Vanderbilt Law Review

Volume 9
Issue 5 *Issue 5 - August 1956*

Article 6

8-1956

# Constitutional Law -- 1956 Tennessee Survey

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# CONSTITUTIONAL LAW—1956 TENNESSEE SURVEY

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Several major constitutional problems were presented to the Tennessee Supreme Court during the survey year. There were no startling developments in the court's disposition of these cases, nor in the opinions proclaimed in each instance. The court avoided what it termed a "spectacular exhibition of judicial sophistry" in giving constitutional approval to certain activities of a religious nature in the public schools. In the regulation of economic affairs the court found no valid basis for a statute prohibiting the offering of benefits or premiums in connection with the sale of gasoline. Basic allocations of governmental power were involved in a case in which the court denied a petition by the Bar Association of Tennessee that it adopt a rule of court integrating the bar of the state. The opinion in this instance weighed the expediency of the proposal and did not rest its decision upon any finding of lack of inherent power in the court to promulgate such a rule. The opinion is of great importance in showing how judicial power may supplement legislative power in prescribing requirements for admission to the bar.

## *Bible Reading in Public Schools*[1]

In the case of *Carden v. Bland*[2] the Supreme Court sustained against attack the constitutionality of the provision of the Tennessee Code[3] imposing a duty on public school teachers to read a selection from the Bible daily in the classroom. The complaint filed in the case had also challenged the constitutionality of related practices in the classrooms such as questioning students as to the Bible passages read, repeating the Lord's Prayer, singing hymns, and inquiring as to Sunday School attendance. The complaint charged that the activities were contrary to the plaintiff's religious beliefs and principles and that the use of public funds to support such "worship" violated the constitutions of Tennessee[4] and of the United States.[5]

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1. See Note, 9 VAND. L. REV. 849 (1956).
2. 288 S.W.2d 718 (Tenn. 1956).
3. TENN. CODE ANN. § 49-1307(4) (1956).
4. TENN. CONST. art. I, § 3, reading as follows:
"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship."
5. U.S. CONST. amends. I, XIV.

The chancellor had sustained demurrers against the complaint filed by the Attorney-General of the state and the defendant Board of Education. The Supreme Court affirmed. The opinion of Chief Justice Neil states that it will not be necessary to discuss the teacher activity relative to Sunday School attendance since it has ceased, "other than to say that it is beyond the scope and authority of School Boards and teachers in public schools to conduct a program of education in the Bible and undertake to explain the meaning of any chapter or verse in either the Old or New Testament." The facts as to the singing of a religious song, reading of a passage from the King James Version of the Bible without comment, and repeating the Lord's Prayer being admitted by demurrer, the Supreme Court's opinion deals with the validity of such practices. More specifically though, the opinion states that the "sole question at issue" is the validity under the state and federal constitutions of the statute requiring Bible reading. The court notes the authorities[6] urged by defendants that would question the special interest or standing of the plaintiff to raise the questions he presents but concludes that the public interest requires that it deal with the merits of the contentions made.

The court finds that the song, prayer and Bible reading practices ("these simple ceremonies") do not violate the provisions in the Tennessee Constitution guaranteeing freedom of worship and prohibiting compulsory support of worship or interference with rights of conscience. Nor do the ceremonies amount to a state "establishment of religion" as forbidden by the first and fourteenth amendments to the Federal Constitution.[7] The opinion reviews decisions on Bible reading from a number of other states, some of which reach contrary results.

With respect to "separation of Church and State" the tone of the opinion is quite critical of the distinction purported to be established by the opinions of the Supreme Court of the United States in the *Everson* and *McCollum* cases—"the conclusions reached are irreconcilable." The importance of the separation principle is conceded, the opinion stating: "But it should not be tortured into a meaning that was never intended by the Founders of this Republic, with the result that the public school system of the several states is to be made a Godless institution as a matter of law." Further, Chief Justice Neil asserts: "the protagonists in this contest for the maintenance of freedom of religion and separation of Church and State have falsified the history of the times, especially when they undertake to call Mr. Jefferson to their standard." The court further states in the opinion that:

6. See, *e.g.*, Doremus v. Board of Education, 342 U.S. 429 (1952).
7. See Everson v. Board of Education, 330 U.S. 1 (1946); Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952).

