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Constitutional Law -- 1957 Tennessee Survey

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CONSTITUTIONAL LAW—1957 TENNESSEE SURVEY

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During the survey period the Tennessee Supreme Court had occasion to deal with a major, though unsuccessful, attack upon the constitutionality of the state legislation providing for the apportionment of Senators and Representatives in the General Assembly. There were also important questions relating to constitutional limitations on the police power in the regulation of insurance and of the number and capacity of gasoline storage tanks by a municipality.

Separation of Powers

The separation between legislative, executive and judicial powers is made express in the Tennessee Constitution.[1] In addition, each of these coordinate branches of government is expressly enjoined from performing the functions of either of the other two.[2] Judicial power in Tennessee has long been treated as including as a normal function the power of courts to determine questions of constitutionality and, if necessary, to invalidate the action of one of the coordinate branches of government.[3] The fact that the Governor and members of the General Assembly likewise take an oath to uphold the constitutions of the state and of the United States has not prevented judicial action declaring the action of either of these two other branches to be unconstitutional and void.[4] Nevertheless, the courts have avoided deciding certain types of constitutional controversies where they have felt that the matter is not appropriate for adjudication but must be resolved, if it is to be resolved, by the legislature or the executive.[5]

The foregoing approach has resulted in certain provisions of the Tennessee Constitution and of other states being judicially nonenforceable.[6] In explaining the courts' unwillingness to deal with such problems, the rationalization may be stated in terms of a lack of jurisdiction over "political questions."[7] Whether this term is used

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1. Art. II. § 1.
2. Art. II. § 2.
3. Wally's Heirs v. Kennedy, 10 Tenn. 489 (1831); Townsend v. Townsend, 7 Tenn. 1 (1821).
4. As to an act in excess of the power of the Governor, see State *ex rel.* Webb v. Parks, 122 Tenn. 230 (1909).
5. State *ex rel.* Sanborn v. Davidson County Bd. of Election Comm'rs and Richard Fulton. No. 36391, Tenn. Sup. Ct., Oct. 29, 1954, discussed in 8 VAND. L. REV. 501 (1955); see also South v. Peters, 339 U.S. 276 (1950), 4 VAND. L. REV. 691 (1951).
6. See Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 U. PA. L. REV. 54 (1931).
7. Coleman v. Miller, 307 U.S. 433 (1939); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925); 4 VAND. L. REV. 691 (1951).

or not, frequent reference is made to the doctrine of separation of powers as a basis for the courts' leaving particular problems to the final determination of other branches of the government or to other political processes.[8] Such a rule of judicial self-limitation is particularly apt to be applied where the problem presented is one that does not lend itself readily to the type of order or decree which the court customarily enters or where, for other reasons, efforts at enforcement directed at one of the coordinate branches of government might prove difficult or embarrassing. The subject of legislative apportionment and reapportionment has frequently fallen into this category.[9] The courts have normally refused to compel the legislative action prescribed by the state constitution for apportionment[10] and have not been willing otherwise to undertake to provide relief against legislative inaction or improper action in this area.[11]

In *Kidd v. McCanless*[12] the Supreme Court followed the normal approach in refusing relief against alleged unconstitutional legislative apportionment arrangements. In Justice Swepston's opinion for the court, Chancellor Steele of Davidson County was declared to have erred in failing to sustain a demurrer to the suit which sought to invalidate the 1901 Apportionment Act.[13] The suit was filed by voters of Washington, Carter, and Davidson Counties against the State Attorney General, the Secretary of State and various state and county election officials. The bill asked for a declaration of invalidity and an injunction to prevent holding elections under the act alleged to be unconstitutional. In the alternative it prayed that election officials be ordered to prepare for a general election at large throughout the state in 1956 for all representatives and senators, or that the court mathematically re-apportion the state and order an election accordingly.

