of pupil desegregation. The court also disapproved delay in desegregation of high school vocational and technical classes in Chattanooga finding differences in such opportunities for Negroes and white students which would have violated the old "separate but equal" test. Certain types of technical training would be totally unavailable to Negro children now in the school system if it were desegregated at the same gradual rate as other high school classes. Without being more specific, the court ordered that the district court require the board to study the problem and submit a plan which would permit Negro students to take vocational training courses for which they were otherwise qualified.

Desegregation of the public schools of both the City of Jackson and Madison County, Tennessee was accomplished in a single action in *Monroe v. Board of Commissioners*.[37] The United States District Court for the Western District of Tennessee granted summary judgment against both boards of education and ordered both to submit plans for desegregation. In ruling upon the city's plan the court accelerated the proposed gradual desegregation to require complete desegregation in four years. The approved plan provided for a single set of non-racial geographical attendance zones with a right in any pupil to continue to attend the school in which he was previously enrolled although he now lives outside that school's zone. Broad transfer provisions were approved subject to express conditions that no admission or transfer may be based on race or have as its purpose the delay of desegregation and that pupils residing in a zone have a prior right to attend its school over outside students seeking to transfer to it.

After school opened in September 1963, plaintiffs moved for further relief, alleging that the Jackson Board was not applying the plan in accordance with the court's order. The court rejected a claim that the Board had "gerrymandered" the lines of the unitary school zones to

36. The Fifth Circuit has since held that a district court may enjoin discriminatory assignment of teachers and administrative personnel in a desegregation action brought by pupils. Board of Public Instruction v. Braxton, 326 F.2d 616 (5th Cir. 1964).

37. 221 F. Supp. 968 (W.D. Tenn. 1963).

perpetuate segregation and held that such de facto segregation as continued was due to residential patterns. The court held that only compulsory segregation based on race is forbidden and school officials are under no affirmative duty to accomplish integration of the races by zoning schools or assigning pupils with a view to avoiding de facto segregation caused by residential segregation. School officials were accorded "considerable discretion" in zoning which is to be overridden only for clear abuse.

D. *Legislative Apportionment*

Further developments in the proceedings upon remand of *Baker v. Carr*[38] failed to bring it to a conclusion. The second legislative reapportionment[39] enacted by the Tennessee General Assembly since the Supreme Court's decision was also found to be unconstitutional. In 1962 the three-judge court had passed on an apportionment made by an extraordinary session of the General Assembly which was convened solely for that purpose in response to the *Baker v. Carr* decision and a temporary abstention by the district court upon remand. The district court then limited itself to an "expression of views" that the equal protection clause required that representation in one house of a bicameral legislature be based exclusively on population and that the other have some rational basis but that the 1962 apportionment failed to meet these standards. Shortcomings of the 1962 acts were discussed in detail to furnish guidelines for the regular 1963 legislature which was elected under the somewhat improved apportionment.[40]

The 1963 apportionment of the House of Representatives was held to be a satisfactory apportionment on a rational basis other than population but the Senate apportionment was based only partially, not exclusively, on population and therefore caused the entire apportionment to fail to meet the court's tests. The 33 Senatorial districts varied from 50,645 to 80,978 in population and urban voters had been discriminated against by a formula which disregarded fractions of the number of persons entitled to one Senator in the five urban counties whose populations were greater than this number. This released three senate seats from urban to rural counties and correspondingly caused overrepresentation of rural districts. The Senate Committee which recommended the scheme justified it on the grounds that the provision of the Tennessee Constitution which makes the county an

38. 369 U.S. 186 (1962).

39. TENN. CODE ANN. §§ 3-101 to -107 (Supp. 1963).

40. The 1962 action of the district court is reported at 206 F. Supp. 341 (W.D. Tenn. 1962), and was discussed at length in Kirby, *Constitutional Law—1962 Tennessee Survey*, 16 VAND. L. REV. 646, 664 (1963).

unbreakable unit in selection of senators[41] compels either that a metropolitan county be underrepresented to the extent of its fraction or that it be placed in a district with an adjoining smaller county which would result in overrepresentation because of larger counties' historical dominance of the election of "shared" senators. This is a rational basis for departure from exclusive numerical representation and would have been a lawful consideration for apportionment of one house but it injected into the Senate the same concept of area or small county representation which was the basis of the House of Representatives apportionment. The result was that neither house was apportioned exclusively on population.