> We do not wish, however, to be understood as holding that any form of sectarian worship, or secular instruction in the Bible, is permissible under our statute and the Constitution of this State.
>
> ....
>
> In conclusion we think that the highest duty of those who are charged with the responsibility of training the young people of this State in the public schools is in teaching both by precept and example that in the conflicts of life they should not forget God. And this in substance is about all that our statute requires. For this Court to hold that the statute herein assailed contemplates the establishment of a religion, and that it is a subtle method of breaking down Mr. Jefferson's "wall of separation" between church and State, would be a spectacular exhibition of judicial sophistry.

*Regulation of Economic Affairs*

In *State v. White*[8] the Supreme Court declared unconstitutional the Tennessee statute,[9] originating in Chapter 200 of the Public Acts of 1939, which, *inter alia,* made it unlawful to offer benefits or premiums calculated to effect a sale of gasoline for other than the posted price. The lower court had quashed the indictment charging violation of the statute on defendant's motion to that end alleging that the statute violated the fourteenth amendment to the United States Constitution and article I, sections 8 and 17 and article XI, section 8 of the Constitution of Tennessee.

The opinion of the Supreme Court by Justice Prewitt quotes extensively from an Alabama decision[10] declaring an identical statute in that state invalid. The quoted language suggests that such a statute is restrictive of competition and includes: "Such legislation does not relate to the general welfare, but to the welfare of the other class of dealers represented by the plaintiffs."

Decisions in Massachusetts, New York, Iowa and Florida upholding the validity of such legislation are cited to support the state's argument that the Tennessee statute is a legitimate exercise of the police power for purpose of preventing frauds upon the public and preventing deception in the sale of gasoline. The court notes that in the cases cited

8. 288 S.W.2d 428 (Tenn. 1956).

9. NOW TENN. CODE ANN. § 59-1502 (1956). The section in its entirety reads:
"It shall be unlawful for any person, firm or corporation to sell or offer for sale at retail, for use or consumption in any motor vehicle, or to deliver into any motor vehicle, for actual apparent use therein, any product whatsoever for use in supplying, creating or generating motive power to such motor vehicle, or lubricating oil for such motor vehicle, at any price or prices, except the exact price or prices contained on the sign or placard required by this chapter, or to offer, deliver, grant, allow, give or promise any actual, prospective, contingent, immediate or future benefits, concessions, discount, refunds, premiums or gratuities of any kind or nature whatsoever, which, in any degree, manner or extent, shall or shall be calculated or intended to effect or accomplish a sale of such product for other than said posted price or prices."

10. Alabama Independent Service Station Ass'n v. McDowell, 242 Ala. 424, 6 So. 2d 502 (1942).

by the state the upholding of the statute has been with respect to posting of the price of gasoline, "but we think when the statute goes further and prohibits as a trade stimulant the giving of a premium or gratuity, that in such a case the statute is unconstitutional." Such a latter provision is outside the scope of the police power, the court finds, and does not relate to the general welfare. "So long as the operator's business does not offend the public morals and work an injustice to the public, its constitutional right to pursue on equal terms to that allowed to others in like business is beyond question, even though his methods may have a tendency to draw trade to him to the detriment of competitors. To uphold the statute in question would be to allow a governmental agency of the State to exercise control over all private enterprises."

The above statement of the court's reasoning is largely by way of stating a conclusion rather than an examination of the elements of possible reasonableness or unreasonableness in such a statute. The very troublesome problem of the desirability of the court substituting its judgment for that of the legislature in this area of economic regulation is not discussed. The result in this case is in line with that reached in many other states,[11] although some courts and authorities have felt that the area was one in which the legislative judgment should be controlling.[12] There would appear to be no limitation on such state laws by reason of the due process clause of the fourteenth amendment.[13] The decision is an illustration, accordingly, of the continuing vitality of the concept of substantive due process in the state courts, particularly with respect to statutes which are judged restrictive of competition.[14]

The Tennessee Supreme Court did not reach the merits of a charge of unconstitutionality directed against a statute forbidding optometrists from advertising eyeglasses or frames in the case of *Seawell v. Beeler*.[15] The complainant optometrists sought a declaration of the invalidity of Chapter 113 of Public Acts of 1953, section 43 of which contained the prohibition against advertising and conferred upon the State Board the authority to suspend or revoke the licenses of violators.[16]

The chancellor had sustained a demurrer to the complaint and the Supreme Court affirmed in an opinion by Chief Justice Neil.