The chancellor denied the relief prayed for under the alternative prayers set out immediately above. The chancellor did entertain the bill, however, for the purpose of rendering a declaratory judgment and thereby overruled two of the fourteen grounds of demurrer filed by the State Attorney General. A principal ground of demurrer was that the court should not declare a statute unconstitutional if to do so will disrupt the orderly processes of government. By its reversal

8. Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 71 (1867); Rutledge, *When Is a Political Question Justiciable?*, 9 GA. B.J. 394 (1947).

9. State *ex rel.* Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610 (1946); *cf.* Colegrove v. Green, 328 U.S. 549 (1946); Smiley v. Holm, 285 U.S. 355 (1932); Carroll v. Becker, 285 U.S. 380 (1932).

10. Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926).

11. People *ex rel.* Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930); Fergus v. Kinney, 333 Ill. 437, 164 N.E. 665 (1929); Latting v. Cordell, 197 Okla. 369, 172 P.2d 397 (1946).

12. 292 S.W.2d 40 (Tenn. 1956).

13. TENN. CODE ANN. §§ 3-101 to -107 (1956).

the Supreme Court later sustained this ground. The chancellor, however, declared the existing apportionment legislation to be unconstitutional, specifically refusing to recognize the validity of the Attorney General's argument that chaos and confusion would result. The chancellor's opinion (quoted by the Supreme Court) said in this connection:

> This court is entitled to presume and will presume that when it has exercised its constitutional duty in this proceeding to declare that there is no authority for the holding of an election for the members of the General Assembly in 1956, that the other two coordinate branches of our government will likewise exercise their duty under the Constitution to provide orderly government for the people within their power to do so; that the Governor, therefore, will exercise his constitutional power and duty to call the Legislature into special session for the purpose of making an enumeration and reapportionment as required by the Constitution; that the Legislature, in turn, its power and duty having been declared herein, will exercise and perform the same by making a proper enumeration and apportionment. That the present General Assembly may thus act as a *de facto* body, the Court entertains not the slightest doubt.[14]

The Supreme Court's opinion states that the chancellor correctly recognized that the courts have no power to compel an election at large,[15] reapportion by decree, or compel either the legislative or executive department to perform duties committed to them exclusively by the fundamental law. The higher court's specific ground of disagreement with the chancellor is the use he made of the *de facto* doctrine. The opinion declares that there can be a *de facto* body or office only until there has been a judicial determination of its invalidity. Since, if the chancellor's declaration is accepted it would eliminate any legal standing in the General Assembly, elected under an invalid law, the higher court finds that the *de facto* doctrine is inapplicable with respect to action that would be taken by that body subsequent to the declaration of invalidity. The Supreme Court's opinion treats the chancellor's declaration of the unconstitutionality of the 1901 Act as having the effect of depriving the state of its present legislature and of the means of electing a new one. The lower court's action is judged to thus result in "ultimately bringing about the destruction of the State itself" there being no prior valid act upon which subsequent action may be based. Accordingly, it was found that the Attorney General's demurrer on this point should have been sustained. The Wisconsin case[16] cited by the chancellor as in accord with his position

14. 292 S.W.2d at 43.

15. Smiley v. Holm, 285 U.S. 355 (1932) was distinguished because of different constitutional wording applicable to the selection of members of the national House of Representatives.

16. State v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892).

was noted as not being followed in subsequent decisions in that state.[17]

If legislation is required to be enacted to comply with a constitutional mandate it can be assumed that the courts will normally consider it beyond their province to compel such enactment.[18] If, however, the obligation to implement the constitution is to be left to the governor or legislative body, it should be in those situations where normal political processes provide the opportunity to correct unconstitutional action. On the basis of experience, there seems little likelihood that normal political processes will implement constitutional provisions relating to apportionment where the unconstitutional arrangements have become strongly entrenched. The Supreme Court's approach to the *de facto* doctrine in this case appears to be in line with the usual discussion of such a point.[19] This does not seem to be really important in considering the underlying dilemma of applying the processes of law to problems of legislative apportionment. If highly flexible remedies can be made available in the determination and settlement of private rights, there need be no basic impossibility in dealing with public rights once the fundamental question of the propriety of judicial action is answered affirmatively.