The court would have accepted the Senate plan if reasonably accurate apportionment could only be accomplished by disregard of urban fractions but a plan was proposed by plaintiffs which split no county and which varied population per senator only from 59,042 to 71,490. This plan's sole defect, an inequity to Anderson County from placing it with Knox County in a single district, was remedied by modifying the plan to also place Anderson in two other districts proposed for Knox alone. The court could see no valid reason to give the Tennessee legislature another opportunity and indicated that it was ready to place this plan in effect by judicial decree. Recognizing that the plan might yet be further improved, the court gave defendants until February 3, 1964 to file objections or alternative plans.[42]

E. *Apportionment of Constitutional Convention Delegates*

In a related case, *West v. Carr*,[43] the Tennessee Supreme Court cleared the way for a convention to propose amendments to the Tennessee Constitution concerning the legislature, including those on apportionment, even though representation in the convention is to be based on the 1901 apportionment of the House of Representatives. The 1962 extra session which enacted the first reapportionment following *Baker v. Carr* also passed an act[44] submitting to a vote of the people the question of calling such a convention. It received the requisite state wide voter approval in the November 1962 general election. Delegates were elected in the August 1964 election and the convention will convene in July 1965. Discrimination against urban voters and taxpayers in the composition of the convention was

41. TENN. CONST. art. II, § 6. This belated concern for Tennessee Constitutional provisions, which require representation in *both* houses on the basis of population, overlooked the fact that fractions lost by counties in the house apportionment are required by this same section to be "made up" to them in the senate apportionment.

42. In an unreported order the court deferred final action until decision by the United States Supreme Court in several apportionment cases pending before it.

43. 370 S.W.2d 469 (Tenn. 1963).

44. Tenn. Pub. Acts 1962, ch. 2.

held not to be a basis for declaration of unconstitutionality of the 1962 enactment or an injunction against the 1964 election of delegates.[45]

The first ground of the court's holding was that *Baker v. Carr* is distinguishable because, unlike the 1901 apportionment legislation, the 1962 act of the legislature initiating the amending process was not an exercise of legislative authority. This is a doubtful basis for application of a different substantive principle from that of *Baker v. Carr*. The role of a legislative body in the amending process has been distinguished from its role in the legislative process for other purposes,[46] but both functions should be regarded as "state action" within the equal protection clause of the fourteenth amendment.[47] If the Tennessee legislature had provided that only white persons could be elected to the 1965 convention the unconstitutionality would be clear. It should be no different when the equal protection claim is based on invidious discrimination against urban voters.

Another ground of the holding was that approval of the call of the convention by a majority of the voters in the 1962 election, at which there was no malapportionment or debasement of individual votes, made the entire 1962 act, including the manner of choosing delegates, the act of the people. The implicit suggestion that majority approval validates discriminatory state action otherwise invalid under the fourteenth amendment goes against the basic premise of constitutional rights. Continuing the previous analogy, the electorate could not have conferred constitutionality upon a convention limited to delegates of the white race.

In a context with popular referendum, an equal protection claim based on rural minority oppression of urban majorities is somewhat

45. The appeal was from an order of the chancellor holding the 1962 act unconstitutional but declining to enjoin the November 1962 election on the question of holding the convention. The complaint had sought to enjoin all the elections called for by the 1962 act but the appeal was not heard and decided in the supreme court until after the favorable vote in the 1962 election. The chancellor's decree was reversed and the bill of complaint dismissed.

46. The action of the United States Congress in proposing a constitutional amendment is non-legislative and need not be approved by the President. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). The action of a state legislature in ratifying an amendment submitted to the states by Congress is the means of "the expression of the assent of the state" and is not legislative action subject to limitation by state constitutional provisions. Leser v. Garnett, 258 U.S. 130 (1922); Hawke v. Smith, 253 U.S. 221 (1920).

47. In submitting the question of calling a convention the legislature is directed to act "by law." TENN. CONST. art. III, § 3, par. 2. See note 48 *infra*. This indicates that its action, if not legislative in the ordinary sense, is nonetheless subject to constitutional limitations on the legislative process and that it is not a grant of a special power to the legislative body as an agency. *Cf.* Smiley v. Holm, 285 U.S. 355 (1932); Carroll v. Becker, 329 Mo. 501, 45 S.W.2d 533 (1932), *aff'd*, 285 U.S. 380 (1932); Koenig v. Flynn, 258 N.Y. 292, 179 N.E. 705 (1932), *aff'd*, 285 U.S. 375 (1932).

more difficult to evaluate. A minority of urban voters may have joined with rural voters in an effort to perpetuate rural overrepresentation. At the most this is a sort of waiver by this urban minority which should not affect the rights of a majority of urban voters to be represented in lawmaking bodies according to their numbers.