11. See decisions cited in the principal case; People v. Victor, 287 Mich. 506, 283 N.W. 666 (1939) and cases cited therein.
12. See dissenting opinion of McAllister, J. in People v. Victor, *supra* note 11; Wolff, *Sales Promotions by Premiums as a Competitive Practice*, 40 COLUM. L. REV. 1174 (1940).
13. Rast v. Van Deman & Lewis Co., 240 U.S. 342 (1916).
14. See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).
15. 287 S.W.2d 54 (Tenn. 1956).
16. TENN. CODE ANN. §§ 63-101 to -127 (1956).

"Considering but not deciding that a Section of the assailed statute violates due process we should not so adjudge until the manner of its enforcement amounts to a denial of due process." The court noted that in proceedings for suspension or revocation of a license the holder of the license was entitled to notice and hearing. "[T]he Board must administer the law in a way and manner that due process is not denied," the opinion states, and it cannot be assumed that it will be administered otherwise than in full compliance with the constitution of the state and of the United States. The opinion also finds no invalidity because of the exclusion from the act of "oculists and ophthalmologists," and concludes generally that any constitutional defects in the form or caption of the Act were cured by Chapter 6 of the Public Acts of 1955.

In *Donahoo v. Mason & Dixon Lines, Inc.*,[17] constitutional attacks were made upon the 1953 legislation increasing the maximum gross weights for trucks[18] and the statutory provision dealing with reciprocal agreements relative to use of the highways by non-residents.[19] The complaint was filed by certain citizens, residents and taxpayers of Jefferson County, Tennessee, who sought a declaration of invalidity of the two statutes mentioned on the theory that they served the special interests of the heavy truckers rather than the general welfare and would, by destroying the highways, require the levying of taxes for rebuilding.

The chancellor had sustained the demurrer to the complaint and the Supreme Court of Tennessee affirmed in an opinion by Justice Swepston. The opinion stresses the necessity for pointing to some specific section of the state or federal constitution as a basis for challenging the validity of legislative action. No merit was found in the charge that the 1953 Act violated article II, section 17 of the Tennessee Constitution by embracing more than one subject and failing to express the subject in the caption. Next the court disposes of the alleged lack of due process in the two statutes under attack. The legislature is declared to have plenary power to regulate and limit gross weight, dimensions and loads of vehicles using the state's highways. Thus it is not in the province of the courts to correct even mistakes of judgment by the legislature, if they should exist, with respect to maximum weight loads. The reciprocity arrangements are not violative of due process nor of article II, section 28 of the Tennessee Constitution. The state may tax non-residents for use of the highways, may fail to do so, or may specifically exempt them. "Therefore, it would seem that the state would be authorized to grant the exemp-

17. 285 S.W.2d 125 (Tenn. 1955).
18. Tenn. Pub. Acts 1953, c. 3(5), TENN. CODE ANN. § 59-1109 (1956).
19. TENN. CODE ANN. § 59-436 (1956).

tion to non-residents on condition that the State of the non-resident grant exemption to our citizens, so long, of course, as such reciprocal arrangements do not unlawfully discriminate against residents of this State."

The opinion concludes with the statement that the interest of the complainants is not sufficient to entitle them to maintain their bill since they have not demonstrated that they are in any immediate danger of having their tax burden increased by the alleged unlawful acts of the defendants. Their interest is only that which they share in common with all other taxpayers of the state rather than that special interest which would give them standing to attack the statutes in question. It may be observed that this last point alone is sufficient for a dismissal. Technically, if the claimants have no interest (lack standing) the court can only dismiss—there is no case before it for determination.