In *Witt v. McCanless,*[20] the Supreme Court did not find that undue legislative authority was being placed in the courts by chapter 113 of the Public Acts of 1955.[21] The act in question provides for the annexation of territory by municipalities either on petition by residents and property owners of the affected territory or upon the municipality's own initiative under stated conditions relating to municipal prosperity and to the health, safety and welfare of the citizens and property affected. Section 2 (b) of the act[22] provides that any aggrieved property owner in territory subject to such annexation may, within a limited time prior to the operative date of the ordinance, file a suit in court in the nature of a quo warranto proceeding to contest the validity of the annexation ordinance. At the trial of such suit the issue is to be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the municipality and of the area affected.

Suit was filed in this instance by certain property owners in Hamilton County for the purpose of having an annexation ordinance of the City of Chattanooga declared unconstitutional. The chancellor held that chapter 113 of the Public Acts of 1955 and the particular ordinance were not unconstitutional.

17. State *ex rel.* Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610 (1946).
18. See articles cited notes 6, 7, 8 *supra.*
19. *Cf.* Beaver v. Hall, 142 Tenn. 416, 217 S.W. 649 (1919).
20. 292 S.W.2d 392 (Tenn. 1956).
21. TENN. CODE ANN. §§ 6-308 to -319 (Supp. 1957).
22. TENN. CODE ANN. § 6-310 (Supp. 1957).

The Supreme Court in an opinion by Justice Swepston affirmed the action of the chancellor, finding no merit in the claim that the enabling act in question violated article II, section 1 of the Tennessee Constitution as a delegation of legislative powers to the judiciary not contemplated by article XI, section 9. The court reasoned first that no unlawful delegation occurs under the circumstances because the court already has such a power to determine the reasonableness of municipal ordinances without the necessity of any act of the legislature giving it such power, citing *Farmer v. City of Nashville.*[23] Secondly, the opinion states, there is no delegation to the court of the power to extend or contract municipal boundaries, "which is a legislative power," but the court merely determines reasonableness with respect to health, safety and welfare and does not act until the ordinance has been passed.

The opinion of the court then sets forth an extensive quotation from 37 *American Jurisprudence,* "Mimicipal Corporations" 641, which indicates the permissible area for court review in annexation matters. The material quoted indicates that the line between an unlawful delegation of legislative power to the court and a legal review by the court of an annexation ordinance will depend upon an outline of sufficient standards in the statute as opposed to "unfettered discretion" as to the political and economic advisability of the annexation. The court's opinion does not discuss the relatively clear standards that are provided for the judgment of the reviewing court in this particular statute. Furthermore, no reference is made to the first sentence of article XI, section 9, of the Tennessee Constitution which on its face would seem to put the constitutional question to rest by providing wide authority in the legislature to vest powers in the courts over local affairs—whether otherwise strictly judicial or not.

State-Federal Relations

The immunity, under certain circumstances, of a federal instrumentality from state taxation, implied from the supremacy clause of the Federal Constitution was before the Supreme Court of Tennessee again during the survey period. *Roane-Anderson Co. v. Evans.*[24] The court found that the company in question, which under contract with the United States had provided certain utility and other services in Oak Ridge during 1944, 1945, and 1946, for a fixed fee using government property and facilities, was exempt from state privilege taxes for that period. This decision is discussed in another article of this survey.[25]

23. 127 Tenn. 509, 156 S.W. 189 (1912).
24. 292 S.W.2d 398 (Tenn. 1956).
25. See Hartman, *State and Local Taxation—1957 Tennessee Survey,* 10 VAND. L. REV. 1209, 1209-11 (1957).