The court emphasized the tentative functions in the amending process of the legislature and the convention and the fact that the constitution can finally be amended only by action of the people.[48] Although popular elections are both final and intermediate steps in the amending process, affirmative action of the convention is equally essential. The fact that urban voters are allowed their constitutional rights at one essential stage of the multi-step amending process should not cure denial of such rights at another. In *Baker v. Carr*, the opinions of Justices Brennan and Clark both emphasized the control of the malapportioned Tennessee legislature over the call of constitutional conventions as one element in the legal frustration of Tennessee voters which justified federal judicial intervention.[49] At the most, a majority of the voters can veto constitutional changes by voting against convention calls and proposed amendments. While they are underrepresented in either the legislature or the convention, they lack power affirmatively to shape constitutional change. As a representative body whose affirmative action is essential to a modification of the state's organic law, the convention is vested with a portion of the sovereign powers granted by the people through the constitution. Its power is of a higher order than that of the legislature and discrimination in representation should be no more lawful.

A procedural ground of the holding was that there was no right to declaratory relief because of the absence of a justiciable controversy until the amending process is concluded. If this means that denial of rights to representation in the convention will be con-

48. Section 3 of article 11 of the Tennessee Constitution provides two modes of amendment: (1) by an amendment proposed by two successive Legislatures and ratified by a vote of the people; and (2) by an act of the legislature providing for a convention, and its submission of proposals to the people as follows: "The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such dates as may be fixed by the convention."

49. 369 U.S. at 193, 259.

sidered only upon a challenge of any amendment which is adopted, the court's holding goes only to timeliness of the action. However, it may rest on a mistaken view that protection of voter rights under the principle of *Baker v. Carr* depends on the results which come from malapportioned representative bodies. That opinion did not base relief to underrepresented urban voters upon specific injury from legislative products of malapportioned bodies, but relied instead upon their right to vote in the election of legislators free of dilution by arbitrary state action. Their injury was described as legislative classification which "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties."[50] If *Baker v. Carr* is applicable to malapportionment of a constitutional convention, as suggested by the foregoing analysis, the legal injury to Tennessee urban voters' voting rights will occur when they vote for convention delegates under an invidiously discriminatory allocation. If election of legislators under an invalid apportionment can be enjoined despite uncertainty as to the laws which they might later enact, election of delegates to a constitutional convention should also be enjoinable despite similar uncertainty as to the amendments they might propose.

IV. Miscellaneous

A. *Standing of Criminal Defendant To Challenge Statute Fixing County Boundary*

In *State v. Hoffman*,[51] the defendant had been convicted in the General Sessions Court of Lake County for unlawfully selling game fish on Reelfoot Lake. On appeal to the Circuit Court of Lake County, he contended that its courts lacked jurisdiction on the grounds that the offense was committed in Obion County. As an exception to general requirements for size of new counties, the Constitution of 1870 had authorized creation of Lake County from that portion of Obion County lying west of the low water mark of Reelfoot Lake.[52] If the constitution had been observed, an offense on the waters of Reelfoot Lake would necessarily have been committed in Obion County rather than Lake, but 1893 and 1897 acts of the legislature had fixed the boundary within the lake. The circuit court held these acts unconstitutional.[53]

On appeal, the Supreme Court of Tennessee reversed, holding that

50. 369 U.S. at 207-08.
51. 362 S.W.2d 231 (Tenn. 1962).
52. Tenn. Const. art. X, § 4.
53. Nonetheless, the court held that it had jurisdiction under Tenn. Code Ann. § 5-102 (1956), which gives counties concurrent jurisdiction over waters lying between them.

long acquiescence by public officials and citizens of both counties in recognition of the challenged boundary and Lake County's actual exercise of jurisdiction over the territory in question meant that defendant was actually tried in the county where the misdemeanor was committed. Under these circumstances the defendant was held to lack standing to challenge constitutionality of the statutes fixing the boundary.[54]

B. *Alteration of County Officers' Salary During Term; Elision of Unconstitutional Date and Substitution of Earliest Valid Date*

In *State ex rel. Ross v. Fleming*,[55] a private act increasing the salary of a county attorney was clearly unconstitutional because it violated the 1953 Home Rule amendment to the Tennessee Constitution which prohibits the state legislature from passing laws altering the salary of a public officer prior to the end of his term.[56] An incumbent whose term had expired began a new term on April 10, 1961. He then claimed the right to a salary increase which a private act had provided effective February 1, 1959, a date within his previous term. The trial court ruled in his favor by eliding the date "February 1, 1959" from the act and substituting the date, "April 10, 1961" in order to give effect to a presumed legislative intent to award the incumbent county attorney an increase in pay at the earliest valid date. The supreme court affirmed.