*Judicial Power*

In *Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee*[20] the Supreme Court denied the petition without prejudice. The court did not disclaim authority to enter the rule urged upon it. Mr. Justice Tomlinson's opinion seems to give major stress to the practical desirability of the step in light of the limited amount of support among lawyers for the movement and the legislative action of disapproval.

The Bar Association of Tennessee, an unincorporated voluntary association of lawyers, filed the petition with the Supreme Court for a rule integrating the bar of the state; that is, establishing an all-inclusive organized bar. Lawyers desiring to practice in the state would have to become and remain members in good standing of this integrated bar. Some twenty-seven states have such an organization of the bar, which is thought by its advocates to provide more adequately for control over admission to the bar, the enforcement of professional standards of ethical conduct, and the combatting of unauthorized practice of the law.[21]

The Tennessee Supreme Court notes that only four of the twenty-seven states integrating their bars have accomplished the step solely by order of the Supreme Court, the others involving legislative action and approval in whole or in substantial part. The Tennessee situation is quite different, the opinion states, since the General Assembly has acted unmistakably to disapprove the idea in Chapter 54 of the Public

20. 282 S.W.2d 782 (Tenn. 1955).

21. See Winters, *Integration of the Bar—You Can't Lose* 39 J. AM. JUD. SOC'Y 140 (1956).

For a favorable response by a supreme court to a petition similar to that in the instant case, see Petition of Florida State Bar Association, 40 So. 2d 902 (Fla. 1949).

Acts of 1955. The statute was passed apparently in anticipation of defeating favorable consideration of the instant petition. The statute reads:

> That no person shall be granted or denied the license or right to practice law in Tennessee because he or she is or is not a member of any lawful Club, Association or Guild.

In discussing the validity of the foregoing statute the Supreme Court of Tennessee makes clear that it possesses inherent powers to prescribe qualifications necessary for the practice of law in the state. As the proper representative and repository of judicial power it possesses this power in an original, rather than merely appellate, sense. The opinion goes on to state that the possession by the courts of this inherent power does not mean that the legislature is without authority over the same subject matter. "[A] legislative requirement that individuals who would practice this profession must first meet certain reasonable conditions and qualifications is only the exercise by the Legislature of the police power . . . ." The court in turn may require qualifications more extensive than those exacted by the Legislature. Although it never expressly so holds, the inference is that the court considers the 1955 statute to be invalid to the extent it seeks to limit the power of the court to prescribe qualifications. "[I]t is one thing for a statute to say that individuals must have certain qualifications in order to practice, but an entirely different thing for the statute to say that individuals need not have certain qualifications in order to practice."

The opinion continues, however, to stress the practical importance of the action of the legislature (even if invalid) as a condition to be considered in judging the wisdom of the action proposed in the petition. Another such condition is the attitude of lawyers in the state. The opinion notes that of the approximately 3600 lawyers in the state, the Bar Association of Tennessee attempted to poll only its own membership (2200). The court feels that a "large majority" of these 1400 not polled will be opposed to the petition. Next it is noted that 557 did not return their ballot which indicated doubt of the wisdom of the proposal or indifference. Of the 1643 returning ballots 836 voted in favor of integration and 807 opposed. "This means that approximately 23% of the lawyers of this State have expressed a desire for integration. . . . The most probable conclusion from the evidence is that the remaining 77% are either positively against it, or in doubt as to its wisdom, or entirely indifferent about it."

The court calls attention to decisions in Minnesota, Massachusetts, Wisconsin and Montana denying petitions to integrate the bar by court order and to the fact that more favorable responses from the bar

obtained in those states where the courts did act affirmatively. The opinion then returns to the weight to be attached to the action of the legislature ("assuming but not deciding . . . invalidity"). The court stresses the need to avoid "unnecessary controversies" between the branches of government. Cooperation is demanded. "Thus the wish of the legislative branch is entitled to much consideration in acting upon this petition." The court concludes that it would be against the public interest to adopt the proposed rule for bar integration.