The school segregation issue was before the Supreme Court of Tennessee somewhat indirectly in *Roy v. Brittain.*[26] Negro school children in Anderson County had obtained an injunction in federal district court requiring admission to Clinton High School without regard to race or color. *McSwain v. Board of Educ. of Anderson County.*[27] Prior to the beginning of the 1956 school term at which admission of the Negro children had been ordered, certain citizens of the county brought a bill in state chancery court asking that the school officials be enjoined from admitting Negroes to the Clinton school. The injunction was prayed for on the grounds that the Tennessee statutory and constitutional provisions requiring racial separation in schools were valid and enforceable and that state funds could not be expended for integrated schools. The chancellor denied the injunction, holding that the bill showed on its face that the federal court had ordered the same defendants to perform the act about which the petitioners complained.[28]

The Tennessee Supreme Court declined review in the above case on September 3, 1957. On the petition to rehear the opinion prepared by Chief Justice Neil took issue with complainants as to the continued validity of Tennessee segregation laws and the effect of decisions of the Supreme Court of the United States. "The language of the Supreme Court, above quoted, is capable of but one meaning, viz., that all State laws on segregation must yield to the paramount authority of the Federal Constitution."[29] The opinion points out that a state court has no authority to enjoin the enforcement of a federal court decree. On the matter of using state funds in desegregated schools, the court found no merit in the contention of the complainants since it assumed in the first instance a continued validity in the state's segregation laws. Issuance of the writ requested would result, the court said, in closing Clinton High School until the state could either adopt a policy of operating its public school system contrary to the United States Supreme Court decision or abandon the present system of public education. The court was unwilling to take action which would have the effect of closing the schools.

Reports of other litigation affecting the Clinton school case and the activities of John Kasper at that location will be found in *McSwain v. Board of Education of Anderson County,*[30] *Kasper v. Brittain,*[31] and *United States v. Kasper.*[32]

26. 297 S.W.2d 72 (Tenn. 1956).
27. 138 F. Supp. 570 (E.D. Tenn. 1956).
28. Roy v. Brittain. 1 Race Rel. L. Rep. 879 (Tenn. Ch. Ct. 1956).
29. 297 S.W.2d at 73-74.
30. 1 Race Rel. L. Rep. 872; 1 *id.* at 1045; 2 *id.* at 26, 2 *id.* at 317 (U.S.D.C.) (E.D. Tenn. 1956, 1957).
31. 245 F.2d 95 (6th Cir. 1957).
32. 2 Race Rel. L. Rep. 795 (U.S.D.C.) (E.D. Tenn. 1957).

Other court decisions during the survey period affecting school desegregation in Tennessee will be found in the federal court's denial of intervention by the Tennessee Federation for Constitutional Government in *Kelley v. Board of Education of City of Nashville*,[33] and the court's approval in the same case of the Nashville desegregation plan.[34]

During the survey period the United States Court of Appeals for the Sixth Circuit reversed and remanded the decision of the Federal District Court for the Western District of Tennessee in the case involving admission of Negroes to Memphis State College. *Booker v. Tennessee Board of Education*.[35] The lower federal court had approved in 1955 a plan of gradual desegregation over a five-year period in state supported colleges under the supervision of the State Board of Education, beginning with graduate schools.[36] The court of appeals held that, when equally pertinent to the limitation of white applicants, the reasons given for delay of admission of Negroes to Memphis State College were racially discriminatory and not sufficient to justify a delay of up to five years in light of the United States Supreme Court's requirement that desegregation proceed with "all deliberate speed."

Substantive Due Process

If regulation of business by the state is permissible it is said to be within the "police power." In this sense the phrase states a conclusion of validity; it provides little aid in determining the underlying question. It is difficult to formulate a test for the constitutionality of regulatory laws much more definite than that they not be "unreasonable" under all the circumstances. Regulation which eliminates a method of doing business previously allowed usually deprives of value (property) and former freedom of action (liberty). The constitutionality of such a regulation will depend upon a judicial determination as to whether these deprivations are so unreasonable and arbitrary under the circumstances as to be lacking in due process and so unconstitutional. The legislature presumably considered reasonableness in enacting the regulation in the first place. The judicial determination of reasonableness for constitutional purposes, however, is regarded as a different problem in a different legal framework.