The doctrine of elision is usually applied to enable enforcement of valid provisions of a statute which are left after separable invalid provisions are stricken[57] and then it is sometimes said to be applied with "hesitation."[58] Substitution of new statutory language by a court is more unusual although in a proper case a court will read in language omitted by the legislature in order to give effect to an actual, but imperfectly expressed, legislative intent.[59] The combination of these two unrelated rules of construction to produce a new doctrine of "elision

54. *Accord,* State v. Rich, 20 Mo. 393 (1855); Speck v. State, 66 Tenn. 46 (1872). In these cases the rule is stated that where the statute establishing the county is not invalid on its face, it may not be attacked collaterally by a defendant in a criminal proceeding but may be challenged only in direct proceedings between the counties.

55. 364 S.W.2d (Tenn. 1963).

56. TENN. CONST. art. XI, § 9, par. 2.

57. Davidson County v. Elrod, 191 Tenn. 109, 232 S.W.2d 1 (1950); Edward v. Davis, 146 Tenn. 615, 244 S.W. 359 (1922). There remains a complete law which the legislature would have intended to become effective without the stricken provision. The absence of a separability clause has been held to create a presumption that the legislature did not intend the act to become effective without all its provisions. Life and Cas. Ins. Co. v. McCormack, 174 Tenn. 327, 125 S.W.2d 151 (1939). *But see* Perritt v. Carter, 203 Tenn. 26, 308 S.W.2d 482 (1957).

58. Mensi v. Walker, 160 Tenn. 468, 475, 26 S.W.2d 132, 135 (1930).

59. Southern Ry. v. Rowland, 152 Tenn. 243, 276 S.W. 638 (1925); Ashby v. State, 124 Tenn. 684, 139 S.W. 872 (1911).

and substitution" appears to make the court a co-worker in the legislative process, amending legislation by striking bad words and inserting good ones to produce a different provision which is presumably the legislature's second choice.

The holding of the *Fleming* case is in accord with *Bayless v. Knox County*,[60] in which the court considered a similar law which violated the corresponding constitutional provision concerning judges.[61] However, in *Bayless* the court reached the same result merely by eliding the invalid date and holding the salary increase to be effective at the beginning of the next term of office without the formality of inserting the new date in the statute.

The purpose of these constitutional provisions is to protect the independence of public officials in the discharge of their duties.[62] The framers of the constitution apparently thought increases and reductions in compensation during terms of office equally were threats to this desired independence.[63] Presumably the liberal rules of the *Fleming* and *Bayless* cases would also be applied to give prospective effect to legislation which attempted to diminish the salary of an officer during a term. The net effect could be to render these constitutional prohibitions virtually ineffective. The legislature can freely enact intra-term salary alterations, secure in an assumption that if it is corrected by the courts, the salary increase or decrease will take effect at the earliest lawful date which could have been specified. This renders it less likely that unlawful salary increases will be challenged by local fiscal officers. Few county judges can be expected to engage in unpopnlar litigation for the slight degree of fiscal relief afforded in the *Fleming* case. The court ruled in *Bayless* that increases paid unlawfully during the initial term could not be recovered for the county in a taxpayers suit. These constitutional provisions may well have become largely directory to the legislature without effective judicial sanctions.

60. 199 Tenn. 268, 286 S.W.2d 579 (1955).

61. TENN. CONST. art. VI, § 7. Similar provisions apply to the governor (art. III, § 7) and to members of the legislature (art. II, § 22). All forbid either increase or deerease in compensation during a term of office.

62. State *ex rel.* Webb v. Brown, 132 Tenn. 685, 179 S.W. 321 (1915).

63. The framers of the United States Constitution chose to guard the independence of federal judges only against diminishment of compensation, U.S. CONST. art. III, § 2, par. 1, but the President's compensation may neither be increased nor diminished. U.S. CONST. art. II, § 1, par. 7. Senators or Representatives are only prohibited from being appointed to any federal office whose emoluments were inereased during their terms. U.S. CONST. art. I, § 6, par. 2.