The Supreme Court of the United States in recent years has refused to interfere with the legislative judgment in the realm of economic regulation but the state courts have not felt similarly constrained.[37] There remains the question of how to bring something more precise

33. 139 F. Supp. 578 (M.D. Tenn. 1956).
34. 2 Race Rel. L. Rep. 21 (U.S.D.C.) (M.D. Tenn. 1957).
35. 240 F.2d 689 (6th Cir. 1957), *cert. denied*, 77 S.Ct. 1050.
36. 1 Race Rel. L. Rep. 118 (U.S.D.C.) (W.D. Tenn. 1955).
37. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

than judicial inclination, and assumptions of preferred values into this inquiry. A complete factual inquiry and development would seem to be necessary in such litigation. What are the problems which led to the regulation? How serious were these problems? What detrimental effects did they produce? What are the alternative solutions and what costs would each involve? What are the costs of the remedy in the regulation before the court? How to evaluate the several interests involved in light of the public good? Supplying authoritative factual answers to such questions was the function of the Brandeis Brief, thus giving the judgment of reasonableness relatively concrete bases for determination.[38] The need for this approach would seem to be virtually as great as it ever was.

Cosmopolitan Life Ins. Co. v. Northington,[39] involved the constitutionality of the 1955 act regulating burial insurance.[40] Among other regulations the bill prohibited insurance companies from making payment in anything other than money and from issuing contracts in which particular persons or companies are designated to conduct the funeral of the insured. The act in question was apparently designed to separate insurance completely from the undertaking business or burial of the insured. However the act permits the beneficiary to assign a policy to an undertaker after the death of the insured and after liability has accrued.

The Tennessee Supreme Court upheld the act against charges of violation of article I, section 8 of the Tennessee Constitution (equated by the court with the fourteenth amendment to the Constitution of the United States) and article XI, section 8 of the Tennessee Constitution. The general authority of the legislature to control the form of insurance contracts is noted as well as the general policy of noninterference by the courts when the legislature purports to act for the protection of the public safety, health or morals.

The Supreme Court in an opinion by Justice Burnett disavowed any concern with the wisdom of the statute or the facts which led to the enactment of the legislation in question: "we do not inquire into the policy of the Legislature, that is, the factual background of why they did it if there is a plausible reason back of such legislation."[41] The court then declared that it is not unreasonable for it to conclude that the legislature acted for the protection of the public safety, health and morals, particularly for the protection of members of burial associations against funeral directors sponsoring such groups. The court

38. See Kales, *New Methods in Due Process Cases*, 12 AM. POL. SCI. REV. 241 (1918).
39. 300 S.W.2d 911 (Tenn. 1957).
40. TENN. CODE ANN. §§ 56-3205 to -3210 (Supp. 1957).
41. 300 S.W.2d at 916.

referred approvingly to decisions upholding similar legislation in Michigan[42] and South Carolina.[43] The claim of class legislation contrary to article XI, section 8 was also overruled, the court finding no unlawful discrimination in a state of law that would permit undertakers to contract to bury but forbid such contracts to insurance companies.

In denying the petition to rehear, the court attempted further clarification of the manner in which it judges the reasonableness of legislation attacked as unconstitutional:

> With the Legislature rests determination of the reasonableness of regulations under the police power and a court will not examine the question de novo and overrule such judgment by substituting its own, unless it clearly appears that those regulations are so "beyond all reasonable relation to the subject to which they are applied as to amount to a mere arbitrary usurpation of power," or they are unmistakeably and palpably in excess of legislative power or they are arbitrary beyond possible justice . . . .[44]

In *Consumers Gasoline Stations v. City of Pulaski*,[45] the Supreme Court reversed the holding of a lower court which had upheld the validity of a city ordinance regulating prospectively the size and number of underground gasoline storage tanks. The ordinance was attacked as in violation of the due process and equal protection clauses of the fourteenth amendment and under article XI, section 8 of the Tennessee Constitution as class legislation. The burden of argument under both points was the complaint that the ordinance allowed existing filling stations to continue with tanks of larger size while prohibiting new stations from having more than three tanks and limiting each tank to 1,100 gallons in capacity. State fire marshal regulations limit capacity of such tanks to 6,000 gallons with a total capacity of 20,000 gallons for all tanks.

The Supreme Court's opinion recognized the general power of the city to pass an ordinance to prevent fires and explosions but denied the applicability of the zoning principle to a regulation such as this. The court found that the effect of the ordinance was to prohibit the construction of new stations which would compete with those in existence at the time of passage and that it was discriminatory since it permitted the continuation of conditions in existing filling stations which it forbade in new stations. The court felt that the safety factor in controlling the size and number of storage tanks would be equally applicable to existing stations and their exemption shows unconstitutional

42. Metropolitan Funeral System Ass'n. v. Forbes, 331 Mich. 185, 49 N.W.2d 131 (1951).
43. Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949).
44. 300 S.W.2d at 919.
45. 292 S.W.2d 735 (Tenn. 1956).

discrimination. There is language in the opinion that might be taken as highly restrictive of the zoning power of a municipality where certain types of businesses have already been established. Also it may be noted that the opinion places little if any stress on the burden that must be borne by those who would attack legislation as detailed in the burial insurance case.

Legislative Form and Procedure

Attacks upon legislation for alleged failure to conform to constitutional provisions governing legislative form and procedure continued throughout the survey period, but were uniformly unsuccessful. This has tended to be the usual result in recent years.

In *Witt v. McCanless*,[46] the state enabling act for the Chattanooga annexation ordinance involved was attacked as having a body broader than the caption. This charge relates to the constitutional provision that a statute shall not embrace more than one subject, which subject is to be expressed in the title.[47] The court found that all of the details of the enabling act were germane to the single object expressed in the caption, namely, the enlargement and contraction of municipal boundaries. In the same way the Supreme Court in *Cosmopolitan Life Ins. Co. v. Northington*[48] found no merit in the claim that the subject expressed in the caption (regulation of burial insurance) did not cover all the prohibitions in the body of the act.

Article XI, section 8, of the Tennessee Constitution forbids suspension of a general law for the benefit of an individual or individuals. In *Memphis v. Yellow Cab, Inc.*[49] it was held that a private act[50] which purported to give authority to Memphis to impose a tax on the operation of taxicabs over city streets was invalid under this provision. The general law, as set forth in section 6-727 of the Tennessee Code, declares:

> "The licensing as a privilege of the driving of any motor driven vehicle upon the roads, streets or other highways of the state of Tennessee is declared an exclusive state privilege and no tax for such privilege under any guise or shape shall hereafter be assessed, levied or collected by any municipality of the state."

The Memphis ordinance purported to tax the operation of each taxicab over its streets at $60.00 per year. The court found that the ordinance and the private act purporting to authorize it to be invalid not only because of conflict with code section 6-727, but because of the express provisions of section 6-728.

46. 292 S.W.2d 392 (Tenn. 1956).
47. TENN. CONST., art. II, § 17.
48. 300 S.W.2d 911 (Tenn. 1957).
49. 296 S.W.2d 864 (Tenn. 1956).
50. TENN. PRIVATE ACTS 1943, c. 157.

In *Freshour v. McCanless*,[51] the Supreme Court did not find any conflict with general law in a 1953 Private Act creating a General Sessions Court for Cocke County with a fixed salary for the clerk. Previous cases involving circuit court clerks serving as general session court clerks at a fixed salary were distinguished. Justice Tomlinson's opinion states that a general statute existed providing that circuit court clerks were entitled to all the fees of office up to a fixed amount, but no comparable provision is made by general law for clerks of general sessions courts.

51. 292 S.W.2d 705 (Tenn. 1956).